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Application of Outdoor Advertising Controls on Indian Land

This report was prepared under NCHRP Project 20-6, "Legal Problems Arising out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Richard O. Jones. James B. McDaniel, TRB Counsel for Legal Research Projects, 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.

In the past, papers such as this were published in addenda to *Selected Studies in Highway Law* (*SSHL*). Volumes 1 and 2 of *SSHL* dealt primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covered government contracts. Volume 4 covered environmental and tort law, inter-governmental relations, and motor carrier law. Between addenda, legal research digests were issued to report completed research. The text of *SSHL* totals over 4,000 pages comprising 75 papers. Presently, there is a major rewrite and update of *SSHL* underway. Legal research digests will be incorporated in the rewrite where appropriate.

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 of the highway agency. The intended distribution of the updated *SSHL* will be the same.

APPLICATIONS

Several states are experiencing the presence of unregulated outdoor advertising along interstate, primary, and scenic highways, erected on lands held in trust by the Department of Interior, Bureau of Indian Affairs, for the benefit of Indian tribes and/or individuals. The establishment of trust land status effectively removes the subject land from the police powers of state and local governments.

Congress enacted the Highway Beautification Act of 1965, Public Law 89-285, which was signed into law October 22, 1965. Title I of the Act controls advertising along the interstate and primary highways. State governments, however, have the responsibility for enforcement. Given the proliferation of outdoor advertising on trust land, this study addresses the need for clarification as to the applicability of the Highway Beautification Act of 1965 to Indian reservations and Indian trust lands.

This report should be helpful to administrators and attorneys who are involved with either regulating outdoor advertising and/or other restrictions adjacent to interstate and primary highways.

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I. INTRODUCTION AND BACKGROUND

A. Statement of the Problem

Western states are beginning to experience a proliferation of unregulated outdoor advertising signs along Interstate, primary, and scenic highways, the result of such signs having been erected on Indian lands. In some cases these signs are within the exterior boundaries of an Indian reservation, but in other cases they are outside of and noncontiguous to an Indian reservation, situated on land held by the United States of America in trust for the benefit of Indian tribes and/or individual Indians. The land is then under lease by commercial sign companies.[1] In some cases the land in question was initially purchased with monetary assistance from a commercial sign company, then conveyed to the U.S. government in trust land status (hereinafter "trust status")[2] for the express purpose of leasing back the property solely for the erection of signs. As will be discussed in more detail later, the acceptance into federal trust status of such land by the Department of the Interior's (DOI) Bureau of Indian Affairs (BIA) effectively removes it from the jurisdiction of state and local governments, preempting state law. Thus, signs erected on Indian trust status land are not required to conform to state or local sign codes or state/federal agreements under Part I of the Highway Beautification Act of 1965 (23 U.S.C. Part 131), unless the state/local law is specifically adopted or made applicable by the Secretary of the Interior,[3] by agreement between a state/local government and a tribe, or pursuant to some other provision of federal law or Indian treaty.

Indian trust land acquisitions by BIA are authorized pursuant to 25 U.S.C. 465,[4] but must comply with procedures established in 25 C.F.R. Part 151.[5] These pro-

[1] In the spring of 1994, a billboard was erected upon property held in trust by the United States for the benefit of two Puyallup tribal members. The structure, constructed in a "V" shape with two sign faces measuring 14 feet by 48 feet, is visible from Interstate 5 near the Portland Avenue exit in Tacoma, Washington, a heavily congested traffic area with a high accident rate. In Nov. 1993, in spite of safety concerns expressed by state, federal, and local officials, the BIA accepted the land into trust status and approved a lease for erection of the sign. The tribe, which is not a beneficiary of the sign lease, was not required to take any action (at that time, the tribe did not have a sign ordinance). The sign would not have been permitted under standards established by the HBA, 23 U.S.C. 131, or Washington State's Scenic Vista Act of 1971 (SVA), RCW 47.42 *et seq*. In a Jan. 22, 1997, copyrighted story in THE NEWS TRIBUNE, Tacoma Mayor Brian Ebersole was quoted as saying that a total of 28 billboards had been erected or received permits in Tacoma, Fife, Milton, and unincorporated Pierce County, Washington, on land owned by Puyallup tribal members and held in trust by the BIA. According to Mayor Ebersole, most of these signs would not comply with local, state, or federal sign control law. The news article also reported that the U.S. Interior Department was considering a moratorium on tribal billboards along Interstate 5 in Tacoma and Pierce County, Washington, in response to controversy over the signs. As discussed, *infra.*, one of these signs, located in the City of Fife, is the subject of litigation in the United States District Court, Western District of Washington.

In late 1995 and early 1996, five outdoor advertising structures with 10 faces were erected in the city limits of St. George City, Utah, on two parcels of land accepted into Indian land trust status by the BIA on August 31, 1995. The parcels in question were purchased by the Shivwits Band of Paiute Indians on August 9, 1994, for the purpose of leasing them to Kunz Outdoor Advertising under a prior arrangement whereby the sign company would advance the purchase price to the tribe as a loan, to be credited toward future sign rental payments. As discussed, *infra.*, these signs are the subject of litigation in the U.S. District Court of Utah.

[2] *See* 25 C.F.R. 151.2(c)(d): *"Trust land or land in trust status* means land the title to which is held in trust by the United States for an individual Indian or a tribe."

[3] 25 C.F.R. Part I, provides as follows in Subsection 1.4, State and local regulation of the use of Indian property:

> (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.
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> (b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

[4] 25 U.S.C. 465 provides, *inter alia*, that

> [t]he Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

[5] 25 C.F.R. 151.1 prescribes the purpose and scope of these regulations:

> The regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. Acquisition of land by individual Indians and tribes in fee simple status is not cov-

cedures, updated in 1995 and 1996, now require notice to state and local governments of any request for trust status of land within their jurisdiction, with a 30-day opportunity for written comment.[6] This affords the opportunity for protest of the proposed action, including the removal of the land from state and local taxation and zoning regulations, such as sign codes. In addition it would afford opportunity to urge that state and local zoning and sign control laws be adopted or otherwise made applicable as a condition of trust status. This is important because the BIA does not otherwise regulate or require the regulation of outdoor advertising on Indian lands in accordance with the Highway Beautification Act, whether on or off a reservation. There is a need for clarification as to the applicability of 23 U.S.C. Part 131 to Indian reservations and Indian trust lands (whether on or off the reservation), and as to who is the responsible government or agency in charge of providing the required "effective control" of outdoor advertising. This report is intended to provide such clarification and to review the administrative and court interpretations of 23 U.S.C. 131, relative to Indian lands. In addition, the report will discuss the case law relative to the constitutionality of 25 U.S.C. 465, and related statutes and implementing regulations.

