



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

IN REPLY REFER TO:

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M-37045

Memorandum

To: Secretary

From: Solicitor

Subject: Reaffirmation of the United States' Unique Trust Relationship with Indian Tribes and Related Indian Law Principles

This Opinion reaffirms longstanding federal Indian law principles concerning the unique legal relationship between the United States and Indian tribes.<sup>1</sup> Under the United States' policy of self-determination, the federal government recognizes the need to abandon the failed policies of paternalism and assimilation and to instead promote tribal sovereignty. As such, the Department of the Interior's (Department's) current policy and regulatory approaches are aimed at empowering tribes to more directly manage their own resources and lands, engage in economic development opportunities based on their own strategies and priorities, and self-govern through their own independent judgment and cultural values.

Under your leadership, the United States has consistently sought to strengthen this relationship in accordance with long-standing Indian law principles. On August 20, 2014, your office issued Secretarial Order No. 3335 (Order), *Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries*. As a follow up to Secretarial Order No. 3292<sup>2</sup> and the resulting Final Report and Recommendations issued by the Secretarial Commission on Indian Trust Administration and Reform,<sup>3</sup> the Order sets forth seven guiding principles to advance the Department's role as a trustee to all federally recognized tribes. The Order discusses the Department's trust obligations and cites a Memorandum issued by former Solicitor Leo Krulitz in support of the proposition that "[t]he trust responsibility doctrine imposes fiduciary standards on the conduct of the executive. The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust

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<sup>1</sup> For the purposes of this Opinion, any reference to an "Indian tribe" refers to any Indian tribe, band, nation, or other organized group or community, including any Pueblo or any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

<sup>2</sup> Dec. 8, 2009 (establishing the Secretarial Commission on Trust Reform).

<sup>3</sup> Dec. 10, 2013.

property.”<sup>4</sup> The Order went on to state that the *Krulitz* opinion remains in effect for the Department.<sup>5</sup>

The close of the current Administration warrants a review and reaffirmation of these pronouncements from *Krulitz* even as applied to the contemporary legal landscape. As your recent Order expanded upon previous Secretarial pronouncements, this Opinion presents a contemporary understanding of the unique federal-tribal relationship and related foundational legal principles in the area of federal Indian law. As the Department actively works to fulfill its trust responsibilities pursuant to these guiding principles, this Opinion highlights examples of the Department’s trust responsibility towards Indian tribes in both overarching terms and as it affects the day-to-day operations of the Department both generally and under the current Administration.

## I. HISTORICAL OVERVIEW OF THE UNITED STATES’ RELATIONSHIP WITH TRIBES

Pre-dating the ratification of the Constitution, the federal government followed the practice of British and French colonial predecessors by engaging tribes on a nation-to-nation basis via treaty making. These treaties recognized tribal sovereign authority and set aside territory for the tribes’ exclusive use as reservations. Many treaties also protected additional tribal rights such as hunting and fishing, and guaranteed that the federal government would provide tribes with goods and services such as food, education, and healthcare.<sup>6</sup> The treaties set the stage for federal protection of Indians against states and non-Indians by recognizing the tribes’ power to exclude non-Indians from tribal lands and through “bad men” provisions, which authorized any on-reservation Indian victim of a crime committed by a non-Indian to recover damages from the federal government.<sup>7</sup> Treaties also were a means through which the federal government acquired vast tracts of Indian land, which was used for homesteading and rights-of-way, and many treaties authorized the allotment of land to individual Indians.<sup>8</sup> And

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<sup>4</sup> Memorandum from Dep’t of the Interior Solicitor Leo M. Krulitz to Assistant Attorney Gen. James W. Moorman, at 2 (Nov. 21, 1978) (“*Krulitz*”).

<sup>5</sup> Order at 4.

<sup>6</sup> See, e.g., 1837 Treaty with the Chippewa, July 29, 1837, 7 Stat. 536. By this treaty, the Chippewa Indians ceded certain lands in exchange for, among other things, money, food and supplies, *id.* at art. II; the establishment of a school, *id.*; and a guarantee that “[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed [sic] to the Indians, during the pleasure of the President of the United States,” *id.* at art. V. See also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (affirming treaty hunting, fishing, and gathering rights set forth in Article 5 of the 1837 Treaty with the Chippewa). As this Opinion cites various cases within the overarching litigation that culminated in the *Mille Lacs* Supreme Court case, I will refer to the Supreme Court decision as “*Mille Lacs*.”

<sup>7</sup> See, e.g., Treaty with the Yakima, June 9, 1855, art. II, 12 Stat. 951, 952 (reservation set aside “for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without the permission of the tribe and the superintendent and agent”); Treaty with the Ute Indians, Mar. 2, 1868, art. VI, 15 Stat. 619, 620 (“If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.”).

<sup>8</sup> For a modern day examination of treaty provisions, see generally *Opinion on the Boundaries of the Mille Lacs Reservation*, M-37032 (Nov. 20, 2015) [hereinafter “*Mille Lacs Opinion*”].

from the federal government's perspective, treaties were an effective way of securing peace with tribes that were in armed conflict with the United States.<sup>9</sup>

A key premise of the treaty process was ensuring that the federal government would protect the Indian tribes and leave them undisturbed from non-Indian settlers in the agreed upon territories (although with only varying degrees of success in practice).<sup>10</sup> In addition, the Supreme Court recognized that treaties were “not a grant of rights to the Indians, but a grant of rights from them – a reservation of those [rights] not granted.”<sup>11</sup> This fundamental principle – that Indian tribes were not granted authorities or rights by the United States, but hold such powers inherently and prior to European contact – undergirds the entirety of federal Indian law. The Supreme Court has accordingly recognized the interplay between tribes and the United States as “that of a nation claiming and receiving the protection of one more powerful: *not* that of individuals abandoning their national character, and submitting as subjects to the laws of a master.”<sup>12</sup> The Court defined this relationship as that of a “ward to his guardian,” and recognized tribes as “domestic dependent *nations*,” thus establishing what we currently understand as the federal government's trust relationship with and obligations towards Indian tribes.<sup>13</sup>

However, federal adherence to this regime of (at least nominally) mutually beneficial treaty making was short lived. In the face of increasing expansion of American settlements and mounting tension between non-Indians and tribes over territory disputes, a succession of Presidents adopted what became known as the “removal” policy. “Removal was characterized by the movement of tribes from the eastern portion of the United States to lands to the west, out of the path of western settlement by non-Indians.”<sup>14</sup>

The primary vehicle for effectuating this policy was the Indian Removal Act of 1830,<sup>15</sup> which resulted in large-scale eastern tribal land cessions that was, at least initially, “voluntary”: for example, in his 1829 State of the Union Address, President Andrew Jackson argued that “it would be as cruel as unjust to compel the aborigines to abandon the graves of their fathers and seek a home in a distant land” without their consent.<sup>16</sup> But this alleged consent quickly devolved into a federal practice of open hostility and forced removal towards those tribes that did not wish to leave their ancestral homelands voluntarily, epitomized by the several Seminole Wars, the Cherokee “Trail of Tears” in 1838, and the Sand Creek and Wounded Knee massacres.<sup>17</sup> While

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<sup>9</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at §§ 1.03[7-9] (Nell Jessup Newton ed., 2012) [hereinafter “COHEN'S”].

<sup>10</sup> See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 591-92 (1823); see also COHEN'S at § 1.03[1].

<sup>11</sup> *United States v. Winans*, 198 U.S. 371, 381 (1905).

<sup>12</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 555 (1832) (emphasis added).

<sup>13</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (emphasis added).

<sup>14</sup> *Keweenaw Bay Indian Cmty. v. Michigan*, 784 F. Supp. 418, 422 (W.D. Mich. 1991).

<sup>15</sup> Ch. 148, 4 Stat. 411 (1830).

<sup>16</sup> *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 916 (8th Cir. 1997) (citation omitted).

<sup>17</sup> See COHEN'S at § 1.03[4, 7-8]; *Seminole Indians of the State of Florida, et al. v. United States*, 13 Ind. Cl. Comm. 326, 338-41 (1964) (discussing history of United States treaty making and conflict with the Seminole groups seeking redress for extinguishment of aboriginal title in the state of Florida); *W. Cherokee Indians v. United States*, 27 Ct. Cl. 1, 2-3 (1891) (discussing the forced removal of the Cherokee to Arkansas and then Oklahoma).

certain tribes resisted removal and remain in their ancestral territory to this day,<sup>18</sup> the removal policy remains a shameful episode in the history of the United States' treatment of tribes.<sup>19</sup>

After having relocated many tribes during the Removal Era, federal Indian policy shifted again in the late 1800s as the United States sought to diminish Indian landholdings in order to sequester Indians into defined reservations, provide “surplus” lands to non-Indian settlers, and eventually integrate Indians into “contemporary” American society.<sup>20</sup> Referred to as the “Reservation Era,” the legal instruments establishing these reservations<sup>21</sup> typically provided for individual Indian land holdings, the cession of “surplus” lands to the United States or private parties, and the discontinuation of otherwise-federally guaranteed monetary annuities in favor of vocational materials and training.<sup>22</sup>

The Reservation Era “was a particularly miserable time for the Indians because the reservation policy deprived Indians of their traditional economy and made them dependent upon the federal government. During the reservation era, the [Bureau of Indian Affairs] BIA became the provider of foods and goods to the tribes.”<sup>23</sup> As a result, “by the 1870s, the government had successfully placed Native Americans in a state of coerced dependency.”<sup>24</sup> As former Assistant Secretary – Indian Affairs Kevin Gover described the period:

[T]he thinking was that it was tribalism that held the Indians back; that what they needed to do was develop the sort of individualism that had been so beneficial for the United States in its expansion, and allotment was the way to do that. But . . . the things that accompanied allotment . . . were really even more dreadful than the allotment policy itself.

For example, there was a system of boarding schools established, and suddenly the Indian people were subject to these mandatory education requirements imposed by the Bureau of Indian Affairs. These schools were run by the Bureau of Indian Affairs, and they would take these kids away from their families, put them in these boarding schools. They might or might not see their parents again for years, or ever. Train them in English. They forbade them their native languages. They forbade them their religions. They cut their hair, and they

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<sup>18</sup> A few examples include the Narragansett Indian Tribe, Oneida Nation, Cayuga Nation, Saint Regis Mohawk Tribe, Penobscot Nation, Passamaquoddy Tribe, and Eastern Band of Cherokee Indians.

<sup>19</sup> With regard to tribes in the West, each region has unique historical circumstances during the 1800s that influenced the status of their land, such as the discovery of gold in California, the Treaty of Guadalupe Hidalgo between Mexico and the United States, and westward expansion along the Oregon Trail in the Pacific Northwest. *See* COHEN’S at § 1.03[5] (“The discovery of gold in California transformed the non-Indian migration westward into a stampede.”); *id.* (describing impact of Oregon Trail migration on Indian tribes); Treaty of Peace, Friendship, Limits and Settlement With the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922.

<sup>20</sup> COHEN’S at § 1.03[6][a].

<sup>21</sup> While this was primarily achieved via Executive Order, Congress ultimately ended the use of Executive Orders to create reservations in 1919. Act of June 30, 1919, ch. 4, § 27, 41 Stat. 34 (codified at 43 U.S.C. § 150).

<sup>22</sup> *See, e.g.*, Treaty with Navajo Tribe of Indians, June 1, 1868, art. V-VIII, 15 Stat. 667; Treaty with the Crows, May 7, 1868, art. VI-IX, 15 Stat. 649.

<sup>23</sup> *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 7 (D.D.C. 1999).

<sup>24</sup> *Id.*

dressed them . . . like non-Indian kids would be dressed, and literally tried to turn them into white people.<sup>25</sup>

In association with this commencement of aggressive policies to acculturate Indians, the United States formally ended its policy of treaty making in 1871.<sup>26</sup> The federal-tribal relationship subsequently evolved into one where Congress enacted legislation to address specific issues for individual tribes and implement broad policy shifts to transform Indian affairs as a whole. Rooted in Congress's constitutionally granted power to regulate commerce with the Indian tribes,<sup>27</sup> as well as its ability enact laws to implement or revoke treaty terms and govern activities on federal lands and territories, Congressional authority in Indian affairs has long been recognized as plenary.<sup>28</sup>

One of Congress's initial and most consequential exercises of this authority was the initiation of what is now considered to be the "Assimilation Era" through the passage of the General Allotment Act of 1887.<sup>29</sup> This law sought to "civilize" Indians and make them part of contemporary, agricultural American life by transforming Indians into private landowners.<sup>30</sup> Instead of preserving tribal territories, the Allotment Act allocated individual Indians a small plot of farmland in the hopes that they would become self-sustaining citizens pursuant to the prevailing American notions of the "civilized" agrarian lifestyle. Under the original conception of the General Allotment Act, the trust period would last for only twenty-five years, after which there was a presumption that individuals would be deemed "competent" to manage their own affairs and take their place in the predominant American culture of the time.<sup>31</sup>

In the words of one court, though, "the objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into the society at large."<sup>32</sup> Tribes felt these deleterious effects in practice: for example, of the nearly 156 million acres of Indian land in 1881, less than 105 million remained by 1890, and less than 78 million by 1900.<sup>33</sup> This irregular loss of land led to a jurisdictional "checkerboard" of

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<sup>25</sup> *Id.* at 8.

