

The Federal Trust Relationship, Tribal Sovereignty and Self-Determination

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Tribal Sovereignty

Federal common law has long recognized that “Indian nations” are “distinct political communities retaining their original natural rights...”¹ As summarized by one court, “Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate... [and are] qualified to exercise powers of self-government...by reason of their original tribal sovereignty.”² The Supreme Court describes tribes as “unique aggregations possessing attributes of sovereignty over both their members and their territory, they are ‘a separate people’ possessing ‘the power of regulating their internal and social relations.’”³ Congress has been recognized as having the authority to limit the exercise of this sovereignty⁴ and the courts have held that tribes have been implicitly divested of certain powers by reason of their “dependent status.”⁵ In recent years, however, Congress has reaffirmed the principle of tribal self-government repeatedly.⁶

Powers of Tribal Governments

The powers of tribal governments include:

- Right to decide membership
- Administration of justice (law enforcement, courts)
- Regulation of domestic and family relations
- Determination of property rights (e.g. inheritance)
- Tribal control of land – acquisition, assignment and leasing, exclusion, zoning)
- Conservation and environmental protection
- Protection of traditional cultural, historic and sacred properties
- Regulating hunting and fishing (even off-reservation if a treaty)

¹ *Worcester v. The State of Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

² *National Labor Relations Board v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) (citations omitted).

³ *United States v. Mazurie*, *supra*, 419 at 557.

⁴ *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

⁵ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208-209 (1978).

⁶ *See, e.g., Indian Self-Determination and Education Assistance Act*, 25 U.S.C. 450 *et seq.*; *Indian Tribal Justice Act*, 25 U.S.C. 3601 *et seq.*

- Business regulation and development – license, tax, zone, establish businesses, regulate or license businesses, resource development (or not)
- Agreements – with businesses or other governments
- Relations with other governments
- Providing social services – education, health care, housing
- Providing, regulating or taxing utilities

Jurisdiction

“Tribal courts play a vital role in tribal self-government and the Federal government has consistently encouraged their development.”⁷ Tribes exercise both civil and criminal jurisdiction.

Civil Jurisdiction

Tribal courts exercise civil regulatory and adjudicatory authority over Indians located on Indian lands, which may include both tribal trust land or individual trust land. It remains the general rule that Indians living in Indian country may not be regulated by the state absent express Congressional intent.⁸ This was changed to a limited extent for certain states during the termination era when Congress passed Public Law 83-280 (hereinafter P.L. 280).⁹ It provided for certain states, some as a mandatory matter and others at their option, to exercise jurisdiction over “civil causes of action” involving American Indian and Alaska Native people residing in the state as well.¹⁰ The United States Supreme Court has interpreted the phrase “civil causes of action” in P.L. 280 as providing states with adjudicatory power over private civil litigation involving American Indians – for example, a lawsuit by an Indian person to enforce a contract, but has not interpreted P.L. 280 to allow for the exercise of general state civil regulatory authority over activities taking place on tribal land.¹¹ A state is exercising civil regulatory jurisdiction when it enacts a law or regulation that permits certain conduct, but which subjects that conduct (e.g, regulates it) by prescribing rules that govern how those permitted activities can take place. For example, people are permitted to drive automobiles, but only if they follow government rules requiring them to obtain a driver’s license.

⁷ *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987).

⁸ See *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458 (1995)

⁹ 18 U.S.C. 1162; 28 U.S.C. 1360.

¹⁰ States that have exercised this authority in whole or in part include Alaska, Arizona, California, Florida, Idaho, Iowa, Minnesota, Nebraska, Nevada, Oregon, and Washington.

¹¹ See *Bryan v. Itasca County*, 426 U.S. 373, 384-385 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 205, 208-212 (1987).

The United States Supreme Court has ruled that tribal civil jurisdiction over non-Indians is dependent upon several factors. According to the Court, tribes retain civil jurisdiction over non-Indians if necessary to protect tribal self-government or control internal relations.¹² Among the factors to be considered are whether the non-Indian has entered into a consensual relationship with the tribe or is engaging in an activity that impacts the tribe's political integrity, economic security or health and welfare.¹³ If these interests are not implicated, then tribal authority can be exercised only if there is a Congressional delegation of authority.¹⁴