B. Overview of Federal Law Relative to Jurisdiction over Indians, Indian Tribes, and Indian Lands[7]

1. General

The U.S. Constitution, Article 1, Section 8, Clause 3, gives Congress the "power to regulate commerce with the Indian tribes." The Supreme Court has held that this "vests the Federal Government with exclusive authority over relations with Indian Tribes...,"[8] with Congress having "plenary power" over the Indian tribes, their government, tribal members, and their property.[9] For example, in *Johnson v. McIntosh,*[10] Chief Justice Marshall, in invalidating a conveyance of Indian lands from tribal chiefs to an individual, ruled that title to the Indian land was in the United States, and it alone could transfer or extinguish such title.

Notwithstanding the plenary power of Congress, beginning with the opinions of Chief Justice Marshall in *Cherokee Nation v. Georgia*[11] and *Worcester v. Georgia*,[12] 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." Since those decisions, the Supreme Court "has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,'...and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.'"[13] However, the Court has now rejected the broad assertion that the federal government has exclusive jurisdiction in Indian matters for all purposes, and cautioned that:

> Generalizations on this subject have become particularly treacherous. The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester v. Georgia*...has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together affect the respective rights of State, Indians, and the Federal Government.[14]...The upshot has been the repeated statements of this Court to the effect that, *even 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.*[15] (Emphasis supplied.)

The enduring principles derived from these decisions are as follows:[16] (1) Indian tribes, because of their original political/territorial status, retain incidents of preexisting sovereignty; (2) this sovereignty may be diminished or dissolved by the United States, but not by the states; (3) because of this limited sovereignty and

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ered by these regulations even though such land may, by operation of law, be held in restricted status following acquisition. Acquisition of land in trust status by inheritance or escheat is not covered by these regulations. These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its members.

[6] *See* 25 C.F.R. 151.10 relative to notification for on-reservation acquisition requests and 151.11 for notification on off-reservation requests.

[7] *See generally* Richard O. Jones, *Legal Issues Relating to the Acquisition of Right of Way and the Construction and Operation of Highways over Indian Lands,* in NCHRP LEGAL RESEARCH DIGEST NO. 30 (Transportation Research Board, December 1994).

[8] Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985).

[9] STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES at 48 (2d ed. 1992), citing United States v. Sandoval, 231 U.S. 28 (1913); Morton v. Mancari, 417 U.S. 535 (1974); United States v. Wheeler, 435 U.S. 313 (1978) ("Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.")

[10] 21 U.S. (8 Wheat.) 543 (1823).

[11] 30 U.S. (5 Pet.) 1 (1831).

[12] 31 U.S. (6 Pet.) 515 (1832).

[13] Indian Country, U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d 967 (10th Cir. 1987), citing California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207, (1987) (quoting United States v. Mazurie, 419 U.S. 544, at 557, (1975); and Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154, (1980)); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-33 (1983).

[14] Mescalero Apache Tribe v. Jones, *id.* 411 U.S. 145, 148 (1973), citing Organized Village of Kake v. Egan, 369 U.S. 60, 71-73.

[15] *Id.*, citing Kake, at 75; Williams v. Lee, 358 U.S. 217 (1959); New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896).

[16] AMERICAN INDIAN LAW DESKBOOK 4 (Conference of Western Attorneys General) (hereinafter: DESKBOOK).

the tribes' dependence on the United States, the government has a trust responsibility relative to Indians and their lands.

In applying these principles in the intervening years, the Court has continually emphasized "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometime exploited people." *Seminole Nation v. United States*[17] states, "This principle has long dominated the Government's dealings with Indians."[18] Thus, the federal government has long been recognized as holding, along with its plenary power to regulate Indian affairs, a trust status towards the Indian—a status accompanied by fiduciary obligations. Therefore, while there is legally nothing to prevent Congress from disregarding its trust obligations, the courts, by interpreting ambiguous statutes in favor of Indians, attribute to Congress an intent to exercise its plenary power in the manner most consistent with the nation's trust obligations.[19]

2. "Indian Country"—The Benchmark in Allocating Jurisdiction

Although the term "Indian reservation" has been historically used and appears in scores of provisions of the United States Code, particularly Title 25 (Indians), there is no single federal statute that defines it for all purposes, and the controlling term of art has become "Indian country." The classification of land as "Indian country" is considered "the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian Lands."[20] The Supreme Court has held that land held in trust by the United States for a tribe is Indian country subject to tribal control whether or not that land has reservation status.[21] While there is a presumption against state jurisdiction in Indian country,[22] the Supreme Court has recognized that state laws may reach into Indian country "if Congress has expressly so provided," and a state may validly assert such jurisdiction even absent express consent in very limited circumstances.[23]

Congress first used the term "Indian country" in describing the territory controlled by Indians.[24] The term was used in various criminal statutes relating to Indians, and several decisions of the Supreme Court developed a recognized definition that was used in the 1948 revision of Title 18, U.S.C.[25] "Indian country" simply refers to those lands that Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments.[26] In the 1948 revision, the express reference to "reservation" was deleted in favor of the use of the term "Indian country," which is used in most of the other special statutes referring to Indians and is defined in 18 U.S.C. 1151:[27]

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter [18 U.S.C. 1151 *et seq.*], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The Supreme Court continues to use the same test for determining what constitutes "Indian country" that it used before enactment of 25 U.S.C. 1151:

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[17] Seminole Nation v. United States, 316 U.S. 286, 296 (1942).

