

American Indian Law Review

Volume 13 | Number 2

1-1-1988

The Legal Origin and Nature of Indian Housing Authorities and the HUD Indian Housing Programs

Mark K. Ulmer

Follow this and additional works at: <https://digitalcommons.law.ou.edu/air>



Part of the [Indian and Aboriginal Law Commons](#)

Recommended Citation

Mark K. Ulmer, *The Legal Origin and Nature of Indian Housing Authorities and the HUD Indian Housing Programs*, 13 AM. INDIAN L. REV. 109 (1988),
<https://digitalcommons.law.ou.edu/air/vol13/iss2/2>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

THE LEGAL ORIGIN AND NATURE OF INDIAN HOUSING AUTHORITIES AND THE HUD INDIAN HOUSING PROGRAMS

*Mark K. Ulmer**

Introduction

In order to efficiently transform federal assistance into decent, safe, and sanitary homes for American Indians on Indian reservations, the Department of Housing and Urban Development (HUD) established and presently regulates a system whereby financial and technical assistance is provided to local Indian housing authorities (IHAs). An IHA may be created by tribal governmental action or pursuant to state statute; in either situation, the IHA is vested generally with the authority to administer and supervise housing programs within areas of its jurisdiction.

First, the focus of this article is to describe the legal origin of the HUD Indian housing program since its inception in 1962. Second, the article also seeks to analyze the legal nature of IHAs, both tribally created and created pursuant to state law.

It is noted that the vast majority of case law involving IHAs is construction litigation; one of the primary responsibilities of IHAs is to oversee the development phase of their housing projects, including the solicitation of bids from potential prime contractors (both Indian and non-Indian), award of the construction contract, actual construction of housing units, and readying those units for Indian home buyers or tenants previously selected by the IHA. As is common to the construction industry as a whole, disputes frequently develop between the owner (the IHA) and the prime (general) contractor. Therefore, it is by analyzing the available case law involving tribally created IHAs in construction settings that one can best interpret the legal nature of an IHA.

Finally, two independent but somewhat related issues concerning tribally created IHAs are consistently raised that remain basic hurdles to a decision by the respective court on the merits. The first is in what situations, from a plain reading of the "sue or be sued" clause contained within the Model Tribal Ordinance

Editor's Note: In March of 1988, the officers, staff, and Faculty Sponsor Professor Joseph Rarick were saddened to learn of the untimely death of Mark Ulmer in an auto accident. Some of us, along with Professor Rarick, had met Mr. Ulmer in Albuquerque at the annual Federal Courts meeting only a short time before his death. We were impressed with his quick intelligence and believed this young attorney would be a valuable asset to our profession.

We extend our deepest sympathy to Mr. Ulmer's family and to his coworkers in HUD's Denver office.

creating the IHA, the IHA has sufficiently waived sovereign immunity to be sued. The second is which courts, federal, state and/or tribal, may have jurisdiction to entertain the matter; the unique composition of a tribally created IHA has raised the issue of whether it is a tribal department or division, a separate corporation, or a federal administrative agency.

1. *Legal Origin of Indian Housing Authorities*

The United States Housing Act of 1937, as amended (hereafter Housing Act),¹ established the Low Rent Public Housing Program to assist the several states in remedying the unsafe and unsanitary housing conditions facing low- to moderate-income persons and to "vest in local public housing agencies the maximum amount of responsibility in the administration of their programs."² The national housing policy, first declared by Congress in 1949, is to provide "decent homes and [a] suitable living environment for every American family";³ this policy has been reaffirmed by Congress.⁴ The Housing Act authorizes the Secretary of HUD to make loans and annual contributions to public housing agencies (including local housing authorities) to assist in the development and acquisition of low-rent housing projects and in maintaining the low-rent character of such projects.⁵

Although the Housing Act provided the statutory basis for housing programs on Indian reservations, HUD did not initiate such programs until 1962.⁶ It was not until this time that HUD adminis-

1. 42 U.S.C. §§ 1404a-1440 (1978 and Supp. III 1985).

2. *Id.* § 1437 (1982 & Supp. III 1985). 42 U.S.C. § 1402(13) (1982) defines the term "Authority" as meaning the United States Housing Authority. This, in turn, is more commonly known as the Department of Housing and Urban Development. The Housing Act authorizes the Secretary of HUD to make contributions to public housing agencies. *Id.* § 1437c(a) (1982 & Supp. III 1985). A public housing agency is defined to include any state. *Id.* § 1437a(b)(6) (1982 & Supp. III 1985). Since the definition of "state" includes Indian tribes, bands, and groups, *Id.* § 1437a(b)(7) (1982 & Supp. III 1985), an Indian tribe or group is generally eligible for housing funds.

3. *Id.* § 1441 (1982).

4. *See id.* § 1441a (1982).

5. *Id.* § 1437c(a) (1982 & Supp. III 1985). *See supra* note 1.

6. STAFF OF SENATE COMM. ON INTERIOR & INSULAR AFFAIRS, 94TH CONG., 1ST SESS., STAFF REPORT ON THE INDIAN HOUSING EFFORT IN THE UNITED STATES WITH SELECTED APPENDICES 3 (Comm. Print 1975) [hereinafter REPORT]; *Low Rent Housing for Indian Tribes on Indian Reservations*, Marie C. McGuire to Central Office Division and Branch Heads and Regional Directors (1962), reprinted in REPORT, at 213; *Low Rent Housing on Indian Reservations Covered by Public Law 280*, Joseph Burstein to PHA Commissioner (July 19, 1962), reprinted in REPORT, at 217

tratively determined that Indian tribes had the legal authority to establish, pursuant to tribal law, the tribal housing authorities that could develop and operate low-rent housing projects in areas subject to tribal jurisdiction.

Subsequent federal legislative amendments to the Housing Act in 1965,⁷ 1968,⁸ and 1974⁹ emphasize and further define HUD's authority and responsibility for assistance to low-income families in areas subject to tribal jurisdiction. In 1964, HUD, in cooperation with the Bureau of Indian Affairs (BIA), established the Mutual Help Homeownership Program ("Old" Mutual Help Program)¹⁰ as an alternative to the Low Rent Program¹¹ initiated several months earlier. In contrast to the Low Rent Program, which still involves the development and administration of rented dwellings for Indian participants, the "Old" Mutual Help Program sought to provide an opportunity for Indian homeownership that would be "a strong incentive for participants to aid in the building and maintenance of their own homes."¹² These two programs were followed in 1968 by a second homeownership program, the Turnkey III Homeownership Program,¹³ which was later made applicable to the Indian housing programs.

The Modernization Program also was introduced by HUD in 1968.¹⁴ This program specifically provides for the rehabilitation of outmoded or deteriorated housing. It was established to improve low-rent housing projects by: (a) correcting extensive physical deterioration of sites, structures, or equipment; (b) replacing outmoded equipment or structures; and (c) improving the grounds, structures, or equipment by alteration or providing additional structures or equipment.¹⁵ The Modernization Program, applicable to

7 42 U.S.C. § 3535(d) (1982).

8. *Id.* § 1467, 1468, 1468a (1982)

9. *Id.* § 1437c(c) (1982 & Supp. III 1985). *See also id.* § 1437g(a)(1) (1982 & Supp. III 1985).

10. REPORT, *supra* note 6, at 4-5. *See PHA Mutual Help Housing for Indians*, Marie C McGuire to all Public Housing Administration Regional Directors (Dec. 5, 1962), reprinted in REPORT, *supra* note 6, at 221; *PHA Mutual-Help Housing Program in Conjunction with the Bureau of Indian Affairs*, Joseph Burstein to PHA Commissioner (Nov. 30, 1962), reprinted in REPORT, *supra*, at 222.

11 *See supra* note 6

12 REPORT, *supra* note 6, at 5.

13 *Id.* at 6-7 *See* 39 Fed. Reg. 10,966 (to be codified at 24 C.F.R. §§ 804.101-309 (1974)), redesignated at 40 Fed. Reg. 15,580 (1975); 49 Fed. Reg. 6,714 (1984).

14. 42 U.S.C. § 1437L (1982 & Supp. III 1985).

15 *Id*

all HUD Indian housing programs, was redesignated the Comprehensive Improvement Assistance Program (CIAP) in 1980.¹⁶

In 1976 a third homeownership program, the Mutual Help Homeownership and Opportunity Program ("New" Mutual Help Program),¹⁷ was established to replace the "Old" Mutual Help Program. HUD promulgated separate regulations at this time to govern generally the Low Rent and "New" Mutual Help programs and "Old" Mutual Help units that have been converted to "New" Mutual Help pursuant to the regulations.¹⁸ The Interim

16. 47 Fed. Reg. 22,315 (1982), redesignated at 49 Fed. Reg. 6,714 (1984). The CIAP is applicable to all HUD Indian housing programs. See 51 Fed. Reg. 979 (1986) (proposed Jan. 9, 1986).

17. 41 Fed. Reg. 10,151 (to be codified at 24 C.F.R. §§ 805.101-.430) (1976)). See 44 Fed. Reg. 54,212 (1979).

18. Title 24 of the Code of Federal Regulations, part 905, applies to the "New" Mutual Help Program and "Old" Mutual Help units which have been converted to the "New" Mutual Help Program pursuant to 24 C.F.R. § 905.428 (1986). See 24 C.F.R. § 905.401 (1986). Part 905, subparts "A" (General), "B" (Development) and "C" (Operations) apply to the Low Rent Program.

It also is clear that title 24 of the Code of Federal Regulations, part 905, subpart "A" is applicable to the "Old" Mutual Help Program. What has not been clearly determined by administrative action is the applicability of subpart "C" (Operation) to the "Old" Mutual Help Program. HUD intended subpart "C" to govern certain aspects of this program, not only because no new "Old" Mutual Help projects would be approved after March 9, 1976, but all "Old" Mutual Help projects would necessarily be in the "operation" or "management" phase as of that date or soon thereafter.

Additional HUD regulations are binding upon all Indian housing programs. These regulatory provisions include the following: "Definition of Family and Other Related Terms; Occupancy by Single Persons" (24 C.F.R. §§ 912.1-.4 (1986)), "Definition of Income, Income Limits, Rent, and Reexamination of Family Income for the Public Housing and Indian Housing Programs" (24 C.F.R. §§ 913.101-110 (1986)), "PHA-Owned or Leased Projects—Maintenance and Operation" (subparts "C" and "D"), 24 C.F.R. §§ 965.301-.410 (1986), and subparts "F" and "G," 24 C.F.R. §§ 965.501-.605 (1986)), "PHA-Owned Projects—Personnel Policies and Compensation" (24 C.F.R. §§ 967.301-309 (1986)), "Comprehensive Improvement Assistance Program" (24 C.F.R. §§ 968.1-.18 (1986)). See *supra* notes 14-16, "PHA-Owned Projects—Continued Operation as Low-Income Housing After Completion of Debt Service" (24 C.F.R. §§ 969.101-.107 (1986)), "Public Housing Program: Demolition or Disposition of Public Housing Programs" (24 C.F.R. §§ 970.1-.11 (1986)), and "Waiver Authority" (24 C.F.R. § 999.101 (1986)). "PHA-Owned or Leased Projects—Maintenance and Operation," subpart "E" (24 C.F.R. §§ 965.470-.480 (1986)) applies only to the Turnkey III and Low Rent Programs; "Annual Contributions for Operating Subsidy" (24 C.F.R. §§ 990.101-116 (1986)). 50 Fed. Reg. 52,280 (1985) applies only to the Low Rent Program.

The section 8 Housing Assistance Payments Program is also applicable to the Indian housing programs, but pragmatically is applicable only to existing housing on the reservations. 24 C.F.R. § 905.103(c) (1986).

Indian Housing Handbook also was drafted and implemented by HUD to provide guidance to IHAs in administering their housing programs.¹⁹

Today the "Old" Mutual Help Program is governed primarily by an internal HUD Handbook²⁰ and the terms and conditions provided in the Mutual Help and Occupancy Agreements executed between the IHA and the individual participants.²¹ No new Indian housing projects pursuant to the "Old" Mutual Help Program have been constructed or otherwise approved since March 1976.

Although the BIA's primary involvement in the Indian housing field concerns tribal trust land issues, it established the Housing Improvement Program (HIP) in 1965 to assist Indian families with exceptionally low incomes or no incomes at all.²² Through HIP, the BIA provides grants for repairs, major rehabilitation, down payments, and some new housing construction to Indian people who are unable to obtain it from any other source. Today this program focuses mainly on grants for home rehabilitation and repair. Additionally, in 1976 the BIA, HUD, and the Indian Health Service entered into a tripartite interdepartmental agreement on Indian Housing to ensure increased coordination between the three federal agencies in providing for housing and related services on Indian reservations.²³

The Housing Act authorizes HUD to process loans and annual contributions to IHAs through the use of an Annual Contributions Contract (ACC) to subsidize the development and administration of its Indian housing programs.²⁴ The ACC is a contractual agreement between HUD and the IHA; it pledges annual contributions (federal funds) to back notes or bonds issued by the IHA to fund all phases of the housing project. Typically, each IHA will administer projects under three ACCs; an ACC for rental housing,²⁵ an

19. HUD Handbook 7440.1 (Mar. 1976).

20. Mutual Help Housing Manual (Sept. 1964).

21. Mutual Help and Occupancy Agreement, Form HUD-53044 (July 1967) (formerly form PHA-3044)

22. 40 Fed. Reg. 19,195 (1975), redesignated at 40 Fed. Reg. 44,543 (1975), and 47 Fed. Reg. 13,327 (1982). 25 C.F.R. § 256 (1986). See REPORT, *supra* note 6, at 7-8.

23. 24 C.F.R. part 905, subpart B, app. 1 (1986). See 24 C.F.R. §§ 905.104, 905.202 and 905.208 (1986).

24. See *supra* note 5

25. Low Rent Consolidated Annual Contributions Contract, Form HUD-53010B (Nov. 1969) and Form HUD-53011 (Nov. 1969).

ACC for the "Old" Mutual Help Program,²⁶ and an ACC for the "New" Mutual Help Program.²⁷

HUD regulations require that an IHA be established for the Indian tribe to take advantage of the Indian housing program.²⁸ An IHA may be created either by properly conducted tribal government action or pursuant to the applicable state law of the state where the Indian tribe or reservation is located.²⁹ The IHA also must demonstrate administrative and financial capability to perform these responsibilities as a prerequisite to HUD approval for new housing projects.³⁰

II. *The Legal Nature of Indian Housing Authorities*

Concerning federal housing programs for American Indians, it is apparent that HUD is subject to traditional notions of tribal sovereignty and the power of tribal governments to generally enact laws for the benefit of and regulate the activities of tribal members residing on Indian reservations. However, Indian housing is not solely an internal tribal matter. HUD has fully evidenced an intent to maintain partial control over the administration of housing projects through promulgated regulations and continuing contractual relations with each IHA, whether state or tribally created. In addition, HUD has adopted and applied current federal policy to its Indian housing programs by granting each IHA the authority to manage federal funding and accept primary responsibility for the administration of the IHA's housing programs.³¹

26. Annual Contributions Contract For Mutual-Help Projects, Form HUD-53040 (June 1967) (formerly Form PHA-3040) and Form HUD-53041 (September 1963) (formerly Form HUD-3041)

27. Mutual Help Homeownership Opportunity Program Annual Contributions Contract, Form HUD-53040 (March 1976) and Form HUD-53041 (March 1976). See Mutual Help and Occupancy Agreement, Form HUD-53056 (March 1976).

28. 24 C.F.R. §§ 905.101, 905.102, 905.108, 905.109 (1986).

29. *Id.* § 905.108

30. *Id.* § 905.207

31. Contrary to the "termination" policy in effect during the 1950s and early 1960s, it is clear that current federal executive and legislative policy favor the concept of independent sovereign Indian nations. Pursuant to its plenary authority, Congress has repeatedly passed legislation (especially during the period 1968 to 1982) emphasizing tribal autonomy, self-government, and the development of Indian reservation economies. These statutes include the Indian Civil Rights Act of 1968, 25 U.S.C.A. §§ 1301-1341 (1983), the Indian Financing Act of 1974, 25 U.S.C.A. §§ 1451-1543 (1983), the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C.A. §§ 450-458 (1983), the Indian Child Welfare Act of 1978, 25 U.S.C.A. §§ 1901-1963 (1983), and the Indian Mineral Development Act of 1982, 25 U.S.C.A. §§ 2101-2108 (1983). See *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 135, 155-57 (1980) (the Supreme Court recognizes

It is well settled that the federal trust relationship, the judicially created doctrine that establishes and defines the federal government's legal responsibilities as trustee and guardian toward Indians

this congressional concern of fostering tribal self-government and economic development).

Evidence of current congressional policy is manifest within the language of the preamble of the 1975 Indian Self-Determination and Education Assistance Act, in which Congress "recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities." 25 U.S.C.A. § 450a (1983).

President Reagan has reaffirmed President Nixon's 1970 message to Congress, see 6 Pres. Doc. 894 (1970), by announcing a policy of "removing the obstacles to self-government" and "creating a more favorable environment for the development of healthy reservation economies." President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983). Reagan stressed the need to "reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination." *Id.* See also Report and Recommendations to the President of the United States, Presidential Commission on Indian Reservation Economies, Nov. 1984; S. 856, 98th Cong., 1st Sess. (1983), which provides for creation of a comprehensive Indian housing program to be consolidated solely within the BIA.

The central focus concerning federal Indian housing programs has been the relationship between the federal government, through HUD, the BIA and Indian Health Service (IHS), and the various IHAs. The *Report* describes some of the problems faced by IHAs during the early 1970s in administering their housing programs:

Whereas non-Indian governments (usually a county or municipality) may need to work only with one Federal agency (HUD), tribal governments must work not only with HUD, but also with the BIA for the roads and site work to be incorporated into the housing project, and then again with IHS, which is responsible for water and sewer facilities servicing the project. . . .

Admittedly, constructing housing units and providing necessary related services is, by nature, a complex process. Any housing authority, Indian or non-Indian, must necessarily endure some "red tape" before units can be financed, constructed and eventually occupied. However, the administration of the Indian housing programs seems to be plagued with an inordinate amount of delay and lack of coordination. The reason for this is primarily two-fold. First, tribal housing authorities must work exclusively through Federal agencies and sub-agencies. This forces the tribal housing authority to work through the Federal bureaucracy at every turn. Secondly, many tribal housing authorities are understaffed and their members inadequately trained and underpaid. Few come to the housing authority with the skills and expertise necessary to cope effectively with the procedures and regulations of the several Federal agencies involved. The net result of these factors, and others suggested above, is a cumbersome process with which few tribal housing authorities are able to contend.

REPORT, *supra* note 6, at 14-15. See Report of the Comptroller General to the 90th Congress, 90th Cong., 2d Sess. (1971) (entitled "Slow Progress in Eliminating Substandard Indian Housing")

However, paralleling the current policy endorsed by the Reagan administration, this relationship has noticeably improved. See also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (the Supreme Court specifically identified the cautiousness federal courts must exert before rushing to "create causes of action that would intrude" on delicate matters of internal tribal concern).

and Indian tribes as beneficiaries, includes Indian housing.³² Although the trust doctrine must be based upon a federal statute to be invoked, the extent of the doctrine is limited only by common law trust principles.³³ The broad scope of this doctrine extends to off-reservation Indian housing programs as well as those within reservation boundaries.³⁴

It is also well settled that HUD is not barred by the equal protection clause of the Constitution or civil rights statutes from providing financial assistance approved under federal or state statutes.³⁵ Thus, so long as an expression of legislative intent is manifest, an Indian preference program will fall within the protection of the trust doctrine.³⁶

Indian Housing Authorities Created By Tribal Action

Tribal Sovereignty in General

The unique legal status of North American Indian tribes, although predating the signing of the United States Constitution,

32. *St. Paul Intertribal Housing Bd. v. Reynolds*, 546 F. Supp. 1408, 1411 (D. Minn. 1983). See also *Eric v. Secretary of HUD*, 464 F. Supp. 44 (D. Alaska 1978).

33. *Eric*, 464 F. Supp. at 49. See also *United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

34. *St. Paul Intertribal Housing Bd.*, 564 F. Supp. at 1414. The federal trust relationship was first established in the initial set of Native American cases before the Supreme Court. This trust relationship addresses the needs of the American Indian people and the legal obligation of the federal government to provide services for Indian people, both on and off the reservation. The federal courts use the terms "fiduciary" and "trust" relationship interchangeably, but there appears to be a difference in the degree of obligation placed upon the federal government.

Congress alone, pursuant to its plenary power, has the authority and the power to determine the manner in which the guardianship of the United States over Indians shall be carried out and in legislating for their protection. See *Minnesota v. United States*, 305 U.S. 382 (1938); *United States v. Kagama*, 118 U.S. 375, 384 (1886). For a discussion of the broad applicability of the federal trust doctrine to Indian housing program, see *St. Paul Intertribal Housing Bd.*, 564 F. Supp. at 1413-14.

35. *Alaska Chapter, Ass'n Gen'l Contrs. of Am., Inc. v. Pierce*, 694 F.2d 1162 (9th Cir. 1982), applying the rule established in *Morton v. Mancari*, 417 U.S. 535 (1974), in upholding Indian preference in the selection of prime contractors for Indian housing projects. See also *St. Paul Intertribal Housing Bd.*, 564 F. Supp. 1408 (D. Minn. 1983) (upholding an urban Indian housing board's Indian preference procedure in the selection of tenants for housing it administered).