Criminal Jurisdiction

Criminal jurisdiction over crimes on the reservation has been retained by tribes as part of their inherent sovereign authority where the crimes have been committed by American Indian or Alaska Native people.¹⁵ Of note, however, there are limitations on the exercise of criminal tribal authority established by the Indian Civil Rights Act.¹⁶ In general, the ICRA limits punishment in tribal criminal cases to one year in prison and \$5,000 fine or both.¹⁷ A recent amendment to the law incorporated in the Tribal Law and Order Act permit tribes to subject a defendant to a term of imprisonment not to exceed 3 years and a fine not to exceed \$15,000 in cases where the defendant has been previously convicted of the same or a comparable offense and is being prosecuted for an offense that would generally punishable by more than 1 year of imprisonment if prosecuted by other jurisdiction. The tribe must provide certain rights to the defendant, including right to counsel, a judge who is licensed to practice law, and access to the applicable tribal laws and rules of criminal procedure.¹⁸

The federal government has assumed concurrent jurisdiction over most criminal activity committed by American Indians in Indian country, and exclusive jurisdiction over non-Indian crime in Indian country in some circumstances, based upon two federal statutes – the Major Crimes Act,¹⁹ and the Indian Country Crimes Act.²⁰ The Major Crimes Act provides the federal government with concurrent jurisdiction over American Indian and Alaska Native perpetrators, regardless of the victim, when the crime is a “major” crime. The Indian Country Crimes Act provides for federal criminal jurisdiction where there is a non-Indian accused and an American Indian or Alaska Native victim or

¹² *Nevada v. Hicks*, 533 U.S. 353 (2001).

¹³ See *Montana v. U.S.*, 450 U.S. 544 (1981).

¹⁴ *Nevada v. Hicks*, *supra*.

¹⁵ See *United States v. Wheeler*, 455 U.S. 191 (1978).

¹⁶ 25 U.S.C. 1301 *et seq.*

¹⁷ 25 U.S.C. 1302(7).

¹⁸ 25 U.S.C. 1302(a)(7)(C)(D),(b),(c), (d).

¹⁹ 18 U.S.C. 1153.

²⁰ 18 U.S.C. 1152

where there is an American Indian or Alaska Native accused and a non-Indian victim, the crime is not a “major” crime and the tribe has not acted to punish the accused.

As noted previously, in 1953, Congress passed Public Law 83-280 (hereinafter P.L. 280). In addition to civil provisions, it provided for certain states to exercise criminal jurisdiction over all American Indian and Alaska Native people living within the state.²¹ The state essentially took the place of the federal government in terms of the prosecution of crimes by Indians in Indian country in those states.

The Supreme Court has ruled that tribes do not have the authority to exercise criminal jurisdiction over non-Indians committing crimes and that states have exclusive jurisdiction over crimes committed by non-Indians against non-Indians, regardless of where the crimes take place.²² This has been partially modified, however, by the recent amendments in the Violence Against Women Act. Beginning in 2015 (or sooner if approved by the Justice Department), a tribe may exercise criminal jurisdiction under certain circumstances over non-Indians who commit the following offenses against Indian victims: domestic violence, dating violence, or criminal violations of protection orders. In order for a non-Indian to be subject to tribal jurisdiction under this provision, the non-Indian must reside or be employed in Indian country, or be is the spouse, intimate partner, or dating partner of an Indian living in Indian country. In order to exercise this jurisdiction, a tribe must provide defendants with the rights provided by the Indian Civil Rights Act of 1968, which mostly but not entirely tracks the Federal Constitution's Bill of Rights, including the right to due process, provide defendants with the rights described in the Tribal Law and Order Act of 2010, include Indians and non-Indians in jury pools, and inform defendants ordered detained by a tribal court of their right to file Federal habeas corpus petitions.²³

The following chart, reprinted with permission, summarizes the jurisdictional framework in non-P.L. 280 states for crimes committed in Indian country:

²¹ 18 U.S.C. 1162; 28 U.S.C. 1360.

²² *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (no tribal criminal jurisdiction over non-Indians); *United States v. McBratney*, 104 U.S. 621 (1881) (exclusive state jurisdiction over crimes where non-Indians are both the perpetrator and victim).

²³ 25 U.S.C. 1304.

