

## 2008 UPDATE

Clinton, Goldberg, & Tsosie

AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM  
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This Update includes, among other things, the recent Supreme Court decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, the U.N. Declaration on the Rights of Indigenous Peoples, the Ninth Circuit en banc decision in the San Francisco Peaks litigation (*Navajo Nation v. U.S. Forest Service*), the D.C. Circuit's decision regarding application of the NLRB to tribal casinos (*San Manuel Indian Bingo & Casino v. N.L.R.B.*), recent developments in the *Sherrill* litigation and the *Cobell* lawsuit, and activity in the area of water rights settlements. The new 2008-2009 Statutory Supplement is slimmer and more selective than earlier versions, and includes new enactments such as the Indian law provisions of the Adam Walsh Act regarding sex offender registration.

## CHAPTER 1

### HISTORIC AND MODERN CONCEPTIONS OF THE TRIBAL↔FEDERAL RELATIONSHIP

**At Page 123, substitute the following for the third paragraph of Note 1:**

The Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly on September 13, 2007, by a vote of 144 in favor, 4 against, and 11 abstentions. A/Res/61/295, Sixty-First Session, 2007. The Declaration affirms “that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such.” In addition to recognizing the individual rights of indigenous peoples, the Declaration recognizes their collective rights in a multitude of areas, including self-determination, spirituality, and land, territory and natural resources. The Declaration sets out minimum standards for the treatment of indigenous peoples and aspires to serve as a basis for the development of customary international law.

The Declaration calls upon State parties to comply with and implement their obligations to indigenous peoples under international instruments, “in particular those related to human rights,” and contains 46 articles that reference the specific rights of indigenous peoples. Article 3 of the Declaration states:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The four countries that opposed adoption of the Resolution included the United States, Canada, New Zealand and Australia. What motivations might countries have, either to oppose or to support such a resolution? As an advocate for Native rights in the United States, would you consult the Declaration’s guidance on matters of interpretation dealing with domestic law? For an explanation of the status of the Declaration under international law and the meaning of self-determination as articulated in the Declaration, see Christopher J. Fromherz, *Indigenous Peoples’ Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples*, 156 U. Pa. L. Rev. 1341 (2008).

**At Page 134, insert the following before the final paragraph:**

A recent decision from the Constitutional Court of South Africa found that the Constitution of South Africa protects a tribe’s autonomy to develop its customary law in order to promote gender equality in the succession of traditional leadership, and thus, the domestic courts of South Africa ought to defer to a tribe’s decision to appoint a female heir of the deceased leader to assume the leadership of the tribe even though she would have been disqualified under the tribe’s traditional law. *Shilubana and Others v. Nwamitwa*, Case CCT 3/07, June 4, 2008, available at [www.constitutionalcourt.org.za/site/shilubana2008.htm](http://www.constitutionalcourt.org.za/site/shilubana2008.htm). In upholding the tribe’s authority, the Court noted that Section 211(2) of the Constitution “specifically provides for the right of traditional communities to function subject to their own system of customary law, including amendment or repeal of these laws.” As the Court observed, this flexibility is necessary to allow a community to bring its customs into line with the norms and values of the Constitution, which includes the “right of cultural and religious communities to enjoy their culture and practice their religion in a manner consistent with the Bill of Rights.” Recognizing that its holding “leaves unanswered some questions” related to future decisions regarding leadership succession, the Court nonetheless found that:

customary law is living law and will in the future inevitably be interpreted, applied and, when necessary, amended or developed by the community itself or by the courts. This will be done in view of existing customs and traditions, previous circumstances and practical needs, and of course the demands of the Constitution as the supreme law.

## CHAPTER 2

### RECURRING ISSUES IN TRIBAL↔FEDERAL LEGAL RELATIONS

**At Page 144, add at the bottom of the page:**

On February 22, 2007, the Department of the Interior issued a notice announcing its final determination that the Mashpee Indian Tribal Council, Inc. of Massachusetts was federally recognized, based on the Tribe's satisfaction of all seven mandatory criteria set forth in 25 C.F.R. § 83.7. 72 Federal Register 8007-01. At the specific request of the Massachusetts Attorney General, the Department had reexamined the record in the federal litigation over Mashpee tribal status, but had not found any evidence that would change its findings. Apparently OFA and the Department did not believe themselves bound by the earlier judicial finding that the Mashpee had abandoned their tribal status.

**At Page 145, add the following immediately after the first full paragraph:**

Following the Second Circuit's 1994 decision in *Golden Hill Paugussett Tribe of Indians v. Weicker*, which withheld any judicial decision about tribal status until completion of the OFA process, the Paugussetts pursued their petition for acknowledgment with OFA. OFA's decision to deny the petition, eventually upheld by the BIA, sent the Paugussetts back to federal court, seeking to reopen their original complaint asserting tribal status. Judge Janet Bond Arterton dismissed the suit, stating that the BIA's determination against tribal status would be given collateral estoppel effect. Thus, judicial decisions giving primary jurisdiction to the OFA can rule out separate court findings about tribal existence.

**At Page 148, insert the following at the end of the carryover paragraph from the previous page:**

That same 1866 treaty with the Cherokee Nation provided in Article 9 that all former Cherokee slaves (known as Cherokee Freedmen) "who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees." Over the past decade, controversy has raged within the Cherokee Nation over whether the descendants of these Freedmen should be entitled to Cherokee citizenship. For further discussion of this controversy, as well as the federal government's reaction to various Cherokee actions on this subject, see Ch. 3, Sec. E of the Casebook and pages 34-35 of this Update.

**At Page 189, insert the following after the second full paragraph on the page:**

In the wake of the Eighth Circuit’s decision, the daunting task of delineating Yankton Indian country fell to United States District Court Judge Lawrence Piersol. Judge Piersol affirmed that the Yankton Sioux Reservation is a “checkerboard reservation” that has been diminished, but not disestablished. After careful analysis, he ruled that parcels within the scope of the original 1858 treaty boundaries are reservation lands for purposes of 18 U.S.C. §1151(a) if they have continuously remained trust allotments; if they earlier went out of trust but were later taken back into trust for the Tribe by the United States; and if they are allotments that went out of trust but have been continuously held by Indians in fee. *Yankton Sioux Tribe v. Podhradsky*, 529 F.Supp.2d 1040 (D.S.D. 2007). Commenting on the potential difficulties of law enforcement and administration under such conditions, Judge Piersol observed that “[even if the checkerboarded reservation] as now diminished presented law enforcement problems, those problems would have to be countenanced for the Reservation as diminished is what varying federal Indian policies have created.” At the same time, he commented that he thought the patchwork jurisdictional arrangement was “workable,” as measured by his own “busy criminal docket” of cases arising at Yankton. It is noteworthy, however, that Charles Mix County, where the Yankton Sioux Reservation is located, has been the site of a successful race discrimination lawsuit by Indian plaintiffs under the Voting Rights Act of 1965. Furthermore, the Tribe and the County have been unable to arrive at a cross-deputization agreement. Under those circumstances, how easy can it be for law enforcement officers and courts to ascertain which cases are within their jurisdiction?

**At Page 199, add the following at the end of the first paragraph of Note 2 on *Morton v. Mancari*:**

In *Indian Educators Federation Local 4524 of the American Federation of Teachers v. Kempthorne*, 541 F.Supp.2d 257 (D.D.C. 2008), United States District Court Judge Thomas F. Hogan considered whether the Indian Reorganization Act’s employment preference extends to positions in the Interior Department outside the BIA. The statutory language refers only to employment within the “Indian Office.” At issue in *Indian Educators* were jobs within the Office of Special Trustee for American Indians, an office established by the American Indian Trust Fund Management Reform Act of 1994 to improve the accountability and management of Indian funds held in trust by the federal government. See *Cobell v. Norton*, presented in this Casebook at page 638. Reversing longstanding Interior Department policy, the Interior Solicitor in the administration of President Ronald Reagan had issued an opinion in 1988 stating that only BIA positions were subject to the preference. Judge Hogan rejected this reading of the statute, relying on the Indian law canons of construction, and found that the preference applies to “all positions in the Department [of the Interior] that directly and primarily relate to providing services to Indians....” Should that ruling allay the concerns of some tribal leaders that the Department of the Interior might respond to Indian trust mismanagement claims by taking management of all trust assets outside the BIA?

**At Page 205, insert the following before the final paragraph of Note 3 on “Treating Indian Classifications as Political Rather than Racial”:**

In *In the Interest of A.W. and S.W.*, 741 N.W.2d 793 (Iowa 2007), the Iowa Supreme Court considered the constitutionality of a state child welfare law that expanded tribal rights beyond those afforded in the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq. (see Ch. 5, Sec. D of the Casebook). Specifically, the Iowa statute defined an “Indian child” to include any child of an enrolled tribal member, while the federal law addresses only children who are themselves tribal members or eligible for membership. The court acknowledged that states may take advantage of the more relaxed *Morton v. Mancari* standard of review if they are carrying out a delegated federal trust obligation. Furthermore, it conceded that the federal Act delegated federal trust authority to the states for the protection of Indian tribes. Nonetheless, it read United States Supreme Court opinions, including *Morton v. Mancari* itself, as limiting the federal trust responsibility to enrolled tribal members. Thus, the court concluded, “Given the limits of Congressional authority to legislate only in favor of members of federally recognized tribes, we conclude the Iowa ICWA’s expansion of the definition of “Indian child” to include ethnic Indians not eligible for membership in a federally recognized tribe constitutes a racial classification.” As such, it had to be reviewed under the “strict scrutiny” standard of review. Has the Iowa Supreme Court given a proper reading to the Supreme Court decisions on this subject, especially *Morton v. Mancari* and *Antelope*? See Note 2 at page 203 of the Casebook.

**At Page 218, insert the following at the end of Note 1:**

In *In the Interest of A.W. and S.W.*, 741 N.W.2d 793 (Iowa 2007), discussed immediately above in this Update, the Iowa Supreme Court used the “strict scrutiny” standard to evaluate a classification created by a state law affording tribes special intervention rights in child welfare proceedings. Under that statute, the tribal rights would arise in any case involving a child of an enrolled tribal member, whether or not the child herself was eligible for tribal membership. According to the Iowa court, this classification could not survive strict scrutiny because it was not narrowly tailored to advance the compelling governmental interest of protecting essential tribal relations. If an Indian child is ineligible for membership in her or his own right, then special tribal rights are not necessary to allow the tribe “to protect its interests in those individuals who will perpetuate the next generation of the tribe’s existence.” Is this decision consistent with the more forgiving treatment of “strict scrutiny” in *Grutter v. Bollinger*? Does it read the concept of “narrow tailoring” too narrowly? The Winnebago Tribe of Nebraska, whose member was involved in *In the Interest of A.W. and S.W.*, had adopted a resolution stating that “[F]or purposes of determining the applicability of the Iowa ICWA, any child of an enrolled Winnebago tribal member shall be included as a child of the Winnebago tribal community.” Why wasn’t this affirmation by the Winnebago Tribe sufficient to indicate a tribal interest in such children and to trigger a federal trust obligation? What are the implications of the Iowa Supreme Court’s decision for tribal choices regarding enrollment criteria?

**At Page 234, at the end of Note 3, it may be appropriate to include the latest major decision on the question whether federal statutes of general applicability apply to Indian tribes:**

**SAN MANUEL INDIAN BINGO AND CASINO v. N.L.R.B.**

475 F.3d 1306 (D.C. Cir. 2007)

BROWN, Circuit Judge.

In this case, we consider whether the National Labor Relations Board (the “Board”) may apply the National Labor Relations Act, 29 U.S.C. §§ 151et seq. (the “NLRA”), to employment at a casino the San Manuel Band of Serrano Mission Indians (“San Manuel” or the “Tribe”) operates on its reservation. The casino employs many non-Indians and caters primarily to non-Indians. We hold the Board may apply the NLRA to employment at this casino, and therefore we deny the petition for review.

I

San Manuel owns and operates the San Manuel Indian Bingo and Casino (the “Casino”) on its reservation in San Bernardino County, California. This proceeding arose out of a competition between the Communication Workers of America (“CWA”) and the Hotel Employees & Restaurant Employees International Union (“HERE”), each seeking to organize the Casino's employees. According to HERE's evidence, the Casino is about an hour's drive from Los Angeles. It includes a 2300-seat bingo hall and over a thousand slot machines. It also offers live entertainment. HERE's evidence further suggests the Tribe actively directs its marketing efforts to non-Indians, and the Board found that “many, and perhaps the great majority, of the casino's patrons are nonmembers who come from outside the reservation.” San Manuel Indian Bingo & Casino, 341 N.L.R.B. 1055, 1056 (2004). The Tribe does not contract with an independent management company to operate the Casino, and therefore many Tribe members hold key positions at the Casino. Nevertheless, given the Casino's size, the Tribe must employ a significant number of non-members to ensure effective operation. *Id.* at 1056, 1061.

The Casino was established by the San Manuel tribal government as a “tribal governmental economic development project,” *id.* at 1055, and it operates pursuant to the Indian Gaming Regulatory Act of 1988 (“IGRA”), which authorized gaming on tribal lands expressly “as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,” 25 U.S.C. § 2702(1). According to San Manuel's evidence, its tribal government consists of a “General Council,” which elects from among

its members a “Business Committee.” The General Council includes all tribal members twenty-one years of age or older. The record is not specific in regards to the size of the Tribe, but the Tribe’s “Articles of Association” call for monthly meetings of the General Council, suggesting the Tribe is relatively small. The record also does not indicate the Casino’s gross annual revenues, but HERE submitted a declaration indicating that, as of February 8, 2000, the Casino’s website was advertising in regard to its bingo operation “Over 1 BILLION Dollars in Cash and Prizes awarded since July 24th, 1986.” Revenues from the Casino are used to fund various tribal government programs and to provide for the general welfare of Tribe members.

In the Tribe’s case, IGRA appears to have fulfilled its purpose, as the Casino has markedly improved the Tribe’s economic condition. The Tribe’s evidence indicates its one-square-mile reservation consists primarily of steep, mountainous, arid land, most of it unsuitable to economic development. For many years, the Tribe had no resources, and many of its members depended on public assistance. As a result of the Casino, however, the Tribe can now boast full employment, complete medical coverage for all members, government funding for scholarships, improved housing, and significant infrastructure improvements to the reservation. In addition, according to the Tribe’s evidence, the tribal government is authorized to make direct per capita payments of Casino revenues to Tribe members, suggesting that improved government services are not the only way Tribe members might benefit from the Casino.

## II

On January 18, 1999, HERE filed an unfair labor practice charge with the Board. The charge asserted the Casino “has interfered with, coerced and restrained employees in the exercise of their [collective bargaining] rights, and has dominated and discriminatorily supported the [CWA] by allowing CWA representatives access to Casino property ..., while denying the same-or any-right of access to representatives of the Charging Party ....” HERE filed a second charge on March 29, 1999, making similar allegations. On September 30, 1999, the Board’s Regional Director for Region 31 issued an order consolidating the two cases, as well as a consolidated complaint. The complaint alleged the Casino had permitted CWA: (1) to place a trailer on Casino property for the purpose of organizing Casino employees; (2) to distribute leaflets from the trailer; and (3) to communicate with Casino employees on Casino property during working hours. The complaint further alleged the Casino’s security guards denied HERE equal access to Casino employees.