36. *St. Paul Intertribal Housing Bd.*, 564 F. Supp. at 1411. HUD has specifically mandated that Indian preference policies apply to programs administered by state and tribal IHAs. See 51 Fed. Reg. 43,734 (1986) (to be codified at 24 C.F.R. §§ 905.106 and 905.204), applicable to Indian housing projects advertised on or after Mar. 15, 1987; 24

was not recognized by the United States Supreme Court until 1831.³⁷ However, any legal analysis of Indians and Indian tribes must focus upon the concepts of tribal sovereignty, federal-state relations, and the nature of the asserted claim. The Constitution directly recognizes tribal sovereignty in two separate places. First of all, it specifically grants Congress the authority or plenary power to regulate affairs involving Indian commerce.³⁸ Second, the Constitution also gives Congress, through the President, the right to enter into treaties with the individual tribes, pursuant to the treaty and supremacy clauses.³⁹

Indian tribes have long been recognized as separate sovereign entities, possessing attributes of sovereignty over both their members and their territory.⁴⁰ These attributes necessarily include the authority to regulate their internal and social affairs, legislate their own substantive law, and enforce that law in their own forums.⁴¹ The powers of tribal government are not powers granted by express acts of Congress but are inherent powers of a limited sovereignty that have never been extinguished.⁴²

Tribal sovereignty is not, however, absolute; it is subject to limitation by specific treaty provisions,⁴³ by statute enacted by

C. F. R. §§ 905.106, 905.204, 905.309 (1986), and 49 Fed. Reg. 37,749 (1984) (HUD's statement of policy concerning its Indian preference regulations).

37. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). See also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

38. U.S. Const. art. I, § 8, cl. 3. The applicable clause states: "The Congress shall have Power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

39. *Id.*, art. II, § 2, cl. 2 and art. VI. The treaty-making power is shared by both the President and the Senate, who must ratify the treaty by a two-thirds' vote. Under the supremacy clause, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

40. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). See *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983), cert. denied, 466 U.S. 926 (1984).

41. *Santa Clara Pueblo*, 436 U.S. at 55-66.

42. *Id.* See *Washington v. Contederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

43. *Wheeler*, 435 U.S. at 323 (Congress has the unilateral power to cancel rights formally established by an Indian treaty). In addition, the major premise concerning Indian treaties is that all rights stated therein are not a grant of rights and privileges to the tribe, but rather a relinquishment of such rights by the tribe, with their consent. *Central Mach Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980); *United States v. Winans*, 198 U.S. 371 (1905).

Congress pursuant to its plenary power,⁴⁴ by portions of the Constitution explicitly binding on the tribes,⁴⁵ and by implication due to the tribes' "dependent" status.⁴⁶

One element of tribal sovereignty is the power to exercise some form of civil jurisdiction over non-Indians on their reservations. The Supreme Court has repeatedly recognized tribal courts as "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."⁴⁷ The power to exercise tribal civil authority over non-Indians derives not only from the tribe's inherent powers necessary for self-government and management but also from the power to exclude nonmembers from tribal land.⁴⁸ Thus a tribe has the power "to place conditions on entry, on continued presence, or on reservation conduct, . . . non-members who [enter] the jurisdiction of the tribe [remain] subject to the risk that the tribe will later exercise [this] sovereign power."⁴⁹ This limited authority over nonmembers does not arise unless and until the nonmember invokes the tribal jurisdiction by entering tribal lands or by conducting business with the tribe.⁵⁰

The limits of tribal civil authority over non-Indians have not been precisely determined; however, recent Supreme Court decisions involving tribal taxation of non-Indian entities provide significant guidance.⁵¹ It is equally clear that each tribe "may regulate, through

44. *Wheeler*, 435 U.S. at 323. See also *Santa Clara Pueblo*, 436 U.S. at 56, 72 (Congress has the plenary authority to limit, modify, or eliminate the powers of local self government that tribes otherwise possess, but Congress' intent to do so must be clearly expressed).

45. *Trans-Canada Enterp., Ltd. v. Muckelshoot Indian Tribe*, 634 F.2d 474, 476-477 (9th Cir. 1980).

46. *Wheeler*, 435 U.S. at 323 (the Indian tribes "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised"). See *Babbitt Ford*, 710 F.2d at 591 nn.3-6.

47. *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1323 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984), quoting *Santa Clara Pueblo*, 436 U.S. at 65.

48. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-44 (1982); *Montana v. United States*, 450 U.S. 544, 565 (1981); *Babbitt Ford*, 710 F.2d at 592. For a discussion of two differing approaches employed by the Supreme Court addressing this issue, see *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982).

49. *Merrion*, 455 U.S. at 144-45.

50. *Id.* at 142; *Montana*, 450 U.S. at 564.

51. Thus, the Supreme Court has recently been confronted with the issues of whether an Indian tribe has the power to regulate and tax the sale of liquor sold on the reservation (*Rice v. Rehner*, 463 U.S. 713 (1983); *United States v. Mazurie*, 491 U.S. 544 (1975));

taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”⁵² Lower federal courts have upheld the authority of tribes to regulate the affairs of non-Indians who have sufficiently infringed upon tribal interests to warrant protection of those interests.⁵³

The Legal Nature of a Tribally Created Indian Housing Authority

Where an Indian tribe has an established governing body with sufficient powers of self-government and governmental police power to promote the general welfare within its reservation boundaries, the tribal governing body may perform the legal functions otherwise performed by a state legislature or local government with regard to HUD-assisted low-income housing.

HUD regulations specifically provide that such a governing body may create an IHA;⁵⁴ in every instance where a tribal government

the power to tax the sale of cigarettes to Indians or otherwise tax a non-Indian business located on the reservation (*Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980)), the power to impose a severance tax on oil and gas production by non-Indian lessees (*Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)), and whether BIA approval is necessary before an Indian tribe may impose a tax upon leasehold interests in tribal lands and receipts resulting from them (*Kerr-McGee Corp. v. Navajo Indian Tribe*, 471 U.S. 195 (1985)). See *National Farmers' Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 n.12 (1985).

52 *Montana*, 450 U.S. at 564-65.

53 See *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir.), cert. denied, 106 S. Ct. 2008 (1986) (Ninth Circuit affirms lower court's dismissal of construction company's claims against the tribe for deprivation of civil rights and pending state claims due to lack of jurisdiction, based on *National Farmers' Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Babbit Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983), cert. denied, 466 U.S. 926 (1984) (the Navajo Tribe's exercise of civil jurisdiction over non-Indians who were repossessing an automobile, purchased off the reservation, is not within that part of the sovereignty which the Indians implicitly lost by virtue of their dependent status); *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), cert. denied, 459 U.S. 967 (1982) (the tribe retained the inherent sovereign power to impose its health, building, and safety regulations on a non-Indian's business, which was located on fee land within the exterior boundaries of the reservation); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir.), cert. denied, 459 U.S. 977 (1982) (Ninth Circuit upheld the tribe's right to regulate federal common law riparian rights of non-Indians who owned reservation land to which the tribes had beneficial title); *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1981) (court held as valid the exercise of tribal power zoning regulation that affected fee land owned by non-Indians located within reservation boundaries).

54 24 C.F.R. §§ 905.108(a) and 905.109 (1986)

does so, the applicable tribal ordinance must follow the exact format prescribed by HUD.⁵⁵ The provisions of this ordinance are similar in substance and in form to a corporate set of bylaws.⁵⁶ The format of the Model Tribal Ordinance has been virtually unchanged since HUD first introduced it in 1962. Certain sections of the Ordinance may be altered by the tribe on its own motion; the majority of the provisions, however, require HUD approval before they can be amended.⁵⁷

HUD shall not enter into an undertaking for assistance to an IHA formed by tribal ordinance unless the ordinance has been submitted to HUD for approval, accompanied by evidence that the tribal government's enactment of the ordinance has either been approved by the Secretary of the Interior (through the BIA) or that the Secretary has reviewed the ordinance and has not objected to it; documentation enumerated in the HUD regulations is also required.⁵⁸

It is not necessary that the tribe creating the IHA be organized under the Indian Reorganization Act of 1934 (IRA),⁵⁹ that it have

55. *Id.*

56. *Id.* § 905, subpart A, app. 1 (1986) [hereinafter Ordinance].

57. *Id.*, and 24 C.F.R. § 905.109 (1986). The footnotes to the Ordinance read as follows:

'Article I may be modified as deemed appropriate.

'Article IV, section 1(a), paragraphs (1), (2) and (3) may be modified. For example the number of board members may be more or less than five; the appointments may be made by the elected head of the tribal government, rather than the Council. The IHA may be made a department or division of the tribal government, membership on the Board may be limited to those who are members of the tribe, or to those who are nonmembers of the Council, or to a certain number of any category.

'Article IV, section 1(b) may be modified to conform to changes in Article IV, section 1(a), and as to the length of the term of membership.

'Article IV, section 1(c) may be modified as to the manner of appointment of the Chairman. For example, it may provide for appointment by the Board members or by the elected head of the tribal government. This paragraph may also be modified as to the manner of appointment of the other officials.

'Article IV, section 1(d) may be modified, but adequate safeguards against arbitrary removal shall be included.

'Article IV, section 1(f) may be modified if deemed appropriate where the full Board consists of more than 5 members.

'Article VIII, section 1(f) may be modified to insert the name of the appropriate court, or it may be deleted where it is demonstrated to HUD that the jurisdiction for evictions is vested in other than tribal courts (e.g., State courts or Courts of Indian Offenses).

58. 24 C.F.R. § 905.109 (1986).

59. 25 U.S.C. §§ 461-479 (1983 and Supp. III 1985). See *Babbitt-Ford*, 710 F.2d at 599 (Indian tribes are not required to adopt a constitution pursuant to the IRA before

previously enacted a tribal constitution and bylaws, or that it even be federally recognized; HUD will consider many factors in determining whether a tribal government retains sufficient powers of self-government to create an IHA.⁶⁰

No one factor is compelling when HUD makes this factual determination. The Trenton Indian Housing Authority in North Dakota, for example, administers Indian housing programs without the benefit of an Indian reservation. Similarly, the Joint Business Council of the Arapahoe and Shoshone tribes of the Wind River Indian Reservation, Wyoming, created the HUD-approved Wind River Housing Authority without the benefit of a joint tribal constitution or by laws. It is clear, however, that the majority of IHAs have been created pursuant to properly enacted tribal ordinances.⁶¹

HUD regulations require that tribal ordinances enacted before March 9, 1976, that do not conform to the required provisions of this form, must be amended as soon as possible thereafter to bring them into compliance.⁶² Additionally, beginning January 1, 1977, no contract or amendment providing any additional commitment for HUD financial assistance shall be entered into unless such conforming amendments have been enacted.⁶³

exercising civil jurisdiction over non-Indians on the reservation). See also F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 231-32 (R. Strickland ed. 1982).

60. Among the factors that HUD will consider in determining whether a tribal government retains sufficient powers of self-government to create an IHA includes whether it has:

- 1) been officially denominated a tribe pursuant to the IRA or otherwise recognized by the Federal government as eligible for basic Federal services, whether by act of Congress or executive order;
- 2) enacted a tribal constitution and by-laws which have obtained BIA approval pursuant to 25 U.S.C.A. § 81 (1983) and 25 C.F.R. §§ 81-83 (1986);
- 3) had treaty relations with the United States;
- 4) been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe;
- 5) been treated as a tribe or band by other Indian tribes;
- 6) exercised political authority over its members, through a tribal council or other distinct and domestic form of government;
- 7) maintained an uninterrupted existence as a united community, isolated for the most part from non-Indian infiltration; and,
- 8) maintained a land base for a prolonged period of time.

F. COHEN, *supra* note 59, at 13-16; Memo. Sol. Int. Feb. 8, 1937 (Mole Lake Band of Chippewas), *Montova v. United States*, 180 U.S. 261, 266 (1901).

61. Currently there are approximately 131 tribally created Indian housing authorities that administer housing programs on their respective reservations. Altogether, there are approximately 172 Indian housing authorities presently in the United States.

62. 24 C.F.R. § 905.109(d) (1986).

63. *Id.* § 905.109(e).

The Model Tribal Ordinance creates a special relationship between the tribal governing body and the IHA. The IHA is established as a separate public body, primarily so that the tribal government is protected from the debts and obligations created when the IHA borrows money to develop projects.⁶⁴ As the IHA is a separate entity, the tribal government is not responsible for the day-to-day supervision of the IHA's activities, nor is it responsible for the IHA's legal obligations or debts.

The tribal government maintains a reasonable amount of control over the activities of the IHA, though, by retaining the authority to amend the tribal ordinance,⁶⁵ to designate the members of the board of commissioners,⁶⁶ and the person who will serve as chairman,⁶⁷ to require regular reports to be provided,⁶⁸ and to reserve the right to remove a member of the board for serious inefficiency, neglect of duty, or misconduct in office.⁶⁹ The Ordinance notes that there is a shortage of decent, safe, and sanitary low-income housing that cannot be remedied through the operation of private enterprise.⁷⁰ The provision of adequate housing is expressly declared to be a "governmental function of Tribal concern" to the tribal council,⁷¹ and the property of the IHA is deemed to be "public property used for essential public and governmental purposes" and exempt from all taxes and special assessments of the tribe.⁷²

Article II of the Ordinance lists the three primary purposes for which each IHA was created: to remedy unsafe and unsanitary housing conditions on the reservation; to supply decent, safe, and

64. See *id.*, art. V, § 2 ("The Tribe shall not be liable for the debts or obligations of the Authority"); art. VI, § 2 ("Neither the commissioners of the Authority nor any person executing the obligations shall be liable personally on the obligations by reason of issuance thereof"); art. VI, § 3 ("The notes and other obligations of the Authority shall not be a debt of the Tribe and the obligations shall so state on their face"); and art. VI, § 7, which delineates generally the authority granted to the IHA to incur obligations.

65. See 24 C.F.R. § 905.109 (1986), *supra* note 57.

66. Ordinance, *supra* note 56, art. IV, § 1 (a)(2).

67. *Id.*, art. IV, § 1(c).

68. *Id.* § 1(h), and art. VII, § 1.

69. *Id.*, art. IV, § 1(d). This section may be modified by subsequent tribal ordinance, but any modification must include safeguards against arbitrary removal.

70. *Id.*, art. I, §§ 1 and 3.

71. *Id.* § 4.

72. *Id.*, art. VII, § 6. See also art. VIII, § 1(a) (the tribe agrees not to levy or impose any real or personal property taxes or special assessments upon the IHA or its property) and 42 U.S.C. § 1437d(d) (1983 and Supp. III 1985); art. VII, § 4 (the obligations of the IHA are given the same legal effect as IHA-owned property).

sanitary housing for persons of low income; and to provide employment opportunities through the construction, repair, and operation of low-income dwellings.

The Model Tribal Ordinance establishes the organizational structure, powers, and duties of the IHA. The board of commissioners, typically consisting of five members, retain the authority to set the policies the IHA will follow.⁷³ The IHA also employs a staff, headed by an executive director, which is responsible for the day-to-day operation of the IHA and for carrying out the policies established by the board.

The powers of the IHA are set forth in article V, section 3 of the Model Tribal Ordinance. An examination of the twenty enumerated powers evidences the intent of the tribe and of HUD, which drafted the ordinance, that the IHA would be a separate corporate body with the freedom to contract with and conduct business transactions with off-reservation entities. However, each IHA's initial, and arguably most important, contractual relationship will be with HUD. Upon the execution of an ACC, federal monies will become available to fund IHA housing projects; these federal funds generally are the sole source of financial assistance provided to the IHAs to construct and manage the projects.

Finally, article VIII states that the tribal government will cooperate with its respective IHA in connection with the construction and management of housing on the reservation. Article VIII is similar in nature to the cooperation agreements required of non-Indian public housing authorities in dealing with their local governing bodies.⁷⁴ The Model Tribal Ordinance also states that the tribe's

⁷³ *Id.*, art. IV, § 1(a)(1).

⁷⁴ Each IHA must execute cooperation agreements with each local governing body that will provide water and sewer services and local cooperation. Section 5(e) of the Housing Act provides as follows.

In recognition that there should be local determination of the need for lower income housing to meet needs not being adequately met by private enterprise—

- (1) the Secretary shall not make any contract with a public housing agency for preliminary loans (all of which shall be repaid out of any moneys which become available to such agency for the development of the projects involved) for surveys and planning in respect to any lower income housing projects (i) unless the governing body of the locality involved has by resolution approved the application of the public housing agency for such preliminary loan; and (ii) unless the public housing agency has demonstrated to the satisfaction of the Secretary that there is need for such lower income housing which is not being met by private enterprise; and
- (2) the Secretary shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this Act *unless the governing body*

intent is to do any and all things necessary to secure the financial aid or cooperation of the federal government in the undertaking, construction, maintenance, or operation of the respective IHA's projects and that no other tribal ordinance with respect to the acquisition, operation, or disposition of tribal property shall be applicable to the IHA.⁷⁵

of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Secretary pursuant to this Act.
42 U.S.C. § 1437c(e) (1982 & Supp. III 1985) (emphasis added).

Each Annual Contributions Contract entered into by HUD and an IHA also requires that the IHA enter into cooperation agreements with the governing body of the locality. See Low Rent Consolidated Annual Contributions Contract, Form HUD-53010B (Nov. 1969), § 1, at 1; Annual Contributions Contract For Mutual-Help Projects, Form HUD-53040 (June 1967) (formerly Form PHA-3040), § 1, at 1; Mutual Help Homeownership Opportunity Program Annual Contributions Contract, Form HUD-53040 (Mar. 1976), §§ 0.1, 0.6 and 0.7, at 8-9.

Where the local governing body is the respective tribal government, a tribally created IHA does not have to enter into separate cooperation agreements because article VIII of the ordinance is sufficient to fulfill this requirement. However, when the local governing body is a state-incorporated municipality, the IHA is required by federal statute and by contract to enter into separate cooperation agreements with the local governing body (this also is the case where the IHA is created pursuant to state law).

The local cooperation required by the cooperation agreement form prescribed by HUD, Form HUD-52481 (Nov. 1969), includes the following: exemption from real and personal property taxes; the provision of the same public services and facilities to the project at no cost to the IHA as are furnished at no cost to other housing units within the governing body's jurisdiction (including, for example, police and fire protection); and the provision of water mains and storm and sanitary sewer mains to the project, for which normal services the IHA may make payments not to exceed those assessed private owners in the jurisdiction.

The standard cooperation agreement form may be modified with the approval of the applicable HUD Regional Office, provided that all legal requirements are otherwise met. See Interim Indian Housing Handbook, Handbook 7440.1 (Mar. 1976) [hereafter IHH], ch. 1, § 1-3(d), at 1-13. For example, when a local governing body is unable to make expenditures for any facilities or improvements required by the cooperation agreement, and such facilities or improvements are not normally provided by the local governing body but are the obligation of a private developer under local codes or established practices, the cooperation agreement may be amended accordingly.

A cooperation agreement may be for as large a program as the parties may agree to; however, HUD will not approve applications for new or additional housing or enter into Preliminary Loan Contracts or Annual Contributions Contracts (ACCs) for units in a specific locality where the number of units to be administered by the IHA exceeds the number of units covered by the cooperation agreement with the local governing body for that locality. See IHH, § 1-3(d), at 1-13. Any cooperation agreement that is executed by an IHA and its local governing body is subject to HUD approval. See IHH, §§ 1-3(d)(1) and (2), at 14.

Tribal Department, Agency, or Corporation?

In *DuBray v. Rosebud Housing Authority*,⁷⁶ the United States District Court for the District of South Dakota determined that the tribally created Rosebud Housing Authority was a “tribal agency, to which the limitations of the United States Constitution do not apply.”⁷⁷ In determining whether the IHA was a tribal agency or a federal administrative agency, the court noted:

The Rosebud Housing Authority was established by the Rosebud Sioux Tribal Council in the exercise of its powers of self-government. The Rosebud Housing Authority operates in connection with the United States Department of Housing and Urban Development in the operation and development of housing projects on the Rosebud Reservation. But this Court must reject the Plaintiffs’ claim that the RHA does not possess attributes of tribal sovereignty and is sufficiently linked to HUD that it may be considered an agency of the federal government, rather than of the tribe.⁷⁸

This determination was relied upon by the Eighth Circuit Court of Appeals in *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*,⁷⁹ in specifically holding the Oglala Sioux Housing Authority to be an arm of the tribal government. The Eighth Circuit stated that “a tribal housing authority possesses attributes of tribal sovereignty, . . . and suits against an agency like the Housing Authority normally are barred absent a waiver of sovereign immunity.”⁸⁰

It is well settled that an IHA is not a “tribe” for purposes of the federal jurisdictional statute that permits Indian tribes to

75. Ordinance *supra* note 56, art. V, §§ 4 and 5

76. 565 F. Supp. 462 (D.S.D. 1983).

77. *Id.* at 466

78. *Id.* at 465-66.

79. 797 F.2d 668 (8th Cir. 1986).