When the Crime Committed is a "Major" Crime

<i>Persons Involved</i>	<i>Jurisdiction</i>
Indian accused, Indian victim	Federal government (Major Crimes Act) and tribal government (inherent sovereignty)
Indian accused, non-Indian victim	Federal government (Major Crimes Act) and tribal government (inherent sovereignty)
Non-Indian accused, Indian victim	Federal government only (Indian Country Crimes Act) except that there may be tribal jurisdiction if the case falls under the Violence Against Women Act provisions
Non-Indian accused, Non-Indian victim	State government only

When the Crime Committed Is Not a "Major" Crime

<i>Persons Involved</i>	<i>Jurisdiction</i>
Indian accused, Indian victim	Tribal government only (inherent sovereignty)
Indian accused, non-Indian victim	Federal government (Indian Country Crimes Act) and tribal government (inherent sovereignty)
Non-Indian accused, Indian victim	Federal government only (Indian Country Crimes Act) except if that there may be tribal jurisdiction if the case falls under the Violence Against Women Act provisions
Non-Indian accused, Non-Indian victim	State government only

Government Trust Relationship

In exercising its authority over American Indian and Alaska Native affairs, there is a “distinctive obligation of trust incumbent upon the [federal] Government that “involves moral obligation of the highest responsibility.”²⁴ The basis for this special legal relationship between Indian people and the federal government is found directly in the Constitution²⁵ and memorialized in treaties. This trust relationship applies to all Federal agencies and to Federal action outside Indian reservations.²⁶ Although the Supreme Court has acknowledged “the undisputed existence of a general trust relationship between the United States and the Indian people,”²⁷ for the Federal government to be held liable in damages for breach of trust, the Court has held that fiduciary duties must be based on a relevant statute or regulation, or a network of statutes and regulations.²⁸ Regardless of whether the federal government can be held liable in damages, however, the trust relationship should be taken into account when federal agencies consult with tribes. For example, as stated in guidance issued by the Department of the Interior:

In the event an evaluation [of a proposed agency action] reveals any impacts on Indian trust resources, trust assets, or tribal health and safety, bureaus and offices must consult with the affected recognized tribal government(s), ... Each bureau and office within the Department shall be open and candid with tribal government(s) during consultations so that the affected tribe(s) may fully evaluate the potential impact of the proposal on trust resources and the affected bureau(s) or office(s), as

²⁴ *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942).

²⁵ See Art. I, § 8, par. 3.

²⁶ See, e.g., *Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir. 1981), cert. den. 454 U.S. 1081 (1981); *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990). See, e.g., internal guidance documents issued by the Department of the Interior in its Departmental Manual (DM), at 303 DM chapter 2, 512 DM chapter 2 (acknowledging that all bureaus and offices within DOI are subject to the federal trust responsibility when their actions affect “tribal trust resources, trust assets, or tribal health and safety.” 512 DM §2.2. The DOI Departmental Manual is available in the Electronic Library of Interior Policies at: elips.doi.gov.

²⁷ *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (often referred to as “*Mitchell II*” to distinguish this decision from *United States v. Mitchell*, 445 U.S. 535 (1980) (“*Mitchell I*”).

²⁸ *Id.* at 224 (finding liability based on a network of statutes and regulations); *United States v. Jicarilla Apache Nation*, 564 U.S. ___ (2011); *United States v. Navajo Nation*, 537 U.S. 488, 493, 502-07 (2003) (holding that the Indian Mineral Leasing Act, 25 U.S.C. § 396a *et seq.*, and implementing regulations do not mandate compensation for alleged breach of trust); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 468, 472-76 (2003) (holding that the Court of Federal Claims does have jurisdiction over claim for compensation based on statute declaring that former military reservation would be held in trust for Tribe subject to use of land and improvement by Secretary).

trustee, may fully incorporate tribal views in its decision-making process. These consultations, whether initiated by the tribe or the Department, shall be respectful of tribal sovereignty.²⁹

Executive Order 13175 and Tribal Consultation

Executive Order 13,175 was signed in 2000. It recognizes the unique relationship between the federal government and Indian tribes (often referred to as the government-to-government or nation-to-nation relationship), the federal trust relationship, inherent sovereign powers of the tribes and their right to self-determination. In circumstances where tribes operate programs subject to federal statutes and regulations, it requires agency to grant tribal governments the maximum administrative discretion possible. When agencies are implementing policies with tribal implications, they are required to defer to tribally-developed policies when possible and consult with tribes to develop alternatives limiting the scope of federal policies and protecting tribal prerogatives.

To the extent practicable and permitted by law, if any agency promulgates a regulation with tribal implications, it is supposed to provide funding to the tribe for implementation costs, consult with tribal officials early in the process, and prepare a tribal impact statement. When issues pertain to tribal self-government, treaty rights or tribal trust resources, each agency should explore the use consensual mechanisms, including negotiating rulemaking. Where legally permitted, agencies should seek to provide tribes with waivers of statutory and regulatory requirements and promote flexible policy approaches.

In 2009, a Memorandum was issued by President Obama requiring agencies to develop detailed plans for the implementation of Executive Order 13,175.