<sup>26</sup> See Act of March 3, 1871, 16 Stat. 544, 566 (stating that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power, with whom the United States may contract by treaty: *Provided, further*, That nothing herein shall be construed to invalidate or impair the obligation of any treaty hereto lawfully made and ratified with any such Indian nation or tribe.").

<sup>27</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>28</sup> See, e.g., *White Mountain Apache v. Bracker*, 448 U.S. 136, 142-43 (1980) (the Indian Commerce Clause vests Congress with broad power to regulate tribal affairs and pre-empt state taxation of on reservation commercial activity); accord *United States v. Lara*, 541 U.S. 193, 200 (2004) (the "central function of the Indian Commerce Clause," we have said, "is to provide Congress with plenary power to legislate in the field of Indian affairs") (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)). But see *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (Indian Commerce Clause does not give Congress the authority to abrogate the Eleventh Amendment's sovereign immunity protection for the States); *Del. Tribal Bus. Committee v. Weeks*, 430 U.S. 73 (1977) (Congress's power under the Indian Commerce Clause subject to the Fifth Amendment).

<sup>29</sup> Act of Feb. 8, 1887, ch. 119, 24 Stat. 388. The General Allotment Act is also known as the Dawes Act for its creator, Sen. Henry Laurens Dawes; see COHEN'S at § 1.04.

<sup>30</sup> COHEN'S at § 1.04.

<sup>31</sup> For example, the Supreme Court described the General Allotment Act as an effort to "put an end to tribal organization" and to "dealings with Indians . . . as tribes." *United States v. Celestine*, 215 U.S. 278, 290 (1909).

<sup>32</sup> *Yakima v. Yakima Indian Nation*, 502 U.S. 251, 254 (1992).

<sup>33</sup> See generally COHEN'S at § 1.04 (internal citations omitted).

non-Indian and Indian landholdings within the outer boundaries of a reservation that persists even today, thus confusing issues related to civil and criminal jurisdiction, the provision of governmental services, etc.<sup>34</sup> In addition, because:

[A]llottees passed their interests on to multiple heirs, ownership of allotments became increasingly fractionated, with some parcels held by dozens of owners. A number of factors augmented the problem: Because Indians often died without wills, many interests passed to multiple heirs; Congress' allotment Acts subjected trust lands to alienation restrictions that impeded holders of small interests from transferring those interests, Indian lands were not subject to state real estate taxes, which ordinarily serve as a strong disincentive to retaining small fractional interests in land. The fractionation problem proliferated with each succeeding generation as multiple heirs took undivided interests in allotments.<sup>35</sup>

The allotment policy fell out of favor in the early 1900s as the federal government fully grasped the devastation that its consequences had wrought on tribes.<sup>36</sup> The seminal Meriam Report in 1928 concluded allotment was a failure that resulted in deplorable living conditions for American Indians.<sup>37</sup> The Report pointedly recognized “the comparative failure of several of the large policies of the past, notably, the whole plan of individual allotment of land, the issuance of fee patents, the removal of restrictions, and the declaration of competency,” and further noted the allotment policy’s “failure to provide adequately for the increased costs resulting from its adoption.”<sup>38</sup>

In an attempt to remedy this disastrous policy, Congress passed the Indian Reorganization Act (IRA) in 1934, ushering in a (temporary) new era of tribal self-determination and the reversal of Indian land dispossession that had characterized the previous half-century. The “overriding purpose” of the IRA was to “establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically,”<sup>39</sup>

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<sup>34</sup> See, e.g., *S. Ute Indian Tribe v. Bd. of County Comm'rs*, 855 F. Supp. 1194, 1196 (D. Colo. 1994):

The lands within the Reservation boundaries are a checkerboard of ownership interests, a characteristic common to many reservations. They include tribal lands held in trust by the United States for the benefit of the Tribe, lands held by the Tribe in its own name, individual Indian allotments subject to federal trust restrictions, land owned in fee simple by individual Indians, and lands held in fee simple by non-Indian third parties.

<sup>35</sup> *Babbitt v. Youpee*, 519 U.S. 234, 237-38 (1997) (citations omitted); see also U.S. DEPARTMENT OF THE INTERIOR, 2016 STATUS REPORT: LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS 6-16 (Nov. 1, 2016), available at [https://www.doi.gov/sites/doi.gov/files/uploads/2016\\_buy-back\\_program\\_final\\_0.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/2016_buy-back_program_final_0.pdf).

<sup>36</sup> See *The Indian Problem: Resolution of the Committee of One Hundred Appointed by the Secretary of the Interior*, H. R. DOC. NO. 149 (1924); THE INSTITUTE FOR GOV'T. RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION: REPORT OF A SURVEY MADE AT THE REQUEST OF HONORABLE HUBERT WORK, SECRETARY OF THE INTERIOR, AND SUBMITTED TO HIM, FEBRUARY 21, 1928 (Lewis Meriam ed., 1928. Johns Hopkins Press) [hereinafter “Meriam Report”]; *A Resolution Directing the Committee on Indian Affairs of the United States Senate to Make a General Survey of the Condition of the Indians of the United States*, S. Res. 79, 70th Cong. (1928); REPORT TO THE NATIONAL ADVISORY COMMITTEE ON EDUCATION, FEDERAL RELATIONS TO EDUCATION, 270-80 (Oct. 1931).

<sup>37</sup> Meriam Report at 461 n.7, 470.

<sup>38</sup> *Id.* at 461.

<sup>39</sup> *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

“rehabilitate the Indian’s economic life,” and “give the Indians the control of their own affairs and of their own property.”<sup>40</sup> The IRA had a secondary focus of strengthening the tribal land base through the Secretary of the Interior’s authorization to take land into trust for tribes.<sup>41</sup> As then-Commissioner of Indian Affairs John Collier acknowledged in his testimony before Congress during the introduction of the IRA:

The Indians are continuing to lose ground; yet Government costs must increase, while the Indians must still continue to lose ground, unless existing law be changed. . . . While being stripped of their property, these same Indians cumulatively have been disorganized as groups and pushed to a lower social level as individuals . . . . The disastrous condition peculiar to the Indian situation in the United States . . . is directly and inevitably the result of existing law – principally, but not exclusively, the allotment law and its amendments and its administrative complications.<sup>42</sup>

To that end, the IRA included provisions designed to encourage Indian tribes to reorganize in a way that would strengthen Indian self-governance. Congress authorized Indian tribes to adopt their own constitutions and associated laws<sup>43</sup> and to subsequently request the Secretary of the Interior to issue charters of incorporation,<sup>44</sup> which in turn were designed to “rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.”<sup>45</sup> In service of the broader goal of recognizing the separate cultural identity of Indians, the IRA further encouraged Indian tribes to take control of their business and economic affairs.<sup>46</sup> Congress also sought to ensure that tribes maintained a solid territorial base by, among other things, “put[ting] a halt to the loss of tribal lands through allotment.”<sup>47</sup> And in order to resolve Indian land claims and trust accounting and management claims with finality, Congress established the Indian Claims Commission in 1946<sup>48</sup> in order to “permit[] consideration of Indian claims under the broad scope of ‘fair and honorable dealings,’ a latitude again which the court lacked prior to passage of the act.”<sup>49</sup>

While these laudable goals did not always achieve positive results on the ground, the IRA remains a foundational principle of federal Indian law. Many tribes operate governments under

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<sup>40</sup> *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. REP. NO. 73-1804 (1934), and 78 CONG. REC. 11125 (1934) (statements of Sen. Wheeler)). See also Meriam Report at 189-345 (detailing the deplorable status of health); 430-54 (poverty); *id.* at 346-430 (education), *id.* at 460-79 (loss of land). The IRA did not confine itself to addressing the ills of allotment, as evidenced by the inclusion of Pueblos in the definition of “Indian tribe.” 25 U.S.C. § 5129.

<sup>41</sup> *The Meaning of “Under Federal Jurisdiction” for Purposes of the Indian Reorganization Act*, M-37029 at 7, 18-19 (Mar. 12, 2014) [hereinafter “*Federal Jurisdiction Opinion*”].

<sup>42</sup> *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the H. Committee on Indian Affairs*, 73rd Cong. 15-16 (1934) (Statement of John Collier, Commissioner of Indian Affairs).

<sup>43</sup> 25 U.S.C. § 5123.

<sup>44</sup> 25 U.S.C. § 5124.

<sup>45</sup> *Mescalero Apache Tribe*, 411 U.S. at 152 (citation omitted).

<sup>46</sup> See Pub. L. No. 73-383, 48 Stat. 984 (1934) (“An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form businesses and other organizations. . .”).

<sup>47</sup> *Mescalero Apache Tribe*, 411 U.S. at 151.

<sup>48</sup> Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049.

<sup>49</sup> *Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1110 (Fed. Cir. 1992) (citations omitted).

IRA constitutions. Tribes routinely request that the Department place their fee lands into trust status under this law,<sup>50</sup> and the IRA-initiated Bureau of Indian Affairs' Indian hiring preference remains in effect.<sup>51</sup> Congress also amended the IRA in 1994 to ensure that the United States treats all tribes equally regardless of when they were federally-recognized,<sup>52</sup> as well as to prohibit "federal agencies from classifying, enhancing, or diminishing the rights of any federally recognized Indian tribe relative to other federally recognized tribes."<sup>53</sup>

Despite these important reforms, tribes would once again face a destructive shift in Indian law and policy shortly after the passage of the IRA. Due to a variety of pressures and dynamics in national politics in the aftermath of World War II, there was an aggressive push to reduce or eliminate federal programs and funds assisting tribes, to once again attempt to integrate Indians into mainstream "American" life, and to discharge the United States from its trust obligations to the tribes.<sup>54</sup> This push led to a number of "termination" statutes that ended the federal-tribal trust relationship with specific tribes;<sup>55</sup> ultimately, the federal government officially terminated its relationship with over one hundred tribes and granted states extensive jurisdiction over Indian territories.<sup>56</sup>

During this Termination Era, Congress attempted to sever the federal responsibility towards tribes in other manners as well. For example, Congress established the Indian Relocation Program in which it offered reservation Indians moving expenses, job training, per diems, and other benefits if they would leave their tribal life, move to certain designated cities, and take up a vocation.<sup>57</sup> Congress also enacted Public Law 280 (P.L. 280),<sup>58</sup> which transferred criminal and civil jurisdiction over Indian lands from federal to state governments in a number of states, namely California, Minnesota, Nebraska, Oregon, and Wisconsin, and Alaska.<sup>59</sup> Congress amended P.L. 280 in 1968 in order to allow the remaining states to assume such jurisdiction with the consent of the affected tribe.<sup>60</sup>

As with allotment, the Termination Era proved to be an exercise of assimilationist paternalism that acted as a blunt instrument against the exercise of tribal self-governance. But

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<sup>50</sup> 25 U.S.C. § 5108.

<sup>51</sup> 25 U.S.C. § 5117.

<sup>52</sup> Pub. L. No. 103-263, 108 Stat. 709 (1994) (codified at 25 U.S.C. § 5123(f)-(g)); *see also* Pub. L. No. 103-454, 108 Stat. 4791 (1994) (codified at 25 U.S.C. § 5131) (requiring Interior to publish a list of all federally recognized Indian tribes).

<sup>53</sup> *Miami Nation of Indians of Ind., Inc. v. Babbitt*, 112 F. Supp. 2d 742, 758 (N.D. Ind. 2000).

<sup>54</sup> *See* H. Con. Res. 108, 83rd Cong. (1953) (providing that "it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States," and stating "the declared sense of Congress that" Indian tribes in certain states and their members "should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians").

<sup>55</sup> *See, e.g.*, Pub. L. No. 83-399, 68 Stat. 250 (1954) (terminating Menominee Tribe).

<sup>56</sup> *Allen v. United States*, 871 F. Supp. 2d 982, 990 (N.D. Cal. 2012).