80. *Id.* at 671. See also *Wilson v. Turtle Mountain Band of Chippewa Indians & the Turtle Mountain Housing Auth.*, 459 F. Supp. 366, 368-69 (D.N.D. 1978), where the United States District Court for the District of North Dakota found that both defendants were sufficiently linked such that not only did tribal sovereign immunity pass to the Housing Authority (TMHA), but also that no waiver of that immunity was manifest. Thus the lawsuit, filed by a Turnkey III participant under the Indian Civil Rights Act against TMHA to enjoin an eviction action filed by TMHA, was barred by the tribe’s sovereign immunity.

file suit in their own behalf.⁸¹ It also is clear that each Indian tribe that utilizes the Model Tribal Ordinance in creating its IHA not only will not be liable for the IHA's debts or obligations (unless the tribe later agrees to do so),⁸² but also that the tribe does not agree to make the IHA a tribal "department" or "division" unless the tribal ordinance specifically states this.⁸³

The issue of whether an Indian housing authority is sufficiently linked to HUD to be legally a "federal agency" was also addressed by the United States Claims Court in *Deroche v. United States*.⁸⁴ Here, a general contractor to an Indian housing project filed suit against the United States in the Court of Claims, alleging that the Blackfeet Indian Housing Authority allowed funds obligated for certain housing construction contracts to be expended for other purposes, with HUD's knowledge. In dismissing the claim, the Court of Claims found that the IHA was not a federal agency or auspice of the United States.⁸⁵ The court relied on substantial case law for the proposition that although it may be necessary for the federal government to establish standards and requirements for IHA housing projects, an IHA does not become an "agent" of the federal government solely because of such control.⁸⁶

Similarly, the United States District Court for the District of Utah decided in *Knowlton H. Brown Construction Co. v. Washoe Housing Authority*,⁸⁷ that mere HUD approval of the IHA construction contract with a general contractor does not give rise to

81 See *Namekagon Dev. Co. v. Bois Forte Reservation Housing Auth.*, 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975); *Hickey v. Crow Creek Housing Auth.*, 379 F. Supp. 1002 (D.S.D. 1974), 28 U.S.C.A. § 1362 (1982) provides access to federal district courts for recognized Indian tribes. It was intended to give tribes such access, particularly when the United States declined to act for the tribes. See, e.g., *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472-75 (1976); *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 710-15 (9th Cir. 1980); *Navajo Tribal Util. Ass'n v. Arizona Dep't of Revenue*, 608 F.2d 1228, 1231 (9th Cir. 1979) ("we are convinced that section 1362 does not cover subordinate, semi-autonomous tribal entities").

For a general discussion of federal court jurisdiction over actions brought by Indian tribes under 28 U.S.C.A. § 1362 (1982), see Annotation, *United States District Court Jurisdiction of Action Brought by Indian Tribe Under 28 U.S.C.A., § 1362*, 65 A.L.R. Fed. 649 (1983).

82 See *supra* note 64.

83 See *supra* notes 56, 57, at n.2.

84 2 Ct. Cl. 809 (1983).

85 *Id.* at 811 n.1.

86 *Id.* at 812.

87 625 F. Supp. 595 (D. Utah 1985).

an expressed or implied contractual relationship between HUD and the general contractor. Said the court:

Although HUD, through its supervision of the use of federal funds by the housing authority, approved the contract, its involvement does not manifest an agreement between HUD and the plaintiff. A representative of HUD signed the contract indicating HUD's approval, but the contract named neither HUD nor the United States as a party therein. The approval itself did not create a contract, express or implied. [Citation omitted.]⁸⁸

However, the Comptroller General of the United States has determined that an IHA that receives funds from HUD to fund construction of housing is tantamount to a "grantee" for purposes of review by the General Accounting Office.⁸⁹ Therefore, each IHA is bound by fundamental principles of federal procurement inherent in the concept of competition.

Both tribally and state-created IHAs are "tribal organizations" within the meaning of the federal statutes governing embezzlement and misapplication of "tribal organization" funds.⁹⁰ The Ninth Circuit, in stating that "the [Hopi] tribe, through its Council, participates in and exercises at least indirect control of the [Hopi Tribal] Housing Authority and its activities," specifically recognized the interdependence of the IHA with other "arms" of the tribal government.⁹¹

Furthermore, the BIA has administratively determined that the Salish and Kootenai Housing Authority of the Confederated Salish and Kootenai tribes of Montana qualifies as a "tribal organization" under the Indian Self-Determination and Education Assistance Act of 1975⁹² because the IHA's activities "include the maximum par-

88. *Id.* at 602-03. See also *Rosebud Housing Auth. v. LaCreek Electric Coop., Inc.*, No. CIV-85-375, 13 Indian L. Rep. 6030 (Rbd. Sx. Tr. Ct. 1986) (HUD is not an indispensable party in a tribal court action by an IHA against an electric cooperative doing business on the reservation).

89. Comp. Gen. Op. No. B-215883 (Aug. 13, 1984).

90. *United States v. Brame*, 657 F.2d 1090 (9th Cir. 1981) and *United States v. Eldred*, 588 F.2d 746 (9th Cir. 1978) (tribally created IHAs), *United States v. Crossland*, 642 F.2d 1113 (10th Cir. 1981) (state-created IHA). See 18 U.S.C. § 1163 (Supp. 1984)

91. *Brame*, 657 F.2d at 1092-93

92. 25 U.S.C. § 450b(c) (1982 & Supp. III 1985). The relevant statutory section reads as follows:

"Tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of

participation of all [tribal] Indians."⁹³ As the Salish and Kootenai Housing Authority may now apply in limited situations on behalf of the tribes for Community Development Block Grant (CDBG) funding pursuant to the Housing and Community Development Act of 1974, as amended,⁹⁴ the question arises whether the IHA itself may apply for CDBG funding in its own right pursuant to the regulations.

Indian Housing Authorities Created Pursuant to State Law

Regulations promulgated by HUD permit creation of an IHA pursuant to state law where the state has authorized generally the creation of public non-Indian housing authorities to carry out low-income housing projects.⁹⁵ A state-created IHA is established as a corporate entity with enumerated powers similar (if not identical) to those granted a city, county, or state public housing authority.⁹⁶ There are approximately forty state-created IHAs in the United

the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities.

93 The BIA made this determination in a Dec. 4, 1985, letter from Donovan Boldt, Acting Area Superintendent, Flathead Agency, Pablo, Mont., to John Dibella, Director, Housing Development Division, HUD-Region VIII Office of Indian Programs, Denver, Colo.

94 42 U.S.C. §§ 5301-5320 (1982 & Supp. III 1985) Pursuant to this statutory authority, HUD promulgated regulations to implement the Indian Community Development Block Grant program. See 24 C.F.R. §§ 571.1-.704 (1986). Eligible applicants for Block Grant funding include tribal organizations, which are eligible under Title I of the Indian Self-Determination and Education Assistance Act, when the Indian tribe, band, group, nation, or Alaskan native village creating the organization authorizes the organization to apply for such funding through a concurring resolution. 24 C.F.R. § 571.5(b) (1986). Eligible tribal organizations pursuant to the Indian Self-Determination Act will be determined by the Bureau of Indian Affairs on a case-by-case basis. *Id.*

95. 24 C.F.R. § 905.108(b) (1986).

96 A listing of the non-Indian state housing authority statutes is as follows: ALA. CODE §§ 24-1-1 to -134 (Supp. 1985) (Alabama); ALASKA STAT. §§ 18.55.010-.290 (1985) (Alaska; see *infra* notes 109-114); ARIZ. REV. STAT. ANN. §§ 36-1401 to -1425 (1974) (Arizona); ARK. STAT. ANN. §§ 19-3001 to -3080.24 (1980) (Arkansas); CAL. HEALTH & SAFETY CODE §§ 34200-34380 (Supp. 1986) (California); COLO. REV. STAT. §§ 29-4-101 to -732 (Supp. 1985) (Colorado); CONN. GEN. STAT. §§ 8-38 to -119aa (1985) (Connecticut); DEL. CODE ANN. tit. 31, §§ 4301-4322 (1975) (Delaware); D.C. CODE ANN. §§ 5-101 to -116 (1981) (providing for the National Capitol Housing Authority) (District of Columbia); FLA. STAT. ANN. §§ 421.001-.55 (Supp. 1985) (Florida); GA. CODE ANN. §§ 8-3-1 to -208 (Supp. 1985) (Georgia); HAWAII REV. STAT. §§ 356-1 to -41 (Supp. 1984) (providing for the Hawaii Housing Authority) (Hawaii); IDAHO CODE §§ 50-1901 to -1927 (1980) (Idaho); ILL. ANN. STAT. ch. 67 1/2, §§ 1-27e (Smith-Hurd Supp. 1985) (Illinois); IND. CODE ANN. §§ 36-7.81-1 to -44 (Burns Supp. 1985) (Indiana); IOWA CODE §§ 270.1-.60 (1985) (providing for the Iowa Housing Finance Authority) (Iowa); KAN. STAT. ANN. §§ 17-2336 to -2365

States that currently administer Indian housing programs. States that have organized IHAs include Oklahoma (19), Alaska (12), Maine (3), Texas (2), Connecticut (1), Nebraska (1), North Carolina (1), and Utah (1).

HUD regulations governing the Indian housing programs apply equally to both state-created and tribally created IHAs, with three important exceptions. First, state-created IHAs are specifically exempt from the requirement of enacting the HUD-prescribed Model Tribal Ordinance.⁹⁷ Thus it is the state's prerogative as to how the IHA will be organized, who shall be liable for its obligations, and to what extent the IHA may waive sovereign immunity.

Second, state-created IHAs subject themselves to state civil and criminal jurisdiction by their very creation. That an IHA is created pursuant to state rather than federal law does not exempt it from federal restrictions. In addition, any state statute that conflicts

(1981) (Kansas); KY. REV. STAT. §§ 80.010-.610 (Supp. 1984) (Kentucky); LA. REV. STAT. ANN. §§ 40:381-.581.41 (West Supp. 1985) (Louisiana); ME. REV. STAT. ANN. tit. 30, §§ 4551-4788 (Supp. 1985) (Maine; see *infra* notes 115-120); MD. ANN. CODE art. 44A, §§ 1-33 (Supp. 1985) (Maryland); MASS. GEN. LAWS ANN. ch. 121B, §§ 1-59 (West Supp. 1985) (Massachusetts); MICH. STAT. ANN. §§ 16.114(1)-.114(98)(f) (Callaghan 1982 & Supp. 1985) (Michigan); MINN. STAT. ANN. §§ 462A.01-.24 (West 1984) (Minnesota); MISS. CODE ANN. §§ 43-33-1 to -69 (Supp. 1985) (Mississippi); MO. REV. STAT. §§ 99.010-.230 (Supp. 1985) (Missouri); MONT. CODE ANN. §§ 7-15-2101 to -4532 (1985) (Montana); NEB. REV. STAT. §§ 71-1518 to 1554 (1981) (Nebraska); NEV. REV. STAT. §§ 315.140-.780 (Housing Authority Law of 1947) and 315.960-.996 (State Rural Housing Authority Act) (1983) (Nevada); N. H. REV. STAT. ANN. §§ 203:1-.27 (1977) (New Hampshire); N. J. REV. STAT. §§ 55:14A-1 to -58 (Supp. 1985) (New Jersey); N.M. STAT. ANN. §§ 3-45-1 to -25 (municipal housing authorities), 11-3-1 to -6 (regional housing authorities), and 11-4-1 to -8 (New Mexico State Housing Authority) (Supp. 1985) (New Mexico); N.Y. PUB. HOUS. LAW 44A, §§ 30-57 (McKinney Supp. 1986) (New York); N.C. GEN. STAT. §§ 157-1 to -70 (1982) (North Carolina); N.D. CENT. CODE §§ 23-11-01 to -36 (Supp. 1985) (North Dakota); OHIO REV. CODE ANN. §§ 3735.01-.07 (Page Supp. 1984) (Ohio); 63 OKLA. STAT. §§ 1051-99 (Supp. 1986) (Oklahoma; see *infra* notes 102-108); OR. REV. STAT. §§ 456.055-.200 and 456.205-.230 (1985) (Oregon); PA. STAT. ANN. tit. 35, §§ 1541-68 (Purdon Supp. 1985) (Pennsylvania); R.I. GEN. LAWS §§ 45-25-1 to 45-27-21 (1980) (Rhode Island); S. C. CODE ANN. §§ 31-3-1 to -1360 (Law. Co-op 1976) (South Carolina); S. D. CODIFIED LAWS ANN. §§ 11-7-1 to -109 (local housing and redevelopment) and 11-11-1 to -185 (housing development authority) (Supp. 1984) (South Dakota); TENN. CODE ANN. §§ 13-20-101 to -614 (Supp. 1985) (Tennessee); TEX. REV. CIV. STAT. ANN. art. 1269k (Vernon 1963) (Texas); UTAH CODE ANN. §§ 55-18-1 to -31 (1974) (Utah); VT. STAT. ANN. tit. 24, §§ 4001-4026 (Supp. 1985) (Vermont); VA. CODE §§ 36-1 to -55.6 (1984) (Virginia); WASH. REV. CODE ANN. §§ 35-82-010 to -910 (1985) (Washington); W. VA. CODE §§ 16-15-1 to -25 (1985) (West Virginia); WIS. STAT. ANN. §§ 66.395-.404 (West Supp. 1985) (Wisconsin); WYO. STAT. §§ 15-10-101 to -117 (1980) (Wyoming). See generally Revised Model Business Corporation Act Annotated, vol. 1-3 (1984).

97. 24 C.F.R. § 905.109(a) (1986).

with federal law must be subordinated to the federal law, following a preemption analysis.

Third, it is not mandatory that an IHA organized pursuant to state law be created by "exercise of a tribe's powers of self-government"; thus, a tribal government is not a necessary prerequisite for its creation.⁹⁸ At least two IHAs were created under state law, although the respective tribes they were to service had been terminated by an act of Congress.⁹⁹

Nine state housing authority statutes directly provide for the creation of IHAs.¹⁰⁰ However, in at least three instances, an IHA was organized under the state housing authority act that did not specifically provide for the creation of IHAs.¹⁰¹

Three states have been particularly prominent, not only by the number of IHAs created pursuant to state law but also by the profuse legal activity generated by these state-created IHAs. Oklahoma enacted legislation permitting IHAs to be created pursuant to state law,¹⁰² and nineteen such IHAs presently administer Indian housing programs within state borders. Although these state-created IHAs have been ruled to be arms of the state government, in legal consequence they are a tribal entity.¹⁰³

98. *Id.* §§ 905.108(b), 905.109(a).

99. The Utah Paiute Tribal Housing Authority is the IHA for the Utah Paiute Tribe. This IHA was created in 1974 despite the fact that its respective tribe, the Paiute Tribe of Utah, was then currently terminated. 25 U.S.C.A. §§ 741-760 (West Supp. 1983). The tribe was not restored to federal status until 1980. 25 U.S.C.A. §§ 761-768 (West Supp. 1983). The Alabama-Coushatta Indian Housing Authority administers housing projects for a tribe (the Alabama-Coushatta Tribe) that is currently terminated. 25 U.S.C.A. §§ 721-728 (West Supp. 1983)

100. These states are as follows: Alaska (ALASKA STAT. §§ 18 55.995-998 (1985)), Connecticut (CONN. GEN. STAT. § 47-66a (1985)), Louisiana (LA. REV. STAT. ANN. §§ 40:581.1-.41 (Supp. 1985)), Maine (ME. REV. STAT. ANN. tit. 22, §§ 4731-4739 (1978)), Maryland (MD ANN. CODE art. 44A, § 23A (1982)), Minnesota (MINN. STAT. ANN. §§ 462A.06) (See MINN. STAT. ANN. § 462A.07, subd. 14-15 (Supp. 1985)); St. Paul Intertribal Housing Bd., 564 F. Supp. at 1408), North Carolina (N.C. GEN. STAT. §§ 157-66 to -70 (1982)), Oklahoma (63 OKLA. STAT. § 1057 (Supp. 1984)), and Utah (UTAH CODE ANN. § 55-18-19 (1974)).

Additionally, North Dakota statutorily provides that any real property that is part and parcel to an Indian housing project is exempt from levy and sale (N.D. CENT. CODE § 23-11-28 (1978)), and that the property of an Indian housing project is exempt from taxes and special assessments (N.D. CENT. CODE § 23-11-29 (1978)).

101. The Housing Authority of the Village of Winnebago, Nebraska (see NEB. REV. STAT. §§ 71-1518 to -1554 (1981)), and the Alabama-Coushatta and the Tigua Indian Housing Authorities of Texas (see TEX. REV. CIV. STAT. ANN. art. 1269k (Vernon 1963)).

102. 63 OKLA. STAT. § 1057 (Supp. 1986)

103. *Ahboah v. Housing Auth. of Kiowa Tribe*, 660 P.2d 625, 632 (Okla. 1983), quoting *Ware v. Richardson*, 347 F. Supp. 344, 347 (W.D. Okla. 1972).

A dispute between members of the tribe and the IHA is an intratribal matter over which federal courts cannot take jurisdiction;¹⁰⁴ however, a dispute between two groups of individuals each claiming to be the same IHA of an Oklahoma tribe is a question properly before the state courts.¹⁰⁵ The state also has no adjudicatory jurisdiction over forcible entry and detainer by an IHA against Indian lessees of trust allotments, as the land is properly Indian country.¹⁰⁶ An Oklahoma IHA's power of eminent domain, granted by state statute,¹⁰⁷ has also been upheld as constitutional.¹⁰⁸

Federal settlement legislation resulted in a state (Alaska) enacting legislation specifically addressing and accepting control over IHAs.¹⁰⁹ In 1971, Congress enacted the Alaska Native Claims Settlement Act¹¹⁰ to address the aboriginal land claims of the various Alaskan natives and tribes.¹¹¹ Twelve regional native corporations were established,¹¹² with the individual Alaskan natives acting as shareholders within the corporate structure. Twelve state IHAs were established, patterned after the settlement legislation enacted by Congress.¹¹³ Alaskan IHAs may accept financial assistance only from the federal government, and then only upon a showing of an existing "acute shortage of housing."¹¹⁴

Maine has also been directly affected by federal settlement legislation. The state enacted an IHA statute in 1965,¹¹⁵ pursuant to which three IHAs were created to ensure that their respective

¹⁰⁴ *Ware v. Richardson*, 347 F. Supp. 344 (W.D. Okla. 1972).

¹⁰⁵ *Housing Auth. of Choctaw Nation v. Craytor*, 600 P.2d 314 (Okla. 1979).

¹⁰⁶ *Ahboah v. Housing Auth. of Kiowa Tribe*, 660 P.2d 625 (Okla. 1983).

¹⁰⁷ 63 OKLA. STAT. § 1078 (Supp. 1986).

¹⁰⁸ *Housing Auth. of Cherokee Nation v. Langley*, 555 P.2d 1025 (Okla. 1976).

¹⁰⁹ ALASKA STAT. §§ 18.55.995-998 (1985) (the Alaska Indian Housing Authority Act of 1971). See ALASKA STAT. §§ 18.55.010-.290 (1985) (the Alaska State Housing Authority Act of 1949).

¹¹⁰ 43 U.S.C. §§ 1601-1628 (Supp. III 1985).

¹¹¹ The settlement statutorily extinguished any and all land claims Alaskan Natives may have had, or may become vested with in the future, against the United States. 43 U.S.C. § 1603 (Supp. III 1985). For a general discussion of the unique legal status of Alaskan Natives, see *Alaska Chapter, Associated Gen'l Contrs.*, 694 F.2d at 1168-69 n.10.

¹¹² 43 U.S.C. § 1606 (Supp. III 1985). Provision was made for the creation of a thirteenth regional corporation for Alaskan Natives, aged eighteen years or older, who are not permanent residents of Alaska. 43 U.S.C. § 1606(e) (Supp. III 1985).

¹¹³ ALASKA STAT. § 18.55.996(a) (1985).

¹¹⁴ *Id.* § 18.55.110.

¹¹⁵ ME. REV. STAT. ANN. III 22, §§ 4731-4739 (1980) (the Maine Indian Housing Authority Law of 1965).

state tribes could benefit from federal financial assistance.¹¹⁶ The state also entered into cooperation agreements with the IHAs to provide all of the customary municipal services to the reservations. However, subsequent federal litigation involving the Passamaquoddy, Penobscot, and Maliseet tribes¹¹⁷ led to the establishment of the Maine Indian Claims Settlement Act of 1980 after these tribes won the rights to almost two-thirds of the land in the state.¹¹⁸ This federal legislation not only defined the terms of the settlement agreement but spawned a second series of legislative acts by the state.¹¹⁹ The Maine Supreme Court has recently determined that a specific provision of the federal settlement agreement discharged the state's obligation to provide assistance under those cooperation agreements.¹²⁰

III. *Waiver of Sovereign Immunity*

Generally

It is well settled that the United States cannot be sued without its consent.¹²¹ Similarly, a federal administrative agency may not be sued unless Congress explicitly consented to such action.¹²² In order to assert a valid claim against the United States or one of its agencies, the plaintiff must identify specific statutory authorization for the type of suit before the court.

When Congress waives the sovereign immunity of the United States or one of its agencies, such a waiver is to be narrowly construed.¹²³ Moreover, Congress may circumscribe the waiver by re-

116 The Passamaquoddy Reservation Housing Authority, the Penobscot Reservation Tribal Housing Authority, and the Pleasant Point Passamaquoddy Reservation Housing Authority.