Pursuant to this Memorandum, a number of agencies have adopted revised consultation protocols.³⁰ One example is the Department of the Interior.

The Department of Interior consultation policy³¹ requires government-to-government consultation early in the process between tribal officials and departmental officials who are knowledgeable about the matters at hand, authorized to speak for the Department and who exercise delegated authority in terms of the agency action. The goal is “effective collaboration and informed

²⁹ 512 DM §2.4.B.

³⁰ See http://www.ncai.org/attachments/Consultation_hxjBLgmqyYDiGehEwgXDsRIUKvwZZKjJOjwUnKjSQeoVaGOMvfl_Consultation_Report_-_Jan_2012_Update.pdf

³¹ <http://www.doi.gov/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf>

Federal decision-making” and the policy “emphasizes trust, respect and shared responsibility.”

The policy requires a minimum of 30 days notice to tribes or departmental actions with tribal implications absent exceptional circumstances and a description of the topics to be discussed, a timeline and possible outcomes. An Indian tribe may also initiate a consultation request. The policy requires appointment of an agency-wide tribal governance officer and tribal liaison officers in each bureau and office of the department. Types of processes specified include negotiated rulemaking, tribal leader task force, series of open tribal meetings and single consultation meetings.

To be sure, the word “consultation” means different things to different people. The definition used by the National Park Service in its guidance for Federal historic preservation programs is one worth noting:

“Consultation means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed. Consultation is built upon the exchange of ideas, not simply providing information.”³²

Indian Self Determination and Education Assistance Act

The United States Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEAA) in 1975.³³ The ISDEAA reversed a 30 year effort by the federal government under its preceding termination policy to sever treaty relationships with and obligation to Indian tribes. The Act declared that “prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people.”³⁴ The Act also reaffirmed Congress’s “commitment to the maintenance of the Federal Government’s unique and continuing relationship with, and responsibility to individual Indian tribes and the Indian people as a whole.” This commitment is expressed by support for Indian “planning, conduct, and administration” of “quality programs” for Indians.³⁵ The ISDEEA is divided into five Titles. Titles I and II allow tribes to enter into self-determination contracts (“638 contracts”) with the federal government to take control of federal programs and schools for Indians.

³²National Park Service, The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs pursuant to the National Historic Preservation Act, 63 Fed. Reg. 20,496, 20,504 (Apr. 24, 1998).

³³25 U.S.C. § 420 et seq.

³⁴ 25 U.S.C. § 450(a)(1).

³⁵ 25 U.S.C. § 450a(b).

Title III created a self-governance demonstration program to increase flexibility in administration of tribal programs. Title IV and V made self-governance permanent for the Department of Interior and the Indian Health Service, respectively.

Self-Determination “638 Contracts”

Under the ISDEAA, tribes and tribal organizations may enter into contracts with the federal government to take over administration of programs formerly administered by the federal government on their behalf. Programs subject to “638 contracts” included all those administered by the Department of the Interior under the Snyder Act or the Indian Reorganization Act, or with monies from other agencies “for the benefit of Indians,” or administered by the Department of Health and Human Services “for the benefit of Indians because of their status as Indians.”³⁶

The Secretary of the Interior may only deny a tribal request to enter into a self-determination contract if the services to the Indian beneficiaries will not be satisfactory, the contract will jeopardize the trust resources of the tribe, the tribe cannot fulfill the contract, the proposed cost is more than that permitted under the Act, or the activity is outside the scope of the Act “because the proposal includes activities that cannot lawfully be carried out by the contractor.”³⁷ If the Secretary declines to enter into a contract, the tribe has a right to assistance in amending the proposal, and a right to a hearing and appeal to challenge the refusal.³⁸ In a hearing or appeal, the Secretary has the burden of proof, and must “clearly demonstrate” the validity of the reasons for the refusal.”³⁹

The ISDEAA provides federal funds for contracts “shall not be less” than would have been provided had the United States operated the program.⁴⁰ Under the statute, if a tribe operates the program more cheaply than the federal government did, the tribe can keep the savings and put that money back into the program.⁴¹ If the federal government does not provide enough federal funding to perform the contract, the tribe has the option to suspend the operation on reasonable notice to the appropriate agency.⁴² However, in the beginning, the high indirect costs of contract administration such as auditing and accounting systems, legal systems, and human resources programs and trainings left tribes operating these programs without the resources equal to the federal government.

³⁶ 25 U.S.C. § 450f(a)(1)(E).

³⁷ 25 U.S.C. § 450f(a)(2).