[18] United States v. Mitchell, 463 U.S. 206, 225 (1983), citing: United States v. Mason, 412 U.S. 391, 398 (1973); Minnesota v. United States, 305 U.S. 382, 386 (1939); United States v. Shoshone Tribe, 304 U.S. 111 (1938); United States v. Candelaria, 271 U.S. 432, 442, (1926); McKay v. Kalyton, 204 U.S. 458, 469, (1907); Minnesota v. Hitchcock, 185 U.S. 373, 396 (1902); United States v. Kagama, 118 U.S. 375, 382-384, (1886); Cherokee Nation v. Georgia, 5 Pet. 1, 17 (1831).

[19] Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (1975), citing Squire v. Capoeman, 351 U.S. 1, 7-8 (1956).

[20] Indian Country, *supra*, n.13, at 973, citing: Solem v. Bartlett, 465 U.S. 463, 465 n. 2, (1984); DeCoteau v. District County Court, 420 U.S. 425, 427-28 & n.2 (1975); Kennerly v. District Court, 400 U.S. 423 (1971); Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma, 618 F.2d 665 (10th Cir. 1980); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 27-46 (R. Strickland, ed., 1982) (hereinafter: HANDBOOK) ("Indian country" usually the governing legal term for jurisdictional purposes). F. COHEN, HANDBOOK OF INDIAN LAW 5-8 (1942) ("Indian country" generally determines allocation of tribal, federal, and state authority).

[21] Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 511 (1991).

[22] Indian Country at 976, citing Cabazon, 107 S. Ct. 1092 n.18 (1987); Cheyenne-Arapaho Tribes, 618 F.2d at 668; cf. Montana v. United States, 450 U.S. 544, 557 (1981). *See generally* C. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 93-106 (1987).

[23] Cabazon, *id.*, 107 S. Ct. at 1087, 1091.

[24] Act of July 22, 1790, Ch. 33, 1 Stat. 137 (The Trade and Intercourse Act of 1790).

[25] United States v. John, 437 U.S. 634, 647-649 & n.16 and 18 (1978). For example, see United States v. McGowan, 302 U.S. 535 (1937), involving the Reno Indian Colony, which was situated on 28.38 acres of land owned by the United States and purchased to provide lands for needy Indians scattered throughout the State of Nevada, and established as a permanent settlement. *Held:* "[I]t is immaterial whether Congress designates a settlement as a 'reservation' or 'colony,'...it is not reasonably possible to draw any distinction between this Indian 'colony' and 'Indian country' [within the meaning of 25 U.S.C. 247, relating to taking intoxicants into 'Indian country']."

[26] Indian Country, *supra*, at 973.

[27] John, at 647 n.16.

> In *United States v. John*, 437 U.S. 634 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been "'validly set apart for the use of the Indians as such, under the superintendence of the Government.'"[28]

Even though this statute deals primarily with crimes and criminal procedures, extending the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States,[29] the Supreme Court has held that the definition given by Section 1151 also applies to state civil jurisdiction:[30] *"[T]he principle that section 1151 defines Indian country for both civil and criminal jurisdiction purposes is firmly established. Any suggestion to the contrary...is simply erroneous."*[31]

The Court has also held that a tribe may exercise civil authority over Indian country as defined by 18 U.S.C. 1151.[32]

While there have been several laws enacted conferring state jurisdiction over particular tribes,[33] the only federal law extending state jurisdiction to Indian reservations generally is Public Law 83-280[34] (hereinafter P.L. 280). Although P.L. 280 provides criminal jurisdiction in Indian country to certain listed states, as an exception to 18 U.S.C. Sections 1152 and 1153,[35] the civil jurisdiction provided such states (see 28 U.S.C. 1360)[36] has been construed by the Supreme Court as being limited to allowing state courts to resolve private disputes in "civil causes of action between Indians or to which Indians are parties which arise in areas of Indian country" in the listed states.[37] The civil jurisdiction provided clearly does not extend to the full range of state regulatory authority:

> Public Law 280 merely permits a State to assume jurisdiction over "civil causes of action" in Indian country. *We have never held that Public Law 280 is independently sufficient to confer authority on a State to extend the full range of its regulatory authority, including taxation, over Indians and Indian reservations.*[38]

In the 1993 decision *Buzzard v. Oklahoma Tax Commission*,[39] the U.S. Court of Appeals for the Tenth Circuit upheld an Oklahoma state tax on off-reservation land owned by the United Keetoowah Band of Cherokee Indians and held that "nothing in...the cases concerning trust land indicates that the Supreme Court intended for Indian tribes to have such unilateral power to create Indian country," even though the land was purchased subject to a restriction against alienation by the DOI.

3. State Regulatory Authority over Indians and Indian Lands

a. Generally.—"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."[40] Given the long-established plenary power of Congress over Indians and Indian country, and the equally established and recognized principle that Indian tribes have sovereignty over their lands and tribal members, as a general rule, states do not have the authority to regulate Indians or Indian lands. However, there are clear exceptions to this rule, such as the state jurisdiction granted to certain states in P.L. 280, under the plenary power of Congress. In addition, the *Supreme Court has noted that "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members,"*[41] *and the initial rigid application of the Indian-sovereignty rule has been modified to allow con-*

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[28] *Id.* at 648-649; *see also* United States v. McGowan, 302 U.S. 535, 539 (1938).

[29] 18 U.S.C. 1152: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian country."

[30] Mustang Production Co. v. Harrison, 94 F.3d 1382, 1385 (10th Cir. 1996), citing DeCoteau v. District County Court, 420 U.S. 425, at 427 n.2, (1975).

[31] *Id.* at 1385, quoting Pittsburgh & Midway Coal Mining v. Watchman, 52 F.3d 1531, n.10 (10th Cir.1995).

[32] DeCateau, *supra*, at 427, n.2.

[33] Mescalero Apache Tribe v. Jones, *supra*, n.14, at 17.

[34] Pevar, *supra*, n.9, at 113.

[35] *See* 18 U.S.C. 1162. States listed are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.

[36] 28 U.S.C. 1360.