The Tribe appeared specially, seeking dismissal for lack of jurisdiction. The Tribe asserted the NLRA does not apply to the actions of tribal governments on their reservations. See *Fort Apache Timber Co.*, 226 N.L.R.B. 503 (1976). On January 27, 2000, the matter was transferred to the Board in Washington, D.C., and on May 28, 2004, the Board issued a decision and order finding the NLRA applicable.

The Board began by reviewing its past decisions regarding application of the NLRA to tribal governments. 341 N.L.R.B. at 1056-57. In *Fort Apache*, the Board had

ruled the NLRA did not apply to a tribal government operating a timber mill on Indian land, finding the mill to be akin to a “political subdivision” of a state government and therefore exempt. *Fort Apache*, 226 N.L.R.B. at 506 n. 22. This ruling would arguably apply wherever the tribal government's enterprise was located, but in *Sac & Fox Industries, Ltd.*, 307 N.L.R.B. 241 (1992), the Board found the NLRA applicable to off-reservation tribal enterprises. *Id.* at 242-43, 245; see also *Yukon Kuskokwim Health Corp.*, 328 N.L.R.B. 761, 763-64 (1999) (a case involving an off-reservation healthcare facility operated by a tribal consortium). Analyzing these precedents, the Board acknowledged reliance on two basic premises—that location is determinative and that the text of the NLRA supported this location-based rule—and found both flawed. 341 N.L.R.B. at 1057. First, the Board concluded that the NLRA applies to tribal governments by its terms and that the legislative history of the NLRA does not suggest a tribal exemption. *Id.* at 1057-59. Next, the Board held federal Indian policy does not preclude application of the NLRA to the commercial activities of tribal governments. *Id.* at 1059-62.

In regard to the latter point, the Board cited the Supreme Court's statement in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116, (1960), that “a general statute in terms applying to all persons includes Indians and their property interests.” The Board noted several contexts in which courts had followed *Tuscarora* and applied federal laws to Indian tribes. 341 N.L.R.B. at 1059. In *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir.1985), for example, the Ninth Circuit found the Occupational Safety and Health Act applicable to a farm operated by a tribe and located on the tribe's reservation. The Coeur d'Alene court identified only three exceptions to *Tuscarora*'s statement that federal statutes apply to tribes. According to the Ninth Circuit, an exception to this general rule is appropriate when: “(1) the law touches ‘exclusive rights of self-governance in purely intramural matters’; (2) the application of the law to the tribe would ‘abrogate rights guaranteed by Indian treaties’; or (3) there is proof ‘by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations ...’” *Id.* at 1116 (alterations in original) (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir.1980)). The Board adopted the *Tuscarora-Coeur d'Alene* framework in this case, thus overruling the *Fort Apache* decision, 341 N.L.R.B. at 1060, and it concluded that none of the three *Coeur d'Alene* exceptions applied and that therefore what it characterized as *Tuscarora*'s general rule was controlling, *id.* at 1063.

But the Board did not stop there. Having found the NLRA applicable according to its terms, and having concluded federal Indian law did not preclude application of the NLRA, the Board considered as a matter of discretion whether to exercise its jurisdiction in light of the need to “accommodate the unique status of Indians in our society and legal culture.” *Id.* at 1062. Here, the Board went beyond the Coeur d'Alene exceptions, asking if the assertion of jurisdiction would “effectuate the purposes of the [NLRA],” *id.*, and noting that when a tribe “is fulfilling traditionally tribal or governmental functions” that do not “involve non-Indians [or] substantially affect interstate commerce,” “the Board's interest in effectuating the policies of the [NLRA] is likely to be lower,” *id.* at 1063. The Board considered the location of the tribal government's activity (that is, whether on or

off the Tribe's reservation) relevant but not determinative. *Id.* Because here “the casino is a typical commercial enterprise [that] employs non-Indians[ ] and ... caters to non-Indian customers,” *id.*, the Board found the exercise of jurisdiction appropriate, *id.* at 1063-64.

Failing in its effort to obtain a dismissal of the complaint, the Tribe filed an amended answer, admitting the key factual allegations and again denying the applicability of the NLRA. The Board's general counsel then moved for summary judgment, and the Board granted the motion. The Board reaffirmed its jurisdictional determination and, based on the Tribe's factual admissions, found an unfair labor practice in violation of the NLRA. The Board issued a cease-and-desist order requiring the Tribe to give HERE access to the Casino and also to post notices in the Casino describing the rights of employees under the NLRA. The Tribe petitioned for review, and the Board filed a cross-application for enforcement of its order.

### III

Several factors make resolution of this case particularly difficult. We have before us conflicting Supreme Court canons of interpretation that are articulated at a fairly high level of generality. In addition, the NLRA was enacted by a Congress that in all likelihood never contemplated the statute's potential application to tribal employers, and probably no member of that Congress imagined a small Indian tribe might operate like a closely held corporation, employing hundreds, or even thousands, of non-Indians to produce a product it profitably marketed to non-Indians. Further, the casino at issue here, though certainly exhibiting characteristics that are strongly commercial (non-Indian employees and non-Indian patrons), is also in some sense governmental (the casino is the primary source of revenue for the tribal government). Finally, out-of-circuit precedent is inconsistent as to the applicability of general federal laws to Indian tribes.

The gravitational center of San Manuel's case is tribal sovereignty, but even if we accept the paramount significance of this factor, our resolution of the case depends on how the Supreme Court and Congress have defined the contours and limits of tribal sovereignty. Our central inquiry is whether the relation between the Tribe's sovereign interests and the NLRA is such that the ambiguity in the NLRA should be resolved against the Board's exercise of jurisdiction. By focusing on the sovereignty question and addressing it first, we find the statutory interpretation question resolves itself fairly simply. Thus, we analyze this case in two parts: (1) Would application of the NLRA to San Manuel's casino violate federal Indian law by impinging upon protected tribal sovereignty? and (2) Assuming the preceding question is answered in the negative, does the term “employer” in the NLRA reasonably encompass Indian tribal governments operating commercial enterprises?

### A

When we begin to examine tribal sovereignty, we find the relevant principles to be, superficially at least, in conflict. First, we have the Supreme Court's statement in *Tuscarora* that “a general statute in terms applying to all persons includes Indians and

their property interests.” 362 U.S. at 116. In *Tuscarora*, the Court applied this principle to permit condemnation of private property owned by a tribal government, finding a general grant of eminent domain powers applicable to the tribe. *Id.* at 118. This *Tuscarora* statement is, however, in tension with the longstanding principles that (1) ambiguities in a federal statute must be resolved in favor of Indians, see *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 268-69, (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Bryan v. Itasca County*, 426 U.S. 373, 390-92 (1976); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 176 (1973); *Squire v. Capoean*, 351 U.S. 1, 6-7 (1956); *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C.Cir.2003), and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty, see *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978). Moreover, *Tuscarora*'s statement is of uncertain significance, and possibly dictum, given the particulars of that case. Unlike the NLRA, the Federal Power Act at issue in *Tuscarora* included a specific limitation on eminent domain on Indian reservations. See 362 U.S. at 107 (noting that lands within a reservation could not be taken by eminent domain unless the Federal Power Commission found that the taking would “not interfere or be inconsistent with the purpose for which such reservation was created or acquired” (internal quotation marks omitted)). This limitation supported the inference that Congress intended in other circumstances to include Indians within the Federal Power Act's eminent domain provision. See *id.* at 118 (“[The Federal Power Act] neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians.... The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians.”).

As discussed above, the Board steered its way between these various rules by following the Ninth Circuit's lead in *Coeur d'Alene*, 751 F.2d at 1116, which identified three exceptions to *Tuscarora*'s general statement. The Board concluded none of the exceptions applied, and therefore *Tuscarora*'s general statement controlled. 341 N.L.R.B. at 1063. Because the Board's expertise and delegated authority does not relate to federal Indian law, we need not defer to the Board's conclusion. See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-44 (2002); ...Therefore, we decide de novo the implications of tribal sovereignty on the statutory construction question before us.

Each of the cases petitioners cite in support of the principle that statutory ambiguities must be construed in favor of Indians (as well as the cases we have found supporting the principle) involved construction of a statute or a provision of a statute Congress enacted specifically for the benefit of Indians or for the regulation of Indian affairs. We have found no case in which the Supreme Court applied this principle of pro-Indian construction when resolving an ambiguity in a statute of general application.

With regard to the alternative principle relied on by petitioners, that a clear statement of Congressional intent is necessary before a court can construe a statute to limit tribal sovereignty, we can reconcile this principle with *Tuscarora* by recognizing

that, in some cases at least, a statute of general application can constrain the actions of a tribal government without at the same time impairing tribal sovereignty.

Tribal sovereignty is far from absolute, ... An examination of Supreme Court cases shows tribal sovereignty to be at its strongest when explicitly established by a treaty, see, e.g., *McClanahan*, 411 U.S. at 173-75, or when a tribal government acts within the borders of its reservation, in a matter of concern only to members of the tribe, see, e.g., *White Mountain Apache Tribe*, 448 U.S. at 144; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480-81 (1976). Examples of such intramural matters include regulating the status of tribe members in relation to one another, see *Fisher v. District Court*, 424 U.S. 382, 387-88 (1976); *United States v. Quiver*, 241 U.S. 602, 605-06 (1916), and determining tribe membership, see *Santa Clara Pueblo*, 436 U.S. at 71. Conversely, when a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transaction with non-Indians, its claim of sovereignty is at its weakest. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). In the latter situation, courts recognize the capacity of a duly established tribal government to act as an unincorporated legal person, engaging in privately negotiated contractual affairs with non-Indians, but the tribal government does so subject to generally applicable laws. See, e.g., *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 94 F.3d 747, 753 (2d Cir.1996); *Gila River Indian Cmty. v. Henningson, Durham & Richardson*, 626 F.2d 708, 715 (9th Cir.1980). The primary qualification to this rule is that the tribal government may be immune from suit. See *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

Many activities of a tribal government fall somewhere between a purely intramural act of reservation governance and an off-reservation commercial enterprise. In such a case, the “inquiry [as to whether a general law inappropriately impairs tribal sovereignty] is not dependent on mechanical or absolute conceptions of ... tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake.” *White Mountain Apache Tribe*, 448 U.S. at 145. The determinative consideration appears to be the extent to which application of the general law will constrain the tribe with respect to its governmental functions. If such constraint will occur, then tribal sovereignty is at risk and a clear expression of Congressional intent is necessary. Conversely, if the general law relates only to the extra-governmental activities of the tribe, and in particular activities involving non-Indians, see generally *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 180-81 (2d Cir. 1996) (“[E]mployment of non-Indians weighs heavily against [a] claim that ... activities affect rights of self-governance in purely intramural matters.”), then application of the law might not impinge on tribal sovereignty. Of course, it can be argued any activity of a tribal government is by definition “governmental,” and even more so an activity aimed at raising revenue that will fund governmental functions. Here, though, we use the term “governmental” in a restrictive sense to distinguish between the traditional acts governments perform and collateral activities that, though perhaps in some way related to the foregoing, lie outside their scope.

Cases involving the application of state law to Indian activities are also instructive. Generally speaking, state laws do not apply to the activities of tribal Indians on their reservations. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). Nevertheless, the location of the activity is not the only consideration the Supreme Court has applied in these cases, and though the application of state law raises very different issues and therefore these cases are not directly on point, we find significant that the Court has defined tribal sovereignty in these cases partly in terms of governmental functions [discussing *Williams v. Lee* (an on-reservation case, see page 680 of this Casebook), *Organized Village of Kake v. Egan* (an off-reservation case, see page 780 of this Casebook), and *Mescalero Apache Tribes v. Jones* (another off-reservation case, see page 776 of this Casebook)].

In sum, the Supreme Court's decisions reflect an earnest concern for maintaining tribal sovereignty, but they also recognize that tribal governments engage in a varied range of activities many of which are not activities we normally associate with governance. These activities include off-reservation fishing, investments in non-residential private property, and commercial enterprises that tend to blur any distinction between the tribal government and a private corporation. The Supreme Court's concern for tribal sovereignty distinguishes among the different activities tribal governments pursue, focusing on acts of governance as the measure of tribal sovereignty. The principle of tribal sovereignty in American law exists as a matter of respect for Indian communities. It recognizes the independence of these communities as regards internal affairs, thereby giving them latitude to maintain traditional customs and practices. But tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint.

Of course, in establishing and operating the Casino, San Manuel has not acted solely in a commercial capacity. Certainly its enactment of a tribal labor ordinance to govern relations with its employees was a governmental act, as was its act of negotiating and executing a gaming compact with the State of California, as required by IGRA. See 25 U.S.C. § 2710(d)(3). Moreover, application of the NLRA to employment at the Casino will impinge, to some extent, on these governmental activities. Nevertheless, impairment of tribal sovereignty is negligible in this context, as the Tribe's activity was primarily commercial and its enactment of labor legislation and its execution of a gaming compact were ancillary to that commercial activity. The total impact on tribal sovereignty at issue here amounts to some unpredictable, but probably modest, effect on tribal revenue and the displacement of legislative and executive authority that is secondary to a commercial undertaking. We do not think this limited impact is sufficient to demand a restrictive construction of the NLRA.

Therefore, we need not choose between *Tuscarora's* statement that laws of general applicability apply also to Indian tribes and *Santa Clara Pueblo's* statement that courts may not construe laws in a way that impinges upon tribal sovereignty absent a clear indication of Congressional intent. Even applying the more restrictive rule of *Santa Clara Pueblo*, the NLRA does not impinge on the Tribe's sovereignty enough to indicate a need to construe the statute narrowly against application to employment at the Casino.

First, operation of a casino is not a traditional attribute of self-government. Rather, the casino at issue here is virtually identical to scores of purely commercial casinos across the country. Second, the vast majority of the Casino's employees and customers are not members of the Tribe, and they live off the reservation. For these reasons, the Tribe is not simply engaged in internal governance of its territory and members, and its sovereignty over such matters is not called into question. Because applying the NLRA to San Manuel's Casino would not impair tribal sovereignty, federal Indian law does not prevent the Board from exercising jurisdiction....

## B

The second question before us, whether the term “employer” in the NLRA encompasses Indian tribal governments operating commercial enterprises, requires a much briefer analysis. The Board concluded the NLRA's definition of employer extended to San Manuel's commercial activities. Neither the text of the NLRA, nor any other reliable indicator of Congressional intent, indicates whether or not Congress specifically intended to include the commercial enterprises of Indian tribes when it used the term “employer.” Therefore, Congress has not “directly spoken to the precise question at issue,” *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984), and the question is therefore one Congress has implicitly delegated to the Board for determination. Under these circumstances, the scope of our review is limited, the matter falling under step two of *Chevron*'s analytical diptych. *Id.* at 842-43; see also *Yukon-Kuskokwim Health Corp. v. NLRB*, 234 F.3d 714, 717 (D.C.Cir. 2000) (applying *Chevron*'s step two to the Board's interpretation of the term “employer” in the NLRA). Specifically, if the Board's interpretation is “a permissible construction of the statute,” *Chevron*, 467 U.S. at 843, we must give that interpretation “controlling weight,” *id.* at 844.