³⁸ 25 U.S.C. § 450f(b).

³⁹ 25 U.S.C. § 450f(e)(1).

⁴⁰ 25 U.S.C. § 450j-1(a)(1).

⁴¹ 25 U.S.C. § 450j-1(a)(4).

⁴² 25 U.S.C. § 450l (c)(b)(5).

In 1987, Congress declared that the failure to provide funding for indirect costs was “perhaps the single most serious problem with the implementation” of the Act.⁴³ ISDEAA was amended to require funding of “contract support costs,” which are costs a tribal organization must incur to comply with its self-determination contracts, but which are not considered part of the direct operation of the program.

Recently, several tribes sued the United States government for breach of contract, alleging the federal government failed to pay the full amount of the contract support costs due from fiscal year 1994 through 2001, as required by the ISDEAA and the contracts. The U.S. Supreme Court held the federal government must pay in full each tribe’s contract support costs incurred by a tribal contractor under the ISDEAA, even if Congress failed to appropriate sufficient funds to cover all of the contract support costs owed to all tribal contractors collectively.⁴⁴

The appropriate Secretary may permit a tribe or tribal organization carrying out a ISDEAA contract or grant to utilize existing school buildings, hospitals, and other facilities and all equipment or other personal property owned by the federal government.⁴⁵

Self-Governance Compacts

Congress enacted the Tribal Self-Governance Act after finding that in spite of the Self-Determination Act, “Federal bureaucracy, with its centralized rules and regulations, has eroded tribal self-governance and dominates tribal affairs.”⁴⁶ This Act allows tribes to negotiate a single annual funding agreement for the administration of all programs for tribes or Indians administered by the Department of Interior.⁴⁷ The tribe may also negotiate a “self-governance compact” which affirms the government-to-government relationship and includes provisions that apply to all bureaus within the Department of Interior.⁴⁸ There is a parallel program, with slightly different provisions, under which tribes can negotiate self-governance compacts with the Department of Health and Human Services for administration of all programs, services, activities, and competitive grants administered by the DHHS through the Indian Health Services.

⁴³ S. Rep. No. 100-274, at 2,8 (1987).

⁴⁴ *Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181 (2012).

⁴⁵ 25 U.S.C. § 450j(f)

⁴⁶ Pub. L. No. 103-413, Title II, § 204, 108 Stat. 4272 (1994); H. Rep. No. 103-653, at 1 (1994).

⁴⁷ 25 U.S.C. § 458cc(b); 25 C.F.R. pt. 1000

⁴⁸ 25 C.F.R. § 1000.161.

Tribal applicants must complete a “planning phase” and show financial stability and management capacity over a period of three years to enter into a self-governance compact. Tribes may either apply on their own or may join together with other tribes to provide services as a consortium and be treated as a single tribe.⁴⁹ The DOI and the DHHS may each enter into self-governance compacts with only 50 new tribes per year.⁵⁰

Tribal governance compacts are different from self-determination 638 contracts in a few important ways. First, the terms for administration of self-governance programs are defined during the negotiation process and in the funding agreements. Second, the compacting tribes may reallocate funds among the programs, and may redesign or consolidate programs. Finally, tribes may include in their agreements Interior Department programs (or parts thereof) “which are of special geographic, historical, or cultural significance” to the tribe⁵¹ and, in the case of HHS, the law specifically provides that Indians or Indian tribes do not need to be included in the authorizing statute for the program to be eligible for inclusion in a compact or funding agreement.⁵²

Liability

Congress amended the ISDEAA in 1988 to provide that tort claims against tribes, tribal organizations, Indian contractors, and their employees would be considered claims against the United States and covered to the full extent of the Federal Tort Claims Act.⁵³ Legal actions must now be filed against the United States directly, and the Attorney General must provide representation for the defendants.⁵⁴ Federal tort protection extends only to claims covered by the Federal Tort Claims Act, and does not include claims based solely on contract or other grounds not within the scope of the Act.⁵⁵

⁴⁹ 25 U.S.C. § 458bb(b)2).

⁵⁰ 25 U.S.C. § 458bb(b).

⁵¹ 25 U.S.C. § 458cc(c).

⁵² 25 U.S.C. § 458aaa-4(c).

⁵³ 25 U.S.C. § 450f(d); Indian Appropriations Act, Pub. L. No. 101-512, § 314, 104 Stat. 1915 (1990).

⁵⁴ 25 C.F.R. §§ 900.190, 900.204.

⁵⁵ 25 C.F.R. § 900.183(b).