<sup>57</sup> Indian Relocation Act of 1956, Pub. L. No. 84-959, 70 Stat. 986.

<sup>58</sup> Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360).

<sup>59</sup> *See generally* COHEN'S at §1.06. The law did not apply to the Red Lake Reservation in Minnesota, Warm Springs Reservation in Oregon, or Menominee Reservation in Wisconsin. *Id.*

<sup>60</sup> Pub. L. No. 90-284, 82 Stat. 73, 78-80 (1968) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1323, 28 U.S.C. § 1360, 1360 note).

despite these federal failures, the tide once again turned during the Johnson and Nixon administrations, which ushered in a new, pro-sovereignty perspective. For example, within the larger context of the Civil Rights movement, President Johnson introduced the National Council on Indian Opportunity that was tasked with coordinating the growth and improvement of federal Indian programs.<sup>61</sup> In an address to Congress, President Johnson stressed that:

...there can be no question that the government and the people of the United States have a responsibility to the Indians. In our efforts to meet that responsibility, we must pledge to respect fully the dignity and the uniqueness of the Indian citizen. That means partnership – not paternalism.<sup>62</sup>

President Nixon would go a step further by rejecting termination and advocating that tribes directly administer the federal programs designed for their benefit. He concluded:

In place of policies which oscillate between the deadly extremes of forced termination and constant paternalism, we suggest a policy in which the Federal government and the Indian community play complementary roles. But most importantly, we have turned from the question of whether the Federal government has a responsibility to Indians to the question of how that responsibility can be best fulfilled....the Federal government needs Indian energies and Indian leadership if its assistance is to be effective in improving the conditions of Indian life. It is a new and balanced relationship between the United States government and the first Americans that is at the heart of our approach to Indian problems.<sup>63</sup>

Congress supported this reaffirmation of tribal self-determination and self-government through a number of consequential initiatives. These include, but were not limited to:

- The Indian Self Determination and Education Assistance Act (ISDEAA) of 1975.<sup>64</sup> The purpose of the ISDEAA was “to implement a policy of self-determination whereby Indian tribes are given a greater measure of control over the programs and services provided to them by the Federal government.”<sup>65</sup> As such, the ISDEAA authorizes federal agencies “to enter into contracts with Indian tribes in which the tribes promise to supply federally funded services, for example tribal law enforcement services, that a federal agency would otherwise provide.”<sup>66</sup>
- The Indian Financing Act of 1974.<sup>67</sup> In an attempt to provide access to private money sources to Indians and Indian tribes, Congress authorized the United States

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<sup>61</sup> See Exec. Order No. 11399, 30 Fed. Reg. 4,245 (Mar. 6, 1968).

<sup>62</sup> Special Message to the Congress on the Problems of the American Indian: “The Forgotten American,” PUB. PAPERS OF THE PRESIDENT OF THE U.S. – LYNDON B. JOHNSON 335 (Mar. 6, 1968) [hereinafter “Johnson Message”].

<sup>63</sup> Message from the President of the United States Transmitting Recommendations for Indian Policy, PUB. PAPERS OF THE PRESIDENT OF THE U.S. – RICHARD M. NIXON 212 (July 8, 1970) [hereinafter “Nixon Message”].

<sup>64</sup> Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 5301 *et seq.*).

<sup>65</sup> *Navajo Health Found.-Sage Mem’l Hosp., Inc. v. Burwell*, No. CIV 14-0958 JB/GBW, 2016 U.S. Dist. LEXIS 152916, at \*122 (D.N.M. Nov. 3, 2016) (quoting S. REP. NO. 93-862, at 13 (1974)).

<sup>66</sup> *Red Lake Band of Chippewa Indians v. United States DOI*, 624 F. Supp. 2d 1, 5 (D.D.C. 2009).

<sup>67</sup> Pub. L. No. 93-262, 88 Stat. 77 (1974) (codified as amended in scattered sections of 25 U.S.C.).

to: (1) guarantee up to ninety percent of the unpaid principal and interest due on any loan made to approved organizations of Indians and individual Indians; and (2) in lieu of such guaranty, to insure loans under a federally-approved agreement whereby the lender will be reimbursed for certain losses.<sup>68</sup>

- The Menominee Restoration Act of 1973,<sup>69</sup> which repealed the termination-era Menominee Termination Act and restored the Tribe's rights and status.
- The American Indian Policy Review Commission,<sup>70</sup> which proffered a comprehensive review of the historical and legal developments of federal Indian law in order to determine the nature and scope of necessary revisions in the formulation of tribal policies and programs.

Subsequent reforms included amendments to the ISDEAA authorizing Departmental transfer of management of and administration of education, governance, and social welfare programs to the tribes under so-called "638" contracts and compacts (named after the ISDEAA's Public Law number),<sup>71</sup> the treatment of tribes as states under environmental laws such as the Clean Water Act and Clean Air Act, which authorize states, and accordingly, tribes, to take the lead in implementing federal programs under those statutes,<sup>72</sup> and protection of cultural and religious practices in the Archaeological Resources Protection Act,<sup>73</sup> Native American Graves Protection and Repatriation Act,<sup>74</sup> Religious Freedom Restoration Act,<sup>75</sup> American Indian Religious Freedom Act,<sup>76</sup> National Historic Preservation Act,<sup>77</sup> and Indian Arts and Crafts Act.<sup>78</sup> Congress also acted to enhance Indian education by enacting the Tribally Controlled Schools Act.<sup>79</sup> These laws continue to provide tribes and the United States with some of the tools necessary to administer programs and services in Indian Country.

In addition to congressional action, nearly every President in modern times has supported tribal self-governance and the unique government-to-government relationship between the United States and Indian tribes.<sup>80</sup> The most recent endorsement of the self-determination policy

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<sup>68</sup> See, e.g., *United Nat'l Bank v. United States DOI*, 54 F. Supp. 2d 1309, 1311 (S.D. Fla. 1998).

<sup>69</sup> Pub. L. No. 93-197, 87 Stat. 770 (1973).

<sup>70</sup> Pub. L. No. 93-580, 88 Stat. 1910 (1974) (codified as amended at 25 U.S.C. § 174 note); see also AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT (May 17, 1977).

<sup>71</sup> Pub. L. No. 103-413, 108 Stat. 4250 (1994); Pub. L. No. 100-472, 102 Stat. 2285 (1987) (both codified as amended in scattered sections of 25 U.S.C.).

<sup>72</sup> 33 U.S.C. § 1377(e); 42 U.S.C. § 7601(d)(1)(A).

<sup>73</sup> 16 U.S.C. §§ 470aa-470mm.

<sup>74</sup> 25 U.S.C. §§ 3001-3013.

<sup>75</sup> 42 U.S.C. §§ 2000bb-2000bb-4.

<sup>76</sup> 42 U.S.C. §§ 1996-1996a.

<sup>77</sup> 54 U.S.C. § 300101 *et seq.*

<sup>78</sup> 25 U.S.C. §§ 305-310.

<sup>79</sup> 25 U.S.C. §§ 2501-2511.

<sup>80</sup> See President Barack Obama, Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009); Exec. Order No. 13,336, 69 Fed. Reg. 25,295 (May 5, 2004) (President George W. Bush executive order to assist American Indian and Alaska Native students in meeting educational standards); Remarks to Indian and Alaska Native Tribal Leaders, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON 800-04 (Apr. 29, 1994); Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE

was President Obama’s establishment of the White House Council on Native American Affairs, with the Secretary of the Interior serving as the Chair.<sup>81</sup> The Order requires cabinet-level participation and interagency coordination for the purpose of “establish[ing] a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities.”<sup>82</sup>

In sum, over the course of American history, tribes have had to endure federal policies and priorities that were often implemented against tribes’ will and led to devastating consequences to their land, natural resources, and livelihood. Even today, tribes must confront the lingering effects of those past decisions, whether in the form of poverty, health crises, underemployment, and other issues. And while more recent developments in federal policy have taken affirmative steps towards fulfilling the trust responsibility and the goals of self-determination, it is important to acknowledge the many instances where the United States sought to terminate and disempower tribes, outlaw their cultural identity and political systems, and forcibly integrate them into American society in competing exercises of paternalism, misunderstanding, and, at times, outright malice.

The Department will be best equipped to make decisions today that avoid the mistakes of the past if it remains guided by this historical context and these foundational legal principles. I next discuss the current state of the law regarding a number of key Indian law concepts, and examples of their current application, to illustrate their ongoing relevance.

## **II. BASIC LEGAL PRINCIPLES IN FEDERAL INDIAN LAW**

Perhaps the two most fundamental pillars of the relationship between tribes and the United States are tribes’ status as “domestic, dependent nations” towards whom the United States owes a trust responsibility, and Congress’s plenary power over Indian affairs. The foundational principle at the heart of the trust relationship is that Indian tribes are sovereign governments that possess inherent sovereignty that pre-dates European contact and the Constitution.<sup>83</sup> Upon the establishment of the United States government, the tribes were, and continue to be, “self-governing sovereign political communities.”<sup>84</sup> As discussed above, and even despite the injustices visited upon tribes during the Assimilation and Termination eras, this separate sovereign status was recognized in treaties and executive orders during the 1800s.

The United States Supreme Court has developed an extensive body of precedent defining the scope of Indian tribes’ political status and their relationship to the United States. In several early 1900s landmark cases involving the Cherokee Nation, the Court examined whether state law applied within the Cherokee Nation’s territory. The Court legally defined the unique

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H. W. BUSH 622 (Jun. 14, 1991); Statement on Indian Policy, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 96 (Jan. 24, 1983); Remarks at a Meeting with American Indian Leaders, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GERALD R. FORD 670 (July 16, 1976); Nixon Message; Johnson Message.

<sup>81</sup> Exec. Order No. 13647, 78 Fed. Reg. 39,539 (July 1, 2013).

<sup>82</sup> *Id.*

<sup>83</sup> *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

<sup>84</sup> *Id.*

federal-tribal relationship as that of a “ward to his guardian” and recognized tribes as “domestic dependent nations.”<sup>85</sup> The Court also concluded that state law had no effect within the Cherokee Nation, as such jurisdiction would “interfere forcibly with the relations established between the United States and the Cherokee nation...”<sup>86</sup> The Court noted that the Cherokee treaties “explicitly recognize[ed] the national character of the Cherokees, and their right of self-government . . . [and] assum[ed] the duty of protection, and of course pledging the faith of the United States for that protection.”<sup>87</sup>

As the Supreme Court has held, “[i]n carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party.”<sup>88</sup> Rather, the United States “has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.”<sup>89</sup> And recognizing that “Indian tribes are the wards of the nation” and “owe no allegiance to the States, and receive from them no protection . . . due to the course of dealing of the Federal Government with them and the treaties in which it has been promised,” the Court has noted that “there arises the [federal] duty of protection.”<sup>90</sup> These principles – the existence of tribal nations and sovereignty, the exclusion of state authority, and the federal protection of Indian nations – form the basis of the special trust relationship between the United States and Indian tribes.

A second foundational Indian law principle is that the federal responsibility to protect Indian interests vests Congress with plenary authority over Indian affairs. The Supreme Court has repeatedly cited as a source of this authority the Indian Commerce Clause, which provides that “Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.”<sup>91</sup> The Court has concluded that the scope of the plenary authority is vast and exclusive, and encompasses the ability to legislate regarding the scope of the trust responsibility, the scope of tribal authority, the provision of services and benefits, and the application of special protections or treatment based on the political status of Indian tribes.<sup>92</sup>

Congressional plenary authority over Indian tribes has immeasurable consequences, though I only focus on a few of them in this Opinion. First, combined with the Supremacy Clause in the U.S. Constitution, state jurisdiction over Indian tribes and on-reservation Indians is largely proscribed.<sup>93</sup> That is, “state jurisdiction is pre-empted by the operation of federal law if it

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<sup>85</sup> *Cherokee Nation*, 30 U.S. at 17.

<sup>86</sup> *Worcester*, 31 U.S. at 561.

<sup>87</sup> *Id.* at 556.

<sup>88</sup> *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

<sup>89</sup> *Id.*; accord *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) (incorporating *Seminole*’s “exacting fiduciary standard” requirement).

<sup>90</sup> *United States v. Kagama*, 118 U.S. 375, 383-84 (1886).

<sup>91</sup> See U.S. CONST. art. I, § 8, cl. 3; see also *Mancari*, 417 U.S. at 551-52 (citing Indian Commerce Clause as among the sources of Congress’s authority to legislate in the field of Indian affairs).