... Black's Law Dictionary defines employer as “[a] person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages.” BLACK'S LAW DICTIONARY 565 (8th ed.2004). Under this generic definition of the term employer, we have no doubt it was reasonable for the Board to conclude the Tribe is an employer of its Casino workers. The Tribe does not suggest that it lacks control over these workers, or that it has no contract of hire with these workers, or that these workers are unpaid. Certainly, then, the Tribe is an employer in the ordinary sense of that term; indeed, the Tribe calls its Casino workers “employees” in its briefs filed in this court. Thus, the Tribe does not seriously contend it is not an employer; rather it contends it falls within one of the NLRA's listed exceptions.

Section 2(2) states that “[t]he term ‘employer’ ... shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization.” 29 U.S.C. § 152(2). The Tribe asserts it falls within the exception for “any State or political subdivision thereof,” calling this exception a “governmental exemption.” Cf. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (tribal governments come within NLRA provision allowing states

to enact right-to-work laws); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490 (7th Cir. 1993) (tribal police come within FLSA exemption for the police of state and local governments). The Tribe's argument is certainly plausible, but we cannot say the Board's more restrictive reading of the NLRA's government exception is not "a permissible construction of the statute," *Chevron*, 467 U.S. at 843. The exception is limited by its terms to state governments (and their political subdivisions), and we can hardly call it impermissible for an agency to limit a statutory phrase to its ordinary and plain meaning. In short, the Board could reasonably conclude that Congress's decision not to include an express exception for Indian tribes in the NLRA was because no such exception was intended or exists.

San Manuel argues, however, that nothing in the legislative history or text of the NLRA indicates a Congressional intent to apply the NLRA to tribal governments. See *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979) (in light of the constitutional avoidance canon, finding church-operated schools exempt because there was no indication of Congressional intent to extend NLRA to such schools); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963) (in light of the "highly charged international circumstances" surrounding the case, finding foreign-flag ships exempt from NLRA because "for us to sanction the exercise of local sovereignty under such conditions in this delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed" (internal quotation marks omitted)). This point is irrelevant in light of our conclusion above that the NLRA does not impinge on the Tribe's sovereignty enough to warrant construing the statute as inapplicable. In the absence of a presumption against application of the NLRA, the legislative history need not expressly anticipate every category of employer that might fall within the NLRA's broad definition.

San Manuel also argues Congress intended, by enacting IGRA, to give tribes and states a primary role in regulating tribal gaming activities, including labor relations, and that Congress therefore, by implication, foreclosed application of the NLRA to tribal gaming. Among other things, IGRA requires tribes that engage or intend to engage in "class III gaming" (the broad category of gaming at issue here) to negotiate, enter into, and comply with a compact between the tribe and the state in which the gaming will occur. See 25 U.S.C. § 2710(d)(1)(C), (3)(A). [This tribal-state compact may include provisions relating to any subjects "that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C).] The compact San Manuel entered into with the State of California specifically addresses labor relations, requiring San Manuel to adopt "an agreement or other procedure acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees." San Manuel satisfied this requirement by enacting a detailed labor relations ordinance, which differs substantively from the NLRA.

In addition, IGRA makes class III gaming activities lawful on Indian lands only if authorized by a tribal ordinance or resolution approved by the Chairman of the National Indian Gaming Commission. *Id.* § 2710(d)(1)(A). To gain this approval, the ordinance or

resolution must include several provisions, one of which [limits the uses of gaming revenues to five specific purposes.] Id. § 2710(b)(2)(B)....

San Manuel argues that IGRA, by authorizing tribes and states to enter into compacts addressing labor-relations issues and by mandating a tribal ordinance or resolution regulating gaming activities, contemplates tribal and state control over gaming and therefore implicitly restricts the scope of the NLRA. Cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000) (a later-enacted, specific statute can “effectively ratif[y]” a narrow construction of an earlier-enacted, general statute).

We think San Manuel reads too much into IGRA. IGRA certainly permits tribes and states to regulate gaming activities, but it is a considerable leap from that bare fact to the conclusion that Congress intended federal agencies to have no role in regulating employment issues that arise in the context of tribal gaming. This is not a case in which Congress enacted a comprehensive scheme governing labor relations at Indian casinos, and then the Board sought to expand its jurisdiction into that field. See *id.* at 126. We find no indication that Congress intended to limit the scope of the NLRA when it enacted IGRA, and certainly nothing strong enough to render the Board's interpretation of the NLRA impermissible. See *Chevron*, 467 U.S. at 843.

In sum, the Board has given the NLRA a natural interpretation that falls within the range of interpretations the NLRA permits, and regardless of whether we think the Board's decision wise, we are without authority to reject it. *Id.*

#### IV

Given that application of the NLRA to the San Manuel Casino would not significantly impair tribal sovereignty, and therefore federal Indian law does not preclude the Board from applying the NLRA, and given that the Board's decision as to the scope of the term “employer” in the NLRA constitutes “a permissible construction of the statute,” *id.*, we uphold the Board's conclusion finding the NLRA applicable. In some regards our analysis has differed slightly from that of the Board. These differences do not, however, constitute an improper usurpation of the Board's decisionmaking prerogative, see *SEC v. Chenery Corp.*, 318 U.S. 80, 88-95 (1943), because the Board, in reaching its ultimate conclusion, relied on the same factors we rely upon; specifically, that the Casino is a purely “commercial enterprise,” 341 N.L.R.B. at 1055, that employs “significant numbers of non-Indians and ... caters to a non-Indian clientele” who live off the reservation, *id.* at 1061. Moreover, the differences between our analysis and that of the Board relate to the application of federal Indian law, not to the Board's interpretation of the scope of the term “employer” in the NLRA. Because Congress has not delegated questions of federal Indian law to the Board, and because we agree with the Board's ultimate conclusion that federal Indian law poses no obstacle here, we need not remand the matter.

#### V

The petition for review is denied, and the cross-application for enforcement is granted. So ordered.

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For a thorough critique of the D.C. Circuit's opinion, see Bryan Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 *Oregon L. Rev.* 413 (2007). Wildenthal contends that the United States Supreme Court has actually abandoned the statements from *Tuscarora* that formed the foundation for the *San Manuel* decision, and that lower federal courts have been departing from Supreme Court practice when they disregard the canons. He also argues that the Supreme Court has been affording states considerable leeway to experiment with government programs that some may disparage as non-"traditional," and that tribes deserve the same freedom.

### CHAPTER 3

#### TRIBAL SOVEREIGNTY AND ITS EXERCISE

**Insert the following case at Page 313 after the notes following *Strate v. A-1 Contractors*, or at Page 350, after the notes following *Nevada v. Hicks*. This case narrows tribal court jurisdiction and reaffirms the importance of land status as to the question of the scope of tribal court jurisdiction.**

**PLAINS COMMERCE BANK v. LONG FAMILY LAND & CATTLE CO.,  
INC.**

128 S.Ct. 2709 (June 25, 2008)

Chief Justice ROBERTS delivered the opinion of the Court.

This case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals. Following the sale, an Indian couple, customers of the bank who had defaulted on their loans, claimed the bank discriminated against them by offering the land to non-Indians on terms more favorable than those the bank offered to them. The couple sued on that claim in tribal court; the bank contested the court's jurisdiction. The tribal court concluded that it had jurisdiction and proceeded to hear the case. It ultimately ruled against the bank and awarded the Indian couple damages and the right to purchase a portion of the fee land. The question presented is whether the tribal court had jurisdiction to adjudicate a discrimination claim concerning the non-Indian bank's sale of fee land it owned. We hold that it did not.

I

The Long Family Land and Cattle Company, Inc. (Long Company or Company), is a family-run ranching and farming operation incorporated under the laws of South Dakota. Its lands are located on the Cheyenne River Sioux Indian Reservation. Once a massive, 60-million acre affair, the reservation was appreciably diminished by Congress in the 1880s and at present consists of roughly 11 million acres located in Dewey and Ziebach Counties in north-central South Dakota. The Long Company is a respondent here, along with Ronnie and Lila Long, husband and wife, who together own at least 51 percent of the Company's shares. Ronnie and Lila Long are both enrolled members of the Cheyenne River Sioux Indian Tribe.

The Longs and their Company have been customers for many years at Plains Commerce Bank (Bank), located some 25 miles off the reservation as the crow flies in Hoven, South Dakota. The Bank, like the Long Company, is a South Dakota corporation, but has no ties to the reservation other than its business dealings with tribal members. The Bank made its first commercial loan to the Long Company in 1989, and a series of agreements followed. As part of those agreements, Kenneth Long-Ronnie Long's father and a non-Indian-mortgaged to the Bank 2,230 acres of fee land he owned inside the reservation. At the time of Kenneth Long's death in the summer of 1995, Kenneth and the Long Company owed the Bank \$750,000.

In the spring of 1996, Ronnie and Lila Long began negotiating a new loan contract with the Bank in an effort to shore up their Company's flagging financial fortunes and come to terms with their outstanding debts. After several months of back-and-forth, the parties finally reached an agreement in December of that year-two agreements, to be precise. The Company and the Bank signed a fresh loan contract, according to which Kenneth Long's estate deeded over the previously mortgaged fee acreage to the Bank in lieu of foreclosure. App. 104. In return, the Bank agreed to cancel some of the Company's debt and to make additional operating loans. The parties also agreed to a lease arrangement: The Company received a two-year lease on the 2,230 acres, deeded over to the Bank, with an option to purchase the land at the end of the term for \$468,000. *Id.*, at 96-103.

It is at this point, the Longs claim, that the Bank began treating them badly. The Longs say the Bank initially offered more favorable purchase terms in the lease agreement, allegedly proposing to sell the land back to the Longs with a 20-year contract for deed. The Bank eventually rescinded that offer, the Longs claim, citing “possible jurisdictional problems” that might have been caused by the Bank financing an “Indian owned entity on the reservation.” 491 F.3d 878, 882 (C.A.8 2007) (case below).

Then came the punishing winter of 1996-1997. The Longs lost over 500 head of cattle in the blizzards that season, with the result that the Long Company was unable to exercise its option to purchase the leased acreage when the lease contract expired in 1998. Nevertheless, the Longs refused to vacate the property, prompting the Bank to initiate eviction proceedings in state court and to petition the Cheyenne River Sioux Tribal Court to serve the Longs with a notice to quit. In the meantime, the Bank sold 320 acres of the fee land it owned to a non-Indian couple. In June 1999, while the Longs

continued to occupy a 960-acre parcel of the land, the Bank sold the remaining 1,910 acres to two other nonmembers.

In July 1999, the Longs and the Long Company filed suit against the Bank in the Tribal Court, seeking an injunction to prevent their eviction from the property and to reverse the sale of the land. They asserted a variety of claims, including breach of contract, bad faith, violation of tribal-law self-help remedies, and discrimination. The discrimination claim alleged that the Bank sold the land to nonmembers on terms more favorable than those offered the Company. The Bank asserted in its answer that the court lacked jurisdiction and also stated a counterclaim. The Tribal Court found that it had jurisdiction, denied the Bank's motion for summary judgment on its counterclaim, and proceeded to trial. Four causes of action were submitted to the seven-member jury: breach of contract, bad faith, violation of self-help remedies, and discrimination.

The jury found for the Longs on three of the four causes, including the discrimination claim, and awarded a \$750,000 general verdict. After denying the Bank's post-trial motion for judgment notwithstanding the verdict by finding again that it had jurisdiction to adjudicate the Longs' claims, the Tribal Court entered judgment awarding the Longs \$750,000 plus interest. A later supplemental judgment further awarded the Longs an option to purchase the 960 acres of the land they still occupied on the terms offered in the original purchase option, effectively nullifying the Bank's previous sale of that land to non-Indians.

The Bank appealed to the Cheyenne River Sioux Tribal Court of Appeals, which affirmed the judgment of the trial court. The Bank then filed the instant action in the United States District Court for the District of South Dakota, seeking a declaration that the tribal judgment was null and void because, as relevant here, the Tribal Court lacked jurisdiction over the Longs' discrimination claim. The District Court granted summary judgment to the Longs. The court found tribal court jurisdiction proper because the Bank had entered into a consensual relationship with the Longs and the Long Company. 440 F.Supp.2d 1070, 1077-1078, 1080-1081 (SD 2006). According to the District Court, this relationship brought the Bank within the first category of tribal civil jurisdiction over nonmembers outlined in *Montana v. United States*, 450 U.S. 544 (1981). See 440 F.Supp.2d, at 1077-1078.

The Court of Appeals for the Eighth Circuit affirmed. 491 F.3d 878. The Longs' discrimination claim, the court held, "arose directly from their preexisting commercial relationship with the bank." *Id.*, at 887. When the Bank chose to deal with the Longs, it effectively consented to substantive regulation by the tribe: An antidiscrimination tort claim was just another way of regulating the commercial transactions between the parties. See *ibid.* In sum, the Tribe had authority to regulate the business conduct of persons who "voluntarily deal with tribal members," including, here, a nonmember's sale of fee land. *Ibid.*

We granted certiorari, 552 U.S. ----, 128 S.Ct. 829 (2008), and now reverse.

### III\*

#### A

For nearly two centuries now, we have recognized Indian tribes as “distinct, independent political communities,” *Worcester v. Georgia*, 6 Pet. 515, 559 (1832), qualified to exercise many of the powers and prerogatives of self-government, see *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). We have frequently noted, however, that the “sovereignty that the Indian tribes retain is of a unique and limited character.” *Id.*, at 323. It centers on the land held by the tribe and on tribal members within the reservation. See *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (tribes retain authority to govern “both their members and their territory,” subject ultimately to Congress); see also *Nevada v. Hicks*, 533 U.S. 353, 392 (2001) (“[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe”) (O’Connor, J., concurring in part and concurring in judgment).

As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers, see *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985), to determine tribal membership, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978), and to regulate domestic relations among members, see *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 387-389 (1976) (per curiam). They may also exclude outsiders from entering tribal land. See *Duro v. Reina*, 495 U.S. 676, 696-697 (1990). But tribes do not, as a general matter, possess authority over non-Indians who come within their borders: “[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana*, at 450 U.S., at 565. As we explained in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), the tribes have, by virtue of their incorporation into the American republic, lost “the right of governing ... person[s] within their limits except themselves.” *Id.*, at 209 (emphasis and internal quotation marks omitted).

This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians—what we have called “non-Indian fee land.” *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997) (internal quotation marks omitted). Thanks to the Indian General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 et seq., there are millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes. See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001). The history of the General Allotment Act and its successor statutes has been well rehearsed in our precedents. See, e.g., *Montana*, supra, at 558-563; *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 254-255 (1992). Suffice it to say here that the effect of the Act was to convert millions of acres of formerly tribal land into fee simple parcels, “fully alienable,” *id.*, at 264 and “free of all charge or encumbrance whatsoever,” 25 U.S.C. § 348 (2000 ed., Supp. V). See F. Cohen, *Handbook of Federal Indian Law* § 16.03[2][b], pp. 1041-1042 (2005 ed.) (hereinafter Cohen).

