Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, Selected Studies in Highway Law, published by the Transportation Research Board.

Areas of Interest: IC Transportation Law, IIA Highway and Facility Design, IIC Maintenance, IVA Highway Operations, Capacity, and Traffic Control

Legal Issues Relating to the Acquisition of Right of Way and the Construction and Operation of Highways over Indian Lands

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by Richard O. Jones. James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

This paper will be published in a future addendum to Selected Studies in Highway Law (SSHl). Volumes 1 and 2 deal primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covers government contracts. Volume 4 covers environmental and tort law, inter-governmental relations, and motor carrier law. An expandable format permits the incorporation of both new topics as well as supplements to published topics. Updates to the bound volumes are issued by addenda. The 5th Addendum was published in November 1991. Addenda are published on an average of every three years. Between addenda, legal research digests are issued to report completed research. Presently the text of SSHL totals over 4,000 pages comprising 75 papers.

Copies of SSHL have been sent, without charge, to NCHRP sponsors, certain other agencies, and selected university and state law libraries. The officials receiving complimentary copies in each state are the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the 4-volume set is for sale through the Transportation Research Board ($185.00).

APPLICATIONS

State highway departments have increasingly encountered problems in planning, developing, constructing, and operating highways that cross Indian reservations because of jurisdictional conflicts with Indian tribes and the Indian self-determination policy supported by the Federal government.

At a White House ceremony April 29, 1994, President Clinton announced strong support of tribal sovereignty and issued a Presidential memorandum to all agency heads, directing that each operate within a government-to-government relationship with federally recognized tribes. The memorandum further requires federal agency officials to consult with tribal councils before developing federal regulations affecting Indian reservations.

According to a compilation by officials within the U.S. Bureau of Indian Affairs, there are now about 349 tribes on reservations or Indian lands located in 34 states. The prevalence of Indian reservations and the growing assertiveness of tribal councils suggest that jurisdictional issues will intensify.

This report should give highway officials a basic understanding of laws relating to Indian reservations and what to expect when confronted by a jurisdictional conflict involving Indian land. It should provide guidance to state highway department directors, attorneys, planners, right-of-way officials, and public information officers.
Legal Issues Relating to the Acquisition of Right of Way and the Construction and Operation of Highways over Indian Lands

By Richard O. Jones
Attorney at Law
Lakewood, Colorado

I. INTRODUCTION

During the past 3 decades state highway agencies have increasingly experienced problems in the planning, project development, construction, and operation of state highways crossing Indian reservations. This has been particularly evident in western states, which contain large areas of Indian lands, many of which are transversed by state highways. Many of the problems encountered stem from jurisdictional conflicts with Indian tribes and their self-determination policies. A renewed assertion of tribal sovereignty, fully supported by a revised federal Indian policy, and the past reluctance of state officials to accept tribal sovereignty are at the root of the conflicts. Much of the conflict and the resulting problems are caused by a misunderstanding of federal Indian law, federal requirements and limitations in the Federal-Aid Highway Program, and by a lack of open communication and government-to-government cooperation.

The renewed assertion of Indian tribal sovereignty, commonly referred to as the "self-determination era," began in 1961 and continues to the present time. This policy and the legislation and programs to support it evolved in response to Indian demands for self-determination, which had the official support of six presidents. At a White House ceremony on April 29, 1994, attended by more than 200 American Indian leaders, a seventh president, Bill Clinton, continued that support by issuing a Presidential Memorandum to all heads of executive departments and agencies. The memorandum recognized the sovereignty of tribal governments, directed that each department and agency operate within a government-to-government relationship with federally recognized tribal governments, and required all federal agencies to consult with tribal councils before developing federal regulations affecting Indian reservations.

According to Cohen:

The self-determination era is premised on the notion that Indian tribes are the basic governmental units of Indian policy. During the period of Indian reorganization in the 1930's tribal governments were brought back to life; during the 1970's, tribal governments have been affirmatively strengthened. Self-determination has operated on a number of fronts to promote the practical exercise of inherent sovereign powers possessed by Indian tribes.

II. INDIANS, INDIAN TRIBES, INDIAN RESERVATIONS, AND INDIAN COUNTRY

A. Background

According to the U.S. Census Bureau, there were 1,959,234 American Indians and Alaska natives living in the United States in 1990 (1,878,285 American Indians, 57,152 Eskimos, and 23,797 Aleuts). This is a 37.9 percent increase over the 1980 recorded total of 1,420,400. The increase is attributed to improved census taking and more self-identification during the 1990 count. The Bureau of Indian Affairs (BIA) estimates that in 1990 almost 850,000 Indians lived on or adjacent to federal Indian reservations. Members of federally recognized tribes who do not reside on or near their reservations have limited relations with BIA because the bureau's programs are primarily administered for members of federally recognized tribes who live on or near reservations.

A total of 278 land areas in the United States are administered as federal Indian reservations (reservations, pueblos, rancherias, communities, etc.). These land areas are located in 33 states. The largest is the Navajo Reservation, which occupies 16 million acres in Arizona, New Mexico, and Utah. Many of the smaller reservations are less than 1,000 acres, with the smallest less than 100 acres. A total of 66.2 million acres are held in trust by the United States for various Indian tribes and individuals. Although much of this is reservation land, not all reservation land is trust land.

B. Who Are Indians?

The term "Indian," as applied to the inhabitants of the Americas at the time of Columbus's discovery, is a misnomer, resulting from the fact that Columbus thought he had reached India. However, the name remains for those inhabitants and their descendants, and it was institutionalized by being placed in the U.S. Constitution. According to Cohen:

The term "Indian" may be used in an ethnological or in a legal sense. If a person is three-fourths Caucasian and one-fourth Indian, that person would ordinarily not be considered an Indian for ethnological purposes. Yet legally such a person may be an Indian. Racial composition is not always dispositive in determining who are Indians for purposes of Indian law. In dealing with Indians, the federal government is dealing with members or descendants of political entities, that is, Indian tribes, not with persons of a particular race. (citations omitted)

There is no single federal or tribal criterion that establishes a person's identity as an Indian. Government agencies use differing criteria to determine who is an Indian eligible to participate in their programs, and tribal membership criteria vary. For example, the Indian Reorganization Act of 1934, 25 U.S.C. Sections 461-79 (1982), used the following definition:

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal people of Alaska shall be considered Indians.

There has never been a general definition of the term "Indian" that could be used by the courts. It is clear that the diversity of the use of, and the varying definitions for, the term "Indian" require practitioners to specifically determine at the outset the purpose for which identification is relevant. However, the following working definition has been suggested:

[A person, some of whose ancestors lived in America before the arrival of Whites, who is generally considered to be an Indian by the community in which he lives or from which he comes, and who holds himself out to be an Indian.]

exterior boundaries of the reservation. The facts showed that Tucker operated his truck and trailer to haul logs from one part of the reservation to another, using Highway 47 only within the reservation.

The court in Tucker first noted that the Indian title was only the right of occupancy extinguishable at will by the United States, citing Johnson v. McIntosh. It reasoned that a grant by the United States of a right of way and permission to maintain a public highway must destroy the possessory right of the Indians and therefore destroy Indian title. The opinion concluded with the following:

'That a grant by the United States to the state of Wisconsin of a right of way to construct and maintain a public highway, in the absence of express declaration to the contrary, be assumed to vest the state with such control of the highway as is usual and necessary to the construction and maintenance of such a highway; that such a grant extinguishes the right of occupancy in the Menominee Indians commonly referred to as Indian title, at least to the extent necessary to vest such jurisdiction and control; that while so maintained, the highway ceases to be Indian land; and that the rights of Indians to use the highway are the same as those of the general public and subject to the same regulations and restrictions. It follows that the trial court had jurisdiction of the offense, and defendant was properly convicted (at 647-48).

The following year, in Application of Konaha, the Court of Appeals for the Seventh Circuit considered the appeal of a conviction for the felony crime of negligent homicide by an enrolled member of the Menominee Indian Tribe. Konaha killed another enrolled member while driving his automobile under the influence of alcohol on Wisconsin Highway No. 47, within the reservation. The sheriff's return to the habeas corpus application that follows relied on the fact that the crime was committed on a highway constructed and maintained by the State of Wisconsin, citing the decision in Tucker.

The court of appeals noted at the outset that it was well settled that in the absence of legislation by Congress conferring jurisdiction on Wisconsin state courts, the courts have no jurisdiction over crimes committed by Indian members to Wisconsin penal statutes, they would be limited to such penal provisions as made applicable to the tribe under the regulations and restrictions of the tribe.

It is true that the grant of a right to maintain a highway must carry with it certain implications respecting the protection of said highway against depredations. If, however, there were any implications arising therefrom which would subject the Indians to Wisconsin penal statutes, they would be limited to such penal provisions as served to protect and preserve the highway, such as speed, impairing the highway, etc.

Whether there was an implied grant of jurisdiction to Wisconsin so as to permit adequate protection of its highway by state statutes, we need not determine. No such case is before us. The case before us is that of manslaughter—killing by the negligence of a drunken driver. The fact that it occurred on the highway does not make its punishment essential or vital to building or maintenance of the highway.

The U.S. District Court decision in In re Fredenberg considered the identical facts as occurred in Tucker (i.e., failing to register his logging truck and operating it on Wisconsin Highway No. 47, within the Menominee Reservation), but squarely rejected the Tucker decision:

This court stated in the case of Application of Konaha, D.C., 43 F.Supp. 747, that the decision in State v. Tucker, supra, was unsound and that this court was not bound by that decision...the Circuit Court of Appeals in Application of Konaha, 7 Cir., 131 F.2d 737, left undecided the question on facts as presented in the case now before us. For the reasons I stated in Application of Konaha...I think the Wisconsin court is in error.

The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history. Rice v. Olson, 324 U.S. 766, 789, 65 S.Ct. 989, 991. There is no legitimate implication to be drawn that Congress intended any grant of jurisdiction when it permitted the State primarily for its own convenience to establish a State highway across the reservation. The act of June 26, 1932, c. 284, 47 Stat. 336, 18 U.S.C.A. 548, provided for the trial of designated crimes in the federal courts when committed upon any Indian reservation and specifically designated rights of way running through the reservation as coming within the scope of that act. In the Tucker case the Wisconsin Supreme Court did not notice that by the act of 1932 Congress had asserted exclusive jurisdiction in the federal courts over crimes committed by Indians on the right of way within Indian reservations (emphasis added).