<sup>92</sup> See, e.g., *Lara*, 541 U.S. at 200 (describing Congress’s authority to legislate in the field of Indian affairs as “plenary and exclusive”).

<sup>93</sup> For example, in 1959, the Supreme Court recognized in *Williams v. Lee*, 358 U.S. 217 (1959); that the right of Indians to self-govern was a fundamental aspect of tribal sovereignty, and accordingly prohibited the application of state law to on-reservation activities in many instances. *Id.* at 218, 223; see also *Bracker*, 448 U.S. at 142, 149 (holding no state taxation given the pervasive federal regulation of timber on the reservation and the underlying

interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.”<sup>94</sup> “The exercise of state authority may also be barred by an independent barrier -- inherent tribal sovereignty -- if it ‘unlawfully [infringes] ‘on the right of reservation Indians to make their own laws and be ruled by them.’”<sup>95</sup> Second, “Indian tribes exercise inherent sovereign authority and retain those aspects of inherent sovereignty not expressly limited by Congress or treaty or implicitly divested by virtue of their domestic dependent status.”<sup>96</sup> “Thus, unless and until Congress acts, the tribes retain” their historic sovereign authority,<sup>97</sup> and states cannot modify or diminish this sovereignty.

While the trust responsibility and Congress’s plenary authority are perhaps the two most fundamental aspects of federal Indian law, there are a number of other prevailing legal principles that require discussion. First, like other sovereigns, tribes are immune from suit absent an express waiver or congressional abrogation.<sup>98</sup> Second, federal statutes providing special benefits to Indians and Indian tribes are not unconstitutional race-based classifications because tribal membership is a political status, not a racial one.<sup>99</sup> Third, given that tribes pre-dated the United States and were not parties to the Constitutional Convention, tribes are not subject to the United States Constitution absent congressional action to the contrary.<sup>100</sup> Instead, tribes are subject to the Indian Civil Rights Act of 1968 (ICRA),<sup>101</sup> which applies certain provisions of the Bill of Rights to tribes, although customized to the unique cultural and political practices and structures of tribal governments.<sup>102</sup> Fourth, courts have developed a doctrine known as the “Indian canons of construction,” which are applied when interpreting Indian statutes, treaties, and regulations, whereby any silence or ambiguity in such sources must be construed in favor of the Indians and

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tradition of Indian sovereignty over their territory, and a “particularized inquiry” showing assessment of state motor carrier license tax would obstruct federal policies).

<sup>94</sup> *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

<sup>95</sup> *Id.* at 334 n.16 (quoting *Bracker*, 448 U.S. at 142).

<sup>96</sup> *Kelsey v. Pope*, 809 F.3d 849, 855 (6th Cir. 2016) (citations and internal quotations omitted).

<sup>97</sup> *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. \_\_\_, 134 S. Ct. 2024, 2030 (2014).

<sup>98</sup> The Supreme Court recently reiterated this long-standing principle in the *Bay Mills*, noting: “[w]e have time and again treated the ‘doctrine of tribal immunity [as] settled law’ and dismissed any suit against a tribe absent congressional authorization (or a waiver).” *Id.* at 2030-31 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) (alteration and parenthetical in original)).

<sup>99</sup> *Mancari*, 417 U.S. at 553 n.24.

<sup>100</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. Thus in *Talton v. Mayes*, 163 U.S. 376 (1896) this Court held that the Fifth Amendment did not ‘[operate] upon’ ‘the powers of local self-government enjoyed’ by the tribes.”).

<sup>101</sup> 25 U.S.C. §§ 1301-1304.

<sup>102</sup> For example, while ICRA does include a “free exercise” clause, ICRA does not require a separation of church and state within a tribal government. See 25 U.S.C. § 1302(1). It also does not include an automatic right to defense counsel in tribal courts in most cases. See *Means v. Navajo Nation*, 432 F.3d 924, 935 (9th Cir. 2005). Amendments to ICRA under the Tribal Law and Order Act of 2010 required that defendants be afforded the right to effective assistance of counsel, including indigent defense, whenever a tribe imposes a term of more than one year imprisonment in a criminal proceeding. See Pub. L. No. 111-211, 124 Stat. 2258, 2280 (2010); 25 U.S.C. § 1302. The latter issue was recently reaffirmed by a unanimous Supreme Court, which concluded that the Sixth Amendment did not preclude the use of an uncounseled tribal court conviction as a predicate offense for a federal prosecution under a statute for which such predicates would increase the potential sentence. *United States v. Bryant*, 579 U.S. \_\_\_, 136 S. Ct. 1954 (2016).

pursuant to their original understanding of the document at issue.<sup>103</sup> “Rooted in the unique trust relationship between the United States and the Indians . . . the Indian canon applies to statutes as well as treaties: The form of the enactment does not change the presumption that Congress generally intends to benefit the Nations.”<sup>104</sup>

Courts have also recognized the ongoing enforceability of treaties.<sup>105</sup> It is settled law that only Congress can abrogate or limit rights reserved under an Indian treaty, which must be construed in accordance with the Indian canons.<sup>106</sup> In certain cases, and often with the support of the United States, tribes have obtained legal relief for protection of rights set forth in treaties, such as hunting and fishing rights both on and off the reservation. For example, in the 2016 *United States v. Washington* case,<sup>107</sup> the Ninth Circuit sided with tribes and the United States and held that the State of Washington could not maintain certain culverts over off-reservation waterways that diminished salmon runs to the point that tribes were functionally prohibited from exercising their guaranteed treaty fishing rights. Invoking the Indian canons of construction, the court held that effectuating the relevant treaties’ reservation of a permanent and adequate supply of salmon for the tribes necessarily included protection from environmental degradation of salmon.<sup>108</sup> Because the State’s construction of barrier culverts undermined these protections, they were impermissible.<sup>109</sup>

Another significant concept in Indian law relates to the legal status and disposition of tribal lands. Both on-reservation and off-reservation, Indian tribes can hold land in fee, restricted fee, or in trust by the United States on behalf of tribes. Restricted fee and trust land cannot be sold without federal approval and is generally free from state authority.<sup>110</sup> In an attempt to reverse the various federal policies over the years that led to a significant reduction in Indian territory, the establishment of reservations, and the allotment of parcels for individual Indian use, there has been a renewed effort to rebuild tribes’ land base, principally through the IRA or specific, mandatory trust land statutes as part of land claim settlements. Tribes can acquire land in fee simple and request that the Department accept that land into trust status pursuant to the IRA’s “fee to trust” process, through which the Secretary of the Interior can acquire an “interest in land . . . within or without existing reservations . . . for the purpose of providing lands for Indians.”<sup>111</sup> The Department has extensive regulations that outline the requirements and process

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<sup>103</sup> *Mille Lacs*, 526 U.S. at 200; see also *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992).

<sup>104</sup> *Chickasaw Nation v. United States*, 534 U.S. 84, 99 (2001) (O’Connor, J., dissenting) (citations and internal quotations omitted).

<sup>105</sup> *Worcester*, 31 U.S. at 559.

<sup>106</sup> *Mille Lacs*, 526 U.S. at 200; *United States v. Dion*, 476 U.S. 734, 738-40 (1986); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 690 (1979).

<sup>107</sup> *United States v. Washington*, 827 F.3d 836 (9th Cir. 2016) (The State of Washington petitioned for rehearing/rehearing *en banc* on Aug. 11, 2016. The Ninth Circuit’s consideration of the petition and responses by the United States and tribes remains pending).

<sup>108</sup> *Id.* at 850-52.

<sup>109</sup> *Id.* at 853.

<sup>110</sup> See generally COHEN’S at § 15.06; see also *Citizens Against Casino Gambling v. Chaudhuri*, 802 F.3d 267, 274 (2d Cir. 2015) (generally explaining distinctions between fee, restricted fee, and trust lands).

<sup>111</sup> 25 U.S.C. § 5108. In 2009, the Supreme Court held in *Carcieri v. Salazar*, 555 U.S. 379 (2009), that the Department’s authority to acquire land under the first definition of “Indian” in the IRA was limited to those tribes who were “under federal jurisdiction” upon the passage of the IRA in 1934. See also *Federal Jurisdiction Opinion*.

for taking land into trust.<sup>112</sup> Congress may also direct Department to take land into trust for specific tribes, often as part of a land claim settlement act.<sup>113</sup>

Another area of Departmental concern is whether federal law or other developments have diminished or otherwise altered the boundaries of Indian reservations. The Supreme Court has established a three-pronged analysis in these cases: (1) the most probative evidence of congressional intent is the language of the statute itself; (2) next, courts will look at the circumstances surrounding the passage of the act; and (3) if necessary, courts will look to events that occurred after the passage of the act to decipher congressional intent.<sup>114</sup> Most recently, and with the support of the United States, the Supreme Court unanimously ruled in *Nebraska v. Parker*<sup>115</sup> that the Omaha reservation in Nebraska remained intact given a lack of clear, unequivocal intent by Congress to diminish the reservation, notwithstanding the sale of lands to non-Indians under subsequent congressional acts.<sup>116</sup> In doing so, the Court noted that subsequent demographic history is “the least compelling” evidence of diminishment, and “[o]nly Congress has the power to diminish a reservation.”<sup>117</sup>

The Department also actively administers numerous statutory schemes concerning Indian tribes and protecting various tribal rights. One such area of the law is the doctrine of reserved tribal water rights. Since the early 1900s, pursuant to the U.S. Supreme Court’s seminal decision in *Winters v. United States*,<sup>118</sup> the Supreme Court and other federal and state courts have recognized that the establishment of Indian and other federal reservations also includes an implied reservation of water necessary to support the purposes of the reservation.<sup>119</sup> Courts applying the so-called *Winters* doctrine recognize that absent such implied rights, tribes would lose their water via upstream appropriation or degradation by non-Indians under state law.<sup>120</sup> The Department has entered into a number of Indian water rights settlements to resolve tribes’

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<sup>112</sup> See generally 25 C.F.R. Part 151 (regulating process of taking land into trust on behalf of tribes).

<sup>113</sup> See, e.g., Puyallup Indian Tribe Land Claims Settlement Act, Pub. L. No. 109-224, 120 Stat. 376 (2006); Ponca Restoration Act, Pub. L. No. 101-484, 104 Stat. 1167 (1990); Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986); White Earth Reservation Land Settlement Act, Pub. L. No. 99-264, 100 Stat. 61 (1986).

<sup>114</sup> *Solem v. Bartlett*, 465 U.S. 463, 467-68, 470-71 (1984).

<sup>115</sup> 577 U.S. \_\_\_, 136 S. Ct. 1072 (2016).

<sup>116</sup> *Id.* at 1082-83.

<sup>117</sup> *Id.* at 1082.

<sup>118</sup> 207 U.S. 564 (1908).

<sup>119</sup> In *Winters*, the Court found that the agreement creating the Fort Belknap Reservation sought to convert the Gros Ventre and Assiniboine Indians into a “pastoral and civilized” people, but that the reservation lands “were arid, and, without irrigation, were practically valueless.” Accordingly, the Court held that the establishment of the reservation impliedly reserved the amount of water necessary to irrigate its lands and to provide water for other purposes. *Id.* at 576-77. See also *Cappaert v. United States*, 426 U.S. 128, 138-39 (1976); *United States v. Adair*, 723 F.2d 1394, 1408-09 (9th Cir. 1984); *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 35 P.3d 68, 71-73 (Ariz. 2001); *Montana ex rel. Greely v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754, 762-66 (Mont. 1985). Applying this rule, the Ninth Circuit in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), observed that although “the specific purposes of an Indian Reservation . . . were often unarticulated. . . [t]he general purpose, to provide a home for the Indians, is a broad one and must be liberally construed.” *Id.* at 47. Accordingly, the court interpreted a one-paragraph Executive Order – which did not list any particular purpose, but instead simply stated that the land would be “set apart as a reservation for said Indians” – as setting aside the Colville Reservation for agriculture and traditional fisheries under a “homeland” concept. *Id.* at 47-48.