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\* Section II of the opinion, on standing, has been omitted.

Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it. See *County of Yakima*, supra, at 267-268 (General Allotment Act permits Yakima County to impose ad valorem tax on fee land located within the reservation); *Goudy v. Meath*, 203 U.S. 146, 149-150 (1906) (by rendering allotted lands alienable, General Allotment Act exposed them to state assessment and forced sale for taxes); *In re Heff*, 197 U.S. 488, 502-503 (1905) (fee land subject to plenary state jurisdiction upon issuance of trust patent (superseded by the Burke Act, 34 Stat. 182, 25 U.S.C. § 349) (2000 ed.)). Among the powers lost is the authority to prevent the land's sale, see *County of Yakima*, supra, at 263 (General Allotment Act granted fee holders power of voluntary sale)-not surprisingly, as “free alienability” by the holder is a core attribute of the fee simple, C. Moynihan, Introduction to Law of Real Property § 3, p. 32 (2d ed.1988). Moreover, when the tribe or tribal members convey a parcel of fee land “to non-Indians, [the tribe] loses any former right of absolute and exclusive use and occupation of the conveyed lands.” *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (emphasis added). This necessarily entails the “the loss of regulatory jurisdiction over the use of the land by others.” Ibid. As a general rule, then, “the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.” *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 430 (1989) (opinion of White, J.).

We have recognized two exceptions to this principle, circumstances in which tribes may exercise “civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.” *Montana*, 450 U.S., at 565. First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” Ibid. Second, a tribe may exercise “civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” Id., at 566. These rules have become known as the *Montana* exceptions, after the case that elaborated them. By their terms, the exceptions concern regulation of “the activities of nonmembers” or “the conduct of non-Indians on fee land.”

Given *Montana's* “general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,” *Atkinson*, supra, at 651 (quoting *Montana*, supra, at 565), efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are “presumptively invalid,” *Atkinson*, supra, at 659. The burden rests on the tribe to establish one of the exceptions to *Montana's* general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. *Atkinson*, 532 U.S., at 654. These exceptions are “limited” ones, id., at 647, and cannot be construed in a manner that would “swallow the rule,” id., at 655, or “severely shrink” it, *Strate*, 520 U.S., at 458. The Bank contends that neither exception authorizes tribal courts to exercise jurisdiction over the Longs' discrimination claim at issue in this case. We agree.

B

According to our precedents, “a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.” *Id.*, at 453. We reaffirm that principle today and hold that the Tribal Court lacks jurisdiction to hear the Longs' discrimination claim because the Tribe lacks the civil authority to regulate the Bank's sale of its fee land.

The Longs' discrimination claim challenges a non-Indian's sale of non-Indian fee land. Despite the Longs' attempt to recharacterize their claim as turning on the Bank's alleged “failure to pay to respondents loans promised for cattle-raising on tribal trust land,” Brief for Respondents 47, in fact the Longs brought their discrimination claim “seeking to have the land sales set aside on the ground that the sale to nonmembers ‘on terms more favorable’ than the bank had extended to the Longs” violated tribal tort law, 491 F.3d, at 882 (quoting Plaintiffs' Amended Complaint, App. 173). See also Brief for United States as Amicus Curiae 7. That discrimination claim thus concerned the sale of a 2,230-acre fee parcel that the Bank had acquired from the estate of a non-Indian.

The status of the land is relevant “insofar as it bears on the application of ...*Montana's* exceptions to [this] case.” *Hicks*, 533 U.S., at 376 (SOUTER, J., concurring). The acres at issue here were alienated from the Cheyenne River Sioux's tribal trust and converted into fee simple parcels as part of the Act of May 27, 1908, 35 Stat. 312, commonly called the 1908 Allotment Act. See Brief for Respondents 4, n. 2. While the General Allotment Act provided for the division of tribal land into fee simple parcels owned by individual tribal members, that Act also mandated that such allotments would be held in trust for their owners by the United States for a period of 25 years-or longer, at the President's discretion-during which time the parcel owners had no authority to sell or convey the land. See 25 U.S.C. § 348 (2000 ed., and Supp. V). The 1908 Act released particular Indian owners from these restrictions ahead of schedule, vesting in them full fee ownership. See § 1, 35 Stat. 312. In 1934, Congress passed the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. § 461 et seq., which “pu [t] an end to further allotment of reservation land,” but did not “return allotted land to pre-General Allotment status, leaving it fully alienable by the allottees, their heirs, and assigns.” *County of Yakima*, 502 U.S., at 264.

The tribal tort law the Longs are attempting to enforce, however, operates as a restraint on alienation. It “set[s] limits on how nonmembers may engage in commercial transactions,” 491 F.3d, at 887-and not just any transactions, but specifically nonmembers' sale of fee lands they own. It regulates the substantive terms on which the Bank is able to offer its fee land for sale. Respondents and their principal amicus, the United States, acknowledge that the tribal tort at issue here is a form of regulation. See Brief for Respondents 52; Brief for United States as Amicus Curiae 25-26; see also *Riegel v. Medtronic, Inc.*, 552 U.S. ----, ---- (2008). They argue the regulation is fully authorized by the first *Montana* exception. They are mistaken.

*Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land. *Montana* and its progeny permit tribal regulation of nonmember conduct inside the reservation that implicates the tribe's sovereign interests. *Montana* expressly limits its

first exception to the “activities of nonmembers,” 450 U.S., at 565, allowing these to be regulated to the extent necessary “to protect tribal self-government [and] to control internal relations,” *id.*, at 564. See *Big Horn Cty. Elect. Cooperative, Inc. v. Adams*, 219 F.3d 944, 951 (C.A.9 2000) (“*Montana* does not grant a tribe unlimited regulatory or adjudicative authority over a nonmember. Rather, *Montana* limits tribal jurisdiction under the first exception to the regulation of the activities of nonmembers” (internal quotations omitted; emphasis added)).

We cited four cases in explanation of *Montana*'s first exception. Each involved regulation of non-Indian activities on the reservation that had a discernable effect on the tribe or its members. The first concerned a tribal court's jurisdiction over a contract dispute arising from the sale of merchandise by a non-Indian to an Indian on the reservation. See *Williams v. Lee*, 358 U.S. 217 (1959). The other three involved taxes on economic activity by nonmembers. See *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 152-153 (1980) (in cases where “the tribe has a significant interest in the subject matter,” tribes retain “authority to tax the activities or property of non-Indians taking place or situated on Indian lands”); *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904) (upholding tribal taxes on nonmembers grazing cattle on Indian-owned fee land within tribal territory); *Buster v. Wright*, 135 F. 947, 950 (C.A.8 1905) (Creek Nation possessed power to levy a permit tax on nonmembers for the privilege of doing business within the reservation).

Our cases since *Montana* have followed the same pattern, permitting regulation of certain forms of nonmember conduct on tribal land. We have upheld as within the tribe's sovereign authority the imposition of a severance tax on natural resources removed by nonmembers from tribal land. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). We have approved tribal taxes imposed on leasehold interests held in tribal lands, as well as sales taxes imposed on nonmember businesses within the reservation. See *Kerr-McGee*, 471 U.S., at 196-197. We have similarly approved licensing requirements for hunting and fishing on tribal land. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983).

Tellingly, with only “one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.” *Hicks*, *supra*, at 360 (emphasis added). See *Atkinson*, 532 U.S., at 659 (Tribe may not tax nonmember activity on non-Indian fee land); *Strate*, 520 U.S., at 454, 457 (tribal court lacks jurisdiction over tort suit involving an accident on non-tribal land); *Montana*, *supra*, at 566 (Tribe has no authority to regulate nonmember hunting and fishing on non-Indian fee land). The exception is *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, and even it fits the general rubric noted above: In that case, we permitted a tribe to restrain particular uses of non-Indian fee land through zoning regulations. While a six-Justice majority held that *Montana* did not authorize the Yakima Nation to impose zoning regulations on non-Indian fee land located in an area of the reservation where nearly half the acreage was owned by nonmembers, 492 U.S., at 430-431 (opinion of White, J.); *id.*, at 444-447 (opinion of STEVENS, J.), five Justices concluded that *Montana* did permit the Tribe to impose different zoning restrictions on nonmember fee

land isolated in “the heart of [a] closed portion of the reservation,” 492 U.S., at 440 (opinion of STEVENS, J.), though the Court could not agree on a rationale, see *id.*, at 443-444 (same); *id.*, at 458-459 (opinion of Blackmun, J.).

But again, whether or not we have permitted regulation of nonmember activity on non-Indian fee land in a given case, in no case have we found that *Montana* authorized a tribe to regulate the sale of such land. Rather, our *Montana* cases have always concerned nonmember conduct on the land. See, e.g., *Hicks*, 533 U.S., at 359 (*Montana* and *Strate* concern “tribal authority to regulate nonmembers' activities on [fee] land” (emphasis added)); *Atkinson*, 532 U.S., at 647 (“conduct of nonmembers on non-Indian fee land”); *id.*, at 660 (SOUTER, J., concurring) (“the activities of nonmembers”); *Bourland*, 508 U.S., at 689 (“use of the land”); *Brendale*, *supra*, at 430 (“use of fee land”); *Montana*, *supra*, at 565 (first exception covers “activities of nonmembers”).<sup>1</sup>

The distinction between sale of the land and conduct on it is well-established in our precedent, as the foregoing cases demonstrate, and entirely logical given the limited nature of tribal sovereignty and the liberty interests of nonmembers. By virtue of their incorporation into the United States, the tribe's sovereign interests are now confined to managing tribal land, see *Worcester*, 6 Pet., at 561 (persons are allowed to enter Indian land only “with the assent of the [tribal members] themselves”), “protect[ing] tribal self-government,” and “control[ing] internal relations,” see *Montana*, *supra*, at 564. The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated. See *Hicks*, *supra*, at 361 (“Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them”). Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations.

The regulations we have approved under *Montana* all flow directly from these limited sovereign interests. The tribe's “traditional and undisputed power to exclude persons” from tribal land, *Duro*, 495 U.S., at 696, for example, gives it the power to set conditions on entry to that land via licensing requirements and hunting regulations. See *Bourland*, *supra*, at 691, n. 11 (“Regulatory authority goes hand in hand with the power to exclude”). Much taxation can be justified on a similar basis. See *Colville*, 447 U.S., at 153 (taxing power “may be exercised over ... nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions” (quoting *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934), emphasis added)).

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<sup>1</sup> Justice GINSBURG questions this distinction between sales and activities on the ground that “[s]ales of land-and related conduct-are surely ‘activities’ within the ordinary sense of the word.” *Post*, at 2729 - 2730. We think the distinction is readily understandable. In any event, the question is not whether a sale is, in some generic sense, an action. The question is whether land ownership and sale are “activities” within the meaning of *Montana* and the other cited precedents.

The power to tax certain nonmember activity can also be justified as “a necessary instrument of self-government and territorial management,” *Merrion*, 455 U.S., at 137, insofar as taxation “enables a tribal government to raise revenues for its essential services,” to pay its employees, to provide police protection, and in general to carry out the functions that keep peace and order, *ibid*.

Justice GINSBURG wonders why these sorts of regulations are permissible under *Montana* but regulating the sale of fee land is not. See post, at 2729 - 2730. The reason is that regulation of the sale of non-Indian fee land, unlike the above, cannot be justified by reference to the tribe's sovereign interests. By definition, fee land owned by nonmembers has already been removed from the tribe's immediate control. See *Strate*, 520 U.S., at 456 (tribes lack power to “assert [over non-Indian fee land] a landowner's right to occupy and exclude”). It has already been alienated from the tribal trust. The tribe cannot justify regulation of such land's sale by reference to its power to superintend tribal land, then, because non-Indian fee parcels have ceased to be tribal land.

Nor can regulation of fee land sales be justified by the tribe's interests in protecting internal relations and self-government. Any direct harm to its political integrity that the tribe sustains as a result of fee land sale is sustained at the point the land passes from Indian to non-Indian hands. It is at that point the tribe and its members lose the ability to use the land for their purposes. Once the land has been sold in fee simple to non-Indians and passed beyond the tribe's immediate control, the mere resale of that land works no additional intrusion on tribal relations or self-government. Resale, by itself, causes no additional damage.

This is not to suggest that the sale of the land will have no impact on the tribe. The uses to which the land is put may very well change from owner to owner, and those uses may well affect the tribe and its members. As our cases bear out, see *supra*, at 2721 - 2723, the tribe may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same. But the key point is that any threat to the tribe's sovereign interests flows from changed uses or nonmember activities, rather than from the mere fact of resale. The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember activity on the land, within the limits set forth in our cases. The tribe has no independent interest in restraining alienation of the land itself, and thus, no authority to do so.

Not only is regulation of fee land sale beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. Tribal sovereignty, it should be remembered, is “a sovereignty outside the basic structure of the Constitution.” *United States v. Lara*, 541 U.S. 193, 212 (2004) (KENNEDY, J., concurring in judgment). The Bill of Rights does not apply to Indian tribes. See *Talton v. Mayes*, 163 U.S. 376, 382-385 (1896). Indian courts “differ from traditional American courts in a number of significant respects.” *Hicks*, 533 U.S., at 383 (SOUTER, J., concurring). And nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws

and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. See *Montana*, 450 U.S., at 564.

In commenting on the policy goals Congress adopted with the General Allotment Act, we noted that “[t]here is simply no suggestion” in the history of the Act “that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority.” *Id.*, at 560, n. 9. In fact, we said it “defies common sense to suppose” that Congress meant to subject non-Indians to tribal jurisdiction simply by virtue of the nonmember's purchase of land in fee simple. *Ibid.* If Congress did not anticipate tribal jurisdiction would run with the land, we see no reason why a nonmember would think so either.

The Longs point out that the Bank in this case could hardly have been surprised by the Tribe's assertion of regulatory power over the parties' business dealings. The Bank, after all, had “lengthy on-reservation commercial relationships with the Long Company.” Brief for Respondents 40. Justice GINSBURG echoes this point. See post, at 2728 - 2729. But as we have emphasized repeatedly in this context, when it comes to tribal regulatory authority, it is not “in for a penny, in for a Pound.” *Atkinson*, 532 U.S., at 656, (internal quotation marks omitted). The Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions—a question we need not and do not decide. But there is no reason the Bank should have anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank's sale of land it owned in fee simple.

Even the courts below recognized that the Longs' discrimination claim was a “novel” one. 491 F.3d, at 892. It arose “directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom,” including the Lakota “sense of justice, fair play and decency to others.” 440 F.Supp.2d, at 1082 (internal quotation marks omitted). The upshot was to require the Bank to offer the same terms of sale to a prospective buyer who had defaulted in several previous transactions with the Bank as it offered to a different buyer without such a history of default. This is surely not a typical regulation. But whatever the Bank anticipated, whatever “consensual relationship” may have been established through the Bank's dealing with the Longs, the jurisdictional consequences of that relationship cannot extend to the Bank's subsequent sale of its fee land.