The Supreme Court of Arizona, in Application of Denet-Claus, rejected the opinion in Tucker and relied on the opinion in In re Fredenberg in dismissing traffic citations to a Navajo Indian for violations occurring on U.S. 66 within the Navajo Reservation:

We hold, therefore, that the State's contention that the granting of an easement for a right of way (under 25 U.S.C. § 311) by implication conferred jurisdiction on Arizona courts over Indian traffic offenders is untenable as it completely ignores the express definition of what constitutes Indian country found in section 1151, supra. [18 U.S.C. § 1151].

The Supreme Court of New Mexico, in State of New Mexico v. Begay, also rejected Tucker and relied on In re Fredenberg in holding:

That the authority under which the State was permitted to construct Highway 66 through, and over, the Navajo reservation (25 U.S.C. § 311) failed to extinguish the title of the Navajo Indian Tribe...Since the State has no jurisdiction over Indian reservations until title in the Indians is extinguished, and the easement to the State did not affect the beneficial title, there is no basis upon which the State can claim jurisdiction.

Finally, in State v. Webster, a 1983 decision of the Wisconsin Supreme Court, the court overruled State v. Tucker, holding that the state did not have jurisdiction to charge and prosecute traffic offenses by Menominee Indians on a state highway within the reservation because (a) title to the land underlying the state highway remained part of the reservation, (b) the tribe had a well-established tradition of tribal self-government in the area of traffic regulation, and (c) state jurisdiction would interfere with tribal self-government and impair a right granted or reserved by federal law. The court said:

We conclude that the language of 25 U.S.C. sec. 311, taken together with the expressed congressional intent to include rights-of-way as part of Indian country, implies that the granting of the Highway 47 right-of-way pursuant to sec. 311 neither extinguished title in the Menominee Tribe nor constituted a general grant of jurisdiction to the state over the land constituting the right-of-way. Anything in State v. Tucker, supra, contrary to our holding in this case is hereby overruled.
c. Utilities within the Right of Way. The Supreme Court, in United States v. Oklahoma Gas & Electric Co., considered the question of whether a grant of right of way over allotted lands held in trust under 23 U.S.C. Section 311 included the right to permit maintenance of rural electric service lines within the highway bounds. The action was brought by the Secretary of the Interior, who considered this use, under license by the Oklahoma State Highway Commission, as not warranted by the grant. The Court noted that such use was a lawful and proper highway use under Oklahoma law. It held that the utility use in accordance with state law was covered under the Section 311 grant of right of way. A U.S. District Court followed this precedent in United States v. Mountain States Telephone and Telegraph Co., which involved buried cable on state highway across tribal land, ruling that "Mountain Bell does have a right to maintain its buried telephone cable in the highway right-of-way and is not trespassing.”

2. Use of FHWA Title 23, U.S.C., Procedures

The question sometimes arises as to whether the right-of-way acquisition or appropriation procedures of 23 U.S.C. Sections 107 and 317 may be used to obtain rights of way over Indian lands. Section 107 authorizes the Secretary of Transportation, at the request of a state, to acquire by federal condemnation lands or interests in lands required for rights of way for the National System of Interstate and Defense Highways, when the state is unable to do so. Section 317 details the procedure to be followed in appropriating lands or interests in lands owned by the United States for the right of way of any highway upon application of the Secretary of Transportation to the federal agency having jurisdiction over the land.

This provision of law was addressed by the court of appeals for the Ninth Circuit in United States v. 10.69 Acres of Land, which involved allotted Indian tribal lands held in trust by the United States for the benefit of the Confederated Tribes and Bands of the Yakima Indian Nation. The Washington State Department of Transportation needed the lands for an interstate highway right of way. The U.S. Department of Transportation was requested to acquire the land involving Section 107, and the Department of Justice commenced condemnation action in the U.S. District Court. The court dismissed the action, and the Ninth Circuit affirmed on the ground that "Mountain Bell does have a right to maintain its buried telephone cable in the highway right-of-way and is not trespassing.”

The Court first held that since the United States was the owner of the fee, the action was one against the United States, and it was indispensable party to the condemnation proceedings. Second, the Court noted that the statute contains no permission to sue in the court of a state and that "judicial determination of controversies concerning [Indian] lands has been commonly committed exclusively to federal courts.”

Several U.S. circuit courts have rejected the contention that the Indian Right-of-Way Act of 1948 repealed, by implication, portions of the act of 1901 and that a condemnation action required the consent of the Secretary of Interior or of the Indians. According to these cases, Section 357 stands alone in providing the authority to condemn allotted Indian land without consent of Indians or the Secretary of the Interior. However, as previously noted, tribal land is not subject to condemnation.

The U.S. Supreme Court in United States v. Clarke considered the question of whether 25 U.S.C. Section 357 authorizes the taking of allotted Indian land by physical occupation, commonly called "inverse condemnation." The Court, reversing the court of appeals for the Ninth Circuit, found that the word "condemned," as used in 1901 when 25 U.S.C. Section 357 was enacted, had reference to a judicial proceeding instituted for the purpose of acquiring title to private property and paying just compensation to the owner, or "inverse condemnation," even though that method was authorized by state law. The Supreme Court decision strictly construes the statute and would appear to preclude any taking of allotted Indian land except by formal condemnation proceedings.

This would also seem to preclude, for example, "regulatory takings" that were not authorized in formal condemnation proceedings.

C. Use of Eminent Domain to Acquire Indian Land

The act of March 3, 1901, provided that "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.” This provision of law was considered by the U.S. Supreme Court in State of Minnesota v. United States, where the United States challenged a condemnation action brought by Minnesota in state court for a highway over nine parcels allotted in severalty to individual Indians by trust patents.

Minnesota contended that the statute (25 U.S.C. Section 357) authorized it to condemn allotted lands in state courts without making the United States a party. The Court first held that since the United States was the owner of the fee, the suit was one against the United States, and it was an indispensable party to the condemnation proceedings. Second, the Court noted that the statute "contains no permission to sue in the court of a state" and that "judicial determination of controversies concerning [Indian] lands has been commonly committed exclusively to federal courts.”

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V. ISSUES RELATING TO HIGHWAY CONSTRUCTION ON INDIAN RESERVATIONS

A. Tribal Sovereign Authority

Beginning with the rulings in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, the U.S. Supreme Court has held that Indian tribes retain inherent sovereign authority over their reservation lands and activities except to the extent withdrawn by treaty, federal statute, or by implication as a necessary result of their status as "dependent domestic nations." In *Worcester*, Chief Justice Marshall stated:

"The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights... The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress."

In these decisions the Court viewed the Indian nations as having distinct boundaries within which their jurisdictional authority was exclusive—a "territorial test." Pevar, in his book *The Rights of Indians and Tribes*, examines nine of the most important areas of tribal self-government:

- formation of a government
- determination of tribal membership
- regulation of tribal property
- regulation of individual property
- the right to tax
- the right to maintain law and order
- the right to exclude nonmembers from tribal territory
- the right to regulate domestic relations
- the right to regulate commerce and trade

In later years, the Court went beyond the territorial test. It formulated other tests that generally decreased Indian tribal jurisdiction and increased state jurisdiction. This was based primarily on the tribe's "dependent status," moving from an "infringement test" to a "preemption test." In 1978 the Court rendered decisions in three cases that further defined the inherent sovereignty of Indian tribes by creating and expanding an "inherent limitations" doctrine, which seemed to limit a tribe's inherent regulatory authority to internal matters among tribal members.

This limitation became less certain after the Court's decision in *Washington v. Confederated Tribes of Colville Indian Reservation*, where the Court upheld the power of tribes to tax on-reservation cigarette sales to non-Indians, recognizing that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians entering the reservation to engage in economic activity.

The Court held that the Crow Tribe lacked inherent civil authority to regulate fishing by non-Indians on non-Indian-owned fee lands within the reservation where no important tribal interest was affected. But the decision made clear that although there is a presumption against tribal power to regulate activities of nonmembers, it can be done if there is a tribal interest sufficient to justify tribal regulation. The Court then gave two basic tests for where and how that could occur:

Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, 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. [1] 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 dealings, contracts, leases, or other arrangements. [2] 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. ([3] emphasis added) (citations omitted)

In 1989, the concept of inherent tribal sovereignty was eroded even further as a result of the opinions in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*. The opinions reviewed the authority of the tribes to impose zoning regulations on two pieces of property owned in fee by nonmembers, which were already under zoning by Yakima County, Washington. Roughly 80 percent of the reservation land was held in trust by the United States, with 20 percent owned in fee by Indian or non-Indian owners. Most of this fee land was in three towns, the rest were scattered in a "checkerboard" fashion throughout the reservation. The reservation was divided informally into an "open area" and "closed area." The open area covered the eastern third of the reservation, half of which was owned in fee by nonmembers who composed 80 percent of the population. One of the fee-owned properties sought to be zoned was in this open area. The other fee-owned property sought to be zoned lies in the closed area, 97 percent of which was tribal land containing no permanent residents and described as an "undeveloped refuge of cultural and religious significance" which access by nonmembers was restricted.

Three separate views of tribal inherent power resulted:

1. Justice White, writing for himself and three others, held that the tribe had neither treaty-reserved nor inherent powers to zone nonmember fee lands.

2. Justice Blackmun, writing for himself and two others, was of the opinion that the tribe had the full inherent sovereign power to zone both member and nonmember fee lands lying within the reservation.

3. Justice Stevens, joined by one other justice, was of the opinion that the tribe could zone the nonmember fee property in the closed area, but not the open area.

The result of this split decision was that zoning was upheld only as to the closed area. The significance of the White opinion is that he and three other justices departed from the analysis in *Montana* and held tribal regulatory jurisdiction over nonmember fee lands was prohibited per se, even when conduct threatened the political integrity, the economic security, or the health and welfare of the tribe (second proviso of *Montana*). But the first proviso of *Montana* survived so that a tribe may still regulate, "through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." As concluded in the analysis of *Brendale* in the *American Indian Law Deskbook*.