<sup>120</sup> *Walton*, 647 F.2d at 46.

water rights and has protected those interests in water adjudications, particularly in the western United States.<sup>121</sup>

The Department also plays a key role in many important decisions involving Indian gaming activities, along with the National Indian Gaming Commission (NIGC). In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA) to address the dire need for economic development in Indian country and to provide a source of revenue to support tribal self-governance.<sup>122</sup> IGRA provides a check and balance system between tribal and state sovereign authority to allow for intergovernmental compacts between tribes and states, approved by the Secretary of the Interior, for class III forms of gaming on “Indian lands.”<sup>123</sup> IGRA requires that gaming revenue be used for tribal programs and welfare and that states negotiate compacts with tribes in good faith, prohibits state taxation of gaming revenue, and imposes certain gaming limitations on lands acquired after 1988.<sup>124</sup> The NIGC closely regulates Indian gaming, which works in concert with the Department to make legal determinations and other authorizations regarding Indian gaming operations.<sup>125</sup> Today, 486 Indian tribes engage in some form of gaming activities in twenty-eight states, generating revenue estimated at \$28.5 billion.<sup>126</sup> IGRA has been instrumental in providing tribes with economic opportunity to support the development and growth of their tribal nations, consistent with Congress’ original vision.<sup>127</sup>

Another area of the Department’s focus is the protection of Indian children. Congress enacted the Indian Child Welfare Act (ICWA) in 1978 to address the alarming rate of removal of Indian children from their families for placement in non-Indian homes.<sup>128</sup> Congress concluded that the loss of these children from their tribal homes and community resulted in their unfamiliarity with their cultural identity and a lack of any connection to the tribes in which they remained eligible for enrollment, whether they knew it or not.<sup>129</sup> ICWA acknowledges the

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<sup>121</sup> COHEN’S at §19.06; *see also* Answering Brief for Intervenor United States, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. 15-55896 (9th Cir. Feb. 12, 2016) (argued Oct. 18, 2016).

<sup>122</sup> Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701-2721).

<sup>123</sup> *See generally* 25 U.S.C. § 2710(d). Class I gaming under IGRA includes social games of minimal value or traditional forms of Indian gaming. 25 U.S.C. § 2703(6); *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1141 (D. Or. 2005). Class II gaming includes bingo and similar games, including pull-tabs and lotto, if played in the same location as bingo, but does not include “electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.” 25 U.S.C. § 2703(7)(B)(ii). Class III gaming includes all forms of gaming not covered by Class I or Class II gaming, such as slot machines, casino games, and sports betting. 25 U.S.C. § 2703(8); *Dewberry*, 406 F. Supp. 2d at 1141.

<sup>124</sup> 25 U.S.C. § 2710(b)(2)(B)(ii) (limiting uses of gaming revenues to tribal programs and general welfare); 25 U.S.C. § 2710(d)(7)(B)(iii) (mandating that states negotiate in good faith); 25 U.S.C. § 2710(d)(4) (prohibiting state taxation); 25 U.S.C. § 2719(a) (imposing restrictions on gaming on Indian lands acquired after October 17, 1988).

<sup>125</sup> *See generally* 25 U.S.C. § 2704.

<sup>126</sup> NATIONAL INDIAN GAMING COMMISSION, FACTS AT A GLANCE (Aug. 2015), *available at* <http://www.nigc.gov/images/uploads/Fact%20Sheet%20August%202015.pdf>.

<sup>127</sup> *See Indian Gaming: The Next 25 Years: Hearing Before the United States Senate Committee on Indian Affairs* 113th Cong. 14-18 (2014) (statement of Kevin Washburn, United States Department of the Interior, Assistant Secretary-Indian Affairs).

<sup>128</sup> Pub. L. No. 95-608, § 2, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. §§ 1901-1963).

<sup>129</sup> 25 U.S.C. § 1901(3-4); *see also generally* *Problems that American Indian Families Face in Raising their Children and How these Problems are Affected by Federal Action or Inaction: Hearing Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. (1974); 123 CONG. REC. 21,042-44 (1977); *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the S. Select Comm. on Indian*

compelling federal interest that Indian children maintain their cultural identity in a federally recognized tribal community.<sup>130</sup>

In order to promote this interest when an Indian child<sup>131</sup> is involved in certain child welfare proceedings, ICWA imposes procedural and notice requirements on state courts, reinforces tribal court jurisdictional authority, and establishes child placement preferences with a child's extended family members, tribal members, or other tribes.<sup>132</sup> In the landmark case of *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>133</sup> the United States Supreme Court categorized ICWA as "a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves."<sup>134</sup> Many of the challenges Congress identified in the 1970s as justifying ICWA's initial enactment remain today; as a result, the Department recently issued comprehensive regulations,<sup>135</sup> an interpretive M-Opinion,<sup>136</sup> and updated ICWA Guidelines<sup>137</sup> that outline in detail ICWA's various requirements, the Department's underlying legal authority for promulgating ICWA regulations, and the Department's recommendations to state courts and agencies for successfully implementing their statutory responsibilities.

Finally, it is necessary to examine the interplay between tribal, federal, and state civil and criminal jurisdiction over on-reservation activities through which the programs and rights discussed above are effectuated in practice. While a full analysis of the overwhelming amount of case law, statutes, regulations, and scholarship devoted to Indian Country jurisdiction is beyond the scope of this Opinion, I highlight key concepts below.

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*Affairs*, 95th Cong. (1977); S. REP. NO. 95-597 (1977); 123 CONG. REC. 37,223-26 (1977); H.R. REP. NO. 95-1386 (1978); 124 CONG. REC. 38,101-12 (1978). See also *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2583-84 (2013) (Sotomayor, J., dissenting).

<sup>130</sup> See, e.g., 25 U.S.C. § 1901(4)-(5), which states Congress's findings that:

An alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

<sup>131</sup> For the purposes of ICWA applicability, a covered "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). Numerous courts have held that in accordance with *Mancari*, the tethering of ICWA to tribal membership means that ICWA does not create impermissible race-based classifications. See, e.g., *In re Parenting & Support of Beach*, P.3d 845, 849 (Wash. Ct. App. 2011) ("Indians are granted preferences under ICWA, not because of their race, but because of their membership in quasi-sovereign tribal entities.").

<sup>132</sup> 25 U.S.C. §§ 1911(a) (tribes have exclusive jurisdiction "as to any State" in child custody proceedings involving Indian child residing or domiciled on a reservation); 1912 (imposing notice requirements on State courts); and 1915 (establishing placement preferences).

<sup>133</sup> 490 U.S. 30 (1989).

<sup>134</sup> *Id.* at 49.

<sup>135</sup> Indian Child Welfare Act Proceedings; Final Rule, 81 Fed. Reg. 38,778 (codified *inter alia* in 25 C.F.R. Part 23).

<sup>136</sup> See also *Implementation of the Indian Child Welfare Act by Legislative Rule*, M-37037 (Jun. 8, 2016).

<sup>137</sup> Guidelines for Implementing the Indian Child Welfare Act, 81 Fed. Reg. 96,476 (Dec. 30, 2016); see also GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT (Dec. 2016), available at <http://bia.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm>.

With regard to civil jurisdiction, it has long been settled law that tribal governments have jurisdiction over their members within their territories.<sup>138</sup> By comparison, the Court in *Montana v. United States*<sup>139</sup> established a test to determine whether tribes have civil jurisdiction over non-members for activity occurring on non-Indian fee land. The two-prong test asks (1) whether there has been a consensual relationship between the non-Indian and the tribe through “commercial dealings, contracts, leases, or other arrangements”; or (2) whether the tribe may exercise inherent authority because the conduct at issue “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>140</sup> Courts have applied *Montana* in a variety of ways based on the unique facts in each case,<sup>141</sup> such as where the state is seeking to issue a warrant against Indians on trust lands for an off-reservation violation of state law,<sup>142</sup> where a claim arises on state rights-of-way through Indian lands,<sup>143</sup> and in other contexts. Despite volumes of case law on the subject, the precise contours of tribal civil jurisdiction over non-Indians remain disputed and are necessarily adjudicated on a case-by-case basis.<sup>144</sup> Nevertheless, courts have repeatedly upheld tribal assertion of regulatory authority over non-Indians in certain contexts, such as taxation, business licensing, and land management, both before and after deciding *Montana*.<sup>145</sup>

With regard to criminal jurisdiction, Congress long ago vested the federal government with exclusive criminal jurisdiction over enumerated “major” crimes perpetrated by Indians in Indian country,<sup>146</sup> although tribal jurisdiction over such crimes remains concurrent.<sup>147</sup> In addition, the United States reserves criminal jurisdiction for non-major, on reservation crimes

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<sup>138</sup> COHEN’S at § 7.02[1][a].

<sup>139</sup> 450 U.S. 544 (1981).

<sup>140</sup> *Id.* at 565-66.

<sup>141</sup> *See, e.g., Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (Navajo Nation could not levy tax on non-Indian overnight hotel guest located on fee land within reservation).

<sup>142</sup> *Nevada v. Hicks*, 533 U.S. 353 (2001) (no tribal court jurisdiction over tribal member’s claims against state officials for conducting a search warrant on tribal member’s Indian land).

<sup>143</sup> *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (no tribal court jurisdiction to review non-Indian plaintiffs’ claim against non-Indian truck driver for accident on state highway within reservation boundaries).

<sup>144</sup> For example, earlier this year, the Supreme Court heard oral arguments in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, a case where a tribal court has asserted jurisdiction over an individual Indian’s tort claim against the manager of an on-reservation Dollar General store located on tribal trust land. The United States appeared as *amicus curiae* in support of the Tribe. The Court, *per curiam*, let the Fifth Circuit’s ruling stand, which held the tribal court did have jurisdiction to hear the matter. *Dolgenercorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), *cert. granted sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 135 S. Ct. 2833 (2015) (argued Dec. 7, 2015), *aff’d per curiam*, 579 U.S. \_\_\_, 136 S. Ct. 2159 (Jun. 23, 2016).

<sup>145</sup> *See, e.g., Merrion*, 455 U.S. at 169 (holding that tribe had authority to impose oil and gas severance tax on non-Indian company operating on tribal lands); *Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 802 (9th Cir. 2011) (holding absent sufficient state interest, tribe had regulatory and adjudicative jurisdiction over non-Indians); *Quechan Tribe v. Rowe*, 531 F.2d 408 (9th Cir. 1976) (holding that the tribe has authority to regulate non-Indians who enter the reservation to hunt and fish).

<sup>146</sup> 18 U.S.C. § 1153. The enumerated crimes include murder, manslaughter, kidnapping, maiming, certain felony crimes of sexual abuse, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault against an individual under the age of sixteen, felony child abuse or neglect, arson, burglary, and robbery.

<sup>147</sup> *See, e.g., Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995).

through the General Crimes Act,<sup>148</sup> though with two important caveats. First, if a non-Indian commits a crime that is either victimless or involves only a non-Indian victim, the crime is exclusively under state jurisdiction.<sup>149</sup> Second, the General Crimes Act explicitly reserves tribal court jurisdiction over non-major, non-federal crimes committed in Indian country by one Indian against another, thus allowing tribes to maintain authority over crimes committed by Indians within their communities and reducing unwarranted federal oversight over internal tribal affairs matters.<sup>150</sup> In order to help navigate these complex jurisdictional issues, tribal, federal, and state law enforcement agencies often enter into cross-deputization agreements establishing the extent to which the authorities of one sovereign may participate in investigations, arrests, or prosecutions that are technically within the jurisdiction of another sovereign.

Complicating this jurisdictional scheme is the fact that the Supreme Court ruled in *Oliphant v. Suquamish Indian Tribe* that Indian tribes do not have any criminal jurisdiction over non-Indians.<sup>151</sup> In doing so, the Court posited that Indian tribes had been implicitly divested of certain governmental powers that were deemed “inconsistent with their status” – a theory that has since been called into question by legal scholars given there is no clear statement from Congress reducing the scope of tribes’ inherent criminal jurisdictional authority.<sup>152</sup> While the Court also subsequently ruled in *Duro v. Reina*<sup>153</sup> that Indian tribes did not have criminal jurisdiction over non-member Indians, Congress passed the so-called “*Duro* fix” authorizing Tribes to do so,<sup>154</sup> which the Supreme Court subsequently upheld.<sup>155</sup> And in 2013, Congress attempted to address the alarming rates of domestic violence in Indian Country, by reauthorizing the Violence Against Women Act (VAWA), which, in relevant part, recognized tribes’ inherent authority to prosecute certain non-Indian domestic violence offenders in tribal court.<sup>156</sup> Tribes are beginning to assert this jurisdiction today.<sup>157</sup>

### III. LITIGATION CONCERNING THE TRUST RESPONSIBILITY

The previous discussion in this Opinion has outlined foundational principles in federal Indian law. But while the general contours of these principles are relatively clear, the United States and tribes have often disagreed about how these principles should be applied in practice.

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<sup>148</sup> 18 U.S.C. § 1152.

<sup>149</sup> *United States v. McBratney*, 104 U.S. 621 (1881); *see also Solem*, 465 U.S. at 465 n.2.