The Longs acknowledge, if obliquely, the critical importance of land status. They emphasize that the Long Company “operated on reservation fee and trust lands,” Brief for Respondents 40, and n. 24, 41, and note that “the fee land at issue in the lease-repurchase agreement” had previously belonged to a tribal member, *id.*, at 47. These facts, however, do not change the status of the land at the time of the challenged sale. Regardless of where the Long Company operated, the fee land whose sale the Longs seek to restrain was owned by the Bank at the relevant time. And indeed, before that, it was owned by Kenneth Long, a non-Indian. See *Hicks*, supra, at 382, n. 4 (SOUTER, J., concurring) (“Land status ... might well have an impact under one (or perhaps both) of the *Montana*

exceptions”), *Atkinson*, supra, at 659 (SOUTER, J., concurring) (status of territory as “tribal or fee land may have much to do (as it does here) with the likelihood (or not) that facts will exist that are relevant under the [*Montana*] exceptions”).

The Longs attempt to salvage their position by arguing that the discrimination claim is best read to challenge the Bank's whole course of commercial dealings with the Longs stretching back over a decade—not just the sale of the fee land. Brief for Respondents 44. That argument is unavailing. The Longs are the first to point out that their breach-of-contract and bad-faith claims, which do involve the Bank's course of dealings, are not before this Court. *Ibid.* Only the discrimination claim is before us and that claim is tied specifically to the sale of the fee land.<sup>2</sup> *Ibid.* Count six of the Longs' amended complaint in the Tribal Court alleges that “[i]n selling the Longs' land, [Plains Commerce Bank] unfairly discriminated against the Company and the Longs.” App. 172-173 (emphasis added). As relief, the Longs claimed they “should get possession and title to their land back.” *Id.*, at 173. The Longs' discrimination claim, in short, is an attempt to regulate the terms on which the Bank may sell the land it owns.

Such regulation is outside the scope of a tribe's sovereign authority. Justice GINSBURG asserts that if “[t]he Federal Government and every State, county, and municipality can make nondiscrimination the law governing ... real property transactions,” tribes should be able to do so as well. *Post*, at 2731. This argument completely overlooks the very reason cases like *Montana* and this one arise: Tribal jurisdiction, unlike the jurisdiction of the other governmental entities cited by Justice GINSBURG, generally does not extend to nonmembers. See *Montana*, supra, at 565. The sovereign authority of Indian tribes is limited in ways state and federal authority is not. Contrary to Justice GINSBURG's suggestion, that bedrock principle does not vary depending on the desirability of a particular regulation.

*Montana* provides that, in certain circumstances, tribes may exercise authority over the conduct of nonmembers, even if that conduct takes place on non-Indian fee land. But conduct taking place on the land and the sale of the land are two very different things. The Cheyenne River Sioux Tribe lost the authority to restrain the sale of fee simple parcels inside their borders when the land was sold as part of the 1908 Allotment Act. Nothing in *Montana* gives it back.

## C

Neither the District Court nor the Court of Appeals relied for its decision on the second *Montana* exception. The Eighth Circuit declined to address the exception's applicability, see 491 F.3d, at 888, n. 7, while the District Court strongly suggested in

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<sup>2</sup> Justice GINSBURG contends that if the Tribal Court has jurisdiction over the Longs' other claims, it is hard to understand why jurisdiction would not also extend to the discrimination claim. *Post*, at 2732 - 2733. First, we have not said the Tribal Court has jurisdiction over the other claims: That question is not before us and we decline to speculate as to its answer. Moreover, the claims on which the Longs prevailed concern breach of a loan agreement, see App. 190, and bad faith in connection with Bureau of Indian Affairs loan guarantees, see *id.*, at 192. The present claim involves substantive regulation of the sale of fee land.

passing that the second exception would not apply here, see 440 F.Supp.2d, at 1077. The District Court is correct, for the same reasons we explained above. The second *Montana* exception stems from the same sovereign interests that give rise to the first, interests that do not reach to regulating the sale of non-Indian fee land.

The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S., at 566. The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community. *Ibid.* One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences." Cohen § 4.02[3][c], at 232, n. 220.

The sale of formerly Indian-owned fee land to a third party is quite possibly disappointing to the tribe, but cannot fairly be called "catastrophic" for tribal self-government. See *Strate*, 520 U.S., at 459. The land in question here has been owned by a non-Indian party for at least 50 years, Brief for Respondents 4, during which time the project of tribal self-government has proceeded without interruption. The land's resale to another non-Indian hardly "imperil[s] the subsistence or welfare of the tribe." *Montana*, *supra*, at 566. Accordingly, we hold the second *Montana* exception inapplicable in this case.

#### D

Finally, we address the Longs' argument that the Bank consented to tribal court jurisdiction over the discrimination claim by seeking the assistance of tribal courts in serving a notice to quit. Brief for Respondents 44-46. When the Longs refused to vacate the land, the Bank initiated eviction proceedings in South Dakota state court. The Bank then asked the Tribal Court to appoint a process server able to reach the Longs. Seeking the Tribal Court's aid in serving process on tribal members for a pending state-court action does not, we think, constitute consent to future litigation in the Tribal Court. Notably, when the Longs did file their complaint against the Bank in Tribal Court, the Bank promptly contended in its answer that the court lacked jurisdiction. Brief for United States as Amicus Curiae 7. Under these circumstances, we find that the Bank did not consent by its litigation conduct to tribal court jurisdiction over the Longs' discrimination claim.

The judgment of the Court of Appeals for the Eighth Circuit is reversed. It is so ordered.

\* \* \*

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, concurring in part, concurring in the judgment in part, and dissenting in part.

[] I take no issue with the Court's jurisdictional ruling insofar as it relates to the Tribal Court's supplemental judgment. In that judgment, the Tribal Court ordered the Bank to give Ronnie and Lila Long an option to repurchase fee land the Bank had already contracted to sell to non-Indian individuals. See App. to Pet. for Cert. A-69 to A-71.

I dissent from the Court's decision, however, to the extent that it overturns the Tribal Court's principal judgment awarding the Longs damages in the amount of \$750,000 plus interest. See App. 194-196. That judgment did not disturb the Bank's sale of fee land to non-Indians. It simply responded to the claim that the Bank, in its on-reservation commercial dealings with the Longs, treated them disadvantageously because of their tribal affiliation and racial identity. A claim of that genre, I would hold, is one the Tribal Court is competent to adjudicate. As the Court of Appeals correctly understood, the Longs' case, at heart, is not about “the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals,” ante, at 2714. “Rather, this case is about the power of the Tribe to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members.” 491 F.3d 878, 887 (C.A.8 2007) (case below).

As the basis for their discrimination claim, the Longs essentially asserted that the Bank offered them terms and conditions on land-financing transactions less favorable than the terms and conditions offered to non-Indians. Although the Tribal Court could not reinstate the Longs as owners of the ranch lands that had been in their family for decades, that court could hold the Bank answerable in damages, the law's traditional remedy for the tortious injury the Longs experienced.

## I

In the pathmarking case, *Montana v. United States*, 450 U.S. 544, 564-565 (1981), this Court restated that, absent a treaty or statute, Indian tribes generally lack authority to regulate the activities of nonmembers. While stating the general rule, *Montana* also identified two exceptions:

“A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.*, at 565-566 [450 U.S. 544] (citations omitted).

These two exceptions, *Montana* explained, recognize that “Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.” *Id.*, at 565 (emphasis added).

*Montana* specifically addressed the regulatory jurisdiction of tribes. See *id.*, at 557. This Court has since clarified that when a tribe has authority to regulate the activity

of nonmembers, tribal courts presumably have adjudicatory authority over disputes arising out of that activity. See *Strate v. A-1 Contractors*, 520 U.S. 438, 453, (1997) (as to nonmembers, a tribe's adjudicative jurisdiction coincides with its legislative jurisdiction). In my view, this is a clear case for application of *Montana's* first or “consensual relationships” exception. I therefore do not reach the Longs' alternative argument that their complaint also fits within *Montana's* second exception.

Ronnie and Lila Long, husband and wife and owners of the Long Family Land and Cattle Company (Long Company), are enrolled members of the Cheyenne River Sioux Tribe. Although the Long Company was incorporated in South Dakota, the enterprise “was overwhelmingly tribal in character, as were its interactions with the bank.” 491 F.3d, at 886. All Long Company property was situated-and all operations of the enterprise occurred-within the Cheyenne River Sioux Indian Reservation. The Long Company's articles of incorporation required Indian ownership of a majority of the corporation's shares. This requirement reflected the Long Company's status as an Indian-owned business entity eligible for Bureau of Indian Affairs (BIA) loan guarantees. See 25 CFR § 103.25 (2007) (requiring at least 51% Indian ownership). Loan guarantees are among the incentives the BIA offers to promote the development of on-reservation Indian enterprises. The Long Company “was formed to take advantage of [the] BIA incentives.” 491 F.3d, at 886.

The history of the Bank's commercial dealings with the Long Company and the Long family is lengthy and complex. The business relationship dates from 1988, when Ronnie Long's parents-one of them a member of the Tribe-mortgaged some 2,230 acres of land to the Bank to gain working capital for the ranch. As security for the Bank's loans over the years, the Longs mortgaged both their land and their personal property. The Bank benefited significantly from the Long Company's status as an Indian-owned business entity, for the BIA loan guarantees “allowed [it] to greatly reduce its lending risk.” *Ibid.* Eventually, the Bank collected from the BIA almost \$400,000, more than 80% of the net losses resulting from its loans to the Longs. See 440 F.Supp.2d 1070, 1078 (SD 2006) (case below); App. 135-138.

The discrimination claim here at issue rests on the allegedly unfair conditions the Bank exacted from the Longs when they sought loans to sustain the operation of their ranch. Following the death of Ronnie's father, the Bank and the Longs entered into an agreement under which the mortgaged land would be deeded over to the Bank in exchange for the Bank's canceling some debt and making additional loans to keep the ranch in business. The Longs were given a two-year lease on the property with an option to buy the land back when the lease term expired. Negotiating sessions for these arrangements were held at the Tribe's on-reservation offices and were facilitated by tribal officers and BIA employees. 491 F.3d, at 881.

Viewing the deal they were given in comparative light, the Longs charged that the Bank offered to resell ranch land to them on terms less advantageous than those the Bank offered in similar dealings with non-Indians. Their claim, all courts prior to this one found, fit within the *Montana* exception for “activities of nonmembers who enter [into] ...

commercial dealing, contracts, leases, or other arrangements” with tribal members. 450 U.S., at 565. Cf. *Strate*, 520 U.S., at 457 (citing *Williams v. Lee*, 358 U.S. 217, 223, (1959)) (*Montana's* consensual-relationships exception justifies tribal-court adjudication of claims “arising out of on-reservation sales transaction between nonmember plaintiff and member defendants”). I am convinced that the courts below got it right.

This case, it bears emphasis, involves no unwitting outsider forced to litigate under unfamiliar rules and procedures in tribal court. Cf. *Nevada v. Hicks*, 533 U.S. 353, 382-385 (2001) (SOUTER, J., concurring). Hardly a stranger to the tribal court system, the Bank regularly filed suit in that forum. See Brief for Cheyenne River Sioux Tribe as Amicus Curiae 29-31. The Bank enlisted tribal-court aid to serve notice to quit on the Longs in connection with state-court eviction proceedings. The Bank later filed a counterclaim for eviction and motion for summary judgment in the case the Longs commenced in the Tribal Court. In its summary judgment motion, the Bank stated, without qualification, that the Tribal Court “ha[d] jurisdiction over the subject matter of this action.” App. 187-188. Had the Bank wanted to avoid responding in tribal court or the application of tribal law, the means were readily at hand: The Bank could have included forum selection, choice-of-law, or arbitration clauses in its agreements with the Longs, which the Bank drafted. See Brief for Respondents 42.

## II

Resolving this case on a ground neither argued nor addressed below, the Court holds that a tribe may not impose any regulation-not even a nondiscrimination requirement-on a bank's dealings with tribal members regarding on-reservation fee lands. See ante, at 2714, 2725 - 2726. I do not read *Montana* or any other case so to instruct, and find the Court's position perplexing.

First, I question the Court's separation of land sales tied to lending activities from other “activities of nonmembers who enter consensual relationships with the tribe or its members,” *Montana*, 450 U.S., at 565. Sales of land-and related conduct-are surely “activities” within the ordinary sense of the word. See, e.g., *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992) (“The excise tax remains a tax upon the Indian's activity of selling the land...” (emphasis added)). Cf. 14 Oxford English Dictionary 388 (2d ed.1989) (defining “sale” as “[t]he action or an act of selling” (def. 1(a))).

Second, the Court notes the absence of any case “[f]ind[ing] that *Montana* authorized a tribe to regulate the sale of [non-Indian fee] land.” Ante, at 2722. But neither have we held that *Montana* prohibits all such regulation. If the Court in *Montana*, or later cases, had intended to remove land sales resulting from loan transactions entirely from tribal governance, it could have spoken plainly to that effect. Instead, *Montana* listed as examples of consensual relationships that tribes might have authority to regulate “commercial dealing, contracts, [and] leases.” 450 U.S., at 565. Presumably, the reference to “leases” includes leases of fee land. But why should a nonmember's lease of fee land to a member be differentiated, for *Montana* exception purposes, from a sale of

the same land? And why would the enforcement of an antidiscrimination command be less important to tribal self-rule and dignity, cf. ante, at 2723 - 2724, when the command relates to land sales than when it relates to other commercial relationships between nonmembers and members?

### III

As earlier observed, see supra, at 2727, I agree that the Tribal Court had no authority to grant the Longs an option to purchase the 960-acre parcel the Bank had contracted to sell to individuals unaffiliated with the Tribe. The third parties' contracts with the Bank cannot be disturbed based on *Montana's* exception for “the activities of nonmembers who enter consensual relationships with the tribe or its members.” 450 U.S., at 565. Although the Tribal Court overstepped in its supplemental judgment ordering the Bank to give the Longs an option to purchase land third parties had contracted to buy, see App. to Pet. for Cert. A-69 to A-71, it scarcely follows that the Tribal Court lacked jurisdiction to adjudicate the Longs' discrimination claim, and to order in its principal judgment, see App. 194-196, monetary relief.<sup>1</sup>

The Court recognizes that “[t]he Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions.” Ante, at 2725. Today's decision, furthermore, purports to leave the Longs' breach-of-contract and bad-faith claims untouched. Ante, at 2725, n. 2. Noting that the Bank “does not presently challenge the breach-of-contract verdict,” ante, at 2717, the Court emphasizes that “[o]nly the discrimination claim is before us and that claim is tied specifically to the sale of the fee land,” ante, at 2725. But if the Tribal Court is a proper forum for the Longs' claim that the Bank has broken its promise or acted deceptively in the land-financing transactions at issue, one is hard put to understand why the Tribe could not likewise enforce in its courts a law that commands: Thou shall not discriminate against tribal members in the terms and conditions you offer them in those same transactions. The Federal Government and every State, county, and municipality can make nondiscrimination the law governing contracts generally, and real property transactions in particular. See, e.g., 42 U.S.C. §§ 1981, 1982. Why should the Tribe lack comparable authority to shield its members against discrimination by those engaging in on-reservation commercial relationships-including land-secured lending-with them?