Despite the fractured nature of the opinions in *Brendale*, a present majority of the Court has adopted the general premise that, outside a land-use situation, inherent tribal regulatory authority extends to nonmembers only when express or constructive
recognize during planning and project development that a government-to-government relationship is being entered into when a state or local government plans a highway project on Indian reservation lands. Congress underscored this in ISTEA, Transit Authority (FTA) programs, amend the regulations of Title 23, C.F.R., of Indian tribal governments having jurisdiction over lands within the boundaries of the State.

The U.S. Department of Transportation issued new regulations on statewide planning on October 28, 1993, which significantly amplify the statutory requirements. These regulations, which apply to both FHWA programs and Federal Transit Authority (FTA) programs, amend the regulations of Title 23, C.F.R., Part 450—Planning Assistance and Standards. Subsection 450.208 prescribes 23 factors that shall be considered, analyzed, and reflected in the planning process, including: "(23) The concerns of Indian tribal governments having jurisdiction over lands within the boundaries of the State." Subsection 450(a) provides as follows:

The degree of consideration and analysis of the factors should be based on the scale and complexity of many issues, including transportation problems, land use, employment, economic development, environmental and housing and community development objectives, the extent of overlap between factors and other circumstances statewide or in subareas within the State.

Under Section 450.210, Coordination, each state, in cooperation with participating organizations "such as... Indian tribal governments... shall... provide for a fully coordinated process," including 13 listed categories such as:

(5) Transportation planning carried out by the State with transportation planning carried out by Indian tribal governments;

(12) Transportation planning with analysis of social, economic, employment, energy, environmental, and housing and community development effects of transportation actions...

Subsection 450.214(c) provides that in developing the statewide plan, the state shall:

(2) Cooperate with the Indian tribal government and the Secretary of the Interior on the portions of the plan affecting areas of the State under the jurisdiction of an Indian tribal government....

Section 450.104 defines the key terms "consultation," "cooperation," and "coordination" as follows:

Consultation means that one party confers with another identified party and, prior to taking action(s), considers that party's views.

Cooperation means that the parties involved in carrying out the planning, programming and management systems processes work together to achieve a common goal or objective.

Coordination means the comparison of the transportation plans, programs, and schedules of one agency with related plans, programs and schedules of other agencies or entities with legal standing, and adjustment of plans, programs and schedules to achieve general consistency.

2. Environmental and Related Issues

a. General.—Whether a specific federal statute of general applicability, such as the National Environmental Policy Act of 1969 (NEPA), applies to activities on Indian lands depends on the intent of Congress. Certainly, such laws will be held to apply where Indians or tribes are expressly covered, but also where it is clear from the statutory terms that such coverage was intended. Where retained sovereignty is not invalided and there is no infringement of Indian rights, Indians and their property are normally subject to the same federal laws as others. There were no reported cases found where an Indian tribe has successfully challenged applicability of federal environmental laws to Indian lands. Federal statutory environmental law has been a fertile field for litigation between states and tribes both as to applicability and jurisdiction. Thus far, state environmental laws have been held not to apply to Indian reservations. However, while "state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply," the Supreme Court has not established an inflexible per se rule precluding state jurisdiction in the absence of express congressional consent. As the Court said in New Mexico v. Mescalero Apache Tribe:

[Under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members.]

But the Court made clear, in Washington v. Confederated Tribes of the Colville Indian Reservation, the tribes have no right "to market an exemption" from state law.

b. NEPA Compliance.—NEPA (42 U.S.C Section 4332 (2)(c)) is silent on its applicability to Indian country and Indian tribal areas. By its terms, it applies to "the major federal actions of federal agencies," and this would include the Department of the Interior and BIA. In Davis v. Morton, the court of appeals for the Tenth Circuit addressed the applicability of NEPA to BIA approval of a 99-year lease on the Tesuque Indian Reservation in Santa Fe County, New Mexico. The court of appeals held as follows:

We conclude approving leases on federal lands constitutes major federal action and thus must be approved according to NEPA mandates. As our court had occasion to consider once before, this Act was intended to include all federal agencies, including the Bureau of Indian Affairs.

Subsequent to this ruling, BIA, in cooperation with the various Indian tribes, began preparing environmental analyses in compliance with NEPA. Although BIA has no specific environmental regulations covering highway rights of way or highway construction, it considers NEPA requirements to be applicable. BIA has issued an NEPA handbook to provide guidance to BIA personnel and others who seek to use Indian lands that are subject to federal approval. Normally, BIA would be the jurisdictional agency, but it may also act as a "cooperating agency"
with another federal agency, such as FHWA, that is acting as "lead agency," under the Council on Environmental Quality regulations.

The Montana Department of Highways has started the practice of entering into a memorandum of understanding with FHWA and the jurisdictional Indian tribe regarding the procedures to be followed in preparation of such environmental impact statements. The American Indian Law Deskbook devotes an entire chapter to state-tribal cooperative agreements, giving many examples and representative samples of such agreements, including several relating to environmental matters.

At present, the FHWA/FTA environmental regulations in 23 C.F.R. Part 771, which prescribe the procedures for compliance with NEPA, exempt "regional" transportation plans from preparation of environmental analysis. This exemption is supported by case law. Although the statewide planning regulations previously discussed place great emphasis on, and establish requirements concerning, the environmental effects of transportation decisions, they do not mandate an NEPA environmental analysis. However, given the importance to Indian tribes of reversing the loss of tribal resources and preserving the integrity of tribal lands, state transportation planning and project development will necessitate the use of environmental inventorying and in some cases may need to consider the use of a "tiered" environmental impact statement.

c. Tribal Enforcement Authority for Federal Environmental Statutes other than NEPA.—In State of Washington Department of Ecology v. United States Environmental Protection Agency, involving the Resources Conservation and Recovery Act, the court of appeals for the Ninth Circuit noted:

The federal government has a policy of encouraging tribal self-government in environmental matters. That policy has been reflected in several environmental statutes that give Indian tribes a measure of control over policy making or program administration or both... The policies and practices of EPA also reflect the federal commitment to tribal self-regulation in environmental matters.

In that case, and in the earlier Ninth Circuit case of Nance v. Environmental Protection Agency, which involved Environmental Protection Agency (EPA) delegations to a tribe under the Clean Air Act, the court of appeals approved EPA's development of regulations and procedures authorizing the treatment of Indian tribes on a government-to-government basis, encouraging Indian self-government on environmental matters, notwithstanding the fact that none of the major federal environmental regulatory statutes at that time provided for delegation to tribal governments.

Subsequently, as these and other environmental statutes came before Congress for amendment or reauthorization, Congress expressly provided tribal governments various degrees of jurisdictional authority. Major environmental statutes granting such tribal authority, which may be involved in the development or maintenance of a highway project on an Indian reservation, are as follows:

- Clean Air Act, 42 U.S.C. Section 7401, et seq. (eligible tribes may assume primary responsibility for all applicable programs, see Section 7801)
- Safe Drinking Water Act, 42 U.S.C. Section 300f, et seq. (eligible tribes may assume primary responsibility for all applicable programs, see Sections 300j-11, 300h-1[a])
- Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. Section 1261, et seq. (eligible tribes allowed to establish water-quality standards, non-point source management plans, and issue National Pollutant Discharge Elimination System and Section 404 dredge/fill permits, see Section 1377(e) allowing tribes to be treated as states)
- Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601, et seq. (Section 9626 provides that tribes are to be treated as states for certain purposes, including notification of release, consultation on remedial actions, access to information, and cooperation in establishing and maintaining national registries.)

Another environmental statute that has not been amended to provide for tribal primacy is the Resources Conservation and Recovery Act, 42 U.S.C. Section 9001, et seq. This statute was construed in State of Washington Department of Ecology v. EPA not to allow state enforcement on tribal lands, but rather EPA enforcement.

d. Other Federal Laws Applicable to Environmental Concerns of Indians.—In addition to the specific environmental statutes noted earlier, the following federal laws should also be considered when planning a project on Indian lands.

(1) American Indian Religious Freedom Act of 1978 (AIRFA). AIRFA provides that it shall be the policy of the United States to protect and preserve for the American Indian, Eskimo, Aleut, and Native Hawaiian the inherent right of freedom to believe, express, and exercise their traditional religions, including but not limited to access to religious sites, use and possession of sacred objects, and freedom to worship through ceremonies and traditional rites. Federal agencies are directed to evaluate their policies and procedures to determine if changes are needed to ensure that such rights and freedoms are not disrupted by agency practices. The court of appeals for the D.C. Circuit determined that there is a compliance element in this act, requiring that the views of Indian leaders be obtained and considered when a proposed land use might conflict with traditional Indian religious beliefs or practices and that unnecessary interference with Indian religious practices be avoided during project implementation on public lands, although conflict does not bar adoption of proposed land uses where they are in the public interest. There is presently pending in Congress the Native American Free Exercise of Religion Act of 1993 to extend the coverage of AIRFA.

(2) Archaeological Resources Protection Act of 1979.—This act provides for the protection and management of archaeological resources. It specifically requires that the affected Indian tribe be notified if proposed archaeological investigations would result in harm to or destruction of any location considered by the tribe to have religious or cultural importance. This act directs consideration of AIRFA in the promulgation of uniform regulations.

(3) National Historic Preservation Act of 1966.—This act addresses preservation of historic properties, including historical, archaeological, and architectural districts, sites, buildings, structures, and objects that are eligible for the National Register of Historic Places. In some cases, properties may be eligible in whole or in part because of historical importance to Native Americans, including traditional religious and cultural importance. Federal agencies must take into account the effects of their undertakings on eligible properties.

(4) Section 4(f) of the Department of Transportation Act of 1966.—Section 4(f) provides a policy of making special effort to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. It mandates that transportation programs and projects...
may use such land, where determined by state or local officials to be significant, only if there is no feasible and prudent alternative and all possible planning to minimize harm has taken place.