117 *Joint Tribal Council of Passamaquoddy Tribes v. Morton*, 528 F.2d 370 (1st Cir. 1975).

118 25 U.S.C.A. §§ 1721-1735 (West Supp. 1983).

119 ME. REV. STAT. tit. 30, §§ 6201-6214 (Supp. 1985).

120 *Indian Twnshp Passamaquoddy Reservation Housing Auth. v. State*, No. 3872, 12 Indian L. Rep. 5077 (Me. 1985). The Maine Supreme Judicial Court affirmed the superior court's ruling that section 12 of the Maine Indian Claims Settlement Act of 1980 discharged and released the state from certain obligations created by cooperation agreements for municipal services that it had entered into with the three state IHAs. See *supra* note 74.

121 *Block v. North Dakota ex rel Bd. of Univ. & School Lands*, 461 U.S. 273 (1983); *Lehman v. Nakshian*, 453 U.S. 156 (1981).

122 *United States v. Testan*, 424 U.S. 392 (1976); *United States v. King*, 395 U.S. 1 (1969); *Soriano v. United States*, 352 U.S. 270 (1957).

123 *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Minnesota v. United States*, 305 U.S. at 388-89.

quiring the would-be plaintiff to satisfy a number of preconditions before bringing suit.¹²⁴ Employees and officers of the United States or its agencies are covered by sovereign immunity while acting in their official and governmental capacity.¹²⁵

The predominant method employed by Congress in specifically waiving the immunity of an administrative agency is utilization of a sue or be sued clause. For example, two congressional waivers of sovereign immunity affect HUD. First, the HUD Secretary is authorized "to sue or be sued in any court of competent jurisdiction, State or Federal," while acting in his official capacity.¹²⁶ The Supreme Court, in discussing this HUD sue or be sued clause, stated that in the absence of incontrovertible evidence supporting implied restrictions within the clause, HUD "is not less amenable to judicial process than a private enterprise under like circumstances would be."¹²⁷

This "sue or be sued" clause is not a general waiver for all civil actions,¹²⁸ nor is it an independent grant of jurisdiction.¹²⁹ Recovery is limited to funds in the possession and control of the agency.¹³⁰

124. *Deakne v. Department of Army Corps of Engrs.*, 701 F.2d 271 (3d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *United States v. 3,218.9 Acres of Land*, 619 F.2d 288 (3d Cir. 1979), *cert. denied*, 449 U.S. 872 (1980).

125. See 14 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3655 (1978).

126. 12 U.S.C. § 1702 (1982). The pertinent section of this statute reads: "The Secretary shall, in carrying out the provisions of this subchapter and subchapters II, III, V, VI, VII, VIII, IX-A, IX-B and X of this chapter, be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal." No mention is made in this section as to the jurisdiction of a tribal court. The Tenth Circuit Court of Appeals has held that this statutory waiver applies primarily to HUD's mortgage insurance programs. *United States v. Adams*, 634 F.2d 1261, 1265 (10th Cir. 1980).

127. *Federal Housing Admin. Region IV v. Burr*, 309 U.S. 242, 245 (1940). In *Burr*, the Court held that section 1702 authorized a garnishment action against the Federal Housing Administration for monies due an employee. However, execution of the judgment was limited to "those funds which have been paid over to the Federal Housing Administration in accordance with § 1 and which are in its possession, severed from Treasury funds and Treasury control." *Id.* at 250.

128. *Lomas & Nettleton Co. v. Pierce*, 636 F.2d 971 (5th Cir. 1981); *Donohue v. United States*, 437 F. Supp. 836 (D. Mich. 1977); *Aetna Cas. & Surety Co. v. United States*, 655 F.2d 1047 (Ct. Cl. 1981).

129. *Industrial Indem., Inc. v. Landrieu*, 615 F.2d 644, 646 (5th Cir. 1980); *Marcus Garvey Square v. Pierce*, 595 F.2d 1126 (9th Cir. 1979).

130. *Federal Housing Admin., Region IV v. Burr*, 309 U.S. 242 (1940); *Armor Elev. Co. v. Phoenix Urban Corp.*, 493 F. Supp. 876 (D. Mass. 1980); *DeRoche v. United States*, 2 Ct. Cl. 809 (1983).

In addition, HUD as a federal administrative agency may "sue or be sued only with respect to its functions" performed pursuant to the Housing Act.¹³¹ Pursuant to this second immunity waiver, HUD "shall continue to have the right to maintain an action or proceeding to recover possession of any housing accommodations" it or any other state or local housing authority administering or operating a low-rent housing project under the Act.¹³²

The majority of state statutes that organize and govern the activities of corporations simply direct that any business seeking to incorporate therein must include a provision in its bylaws that it agrees to sue or be sued.¹³³ The language is brief; yet this, in and

131. 42 U.S.C. § 1404a (1982)

132. It has been held that HUD's "functions" within meaning of section 1404a do not include the payment of damages for the alleged contractual breaches arising from a HUD-approved contract. See *United States v. Adams*, 634 F.2d 1261 (10th Cir. 1980). The United States District Court for the District of Minnesota also has held that this section generally does not operate as a waiver in a civil rights action for damages brought by an Indian tribe against HUD arising from foreclosure on a housing project. See *Little Earth of United Tribes, Inc. v. HUD*, 584 F. Supp. 1292, 1299-1300 (D. Minn. 1983). In comparing section 1404a with section 1702, the court noted that the statutes had similar application:

[S]everal courts have limited the waiver [under § 1702] to suits seeking funds which have already been allocated to a project, holding that suits for damages were barred because they would require diversion of funds already appropriated for another purpose or appropriation of funds from the general treasury. See, e.g., *United States v. Adams*, 634 F.2d 1261 (10th Cir. 1980); *Armor Elevator Company, Inc. v. Phoenix Urban Corp.*, 493 F. Supp. 876, 883 (D. Mass. 1980).

The limited waiver contained in § 1702 is similarly inapplicable here. Any monies awarded for claimed civil rights violations would either have to be diverted from funds appropriate for another purpose or from the general treasury, not from a separate fund within the control and possession of HUD. 584 F. Supp. at 1299. The court held that the waiver of section 1404a was inapplicable for the same reasons. 584 F. Supp. at 1299-1300.

133. See Revised Model Business Corporation Act Annotated, § 3.02(1) (1984). The sue or be sued clause contained within the Revised Model Business Corporation Act states as follows:

Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power:

(1) to sue or be sued, complain and defend in its corporate name

For a listing of all state business corporation acts, including their sue or be sued clauses, see Revised Model Business Corporation Act Annotated, vol. 1, at 194-96 (1984). The American Bar Association Committee on Corporate Laws of the Section of Corporation, Banking and Business Law has included this clause in substantially the same form within each model business corporation statute it has drafted. *Id.* at 189.

of itself, generally is sufficient to waive immunity concerning the business activity of the corporation in any court, state or federal.

Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers.¹³⁴ The Supreme Court, in interpreting the basis for this immunity, has reasoned both that the immunity which was theirs as sovereign nations "passed to the United States for their benefit,"¹³⁵ and that the tribes were once-independent nations with "inherent powers of a limited sovereignty which has never been extinguished."¹³⁶ This tribal immunity is extended to tribal officials acting in their official and governmental capacity, but they are not immune in their individual capacities for actions committed outside the scope of their official capacities.¹³⁷

An Indian tribe may waive its sovereign immunity in several different ways. First of all, this immunity may be waived by Congress, acting pursuant to its plenary power.¹³⁸ Second, a tribe may waive its immunity by consenting to suit as a result of unilateral tribal action.¹³⁹ In his treat-

134. *Puyallup Tribe, Inc. v. Washington Dep't of Game*, 433 U.S. 165, 172-73 (1977); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940); *Turner v. United States*, 248 U.S. 354 (1919) For a recent discussion by the Supreme Court reaffirming this principle, see *Santa Clara Pueblo*, 436 U.S. at 55-56.

135. *United States Fidelity & Guar. Co.*, 309 U.S. at 512.

136. *Santa Clara Pueblo*, 436 U.S. at 55.

137. *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958; *Bruette v. Knope*, 554 F. Supp. 301 (D. Wis. 1983); *Brunette v. Dann*, 417 F. Supp. 1382 (D. Idaho 1976) See also *Santa Clara Pueblo*, 436 U.S. at 59.

138. *Santa Clara Pueblo*, 436 U.S. at 58.

139. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (9th Cir. 1982); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982) (the Tenth Circuit recognizes that the tribal council passed a formal resolution expressly waiving sovereign immunity). In *R.C. Hedreen Co. v. Crow Tribal Housing Auth.* 521 F. Supp. 599 (D. Mont. 1981), the Montana Federal District Court explained the legal background for this proposition:

Justice Brandeis' language in *Turner v. United States*, 248 U.S. 354, 39 S. Ct. 109, 63 L. Ed. 2d 291 (1919), supports, at least by implication, the conclusion that specific Congressional consent is not necessary for a tribe to waive its immunity. He writes "[w]ithout authorization from Congress, the [Indian] Nation could not then have been sued in any court, at least, [not] without its consent." *Id.* at 358, 39 S. Ct. at 110; quoted in *Namekagon*, *supra*, at 28 [395 F. Supp. 23, 28 (D. Minn. 1974)] (emphasis added) To the same effect is language from *Puyallup Tribe v. Washington Game Department*, 433 U.S. 165, 170-73, 97 S. Ct. 2616, 2619-22, 53 L. Ed. 2d 667 (1977), where the Court's language implies that a tribe is free to waive its immunity. The Courts in *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975), *cert. denied*, 425 U.S. 903, 96 S. Ct. 1492, 47 L. Ed. 2d 752 (1976) and *R.C. Hedreen Company*

ise,¹⁴⁰ Felix Cohen states this to be a less-settled problem with no clear judicial determination;¹⁴¹ however, federal case law supports this proposition. In any event, a waiver cannot be implied but must be unequivocally expressed and will be strictly construed;¹⁴² it is also subject to the same limitations and restrictions applicable to the United States and its administrative agencies. Any doubt as to the waiver will be interpreted in favor of the Indian tribe.¹⁴³

Federal statute also prohibits Indian tribes from waiving immunity by contract in matters affecting tribal trust property, without consent of either the Secretary of the Interior or Congress.¹⁴⁴

A second issue concerns the extent to which an Indian tribe may transfer its sovereign immunity when it creates tribal corporations or entities to perform tribal business. The test generally utilized by the federal courts to determine whether a semigovernmental Indian enterprise is separate or coextensive with the tribal governmental entity focuses not on the indices of control but on the legal issue presented.¹⁴⁵ The court measures the detrimental impact of asserting jurisdiction against certain attributes of sovereignty belonging to the tribal government.¹⁴⁶ For example, section 16 of the IRA authorizes any Indian tribe to adopt a constitution and bylaws as a political governing body to exercise preexisting powers of self-government.¹⁴⁷ Section 17 of the IRA grants the Secretary of the Interior the authority to issue charters of incorporation to such tribes to conduct business with outside entities.¹⁴⁸ A section 17 corporation is more capable of obtaining credit and "otherwise

v. *Blackfeet Tribe of the Blackfeet Indian Reservation and the Blackfeet Housing Authority*, CV-80-37-GF (Sept. 30, 1980) at 3, have apparently taken the implication from the Supreme Court cases to heart, concluding that the tribe involved in each case, "as a dependent quasi-sovereign nation . . . enjoys sovereign immunity and cannot be sued without its consent or the consent of the Congress." (Citations omitted, emphasis added.)

¹³⁹ 21 F. Supp. at 604 n.2.

¹⁴⁰ F. COHEN, *supra* note 59.

¹⁴¹ *Id.* at 325 nn.358-362.

¹⁴² *Id.* at 324 nn.353-354.

¹⁴³ *Maryland Cas. Co. v. Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir. 1965), *cert. denied*, 385 U.S. 918 (1966).

¹⁴⁴ 25 U.S.C. § 81 (West 1983).

¹⁴⁵ *Navajo Tribe v. Bank of New Mexico*, 700 F.2d 1285 (10th Cir. 1983).

¹⁴⁶ *Id.* at 1287.

¹⁴⁷ 25 U.S.C. § 476 (West 1983).

¹⁴⁸ *Id.* § 477.

expediting the business of the tribe, while removing the possibility of Federal liability for activities of that nature."¹⁴⁹

The Department of the Interior recognizes that section 16 tribal governments and section 17 tribal corporations are legally different entities.¹⁵⁰ Lawsuits against section 16 tribal governments and section 17 Indian corporations inevitably involve the issue of tribal sovereign immunity. If an Indian tribe organizes pursuant to section 16 of the IRA, its corporate charter does not waive the tribe's sovereign immunity for governmental conduct.¹⁵¹

149. *Southern Unique, Ltd v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376, 1383 (Ariz. App. 1983), quoting Memo. Sol. Op. No. M-36515, "Request For Interpretative Opinion On the Separability of Tribal Organizations Organized Under Section 16 and 17 of the Indian Reorganization Act," 65 I. D. 483, 484 (1958).

150. *Id.*

151. *Maryland Cas. Co v. Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir. 1965), *cert. denied*, 385 U.S. 918 (1966); *Enterprise Elec. Co. v. Blackfeet Tribe*, 353 F. Supp. 991 (D. Mont. 1973).

In *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977), the Alaskan Supreme Court was confronted with a wrongful death action arising from an automobile accident on the reservation. The court determined that the sue or be sued clause in the tribal charter had no effect in the tort action against the tribe itself. In discussing the fact that the section 16 Indian community was equivalent to an Indian tribe for purposes of sovereign immunity, the court quoted the Fifth Circuit's rationale in *Maryland Cas. Co., supra*:

The fact that the Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material. It is in such enterprises and transactions that the Indian tribes and the Indians need protection. The history of intercourse between the Indian tribes and Indians with whites demonstrates such need. . . . To construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity, namely, the protection of the interests and property of the tribes and the individual Indians.

569 P.2d at 169-70. The court stated that "the essential differences between municipalities and tribes have led the courts not to recognize the proprietary act/governmental function test for application of sovereign immunity." *Id.*

The court continued in a footnote:

Implicit in these conclusions is our determination that the cases, *Martinez* [*Martinez v. Southern Ute Tribe*, 374 P.2d 691 (Colo. 1962)], *Maryland Casualty* [*Maryland Cas. Co. v. Citizens Nat'l Bank*, 361 F.2d 517 (5th Cir. 1965), *cert. denied*, 385 U.S. 918 (1966)], and *Fontenelle* [*Fontenelle v. Omaha Tribe*, 450 F.2d 143 (8th Cir. 1970)] are either not persuasive or are distinguishable from the case at bar. We do not find *Martinez* persuasive, primarily because the Colorado Supreme Court does not address the difficult issues inherent in a case of that kind. However, *Martinez* is also readily distinguishable; it involved suit against a tribe which had mixed the governmental and corporate entities in the corporate charter and thus, at least arguably, had waived immunity for all purposes. In the case at bar, the clause, by its terms, applies only to the [section 17] corporation. *Maryland Casualty* involved actions that were clearly of a corporate nature; thus, even under the distinction articulated here, the tribe would be subject to suit. *Fontenelle* is more difficult to distinguish because it involved rights

Section 5(i) of the typical section 17 corporate charter states that corporations shall retain the power

to sue and be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue or be sued shall not be deemed a consent by the said Community [section 17 tribal corporation] or by the United States to the levy of any judgment, lien, or attachments upon the property of the Community other than income or chattels especially pledged or assigned.¹⁵²

The language of the clause moots the issue of whether state or federal courts will be precluded from hearing the matter because the clause stated above contains the phrase "in courts of competent jurisdiction within the United States." This would imply the inclusion of tribal courts as well as state and federal courts (compare, *supra*); 12 U.S.C. § 1702 contains the language "in any court of competent jurisdiction, State or Federal"; 42 U.S.C. § 1404a does not specify in which courts HUD may be sued. The model language of this clause also expressly bars "levy of any judgment, lien or attachment of the tribe," except when pertaining to "income or chattels especially pledged or assigned." Cohen states that "some courts have held this language to be a waiver of the immunity of the tribal corporation. . . . But this waiver is limited to actions involving the business activities of the section 17 corporation."¹⁵³

It is also clear that the waiver of sovereign immunity by the section 17 corporation does not waive immunity of the section 16 tribal government.¹⁵⁴ Cohen identified the import of this issue:

to land which may have been the property of either aspect of the tribe. However, since the issue was not discussed in *Fontenelle*, we do not consider it appropriate precedent for resolution of the issue in the case at bar.

569 P.2d at 175 n.83. Cohen lists many of the cases explained in this article, but noted that the holdings in *Fontenelle v. Omaha Tribe*, 430 F.2d 143 (8th Cir. 1970), *Brunette v. Dann*, 417 F. Supp. 1382 (D. Idaho 1976), and *Martinez v. Southern Ute Tribe*, 374 P.2d 691 (Colo. 1962), were arguably incorrect decisions. F. COHEN, *supra* note 59, at 326

152 See *Southern Unique, Ltd.*, 674 P.2d at 1380; *Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315, 319-20 (10th Cir. 1982). The issue often is complicated by the fact that a tribal government, and the business corporation it creates, have the same name.

153 F. COHEN, *supra* note 59, at 326.

154 *Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315 (10th Cir. 1982). In *Ramey*, a general contractor sought to recover contract retainage withheld by a tribe, as well as damages for breach of contract. After noting that a waiver of sovereign immunity is to be strictly construed, the Court stated:

Complications in determining the waiver can arise from the fact that many tribes have not clearly separated the activities of their section 16 tribal governments from the section 17 business corporations. This should not broaden the consent provision, because congressional authority for the consent to suit is clearly predicated on the existence of two different organizations and is limited to business transactions. Any action against the tribe acting in a government capacity is beyond the scope of the waiver and should be barred.¹⁵⁵

Indian Housing Authorities Created by Tribal Action

Article V, section 2 of the Model Tribal Ordinance also includes a sue or be sued provision, which states as follows, with emphasis added:

The [Tribal] Council hereby gives its irrevocable consent to allowing the [Housing] Authority to sue and be sued in its corporate name, upon any *contract, claim or obligation* arising out of its activities under this ordinance *and hereby authorizes the*

Finally, the presence of a "sue or be sued" clause in the tribal corporate charter cannot serve as a waiver of sovereign immunity in this case. The trial judge found that Ramey contracted and dealt only with the Mescalero Apache Tribe as a constitutional entity, and not with the Mescalero Apache Tribe, Inc., the tribal corporate entity. . . . Section 476 of the Indian Reorganization Act, 25 U.S.C. § 476, authorizes Indian Tribes to organize a constitutional entity, and § 477 authorizes organization of a corporate entity. Most courts that have considered the issue have recognized the distinctness of these two entities. . . . Therefore, the consent to suit clause in the corporate charter of the Mescalero Apache Tribe, Inc., in no way affects the sovereign immunity of the tribe as a constitutional entity.

Id. at 320

Concerning torts allegedly committed by a section 17 corporation, the United States District Court for the District of Alaska held in *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127 (D. Alaska 1978), that if an airport and an aviation company were owned and operated by the same section 16 tribal governmental entity, the action would be precluded by sovereign immunity. On cross-motions for summary judgment, the court found that there was sufficient evidence that the proper defendant was the section 17 corporate entity, and held further that the corporation's immunity had been waived by a sue or be sued clause in the tribal corporate charter. The court noted that the issue had been presented in a similar fashion, with the same conclusion, in *Namekagon Dev. Co. v. Bois Forte Reservation Housing Auth.*, 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975) (involving a tribally created IHA), and that the issue was not raised on appeal. See 451 F. Supp. at 1137 n.21

155 F. COHEN, *supra* note 59, at 326.

Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for the debts or obligations of the Authority.

Two distinguishing factors are noted about this particular sue or be sued clause. First, the clause fails to state in which courts the IHA may be sued. The sole jurisdictional limitation in the ordinance mandates that the tribal courts "shall have jurisdiction to hear and determine an action for eviction of a tenant or home-buyer."¹⁵⁶ Second, the clause contains an express condition regarding waiver; the tribal council authorizes the IHA to waive sovereign immunity in any situation involving a contract, claim, or obligation that arises as a result of the IHA's business activities, but apparently allows the IHA to do so only by contract.

HUD had the opportunity to simply model the IHA's sue or be sued clause after its own statutory waiver, that of section 16 and section 17 corporations, other businesses created pursuant to state law or other state and local governments; however, HUD did not draft the Model Tribal Ordinance in this manner.

In the seminal case of *Namekagon Development Co. v. Bois Forte Reservation Housing Authority*,¹⁵⁷ the United States District Court for the District of Minnesota seized the opportunity to set precedent in discussing the sovereign immunity issue where a construction contract was involved. The court specifically analyzed the decision of *Hickey v. Crow Creek Housing Authority*,¹⁵⁸ rendered earlier that year (1974). Although the United States District Court for the District of South Dakota had dismissed the *Hickey* case on jurisdictional grounds without reaching the issue of whether the IHA defendant had waived immunity, the *Hickey* court also explained that any waiver of sovereign immunity would limit jurisdiction of the Crow Creek Tribal Court.¹⁵⁹ The *Namekagon* court directly attacked this reasoning:

This Court cannot agree [with the *Hickey* court's analysis], for there is little logic to that proposition [of limiting waiver to tribal court] and there is no language in the [Model Tribal] Ordinance limiting the consent to suits in tribal court. It is important to the development of the Indian tribes that they be given a greater

156. Ordinance, *supra* note 56, art. VIII, § 1(f).

157. 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975).