### A

The “fighting issue” in the tribal trial court, the Eighth Circuit underscored, “was whether the bank denied the Longs favorable terms on a deal solely on the basis of their race or tribal affiliation.” 491 F.3d, at 891. The Longs maintained that the Bank initially

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<sup>1</sup> The Longs joined their discrimination claim with claims of breach of contract and bad-faith dealings. The jury found in favor of the Longs on all three claims. App. 190-192. The latter claims alleged that the Bank “never provided the ... operating loans” promised during the parties' negotiations. 491 F.3d 878, 882 (C.A.8 2007). “[A]s a result,” the Longs asserted, “the company was not able [to] sustain its ranching operation through the particularly harsh winter of 1996-97.” Ibid. Nothing in the Court's opinion precludes decision of those claims by the Tribal Court. See ante, at 2717, 2718, 2725, n. 2.

offered them more favorable terms, proposing to sell the mortgaged land back to them with a 20-year contract for deed. Thereafter, the Bank sent a letter to Ronnie Long withdrawing its initial offer, “citing ‘possible jurisdictional problems’ posed by the Long Company’s status as an ‘Indian owned entity on the reservation.’ ” *Id.*, at 882 (quoting Letter from Charles Simon, Vice President, Bank of Hoven, to Ronnie Long (Apr. 26, 1996), App. 91). In the final agreement, the Bank promised no long-term financing; instead, it gave the Longs only a two-year lease with an option to purchase that required a large balloon payment within 60 days of the lease’s expiration. When the Longs were unable to make the required payment within the specified deadline, the Bank sold the land to nonmembers on more favorable terms.

In their complaint, the Longs alleged that the Bank allowed the non-Indians “ten years to pay for the land, but the bank would not permit [the] Longs even 60 days to pay for their land,” and that “[s]uch unfair discrimination by the bank prevented the Longs and the [Long] Company from buying back their land from the bank.” App. 173. Although the allegations about the Bank’s contracts to sell to nonmembers were central to the Longs’ lawsuit, those transactions with third parties were not the wrong about which the Longs complained. Rather, as the tribal trial court observed, the contracts with nonmembers simply supplied “evidence that the Bank denied the Longs the privilege of contracting for a deed because of their status as tribal members.” App. to Pet. for Cert. A-78 to A-79 (emphasis added).

The Tribal Court instructed the jury to hold the Bank liable on the discrimination claim only if the less favorable terms given to the Longs rested “solely” upon the Longs’ “race or tribal identity.” 491 F.3d, at 883 (internal quotation marks omitted). In response to a special interrogatory, the jury found that “the Defendant Bank intentionally discriminate[d] against the Plaintiffs Ronnie and Lila Long [in the lease with option to purchase] based solely upon their status as Indians or tribal members.” App. 191. Neither the instruction nor the special finding necessitated regulation of, or interference with, the Bank’s fee-land sales to non-Indian individuals. See ante, at 2714.<sup>2</sup>

Tellingly, the Bank’s principal jurisdictional argument below bore no relationship to the position the Court embraces. The Bank recognized that the Longs were indeed complaining about discriminatory conduct of a familiar sort. Cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (42 U.S.C. § 1982 “bars all racial discrimination ... in the sale or rental of property”). In *Hicks*, 533 U.S. 353, this Court held that tribal courts could not exercise jurisdiction over a claim arising under federal law, in that case, 42

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<sup>2</sup> The Court criticizes the Tribal Court for “requir[ing] the Bank to offer the same terms of sale to a prospective buyer who had defaulted in several previous transactions with the Bank as it offered to a different buyer without such a history of default.” Ante, at 2728. That criticism is unfair. First, the record does not confirm that the Longs were riskier buyers than the nonmembers to whom the Bank eventually sold the land. Overlooked by the Court, the Bank’s loans to the Longs were sheltered by BIA loan guarantees. See supra, at 2715 - 2716. Further, a determination that the Longs had encountered intentional discrimination based solely on their status as tribal members in no way inhibited the Bank from differentiating evenhandedly among borrowers based on their creditworthiness. The proscription of discrimination simply required the Bank to offer the Longs the same terms it would have offered similarly situated non-Indians.

U.S.C. § 1983. Relying on *Hicks*, the Bank insisted that the Longs' discrimination claim could not be heard in tribal court because it arose under well-known federal antidiscrimination law, specifically, 42 U.S.C. § 1981 or § 2000d. 491 F.3d, at 882-883. The Tribal Court of Appeals, however, held that the claim arose under Lakota common law, which resembled federal and state antidiscrimination measures. See App. to Pet. for Cert. A-54 to A-55, and n. 5.<sup>3</sup>

## B

The Longs requested a remedy the Tribal Court did not have authority to grant—namely, an option to repurchase land the Bank had already contracted to sell to nonmember third parties. See *supra*, at 2717. That limitation, however, does not affect the court's jurisdiction to hear the Longs' discrimination claim and to award damages on that claim. “The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy.” *Avco Corp. v. Machinists*, 390 U.S. 557, 561 (1968). See also *Davis v. Passman*, 442 U.S. 228, 239-240, n. 18 (1979) (“[J]urisdiction is a question of whether a federal court has the power ... to hear a case”; “relief is a question of the various remedies a federal court may make available.”).

Under the procedural rules applicable in Cheyenne River Sioux Tribal Courts, as under the Federal Rules, demand for one form of relief does not confine a trial court's remedial authority. See Law and Order Code of Cheyenne River Sioux Tribe, Rule Civ. Proc. 25(c)(1) (“[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if such relief is not demanded in the pleadings.”); Fed. Rule Civ. Proc. 54(c) (materially identical). A court does not lose jurisdiction over a claim merely because it lacks authority to provide the form of relief a party primarily demands. See *Avco*, 390 U.S., at 560-561; 10 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2664, pp. 181-182 (3d ed. 1998) (“[I]t is not ... the type of relief requested in the demand that determines whether the court has jurisdiction.”). In such a case, authority to provide another remedy suffices to permit the court to adjudicate the merits of the claim. See *Avco*, 390 U.S., at 560-561.

For the reasons stated, I would leave undisturbed the Tribal Court's initial judgment, see App. 194-196, awarding the Longs damages, prejudgment interest, and

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<sup>3</sup> The Court types the Longs' discrimination claim as “‘novel,’ ” *ante*, at 2728 (quoting 491 F.3d, at 892), because the Tribal Court of Appeals derived the applicable law “ ‘directly from Lakota tradition,’ ” *ante*, at 2728 (quoting 440 F.Supp.2d 1070, 1082 (SD 2006) (case below)). Concerning the content of the Tribe's law, however, the appeals court drew not only from “Tribal tradition and custom,” it also looked to federal and state law. See App. to Pet. for Cert. A-55. Just as state courts may draw upon federal law when appropriate, see, e.g., *Dawson v. Birenbaum*, 968 S.W.2d 663, 666-667 (Ky.1998), and federal courts may look to state law to fill gaps, see, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-730 (1979), so too may tribal courts “borrow from the law of ... the federal government,” see F. Cohen, *Handbook of Federal Indian Law* § 4.05[1], p. 275 (2005 ed.). With regard to checks against discrimination, as the Tribal Court of Appeals observed, “there is a direct and laudable convergence of federal, state, and tribal concern.” App. to Pet. for Cert. A-55 to A-56.

costs as redress for the Bank's breach of contract, bad faith, and discrimination. Accordingly, I would affirm in large part the judgment of the Court of Appeals.

**At Page 486, insert the following at the end of the second full paragraph:**

By a divided 4-3 vote, the California Supreme Court affirmed the Court of Appeal decision rejecting tribal sovereign immunity. *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 40 Cal. 4th 239 (Cal. 2006). The California high court majority opinion relied on what it viewed as practical exigencies, rather than Supreme Court precedent. As the majority opinion observed,

Tribal members, as citizens of the United States, are allowed to participate in state elections. Allowing the Tribe immunity from suit in this context would allow tribal members to participate in elections and make campaign contributions (using the tribal organization) unfettered by regulations designed to ensure the system's integrity. Allowing tribal members to participate in our state electoral process while leaving the state powerless to effectively guard against political corruption puts the state in an untenable and indefensible position without recourse. Given the unique facts here, we ... conclude that guarantee clause, together with the rights reserved under the Tenth Amendment, provide the FPPC authority under the federal Constitution to bring suit against the Tribe....

Was this opinion exaggerating how “powerless” the state would be, under the “unique facts” of that case, given that the Tribe had offered to report its contributions on a voluntary basis? For a recent federal Court of Appeals case reaffirming the vitality of tribal sovereign immunity, see *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. Cal. 2006).

**At Page 508, add the following at the end of Note 3 on Limitation on Tribal Power to Control Membership:**

On March 3, 2007, Freedmen descendants were denied citizenship in the Cherokee Nation in a special election for an amendment to the Cherokee Nation constitution. Shortly after the vote, Principal Chief Chad Smith defended the results against charges of racism: “Of the 270,000 Cherokee citizens, there are many who are racially black, racially white, racially Hispanic and racially Asian. However, each one shares a common bond of having a Cherokee ancestor on the base roll of 1906.” He called the vote “an affirmation of identity” and said that “the Cherokee Nation is an Indian tribe made up of Indians, just like other Indian tribes all over the country.” “Smith: Cherokees Vote for Indian Blood,” *Indian Country Today*, March 9, 2007.

Supporters of Cherokee citizenship for Freedmen descendants have been challenging the constitutional amendment vote in several different venues. They have brought an action for injunctive relief in the Cherokee courts, alleging violation of the Thirteenth Amendment and the 1866 Treaty. *Raymond Nash v. CN Registrar*, papers

available at [www.cherokeecourts.org](http://www.cherokeecourts.org). In May, 2007, Cherokee District Court Judge John T. Cripps approved a temporary injunction restoring citizenship to the Freedmen until the litigation is completed. This Cherokee litigation runs concurrently with a federal lawsuit filed before the 2007 constitutional amendment vote. In that federal suit, the Freedmen have sought to overturn earlier Cherokee actions denying them the vote. In *Vann v. Kempthorne*, 467 F.Supp.2d 56 (D.D.C. 2006), a federal trial judge rejected the Cherokee Nation's effort to dismiss the suit on sovereign immunity grounds, stating that the Thirteenth Amendment's ban on slavery and the 1866 Treaty abrogated tribal sovereign immunity. On July 29, 2008, the D.C. Circuit reversed the district court's decision as it applied to the Cherokee Nation, but affirmed as to the claim for injunctive relief against tribal officials, relying on the reasoning of *Ex Parte Young*, 209 U.S. 123 (1908) (authorizing injunctive actions against state officials notwithstanding state sovereign immunity under the Eleventh Amendment).

The Cherokee Freedmen have also mounted a political campaign against the 2007 Cherokee constitutional amendment that denied them citizenship. In June, 2007, members of the Congressional Black Caucus and others introduced a bill into the House of Representatives to sever all government relations with the Cherokee Nation until the Freedmen's citizenship was restored. H.R. 2824, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2007). To date, this bill has not passed either house of Congress. In September, 2007, the House passed a version of the Native American Housing Assistance and Self-Determination Reauthorization Act of 2007 which included a provision denying funds to the Cherokee Nation until citizenship was reinstated. The Senate version of the bill, passed in May, 2008, did not include that language. See H.R. 2786, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2007); S. 2062, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2007).

Principal Chief Chad Smith of the Cherokee Nation has argued that the 1866 Treaty was thoroughly abrogated by the United States, and the Cherokee should no longer be bound by it. Furthermore, he has contended that the language of that treaty, guaranteeing Cherokee citizenship to those former slaves "who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants," limits the benefit of the treaty protections to a smaller group than all descendants of former Cherokee slaves. Are these arguments convincing?

**At Page 512, add the following at the end of the carryover paragraph from the previous page:**

In *Quair v. Sisco*, 2007 U.S. Dist. LEXIS 36858 (E.D. Cal. May 18, 2007), Judge Levi considered whether a federal court could entertain a habeas corpus action challenging the decision of a tribe's General Council to disenroll and banish two members. The Santa Rosa Tachi Yokut Tribe had determined that the two individuals had been working against tribal interests, cooperating with an attorney who had threatened to destroy the Tribe's essential economic relations with outside sources of financing. Challenging this action, the two individuals asserted that they were denied due

process under the Indian Civil Rights Act, because the General Council did not follow the procedures of an adversarial court system. Applying *Martinez*, Judge Levi found that the habeas corpus provision of the Indian Civil Rights Act would be available to challenge the Tribe's decision to banish, but not to disenroll. Subsequently, the case settled. The individuals involved agreed to drop their suit in exchange for another opportunity to address the General Council directly. Following their appearance, the General Council agreed to reinstate them as members. By that time, the two had been excluded from the Tribe for several years.

## CHAPTER 4

### FEDERAL & STATE CLAIMS TO LEGAL AUTHORITY IN INDIAN COUNTRY

**At Page 636, add the following paragraph at the end of the discussion of the *Navajo Nation* trust case:**

On remand, following the Supreme Court's decision, the Court of Federal Claims ruled that the Navajo Nation had no cognizable claim under statutes and regulations covering the payment of royalties. The Federal Circuit reversed, holding that tribe had a cognizable money-mandating claim under Indian Tucker Act against the United States for a breach of trust in a lease of Indian lands under the Indian Mineral Leasing Act for coal mining. It also held that the government violated the following duties: its common law trust duties of care, candor, and loyalty; its duty under the Navajo-Hopi Rehabilitation Act to inform the tribe about development of its coal resources; its duty under its surface mining regulations promulgated under the Surface Mining Control and Reclamation Act (SMCRA) to provide the tribe representation in matters related to coal mining operations; and its duty under SMCRA to include and enforce terms and conditions requested by the tribe. *Navajo Nation v. United States*, 501 F.3d 1327 (Fed. Cir. 2007). Certiorari was sought in May of 2008.

**At Page 650, add the following paragraph to the Note on the Future of the *Cobell* litigation:**

Judge Lamberth was ultimately removed from the *Cobell* litigation. *Cobell v. Kempthorne*, 455 F.3d 317, 334-35 (D.C. 2006). A new judge, James Robertson, was assigned the case.

In *Cobell v. Kempthorne*, 532 F.Supp. 2d 37 (D.D.C. 2008) (*Cobell XX*), Judge Robertson ruled that it was impossible for the government to produce the accounting mandated by the Indian Trust Fund Reform Management Act. Judge Robertson then held a trial on the value of the plaintiffs' equitable claims against the federal government for restitution. Following trial, Judge Robertson issued an opinion, holding that the court's equitable jurisdiction was broad in the context of a trust, but that its ability to award relief other than restitution was limited by the doctrine of sovereign immunity. Based on the use of statistical sampling to determine what might have been the outcome of an

accounting, and the government's own admissions through testimony by expert witnesses of the possible magnitude of the error, Judge Robertson issued an award of \$455,600,000. The court left open questions as to the distribution of the sum among the class. *Cobell v. Kempthorne* (D.D.C. August 8, 2008).