C. Highway Construction Activities

1. Indian Employment and Contracting Preference

a. General.—At least as early as 1834, the federal government accorded some hiring preference to Indians. Since that time, Congress has continued to enact such preferences. The Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, 48 Stat. 984, 25 U.S.C. Section 461 et seq., accords an employment preference for qualified Indians in any position in BIA, without regard to the civil-service laws.

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, was the first major federal statute prohibiting discrimination in private employment on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. Section 2000e-2(i). However, Sections 701(b) and 703(i) of this act expressly exempted from coverage the preferential employment of Indians by Indian tribes or by industries located on or near Indian reservations. The Equal Employment Opportunity Commission (EEOC) regulations relating to work on or near Indian reservations define the word "near" to include "all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day." It should be noted that these regulations expressly prohibit extending such preferences on the basis of tribal affiliation.


The Court rejected both contentions and upheld the Indian hiring preference.

Contrary to the characterization made by appellants, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. (footnote 24). The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities... On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. (citations omitted)... As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.

In the footnote to the preceding quotation, the Court noted that the preference was political rather than racial:

The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians" in this sense, the preference is political rather than racial in nature.

The Buy Indian Act, 25 U.S.C. Section 47, provides that "[a]s far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior." However, in a 1980 decision, the Supreme Court held in Anderson v. Glover Construction Co. that this act does not authorize BIA to enter into road construction contracts with Indian-owned companies without public advertising of such contracts for competitive bids pursuant to the Federal Property and Administrative Services Act of 1949, 41 U.S.C. Sections 252(e) and 253.

The Indian Self-Determination and Education Assistance Act of 1976 directs the Secretary of the Interior and the Secretary of Health and Human Services to contract with tribal organizations for specified programs administered by their departments for the benefit of Indians, including construction programs. Relative to subcontracting, 25 U.S.C. Section 450b(2) requires all federal agencies, to the greatest extent practicable, to give preference in the awarding of subcontracts to Indian organizations and Indian-owned economic enterprises in any contracts with Indian organizations or for the benefit of Indians. In connection with employment, 25 U.S.C. Section 450b(1) requires all federal agencies, to the greatest extent practicable, to give preference in opportunities for training and employment to Indians in any contracts with Indian organizations or for the benefit of Indians.

b. In the Federal Highway Program.—(1) Federal Lands Highways Program. The Surface Transportation Assistance Act of 1982 amended Title 23 U.S.C. Section 204 to establish a Federal Lands Highway Program, which includes funding for the construction or improvement of "Indian reservation roads." Under 23 U.S.C. Section 204(b), a preference may be given for Indian labor on those projects funded by Indian reservation road funds. An exception to competitive bidding requirements for contracts funded with Indian reservation road funds is provided in 23 U.S.C. Section 204(c), making these contracts subject to the Buy Indian Act and the Indian Self-Determination and Education Assistance Act. Therefore, on such projects, there is authority to contract directly with Indian tribes or Indian contractors and to require preferential hiring of Indians.

On other direct federal highway projects, not funded by Indian reservation road funds, the authority is limited to use of Section 8(a) set-asides to qualified Indian contractors and the use of affirmative-action requirements for contractors to use good-faith efforts to hire minorities, such as Indians, using preestablished hiring goals. Relative to subcontracting, the FHWA Federal Lands Highway Program sometimes uses a Federal Acquisition Regulation clause, which encourages contractors to subcontract with Indian-owned firms by paying additional (up to 5%) of the added costs of such subcontractors.

(2) Federal-Aid Highway Program. (a) Indian Employment Preference. Congress, in enacting the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), added a new Subsection (d) to 23 U.S.C. Section 140.

(d) INDIAN EMPLOYMENT AND CONTRACTING. Consistent with section 701(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(b)), nothing in this subsection shall preclude the preferential employment of Indians living on or near a reservation on projects and contracts on Indian reservations. The Secretary shall cooperate with Indian tribal governments and the States to implement this subsection.

Prior to the enactment of 23 U.S.C. 140(d), in early 1985, FHWA had interpreted Sections 112 and 140 of Title 23 U.S.C. as precluding Indian hiring preference on any federal-aid highway contract. Indian hiring preference could not be "imposed" by a state as a condition to awarding a federal-aid highway contract, but federal-aid contractors could voluntarily give such preferences. However,
Congress enacted Section 140(d) to clarify that Indian hiring preference was permissible on federal-aid highway projects. Congress expanded Section 140(d) in ISTEA by adding the following new sentence:

States may implement a preference for employment of Indians on projects carried out under this title near Indian reservations.11

As written and as explained in the House Committee Report,117 this amendment was intended to permit states to extend Indian hiring to all Indians for any projects near Indian reservations, even though such projects were not technically Indian reservation roads.

Following passage of ISTEA, FHWA issued FHWA Notice, N 4720.7, "Indian Preference in Employment on Federal-aid Highway Projects on and near Indian Reservations," dated March 15, 1993. The purpose of this notice was to consolidate all previous guidance for FHWA field officials, state highway agencies, and their subrecipients and contractors regarding the allowance for Indian preference in employment on projects on and near Indian reservations. The notice covered the following:

1. Eligible projects for Indian employment preference consideration (those on Indian Reservation Roads (IRRs), those not on IRRs, but near reservations and "other Indian lands");
2. Eligible and "targeted" employees for Indian employment preference;
3. Indian employment preference goal setting and revision, including directions that State and tribal representatives are to confer during project development and make determinations regarding employment goals, excepting the contractor's "core crew;" and
4. Guidelines for FHWA participation in a TERO tax applicable to off-reservation situations.

(b) Indian Preference in Contracting. The Indian Self-Determination Act provides for Indian preference in contracting and subcontracting. This new concept has caused much confusion relative to the Federal-Aid Highway Program. This is due, in part, to the fact that Indian tribal officials believed its provisions applied to all federal highway construction funds, including the grant-in-aid to the states for highway construction. The confusion is understandable given the fact that certain earmarked funds from the Highway Trust Fund are subject to the Indian Self-Determination Act (i.e., Indian reservation road funds administered under 23 U.S.C. Section 204, previously discussed). However, the contracting preference for Indian-owned firms is either authorized or mandated under the Federal-Aid Highway Program.

The question was addressed by FHWA in a legal memorandum to the FHWA Montana division administrator in connection with a letter from the tribal attorney for the Blackfeet Tribe.118 The Blackfeet attorney took the position that 23 U.S.C. Section 140(d), Indian Employment and Contracting, seemed to extend preference to Indians living on or near a reservation relative to contract awards. The FHWA response was that Section 140(d) does not authorize Federal-Aid Highway Program grantees to use Indian contractor preference, but they must follow competitive bidding procedures mandated by 23 U.S.C. Section 112 and its implementing regulations in 23 C.F.R. Section 635. However, it was pointed out that a complete set-aside procedure may be followed by state grantees for disadvantaged business enterprises, including but not limited to Indian-owned firms, in accordance with 49 C.F.R. Section 23.45(k).114

2. Tribal Employment Rights Ordinances

a. Background.-The genesis of Tribal Employment Rights Ordinances (TEROs) was the failure of construction contractors to live up to Indian hiring commitments that had been made to the Navajo Tribe in connection with construction of the Salt River generating plant in Arizona. Based on this experience in the early 1970s, the EEOC conducted a 2-year study that concluded that "tribes had the sovereign right to enforce employment requirements on employers conducting business on the reservation." By 1978, EEOC, working through a consulting firm, funded the design and testing of the first TEROs, and assisted 22 tribes to enact TEROs.119

One of the more significant products of the EEOC involvement in TERO development was the preparation and issuance of the manual Indian Employment Rights—A Guide to Tribal Action, by Daniel A. Press. The 1979 revised edition of the manual, more than 200 pages long, includes model tribal ordinances and a set of guidelines for a tribal employment rights office. The shorter version TERO was enacted by several tribes in the late 1970s and early 1980s, and it was this version that state highway departments began to see enforced against federal-aid highway contractors.

This model ordinance establishes the requirement for Indian-hiring preference using the following language:

All employers operating within the exterior boundaries of the reservation are hereby required to give preference to Indians in hiring, promotion, training, and all other aspects of employment, and in subcontracting. Said employers shall comply with the rules, regulations, and guidelines of employment rights office that set out the specific obligations of the employer in regard to Indian preference.

The ordinance requires the "employer who has a collective bargaining agreement to obtain a written agreement from the union(s) stating that the union(s) shall comply with the Indian-preference laws, and so forth. Failure of the employer to comply with the ordinance or any implementing rules on employment rights or to get the required union agreements is subject to sanctions that include, but are not limited to the following:

1. Denial of the right to commence business on the reservation, civil fines, suspension of employer's operation, denial of the right to conduct any further business on the reservation, payment of back pay or other relief to correct harm done to aggrieved Indians, and the summary removal of the employee hired in violation of the Tribes' employment rights requirements.

The ordinance provides that these sanctions are to be imposed by the TERO director after opportunity for an evidentiary hearing. In addition, the TERO director is authorized to issue rules and regulations to implement the ordinance, and to:

1. Impose numerical hiring goals and timetables;
2. Require establishment/participation in training programs;
3. Establish a tribal hiring hall with a requirement that no covered employer may hire a non-Indian until the hall certifies that no qualified Indian is available;
4. Prohibit use of qualification criteria that serve as barriers to Indian employment unless clearly demonstrated to be a business necessity;
5. Enter into agreements with unions to insure union compliance;
6. Require employers to give preference in award of contracts and subcontracts to tribal or other Indian-owned firms;
7. Establish counseling programs to aid Indians to retain employment and to require employers to participate therein.

Finally, the ordinance imposes an employment rights fee to raise revenue for the operation of the TERO Office. For construction contracts of $100,000 or more the recommended fee is 0.5 percent of the total amount of the contract. This tax has become known as the TERO tax.

b. FHWA and State Highway Agency Treatment of TERO.—During the early 1980s the states employed a variety of methods to recognize or give notice in their contracts of TERO requirements applicable to an advertised contract for highway construction on an Indian reservation. Some states only advised bidders in the notice to bidders or other contract documents, while others required contractors to comply with the TERO as a contractual obligation. Initially, FHWA regional offices, while recognizing the authority of the tribes to enforce TEROs against contractors, cautioned the states about incorporating the ordinance into their highway construction contracts as a state-enforced provision. In 1975 FHWA issued a memorandum dated October 6, 1987, directing as follows:

...FHWA field offices should encourage States to meet with Indian tribes and their Tribal Employment Rights Offices (TERO's) to develop contract provisions for Federal-Aid highway projects which will promote employment opportunities for Indians.