<sup>150</sup> *See* 25 U.S.C. § 1301(2) (“Powers of self-government’ means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”); 18 U.S.C. § 1152 (reserving tribal jurisdiction for crimes committed in Indian country “by one Indian against the person or property of another Indian”).

<sup>151</sup> 435 U.S. 191 (1978).

<sup>152</sup> *See, e.g.,* N. BRUCE DUTHU, *SHADOW NATIONS: TRIBAL SOVEREIGNTY AND THE LIMITS OF LEGAL PLURALISM* at 156-160 (Oxford Press 2013); Samuel E. Ennis, *Implicit Divestiture and the Supreme Court’s (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 629-38 (2011).

<sup>153</sup> *Duro v. Reina*, 495 U.S. 676 (1990).

<sup>154</sup> Pub. L. No. 101-511, 104 Stat. 1856, 1892-93 (1990) (codified as amended at 25 U.S.C. § 1301(2)).

<sup>155</sup> *Lara*, 541 U.S. at 210.

<sup>156</sup> Violence Against Women Reauthorization Act of 2013, 113 Pub. L. No. 4, 127 Stat. 54 (2013).

<sup>157</sup> *See, e.g.,* indianz.com, *Tribes in pilot project filed 26 VAWA cases against non-Indians* (Mar. 10, 2015), available at <http://www.indianz.com/News/2015/016691.asp>.

One major dispute is the extent that the trust responsibility places legally enforceable requirements on the federal government.

The primary context in which this case law has developed has been in tribal breach of trust claims seeking monetary damages against the United States pursuant to the Tucker Act,<sup>158</sup> the Indian Tucker Act,<sup>159</sup> and the Little Tucker Act,<sup>160</sup> which grant Court of Federal Claims the authority to review such suits. Beginning with the two *United States v. Mitchell* decisions in the early 1980s,<sup>161</sup> and culminating most recently in *United States v. Jicarilla Apache Nation*,<sup>162</sup> the Supreme Court has grown more reluctant to view the United States as subject to the rules governing a common law private trustee. Rather, the Court now generally favors an approach that requires clear statutory directive that the scheme at issue implicates trust obligation with money mandating damages as recourse.

In the *Mitchell* cases, the Quinault Tribe (now the Quinault Indian Nation) alleged federal mismanagement of tribal timber trust resources. The Court found the necessary elements of a common law trustee claim on account of the Department's "elaborate control" over Indian forest resources, reasoning that the statutes and regulations at issue "clearly establish[ed] fiduciary obligations of the Government in the management and operation of Indian lands and resources" and that these statutes could "fairly be interpreted as mandating compensation" for damages sustained.<sup>163</sup> Rejecting the government's position that duties imposed by these statutes could be enforced through declaratory, injunctive, or mandamus relief, the Court found such prospective equitable remedies to be "totally inadequate," because a "trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement."<sup>164</sup>

However, the Court subsequently revisited the *Mitchell* decisions while evaluating the Department's role in approving coal lease royalty rates negotiated between the Navajo Nation and Peabody Coal Company in two cases entitled *United States v. Navajo Nation*.<sup>165</sup> The Court held that a tribe must clear two hurdles in order to successfully invoke jurisdiction under the Indian Tucker Act: (1) the tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and further establish that the United States has failed to faithfully perform those duties; and (2) the source of substantive law must be fairly interpreted to mandate compensation for damages as a result of that breach of those duties.<sup>166</sup> Finding that the first standard had not been met, the Court held that in the absence of "a specific, applicable, trust-creating statute or regulation that the Government violated, we do not reach the question whether the trust duty was money mandating. Thus, neither the Government's 'control' over coal nor

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<sup>158</sup> 28 U.S.C. § 1491(a)(1).

<sup>159</sup> 28 U.S.C. § 1505.

<sup>160</sup> 28 U.S.C. § 1346(a)(2).

<sup>161</sup> *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell I*"); *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell P*").

<sup>162</sup> 564 U.S. 162 (2011).

<sup>163</sup> *Mitchell II*, 463 U.S. at 225-26.

<sup>164</sup> *Id.* at 227.

<sup>165</sup> *United States v. Navajo Nation*, 556 U.S. 287 (2009) ("*Navajo I*"); *United States v. Navajo Nation*, 537 U.S. 488 (2003) ("*Navajo P*").

<sup>166</sup> *Navajo I*, 537 U.S. at 506.

common law trust principles matter.”<sup>167</sup> The Court concluded that since the statute at issue promoted self-determination through empowering the tribe to negotiate the lease, the role of the Secretary in mere approval of the amendment could not trigger a trust duty.<sup>168</sup>

By comparison, the Court in *United States v. White Mountain Apache Tribe*<sup>169</sup> affirmed the tribe’s claims for a breach of trust stemming from the federal government’s failure to maintain the Fort Apache Military Reservation, a former federal outpost that was located within what became the tribe’s reservation. The Court found that a 1960 statute directing the military reservation to be held in trust for the tribe went far beyond a bare trust and expressly defined a fiduciary relationship where the United States had the discretion to make direct use of the trust corpus: that is, federal control that was “at least as plenary” as the authority over timber resources in *Mitchell II*.<sup>170</sup> In light of this statutorily-granted federal control, and coupled with the express trust-creating language, the Court confirmed that the United States had a common law duty of a trustee to preserve and maintain trust assets under “the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.”<sup>171</sup> In rejecting the government’s suggestion that the proper remedy for the tribe was injunctive or equitable relief, the Court noted that such an approach would “bar the courts from making the Tribe whole for deterioration already suffered, and shield the Government against the remedy whose very ability would deter it from wasting trust property in the period before a Tribe has gone to court for injunctive relief.”<sup>172</sup>

Most recently, in *Jicarilla Apache Nation*, the Court considered the frameworks established in *Mitchell*, *Navajo*, and *White Mountain Apache* and evaluated whether a tribe could employ the common law fiduciary exception to the attorney-client privilege in order to compel the United States to disclose to the tribe documents the federal government wished to withhold from production in litigation.<sup>173</sup> While acknowledging that *Mitchell* and *White Mountain* held that tribal trust management trust bore some resemblance to the obligations of a private trustee, the Court found common law principles inapplicable. Rather, the Court found that the trust obligations at issue were expressly governed by statute rather than the common law, and that the federal government was accordingly not required to turn over the documents at issue.<sup>174</sup>

While modern Court precedent has generally held that a tribal breach of trust suit against the United States must be based on an explicit statutory command, tribes continue to assert that there is room for common law fiduciary standards to fill gaps in the statutory framework. This is because the *Navajo* line of cases has developed in the context of evaluating claims for actual monetary damages stemming from alleged federal breaches of trust. But in those cases where tribes are not seeking damages, but rather to halt or reverse a federal action or determination,

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<sup>167</sup> *Navajo II*, 556 U.S. at 302.

<sup>168</sup> *Navajo I*, 537 U.S. at 507-08.

<sup>169</sup> 537 U.S. 465 (2003).

<sup>170</sup> *Id.* at 474-75.

<sup>171</sup> *Id.* at 475.

<sup>172</sup> *Id.* at 479.

<sup>173</sup> *Jicarilla Apache Nation*, 564 U.S. at 178.

<sup>174</sup> *Id.* at 178-83, 186-87.

courts have developed what is known as “the procedural trust responsibility” of federal agencies to consider tribal treaty rights during permitting and other federal determinations.<sup>175</sup>

The fiduciary obligations created by this “procedural” trust responsibility “mandate that special regard be given to the procedural rights of Indians by federal administrative agencies,”<sup>176</sup> as there is “no doubt . . . that the government’s trust responsibility extends to the protection of treaty rights.”<sup>177</sup> As such, “it is the government’s . . . responsibility to ensure that Indian treaty rights are given full effect.”<sup>178</sup> “In practical terms, the trust relationship gives rise to a procedural requirement that the federal government ‘at the very least . . . investigate and consider the impact of its action upon a potentially affected Indian tribe.’”<sup>179</sup> If the agency develops information pursuant to this review that “forecasts deleterious impacts, the [agency] must consider and implement measures to mitigate these impacts if possible.”<sup>180</sup> And as only Congress may abrogate treaty rights, agencies “owe a fiduciary duty to ensure that . . . [Indian] treaty rights are not abrogated or impinged upon absent an act of Congress.”<sup>181</sup>

In sum, the majority of litigation seeking to enforce the federal trust responsibility is subject to the rule set out in *Navajo I*. It remains to be seen whether higher courts will embrace the procedural trust responsibility doctrine set forth in other cases as a companion doctrine to the damages cases.

#### **IV. RECENT DEPARTMENTAL ACHIEVEMENTS AND ACTIVITIES IN INDIAN LAW**

The prior discussion on the historical background and legal overview of Indian law and policy sets the stage for the final discussion in this Opinion, which summarizes some of the Department’s recent efforts and achievements in Indian Country.

At the outset of the Administration, the Department was faced with one of the largest class action lawsuits in United States history. Nearly 500,000 individual Indians, under the leadership of Elouise Cobell, a member of the Blackfeet Tribe, had sued the United States for breach of trust, specifically alleging the failure to account for and properly manage individual Indian trust accounts for over a century. At the same time, over 100 tribes had similar breach of trust claims pending against the United States.

In partnership with the Department of Justice, the Department worked in a comprehensive and coordinated manner to settle the *Cobell* litigation, as well as nearly all of the other tribal trust cases. The *Cobell* litigation settled for \$3.4 billion in 2010, a substantial portion

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<sup>175</sup> See, e.g., *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (stating that the “general ‘contours’” of the trust duty may be defined by statute but that “the interstices must be filled in through reference to general trust law.”); *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 736-38 (Ct. Cl. 2011) (applying common law principles to “flesh out” general trust duties once a fiduciary relationship is established); *Okanogan Highlands Alliance v. Williams*, Civil No. 97-806-JE, 1999 U.S. Dist. LEXIS 4068, at \*59 (D. Or. Jan. 12, 1999).

<sup>176</sup> *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (quotation omitted).

<sup>177</sup> *Okanogan*, 1999 U.S. Dist. LEXIS 4068 at \*44.

<sup>178</sup> *Nw. Sea Farms, Inc. v. United States*, 931 F. Supp. 1515, 1519-20 (W.D. Wash. 1996).

<sup>179</sup> *Okanogan*, 1999 U.S. Dist. LEXIS 4068 at \*45-47 (citing *Northern Cheyenne v. Hodel*, No. CB 82-116-BLG, 112 ILR 3065, 3071 (D. Mont. 1985)).

<sup>180</sup> *Id.* at \*47 (citation omitted).

<sup>181</sup> *Northwest Sea Farms*, 931 F. Supp. at 1515.

of which addressed the allotment policy aftermath of land fractionation.<sup>182</sup> Upon the announcement of the *Cobell* settlement, President Obama stated:

. . . I heard from many in Indian Country that the Cobell suit remained a stain on the Nation to Nation relationship I value so much. . . . I came to Washington with a promise to change how our government deals with difficult issues like this, and a promise that the facts and policies, and not politics, will guide our actions and decisions. . . . I congratulate all those in Indian Country that have waited for this news . . . .<sup>183</sup>

As part of the *Cobell* settlement's Land Buy Back Program, the Department has engaged in efforts to reverse the difficult legacy of the Allotment Era. This program provided \$1.9 billion to purchase fractional interests in trust or restricted land from willing sellers at fair market value. Consolidated interests are immediately restored to tribal trust ownership for uses benefiting the reservation community and tribal members. The Department has spent over \$1 billion and restored the equivalent of nearly 1.9 million acres of land to tribal governments.<sup>184</sup>

Beyond *Cobell*, over one hundred tribes have settled their tribal trust cases during this Administration for a total amount of over \$3.3 billion.<sup>185</sup> In addition to the tribal trust settlements, on February 23, 2016, the Department entered into a \$940 million settlement of the claims adjudicated in *Salazar v. Ramah Navajo Chapter*,<sup>186</sup> resolving a decades-long dispute related to contract support costs.<sup>187</sup> The settlement resolved claims that the government failed to appropriate sufficient funds to pay the tribes' contract support costs when it entered into 638 agreements with tribes and tribal organizations to operate federal programs like law enforcement, forest management, fire suppression, road maintenance, housing, education, and other support programs. These historic settlements have helped resolve ongoing claims against the Department, avoid costly and adversarial litigation, and provide more opportunities for the

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<sup>182</sup> It took an act of Congress to ratify the settlement, for among other reasons, to broaden the scope of the district court's jurisdiction to cover all potential claims including mismanagement of resources. Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (2010). Some class members challenged the settlement, but the settlement withstood challenge through the appeal process. See *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009), cert. denied, *Cobell v. Salazar*, 561 U.S. 1020 (2010).