## CHAPTER 5

### JURISDICTION UNDER SPECIAL STATUTES

#### **At Page 803, add the following at the end of Note 1:**

For a detailed account of the litigation strategy behind *Bryan* as well as the key role the case played in bringing about the tribal gaming phenomenon, see Kevin Washburn, *The Legacy of Bryan v. Itasca County: How an Erroneous \$147 County Tax Notice Helped Bring Tribes \$200 Billion in Indian Gaming Revenue*, 92 Minn. L. Rev. 919 (2008).

#### **At Page 803, add the following at the end of Note 2:**

For a complete listing of tribes affected by Public Law 280, including optional as well as mandatory states, retroceded tribes, and excluded tribes, see Carole Goldberg & Duane Champagne, *Final Report: Law Enforcement and Criminal Justice under Public Law 280 at 7-11* (November, 2007), available at [https://www.law.ucla.edu/docs/pl280\\_study.pdf](https://www.law.ucla.edu/docs/pl280_study.pdf).

#### **At Page 812, add the following after the carryover paragraph from the previous page:**

**Note 9: Recent Extension of Public Law 280 through the Adam Walsh Act:** Despite language in the 1968 Indian Civil Rights Act stating that future extensions of Public Law 280 jurisdiction should occur only with tribal consent, Congress broadened the scope of state jurisdiction in 2006 with passage of the Adam Walsh Child Protection and Safety Act, 42 U.S.C. § 16901. The Act requires states to establish and maintain sex offender registries, imposing substantial burdens on individuals convicted of a broad range of offenses. Sex offenders covered by the Act must maintain their registration in all of the jurisdictions where they reside, work, and attend school. Tribes other than those covered by mandatory Public Law 280 jurisdiction may elect whether to maintain registries of their own, or to delegate that authority to their respective states. But mandatory Public Law 280 tribes are denied that choice, and must accept state jurisdiction over registration of sex offenders living, working, or attending school within their territory. Is sex offender registration a civil regulatory matter, and therefore outside the states' ordinary Public Law 280 jurisdiction? Is the Adam Walsh Act thus an expansion of state jurisdiction for the mandatory tribes? For a ruling that a state sex offender registration law is criminal/prohibitory rather than civil regulatory, see *State v. Jones*, 729 N.W.2d 1 (Minn. 2007). In enacting the Public Law 280 provision of the

Adam Walsh Act, was Congress disregarding the spirit of the 1968 amendments to Public Law 280, or was it taking a practical step in light of the reduced law enforcement capability of some Public Law 280 tribes? See Sec. A,4 of this Casebook, beginning on page 816.

**At page 818, add the following just before Section B. Alaska:**

Professors Carole Goldberg and Duane Champagne have conducted a detailed empirical study of the effects of Public Law 280 on law enforcement and criminal justice in Indian country. The researchers used qualitative and quantitative instruments to ascertain the views of reservation residents, law enforcement officers, and criminal justice officials in Public Law 280 as well as non-Public Law 280 jurisdictions. They also examined federal funding levels for law enforcement and criminal justice in the two types of jurisdictions. Among other things, their report considers the responsiveness of law enforcement, the cultural sensitivity of law enforcement, and discrimination against Indian victims and perpetrators in state court systems. It also employs case studies and other methods to analyze cooperative agreements and retrocession as appropriate responses to Public Law 280. Findings include a large disparity between the assessments of reservation residents and state officials regarding the quality of state law enforcement and criminal justice, and a preference on the part of reservation residents for tribal policing. See Carole Goldberg & Duane Champagne, Final Report: Law Enforcement and Criminal Justice under Public Law 280 at 7-11 (November, 2007), available at [https://www.law.ucla.edu/docs/pl280\\_study.pdf](https://www.law.ucla.edu/docs/pl280_study.pdf).

**At Page 825, add the following to the section on Alaska:**

The Alaska Supreme Court issued a decision invalidating the portion of Alaska's English Only law that requires the state and its political subdivisions, as well as all state employees, to use only English in all government functions and actions at the state and local levels, holding this to be a violation of the free speech clause of the Alaska Constitution. *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183 (Alaska 2007).

Members of many Alaska Native villages are plaintiffs in the class action lawsuit dealing with the impacts of the 1989 Exxon Valdez oil spill in Prince William sound, which was devastating to the subsistence fishing, hunting and gathering lifestyle of those villages. On June 25, 2008, the United States Supreme Court invalidated the \$2.5 billion punitive damages award in the class action lawsuit against Exxon as a result of the 1989 oil spill, vacating the Ninth Circuit's opinion and remanding the case back to that court. A majority of the Court held that the award was clearly excessive under maritime common law, and identified a lower threshold for damages that will substantially reduce the award of each class action plaintiff. *Exxon Shipping Co. v. Baker*, (No. 07-219), 128 S.Ct. 2605 (2008).

**At Page 830, insert the following at the end of the carryover paragraph from the preceding page:**

The Hawaii Supreme Court reversed a lower court ruling to hold that the State of Hawaii should be enjoined from selling or transferring 1.2 million acres of “ceded lands,” currently owned by the state, until a political settlement is reached with Native Hawaiian people about the status of that land. *Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawaii*, 177 P.3d 884 (Haw. 2008). In reaching this decision, the Hawaii Supreme Court found that “the Apology Resolution [adopted by Congress in 1993] and related state legislation give rise to a fiduciary duty by the State, as trustee, to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved.” The State of Hawaii has filed a petition for certiorari in this case.

**At Page 865, add the following at the end of Note 1:**

Two more California Court of Appeal districts have now declined to apply the “existing Indian family” exception to ICWA. *In re Vincent M.*, 59 Cal. Rptr.3d 321 (Ct. App. 6<sup>th</sup> Dist. 2007); *In re Adoption of Hannah S.*, 48 Cal. Rptr.3d 605 (Ct. App. 3<sup>rd</sup> Dist. 2006). The *Hannah S.* opinion specifically rejects the constitutional analysis offered in *In re Santos Y.* and the case upon which it relies, *Bridget R.*

**At Page 870, add the following at the end of Note 3:**

A portion of the Iowa ICWA statute was held unconstitutional on equal protection grounds in *In the Interest of A.W. and S.W.*, 741 N.W.2d 793 (Iowa 2007). The Iowa high court found that the state law erred in extending protection to children of Indian ancestry who did not qualify as “Indian children” under ICWA. This case is discussed further at page 5 of this Update.

**At Page 874, add the following at the very bottom of the page:**

A divided Minnesota Supreme Court has invoked the Adoption and Safe Families Act (ASFA) to justify refusal to transfer a case from state to tribal court. In *In re Welfare of Child of T.T.B. & G.W.*, 724 N.W.2d 300 (Minn. 2006), the trial judge had denied transfer because the child welfare proceeding was at a relatively late stage when the Tribe filed its motion. The state’s intermediate appellate court had reversed, finding insufficient cause to transfer. In reversing the appellate court, the majority on the Minnesota Supreme Court does not carefully evaluate the competing demands of ICWA and ASFA. But the court appears to be using ASFA to explain why the Minnesota child welfare department was moving the case forward so quickly.

**At Page 879, insert the following right before the opinion in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*:**

Here are some more recent data about tribal gaming: total revenue in 2007 was \$26 billion; as of 2007, 225 of 562 federally recognized tribes in 28 states had Class II or Class III gaming facilities; for fiscal 2007, only 22 tribal facilities had revenues above \$250 million, and 15.4 % had revenues under \$3 million; an estimated 670,000 jobs have been created by tribal gaming, about 75% of which go to non-Indians.

**At Page 893, add the following at the end of the second full paragraph:**

The type of question posed above in the Casebook reached the New Mexico Supreme Court in *Jane Doe v. Santa Clara Pueblo*, 154 P.3d 644 (N.M. 2007). Santa Clara Pueblo and New Mexico had included a provision in their compact relating to tort claims by casino patrons: “[A]ny such claim may be brought in state district court, including claims arising on tribal land, unless it is finally determined by a state or federal court that IGRA does not permit the sifting of jurisdiction over visitors’ personal injury suits to state court.” Section 2710(d)(3)(C) of IGRA states that compacts may address “the application of the criminal and civil laws or regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity.” Does this language encompass patron lawsuits? If not, does the catch-all language of IGRA quoted in the previous paragraph of the Casebook, approving compacting provisions that are “directly related to the operation of gaming activities,” provide sufficient support? How should these two provisions be read together, especially in light of the Indian law canons of construction? Recall the case of *Kennerly v. District Court*, 400 U.S. 423 (1971), discussed at page 685 of the Casebook, which holds that states and tribes may not make agreements to extend state jurisdiction on reservations unless Congress has given its consent. Does the compact provision above even demonstrate tribal consent to state jurisdiction? If so, would the language of IGRA count as adequate evidence of congressional consent? Over a dissent from Justice Minzner, the New Mexico Supreme Court upheld state jurisdiction.

**At Page 895, add the following at the end of Note 2:**

Taking a position at odds with the Eleventh and Ninth Circuits, a split panel of the Fifth Circuit, with one judge dissenting and the other concurring only in the judgment, has found the Part 291 regulations violate IGRA because they contain no requirement of bad faith. Compare *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007) with *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994) and *United States v. Spokane Tribe*, 139 F.3d 1297, 1301-1302 (9th Cir. 1998). The impact of the *Texas* case is limited by the absence of a majority opinion. But which of the federal circuits offers a better reading of IGRA, given that the statute imposed a limitation on pre-existing tribal gaming authority as recognized in *Cabazon*? Given your reading of IGRA, are the Part 291 regulations a reasonable response to the statutory dilemma presented by the Supreme Court’s decision in *Seminole*?

The discussion in Note 2 of the Casebook focuses on tribal remedies against states refusing to bargain or to enter into compacts. What if the compact is made, and the state wants to sue the tribe for breach? IGRA provides for a waiver of tribal immunity and authorization for injunctive actions with respect to any “class III gaming activity ... conducted in violation of any Tribal-State compact entered into [in accordance with IGRA] ... that is in effect.” 25 U.S.C. § 1710(d)(7)(A)(ii). Should a tribe’s failure to make payments under a compact’s revenue-sharing provisions trigger the operation of this provision? Or should suit be allowed against the tribe only when the actual operations of the tribal casino are being conducted in violation of the compact’s terms? In *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (7<sup>th</sup> Cir. 2008), Wisconsin sued the Ho-Chunk Nation to compel arbitration in a dispute over tribal payments to the state under its revenue-sharing agreement (see page 894 of the Casebook). The Seventh Circuit said that the language of IGRA allowed suits against tribes for compact violations, but only for terms addressing the seven items listed in 25 U.S.C. § 2710(d)(3)(C)(i)-(vii). The Ninth and Eleventh Circuits have adopted even more restrictive readings of the IGRA language waiving tribal sovereign immunity and authorizing suits. See *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1242 (11<sup>th</sup> Cir. 1999); *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1059-1060 (9<sup>th</sup> Cir. 1997).

**At Page 898, add the following just before Note 5:**

Numerous controversies have arisen over the eligibility of lands for tribal gaming under 25 U.S.C. § 2719. To address many of these questions, the Bureau of Indian Affairs has published implementing regulations. See 25 C.F.R. 292 (Interior; Final Rule). For example, for a parcel of land to qualify under the “initial reservation” exception to § 2719(b)(1)(B)(ii), the tribe must have present and historical connections to the land, and the Department of the Interior must proclaim the land a new reservation under the Indian Reorganization Act.

**At Page 911, add the following at the end of Note 1:**

*Rice v. Rehner* continues to spawn controversy. A serious question is whether 18 U.S.C. § 1161, as interpreted in *Rice v. Rehner*, waives tribal sovereign immunity in state courts and allows application of state dram shop laws. (State dram shop laws establish liability for those who provide alcoholic drinks to individuals who subsequently cause injury while under the influence of alcohol.) For two sharply contrasting views of § 1161 and *Rice v. Rehner*, see *Bittle v. Bahe*, 2008 OK 10 (Okla. 2008) (Oklahoma Supreme Court finds jurisdiction in state court for claim under dram shop law and no tribal sovereign immunity) and *Foxworthy v. Puyallup Tribe of Indians Association*, 169 P.3d 53 (Ct. App. WA 2007) (Washington Court of Appeals finds no state jurisdiction and insufficient evidence of congressional intent to abrogate tribal sovereign immunity).

## CHAPTER 6

### TRIBAL RIGHTS TO LAND & CULTURAL RESOURCES

**At Page 973, insert the following after the first paragraph of Note 3:**

The Third Circuit Court of Appeals held that the Delaware Nation's aboriginal rights to a portion of their historic territories had been validly extinguished in 1737, even though the purchase was made by a private individual, William Penn, and under fraudulent circumstances involving a forged document and overt misrepresentations to tribal leaders. *Delaware Nation v. Commonwealth of Pennsylvania*, 446 F.3d 410 (3<sup>rd</sup> Cir. 2006). The court acknowledged that there was uncertainty about whether William Penn possessed the sovereign authority to extinguish Native title, but held that because the Delaware had not raised that issue in the district court proceeding, it could not be raised on appeal. The court refused to accept the Delaware's contention that a fraudulent purchase should have no valid legal effect, finding that "the manner, method, and time of the sovereign's extinguishment of aboriginal title raise political, not justiciable issues."

**At Page 1049, add the following at the end of Note 1:**

The *Oneida* litigation continues in a variety of forms. Lawyers for the Oneida Indian Nation, the state of New York, and Oneida and Madison counties argued recently over the land claim at a hearing held by the Second Circuit Court of Appeals. In a challenge to the district court's ruling that the Oneidas have no right to take back title to 250,000 acres of disputed land in upstate New York, but that the Tribe might be eligible for damages, the Oneida Indian Nation argued that it should get title to 250,000 acres of its ancestral land or some sort of cash settlement. See *Oneida Indian Nation of New York v. New York*, 500 F.Supp.2d 128 (N.D.N.Y. 2007). "Oneida land claim case goes before federal appeals court," Newport Television LLC (June 2, 2008), [http://www.9wsyr.com/news/local/story.aspx?content\\_id=9clef237-6077-44be-9f3a-9ee62a0ea926](http://www.9wsyr.com/news/local/story.aspx?content_id=9clef237-6077-44be-9f3a-9ee62a0ea926). In an unrelated proceeding, the U.S. Department of Interior agreed to place 13,004 acres of Oneida land into federal trust, which will exempt the land from state and local taxes and laws. The state, two counties and a citizens' group have said that they plan to file lawsuits challenging this decision. Id.