158. 379 F. Supp. 1002 (D.S.D. 1974).

159. *Id.* at 1003.

control over their own destinies. If they are to be permitted to form corporations to conduct semi-governmental activities, they must of necessity be permitted to waive immunity from suit with respect to those activities. If a tribe can unilaterally consent to suit in a tribal court, there is no reason why it should be incapable of consent to suit in a Federal court.¹⁶⁰

In protecting the interests of the off-reservation contractor doing business with the IHA, Judge Heaney additionally noted:

To dismiss this suit against the local Housing Authority on grounds of sovereign immunity would be *grossly unfair*. The Reservation Business Community purported to create an independent corporation which would be legally responsible for its promises. It invited outsiders to do business with it on a contractual basis, and the corporation promised the plaintiff over one million dollars in compensation.¹⁶¹

The federal district court in *Namekagon* did not address the jurisdictional issue, as it assumed that if the IHA had waived immunity the court could proceed to the merits. However, on appeal to the Eighth Circuit Court of Appeals, the court held that although the IHA could and did refuse to relinquish its general immunity from levy and execution, it did relinquish that immunity as to all funds it received from HUD for payment of its contractual obligations.¹⁶² Since the contract between the IHA and the developer expressly provided that all HUD funds were available to effect payment and performance under the contract, the issuance of the injunction was affirmed.

The "grossly unfair" test of *Namekagon* originally became the basis for a federal court finding that an IHA, as a party to the construction contract, has waived immunity in those settings. At least two other federal district courts have specifically relied upon the "grossly unfair" test in finding that the IHA defendant had waived its sovereign immunity in executing a construction contract with the plaintiff contractor.¹⁶³

The Ninth Circuit adopted a more direct approach to this issue

160. 395 F. Supp. at 28-29.

161. *Id.* at 29 (emphasis added)

162. 517 F.2d at 509-10

163. *R. C. Hedreen Co. v. Thunderbolt Enterp., Inc. & Rosebud Housing Auth.*, No. 79-46-W, 7 Indian L. Rep. 3175 (S.D. Iowa 1980)

in *R. J. Williams Co. v. Fort Belknap Housing Authority*.¹⁶⁴ Here the court was confronted with the legality of a tribal court's writ of attachment against the plaintiff contractor's construction equipment rather than the underlying construction contract. The court determined in a footnote that any sovereign immunity of the Fort Belknap IHA had been waived through a combination of the Fort Belknap Tribe's enactment of the tribal ordinance creating the IHA and the IHA's entering into a construction contract with the plaintiff general contractor.¹⁶⁵ The sue or be sued clause in the ordinance creating the Fort Belknap Housing Authority also is identical to article V, section 2 of the Model Tribal Ordinance.¹⁶⁶

Similarly, in *Ledford v. Housing Authority of the Sac & Fox Tribe*,¹⁶⁷ the United States District Court for the District of Kansas determined that the defendant IHA waived its sovereign immunity under the tribal ordinance and also by entering into a construction contract with the plaintiff.¹⁶⁸ However, the district court noted that any waiver was limited under the ordinance and the contract to mechanics' liens available under Kansas law.¹⁶⁹

164. 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985).

165. 719 F.2d at 982 n.2. The Court explained as follows:

The issue of citizenship for this [diversity] purpose is often entangled with the issue of sovereign immunity. Any sovereign immunity the Housing Authority had, however, was waived through operation of Fort Belknap Ord. No. 2-77, art. V, § 2 (1977), a "sue or be sued" clause in the ordinance establishing the Housing Authority. See also 24 C.F.R. § 805.108-.109 & app. 1, art. V, § 2.

166. 719 F.2d at 982 n.2.

167. 609 F. Supp. 211 (D. Kan. 1985).

168. The court noted:

The relevant provisions of this tribal ordinance are the same as the relevant provisions of the tribal ordinance involved in *Namekagon Development Company v. Bois Forte Reservation Housing Authority*, 517 F.2d 508 (8th Cir. 1975). There, the court noted that since an Indian tribe is immune from unconsented suit, the court must construe any consent to suit strictly and enforce any conditional limitations imposed on that consent. The court held that under what is Article VII.7 above restrictions were placed on the waiver so that the net result of the ordinance was a waiver only of the right to be free from suit and not of the right to be free from judicial execution upon any judgment arising from such suit. *Id.* at 509. However, the court noted that the very terms of the ordinance (Article V.2 of the instant contract) authorized the Authority to "agree by contract to waive any immunity from suit which it might otherwise have." Thus, it is necessary in the instant case, to consider the terms of the contract between plaintiff and defendant. Here, at Section 2.26 of the contract between plaintiff and defendant, the parties clearly contemplated mechanics liens and this contractual provision must be read as a waiver by the defendant of its sovereign immunity as to mechanics liens.

Id. at 213.

169. *Id.* See *infra* note 281. The court also labeled the IHA as a "Kansas corporation" *Id.* at 212, which may be misleading.

The Eighth Circuit Court of Appeals took this reasoning one step further in *Weeks Construction, Inc.*¹⁷⁰ The court found that the Oglala Sioux Tribe's mere enactment of the Model Tribal Ordinance constituted an express waiver of sovereign immunity by the Oglala Sioux Housing Authority in a construction contract setting.¹⁷¹

In *Dubray v. Rosebud Housing Authority*,¹⁷² the plaintiffs in the federal court action filed an identical action in the Rosebud Sioux Tribal Court.¹⁷³ The cause of action centered around a dispute for wrongful termination of employment by the Rosebud Housing Authority. The tribal court, in finding that the IHA had not waived its sovereign immunity, distinguished *Namekagon Development Co.* on the basis that no written contract existed between the parties.¹⁷⁴

Two observations are noted at this juncture. First, many federal courts have considered the tribe's mere enactment of the sue or be sued clause itself to be the waiver of sovereign immunity. However, a few courts have looked deeper to the specific factual situation before it, not unlike the test utilized in situations involving section 17 corporations. Applying this analysis, the situation must involve a "contract, claim or obligation" before waiver may be asserted. The issue appears to be whether the tribally created IHA, vested with limited sovereign immunity through enactment of the Model Tribal Ordinance, has waived that immunity by entering into a contract.

Second, it is conceivable that an IHA will be deemed to have waived its immunity in situations involving not only a contract but any other "claim" or "obligation" it may be bound by. The courts will address this issue on a case-by-case basis; it may be assumed, however, that the inclusion of these terms within the ordinance potentially broadens the scope of the waiver provision. Thus the IHA may not be able to use the sue or be sued clause

170. 797 F.2d 668 (8th Cir. 1986)

171. *Id.* at 670-71.

172. No. CIV-83-01, 12 Indian L. Rep. 6015 (Rbd. Sx. Tr. Ct. 1985)

173. See *supra* text accompanying note 76.

174. 12 Indian L. Rep. at 6015 Said the court:

This case is easily distinguishable from *Namekagon*. The plaintiffs in this case cannot show any express contractual waiver of sovereign immunity. As the court of appeals stated in *Namekagon, supra*, a housing authority can refuse to relinquish its general immunity from suit, and that is exactly what the Rosebud Housing Authority has done as a matter of practice except for certain construction contracts. Since no particular express contractual immunity waiver exists as to the plaintiffs' employment, the housing authority cannot be said to have waived the general immunity to which it was otherwise entitled.

as a shield where it enters into a loan agreement or a promissory note, or executes a mortgage upon IHA property.¹⁷⁵ The IHA also may not be able to assert immunity from an action arising out of other contracts it has entered into, including the ACCs executed with HUD or the individual agreements entered into with the IHA's rental tenants or Mutual Help participants.

Indian Housing Authorities Created Pursuant to State Law

State-created IHAs, as mentioned above, are subject to the state laws and regulations under which they were created. The majority of the fifty states have inserted sue or be sued clauses in the statutory provisions that become the articles of incorporation of the IHA.¹⁷⁶ These sue or be sued clauses simply state that the IHA may sue or be sued in its corporate capacity.

175. See Ordinance, *supra* note 56, art. V, § 3(f) ("To borrow or lend money, to issue temporary or long term evidence of indebtedness, and to repay the same. Obligations shall be issued and repaid in accordance with the provisions of Article VI of this ordinance") and § 3(g) ("To pledge the assets and receipts of the Authority as security for debts; and to acquire, sell, lease, exchange, transfer or assign personal property or interests therein.")

176. A listing of the applicable non-Indian state housing authority sue or be sued clauses are as follows: ALA. CODE §§ 24-1-27(22) (municipal housing authorities), 24-1-66 (county housing authorities) and 24-1-109 (regional and consolidated housing authorities) (1986) (Alabama); ALASKA STAT. § 18.55.100(a)(1) (1986) (Alaska); Arizona does not have a specific sue or be sued clause (*but see* ARIZ. REV. STAT. ANN. § 36-1424 (1986), municipal housing authority powers are supplemental to other powers conferred upon municipalities, §§ 9-101 to -1281 (1986)); ARK. STAT. ANN. § 19-3011(a) (1980) (Arkansas); CAL. HEALTH & SAFETY CODE § 34311(a) (West 1979) (California); COLO. REV. STAT. §§ 29-4-209(q) (1977) (municipal housing authorities) and 29-4-505(a) (1986) (county housing authorities) (Colorado); CONN. GEN. STAT. § 8-44 (Supp. 1987) (Connecticut); DEL. CODE ANN. tit. 31, § 4308(a)(5) (1975) (Delaware); District of Columbia's statute does not specifically provide for a "sue or be sued" clause (*but see* D.C. CODE ANN. § 5-102 (1981), the powers of the National Capitol Housing Authority president are vested in the mayor, §§ 1-301 to -366 (1981)); FLA. STAT. ANN. § 421 08(1) (1986) (Florida); GA. CODE ANN. § 8-3-30(a)(1) (1982) (Georgia); HAWAII REV. STAT. § 356-10(a) (1985) (Hawaii); IDAHO CODE § 50-1904(a) (1980) (Idaho); ILL. STAT. ANN. ch. 67½, § 8.5 (Smith-Hurd 1959) (Illinois); IND. CODE ANN. § 36-7-18-15(1) (Burns 1981) (Indiana); IOWA CODE § 220.5(2) (1985) (Iowa); KAN. STAT. ANN. § 17-2340 (1981) (in any suit involving state-created housing authorities, a statutory conclusive presumption exists that the municipality created and authorized its housing authority to transact business) (Kansas); KY. REV. STAT. § 80.050 (municipal housing authorities) (1986), §§ 80.262 (county housing authorities) and 80.500(1) (regional housing authorities) (1986), both refer to § 80.050 (Kentucky); LA. REV. STAT. ANN. § 40:474(1) (1977) (Louisiana); ME. REV. STAT. ANN. tit. 30, § 4651(1) (1978 & Supp. 1986) (Maine); MD. ANN. CODE art. 44A, § 8(a) (1986) (Maryland); MASS. GEN. LAWS ANN. ch. 121B, §§ 11(a) and 26 (1981 & Supp. 1987) (Massachusetts); MICH. STAT. ANN. § 16.114(22)(a) (Supp. 1985)

IV. Jurisdiction Over Tribally Created Indian Housing Authority Matters

Federal courts are courts of limited jurisdiction. For a plaintiff to gain the opportunity to argue the merits of his claim in federal district court, the complaint must allege an independent statutory ground for jurisdiction.¹⁷⁷ Parties suing a tribally created IHA have attempted to utilize many statutory bases as a means of obtaining federal jurisdiction over the matter with varying degrees of success.

The following discussion focuses on litigation involving tribally created IHAs. However, IHAs organized under state statute are

(Michigan); MINN. STAT. ANN. § 462A.06 (Supp. 1987) (Minnesota); MISS. CODE ANN. § 43-33-11(a) (1981) (Mississippi); MO. REV. STAT. § 99.080(1)(1) (1971 & Supp. 1987) (Missouri); MONT. CODE ANN. § 7-15-4451(2)(a) (1985) (Montana); NEB. REV. STAT. § 71-1528(1) (1986) (Nebraska); NEV. REV. STAT. §§ 315.430(1) (Housing Authority Law of 1947) and 315.983(2)(a) (State Rural Housing Authority Act) (1985) (Nevada); N.H. REV. STAT. ANN. § 203.8(1) (1977) (New Hampshire); N.J. REV. STAT. § 55:14A-7(a) (Supp. 1987) (New Jersey); New Mexico's applicable statute does not mention a sue or be sued clause (*but see* N.M. STAT. ANN. § 11-3-6(a) (1978)) (New Mexico); N.Y. PUB. HOUS. LAW 44A, § 37(1)(s) (McKinney 1955 & Supp. 1987) (New York); N.C. GEN. STAT. § 157-9 (1982) (North Carolina); N.D. CENT. CODE § 23-11-11(2) (1978) (North Dakota); OHIO REV. CODE ANN. § 3735.31(a) (1980 & Page Supp. 1986) (Ohio); 63 OKLA. STAT. § 1061(a) (Supp. 1986) (Oklahoma); OR. REV. STAT. § 456.120(1) (1985) (Oregon); PA. STAT. ANN. tit. 35, § 1550(t) (1977) (Purdon 1977) (Pennsylvania); R.I. GEN. LAWS § 45-25-15 (1980) (Rhode Island); South Carolina's "sue or be sued" clauses are contained within each of six separate statutory sections (*see* S.C. CODE ANN. §§ 31-3-10 to -1360 (Law Co-op 1976); S.D. CODIFIED LAWS ANN. §§ 11-7-18 (local housing and redevelopment) and 11-11-27(1) (housing development authority) (1982) (South Dakota); TENN. CODE ANN. § 13-20-104(25) (1987) (Tennessee); TEX. REV. CIV. STAT. ANN. art. 1269k (Vernon 1963) (Texas); UTAH CODE ANN. § 55-18-9(1) (1986) (Utah); VT. STAT. ANN. tit. 24, § 4008(1) (1975) (Vermont); VA. CODE § 36-19(a) (1984) (Virginia); WASH. REV. CODE ANN. § 35-82-070(1) (1965 & Supp. 1987) (Washington); W. VA. CODE § 16-15-7 (1985) (West Virginia); WIS. STAT. ANN. § 66.40(9)(n) (1965) (Wisconsin); and Wyoming, whose housing authority statute does not contain a specific sue or be sued clause (*but see* the general powers of local governing bodies; § 15-1-103(7)(i) (1980)). *See* Revised Model Business Corporation Act Annotated, vol. 1, at 184-8f (1984).

The state sue or be sued clauses applicable to IHAs created by the state statutes mentioned above include the following: ALASKA STAT. § 18.55.100(a)(1) (1986) (Alaska); CONN. GEN. STAT. § 8-44(a) (Supp. 1987) (Connecticut); LA. REV. STAT. ANN. § 40:581.23(A)(1) (Supp. 1985) (Louisiana); ME. REV. STAT. ANN. tit. 30, § 4651(1) and tit. 22, § 4733 (1978 & Supp. 1986) (Maine); MD. ANN. CODE art. 44A, § 8(A) (1986) (Maryland); MINN. STAT. § 462A.06 subd. 2 (Supp. 1987) (Minnesota); N.C. GEN. STAT. § 157-9 (1982) (North Carolina); 63 OKLA. STAT. § 1061(a) (Supp. 1986) (Oklahoma); UTAH CODE ANN. § 55-18-9(1) (1986) (Utah). *See supra* note 100.

177. *Electric Enterp. Co.*, 353 F. Supp. at 992; *Schubert Constr. Co. v. Seminole Tribal Housing Auth.*, 490 F. Supp. 1008, 1009 (S.D. Fla. 1980).

subject to the same state civil and criminal jurisdiction as any other state, county, or municipal public housing authority. That the IHA has consented to such jurisdiction strongly rebuts the argument that assumption of state jurisdiction does not impinge upon the tribe's right to self-government. State court jurisdiction is more likely where a state-created IHA is concerned because the applicable state public housing authority act vests jurisdiction over the state IHA with the court. Federal preemption will not apply unless the housing act or federal regulations squarely conflict with state law.

Federal Subject-Matter Jurisdiction

Federal Question Jurisdiction

Section 1331 of title 28 of the United States Code provides that a federal district court "shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." The asserted right must depend upon the operative effect of federal law or statute, i.e., the result of the suit must depend upon the construction and effect of such law.¹⁷⁸

It is well settled that this statutory grant of jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.¹⁷⁹ Thus, in order to invoke a federal district court's federal question jurisdiction, it is not essential that a claim be based upon a specific federal statute, treaty, or provision of the Constitution; however, it is necessary that the claim sufficiently "arise under" federal common law. A case does not arise under federal law if the complaint merely anticipates or replies to a probable defense that would be based on federal law.¹⁸⁰

The district court may take jurisdiction if it must make determinations of law in order to ascertain the existence of a federal claim.¹⁸¹ Thus federal question jurisdiction is not defeated by the possibility that the averments of the complaint might fail to state a cause of action upon which the plaintiff may recover, for the

178 *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936).

179 *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972).

180 *National Farmers' Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985). See *Phillips Pet Co. v. Texaco, Inc.*, 415 U.S. 125 (1974); *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

181 *R. J. Williams Co. v. Fort Belknap Housing Auth.*, 719 F.2d 979, 981 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985). See *Bell v. Hood*, 327 U.S. 678 (1946).

failure to state such a cause of action calls for judgment on the merits, not for dismissal due to lack of jurisdiction.¹⁸²

Where Indians are involved, the federal district courts generally decline to accept jurisdiction over matters concerning purely internal affairs of the tribe and involving exclusively Indians as parties. The mere fact that an Indian is a party to a lawsuit, or that the subject matter involves Indian property or contracts, does not in and of itself grant a federal district court jurisdiction to hear the case.¹⁸³ The courts will scrutinize not only the factual situation but the applicable tribal code to determine if the issue is specifically addressed by tribal legislation; if so, the issue generally must be addressed in the first instance by the tribal court. The absence of a state and tribal forum alone will not compel the federal court, as a court of limited jurisdiction, to hear a case if the matter is not properly before it.¹⁸⁴

In 1985 the Supreme Court established a benchmark as to when an Indian tribal matter sufficiently arises under federal law to support federal question jurisdiction. In *National Farmers' Union Insurance Co. v. Crow Tribe*,¹⁸⁵ an Indian brought suit in

182. *Bell*, 327 U.S. at 682.

183. *Martinez v. Southern Ute Tribe*, 249 F.2d 915, 917 (10th Cir. 1957), *cert. denied*, 363 U.S. 678 (1958).

184. *Schantz v. White Lightning*, 502 F.2d 67 (8th Cir. 1974). Thus federal courts have accepted federal question jurisdiction in an action brought by a non-Indian private landowner on an Indian reservation to prevent imposition of the tribe's health regulations against him (*Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982)); a non-Indian used car salesman's attempt to repossess a car sold to a reservation Indian (*Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984)); a tribe's attempt to prevent a nonreservation bank from wrongful set-off of a tribal housing and development enterprise debt against tribal funds (*Navajo Tribe v. Bank of New Mexico*, 700 F.2d 1285 (10th Cir. 1983)); an oil company's challenge to a tribe's attempt to cancel a lease of trust land (*Tenneco Oil Co. v. Sac & Fox Tribe*, 725 F.2d 572 (10th Cir. 1984)); and a tribal challenge to the BIA's attempted refusal to recognize a tribal election (*Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983)).

Similarly, however, U.S. district courts have refused to entertain federal question jurisdiction in a number of situations involving Indians. These include actions involving exclusively internal tribal elections (*Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967)); an action brought by non-Indians arising out of an automobile accident occurring on a reservation (*Schantz v. White Lightning*, 502 F.2d 67 (8th Cir. 1974)); an action involving a mortgage of allotted land on a reservation to provide security for a Mutual Help home (*Northwest S.D. Prod. Credit Ass'n v. Smith*, No. 84-2460, 13 Indian L. Rep. 2069 (8th Cir. 1986)); and an action brought by a nonreservation electric contractor for work performed on a tribal center complex (*Enterprise Elec. Co. v. Blackfeet Tribe*, 353 F. Supp. 991 (D. Mont. 1973)).

185. 471 U.S. 845 (1985).

the Crow Tribal Court against the Lodge Grass school District, a political subdivision of the state of Montana possessing land within the exterior boundary of the Crow Reservation, upon which state land the Indian was injured. Before the tribal court considered the issue on its merits, the school district and its insuring agent brought a separate action in the United States District Court for the District of Montana, alleging federal question jurisdiction.

A unanimous Supreme Court, reversing the Ninth Circuit Court of Appeals, decided that the federal district court would have jurisdiction to review the tribal court's assertion of jurisdiction; however, the plaintiff had to first exhaust all his tribal court remedies.¹⁸⁶ The Court found that the question of federal court jurisdiction "will require a careful examination of tribal sovereignty, the extent to which sovereignty has been altered, divested or diminished, as well as a detailed study of the relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."¹⁸⁷ Thus the issue of whether federal action should have been dismissed by the district court or merely held in abeyance pending a ruling on the merits by the tribal court was left to the district court.¹⁸⁸ However, the issue of whether plaintiffs were required to exhaust all their tribal remedies was relegated to the tribal court.