The Senate Committee Report on STURAA encouraged state departments of transportation to meet with tribal employment rights officers and contractors prior to bid letting on a project to develop workable and acceptable employment agreements, including agreed employment goals, prior to bid letting. Following enactment of STURAA, with the addition of 23 U.S.C. Section 140(d), and consistent with the Senate report language, the Federal Highway Administrator, in a memorandum dated October 6, 1987, directed as follows:

...FHWA field offices should encourage States to meet with Indian tribes and their Tribal Employment Rights Offices (TERO's) to develop contract provisions for Federal-Aid highway projects which will promote employment opportunities for Indians.

To develop a workable and acceptable project Indian employment goal, the State should confer with tribal representatives during project development. In setting the goal, consideration should be given to the availability of skilled and unskilled Indian resources, the type of contract, and the potential employment requirements of the contractor in addition to its core-crew. Once established, the goal should only be changed by the State after consultation with the Indian tribal representative and the contractor and after consideration of good faith efforts to achieve the original goal. Sanctions for failure to meet the employment goal should be determined in advance and be a part of the contract to facilitate enforcement.

This memorandum stated that FHWA would not recognize or allow any contract preference for Indian-owned firms, except through the Department of Transportation's Disadvantaged Business Enterprise (DBE) program. In addition, FHWA would participate with federal-aid funds in the cost of TERO taxes, as with other state and local taxes, provided they did not discriminate or otherwise single out federal-aid projects.

A 1988 FHWA memorandum advised field offices that relative to TERO taxes, FHWA would participate in a tax on the full contract amount of a project not within the reservation if this was state policy for nonfederal-aid projects. It also said that FHWA participation was not limited to a TERO tax of 1 percent, provided the percentage of tax was the same for nonfederal-aid projects. In addition, the memorandum advised that before FHWA authorizes advertisement of a contract, agreements on the TERO costs and requirements must be reached and the requirements must be clearly set forth in the bidding proposal. Despite this guidance, such agreements have not been considered mandatory in practice.

The FHWA guidance of 1987 and 1988 was consolidated into FHWA Notice N-4720.7, dated March 15, 1993.

c. Examples of Problems under TERO Agreements.—(1) The Oregon Department of Transportation (ODOT) presently deals directly with Indian tribes and enters into TERO agreements that set hiring goals, TERO tax, and other matters. In attempting to reach agreement relative to rehabilitation projects on I-84 on the Umatilla Reservation, the tribe demanded two requirements that ODOT would not accept and make a part of its contracts. The two requirements are as follows:

1. All suppliers supplying material for the contractors and subcontractors would be subject to Indian hiring preferences for any new hires;
2. The tribe was to have a veto power over all DBE firms to be used by the prime contractor.

Although not agreeing to these provisions, ODOT put out an addendum to all prospective bidders communicating a statement prepared by the tribe relative to the tribe's position on these matters.

(2) Several tribes have sought to require exclusive use of Indian-owned or Indian-furnished borrow material on federal-aid projects, using either the TERO agreement or specific ordinances. The FHWA's Office of Engineering addressed this problem in an April 15, 1993, memorandum. Although not addressing the jurisdictional question of whether the tribes had the authority to make such requirements, FHWA advised that its policies, in 23 C.F.R. 635.407, must be complied with regardless of who furnishes the material. Section 635.407 requires that the contractor is to furnish all materials to be incorporated into the project, using sources of his or her own choice, unless the state highway agency, with FHWA concurrence, makes a public-interest finding that a mandatory furnished source is to be used. The memorandum concluded:

The above described policies apply whether the materials are furnished by the SHA (state highway agency), or, as in the subject case, a SHA designated Indian-owned source. Whether the designated material source is privately owned, or Indian-owned and whether or not is the result of a local Indian ordinance has no affect on our policy.

It should be noted that were a state or contractor is intending to use Indian lands that are under federal trust ownership, it must get prior approval of the secretary of the interior. This would apply to both tribal and allotted trust lands.

d. Litigation of TEROs.—Litigation testing the authority of Indian tribes to enforce TEROs has been quite limited. The only reported appellate case is FMC v.
Shoshone-Bannock Tribes, et al., a 1990 decision of the court of appeals for the Ninth Circuit upholding a TERO, which will be discussed later. However, the first case testing a TERO was Empire Sand & Gravel Co., Inc. v. Crow Tribe of Indians (Jan. 6, 1986), filed by several highway construction contractors against the Crow Tribe and the Montana Department of Highways, in connection with several Interstate 90 projects within the Crow Reservation.

The highway contractor plaintiffs in Empire challenged Montana's April 4, 1983, agreement with the Crow Tribe, previously discussed, whereby contractors would be required to give hiring preference to Indians, as contravening 23 U.S.C. Section 140. In addition, they challenged the authority of the Crow Tribe to enforce TERO and the TERO tax against contractors constructing a federal-aid highway. They sought an injunction against the Crow Tribe and the Crow Tribal Employment Rights Office from attempting to impose Indian preference and other provisions of the TERO, as well as damages refunding the TERO tax that had been collected.

The U.S. District Court dismissed the case on cross-motions for summary judgment, stating:

The facts make clear that plaintiffs bid on the highway construction projects and entered into contracts with the State with full knowledge of an Indian preference clause because the clause was a part of the bid specifications as well as the contracts. Plaintiffs entered into agreements with the Crow Tribe to comply with Crow Tribal Resolution No. 78-27 and agree to pay certain amounts to the Crow T.E.R.O. The contracts and agreements were consensual and have been fully performed.... The State and the Tribe have detrimentally relied on their agreement. Plaintiffs have neither shown that there is a present case and controversy nor that they were injured as to have standing.

The FMC case involved the enforcement of TERO EMPT-80-54, enacted July 22, 1980, by the Shoshone-Bannock Tribes, applying to all employers within the Fort Hall Reservation in southeastern Idaho, including those businesses owned by non-Indians operating on fee land. The case presented the question of the extent of power Indian tribes have over non-Indians acting on fee lands located within the confines of a reservation. The district court held that the tribes did not have such power, but the Ninth Circuit reversed the decision and upheld the tribe's jurisdiction, affirming the decision of the Tribal Appellate Court.

The facts of FMC involved its manufacturing plant on fee land where the company manufactured elemental phosphorus. FMC was the largest employer on the reservation, with 660 employees. At the time, FMC got all of its phosphate shale (one of three primary raw materials required) from mining leases located within the reservation and owned by the tribes or individual Indians. Upon notification of the passage of the TERO, FMC objected to the ordinance's application to its plant. However, after negotiations with the tribe, FMC entered into an employment agreement based on a 1981 TERO that resulted in a large increase in the number of Indian employees at FMC. In late 1985, the tribes became dissatisfied with FMC's compliance and filed civil charges in tribal court. FMC immediately challenged the tribal court's jurisdiction in federal court and got an injunction from enforcement of any order against FMC until the tribal court had an opportunity to rule on the tribe's jurisdiction over FMC. The tribal court then found that the tribes had jurisdiction over FMC based on Montana v. United States, and the court held that the company had violated the TERO. The tribal appellate court affirmed those rulings and entered into a compliance plan that required 75 percent of all new hires and 100 percent of all promotions to be awarded to qualified Indians, mandated that one-third of all internal training opportunities be awarded to local Indians, and levied an annual TERO fee of approximately $100,000 on FMC. The federal district court preliminarily enjoined enforcement of this compliance order, and in April 1988, it reversed the tribal appellate court.

The Ninth Circuit noted that the standard of review of a tribal court decision regarding tribal jurisdiction is "a question of first impression among the circuits." It further noted that the leading case on the question of tribal court jurisdiction is National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), which established that a federal court must initially "stay its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made," allowing a full record to be developed in the tribal court before either the merits or any question concerning appropriate relief is addressed. After further reviewing the opinion in Farmers, the court of appeals determined that the standard of review would be one "clearly erroneous" as to factual questions and de novo on federal legal questions, including the question of tribal court jurisdiction.

In its review of tribal jurisdiction, the court of appeals cited Montana as the leading case on tribal jurisdiction over non-Indians and quoted the two circumstances in which the Supreme Court said 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:

1. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.

2. 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.

The court of appeals found that FMC had entered into "consensual relationships" with the tribe or its members and that Montana's first test was met:

FMC has certainly entered into consensual relationships with the Tribes in several instances. Most notable are the wide ranging mining leases and contracts FMC has for the supply of phosphate shale to its plant. FMC also explicitly recognized the Tribes' taxing power in one of its mining agreements. FMC agreed to royalty payments and had entered into an agreement with the Tribes relating specifically to the TERO's goal of increased Indian employment and training. There is also the underlying fact that its plant is within reservation boundaries, although, significantly, on fee and not on tribal land. In sum, FMC's presence on the reservation is substantial, both physically and in terms of the money involved. FMC actively engaged in commerce with the Tribes and has subjected itself to the civil jurisdiction of the Tribes. See e.g., Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983).

The court of appeals disagreed with the district court and FMC that these connections between the company and the tribes, although substantial, did not provide a sufficiently close "nexus" to employment to support the TERO, citing Cardin v. De La Cruz and pointed out that Cardin contained no explicit requirement of a nexus. The case was remanded to the tribal court to "give FMC an opportunity to challenge the application of the TERO under the Indian Civil Rights Act, 25 U.S.C. Section 1302."
3. Tribal Jurisdiction Affecting Highway Contractors

a. General.—“Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.” One feature of this authority, previously noted, is a tribe’s power to exclude nonmembers entirely or to condition their presence on the reservation. In addition, as the Supreme Court stated in Montana, referring to this tribal inherent sovereign power over non-Indians, the tribe can “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.”

b. Criminal Jurisdiction.—The Supreme Court clearly stated in Oliphant that an Indian tribe does not have criminal jurisdiction to try non-Indians in the absence of express delegation by Congress. In Duro v. Reina, Justice Kennedy, writing for the majority stated:

We hold that the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership.