**At Page 1100, add the following before the Notes:**

On February 25, 2008, the Supreme Court granted review in *Carcieri v. Kempthorne*, a decision by the en banc panel of the First Circuit Court of Appeals which upheld the Secretary of Interior's authority to take land into trust for the Narragansett Tribe under Section 5 of the Indian Reorganization Act. *Carcieri v. Kempthorne*, 497 F.3d 15 (1<sup>st</sup> Cir. 2007). This case involved a parcel of approximately 32 acres in the town of Charlestown, RI, which the Narragansett Indian Tribe purchased in 1991 and which, in 1998, the Secretary of Interior had agreed to take into trust for use as a tribal housing project. After exhausting administrative remedies, the State filed a lawsuit against the Secretary of Interior and the Regional Director of the Bureau of Indian Affairs in federal

court, challenging the Secretary's authority to take the land into trust under a variety of theories. First, it argued that the IRA does not authorize the Secretary to take land into trust for any tribe, including the Narragansetts, who achieved federal recognition after the effective date of the Indian Reorganization Act in 1934. Second, the State argued that the 1978 Rhode Island Indian Claims Settlement Act restricted the Secretary's authority to take the land into trust pursuant to the IRA. Finally, the state argued that the Constitution prohibited this exercise of the Secretary's authority. The en banc panel rejected all of these claims, affirming the district court's decision. See *Carcieri v. Norton*, 290 F. Supp.2d 167 (D.R.I. 2003); *Carcieri v. Norton*, 423 F.3d 45 (1<sup>st</sup> Cir. 2005).

The Supreme Court granted review on the first two questions presented by the State's petition for certiorari: (1) "Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934"; and (2) "Whether an act of Congress that extinguishes aboriginal title and all claims based on Indian rights and interests in land precludes the Secretary from creating Indian country there." The Court did not grant review on the third question raised in the petition, which alleged that Section 5 of the IRA is an unconstitutional delegation of legislative authority. A group of 21 state Attorney Generals filed an amicus brief in support of Rhode Island, indicating the national importance of the questions raised by Rhode Island's petition.

**At Page 1104, add the following at the end of Note 3, carried over from the previous page:**

The Department of the Interior recently issued regulations clarifying its view of some of the more disputed questions regarding lands for gaming where tribes are newly recognized, restored to federal recognition, or parties to land claim settlements. See page 41 of this Update. A recent challenge to the National Indian Gaming Commission's authority to authorize the Seneca Nation of Indians to operate a casino in the City of Buffalo on land purchased by the Tribe in 2005 resulted in a district court's finding that the parcel is "Indian country" over which the Seneca Nation has jurisdiction, but that the NIGC had acted in an "arbitrary and capricious" manner in finding the land to be eligible for gaming pursuant to IGRA's settlement of a land claim exception. *Citizens Against Casino Gambling in Erie County v. Hogen*, 2008 U.S. Dist. Lexis 52395 (2008). The district court vacated the NIGC's approval of the Seneca Nation of Indians' Class III gaming ordinance, which was based on that exception.

**At Page 1136, insert the following at the end of the carryover paragraph from the previous page:**

The impact of the Religious Freedom Restoration Act (RFRA) on Native American sacred sites claims is prominently featured in recent litigation over a U.S. Forest Service permit to a ski resort operator in Arizona. The permit would allow use of partially treated sewage water for snow-making on the San Francisco peaks, a mountain sacred to many Indian nations in the Southwest, including the Navajo, Hopi, and Hualapai. An en banc panel of the Ninth Circuit issued its opinion on August 8, 2008.

*Navajo Nation v. United States Forest Service*, 2008 U.S. App. LEXIS 16860 (9th Cir. 2008). In an opinion authored by Judge Bea, a majority of the panel held that the government-approved use of artificial snow made from recycled sewage effluent did not violate RFRA or any other federal law and affirmed the district court's denial of relief to Plaintiffs on all grounds. The court held that in order to establish a prima facie RFRA claim, a plaintiff must prove that (1) the activities the plaintiff claims are burdened by the government action constitute an "exercise of religion," and (2) the government action "substantially burdens" the exercise of religion. If the plaintiff proves both elements, the burden shifts to "the government to prove that the challenged government action is in furtherance of a 'compelling government interest' and is implemented by 'the least restrictive means.'" The court found that the Plaintiffs had proven that the religious activities in question constitute an "exercise of religion." However, the court found that Plaintiffs had not proven that the use of recycled water on the Snowbowl would impose a "substantial burden" on the exercise of plaintiffs' religion. Consequently, there was no need to engage the analysis of whether the government had a compelling interest in approving the use of recycled wastewater on the sacred mountain or whether its action constituted the least restrictive means of achieving such a purpose. In reaching this holding, the court found that, in enacting RFRA, Congress had intended to incorporate the pre-*Smith* case law on what constitutes a "substantial burden," including the *Sherbert* and *Yoder* decisions. The court found that this case law supported its conclusion that:

Under RFRA, a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a government benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert* or *Yoder* is not a "substantial burden" within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases.

Using this analysis, the court found that the harm to Plaintiffs in this case was merely offense to their "subjective, emotional religious experience." Because there was no "physical effect" on Plaintiffs' religious experience, neither factor in the substantial burden test was met. The court found that a claim of "damaged spiritual feelings" is not actionable under RFRA. The court cited *Lyng v. Northwest Indian Cemetery Association* as the closest precedent on point because in that case, the Court concluded that the Native plaintiffs' "belief" that the government's construction of a road through a sacred site on government land would "destroy" their ability to practice their religion did not constitute a "substantial burden" on the religion, when tribal members remained free to access the area and perform ceremonial activities. The court found that RFRA incorporated all of the Court's prior Free Exercise analysis, including *Lyng*.

The policy underpinning of the court's decision rested on its finding that the government could not function if it was forced to respond to the preferences of all citizens about what is offensive to their religious beliefs. "Were it otherwise, any action the federal government were to take, including action on its own land, would be subject

to the personalized oversight of millions of citizens.” The court maintained that “[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference,” and that the government meets its obligation to respect that pluralism by protecting the right of citizens to “believe” as they choose, but it does not have the obligation to conform its conduct to those beliefs.

The majority further found that the Plaintiffs' NEPA claim that the Forest Service had not adequately evaluated the risks posed by human ingestion of artificial snow had not been properly raised in the district court and was therefore waived on appeal.

Judge Fletcher authored a strong dissent, joined by Judge Pregerson and Judge Fisher, concluding that “the proposed expansion of the Arizona Snowbowl, which would entail spraying up to 1.5 million gallons per day of treated sewage effluent on the holiest of the San Francisco Peaks, violates RFRA” because the expansion “would impose a ‘substantial burden’ on the Indians’ ‘exercise of religion’ and is not justified by a ‘compelling government interest.’” In a carefully documented and reasoned opinion, the dissent found that the majority had misstated the law under RFRA and had misunderstood the very nature of the religions under consideration. The dissent observed that RFRA had been amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which replaced the original “First Amendment definition of ‘exercise of religion’ with a broader statutory definition.” This statutory mandate requires the government to consider the effects of its actions on “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” Thus, the government had an obligation to consider the effects of its action on the land-based religions of American Indian peoples, which are necessarily different from the religions of any other group. Moreover, the dissent found that in several other ways, “RFRA provides greater protection for religious practices than did the Supreme Court’s pre-*Smith* cases.” For example, “RFRA ‘goes beyond the constitutional language that forbids the ‘prohibiting’ of the free exercise of religion and uses the broader verb ‘burden.’” RFRA also “imposes in every case a least restrictive means requirement” that was not used in the pre-*Smith* jurisprudence. And finally, RFRA “applies *Sherbert* and *Yoder*’s compelling interest test ‘in all cases’ where the exercise of religion is substantially burdened.” In particular, the dissent found that the majority had misstated the law under RFRA by developing such a restrictive definition of “substantial burden,” by ignoring the impact of RLUIPA and cases interpreting RLUIPA, “on the definition of ‘substantial burden’ on the ‘exercise of religion’ in RFRA” and by suggesting that it is an “open question whether RFRA applies to the federal government’s use of its own land.”

The dissent also found that the Forest Service had failed to satisfy its obligation under NEPA by evaluating the possible risks posed by human ingestion of artificial snow. The dissent noted that the NEPA violation could be cured, but the RFRA violation could not be cured: “Because of the majority’s decision today, there will be a permanent expansion of the Arizona Snowbowl,” with a daily release of sewage effluent on the mountain that would forever desecrate the mountain and impair the Indians’ exercise of their religion. The dissent read the majority’s opinion as “effectively read[ing] American Indians out of RFRA,” and criticized the majority for treating the mountain as a “public

park” that “belongs to everyone,” conveniently ignoring the historical fact that the mountains were taken “from the Indians by force” and using that fact as a “justification for spraying treated sewage effluent on the holiest of the Indians’ holy mountains.” The dissent also noted the sweeping effect of the majority’s analysis on Native peoples: “RFRA was passed to protect the exercise of all religions, including the religions on American Indians. If Indians’ land-based exercise of religion is not protected by RFRA in this case, I cannot imagine a case in which it will be.”

Another recent Circuit Court opinion, *United States v. Friday*, considers the effect of RFRA on the prosecution of a Native American defendant who was charged with shooting an eagle without a permit on the reservation. *United States v. Friday*, 525 F.3d 938 (10<sup>th</sup> Cir. 2008). Defendant William Friday, a member of the Northern Arapahoe Tribe residing on the Wind River Reservation in Wyoming, was charged under federal law with shooting an eagle without a permit, a forbidden act under the Bald and Golden Eagle Protection Act. Mr. Friday asserted that RFRA precludes the government from prosecuting him because the act was taken in observance of a religious practice. The district court agreed, dismissing the indictment. The 10<sup>th</sup> Circuit Court of Appeals reversed, concluding that the Bald and Golden Eagle Protection Act and its regulations are the least restrictive means of pursuing the government’s compelling interest in preserving the bald eagle.

**At Page 1181, insert the following after the carryover paragraph at the top of the page:**

The latest round of the 16 year legal battle between Native American plaintiffs and the Washington Redskins culminated in a June 25, 2008 memorandum opinion in the United States District Court for the District of Columbia, in which Judge Colleen Kollar-Kotelly ruled that the youngest of the seven Native American plaintiffs waited too long after turning 18 to file the lawsuit attempting to revoke the Redskins trademarks and therefore the lawsuit was barred by laches. See *Pro-Football, Inc. v. Harjo*, (Civ. Action No. 99-1385) (D.D.C. 2008). The court granted Pro-Football’s motion for summary judgment on the laches issue, but underscored its earlier ruling that the “opinion should not be read as ... making any statement of the appropriateness of Native American imagery for team names.” Attorneys representing the Native American plaintiffs have already filed suit in D.C. with another group of Native American petitioners, all of whom just turned 18, to keep the litigation alive even if the first lawsuit does not move forward. See Quinn Emanuel, *Drinker Biddle Battle Over Redskins Trademark*, Law.Com, 7-15-08, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202422982346>.

## CHAPTER 7

### THE OPERATION OF THE RESERVED RIGHTS DOCTRINE: HUNTING, FISHING, AND WATER RIGHTS

**At Page 1199, insert the following after the citation to *United States v. Washington* in Note 4:**

In further litigation over the content of the Washington tribes' treaty-based fishing rights, a federal district court judge has enjoined the state of Washington from maintaining culverts rather than bridges where roadways cross rivers and streams. *United States v. Washington*, 2007 U.S. Dist. LEXIS 61850 (W.D. Wash. Aug. 22, 2007). The tribes maintained that these culverts blocked the passage of fish up and down the streams, diminishing the supply of fish available to them. Federal District Court Judge Martinez read the Ninth Circuit's 1985 opinion as resting on the general nature of the claim for habitat protection made at that time (described by the Ninth Circuit as an "environmental servitude"). Judge Martinez pointed to language in the Ninth Circuit opinion acknowledging the tribal right to protection of the fish supply or catch, and insisting only that any attempt to enforce that right invoke concrete facts and a particular dispute.

**At Page 1231, add the following just before the beginning of Note 3:**

In September, 2007, several Makah tribal members, impatient with the slow pace of federal review and approvals, embarked on a whale hunt without waiting for tribal permission. While out to sea, the tribal members killed a gray whale. The Tribe prosecuted them for hunting without a tribal license, though difficulties empanelling a tribal jury led the tribal prosecutor to drop his request for a sentence of one year in jail, and limit the sentence to community service. A federal prosecution followed, which resulted in jail sentences for two of the five tribal defendants, and two years' probation for the other three. Linda V. Mapes, "2 Makahs to Serve Time for Illegally Killing Whale," Seattle Times, July 1, 2008.

**At Page 1277, add the following at the end of Note 2:**

A thorough and insightful treatment of Indian water rights settlements can be found in Bonnie G. Colby, John E. Thorson, and Sarah Britton, Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West (University of Arizona Press: 2005). The book does an excellent job of outlining the varying goals of parties usually involved in water settlements, including Tribes, non-Indian water users, federal governments, state water agencies. Although many of these participants' goals conflict, some may be shared, such as reliable access to water, effective management of water resources, improved community and intergovernmental relations, economic development, conflict resolution, and some measure of stability and ability to plan for the future. Later, the book analyzes and identifies the standard components of water settlements, including

finding a source of water to settle tribal claims, securing funds for water development projects, and resolving questions of jurisdiction over water management. The book also explains how these elements have been negotiated, and offers case studies of representative settlements, including the Ak-Chin Water Settlement, the Gila River Settlement, and the Truckee-Carson-Pyramid Lake Water Settlement. The most recent Indian water rights settlement is one reached by the Soboba Band of Luiseno Indians with several southern California water districts, signed by President Bush on July 31, 2008.

**At Page 1280, insert the following just before the Note:**

In a follow-up to the *Clinch* and *Stults* cases, the Montana Supreme Court has moved toward allowing the state's Department of Natural Resources and Conservation to process applications for *changes* of water uses by non-Indians on the Flathead Reservation, even though the Tribe's water rights have not yet been quantified. *Confederated Salish and Kootenai Tribes v. Clinch*, 336 Mont. 302, 158 P.2d 377 (2007). The court remanded the case, however, so that the trial judge could determine whether the state even has sovereign authority to process applications, given the United States Supreme Court's line of cases dealing with state regulatory and taxing jurisdiction over non-Indians on reservations. See Ch. 4, pages 703-786 of the Casebook. In the court's view, the important issue arising from this line of cases is whether the proposed changes in water use would adversely affect the Tribes' reserved water rights, and thereby have some direct impact on their political integrity, economic security, health, or welfare. The Montana high court indicated that even if the trial judge finds in favor of state jurisdiction, under Montana law the non-Indian applicants will still have to prove, by a preponderance of the evidence that the "proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons," including the Tribes' reserved rights. Crucial to the court's decision was an assumption that the unquantified nature of the Tribes' rights shouldn't matter when only a change of use is at stake. Dissenting Justice James C. Nelson challenged that assumption, pointing out:

While an applicant might not divert any more water after a proposed change than he or she has diverted historically, the change in use still could increase or decrease the flow in a protected stretch of a stream, raise or lower a water table, artesian pressure, or water level in a protected area, or impede aboriginal practices. For instance, the change could adversely affect the use of water rights reserved by the Tribes for aboriginal hunting and fishing, which may require that a particular quantity of water is located (or not located) at a particular location. Indeed, the [Department] conceded this point in the District Court.

What will be the burden, both legal and practical, of the latest *Clinch* decision on the Confederated Salish and Kootenai Tribes? Should it have to bear that burden so long as the Tribes' water rights haven't been quantified?