> *State civil jurisdiction in actions to which Indians are parties:* (a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

[37] Bryan v. Itasca County, 426 U.S. 373 (1976). *See* Pevar, *supra*, n.9, at 161:

> The only difference between a P.L. 280 state and a non-P.L. 280 state is that courts of the former are permitted to resolve private disputes brought by reservation Indians. A state court in a non-P.L. 280 state has no jurisdiction over such a dispute, even if all the parties ask the court to resolve it. [Citing Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877 (1986); Camenout v. Burdman, 525 P.2d 217 (Wash. 1974). *Cf.* Kennerly v. District Court, 400 U.S. 423 (1971).]

[38] Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 513 (1991), citing Bryan v. Itasca County, 426 U.S. 373 (1976), and Rice v. Rehner, 463 U.S. 713, 734, n.18 (1983); and California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208-210, and n.8 (1987).

[39] 992 F.2d 1073 (1993).

[40] Rice v. Olson, 324 U.S. 786, 789 (1945).

[41] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, at 142 (1980).

sideration of the state's legitimate regulatory interests.[42] As previously noted, the Supreme Court has cautioned that "[g]eneralizations on this subject have become particularly treacherous," and there have been "repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government [*"infringement test"*] or would impair a right granted or reserved by federal law" [*"preemption test"*]."[43]

b. Jurisdictional Tests Applied by the U.S. Supreme Court.—In the early decisions of the Supreme Court, when the Court viewed the Indian nations as having distinct boundaries within which their jurisdictional authority was exclusive, the test for impermissible state jurisdiction was a "territorial test,"[44] which simply asked whether the state action had invaded Indian tribal territory. Later cases developed the *"infringement test,"* which asked whether the state action had infringed on the rights of reservation Indians to make their own laws and be ruled by them.[45] Still later, the trend was "away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." The "preemption test,"[46] asked whether federal action had preempted any state action. The analysis of preemption in Indian cases differs from traditional preemption analysis because the courts will find it to exist even in the absence of congressional intent. Preemption of state regulation by federal law takes three forms: (1) preemption when federal law expressly provides; (2) preemption due to comprehensive or pervasive federal regulation; and (3) preemption due to conflict with federal policies or achievement of congressional purpose found in underlying statutes.

The modern cases "avoid reliance on platonic notions of Indian sovereignty and look instead to the applicable treaties and statutes which define the limits of state power."[47] The Indian sovereignty doctrine is still considered relevant, not because it always provides a definitive resolution, but "because it provides a backdrop against which the applicable treaties and statutes must be read."[48] However, these two barriers of "infringement" and "preemption" are still considered independent because either standing alone can be a sufficient basis for holding state law inapplicable.[49] The principles for applying the two tests were set out by the Supreme Court in the 1980 decision *White Mountain Apache Tribe v. Bracker,*[50] which held, in a suit for refund of motor carrier license and use fuel taxes paid by a logging company under contract to sell, load, and transport timber on a reservation, that such taxes were preempted by federal law. In a six to three decision, Justice Marshall, writing for the majority, concluded:

> Where, as here, the Federal government has undertaken comprehensive regulation of the harvesting and sale of timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.[51]

Justice Marshall's opinion provided these distinct standards for applying the "infringement" and "preemption" tests when state authority in Indian country is challenged:

> The tradition of Indian sovereignty over reservation and tribal members must form the determination whether the exercise of state authority has been pre-empted by operation of federal law...As we have repeatedly recognized this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development. Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence...*We have thus rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required...*At the same time any applicable regulatory interest of the State must be given weight...and "automatic exemptions 'as a matter of constitutional law'" are unusual...When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest...More difficult questions arise where...a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of

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[42] Youngbear v. Brewer, 415 F. Supp. 807, 812 (1976), *aff'd*, 549 F.2d 74 (8th Cir. 1977), citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171-173, 93 S. Ct. 1257; Mescalero Apache Tribe, *supra*.

[43] Mescalero Apache Tribe, *supra*, n.14.

[44] Jones, *supra*, n.7, p. 8.

[45] *Id.*, p. 20, n.108, citing Williams v. Lee, 358 U.S. 217, 220 (1959).

[46] McClanahan, *supra*, at 172. *See also* White Mountain Apache, *supra*, where the Court set out the modern preemption principles, and where a state motor carrier license tax on a non-Indian contractor was overturned; New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), where the Court denied New Mexico concurrent jurisdiction of non-Indian fishermen and hunters on the reservation on the basis of federal preemption.

[47] *Id.*, comparing United States v. Kagama, 118 U.S. 375 (1886), with Kennerly v. District Court, 400 U.S. 423 (1971) and providing the following comment in note:

> The extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question. *Cf.* Organized Village of Kake v. Egan, 369 U.S. 60, 62 (1962); Federal Indian Law 846. The question is generally of little more than theoretical importance, however, since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.

[48] *Id.*

[49] White Mountain Apache Tribe, *supra*, n.41, at 144.

[50] *Id.*

[51] *Id.* at 151.

> both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for *a particularized inquiry* into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law...(Citations and footnotes omitted).[52] (Emphasis added.)

c. Cases Recognizing/Rejecting State Jurisdiction.—(1) Taxation.[53]—Two established principles govern the authority of states to tax Indian tribes and their members. First, in the absence of express congressional authority, states have no jurisdiction to tax tribes or tribal members.[54] Second, in the absence of express federal law to the contrary, "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."[55] But the most common taxing situations addressed by the cases involve state taxes on transactions between tribes or tribal members and nonmembers on Indian reservations. In several cases the Supreme Court has conducted the "particularized inquiry" used in *Bracker, supra*, looking "into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law and be preempted."[56] Two cases where the Supreme Court upheld a state cigarette tax on Indian on-reservation "smoke shop" owners are important to our discussion of the loss of state/local sign control regulation because they involved the circumvention of state taxes by nontribal members, or what the Supreme Court called "marketing an exemption."