The Oliphant decision indicated that at the time the case was decided at least 30 tribes had been asserting criminal jurisdiction over non-Indians, with many of them relying on implied consent ordinances. Notice of these “implied consent” laws were posted on signs at entry points to the reservations. However, despite the “consensual relationship” language in Montana, the Court did not adopt a theory of implied consent in either Oliphant or Duro, to support criminal jurisdiction over nonmembers of the tribe. The question now is whether the courts will accept or reject such implied consent for civil jurisdiction.

c. Civil Jurisdiction.—The Indian tribes have been recognized by the Supreme Court as having “a broad range of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest.” Even though tribes do not have criminal jurisdiction over non-Indians, civil disputes between Indians and non-Indians arising out of transactions on a reservation are exclusively within tribal court jurisdiction. For example, in Williams v. Lee, the Supreme Court upheld the exclusive jurisdiction of the Navajo Tribal Court over the collection of a debt owed by Indians to a non-Indian merchant.

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.

This civil jurisdiction is enforceable through tribal courts, where they exist, so that where a tribe has the power to regulate activities of non-Indians, they may sue them in tribal court in connection with such activities.

d. Consent and “Implied Consent” to Tribal Court Jurisdiction in Highway Construction Activities.—(1) Example of a “Consent” Ordinance. The South Dakota Department of Transportation (SDDOT) and the Rosebud Sioux Tribe (RST) were able to resolve a troublesome conflict in 1989, which had to do with the tribe’s use of an express consent provision in the tribe’s Business Licensing Code. This regulation required that contractors, as a condition to obtaining a mandatory business license for doing business on the reservation, consent to jurisdiction of the RST tribal court and to service of process, for all tax laws, health and sanitation laws, and consumer protection laws, as well as Indian employment and contracting preference laws.

SDDOT advised RST that it did not object to its contractors obtaining the tribe’s §50 business license, but unless the tribe agreed to waive the consent to jurisdiction clause it would withdraw from advertisement certain federal-aid highway projects scheduled for construction on the reservation. The tribe strongly wanted to retain the consent to jurisdiction as a matter of tribal sovereignty. South Dakota Governor Mickelson and Attorney General Tellinghuisen were equally as strong in defending retention of state court jurisdiction over contractual obligations arising out of the SDDOT highway construction contracts, including obligations to provide comprehensive insurance, performance and payment bonds, worker’s compensation, unemployment tax, and sales and service taxes, and state and federal equal employment opportunities laws. The state believed that none of these obligations could reasonably be ceded to the tribal court. In addition, at that time, the FMC decision had not been made by the Ninth Circuit, and there were serious reservations about the validity of the TERO.

The tribe initially refused to waive the consent provision, and SDDOT withdrew advertisement of the projects. Later, the tribe offered, and SDDOT accepted, a compromise that relieved the SDDOT contractors from signing a statement of consent to tribal jurisdiction, allowed the contractors to retain the right to assert that the tribe lacked jurisdiction, and agreed that the tribe was not waiving its jurisdiction. The projects were completed on a cooperative basis, with the TERO provisions being considered in full force. In this posture, any disputes over tribal jurisdiction would have been resolved under the procedures set out in the Farmers case, with the tribal court first determining jurisdiction and developing a record, with any further review going to federal court.

(2) Example of “Implied Consent.”—In the fall of 1993, the Oglala Sioux Tribe posted the following sign within the right of way of South Dakota Highway 497:

ENTERING PINE RIDGE
UPON ENTERING YOU DO
IMPLY CONSENT TO JURISDICTION
OF OGLALA SIOUX TRIBE ORD #9312

Ordinance 93-12 was enacted by the Oglala Sioux Tribe in July 1993 to establish jurisdiction of the tribal court based on consent to jurisdiction. This ordinance revised the tribe’s Law and Order Code relating to jurisdiction of the tribal court to provide as follows:

Section 20. JURISDICTION

The Oglala Sioux Tribal Court shall have jurisdiction of all suits wherein the defendant is a member of the Oglala Sioux Tribe and of all suits between members and nonmembers who consent to the jurisdiction of the tribe. (emphasis added)

The ordinance adopted two new sections to the code, including Section 20(a) Implied Consent to Tribal Jurisdiction by Non-Members of the Oglala Sioux Tribe, which provides as follows:

Any person who is not a member of the Oglala Sioux Tribe shall be deemed as having consented to the jurisdiction of the Oglala Sioux Tribe, by doing personally, through an agent or through a subsidiary, any of the following acts within the exterior boundaries of the Pine Ridge Indian Reservation:

1. The transaction of any business.
The uncertainty over what, if any, litigation costs may be involved is likely to cause bidders to protect themselves by including a large contingency bid amount.

The implications for state highway contractors entering the reservation under this ordinance are many. The uncertainty over what, if any, litigation costs may be involved is likely to cause bidders to protect themselves by including a large contingency bid amount.

VI. LEGAL ISSUES RELATING TO THE MAINTENANCE OF HIGHWAYS ACROSS INDIAN LANDS

A. State Jurisdiction over Highways Across Indian Lands

1. General

Previously discussed in Section IV, B, 1, b of this report was the question of whether a grant of right of way to construct, operate, and maintain a highway was effective to destroy Indian title so as to give complete power to regulate the use and occupancy of that highway against all the public, including the tribal Indians. The supreme courts of Arizona, New Mexico, and Wisconsin have held that Indian title is not extinguished, and the granting of such right of way is not a grant of general jurisdiction. The U.S. District Court in In re Frederich,90 later followed in Application of Denet-Claw and New Mexico v. Begay,91 held that Congress had asserted “exclusive jurisdiction...as to crimes committed by Indians on the rights of way within reservations,” referring to 18 U.S.C. Section 1151. The Ninth Circuit, in Ortiz-Barrasa v. United States,92 agreed, holding that “rights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of the tribal police.”

Although the dicta by the Seventh Circuit in Kanaha v. Brown93 indicated there was some “right to maintain a highway...limited to such penal provisions as served to protect and preserve the highway, such as speeding, impairing the highway, etc.” subsequent cases have not expanded this language into any established precedent.94

The opinion of Justice O'Connor, joined by five other justices, in Rice v. Rehnanner rejected the view that the states are absolutely barred from exercising jurisdiction over tribal reservations and members.95 She noted that the decisions of the Court concerning state regulation of activities in Indian country had not been static since the Marshall decision in Worcester v. Georgia and that "Congress has to a substantial degree opened the doors of reservations to state laws in marked contrast to what prevailed in the time of Chief Justice Marshall, Organization of Village of Kake v. Egan, 369 U.S. 60, 74 (1962)." Justice O'Connor further noted that "[E]ven on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." Mascareno Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)."

Although "[federal treaties and statutes have been consistently construed to reserve the right of self-government to the tribes,"...our recent cases have established a "trend...away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."(p.178)... We do not necessarily require that Congress explicitly pre-empt assertion of state authority insofar as Indians on reservations are concerned, but we have recognized that any applicable regulatory interest of the State must be given weight and 'automatic exemptions as a matter of constitutional law' are unusual.(p.719)... When we determine that tradition has recognized a sovereign immunity in favor of the Indians in some respect, then we are reluctant to infer that Congress has authorized the assertion of state authority in that respect 'except where Congress has expressly provided that State laws shall apply'.(p.732)." Repeal by implication of an established tradition of immunity or self-government is disfavored.... If, however, we do not find such a tradition, or if we determine that the balance of state, federal, and tribal interests so requires, our pre-emption analysis may accord less weight to the "backdrop" of tribal sovereignty. (citations omitted).

The Supreme Court of Wisconsin relied on the analysis and principles established in Rice in County of Vilas v. Chapman,96 a 1985 decision holding that Vilas County had jurisdiction to enforce a noncriminal traffic ordinance against a member of the Lac du Flambeau Bank of Lake Superior Chippewa Indians for an offense occurring on a public highway within the boundaries of a reservation. The court went through a three-step process as outlined in Rice:

1. Whether the Tribe had a tradition of tribal self-government in the area of traffic regulation on Highway 47 within the reservation.
2. An evaluation of the balance of federal, state, and tribal interest in the regulation of Highway 47.
3. Whether the federal government had preempted state jurisdiction to regulate Highway 47 within the Lac du Flambeau Reservation.

The Wisconsin Court, while noting that it had found a tradition of traffic regulation by the Menominee Tribe in the Webster case, found in marked contrast that the Lac du Flambeaus had no motor vehicle code in effect at the time of the offense and therefore no tradition of self-government in this area (at the time of this decision the tribe had established a traffic code). In balancing the federal, state, and tribal interest, the Supreme Court of Wisconsin found that the state had a dominant interest in regulating traffic on Highway 47 against both Indians and other users of public highways. It found no federal preemption of state jurisdiction.

However, in Confederated Tribes of the Colville Reservation v. State of Washington,97 the court of appeals for the Ninth Circuit held Washington's speeding statute not enforceable on public roads within the reservation because, under the state's law, the offense of speeding was classified as a civil infraction, rather than a criminal offense. The Ninth Circuit noted that concern for protecting Indian sovereignty from state interference prompted courts to develop the civil/prohibitory-criminal/regulated test (United States v. Dakota, 796 F.2d 186, 188 (8th Cir. 1986), under which civil infractions would usually remain under Indian jurisdiction). The Ninth Circuit decision rejected Washington's argument that uniformity in highway safety laws required state jurisdiction, "at least where the Tribes have shown their own highway safety laws and institutions are adequate..."
The period between 1943 and 1961 is often referred to as the “termination era” in the history of federal Indian law. The official congressional policy of termination was established by House Concurrent Resolution 108 in 1953, under which 109 Indian tribes and bands were terminated. One result of these laws was that thousands of Indians and millions of acres of Indian land came under state jurisdiction.