The Court in effect established a two-pronged test, binding upon the federal district courts, that must be satisfied before federal question jurisdiction exists. First, the issue must arise under federal law in the context of the federal question statute. Second, the plaintiff must exhaust all available tribal court remedies.¹⁸⁹

The companion case to *National Farmer's Union, R. J. Williams Co. v. Fort Belknap Housing Authority*, involved an action by a prime contractor seeking return of certain construction equipment and materials held by the Fort Belknap Tribal Court as satisfaction

186 *Id.* at 853-57.

187. *Id.* at 855-56. See also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983), *Merrion*, 455 U.S. at 137; *Colville Reservation*, 447 U.S. at 152.

188. 471 U.S. at 857.

189 In a footnote, the Court outlined a narrow exception to the exhaustion requirement: We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."

471 U.S. at 856 n.2! See *A & A Concrete, Inc.*, 781 F.2d at 1416.

for an outstanding debt to the Fort Belknap Housing Authority pursuant to a writ of attachment.¹⁹⁰ The Ninth Circuit found that the issue of whether the tribal court had overstepped its jurisdictional boundaries in issuing the writ of attachment properly defined a federal question, and declared that federal question jurisdiction could be asserted by the lower court. However, the Court reversed the lower court's award of damages to the contractor on the basis that it did not state a federal claim upon which relief could be granted.¹⁹¹ In doing so, it rejected four specific arguments by the plaintiff contractor as unmeritorious.¹⁹² The Supreme Court, at the same time it rendered the *National Farmers' Union* decision, denied certiorari to hear *R. J. Williams*.

Two recent cases presented to the Eighth Circuit Court of Appeals have further defined what constitutes a federal question in lawsuits against tribally created IHAs. In *Weeks Construction Co.*, the Eighth Circuit was confronted with a common breach of contract action, filed by a general contractor against a tribally created IHA. The Court held that no federal question jurisdiction existed in the matter, expressly stating that interpretation of the construction contract entered into between the parties was governed by *local* rather than *federal* law.¹⁹³

In *Northwest South Dakota Production Credit Association v. Smith*,¹⁹⁴ the plaintiff sued two Indian individuals to foreclose on a mortgage of allotted land upon which a Mutual Help home was attached. The Cheyenne River Housing Authority was named as a defendant because of its potential interest in the subject land and home. The Court, after determining that federal question jurisdiction existed in the context of section 483 of title 25 of the United States Code, dismissed the matter for failure to state a claim upon which relief can be granted.¹⁹⁵

190 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985).

191 719 F.2d at 981.

192 *Id.* at 981-82. The plaintiff contractor attempted to show that his rights under the U.S. Constitution, the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (1982), and the Civil Rights Act of 1866, 42 U.S.C. § 1983 (1982), were impermissibly violated. The Court rejected these arguments, along with the argument that the tribal court's adoption of Montana law as a guideline was a relinquishment of sovereignty.

193 *Weeks Constr. Co.*, 797 F.2d at 672. See *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1315 (9th Cir. 1982); *Schantz v. White Lightning*, 502 F.2d 67 (8th Cir. 1974); *Superior Oil v. Merritt*, 619 F. Supp. 526, 529 (D. Utah 1985).

194 No. 84-2460, 13 Indian L. Rep. 2069 (8th Cir. 1986).

195 *Id.* at 2070-71. As for the sovereign immunity issue, the Eighth Circuit did not remand to the United States District Court but preserved it to be addressed in the first instance by the tribal court. *Id.* at 2071.

The four cases mentioned above seem to establish a pattern where federal question jurisdiction is the issue in a matter involving a tribally created IHA. The typical scenario may involve a non-Indian off-reservation contractor who voluntarily enters into a contract with the Indian housing authority to construct housing or perform other work on the reservation. If the contractor sues the IHA under their contract, *National Farmer's Union*, as interpreted by *Weeks Construction Co.*, may mandate that the tribal court hear the case in the first instance to interpret the contract provisions at issue. If the losing party desires to file the matter in federal court, not only must it exhaust all available tribal court remedies (i.e., a final adjudication on procedural or substantive grounds), it also must sufficiently raise the issue of whether the matter arises under federal law, in the context of the federal question statute, before the federal court may take jurisdiction. However, if the matter involves an issue peripheral to or not involving any underlying construction contract, the number of possibilities for a federal court asserting federal court jurisdiction seemingly increase.

Situations where a pending tribal court matter is interrupted by the filing of an action in federal district court is scrutinized more carefully, however. In *R. J. Williams Co.*, the Ninth Circuit found that the Fort Belknap Tribal Court's writ of attachment adequately raised the issue of whether it had exceeded its jurisdiction, thus giving the court federal question jurisdiction. However, plaintiff failed to exhaust its available tribal remedies by filing an identical action in federal district court before the tribal court had made a final decision. Such an attempt, not unlike forum shopping, may compel the federal court to allow the tribal court to first proceed to render a final decision.¹⁹⁶

Diversity Jurisdiction

In order for a federal district court to have diversity jurisdiction generally, not only must the parties be of diverse citizenship under section 1332(a) of title 28 of the United States Code ("complete

196 See *Iowa Mut. Ins. Co. v. LaPlante*, 107 S.Ct. 971, 977 (1987) ("at a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determination of the lower tribal courts"); *A & A Concrete*, 781 F.2d at 1415-17 (review of construction company's claims is premature due to company's failure to exhaust its remedies in tribal court, in light of *National Farmers' Union*; company is not excused from the requirement based on tribal court's alleged lack of jurisdiction).

diversity") and the issue in controversy exceed \$10,000, but the courts of the state in which the federal court sits also must be able to entertain the matter.¹⁹⁷ The Supreme Court has recently held that the exhaustion of tribal remedies requirement of *National Farmers' Union* applies to diversity situations as well as federal question cases.¹⁹⁸ Thus, although the Court held that diversity jurisdiction existed over a matter filed previously in the Blackfeet Tribal Court concerning an insurance claim, the tribal court should first be given full opportunity to determine its own jurisdiction, including tribal appellate court review of the lower court's determination.¹⁹⁹

An additional requirement attaches in matters involving Indians and Indian tribes. Even if the complaint sufficiently discloses all facts required to invoke diversity jurisdiction, such jurisdiction will be precluded where state jurisdiction will impermissibly infringe upon the Indians' right to self-government.²⁰⁰ Thus, when a federal court attempts to assert diversity jurisdiction over an Indian tribe or a tribal entity, it must determine whether the state in fact has taken affirmative steps to assume jurisdiction over tribes within the state's boundaries.

A tribe's interest in self-government can be implicated in one of two ways. First, the tribe's right to adjudicate disputes may be impermissibly limited if a state or federal court seeks to resolve a dispute properly and exclusively within the province of the tribal court (i.e., the matter is purely an internal tribal matter or the

197 *Woods v. Interstate Realty Company*, 337 U.S. 535 (1949); *R.J. Williams Co.*, 719 F.2d at 982. The diversity jurisdiction statute states in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state. . . .

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business

28 U.S.C.A. § 1332 (West Supp. 1983) (emphases added).

198 *Iowa Mut. Ins. Co. v. LaPlante*, 107 S.Ct. 971, 976-79 (1987).

199 The Supreme Court clearly stated that regardless of the basis for jurisdiction, federal policy supporting tribal self-government requires federal courts, as a matter of comity, to "stay their hand" in order to give tribal courts full opportunity to consider the issues before them and rectify any errors. 107 S.Ct. at 977. The Court also rejected the argument that tribal court bias or incompetence served as a sufficient exception to the exhaustion requirement.

200 *Littel v. Nakai*, 344 F.2d 486, 489 (9th Cir. 1965); *Weeks Constr. Co.*, 797 F.2d at 672-74, *R.J. Williams Co.*, 719 F.2d at 982; *Kerr-McGee Corp.*, 682 F.2d at 1317.

tribal code specifically addresses the issue).²⁰¹ Second, if the subject matter of the dispute itself calls into question "the validity or propriety of an act fairly attributable to the tribe as a governmental body," tribal self-government is drawn directly into the controversy.²⁰² Although exclusive tribal jurisdiction can be altered by express congressional action, the diversity jurisdiction statute does not have this effect.²⁰³

Two Supreme Court decisions are instructive in this area. In the 1938 case of *Erie Railway Co. v. Tompkins*,²⁰⁴ the Court held that a federal court's diversity jurisdiction is derivative of the courts of the state in which the federal court sits.²⁰⁵ The Court reasoned that to permit a nonresident party to maintain an action in the federal courts through diversity jurisdiction, which could not be maintained in the state courts, would work a gross discrimination against state residents who could not avail themselves of diversity jurisdiction.²⁰⁶ Thus, if the plaintiff is barred from recovery in state court, he should likewise be barred in federal court.

In the 1959 decision of *Williams v. Lee*,²⁰⁷ a non-Indian plaintiff sued an Indian couple in an Arizona state court to recover for goods sold on the Navajo Reservation. The Court unanimously held that exclusive jurisdiction over the matter was vested in the Navajo Tribal Court. In holding this to be an internal affair of the tribe pursuant to an 1868 treaty with the United States, the Court noted that "to allow the exercise of State jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the rights of the Indians to govern themselves."²⁰⁸ Thus, regardless of whether the federal court possessed diversity jurisdiction, a matter properly before the tribal court must be heard there in the first instance.

The *Erie* mandate, unlike the decision in *Williams v. Lee*, was a "choice of law" directive rather than strictly a jurisdictional

201. *R.J. Williams Co.*, 719 F.2d at 983. See *Santa Clara Pueblo*, 436 U.S. at 65-66; *Fisher v. District Court*, 424 U.S. 382, 387-88 (1976).

202. *R.J. Williams Co.*, 719 F.2d at 983. See *Littel*, 344 F.2d at 490.

203. *Iowa Mut. Ins. Co.*, 107 S.Ct. at 977; *Littel*, 344 F.2d at 489-90.

204. 304 U.S. 64 (1938).

205. *Id.* at 74-77.

206. *Id.* The twin aims of the *Erie* decision were "discouragement of forum-shopping and the avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). See also *Woods*, 337 U.S. at 538.

207. 358 U.S. 217 (1959).

208. *Id.* at 223.

ruling. However, the federal courts, specifically the Eighth and Ninth circuits, have read both decisions together in determining whether a federal court has diversity jurisdiction over a lawsuit involving Indians. The primary issue addressed by the two circuits is whether, after the statutory requirements for diversity are met, the factual situation before the district court constitutes purely an internal tribal matter. The Eighth and Ninth circuits have specifically adopted the *Williams v. Lee* ruling as compelling upon diversity actions involving Indians.²⁰⁹

It is well settled that for "complete diversity" purposes a tribally created IHA is a citizen of the state where the respective Indian reservation is located.²¹⁰ Thus the underlying issue concerning IHAs is whether, after the statutory requirements have been met, all the judicially created tests peculiar to diversity jurisdiction have also been satisfied.

In *R. C. Hedreen Co. v. Crow Tribal Housing Authority*,²¹¹ the United States District Court for the District of Montana was

209 See *Littel v. Nakai*, 344 F.2d 486 (9th Cir. 1965). See also *Hot Oil Serv., Inc. v. Hall*, 366 F.2d 295 (9th Cir. 1966) (the Ninth Circuit held that the Arizona state courts were without diversity jurisdiction primarily because the incident occurred on tribal trust land, necessarily involving reservation affairs which were within the exclusive province of the tribal courts. *Id.* at 297); *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311 (9th Cir. 1982) (in discussing *Littel* and *Hot Oil*, the court believed that both cases were better understood when viewed as "decisions construing section 1332(a) to preclude a non-Indian plaintiff from obtaining Federal judicial resolution of a dispute which *Williams v. Lee* vests in the tribe's exclusive jurisdiction." 682 F.2d at 1317. The court explicitly stated that, consistent with the *Erie* doctrine, the United States District Court's jurisdiction is a creature of federal law pursuant to both article III of the Constitution and 28 U.S.C. 1332(a); thus, as the federal jurisdictional statute preempts any conflicting state law, state law does not nor may not control or limit a United States District Court's diversity jurisdiction. *Id.* at 1315-17. The court effectively limited application of the *Williams v. Lee* ruling to situations involving a non-Indian plaintiff and an Indian defendant.)

The Eighth Circuit distinguished the holdings of *Littel* and *Hot Oil* in the 1975 case of *Poutra v. Demarrias*, 502 F.2d 23 (8th Cir. 1974), cert. denied, 421 U.S. 934 (1975). Here the court determined that the United States District Court possessed diversity jurisdiction in a wrongful death action brought by one Indian against another, even though they were both members of the same tribe and the tort occurred on the Standing Rock Indian Reservation. The court interpreted the *Williams v. Lee* ruling to be limited to issues involving interference with tribal affairs. In *Poutra*, on the other hand, the court was confronted with "one Indian seeking to avail herself of the Federal court in an action against another Indian," which in and of itself "would seem to negate any [tribal] interference claim that could be made since no interfering outsiders are trying to foist jurisdiction on the Indians." 502 F.2d at 29.

210 *Weeks Constr. Co.*, 797 F.2d at 673, n.6; *R.J. Williams Co.*, 719 F.2d at 982 n.2; *R.C. Hedreen Co.*, 521 F. Supp. at 602-03.

211 521 F. Supp. 599 (D. Mont. 1981).

confronted for the first time with a diversity lawsuit involving a tribally created IHA defendant. The plaintiff general contractor, based in the state of Washington, sued the Montana-based IHA for wrongful nonpayment of funds due under their construction contract. In finding that it possessed diversity jurisdiction, the court simply determined that the IHA was a "citizen" for purposes of the diversity statute, without determining the effect that this holding may have upon tribal sovereignty or self-government.²¹²

However, in *R. J. Williams Co. v. Fort Belknap Housing Authority*, the Ninth Circuit rejected not only the *Hedreen* court's legal analysis of diversity jurisdiction as it involved Indians but also the district court's test to determine the business contacts made by the IHA. Confronted with a factual setting almost identical to *Hedreen*, the court found that although the parties were of "complete diversity,"²¹³ any federal court interpretation of the tribal code provision would impermissibly trod upon the tribe's "responsibility for self-government."²¹⁴ The question of whether

212. *Id.* at 602-03. The court, in analogizing a tribal corporation to a general non-Indian business corporation, discussed the legal effect of the sovereign immunity issue: The reason prior court decisions have not expressly addressed the question of whether a corporation chartered by the tribe is a citizen for diversity purposes is that the issue is almost inseparable from the issue of sovereign immunity. To illustrate, under the defendant's analysis it would be possible to conclude that the Housing Authority and/or even the Crow Tribe has completely waived its sovereign immunity, yet nonetheless cannot be sued in federal court since they are not "citizens" for purposes of diversity jurisdiction. Both common sense and the legal practicalities of the commercial v. dictate a different result. Regardless of the sovereign source from which a corporate entity derives its charter, when it is constituted with all of the required formalities it comes into existence as a legal entity. As a legal entity, it is susceptible to suit on its contracts in any court of competent jurisdiction unless it enjoys some legal excuse, e.g., sovereign immunity.

The *Hedreen* case was settled out of court in 1981 before an appeal was heard before the Ninth Circuit.

213. 719 F.2d at 982-83 n.2.

214. *Id.* at 983. The court relied primarily on *Williams v. Lee* and its progeny in determining that no diversity jurisdiction existed. The Ninth Circuit explained its reasoning as follows:

In *Littel v. Nakai*, 344 F.2d 486 (9th Cir. 1965), this court held that *Williams* also had an impact on diversity actions brought in federal court. After we concluded that *Littel* would have been precluded from suing in state court by *Williams v. Lee*, we noted that a federal court sitting in diversity operates as an adjunct to a state court and should also be precluded from entertaining the action. . . . We have recognized that the tribal court is generally the exclusive forum for the adjudication of disputes affecting the interests of both Indians and non-Indians which arise on the reservation. *Snow v. Quinault Indian Nation* [citation omitted]. . . . Here, however, at the time of the dispute there is some question of whether the tribe had exercised its right to assume its exclusive jurisdiction. Fort Belknap Law and Order Code ch. 1, § 14.1 (1970). States

the Fort Belknap Housing Authority was a "member" of the tribe, pursuant to a tribal code provision defining tribal court jurisdiction, should be answered in the first instance by the tribal court; therefore, the court of appeals refused to take diversity jurisdiction.²¹⁵

Through *R. J. Williams*, the Ninth Circuit has adopted an additional test for diversity jurisdiction, based specifically upon Montana state case law. This test scrutinizes the "significant contacts" made by the IHA off the reservation in securing the construction contract with the general contractor.²¹⁶ The focus is to determine *the place where the dispute arose*; if the district court finds that the dispute arose on reservation lands (taking five factors into consideration), state courts are without jurisdiction and, pursuant to the *Erie* doctrine, the issue should be heard first by the tribal court. If, however, a sufficient amount of business was transacted off the reservation, the United States District Court may assert diversity jurisdiction.²¹⁷

that the tribal court has jurisdiction to hear suits in which the "defendant is a member of the Fort Belknap Indian Community." The word "member" is not precisely defined in the ordinance, and there remains a genuine question as to whether the Housing Authority is contemplated within the jurisdictional statute. Interpretation of a tribal ordinance is one of the duties of a tribal court

215. *Id.* at 983.

216. *Id.* at 984-85.

217. *Id.* The United States District Court for the District of Montana initially applied the Montana Supreme Court-based test in *R.C. Hedreen Co.*, 521 F. Supp. 599 (D. Mont. 1981). The court found as dispositive certain "significant contacts" in holding that the tribally created IHA had sufficiently "gone off the reservation" to do business:

Since the Authority has voluntarily gone beyond reservation boundaries to transact the business and negotiate the contracts at issue here, suit could also have been brought in state court. See *Crawford v. Roy*, 176 Mont. 227, 230-31, 577 P.2d 392, 393-94 (1978), see also the relevant discussion in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152-58, 93 S. Ct. 1267, 1272-76, 36 L. Ed. 2d 114 (1973). Adequate substantial contacts with the state are manifest: (1) the contracts were made with non-Indian entities residing off the reservation, (2) they contemplated the procurement of supplies and labor off the reservation, (3) bids for the work were solicited off the reservation, (4) the plaintiff executed the contracts off the reservation, and (5) the bond essential to the contracts was procured and signed off the reservation. In any event, this conclusion does not "infringe on the rights of Indians to make their own laws and to be ruled by their own laws," *Crawford, supra*, 176 Mont. at 230; 577 P.2d at 394; *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 270, 3 L. Ed. 2d 251 (1959); see also *Duluth Lumber & Plywood v. Delta Development, Inc.*, 281 N.W.2d 377, 382-83 (1979), particularly since we are dealing with a commercial transaction not confined to the reservation, where the applicable tribal ordinance (authorized by the federal government) contains an unqualified "sue or be sued" clause.

521 F. Supp. at 606-07 n.4.

The Ninth Circuit, however, expressly disagreed with the *Hedreen* court's analysis in *R.J. Williams Co.*, 719 F.2d at 981, involving a factual setting almost identical to the

The Ninth Circuit is the only circuit thus far to employ such a test for diversity purposes. Two observations are made at this juncture, however. First, state courts have applied a similar "significant contacts" test for purposes of determining jurisdiction in matters involving not only Indians but tribally created IHAs.²¹⁸ Second, a similar test has been employed by federal, state, and, most recently, tribal courts in determining whether personal jurisdiction exists over a defendant.²¹⁹

The Eighth Circuit applied substantial case law it had previously rendered concerning Indian tribes to *Weeks Construction Co.*²²⁰

case before the Montana District Court. 719 F.2d at 985. The circuit modified the set of factors applied to the situation; while the *Hedreen* court looked to the location of the parties dealing with the IHA and the place where the contract was actually executed, the circuit court focused instead on the location of the dispute itself:

We disagree with the [*Hedreen*] court's analysis. In determining the locus of a contract dispute, courts generally look to (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the place of residence of the parties, evaluating each factor according to its relative importance with respect to the dispute. Restatement (Second) of Conflict of Laws § 188(2) (1971). When a contract concerns a specific physical thing, such as land or a chattel, the location of this is regarded as highly significant. *Id.*, § 188, comment e; see also, *id.*, § 189-191. Here, as in *Hedreen*, the contract involved housing to be built on the reservation, to be occupied by reservation members and paid for by an agency representing the tribe. *We think these factors determine the locus of the dispute, although workers, supplies, and the construction bond would have to come in from off the reservation.* There were thus no "substantial activities giving rise to a dispute" arising outside the reservation. *In re Bertelson*, 617 P.2d 121, 125 (Mont. 1980). Thus, the "significant contacts" test is not met here. [Emphasis added.]

218 See *Duluth Lumber & Plywood Co. v. Delta Dev., Inc.*, 281 N.W.2d 377 (Minn. 1979). The Minnesota Supreme Court found that Minnesota state courts may assert jurisdiction over essentially the same factual situation. See *infra* text accompanying notes 277-283.