In *Moe v. Confederated Salish and Kootenai Tribes*,[57] the Court considered a challenge by the tribe and some of its members residing on the reservation to Montana's cigarette sales taxes and personal property taxes as applied to reservation Indians, and also the State's vendor licensing statute as applied to tribal members who sell cigarettes at "smoke shops" on the reservation. The Court in a unanimous opinion by Justice Rehnquist held that the personal property tax on personal property located within the reservation, the vendor license fee sought to be applied to reservation Indians conducting cigarette business for the tribe on reservation land, and the cigarette sales tax, as applied to on-reservation sales by Indians to Indians, "conflict with congressional statutes" and could not be sustained. But the State's requirement that the Indian tribal seller collect a tax validly imposed on *non-Indians "is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax."*[58] The Court saw nothing in this burden that frustrates tribal self-government or runs afoul of any congressional enactment dealing with the affairs of reservation Indians. The Court concluded:

> We therefore agree with the District Court that to the extent that the "smoke shops" sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof.[59]

The Supreme Court reaffirmed its cigarette tax decision in *Moe*, when it decided *Washington v. Confederated Tribes of Colville Indian Reservation*.[60] In that case several Indian tribes challenged the State of Washington's imposition of cigarette excise and general sales taxes upon on-reservation tribal sales of cigarettes to *nonmembers*. The Court, in upholding the state taxes, found that the imposition of a similar tax on nonmembers by a tribe did not bar or preempt a state from imposing its tax. Noteworthy to our sign control problem is the following language in the majority opinion by Justice White:

> Most cigarette purchasers are outsiders attracted on to the reservations by the bargain prices the smoke shops charge by virtue of their claimed exemption from state taxation...It is painfully apparent that the value mar-

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[52] *Id.* at 144-145.

[53] *See generally* DESKBOOK, *supra*, n.16, pp. 304-325.

[54] *Id.* at 304, n.9, citing: McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (State of Arizona held to have no jurisdiction to impose an income tax on Navajo Indians residing on the Navajo reservation and whose income was wholly derived from reservation sources.) *See also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175 (1989) ("tax immunity of the United States is shared by the Indian tribes for whose benefit the United States hold reservation lands in trust"); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985) ("Indian tribes and individuals generally are exempt from taxation within their own territory"); Bryan v. Itasca County, 426 U.S. 373, 376-77 (1976); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 475-81 (1976).

[55] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148, 93 S. Ct. 1267, 1270, 36 L. Ed. 2d 115 (1973) (held state could impose nondiscriminatory gross receipts tax on ski resort operated by tribe on off-reservation land that tribe leased from the federal government under the Indian Reorganization Act (IRA), but use tax assessment was barred by the IRA.)

[56] DESKBOOK, *supra*, n.16, p. 305, n.16, citing Ramah Navajo School Board, Inc. v. Bureau of Revenue, 458 U.S. 832, 837 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980); and Peabody Coal Co. v. State, 761 P.2d 1094, 1100 (Ariz. Ct. App. 1988), *cert denied*, 490 U.S. 1051 (1989):

> ([W]hile the Court has not articulated a specific preemption/sovereignty test, other than the particularized interests analysis previously mentioned, all cases involved a two-pronged inquiry into: (1) whether a sufficient state interest supported imposition of the tax, despite heavy federal regulation of the taxed activity, and (2) how did the tax directly or indirectly impact upon Indians, that is, where did the economic burden of the tax fall as compared to where the legal burden of the tax was initially imposed.)

[57] 425 U.S. 463 (1976).

[58] *Id.* at 480-481.

[59] *Id.*

[60] 447 U.S. 134 (1980).

keted by the smoke shops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest...What the smoke shops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation...*We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.*[61]

(2) Hunting and Fishing Regulation.—The "particularized inquiry" called for in *Bracker, supra*, was made by the Court in the 1981 decision of *Montana v. United States,*[62] which involved the attempt by both the State of Montana and the Crow Tribe to regulate fishing by *non-Indians* on non-Indian-owned fee lands within the reservation. In this seminal case, the Court, in denying tribal jurisdiction, reviewed the limitations on the "inherent power" of Indian tribes, clearly stating the general principles:

But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation...Since regulation of hunting and fishing by *nonmembers* of a tribe on lands no longer owned by the Tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow tribe to [do so]...The Court recently applied these general principles in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over *non-Indians*[,] [s]tressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns....[63] (Emphasis added.)

The Court went on to establish two basic tests for determining inherent sovereign power of a tribe 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 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 Supreme Court's unanimous decision in *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997), concluded that *Montana* was still the controlling precedent, relying on it in rejecting tribal court jurisdiction over non-Indians in tort suit arising out of a collision on a North Dakota state highway running through the Fort Berthold Indian Reservation. The Court found that the state's federally granted right-of-way over tribal trust land was the *"equivalent, for nonmember governance purposes, to alienated, non-Indian land."*

The Supreme Court provided another particularized inquiry of facts and issues similar to *Montana* in the 1983 decision in *New Mexico v. Mescalero Apache Tribe,*[64] but with a different result. The Court found that this case was far removed from those situations in *Washington v. Confederated Tribes,* where on-reservation sales outlets were marketing an exemption to nonmembers of goods not manufactured by the tribe or its members, *"in which the tribal contribution to an enterprise is de minimis."* As in *Montana*, both the tribe and the state sought to regulate hunting and fishing by nonmembers of the tribe. However, unlike that case, the reservation lands at issue were not owned by nonmembers, and the state sought only concurrent jurisdiction over the *nonmembers*, conceding that on the reservation the tribe exercised exclusive jurisdiction over hunting and fishing by members of the tribe and authority to also regulate nonmembers. The Court noted

that under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation [citing *Washington v. Confederated Tribes*, 447 U.S. 134 (1980) and *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976)][65] and that in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members [citing *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977)[66]].

The Court further noted that "[w]hile under some circumstances a State may exercise concurrent jurisdiction over non-Indians acting on tribal reservations [citing *Washington and Moe, supra*], such authority may be asserted only if not preempted by the operation of federal law." Relying heavily on *Bracker, supra*, the Court went on to state that "[s]tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." (Emphasis added.) The opinion by Justice Marshall for a unanimous Court concluded with the following decision:

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[61] *Id.* at 155.

[62] 450 U.S. 544 (1981).

[63] *Id.* at 564-565.

[64] 462 U.S. 324, *supra*, n.13.