<sup>183</sup> Statement by the President on the Settlement of Cobell Class-Action Lawsuit on Indian Trust Management (Dec. 8, 2009), available at <https://www.whitehouse.gov/the-press-office/statement-president-settlement-cobell-class-action-lawsuit-indian-trust-management>.

<sup>184</sup> Press Release, United States Department of the Interior, Office of the Secretary, Deputy Secretary Connor Announces Land Buy-Back Program Sales Exceed \$1 Billion (Jan. 5, 2017), available at <https://www.doi.gov/pressreleases/deputy-secretary-connor-announces-land-buy-back-program-sales-exceed-1-billion>.

<sup>185</sup> See Joint Press Release, United States Department of Justice, Attorney General Loretta E. Lynch and Secretary of the Interior Sally Jewell Announce Settlements of Tribal Trust Accounting and Management Lawsuits (Sept. 26, 2016), available at <https://www.justice.gov/opa/pr/attorney-general-loretta-e-lynch-and-secretary-interior-sally-jewell-announce-settlements>.

<sup>186</sup> *Salazar v. Ramah Navajo Chapter*, 567 U.S. \_\_\_, 132 S. Ct. 2181 (2012); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217 (D.N.M. 2016). As a member of the Navajo Nation, I voluntarily recused myself from this matter.

<sup>187</sup> "Contract support costs" are the "reasonable costs" that a federal agency would not have incurred, but which the tribe would incur" in managing a given program under the ISDEAA. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 634 (2005); see also 25 U.S.C. § 5325.

United States to partner with tribes in order to address the many pressing issues facing Indian Country.

The protection and establishment of tribal homelands has been another of the Department's areas of renewed focus. Since 2009, over half a million acres have been taken into trust for tribes, which has provided lands for government offices, health care facilities, senior citizen centers, housing, schools, and other important projects to support tribal services.<sup>188</sup> On March 12, 2014, I issued M-37029, formally institutionalizing the two-part framework the Solicitor's Office developed for analyzing whether a tribe was "under federal jurisdiction" in 1934 following the Supreme Court's *Carciere* decision. That framework has been upheld in litigation challenging the Department's fee-to-trust decisions.<sup>189</sup>

Along with the normal fee to trust process under the recently revised 25 C.F.R. Part 151,<sup>190</sup> the Department also took an important step in exercising its discretion to remove the "Alaska Exception" to governing regulations, which had previously prohibited trust land acquisitions in Alaska. Litigation over the Alaska Exception has since been resolved, and the Department recently issued final regulations regarding the permissibility of and process for achieving such acquisitions.<sup>191</sup> On January 10, 2017, the Department announced that it had issued the first decision under the new Final Rule and accepted the Craig Tribal Association's application for the Department to take land into trust in Craig, Alaska.<sup>192</sup>

The Department has also taken proactive stances towards preserving the integrity of reservation boundaries.<sup>193</sup> For example, on November 20, 2015, I issued an opinion concluding that the Mille Lacs Reservation boundaries, as established by the 1855 Treaty with the

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<sup>188</sup> Sally Jewell, United States Secretary of the Interior, *Toward a Bright Future: The Interior Department's Record of Progress, Tribal Land Restoration* (Jan. 5, 2017), available at <https://www.doi.gov/blog/exit-memo>.

<sup>189</sup> See, e.g., *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556 (2d Cir. 2016) (Oneida Nation of New York); *Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016) (*petition for cert. filed*, Oct. 27, 2016) (Cowlitz Indian Tribe); *Stand Up for California! v. U.S. DOI*, Civ. Action No. 12-2039 (BAH); Civ. Action No. 12-2071 (BAH), 2016 U.S. Dist. LEXIS 119649 (D.D.C. Sept. 6, 2016), *appeal docketed*, Nos. 16-5327, 16-5328 (D.C. Cir. Nov. 15, 2016) (North Fork Rancheria of Mono Indians); *Citizens for a Better Way, et. al. v. U.S. DOI, et. al.*, 2:12-cv-03021, 2015 U.S. Dist. LEXIS 128745 at \*49-55 (E.D. Cal., Sept. 24, 2015) (Estom Yumeka Maidu Tribe of the Enterprise Rancheria); *State of Kansas v. Acting E. Okla. Reg'l Dir.-BIA*, 62 IBIA 225, 235-37 (2016) (Wyandotte Nation); *Grand Traverse County Bd. of Commr's v. Acting Midwest Reg'l Dir.-BIA*, 61 IBIA 273, 279-83 (2015) (Grand Traverse Band of Ottawa and Chippewa Indians); *State of New York, et. al. v. Acting E. Reg'l Dir.*, 58 IBIA 323, 334-35 n.17 (2014) (St. Regis Mohawk Tribe).

<sup>190</sup> On November 13, 2013, the Department revised its fee-to-trust regulations to eliminate the thirty day waiting period following a trust acquisition decision before title could be transferred and broadened and clarified the notice of decisions to acquire land in trust. Land Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 67,928 (Nov. 13, 2013).

<sup>191</sup> See Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888 (Dec. 23, 2014); *Akiachak Native Cmty. v. Salazar*, 935 F. Supp. 2d 195 (D. D.C. 2013), *vacated and appeal dismissed by Akiachak Native Cmty. v. U.S. DOI*, 827 F.3d 100 (D.C. Cir. 2016).

<sup>192</sup> Land Acquisitions; Craig Tribal Association, Craig, Alaska, 82 Fed. Reg. 4,915 (Jan. 17, 2017).

<sup>193</sup> See *Boundary of the Skokomish Reservation along the Skokomish River*, M-37034 (Jan. 15, 2016) [hereinafter "Skokomish Opinion"]; *Opinion Regarding the Status of the Bed of the Clearwater River within the 1863 Treaty Boundaries of the Nez Perce Reservation (Idaho)*, M-37033 (Jan. 15, 2016); *Applicability of the New Mexico Bureau of Land Management's Riparian Policy to Lands within the Boundaries of the Santa Clara Pueblo Grant*, M-37028 (Jun. 21, 2013); *Boundary Dispute: Pueblo of Santa Ana Petition for Correction of the Survey of the South Boundary of the Pueblo of San Felipe Grant*, M-27027 (Jun. 7, 2013).

Chippewa,<sup>194</sup> remain intact.<sup>195</sup> I also issued a 2012 opinion concluding that the Act of August 7, 1882<sup>196</sup> did not diminish the Omaha Reservation in Nebraska, thus supporting the United States' successful intervention in the Omaha's Tribe litigation with the State of Nebraska, discussed *supra*.<sup>197</sup> I have further concluded that neither the Act of March 3, 1905<sup>198</sup> nor any other statutes diminished or altered the exterior boundaries of the Wind River Indian Reservation.<sup>199</sup>

The Department has also been actively engaged in important efforts to protect tribal treaty rights. For instance, the United States intervened as a trustee in support of the Penobscot Nation in their effort to protect their treaty and statutory fishing rights in the Penobscot River in Maine.<sup>200</sup> In December 2015, the district court recognized the Tribe's right to subsistence fishing from bank to bank in the Main Stem of the River.<sup>201</sup> The Department also supported tribal fishing rights in response to various inquiries from the Environmental Protection Agency (EPA), resulting in EPA's issuance of water quality standards protective of subsistence use by the tribes.<sup>202</sup> Similarly, the Department recently recognized that the riverbed of the Skokomish River is located within the boundaries of the Skokomish Indian Reservation and is accordingly held in trust for the benefit of the tribe, which in turn provides a basis for supporting the Tribe's hunting and fishing rights.<sup>203</sup> The Department also provided technical expertise to the United States Army Corps of Engineers regarding the Dakota Access pipeline controversy, after which the Corps announced it would not grant the applicant an easement for its pipeline to cross federal lands underneath Lake Oahe in South Dakota pending further environmental review under applicable federal law. Among other things, the Department's expertise offered insight on the existence and protection of the Standing Rock Sioux Tribe's hunting and fishing treaty rights.<sup>204</sup> Lastly, multiple agencies, including the Department, have joined a Memorandum of Understanding to ensure consideration of tribal treaty rights in federal decision making processes, sharing of best practices, and establishment of an interagency working group to promote collaboration and coordination between agencies.<sup>205</sup>

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<sup>194</sup> Feb. 22, 1855, 10 Stat. 1165.

<sup>195</sup> See generally *Mille Lacs Opinion*.

<sup>196</sup> 22 Stat. 341.

<sup>197</sup> See, e.g., Memorandum from Michael Berrigan, Assoc. Solicitor, Div. of Indian Affairs, to Priscilla Wilfahrt, Twin Cities Field Solicitor, *Omaha Reservation Boundary* (Sept. 5, 2012).

<sup>198</sup> Pub. L. No. 58-212, 33 Stat. 1069.

<sup>199</sup> Letter from Hilary Tompkins, Solicitor, U.S. Dep't of the Interior, to Scott Fulton, Gen. Counsel, U.S. Env't'l Protection Agency (Oct. 26, 2011).

<sup>200</sup> *Penobscot Nation v. Mills*, 151 F. Supp. 3d 181 (D. Me. 2015), *appeal docketed*, No. 16-1435 (1st Cir. April 26, 2016).

<sup>201</sup> *Id.* at 221-23.

<sup>202</sup> Letter from Hilary C. Tompkins, Solicitor, Dep't of the Interior, to Avi S. Garbow, Gen. Counsel, U.S. Env't'l Protection Agency, *Re: Maine's WQS and Tribal Fishing Rights of Maine Tribes* (Jan. 30, 2015), available at <https://turtletalk.files.wordpress.com/2015/02/maine-tribal-fishing-rights-letter-to-epa-1-30-15.pdf>; see also Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92,466, 92,476 n.37, 92,477 n.42 (Dec. 19, 2016) (effective Jan. 18, 2017, to be codified at 40 C.F.R. Part 131).

<sup>203</sup> See generally *Skokomish Opinion*.

<sup>204</sup> Memorandum, U.S. Army Corps of Engineers, *Army will not grant easement for Dakota Access Pipeline Crossing* (Dec. 4, 2016) available at [https://www.army.mil/article/179095/army\\_will\\_not\\_grant\\_easement\\_for\\_dakota\\_access\\_pipeline\\_crossing](https://www.army.mil/article/179095/army_will_not_grant_easement_for_dakota_access_pipeline_crossing).

<sup>205</sup> White House Tribal Nations Conference, *Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights Related to Natural Resources*, (Nov. 29, 2016) available at <https://www.epa.gov/tribal/memorandum-understanding-regarding-interagency-coordination-and-collaboration-protection>.

As noted above, another key role that the Department has emphasized in recent years is ensuring adequate protection, proper management, and sufficient tribal water supplies pursuant to the *Winters* doctrine. Congress has passed thirty-three Indian water rights settlements since 1978 (including twelve under the Obama administration, with the Department's support), which includes significant funding for important infrastructure projects that ensure protection of the tribal senior water right.<sup>206</sup> The Department has also stood with tribes in various stream adjudications to assist in quantifying and setting priority dates for tribal water rights.<sup>207</sup>

In one representative case, the United States successfully claimed federal reserved water rights for the Yakama Nation through a general stream adjudication of the Yakima River Basin in Washington State. That adjudication, which began in 1977, is approaching completion with the pending issuance of a final decree. In addition to recognizing tribal water rights for agricultural and other users, the state courts in the adjudication have recognized that the Yakama's treaty-reserved fishing right carries with it a reserved water right for "instream flows in the Yakima River and its tributaries for fish and other aquatic life" with a priority date of "time immemorial."<sup>208</sup> The court also recognized that the reserved rights extend off-reservation to support fishing at the Tribe's "usual and accustomed" fishing places.<sup>209</sup> In other cases, the United States successfully argued in federal court that tribes have a protectable legal interest in groundwater, not just surface water, which will be an increasingly important aspect of our approach to water conflicts in the face of persistent drought due to residential and industrial overuse, climate change, and other factors, as well as increased demands on water supply are depleting surface flows.<sup>210</sup>

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<sup>206</sup> See Press Release, Sally Jewell, U.S. Sec'y of the Interior, *Deputy Secretary Connor to Celebrate Indian Water Rights Settlements* (Jan. 12, 2017), available at <https://www.doi.gov/mediaadvisories/secretary-jewell-deputy-secretary-connor-celebrate-indian-water-rights-settlements>; *Addressing the Needs of Native Communities through Indian Water Rights Settlements: Hearing Before the United States Senate Committee on Indian Affairs*, 114th Cong. 5-11 (2015) (statement of Michael Connor, Deputy Secretary, United States Department of the Interior); CHARLES V. STERN, CONG. RESEARCH SERV., INDIAN WATER RIGHTS SETTLEMENTS 1 (Sept. 18, 2015).