Another product of this termination policy was enactment of Public Law 83-280 (hereinafter Pub. L. No. 280), the only federal law extending state jurisdiction to Indian reservations generally. This act mandatorily delegated civil and criminal jurisdiction over reservation Indians to 5 states (California, Minnesota, Nebraska, Oregon, and Wisconsin)—the “mandatory” states. A sixth mandatory state, Alaska, was added in 1958. In addition, the act authorized the remaining states the option of assuming such jurisdiction. In 1968, based on Indian concerns, Congress amended Pub. L. No. 280 to provide that there had to be tribal consent to state jurisdiction and that the United States could accept a “receding” of any jurisdiction previously acquired under Pub. L. No. 280. Only 10 of the 44 “option” states assumed jurisdiction under Pub. L. No. 280. By 1992, 6 states had retroceded jurisdiction to some extent.

Pevar provides a table showing the jurisdiction delegated to or assumed by states under Pub. L. No. 280 (see Table 1).

3. State Jurisdiction Under Other Congressional Acts

Several laws have been enacted conferring state jurisdiction over particular tribes. Oklahoma and New York are examples of states that have been given extensive jurisdiction. New York, for example, has been given jurisdiction over “all offenses committed by or against Indians on Indian reservations within the State.” A series of court decisions in the past 10 years have recognized the Oklahoma tribes as having the powers of local self-government possessed by other tribes and cast doubt as to the State of Oklahoma’s general criminal and civil jurisdiction. Pevar discusses these laws and the special status of certain Indian groups, including the Pueblos of New Mexico, the Alaska Natives, the Oklahoma Indians, the New York Indians, and “nonrecognized tribes,” in Chapter XV of his book.

### Table 1. Jurisdiction Delegated to or Assumed by States

<table>
<thead>
<tr>
<th>STATE</th>
<th>EXTENT OF JURISDICTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mandatory States</td>
<td></td>
</tr>
<tr>
<td>Alaska</td>
<td>All Indian country within the state.</td>
</tr>
<tr>
<td>California</td>
<td>All Indian country within the state.</td>
</tr>
<tr>
<td>Minnesota</td>
<td>All Indian country within the state, except the Red Lake Reservation.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>All Indian country within the state.</td>
</tr>
<tr>
<td>Oregon</td>
<td>All Indian country within the state, except the Warm Springs Reservation.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>All Indian country within the state, except the Menominee Reservation.</td>
</tr>
<tr>
<td>Option States</td>
<td></td>
</tr>
<tr>
<td>Arizona</td>
<td>All Indian country within the state, limited to enforcement of the state’s air and water pollution laws.</td>
</tr>
<tr>
<td>Florida</td>
<td>All Indian country within the state.</td>
</tr>
<tr>
<td>Idaho</td>
<td>All Indian country within the state, limited to the following subject matters: compulsory school attendance; juvenile delinquency and youth rehabilitation; dependent, neglected, and abused children; mental illness; domestic relations; operation of motor vehicles on public roads.</td>
</tr>
<tr>
<td>Iowa</td>
<td>Only over the Sac and Fox Indian community in Tama County, limited to civil and criminal jurisdiction.</td>
</tr>
<tr>
<td>Montana</td>
<td>Over the Flathead Reservation, limited to criminal and later, by tribal consent, to certain domestic relations issues.</td>
</tr>
<tr>
<td>Nevada</td>
<td>Over the Ely Indian Colony and any other reservation that may subsequently consent.</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Limited to civil jurisdiction over any reservation that gives its consent. No tribe has consented.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>A federal court invalidated the jurisdiction assumed by the state and therefore no Pub. L. No. 280 jurisdiction exists.</td>
</tr>
<tr>
<td>Utah</td>
<td>All Indian country within the state with tribal consent. No tribe has consented.</td>
</tr>
<tr>
<td>Washington</td>
<td>All fee patent (deeded) land within Indian country. Jurisdiction on trust land is limited to the following subjects unless the tribe requests full jurisdiction: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption, dependent children, operation of motor vehicles on public roads. The following tribes have requested and are now under full state jurisdiction: Chehalis, Colville, Muckleshoot, Nisqually, Quilcene, Skokomish, Squaxin, Swinomish and Tulalip.</td>
</tr>
</tbody>
</table>

Retroceding States

- Minnesota: Retroceded jurisdiction over the Nett Lake Reservation (1975).
- Nebraska: Retroceded jurisdiction over the Omaha tribe except for traffic violations on public roads (1970).
- Nevada: Retroceded jurisdiction over all but the Ely Indian Colony (1975).
- Washington: Retroceded jurisdiction over the Quinault Reservation (1969), the Squaxin Island Port Madison Reservation (1972), and the Colville Reservation (1987).
- Wisconsin: Retroceded jurisdiction over the Menominee Tribe.
B. Jurisdictional Issues in the Federal Highway Program

1. Highway Beautification Act of 1965

In 1976 FHWA concluded that the states could not be penalized by a 10 percent reduction in federal-aid highway funds, 23 U.S.C. Section 131(b), for failure to enforce Section 131, et seq., on federal Indian reservations. Before reaching its conclusion, FHWA obtained a legal opinion from the solicitor of interior, which concluded that Indian reservation lands were subject to regulation under the act. Based on this Department of Interior opinion and its own legal analysis, the FHWA legal opinion concluded:

Although statutory construction leads us to the conclusion that Indian reservations are technically within the meaning of the phrase "reservations of the United States"...failure of the Act to delegate either to the [FHWA] or to the Department of the Interior, the explicit authority to implement the Act on Indian reservations results in inapplicability to Indian reservations due to: a. Lack of uniform civil jurisdiction of the States over Indian reservations, thereby resulting in irregular exercise of the States' police power through their zoning ordinances; b. Lack of authority of the States to condemn Indian reservation land; and c. Lack of specific delegation by Congress to any Federal agency or department the necessary authority and jurisdiction to implement the Act on Indian reservations.

In California v. Naegele Outdoor Advertising Co., a 1985 decision of the Supreme Court of California, it was held that:

(1) Department of Transportation could not, through Outdoor Advertising Act, regulate billboards erected on reservation land held in trust by United States; (2) state's regulatory authority in area of outdoor advertising on Indian reservation land was preempted by operation of Federal Highway Beautification Act.

2. Enforcement of 55 Miles per Hour Speed Limit

FHWA dealt with state enforcement of the 55 miles per hour speed limit on Indian reservations in a 1975 memorandum. The memorandum was prompted by enforcement problems in Montana, where the state could enforce (partly or fully) the speed limit on only three out of seven Indian reservations in the state. FHWA concluded:

[That on reservations where the Indians have refused consent to State assumption of jurisdiction, the State cannot be penalized under Section 154 for having a "speed limit...within its jurisdiction in excess of fifty-five," or under Section 141 for failing to certify...that it is enforcing...all speed limits on public highways in accordance with Section 154...]

3. Application of the Federal Motor Carrier Safety Regulations and the Federal Hazardous Materials Regulations to Indian Tribes

A 1993 FHWA memorandum concluded that federal motor carrier safety regulations (FMCSRs) applied to Indian tribal entities, that federal hazardous materials regulations (FHMRS) applied to Native Americans living on tribal lands and involved in interstate commerce, that FHMRS apply when the "interstate transportation is conducted solely within the tribe's reservation," and that FMCSRs apply in the same manner in similar situations. It advised that:

[The FMCSRs generally apply to the various Indian tribes as they do not interfere with purely intramural affairs of the tribe, and there is no evidence in the Congres...]

VII. CONCLUSION

This paper was intended to be a primer for highway officials and tribal officials to gain a better understanding of federal Indian law and federal highway law as it relates to Indian lands. Given that Indian law is very complex and ever changing, it constitutes a "moving target" for anyone trying to understand and apply it. This body of law, as it now stands, has many legal issues that are unresolved. However, the new emphasis and recognition being given to Indian tribal sovereignty by Congress and the Executive Branch make it clear that Indian self-determination is the federal policy. Conflicts in jurisdiction can be greatly reduced if Indian self-determination is accepted.

By the same token, highway law is very complex, both at the federal and state levels, and what may be authorized for one type of highway funding may be prohibited for similar funding on Indian lands. This means that highway officials and tribal officials must make adjustments in their government-to-government relations and begin to better emphasize consultation and coordination in a spirit of cooperation.
This image includes a page from a document discussing American Indian law and policy. The text refers to the Endnotes section, which contains references to various legal and historical documents, such as the United States Constitution, treaties, and federal legislation. The text also mentions the Indian Self-Determination and Clements Act, which was signed into law in 1978 by President Jimmy Carter. This act aimed to give American Indian tribes greater control over their own affairs and resources. The text highlights the importance of tribal sovereignty and the challenges faced by American Indian tribes in asserting their rights and maintaining their cultural integrity. The references in the Endnotes section indicate a comprehensive analysis of legal texts, court rulings, and historical documents related to American Indian law.
ways in accordance with the respective laws of those States...


*Nebraska Public Power District v. 100 Acres of Land, 719 F.2d 966, 968 (8th Cir. 1983). For example, the court noted that frequently, "many individual Indians, often widely scattered, owned undivided interests in a single tract of land. Obtaining the signatures of all the owners was a time-consuming and burdensome process, both for the party seeking the right-of-way and for the Interior Department."


25 C.F.R. § 169.3(a).

25 U.S.C. § 324; 25 C.F.R. § 169.3(c) (1993). The Secretary may issue permission to survey with respect to, and he may grant rights of way over and across individually owned lands without the consent of the individual Indian owners when: (1) the individual owner is a minor or non compos mentis, and such grant will cause no substantial injury to the land or owner that cannot be adequately compensated for by monetary damages; (2) the land is owned by more than one person, and the owners or owner of a majority of the interests in the land have not been conveyed to the allottee with full power of alienation; (3) the whereabouts of the owners or owner of the land are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (4) the heirs or devisees of a deceased owner of the land have not been determined and the grant will cause no substantial injury to the land or owner thereof; (5) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent and also finds that the grant will cause no substantial injury to the land or any other owner thereof. 25 C.F.R. § 169.3(a) (1993).

237 Wis. 310, 296 N.W. 846 (Sup. Ct. Wis. 1941).

Id., 296 N.W. 846-46.