[65] In both Washington and Moe, the Court upheld the imposition of state sales tax on reservation purchases by nonmembers at "smoke shops," and held that the state may require the Indian proprietor to collect the tax for the state, notwithstanding the tribe's power to also tax such sales on Indian trust lands.

[66] In Puyallup, the Court upheld the State of Washington's authority to regulate on-reservation fishing by tribal members. Like Montana, the reservation lands did not belong to the tribe, but had been alienated in fee simple (all but 22 of 18,000 acres). The Court, *inter alia*, relied on a provision of the Indian treaty that qualified the Indians' fishing rights by requiring that they be exercised "in common with all citizens of the Territory," (at 175) and in the State's interest in conserving a scarce, common resource (at 174, 175-177).

> In this case the governing body of an Indian Tribe, working closely with the Federal Government and under the authority of federal law, has exercised its lawful authority to develop and manage the reservation's resources for the benefit of its members. The exercise of concurrent jurisdiction by the State would effectively nullify the Tribe's unquestioned authority to regulate the use of its resources by members and nonmembers, interfere with the comprehensive tribal regulatory scheme, *and threaten Congress' firm commitment to the encouragement of tribal self-sufficiency and economic development. Given the strong interests favoring exclusive tribal jurisdiction and the absence of State interests which justify the assertion of concurrent authority, we conclude that the application of the State's hunting and fishing laws to the reservation is preempted.* (Emphasis supplied.)[67]

(3) Gaming.[68]—The Seminole tribe of Florida opened a bingo hall on the reservation in 1979 and generated the first lawsuit involving Indian gaming: *Seminole Tribe of Florida v. Butterworth.*[69] The U.S. Court of Appeals for the Fifth Circuit, following the principles established in *Bryan v. Itasca County,*[70] ruled that Florida's law was civil regulatory, and did not afford the state jurisdiction over the gaming.[71] A similar challenge was won by the Oneida Tribe in *Oneida Tribe of Indians v. Wisconsin,*[72] where the court found the Wisconsin scheme to be regulatory in nature.[73] The U.S. Court of Appeals for the Ninth Circuit would reach the same conclusion in *Barona Group of Capitan Grande Band of Mission Indians v. Duffy,*[74] determining that California's bingo laws were civil and regulatory.[75] By 1986 Indian gaming revenues exceeded $100 million per year from casinos and bingo halls.[76]

The U.S. Supreme Court addressed the issue in *California v. Cabazon Band of Mission Indians,*[77] where it held that neither the state nor the county had any authority to enforce its gambling laws within the reservations of the Cabazon and Morongo bands of Mission Indians in Riverside County, California, following the rule that state law may be applicable when it is prohibitory and inapplicable when regulatory. Both tribes, by ordinances approved by the federal government, conducted on-reservation bingo games. The Cabazon Band also operated a card club for draw poker and other card games. The games were open to the general public and predominantly played by non-Indians coming onto the reservations. In a 7-2 opinion, Justice White, finding P.L. 280 did not authorize state regulation here since criminal laws were not involved (noting in footnote 11 that "it is doubtful that P.L. 280 authorizes application of any local laws to Indian reservations") *and rejecting California's contention that the tribes were "marketing an exemption" from state law* (condemned by the Court in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 155), found that:

> [T]he [d]ecision...turns on whether state authority is preempted by the operation of federal law; and "[s]tate jurisdiction is pre-empted...if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify assertion of state authority." *Mescalero*, 462 U.S., at 333, 334. The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development. *Id.* at 334-335.
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> While noting that the State's concern that organized crime would be attracted to the high stakes games, was "a legitimate concern...we are unconvinced that it is sufficient to escape the pre-emptive force of federal and tribal interests apparent in this case" and "the prevailing federal policy continues to support these tribal enterprises..."[78]

In response to *Cabazon,* Congress enacted the Indian Gaming Regulatory Act of 1988 (IGRA),[79] which provided a statutory basis for the operation of gaming by Indian tribes as a "means of promoting tribal economic development, self-sufficiency, and strong tribal governments." IGRA requires Indian tribes to appropriate the profits from gaming activities to fund tribal government operations or programs and to promote eco-

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[67] *See generally,* the U.S. Supreme Court in the 1993 case of South Dakota v. Bourland, 508 U.S. 679, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993), in an opinion by Justice Thomas, joined by six other Justices, addressed tribal regulation of hunting and fishing by non-Indians, holding that Congress had abrogated the tribe's rights to regulate hunting and fishing by non-Indians on lands taken for construction of the Oahe Dam and reservoir, as contained in the Flood Control and Cheyenne River Acts.

[68] *See generally* Jason Kalish, *Do The States Have an Ace in the Hole or Should the Indians Call Their Bluff? Tribes Caught in the Power Struggle Between the Federal Government and the States,* 38 ARIZ. L. REV. 1345 (1996); Anthony J. Marks, *A House of Cards: Has the Federal Government Succeeded in Regulating Indian Gaming?* 17 LOY. ENTERTAINMENT L.J. 157 (1996); Jason D. Kolkema, *Federal Policy of Indian Gaming on Newly Acquired Lands and the Threat to State Sovereignty: Retaining Gubernatorial Authority Over the Federal Approval of Gaming on Off-Reservation Sites,* 73 U. DET. MERCY L. REV. 361 (1996); Michael D. Cox, *The Indian Gaming Regulatory Act: An Overview,* 7 ST. THOMAS L. REV. 769 (1995); Jeffrey B. Mallory, *Congress' Authority to Abrogate a State's Eleventh Amendment Immunity from Suit: Will Seminole Tribe v. Florida be Seminal?,* 7 ST. THOMAS L. REV. 791 (1995); Leah L. Lorber, *State Rights, Tribal Sovereignty, and the "White Man's Firewater": State Prohibition of Gambling on New Indian Lands,* 69 IND. L.J. 255 (1993).

[69] 658 F.2d 310 (5th Cir. 1981).

[70] 426 U.S. 373 (1976).

[71] Butterworth, 658 F.2d 310, at 314-15.

[72] 518 F. Supp. 712 (W.D. Wis. 1981).

[73] *Id.* at 719.

[74] 694 F.2d 1185 (9th Cir. 1982).

[75] *Id.* at 1189.