<sup>207</sup> The 114th Congress enacted four Indian water rights settlements or amendments to existing settlements as part of the Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, 130 Stat. 1628 (2016): Blackfeet Water Rights Settlement Act, Pechanga Band of Luiseno Indian Water Rights Settlement Act, Choctaw Nation of Oklahoma and the Chickasaw Nation Water Settlement, and an Amendment to the San Luis Rey Indian Water Rights Settlement Act. In addition, three bills were introduced in 2016 in the Senate Committee on Indian Affairs: an Amendment to the White Mountain Apache Tribe Water Rights Quantification Act (S. 2959, 114th Cong. (as reported by S. Comm. on Indian Affairs, Sept. 27, 2016)), Salish and Kootenai Water Rights Settlement Act (S. 3013), Hualapai Water Rights Settlement Act (S. 3300, 114th Cong. (2016)), and Navajo Utah Water Rights Settlement Act (S. 3482, 114th Cong. (2016)).

<sup>208</sup> *Dep't of Ecology v. Acquavella*, No. 77-2-01484-5, at \*5, 8, (Wash. Super. Ct. Nov. 19, 1990) (Amendment to Order for Partial Summary Judgment).

<sup>209</sup> *Dep't of Ecology v. Acquavella*, No. 77-2-01484-5, at 15 (Wash. Super. Ct. Sept. 1, 1994) (Memorandum Opinion: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places) (reserved water right for treaty-reserved fishing rights "to include all Yakima River tributaries affecting fish availability at the [Yakama Nation's] 'usual and accustomed' fishing stations.") (emphasis in original).

<sup>210</sup> See generally *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. EDCV 13-883-JGB, 2015 U.S. Dist. LEXIS 49998 (C.D. Cal. Mar. 20, 2015). This case was appealed and oral arguments were held before the Ninth Circuit Court of Appeals on October 18, 2016. The United States and Agua Caliente Band's position in this litigation finds significant support in both federal and state cases. See, e.g., *United States v. Anderson*, 736 F.2d 1358, 1361 (9th Cir. 1984); *Walton*, 647 F.2d at 47; *Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1968); *Confederated Salish and Kootenai Tribes v. Stults*, 59 P.3d 1093, 1098-99 (Mont. 2002); *Gila*

Proper management of tribal lands is another key component of the Department's responsibilities. In 2012, Congress passed the Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act of 2012, which makes a voluntary, alternative land leasing process available to tribes in order to foster economic development in Indian Country. The Act authorizes tribes to submit their own leasing regulations, including an environmental review process, to the Secretary for review. Upon approval, tribes will then have the authority to negotiate and enter into leases for various uses and terms without any further federal involvement.<sup>211</sup> The Department has taken an active role in facilitating tribal participation in this process and has approved twenty-six tribal leasing regulations to date.<sup>212</sup>

The Department has also modernized the surface leasing regulations for Indian lands, which promotes leasing of Indian land for residential, business, and solar and wind development. The previous version was adopted over fifty years ago and was insufficient to address the modern needs of Indian tribes and individual Indians to effectively use their lands for housing, economic, and energy development. The 2013 Final Rule streamlined the leasing process by imposing timelines on Departmental review, distinguishing criteria for different types of leases, and eliminating Departmental approval of permits for certain activities on Indian lands.<sup>213</sup> Mirroring many of the improvements made within the leasing regulations, the Department has also recently updated its right-of-way regulations for Indian lands to modernize the approval process in a similar manner.<sup>214</sup> The right-of-way regulations provide procedures, standards, and tribal consent requirements for certain rights-of-way crossing Indian land for purposes such as service lines, railroads, oil and gas pipelines, telecommunication lines, electric distribution systems, and public highways (subject to certain exceptions under the law). These regulations vest tribes with more independent and autonomous management of their own affairs, to the benefit of not only the tribes, but also those seeking to do business in Indian Country

Public safety and social welfare are other evolving categories of current affairs. Most recently, the Department assisted in implementing the Tribal Law and Order Act of 2010<sup>215</sup> in order to strengthen and support tribal public safety initiatives.<sup>216</sup> Crime rates in Indian Country are more than twice the national average and up to twenty times the national average on some

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*River System*, 989 P.2d at 747. Scholars also generally agree that *Winters* rights extend to groundwater. See, e.g., DAVID GETCHES ET AL., *WATER LAW IN A NUTSHELL* 325 (5th ed., 2015); COHEN'S § 19.03[2][b]; WILLIAM C. CANBY JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 407 (1998 ed.); A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 9.07[3] (1991 ed.); John D. Leshy, *The Federal Role in Managing the Nation's Groundwater*, 11 HASTINGS W.-N.W. J. ENV. L. & POL'Y 1, 2-3 (2004).

<sup>211</sup> 25 U.S.C. § 415(h).

<sup>212</sup> See United States Department of the Interior, Who We Are, HEARTH Act of 2012, available at <https://www.bia.gov/WhoWeAre/BIA/OTS/HEARTH/index.htm> (last visited Jan. 17, 2017).

<sup>213</sup> See Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440 (Dec. 5, 2014).

<sup>214</sup> See Rights of Way on Indian Lands-Final Rule, 80 Fed. Reg. 72,492 (Nov. 19, 2015).

<sup>215</sup> Pub. L. No. 111-211, 124 Stat. 2248, 2261 *et seq.* (2010); 25 U.S.C. § 1304.

<sup>216</sup> *Tribal Law and Order Act: Five Years Later: How Have the Justice Systems in Indian Country Improved?: Hearing Before the United States Senate Committee on Indian Affairs*, 114th Cong. (December 2, 2015) (statement of Lawrence S. Roberts, United States Department of the Interior, Principal Deputy Assistant Secretary for Indian Affairs).

reservations.<sup>217</sup> To address these critical needs, the Department has increased and streamlined training for BIA and tribal law enforcement, issued special law enforcement commissions that allow for cross-deputization with state and federal authorities, established systems for sharing crime data across federal agencies and with state agencies, and provided financial and infrastructure support for tribal courts.<sup>218</sup> The Department has also accepted retrocession of state jurisdiction on behalf of certain P.L. 280 tribes in accordance with TLOA's authorization, whereby a state can submit to the federal government a Governor's proclamation announcing what state criminal jurisdiction it agrees to retrocede back to the United States for enforcement in Indian Country.<sup>219</sup> These efforts are aimed at providing tribes with the necessary tools to protect their communities.

A companion piece to the TLOA was the landmark 2013 VAWA reauthorization. VAWA recognizes the inherent tribal authority to prosecute certain non-Indian domestic violence offenders – a historic, partial reversal of the Supreme Court's decision in *Oliphant*. The VAWA reauthorization was enacted in response to the alarmingly high rates of domestic violence among Indian women, where offenders are predominantly non-Indian men.<sup>220</sup> Under a VAWA Pilot Project, five tribes were permitted to exercise this renewed jurisdictional authority on an accelerated basis pending demonstration that the tribes had the technical capacity to prosecute non-Indians in accordance with the requirements of the reauthorization, and this expanded VAWA prosecutorial authority became available to all tribes in March 2015.<sup>221</sup> While a larger scale “*Oliphant* fix” similar to the congressional action following the *Duro* decision has remained elusive,<sup>222</sup> TLOA and VAWA represent incremental congressional affirmation of inherent sovereign tribal authority.

Finally, this Opinion previously discussed the Department's recent achievements concerning ICWA implementation. I further note that the Department has held trainings across the country to provide technical assistance for implementing the new regulations.<sup>223</sup> The United States has filed several *amicus* briefs and received favorable rulings in ICWA cases

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<sup>217</sup> U.S. DEP'T OF JUSTICE, TRIBAL LAW AND ORDER ACT (TLOA) LONG TERM PLAN TO BUILD AND ENHANCE TRIBAL JUSTICE SYSTEMS 7 (2011) (citations omitted) *available at* <https://www.justice.gov/sites/default/files/tribal/legacy/2014/02/06/tloa-tsp-aug2011.pdf>.

<sup>218</sup> U.S. DEP'T OF JUSTICE, INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 2-4 (2015), *available at* <https://www.justice.gov/tribal/page/file/904316/download>.

<sup>219</sup> See Press Release, U.S. Dep't of the Interior, Office of the Ass. Sec. – Indian Affairs, *Assistant Secretary Washburn Accepts Washington State's Retrocession of its Civil and Criminal Authority Over the Yakama Nation* (Oct. 19, 2015), *available at* <https://www.bia.gov/cs/groups/public/documents/text/idc1-031967.pdf>.

<sup>220</sup> See generally *Hearing on the Implementation of the Violence Against Women Act Reauthorization of 2013 Before the United States Sentencing Commission*, 113th Cong. (2014) (joint statement of Sam Hirsch, United States Department of Justice, Deputy Associate Attorney General, and Michael W. Cotter, United States Department of Justice, United States Attorney for the District of Montana).

<sup>221</sup> NATIONAL CONGRESS OF AMERICAN INDIANS SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION PILOT PROJECT REPORT 2 (Oct. 29, 2015), *available at* <http://www.ncai.org/news/articles/2016/06/08/vawa-pilot-project-report-2015>.

<sup>222</sup> See, e.g., Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553 (2009) (proposing *Oliphant* fix).

<sup>223</sup> See Press Release, U.S. Dep't of the Interior, Office of the Ass. Sec. – Indian Affairs, *Acting Assistant Secretary Roberts Issues Final Regulations to Strengthen Implementation of the Indian Child Welfare Act* (June 8, 2016), *available at* <http://www.bia.gov/cs/groups/public/documents/text/idc1-034237.pdf>.

nationwide.<sup>224</sup> With more consistent application of ICWA, tribes will be able to better participate in the placement of tribal member children and safeguard their roles as interested sovereigns.

## V. CONCLUSION

This Opinion aims to provide an updated snapshot of the current state of Indian law and policy. While some parts of the legal landscape have evolved over the passage of time, there is no question that Indian tribes hold a unique legal status in America’s legal system and possess certain rights and authorities that are afforded clear protection under the law. History speaks to the reality that tribes and their members have endured many tragic and destructive chapters, resulting in great injustices and harm to Indians and their lands, resources, and cultures. In the face of this adversity, Indian nations nevertheless remain strong, engaging in self-governance and defining their destiny on their own terms.

The United States has struggled to accept and remedy its past wrongdoings, but the current Administration has started on a path towards healing and acceptance, and has begun the process of restoring trust between the federal government and Indian nations. The current state of affairs demonstrates that the United States can be a trustee in many different capacities, from restoring and protecting tribal lands and protecting treaty rights and water rights, to supporting tribes in the exercise of their sovereign authority for the benefit and protection of their citizens and territories, combined with returning management of tribal lands and resources into tribal hands. The lessons of the past tell us that when the United States exercises its full panoply of authority in a manner that facilitates and supports the exercise of tribes’ inherent authority, the trust relationship blossoms and sustains all sovereigns. It is up to future administrations to continue this promising path.



Hilary C. Tompkins

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<sup>224</sup> *Oglala Sioux Tribe & Rosebud Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 754 (D.S.D. 2015) (finding that the State had “developed and implemented policies and procedures for the removal of Indian children from their parents’ custody in violation of the mandates of the Indian Child Welfare Act and in violation of the Due Process Clause of the Fourteenth Amendment”); *Alaska v. Central Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255 (Alaska 2016) (tribal courts have inherent subject matter jurisdiction to decide the child support obligations owed to children who are tribal members or are eligible for membership); *Native Village of Tununak v. Alaska*, 334 P.3d 165, 167-68 (Alaska 2014) (“Because the Supreme Court’s holding in *Baby Girl* is clear and . . . because . . . [Grandmother] did not formally [seek] to adopt [Child] in the superior court . . . there simply is no preference to apply[,] [as] no alternative party that is eligible to be preferred under § 1915(a) has come forward[,] and therefore ICWA § 1915(a)’s [placement] preferences are inapplicable.”) (internal quotations omitted); *In re Abbigail A.*, 375 P.3d 879 (Cal. 2016); *In re Isaiah W.*, 373 P.3d 444, 446 (Cal. 2016) (“Because ICWA imposes . . . a continuing duty to inquire whether the child is an Indian child . . . the parent may challenge a finding of ICWA’s inapplicability in an appeal from the subsequent order, even if she did not raise such a challenge in an appeal from the initial order.”).