219 See *infra* the section on "Tribal Court Jurisdiction."

220 *Weeks Constr. Co.*, 797 F.2d at 674, citing *Poitra v. Demarrias*, 502 F.2d 23 (8th Cir. 1974), cert. denied, 421 U.S. 934 (1975). See also *American Indian Nat'l Bank v. Red Owl*, 478 F. Supp. 302 (D.S.D. 1979) (the district court, in finding diversity jurisdiction, noted that as the state court lacked jurisdiction over the instant matter due to federal law rather than state policy, state citizens would not be subject to discrimination because the tribal court was open to them, *id.* at 304-05); *Tibbets v. Turtle Mountain Housing Auth.*, No. A2-82-59 (D.N.D. 1985) (plaintiff executor of the estate of a deceased member of the Turtle Mountain Band of Chippewa Indians sued the IHA, alleging that it "built low cost housing units that encroach on the land held in trust for deceased by the United States") Diversity was utilized as the sole ground for jurisdiction; in dismissing the action, the court cited both Eighth and Ninth Circuit case law (especially *Hot Oil Serv., Inc. v. Hall*, 366 F.2d 295 (9th Cir. 1966)) because of the similarity of the fact pattern as controlling. The court explained as follows:

The question of whether the exercise of jurisdiction by the federal district court on

In *Weeks*, the court was faced with the same issue presented before the Ninth Circuit in *R. J. Williams*, that is, whether the IHA was a "member" of the tribe so as to subject it to the tribe's jurisdiction.²²¹ The plaintiff contractor was a Montana corporation, while the defendant IHA was located in South Dakota. The court determined that the Oglala Sioux Tribal Court should hear the matter in the first instance in order not to infringe upon the sovereignty of the Oglala Sioux Tribe;²²² in doing so, the circuit specifically noted that the failure of the Montana Federal District Court to complete its legal analysis in *Hedreen* was determinative in that court's assertion of diversity jurisdiction.²²³

The Tenth Circuit has not had an opportunity to interpret the *Williams-Erie* doctrine where diversity and IHA matters are concerned.²²⁴ However, the Utah Federal District Court has applied this line of reasoning in finding that diversity jurisdiction existed in *Brown v. Washoe Housing Authority*. In *Brown*, the court was

reservation matters between Indians would interfere with tribal self-government or tribal affairs, or with considerations of tribal policy or customs is dependent upon the facts and circumstances of each individual case. Under the circumstances of this case its disposition by the federal district court would necessarily involve reservation affairs and affect the Tribe in its policy of providing low cost housing to tribal members. The dispute should be resolved by the Tribe and the United States District Court should not become involved except upon a showing of violation of constitutional rights. See 25 U.S.C. § 1302(5).

Slip op. at 2-3

221. 797 F.2d at 673

222. *Id.* at 674.

223. *Id.* Said the court:

Because a grant of federal jurisdiction based on diversity would impinge on the tribe's right to self-government, the district court did not err when it refused to assume jurisdiction and referred the case for an initial determination by the tribal court of whether the Housing Authority is a member of the tribe.

224. *But see* American Indian Agric. Credit Consortium, Inc. v. Fredericks, 551 F. Supp. 1020 (D. Colo. 1982) (the Colorado Federal District Court determined that Eighth Circuit case law controlled where the matter did not involve a "purely internal tribal matter"), *id.* at 1021. In contrast to *Williams v. Lee, Hot Oil Serv., Inc., and Littell*, the issue before the court was "a transaction between an outside corporation and an individual member of a tribe, acting solely in his private capacity as signer of a promissory note now in default." *Id.*; Superior Oil Co. v. Merritt, 619 F. Supp. 526 (D. Utah 1985), where the Utah Federal District Court dismissed a lawsuit by an oil company for lack of diversity jurisdiction based on *Williams v. Lee*. The court noted, however, that a contrary holding might have been possible if the plaintiff had asserted that the tribal court lacked jurisdiction over the matter, pursuant to National Farmers' Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 851-52 n.12 (1985), or that it had been refused access to tribal courts, pursuant to *R. J. Williams Co.*, 719 F.2d at 981. See 619 F. Supp. at 535 n.3.

faced with the issue of whether the Nevada defendant IHA had "transacted business" in Utah so as to be subject to state jurisdiction under the Utah long-arm statute. The court found that, applying a liberal construction of the state statute, the IHA had sufficiently conducted business with the plaintiff Utah construction company to subject itself to the jurisdiction of that forum.²²⁵

It is apparent from a close reading of the above case law that all three circuits are consistent in applying the *Williams-Erie* decisions. The federal district court must justify a finding of diversity jurisdiction, after finding that the statutory requirements have been met, not only upon the fact that the state court had previously or could have assumed jurisdiction over the matter but that interference with tribal jurisdiction would be minimal. Thus it is apparent that the federal courts may be inclined to assert jurisdiction where the IHA is the plaintiff, going beyond the bounds of the reservation in order to resolve a dispute.

The Indian Civil Rights Act

It is not seriously questioned that the protection afforded by the United States Constitution and the Bill of Rights does not apply to Indian tribes, tribal agencies, and tribal officials.²²⁶ Congress has modified this, acting pursuant to its plenary power, by enacting the Indian Civil Rights Act of 1968 to ensure that individual Indians receive certain due process protection in tribal courts.²²⁷

The Indian Civil Rights Act applies to both Indian and non-Indian individuals while on the Indian reservation.²²⁸ However, a specific provision of the Act restricts federal court jurisdiction over alleged

225. 625 F. Supp. at 599. The court stated its reasoning as follows:

Washoe supplied information to a trade journal that is located in Utah and that services Utah contractors. Washoe supplied plaintiff with bid information, sent plaintiff a HUD-approved contract for plaintiff's signature and sent plaintiff a copy of the executed contract. Other mail and wire correspondence occurred to and from Washoe, in and out of the State of Utah. Although modern modes of communication obviated the need for Washoe actually to enter this State to transact business, the transaction of business no less occurred despite the absence of Washoe's physical presence. It is clearly the case that Washoe directed its business activities to residents of this state and that those activities affected persons or businesses within this state sufficient to satisfy the [state long-arm] statute.

226. *DuBray*, 565 F. Supp. at 465. See generally *Santa Clara Pueblo*, 436 U.S. at 56 n.7; *Talton v. Mayes*, 163 U.S. 376 (1896).

227. 25 U.S.C. §§ 1301-1341 (1982).

228. *Schantz*, 502 F.2d at 70 n.5; *R.J. Williams Co.*, 719 F.2d 979 n.4; *Dodge v. Nakai*, 298 F. Supp. 17, 24-25 (D. Ariz. 1968).

civil rights violations to habeas corpus proceedings.²²⁹ It is clear that responsibility to enforce the provisions of the Act, including matters involving tribally created IHAs, rests primarily with the tribal courts.²³⁰

Concerning tribally created IHAs, two other interrelated barriers exist before a federal district court may hear any matter involving an IHA defendant. First, the lawsuit must be based on a "contract, claim or obligation" in order to avoid the issue of sovereign immunity.²³¹ Second, it is well settled that an action alleging breach of contract does not involve a deprivation of individual constitutional civil rights.²³²

The majority of lawsuits filed in federal district court against tribally created IHAs were dismissed due to lack of jurisdiction.²³³ In one situation, however, the lawsuit was dismissed because the court found that the IHA had not waived its sovereign immunity concerning an Indian civil rights action.²³⁴

Thus, in avoiding the hurdle of a tribally created IHA's sovereign immunity, the plaintiff must base its cause of action upon breach or other action founded in a contract, claim, or obligation. Yet,

229. 25 U.S.C. § 1303 (1982) See *Weatherwax v. Fairbanks*, No. CV-85-159-GF, 12 Indian L. Rep. 3173 (D. Mont. 1985), where the mere challenge of a tribal court judgment that determined certain visitation rights in a child custody case did not amount to a habeas corpus proceeding.

230. For example, see *Lawrence v. Southern Puget Sound Inter-Tribal Housing Auth.*, Nos. CV-860002 and 860003, 14 Indian L. Rep. 6011 (Suq. Tr. Ct. 1987), where the Suquamish Tribal Court held that a tribal member's tenancy in a Southern Puget Sound Inter-Tribal Housing Authority's (SPSITHA) Mutual Help unit is a property right entitled to the due process protections of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (1982), and, further, that her civil rights were violated when the SPSITHA failed to follow the rules of its own grievance procedure. See 24 C.F.R. § 905.303 (1986).

231. See Ordinance, *supra* note 56, art. V, § 2.

232. *Schubert Constr.*, 490 F. Supp. at 1010; *Hickey v. Crow Creek Housing Auth.*, 379 F. Supp. at 1003.

233. See *R.J. Williams Co.*, 719 F.2d 979 (9th Cir. 1983); *DuBray v. Rosebud Housing Auth.*, No. CIV-83-01, 12 Indian L. Rep. 6015 (Rbd. Sx. Tr. Ct. 1985) (Rosebud Tribal Court holds that Rosebud IHA did not waive sovereign immunity in civil rights action for wrongful termination of plaintiffs' employment by the IHA). See also *Schubert Constr.*, 490 F. Supp. 1008 (S.D. Fla. 1980) (federal district court had no jurisdiction in civil rights action arising solely from an Indian housing construction contract); *Wilson v. Turtle Mountain Band of Chippewa Indians & Turtle Mountain Housing Auth.*, 459 F. Supp. 366, 368-69 (D.N.D. 1978) (federal district court had no jurisdiction in civil rights action by a nonmember former tenant of the IHA in a turnkey housing project); *Hickey v. Crow Creek Housing Auth.*, 379 F. Supp. 1002 (D.S.D. 1974) (damages action arising from well-drilling contract on Indian housing project).

234. See *Wilson* and *DuBray* cases, *supra* note 233 (Rosebud Sioux Tribal Court dismisses the action based on sovereign immunity).

the federal courts may not take jurisdiction over an action alleging Indian Civil Rights Act violations where the cause of action is based solely upon contract.

An "absolute necessity" exception has been carved out of the statutory limitation to habeas corpus proceedings by the Tenth Circuit.²³⁵ However, the Montana Federal District Court explicitly rejected application of this exception to construction disputes involving tribally created IHAs in *R. J. Williams Co.*²³⁶ It will suffice at this juncture to state that, as current case law has dictated, federal courts most likely will not hear actions against tribally created IHAs based solely on violation of the Indian Civil Rights Act.

State Court Jurisdiction

When a state court attempts to exercise jurisdiction over a matter involving an IHA, three factors must exist before jurisdiction will be granted. First, it must be ascertained whether the IHA was organized under state law or created by tribal ordinance. In addition, a state may not exercise jurisdiction either where there exists incompatible federal legislation or regulations, or where such jurisdiction would otherwise interfere with the tribe's right to self-government.

Applicability of State Regulatory Schemes

Incident to the question of federal court jurisdiction over Indian issues is when state courts also may invoke their jurisdiction, inherently or by specific statute. In deciding when a state court has jurisdiction over factual situations involving Indians and Indian tribes, federal courts look not only to whether the Indian party is plaintiff or defendant but also to the extent to which state jurisdiction will infringe upon tribal self-government.

In sharp contrast to Chief Justice Marshall's initial recognition of the importance and qualities of tribal self-government,²³⁷ "Con-

235 *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975), *re-designated* *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118, *reh. denied*, 450 U.S. 960 (the Court distinguished *Santa Clara* not only because no tribal remedies or other relief were available in tribal court, but the defense of tribal sovereign immunity disappeared when the issue related to a matter not exclusively an internal tribal affair).

236. 509 F. Supp. 933, 940-41 (D. Mont. 1981), *rev'd on other grounds*, 719 F.2d 979 (9th Cir. 1983) (the Montana Federal District Court felt itself bound by prior Ninth Circuit case law in rejecting the holding of *Dry Creek Lodge*).

237 *Worcester*, 31 U.S. at 561.

gress has to a substantial degree opened the doors of reservations to State laws."²³⁸ Although "federal treaties and statutes have been consistently construed to reserve the right of self-government to the tribes,"²³⁹ recent Supreme Court decisions have established a trend "away from the idea of inherent Indian sovereignty as a bar to State jurisdiction and toward a reliance on Federal preemption."²⁴⁰ The Court has employed by its own admission a preemption analysis "that is informed by historical notions of tribal sovereignty rather than determined by them."²⁴¹

Two separate tests sharply limit the assertion of state authority on Indian reservations. First, state authority may be preempted by conflicting federal statute.²⁴² A basic tenet of American Indian law is that tribal sovereignty is dependent solely upon, and subordinate only to, the federal government; it exists only because of the recognition given to it by Congress and is "subject to complete defeasance" by congressional action.²⁴³

Under the supremacy clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to preempt state law by so stating in express terms.²⁴⁴ Second, Congress' intent to preempt may be inferred where the scheme of federal regulation is "sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary State regulation."²⁴⁵ Third, federal preemption can be inferred where the field is one in which "the Federal interest is so dominant that the Federal system will be assumed to preclude enforcement of State laws on the same subject."²⁴⁶ State law will also be nullified to the extent that it actually conflicts with federal law. Federal regulations, including

238 *Rehner*, 463 U.S. at 718, quoting *Organized Village of Kake v. Egan*, 369 U.S. 60, 74 (1962).

239 *Rehner*, 463 U.S. at 718, quoting *F. COHEN*, *supra* note 59, at 273.

240 *Rehner*, 463 U.S. at 718, quoting *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973).

241 *Rehner*, 463 U.S. at 718. In deciding when a state court has jurisdiction over factual situations involving Indians and Indian tribes, federal courts look not only to whether the Indian party is plaintiff or defendant but the extent to which state jurisdiction will intrude upon tribal self-government. See *infra* note 250.

242 *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 147 (1984).

243 *Rehner*, 463 U.S. at 718, quoting *Wheeler*, 435 U.S. at 323.

244 *Hillsborough County v. Automated Med Labs., Inc.*, 471 U.S. 707, 713 (1985).

245 *Id.* quoting *Rice v. Santa Fe Elev. Corp.*, 331 U.S. 218, 230 (1947).

246 *Id.* See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984), quoting *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-154 (1982).

HUD's regulations found at 24 C.F.R. part 905, have the same preemptive effect as federal statute.²⁴⁷

Second, exercise of state authority may be foreclosed because it would undermine the right of reservation Indians to govern themselves.²⁴⁸ This limitation is being sharply diminished in scope, however; a growing body of case law indicates that states generally have authority over non-Indians in Indian country unless there is a conflict with federal law.²⁴⁹ The effects of the apparent shift in the law is most evident in matters where a state attempts to impose taxes on Indians or Indian entities, located on or off the reservation; the Supreme Court has faced this issue many times in the last two decades.²⁵⁰

Even if the state has not assumed or been delegated civil and/or criminal jurisdiction over the tribes within its boundaries, the lack of such action does not absolutely preclude a state from exercising such jurisdiction.²⁵¹ States also possess inherent "residuary" authority over non-Indians in Indian country unless there is a conflict with federal law.²⁵² On the state's assumption of jurisdiction

247. *Hillsborough County*, 471 U.S. at 713. See *United States v. Shimer*, 367 U.S. 374, 381-83 (1961).

248. *Three Affiliated Tribes*, 467 U.S. at 147.

249. *State ex rel. May v. Seneca-Cayuga Tribe*, Nos. 66074-75, 12 Indian L. Rep. 5085, 5090 and n.42 (Okla. 1985). The Oklahoma Supreme Court indicated that the areas of natural resources and taxation were especially subject to state jurisdiction. See *Smith Plumbing Co. v. Aetna Cas. & Sur. Co.*, No. 17691-PR, 13 Indian L. Rep. 5055 (Ariz. 1986).

250. Thus the Court has determined the following: state could not tax the gross proceeds of sales or gross income of a corporation doing business on the reservation (*Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685 (1965)); state could tax the gross receipts of an Indian corporation located off the reservation (*Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)); state could not tax the income of tribal members earned on the reservation (*McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973)); state could tax an Indian smoke shop's materials sold to non-Indians on the reservation (*Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976)); state could not impose its motor carrier tax and excise fuel tax on a non-Indian logging contractor hired by the tribe for on-reservation logging activities (*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)); and state could impose a sales tax on cigarettes sold by Indians to nonmembers on the reservation (*Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 135, 155-57 (1980)). See *supra* notes 209, 214.

251. *Three Affiliated Tribes*, 467 U.S. at 155-57; *State ex rel. Iron Bear v. District Court*, 512 P.2d 1292, 1296-98 (Mont. 1973).

252. *Id.* See also *United States v. McGowan*, 302 U.S. 535 (1938), *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1882). See generally F. COHEN, *supra* note 59, at 348-61. In *Little Horn State Bank v. Stops*, 170 Mont. 510, 555 P.2d 211 (1976), *cert. denied*, 411 U.S. 924 (1977), a bank sought to levy upon certain property owned by Indians who had borrowed money from the bank. The bank was located

under its residuary powers, the state police power is automatically operative in the absence of congressional action; the state itself has the power to define its jurisdictional limits, subject to the twin limitations of interference with tribal sovereignty and incompatible federal legislation.²⁵³

Several Supreme Court decisions provide guidance regarding the limitations upon residuary state jurisdiction over Indian matters arising on an Indian reservation. The issue in *Williams v. Lee* was interference with tribal sovereignty as a bar to state jurisdiction.²⁵⁴ Thus, where a non-Indian sued an Indian in state court to recover the cost of goods sold on the Navajo Reservation, the state was foreclosed from exerting jurisdiction. The Court went on to note that the absence of affirmative state or federal action granting the state jurisdiction was compelling in making its decision.²⁵⁵

In *Kennerly v. District Court*,²⁵⁶ a suit was initially commenced in the state courts based on essentially the same factual situation as in *Williams v. Lee*. The non-Indian plaintiffs in this situation, however, asserted that a tribal code provision that purported to give the state concurrent jurisdiction over the instant matter was applicable. The Court rejected this argument, holding that this unilateral tribal action was insufficient to give Montana jurisdiction without some appropriate affirmative action by the state.²⁵⁷ Follow-

and the transaction occurred outside of the reservation. The Montana Supreme Court held that the state court had jurisdiction, noting that:

The crucial fact of this appeal is that the subject matter jurisdiction lies with the State court, not the tribal court. In this case the tribal members elected to leave the reservation and conduct their affairs within the jurisdiction of the State courts. When they do so they are submitting themselves to the laws of this State. They cannot violate those laws and then retreat to the sanctuary of the reservation for protection.

Id., 555 P.2d at 214

253. *Organized Village of Kake*, 369 U.S. at 75 n.32, *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1135 (10th Cir.), cert. denied, 444 U.S. 995 (1979), quoting *Mescalero Apache Tribe*, 411 U.S. at 148.

254. 358 U.S. 217 (1959).

255. Concerning the fact situation before it, the Court noted that:

No Federal Act has given state courts jurisdiction over such controversies. In a general statute Congress did express its willingness to have any State assume jurisdiction over reservation Indians if the State legislature or the people vote affirmatively to accept such responsibility. To date, Arizona has not accepted jurisdiction, possibly because the people of the State anticipate that the burdens accompanying such power might be considerable.

Id. at 222-23

256. 400 U.S. 423 (1971)

257. *Id.* at 424-27. In addition, the Court determined that:

The tribal consent that is prerequisite to the assumption of state jurisdiction under the provisions of Title IV of the Act [25 U.S.C.A. §§ 1326 (1983)] must be manifested

ing *Williams v. Lee*, the Court directed that the case be remanded with the direction that it be heard first by the tribal court.²⁵⁸

In direct contrast to the factual setting in *Williams* and *Kennerly*, however, *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*²⁵⁹ involved an Indian tribe seeking the jurisdiction of the state courts to settle a dispute with a nonreservation contractor who had performed work on the reservation. The Supreme Court remanded the case to the North Dakota Supreme Court with the instruction that the state courts could not refuse to take jurisdiction simply because the tribe had not previously consented to such jurisdiction under relevant provisions of the Indian Civil Rights Act.²⁶⁰ In other words, that the tribe had not consented to imposition of state jurisdiction under the Act did not per se foreclose it from suing in state court. The Court itself acknowledged in passing that it has repeatedly "approved the exercise of jurisdiction by State courts over claims by Indians against non-Indians, even when those claims arose in Indian country."²⁶¹ However, as the Court pointed out, different interests are implicated when a non-Indian sues an Indian in state court resulting from a similar transaction occurring in Indian country.²⁶²

Federal legislation also has been enacted to facilitate state assumption of general civil and criminal matters. The majority of this legislation was a direct result of the congressional termination policy in effect during the 1950s.²⁶³

The federal statute with the greatest impact upon tribally created IHAs is known as Public Law 280.²⁶⁴ In 1953, Congress delegated

by majority vote of the enrolled Indians within the affected area of Indian country. Legislative action by the Tribal Council does not comport with the explicit requirements of the Act.

Id. at 429

258 *Id.*

259 467 U.S. 138 (1984)

260 *Id.* at 149-51. On remand, the North Dakota Supreme Court concluded that Indian tribes may properly bring such a suit in state court provided they accept civil jurisdiction pursuant to the state Indian Civil Jurisdiction Act, which allows assumption of general state civil jurisdiction with approval by the Indian people. The court noted that such jurisdiction may also be withdrawn pursuant to state law.