[76] Kalish, *supra*, n.62, at p. 1361, n.187, citing S. Rep. No. 99-493, at 2 (1986).

[77] 480 U.S. 202 (1987).

[78] *Id.* at 221 (1987).

[79] 25 U.S.C. 2701, *et seq.* (1988).

nomic development.[80] The Act divides Indian gaming into three classes: (1) traditional Indian games and social games for small value prizes, which may be operated by the tribes without restrictions by state or federal governments (Class 1); (2) lotto, bingo and similar games, and nonbanked card games authorized or governed by tribal ordinance if such gaming is permitted by state laws, although states have no control over its regulation (Class 2); and (3) high stakes gambling such as blackjack, slot machines, roulette, and pari-mutuel betting, when authorized by Indian tribal ordinance, if permitted by the state, and if conducted in conformance with a tribal-state compact (Class 3). When a state refuses to negotiate such a compact, IGRA authorizes the tribes to sue in federal court to compel negotiating.[81] In *Seminole Tribe v. Florida,*[82] in a 5-4 decision, the Supreme Court held that the Eleventh Amendment precludes tribes from suing states in federal court to compel negotiation of a Tribal-State compact.[83] Congress is in the process of addressing the results of *Seminole* by amending IGRA.

One section of the IGRA has particular relevance to the issue of newly acquired trust lands. Section 2719(a) of IGRA prohibits gaming on lands acquired in trust for Indian tribes after October 17, 1988. However, IGRA provides a waiver of this provision in Section 2719(b)(1)(A), where:

> [T]he Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, *but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.* (Emphasis added.)

From the outset, some parties, such as the Western Governors Association, criticized the provision, even seeking clarifying amendments. Others, such as the State of Oregon, sought judicial interpretation. The DOI vacillated on its meaning, but until recently took the position that the language only allowed the state governor to voice concerns about off-reservation gambling. However, in December 1992, DOI reversed this position and adopted a policy making the governor's veto dispositive in whether newly acquired lands could be used for Indian gaming.[84]

The state governor "veto" issue came into play in 1992 when the Confederated Tribes of Siletz Indians of Oregon applied to the Secretary of the Interior for a 16-acre tract of land near Salem, Oregon, that was 50 miles from the tribe's reservation. The land was to be taken in trust for the purpose of gaming. The Governor of Oregon refused to concur, and in December 1992 the secretary denied the application, and the tribes filed suit challenging the denial. In 1994 the U.S. District Court of Oregon in *Confederated Tribes of Siletz Indians v. United States,*[85] while upholding the Secretary's denial of a tribe's application, held that because the governor's concurrence was mandatory, it violated the Appointments Clause of the U.S. Constitution and the general separation of powers. The court severed Section 2719(b)(1)(A) in its entirety, reasoning that a severance of only the unconstitutional portion "would not function independently in a manner consistent with the apparent intent of Congress."[86] The U.S. Court of Appeals for the Ninth Circuit, in reviewing the constitutionality of the statute *de novo*, affirmed the judgment of the district court, but upheld the Secretary's denial of trust application "because s. 2719(b)(1)(A) does not violate either the Appointments Clause or separation of powers principles."[87]

4. State Liquor Control.—The 1983 opinion of Justice O'Connor, joined by five other Justices, in *Rice v. Rehner*[88] also rejected the view that states are absolutely barred from exercising jurisdiction over Indian reservations and members.[89] She noted that the decisions of the Court concerning state regulation of activities in Indian country had not been static 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." She further noted that

> *[w]hen 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 apply"...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.*[90]

In *Rehner,* the respondent was a federally licensed Indian trader operating a general store on an Indian reservation in California. She was refused an exemption from California law requiring a state license in order to sell liquor for off-premises consumption and filed this suit for declaratory judgment that she did not need a state license. The district court dismissed, ruling that a state license was required by 18 U.S.C. 1161, which provides that liquor transactions in Indian country are not subject to prohibition under federal law if they are "in conformity both with the laws of the State in which [they] occu[r] and with an ordinance duly adopted by the tribe having jurisdiction over such area

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[80] 25 U.S.C. 2710(b)(2)(B) (1994).

[81] 2710(d)(7)(A)(i))

[82] 116 S. Ct. 1114 (1996).

[83] *See* Marks, *supra*, n.68, for a thorough analysis of Seminole Tribe v. Florida.

[84] *See* Lorber, *supra*, at 256.

[85] 841 F. Supp. 1479 (D. Or. 1994).

[86] *Id.* at 1491.

[87] Confederated Tribes of Siletz Indians of Oregon v. United States, 110 F.3d 688 (9th Cir.1997).

[88] 463 U.S. 713 (1983).

[89] *Id.* at 718.

[90] *Id.* at 719, 720.

of Indian country." The U.S. Court of Appeals for the Ninth Circuit reversed, holding that state licensing was preempted by Section 1161. The Supreme Court reversed, upholding the requirement for a state license:

> Congress was well aware that the Indians never enjoyed a tradition of tribal self-government insofar as liquor transactions were concerned. Congress was also aware that the States exercised concurrent authority insofar as prohibiting liquor transactions with Indians was concerned. By enacting section 1161, Congress intended to delegate a portion of its authority to the tribes as well as to the States, so as to fill the void that would be created by the absence of the discriminatory federal prohibition...Application of the state licensing scheme does not "impair a right granted or reserved by federal law." *Kake Village*, 369 U.S., at 75. On the contrary, such application of state law is "specifically authorized by...Congress...and [does]not interfere with federal policies concerning the reservations." *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 687, n.3 (1965).[91]

The Supreme Court of Wisconsin relied on the analysis and principles established in *Rice* in its decision in *County of Vilas v. Chapman*,[92] 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 decision was based upon a lack of a motor vehicle code by the tribe, giving the state a dominant interest in regulating traffic on Highway 47.[93]

(5) Zoning.—The Court substantially eroded the concept of inherent tribal sovereignty as a result of the divided opinions issued in the 1989 judgment in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*.[94] The case involved the authority of the tribes to impose zoning regulations on two pieces of property owned in fee by nonmembers, when the land was already zoned by Yakima County, Washington. There was an 80–20 split between the trust lands and the fee-owned land, with most of the fee land being located in three towns and the rest scattered in "checkerboard" fashion throughout the reservation. The reservation was divided informally into an "open area" and a "closed area," with the open area covering the eastern third of the reservation, half of which was owned in fee by nonmembers who composed 80 percent of the population. One fee-owned property at issue was in this open area. The other fee-owned property at issue was 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," with restricted access to nonmembers.