Application of Konaha, Konaha v. Brown, 131 P.2d 737, (7th Cir. 1942).

Id. at 738.

Id. at 739.

Id.


Id. at 5, 6.

320 P.2d 697 (1956).

Id. at 700. Accord: Enriquez v. Superior Court, 115 Ariz. 342, 565 P.2d 622 (1977), (involving suit brought by non-Indians against Papago Indians residing on the reservation, for injuries resulting from a motor vehicle accident occurring on state highway within the reservation), held: no state court jurisdiction.—"Their right of self-government includes the right to decide what conduct on the reservation will subject the Indians living there to civil liability in the Tribal court." See also State of Wyoming ex rel. Peterson v. District Court and Milbank Mutual Insurance Co., 617 P.2d 1056 (Sup. Ct. Wyo. 1980) (held that tribal court, not state court, had jurisdiction of suit for damages arising out of collision between horse and pickup, both owned by tribal members, occurring on Indian reservation); Gourneau v. Smith, 205 P.2d 1056 (Sup. Ct. N.D. 1953), (held that state court did not have jurisdiction of tort action by an Indian against another Indian for injuries resulting from automobile accident on state highway within limits of Indian reservation where Indians had not voted to accept state jurisdiction), Accord: Schantz v. White...
Lightning, 231 N.W.2d 812 (Sup. Ct. N.D. 1975) (tort action by non-Indian against Indian).

Id. at 318.


425 F.2d 317 (9th Cir. 1970).

Id. at 319-20 and n.8 PPM 80-8 provided that applications for rights of way across Indian lands "shall be filed with the Department of Interior in accordance with the regulations established by the Bureau of Indian Affairs for the processing of applications under 25 U.S.C. 325-328," referring to 25 C.F.R. 161, which is now 25 C.F.R. 180. PPM 80-8 is now codified as 25 C.F.R. 712, Subpart E. § 712.503, paragraph (b) of the regulation provides: "If lands or interests in lands owned by the United States are needed for highway purposes, the SHD shall file applications with FHWA except that if such lands are managed or controlled by Bureau of Indian Affairs, the SHD may make applications directly to said agency." (emphasis added).

2 subsect. (a) of § 317 provides that the Secretary of Transportation "shall file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands it is desired to appropriate." Subsection (b) provides that the lands may be appropriated for highway purposes if within four months after the filing of the map by the Secretary of Transportation, the Secretary of the Department having jurisdiction over the lands either (1) does not certify that appropriation would be "contrary to the public interest or inconsistent with the purposes for which such land has been reserved," or (2) does agree to the appropriation under such conditions as "deems necessary for the adequate protection and utilization of the reserve." 23 U.S.C. § 317.

Lightning v. United States, 512 F.2d 1176, 1180 (9th Cir. 1975) (right of way running through a reservation remain part of the reservation and within the territorial jurisdiction of tribal police).

318 U.S. 206 (1943).


31 U.S. (6 Peters) 615 (1832).


Worcester, supra note 104, at 559, 561. In Wheeler v. United States, 435 U.S. 313, (1978), at 323, the Court said: "...until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as the result of their dependent status." Thus tribes retain inherent powers of self-government over tribal members. In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 at 335 (1983), the Court reaffirmed the inherent right to determine who can enter a reservation, unanimously ruling that "[a] tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established [citations omitted]."

Moebius supra note 8, at 79-110.

Williams v. Lee, 358 U.S. 217 (1969), where the Court enunciated the infringement doctrine and held that the state court lacked jurisdiction to hear a contract dispute arising between an Indian and a non-Indian on the Navajo Reservation. The Court reviewed the doctrine of Worcester, noting that it stood for the proposition that "absent governing acts of Congress, the question has always been whether the state action infringed on the rights of reservation Indians to make their own laws and be ruled by them." at 220.


In 1980 the Court set out the modern preemption principles in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), where a state motor carrier license tax on a non-Indian contractor was overturned. See also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) at 338, where the Court denied New Mexico concurrent jurisdiction of non-Indian fishermen and hunters on the reservation on the basis of federal preemption.

In Oliphan v. Suquamish Indian Tribe, supra note 105, (habeas corpus petitions granted to two non-Indians for misdemeanor crimes occurring on the reservation, one involving reckless driving, held tribal inherent power significantly reduced was non-Indians). Wheeler v. United States, supra note 106, (federal prosecution of Navajo tribal member for conduct...
held not to be double jeopardy since previously punished under tribal law held in
tribal ordinance extending membership to children of male members ... at 55-56).
Id., at 283.
See generally, Gover and Walker, Tribal Environmental Regulation, 39 FED. B. NEWS J. 438 (No. 9, 1983); DESBOK, supra note 15, Chap. 10, Environmental Regulation, at 280-800.
Id., Sec. 1025(a), amending 23 U.S.C. 135.
See generally, DESKBOOK, supra note 15, Chap. 10, Environmental Regulation, at 280-800.
COHEN, supra note 1, at 262.
Id., at 283.
See generally, Gover and Walker, Tribal Environmental Regulation, 39 FED. B. NEWS J. 438 (No. 9, 1983); DESKBOOK, supra note 15, Chap. 10, at 280-800.
State of Washington Department of Ecology v. United States Environmental Protection Agency, 752 F.2d 1466 (9th Cir. 1985), which addressed the issue of whether the Resource Conservation and Recovery Act authorizes state authority over tribal lands.
living on or near reservations and to projects on Indian reservation roads. 

"Supra n.169.


Unpublished memorandum dated Feb. 11, 1988, from FHWA deputy administrator to Region 10 regional administrator.


Unpublished memorandum dated May 24, 1990, from FHWA Director, Office of Engineering, to FHWA Region 9 administrator.

"E.g., the State of Wyoming, while giving notice in the bid invitation of the Wind River Reservation TERO requirements, let the winning contractor handle any negotiations with the tribes relative to hiring preferences. A Mar. 9, 1988, unpublished opinion of the U.S. District Court, District of Wyoming, in Dry Creek Grading, Inc. v. U.S. Dep't. of Energy, State of Wyoming, et al. (No. CS-977-31), found that the TERO expressly excluded federal and state agencies, their contractors, and subcontractors from its requirements.

"The Crow Tribe of Montana enacted a TERO in 1979 and insisted on Indian hiring preference, inter alia, as a condition to their consenting to the transfer of tribal lands for right of way for construction of I-90. An agreement between the state and the Crow Tribe, dated Apr. 4, 1983, provided that the following language would be included in all bid solicitations involving I-90 projects on the reservation:

This project is located on the Crow Indian Reservation. Past efforts and projects in this area have developed a reservoir of capable trained workers. The contractor shall contact the Crow Tribal Chairman or his designee...for assistance in hiring such workers. The contractor and all of its agents, subcontractors and assigns shall give preference to qualified Crows and other Indians in employment arising in connection with these projects."

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"Supra n.169.
For example, see FMC v. Shoshone-Bannock Tribes, supra note 184, where the tribes sued to enforce the TERO and to collect the TERO tax. See also, Taylor, Modern Practice in The Indian Courts, 10 U. Puget Sound L. Rev. 231 (1987).)


Application of Denet-Claw, supra note 80: New Mexico v. Begay, supra note 82; State v. Webster, supra note 84.

In re Fredenberg, supra note 78.

312 F.2d 1176 (9th Cir. 1965).

Supra note 74.

The decision in Konaha is cited in Swift Transportation v. John, 546 F.Supp. 1185 (D.Ariz. 1982), (suit by non-Indians seeking declaratory judgment that the tribal court lacked jurisdiction over them arising from a vehicle accident with Indians occurring on U.S. Highway 89 on the reservation.) Held: No jurisdiction in tribal court over U.S. 89 because Indian title extinguished under right-of-way grant pursuant to 25 U.S.C. § 325. However, under mandate from the Ninth Circuit Court, the decision was vacated. 574 F.Supp 710 (1983).


Id. at 718.

361 N.W. 2d 699 (Wis. 1985).

Id. at 702.

Id. at 702-703.

938 F.2d 146 (9th Cir. 1991), cert. denied, 118 L. Ed. 2d 412, 112 S. Ct. 1704 (1992). Compare: State of Washington v. Schmuck, 121 Wn.2d 573, 850 P.2d 1332 (1992), involving the conviction of a non-Indian for driving through the influence of intoxicating liquor; held: state statute asserting criminal and civil jurisdiction over operation of motor vehicles did not divest Indian tribe of its inherent authority to stop and detain non-Indian for violation of state and tribal law while traveling on public road in reservation, until he could be turned over to state authorities for charging and prosecution.

Id. at 149.


COHEN, supra note 1, at 152-77.


PEVAR, supra note 8, at 118.


Unpublished memorandum dated Jan. 23, 1976, from FHWA assistant chief counsel, to FHWA associate administrator for right of way.

Unpublished memorandum dated Apr. 7, 1967, from associate solicitor, Indian affairs, to commissioner of Indian affairs.


Unpublished memorandum dated Sept. 30, 1975, from FHWA associate chief counsel to FHWA Region 8 administrator.
ACKNOWLEDGMENTS

This legal study was performed under the overall guidance of NCHRP Project Committee SP20-6. The Committee is chaired by Delbert W. Johnson, Office of the Attorney General of Washington. Members are: Watson C. Arnold, Austin, Texas (formerly with Texas Office of the Attorney General); Robert F. Carlson, Carmichael, California (formerly with California Department of Transportation); Kingsley T. Hoegstedt, Carmel, California; Michael E. Libonati, Temple University School of Law; Spencer A. Manthorpe, Pennsylvania Department of Transportation; Walter A. McFarlane, Office of the Governor, Commonwealth of Virginia; Joseph M. Montano, Denver, Colorado (formerly with Colorado Department of Highways); Marilyn Newman, Boston, Massachusetts; Lynn B. Oberlyer, Colorado Department of Law; Jean G. Rogers, Federal Highway Administration; James S. Thiel, Wisconsin Department of Transportation; and Richard L. Tiemeyer, Missouri Highway and Transportation Commission. Edward V.A. Kussy provides liaison with the Federal Highway Administration, and Crawford F. Jencks represents the NCHRP staff.