261 *Id.* at 148. See *McClanahan*, 411 U.S. at 173; *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968); *Williams*, 358 U.S. at 219 (dictum); *United States v. Candelaria*, 271 U.S. 432, 444 (1926); *Felix v. Patrick*, 145 U.S. 317, 332 (1892)

262 467 U.S. at 148

263 See H.R. CON. RES. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953); Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM INDIAN L. REV. 139 (1979)

264 18 U.S.C. § 1162 (1982); 25 U.S.C. §§ 1321-26 (1983 & Supp. III 1985); and 28 U.S.C. § 1360 (1978)

to five (later six) states certain civil and criminal jurisdiction to regulate affairs on Indian reservations.²⁶⁵ Public Law 280 extends to all other states the option of assuming civil and criminal jurisdiction of Indian reservations within their boundaries. A 1968 amendment to Public Law 280 now requires tribal consent before such jurisdiction may be asserted.²⁶⁶

The Supreme Court has noted that Public Law 280 was primarily intended to "redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes."²⁶⁷ There is nothing in the statute resembling an intention to confer *general* state civil regulatory control over Indian reservations.²⁶⁸ There is also "notably absent any conferral of State jurisdiction over the tribes themselves."²⁶⁹ The grant of state jurisdiction is thus intended to cover only the private civil disputes of individual reservation Indians, as determined on a case-by-case basis.

265 California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin (except the Menominee Reservation). 18 U.S.C. § 1162(a) (1982) and 28 U.S.C. § 1360(a) (1978). Jurisdiction was later conferred upon the Menominee Reservation and the Alaska Territory, later the state of Alaska. *Id.* See Act of Aug. 24, 1954, ch. 910, § 2, 68 Stat. 795-6. For a listing as to which states have accepted partial jurisdiction under Public Law 280, see F. COHEN, *supra* note 59, at 362-63 n 125.

The United States is authorized to accept a retrocession of any or all jurisdiction previously assumed by a state over certain or all Indian tribes within that state's borders. 25 U.S.C. § 1323 (1983 & Supp. III 1985). The federal government is not compelled to accept such jurisdiction based solely upon the state's unilateral action. See *Omaha Tribe v. Village of Walthill*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107.

Public Law 280 expressly rejects any theory that it authorizes the alienation, encumbrance, or taxation of any real or personal property belonging to any Indian or Indian tribe and held in trust by the United States. 25 U.S.C. § 1322(b) (1983 & Supp. III 1985). It likewise grants no authority to confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, ownership or possessory interests in such property. *Id.* "Real or personal property" as defined by this statute may reasonably be interpreted to include Indian housing and land (held in trust or as an allotment) that are involved in Indian housing programs.

266. 25 U.S.C. § 1326 (1983 & Supp. III 1985). Pursuant to this statute (part of the Indian Civil Rights Act), the enrolled adult tribal members within the affected area of Indian country must accept state jurisdiction by a majority vote at a special election called by the Secretary of the Interior, the tribal council, or 20 percent of the enrolled adult members.

267. *Bryan v. Itasca County*, 426 U.S. 373, 383 (1976).

268. *Id.* at 384-85. See H.R. REP. NO. 848, 83d Cong., 1st Sess. 3 (1953).

269. 426 U.S. at 388-89. See 25 U.S.C. § 1322(e) (1983 & Supp. III 1985).

Public Law 280 is not a general waiver of the sovereign immunity of either the tribe or the semigovernmental entity the tribe creates, including an IHA.²⁷⁰ Furthermore, the Supreme Court has recently emphasized that nothing in Public Law 280 purports to authorize states to disclaim any preexisting state jurisdiction it otherwise acquired over Indian tribes within the state.²⁷¹

Understanding the limitations of residuary state authority is the key to resolving the legal effect of Public Law 280 in a specific state jurisdiction. The state itself has the power to define its jurisdictional limits, subject to certain limitations as discussed elsewhere in this article. Assumption of civil and criminal jurisdiction pursuant to Public Law 280 only facilitates the state's ability to exercise jurisdiction over Indian matters.²⁷²

Congress additionally recognized the need to preserve federal jurisdiction over Indian tribes from state interference. The enabling legislation that created many states between 1889 and 1959 contained a provision in each state constitution expressly disclaiming state jurisdiction over Indian lands within that state's boundaries.²⁷³ However, as Cohen points out in his treatise, "as a general matter these clauses were not necessary, since the Supreme Court has sustained the same Federal and tribal authority in States admitted without such clauses."²⁷⁴

The Supreme Court has mandated that an asserted bar to jurisdiction over Indian lands based on the respective state constitution is "a question of State law over which the State courts have binding authority."²⁷⁵ Federal statute also provides that the people of any state allegedly bound by such a state constitutional provision or

270 *Charley v. Washington*, No. C-83-183-JLQ, 11 Indian L. Rep. 3043 (E.D. Wash. 1984); *Atkinson v. Haldane*, 569 P.2d at 163-67.

271 *Three Affiliated Tribes*, 467 U.S. at 150-55.

272 The effect of Public Law 280 upon residuary state authority to assert civil and criminal jurisdiction over Indians is perhaps best witnessed in the area of high-stakes gambling on Indian reservations. See 18 U.S.C. §§ 13, 1152, 1955 (Supp. II 1984); *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987).

273 See F. COHEN, *supra* note 59, at 268 nn.69-72. The enabling act disclaimers were effectively removed through passage of Public Law 280. *Seneca-Cayuga Tribe*, 12 Indian L. Rep. at 5090-91 nn.47-52. Any state constitution that still contains a disclaimer provision must be given effect to the extent legally possible, the issue remains whether the state must take affirmative action, legislative or otherwise, to remove it.

274 F. COHEN, *supra* note 59, at 268.

275 *Three Affiliated Tribes*, 467 U.S. at 151, quoting *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 561 (1983).

state statute may amend either enactment as necessary to remove such an impediment to jurisdiction.²⁷⁶

Duluth Lumber & Plywood Co. v. Delta Development, Inc.

The effect of Public Law 280 and corresponding state jurisdiction over a tribally created IHA has been addressed only once and that by the Minnesota Supreme Court in *Duluth Lumber & Plywood Co. v. Delta Development, Inc.*²⁷⁷ In *Duluth*, a non-Indian materialman sued his general contractor and the Bois Forte Reservation Housing Authority for lumber furnished to a Indian housing project located on a Minnesota Indian reservation. The court disposed of the sovereign immunity issue by holding that waiver by the IHA to assumption of state jurisdiction occurred at the time the tribal council enacted the Model Tribal Ordinance.²⁷⁸ The court then proceeded to the primary issue of "whether the State courts would adversely affect the Chippewa Tribe's self-government by assuming jurisdiction over a civil dispute involving monies disbursed by the Housing Authority."²⁷⁹

The court decided that asserting jurisdiction over the matter would not significantly affect the tribe's self-government, citing two reasons; not only was Minnesota one of the mandatory Public Law 280 states but execution of the construction contract by the IHA, HUD, and the general contractor evidenced the IHA's intent to do business off the reservation.²⁸⁰

As assumption of state jurisdiction did not interfere with the Fond Du Lac Reservation Indians' right "to make their own laws and be ruled by them" (distinguishing *Williams v. Lee*), the primary issue was interpretation of the contract in question rather than tribal

276 25 U.S.C. § 1324 (1983 & Supp. III 1985)

277. 281 N.W.2d 377 (Minn. 1979)

278. *Id.* at 383-84

279. *Id.* at 382-83

280. *Id.* In distinguishing *Hickey v. Crow Creek Housing Auth.*, 379 F. Supp. 1602 (D.S.D. 1974), the court noted that not only did the Crow Creek Indian Reservation have its own tribal court, but the applicable Crow Creek tribal ordinance gave the tribal court "original jurisdiction over Indians in all matters of a civil nature." *Id.* at 383. The Fond Du Lac Indian Reservation, on the other hand, did not have a tribal court, the tribal code also did not have the provisions mentioned above.

The court utilized a three-step analysis. First, the state was one of the mandatory Public Law 280 states. Second, the court felt that assumption of state jurisdiction would not interfere with tribal self-government. Third, the IHA went off the reservation to secure a general contractor to construct housing on the reservation. 281 N.W.2d at 380-83.

sovereignty. In affirming judgment for the plaintiff on a third-party beneficiary theory, the court analogized the situation to one involving construction work on public property, regardless of whether the Indian entity was involved.²⁸¹

First, it is clear that the *Duluth* court relied on the state's affirmative assumption of jurisdiction under Public Law 280, prior to institution of the *Duluth* lawsuit, in finding that state jurisdiction existed. The state's failure to do so may have barred such jurisdiction based on *Williams v. Lee*. State assumption of jurisdiction pursuant to Public Law 280 may thus be a significant factor to be scrutinized by a state court in deciding whether to assert jurisdiction over a matter involving a tribally created IHA defendant. It is interesting to note that this reasoning may in turn be compelling upon federal district courts where diversity jurisdiction is at issue, as assertion of state court jurisdiction over the same matter is to be considered in determining whether diversity jurisdiction exists.

Second, the *Duluth* court closely scrutinized the IHA's business activities with the general contractor, specifically holding that the IHA sufficiently went "off the reservation" to permit state jurisdiction over the matter. The court utilized the same line of Montana case law that formed the basis of the "significant contacts" test used by the Ninth Circuit in *R. J. Williams* four years later.²⁸²

Although essentially the same factual setting and legal issue was presented to the Minnesota Supreme Court and the Ninth Circuit, and the same case law was used by both courts as the test for determining the contacts made by the tribally created IHA, the

281 *Id.* at 384-86. The court presented its analysis as follows:

This discussion indicates that if construction work is performed on public property that is exempt from a mechanic's lien, then promises in the contract concerning payment of materialmen will be deemed to be for the benefit of the materialmen because the public owner does not need protection against a mechanic's lien and because of the injustice which would otherwise be suffered by the materialmen that have no lien rights. Such reasoning supports recovery under the particular facts of this case. The materialman, Duluth Lumber, has no mechanic's lien because it does not attach to the property of the United States or the Indian Housing Authority. Thus, neither the United States nor the Housing Authority needs protection against a mechanic's lien, and the contractual provision inserted by HUD requiring that the materialmen be paid before the Housing Authority makes final payment to the contractor can reasonably be interpreted as to benefit the materialman

Id. at 385

282 *Id.* at 382. See *R.J. Williams Co.*, 719 F.2d at 984-85. See *supra* text accompanying notes 213-219 and note 252

two courts reached opposite holdings.²⁸³ Thus, a difference of opinion among the states is evident as to what constitutes the IHA's "significant contacts" in securing a prime contractor to construct housing on the reservation.

Tribal Court Jurisdiction

Pursuant to the concept of tribal sovereignty, which is based on the inherent powers of tribal government, on applicable provisions of the United States Constitution and on such guidelines provided by the Supreme Court,²⁸⁴ Indian tribes with powers of self-government generally are free to enact a tribal code to govern the actions of individuals and entities located on their reservation.²⁸⁵ These tribes also may create a tribal court system to settle disputes arising on the reservation.

The Supreme Court has determined that a tribal court has exclusive jurisdiction over a non-Indian trading post proprietor's attempt to collect a debt from a reservation Indian for goods sold from the proprietor's store located on the reservation²⁸⁶ and over an adoption proceeding where all the parties were tribal members residing on the reservation.²⁸⁷ The Court has also mandated that tribal courts may assume civil jurisdiction over non-Indians who enter "consensual relationships" with the tribe or its members if the cause of action arose on the reservation.²⁸⁸ However, absent

283. The legal issues differed somewhat between the cases. In *Duluth*, the state court was faced with a simple breach of contract action; in *R.J. Williams Co.*, however, the Ninth Circuit's primary issue concerned the tribal court's issuance of a writ of attachment on the plaintiff's construction equipment. Although both courts relied upon the same Montana case law, the state court found that it had jurisdiction, while the Ninth Circuit did not, on the basis that assertion of diversity jurisdiction would interfere with tribal sovereignty. It also appears that, in rejecting the *Hedreen* court's analysis of diversity and "significant contacts," the court of appeals interpreted the Montana case law differently from the lower court. In any event, it is possible that if Montana was a Public Law 280 state, the holding in *R.J. Williams Co.* may have changed. See *supra* text accompanying notes 213-219.

284. See *supra* the section, "Tribal Sovereignty in General," and notes 37-53, and "Applicability of State Regulatory Schemes" and notes 237-276.

285. See, e.g., *R.J. Williams Co.*, 719 F.2d at 982 (the Ninth Circuit rejects plaintiff's argument that the tribal court's use of Montana case law was equivalent to a relinquishment of tribal sovereignty).

286. *Williams v. Lee*, 358 U.S. 217 (1959).

287. *Fisher v. District Court*, 424 U.S. 382 (1976).

288. *Montana v. United States*, 450 U.S. 544 (1981).

congressional legislation, tribal courts do not have criminal jurisdiction over non-Indians for criminal offenses committed in Indian country.²⁸⁹

Tribal court jurisdiction over matters brought to the court's attention commonly is determined by the jurisdictional statements in the tribal code; if the tribal code does not specifically address the immediate issue, the court is free to adopt any applicable federal or state common law guidelines in determining whether to assert jurisdiction.

Where tribally created IHAs are concerned, both the Crow and the Rosebud Sioux tribal courts have adopted the same two Supreme Court-established tests in 1986 for determining whether personal jurisdiction existed over the matter.²⁹⁰ First, the courts applied the "minimum contacts" test of *International Shoe v. Washington*,²⁹¹ which requires that a defendant, if not present within the forum, have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice" before the defendant can be subjected to a judgment in personam.²⁹² The *International Shoe* standard normally is utilized by federal and state courts as a due process (fourteenth amendment) safeguard.²⁹³

The Supreme Court recently stated in *Burger King Corp. v. Rudzewicz*²⁹⁴ that a contract between an out-of-state resident and a forum resident alone cannot serve as a basis for personal jurisdiction.²⁹⁵ The Court listed four factors that must be evaluated in addition to the execution of the contract in determining whether the defendant purposefully established minimum contacts within the forum.²⁹⁶

289 *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). See *National Farmer's Union*, 471 U.S. at 853-57, in which the Supreme Court clearly rejects any application of *Oliphant* to civil disputes.

290 *Crow Tribal Housing Auth. v. Little Horn State Bank*, No. 85-294, 13 Indian J. Rep. 6029 (Crow Tr. Ct. 1986); *Rosebud Housing Auth. v. LaCreek Elec. Coop., Inc.*, No. CIV-85-375, 13 Indian L. Rep. 6030 (Rbd. Sv. Tr. Ct. 1986).

291 326 U.S. 310 (1945).

292 *Id.* at 316.

293 For a recent discussion of application of the *International Shoe* standard, see *Brown v. Washoe Housing Auth.*, 625 F. Supp. at 599-601.

294 471 U.S. 462 (1985).

295 *Id.* at 478.

296 The Court stated:

The [Supreme] Court long ago rejected the notion that personal jurisdiction might turn on "mechanical tests," *International Shoe v. Washington*, 326 U.S. at 319, 66

Second, the two tribal courts also have applied the consensual relationship test for tribal court jurisdiction, first established in *Montana v. United States*.²⁹⁷

In *Crow Tribal Housing Authority v. Little Horn State Bank*,²⁹⁸ the plaintiff IHA filed suit in the Crow Tribal Court alleging that the defendant bank had wrongfully dishonored a letter of credit drawn by the defendant as assurance of performance and payment for the IHA's development project. The court, while determining that the letter of credit must be dealt with independently of the underlying construction contract, applied the two tests mentioned above. Concerning *International Shoe*, the court noted that the only "contact" that the defendant had with the IHA was execution and delivery of the letter of credit itself.²⁹⁹ As for the *Montana* test, the court noted:

[C]onsidered apart from the underlying construction agreement and its resulting problems, the activities of Little Horn State Bank, specifically the issuance of its letter of credit, do not meet the consensual business transaction requirements set forth in *United States v. Montana, supra*. . . . In this instance, the court finds that the bank's only on-reservation contact in this matter is the delivery of the letter of credit. This contact is incidental and insufficient for the tribe to exercise jurisdiction based upon a legitimate interest concerning the on-reservation activities of this non-Indian, the Little Horn State Bank.

While these matters do affect a legitimate tribal interest in the health and welfare of the Crow Indian Tribe, also a part

S. Ct. at 159, or on "conceptualistic . . . theories of the place of contracting or of performance," *Hoopston Canning Co. v. Cullen*, 318 U.S. at 316, 63 S. Ct. 604. Instead, we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." *Id.*, at 316-17, 63 S. Ct. at 604-605. It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum

Id. at 479

297 See *supra* the section, "Tribal Sovereignty in General," and notes 48, 50, 52 and note 288

298 No. 85-294, 13 Indian L. Rep. 6029 (Crow Tr. Ct. 1986).

299 *Id.* at 6029-30. However, the court specifically notes that "had a letter of credit not been considered to be independent of the underlying construction contract, this court would have found jurisdiction" based on *International Shoe*. *Id.* In so holding, the court adopted case law from numerous state court decisions

of the *Montana* test, inasmuch as they deal with the funds necessary to complete the building of homes for tribal members, these matters are not grounded in on-reservation activities of the bank.³⁰⁰

The court, upon finding that the IHA failed to satisfy either test, refused to assert jurisdiction.

However, in *Rosebud Housing Authority v. LaCreek Electric Power Cooperative, Inc.*,³⁰¹ the Rosebud Sioux Tribal Court found personal jurisdiction over the plaintiff IHA's breach of contract action against a non-Indian-owned electric cooperative doing business on the reservation. Using the *Montana* test, the court stressed that the defendant had virtually interfered with the health and welfare of the housing unit residents, thus justifying a finding of a consensual relationship.³⁰² Using the *International Shoe* test, the court found that the defendant's conducting business on the reservation constituted a "residence" within meaning of the tribal code then in effect at the time the complaint was filed.³⁰³

In this setting, both tests scrutinize the business contacts made by the outside non-Indian defendant with the reservation IHA. It is apparent that the tribal court may in all likelihood take jurisdiction if the cause of action is based not only on a contractual relationship between the parties, but sufficient other business contacts as well. An interesting situation may soon arise if and when the lawsuit involves a subcontractor on an IHA development project, rather than the general contractor; in that case, the tribal court would be compelled to determine jurisdiction without the benefit of a contract.

300. *Id.* at 6030.

301. No. CIV-85-375, 13 Indian L. Rep. 6030 (Rbd. Sx. Tr. Ct. 1986)

302. *Id.* at 6031. Said the court:

Using the *Montana* analysis, the court concludes that it has jurisdiction to hear the merits of the complaint. The tribe, through the Rosebud Housing Authority, administers the public housing program through which the houses involved in this action were built. Lack of electric service to these homes will have a direct effect on the economic security of the tribe and its members since the lack of that kind of service will reduce the productive use of the homes by tribal members. In addition, the homes were built to provide shelter to eligible members of the tribe, and therefore, there can be no logical argument otherwise that the health and welfare of tribal members will be directly affected by the lack of electric service to these homes.

303. *Id.* at 6031-32.

Conclusion

Unlike an IHA created by state law, the legal nature of a tribally created IHA poses problems in the federal, state, and tribal courts that must be addressed in the first instance. However, it is clear that a tribally created IHA is not a tribal department (unless the tribal government expressly states so in the ordinance creating the IHA) or a federal administrative agency, but rather an arm of the tribal government. Traditional notions of sovereign immunity also attach to the actions and legal nature of a such an IHA. Both of these factors will be taken into consideration by the respective court in litigation involving a tribally created IHA defendant, when the procedural issues of jurisdiction and sovereign immunity must be addressed in advance of any determination on the merits of the case.

Federal courts are unclear as to whether mere enactment of the model tribal ordinance waives the immunity of the IHA, or whether the IHA must waive that immunity by contract. What is clear, though, is that the issue of sovereign immunity is moot in lawsuits arising from a construction contract entered into by the IHA and the general contractor on the IHA development project.

The jurisdictional issue arises only after the court determines that sovereign immunity has been waived. The court will have to look to the specific factual situation and the jurisdictional basis asserted in determining whether to proceed to the merits of the case. Tribal courts, specifically, have resorted to utilizing federal law concerning personal jurisdiction in making this determination.

Finally, the differing applications and uses of a business contacts test in situations involving IHAs deserves mention. The "significant contacts" test of *R. J. Williams* and *Duluth*, founded in Montana state law, is utilized to determine state jurisdiction by the state court and diversity jurisdiction by the United States District Court. The test is based on several specific factors that are scrutinized to determine the locus of the contract dispute. The determination of the locus then determines whether the specific court may take jurisdiction.

The purpose of the *International Shoe* test is to satisfy fourteenth amendment due process requirements. Federal courts usually use this test in conjunction with state long-arm statutes; generally, however, tribal courts are using the minimum contacts standard to determine whether personal jurisdiction exists with that court, without regard to any constitutional considerations.

As opposed to the two tests mentioned above, which look to the degree that the IHA reaches out beyond reservation boundaries, the *Montana* test looks to the business dealings of non-Indian individuals or entities encroaching on tribal affairs. This test, used by tribal courts to determine whether they may take jurisdiction over non-Indians, focuses on the degree of regulation tribal governments may impose upon non-Indians doing business on the reservation.