There were three separate opinions, with three distinct views of inherent power:

(1) Justice White, joined by three Justices, held that the tribe had neither treaty-reserved nor inherent powers to zone nonmember fee land.

(2) Justice Blackmun, joined by two Justices, concluded 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 Justice, was of the opinion that the tribe could zone the nonmember fee property in the closed area, but not the open area.

This split decision resulted in tribal zoning being upheld only as to the closed area. The White opinion is significant because four Justices departed from the analysis in *Montana,* holding that tribal regulatory jurisdiction over nonmember fee lands was prohibited per se, even when conduct (over-development) threatened the political integrity, the economic security, or the health and welfare of the tribe (Proviso 2 of *Montana, supra*).[95] The analysis of *Brendale* in the *American Indian Law Deskbook* gives this conclusion:[96]

> 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 consent is present, such as through voluntary on-reservation business transactions with tribes or use of tribal lands. This conclusion was reinforced in *Duro v. Reina*[97] where the Court held a tribe lacked criminal jurisdiction over a nonmember Indian with respect to on-reservation conduct. *The Court's decisions since Oliphant thus reflect a strong tendency to restrict inherent tribal authority over nonmembers to a consensual core—the first Montana exception.* (Emphasis supplied.)[98]

C. Overview of Legal Principles Applicable to Outdoor Advertising Control

1. Background

The initial federal efforts to control outdoor advertising along the federal-aid highway systems began with Public Law 85-381, the so-called "Bonus Act," which amended the Federal-Aid Road Act of 1916 (39

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[91] *Id.* at 733.

[92] 361 N.W.2d 699 (Wis. 1985).

[93] *Contra* Confederated Tribes of the Colville Reservation v. State of Washington, 938 F.2d 146 (9th Cir. 1991), *cert denied*, 118 L. Ed. 412, 112 S. Ct. 1704 (1992); *compare* State of Washington v. Schmuck, 121 Wn. 2d 373, 850 P.2d 1332 (1993).

[94] 492 U.S. 408 (1989).

[95] 450 U.S. 544, at 565.

[96] DESKBOOK, *supra,* n.16, at 109-110.

[97] 495 U.S. 676 (1990). Also, *see generally* Peter Fabish, *The Decline of Tribal Sovereignty: The Journey from Dicta to Dogma in Duro v. Reina,* 66 WASH. L. REV. 567 (1991).

[98] *See also* South Dakota v. Bourland, 508 U.S. 679, 113 S. Ct. 2309 (1993), where Justice Thomas, in a 7–2 decision, explained that "Montana and Brendale establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right...implies the loss of regulatory jurisdiction over the use of land by others." At 2316.

Stat. 355), to provide for control of outdoor advertising adjacent to and within 660 feet of Interstate highways. Exempted from control were areas adjacent to rights-of-way acquired prior to July 1, 1956, and commercial and industrial zones within the boundaries of incorporated municipalities, as they existed on September 21, 1959, or other areas where the land use as of that date was clearly established by state law as industrial or commercial. This was a voluntary program allowing states to enter into agreements with the federal government to provide sign control along the Interstate system and thereby become eligible for a bonus payment equal to one-half of 1 percent of the construction cost of the highway project. When the program expired on June 30, 1965, 25 states had entered into such agreements.[99] A majority of these states used only police power regulation to control outdoor advertising, with three states using only the power of eminent domain, and seven states using a combination of both.[100] Subsection (d) of the Bonus Act provided as follows:

> Whenever any portion of the Interstate System is located upon or adjacent to any *public lands or reservations of the United States*, the Secretary of Commerce may make such arrangements and enter into such agreements with the agency having jurisdiction over such lands or reservations as may be necessary to carry out the national policy set forth in subsection (a) of this section, and any such agency is hereby authorized and directed to cooperate fully with the Secretary of Commerce in this connection. (Emphasis added.)[101]

Whether or not this provision was intended to cover Indian reservations is not clear from the legislative history, but if they were covered, it was the federal government, not the states, that had the responsibility to implement any control. This provision authorized, but did not mandate, that arrangements for federal compliance be undertaken by the Secretary of Commerce. There is no record indicating any effort by the Secretary to implement this provision as to Indian reservations.

2. 1965 Highway Beautification Act

a. General.—The bonus program had mixed results, and at the urging of President Lyndon B. Johnson, who expressed dissatisfaction with the effectiveness of the program, Congress passed the Highway Beautification Act (HBA) of 1965, Public Law 89-285, which was signed into law on October 22, 1965.[102] The Act contained three substantive titles: Title I, control of outdoor advertising along the Interstate and primary highways;[103] Title II, control of junkyards adjacent to the Interstate and primary highways;[104] and Title III, landscaping and scenic enhancement of federal-aid highways, including development of publicly owned and controlled rest and recreation areas to accommodate the traveling public.[105] This report addresses only the provisions of Title I, control of outdoor advertising.

b. Title I of the Highway Beautification Act of 1965 (23 U.S.C. 131).—Congress, in enacting Title I, declared its purpose in Subsection 131(a):

> The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the safety and recreational value of public travel, and to preserve natural beauty.

The focus of the program is the segregation of signs to areas of similar land use (i.e., commercial and/or industrial areas) so that areas not having commercial or industrial character will be protected for reasons of safety, recreational value, and preservation of natural beauty. In order to accomplish this purpose, the states, using their police power and their power of eminent domain,[106] were required to enact laws that would provide the "effective control" prescribed in federal law[107]

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[99] California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Georgia and North Dakota later dropped the bonus program. FEDERAL HIGHWAY ADMINISTRATION, HIGHWAY BEAUTIFICATION PROGRAM DIGEST (April 1979).

[100] Ruth R. Johnson., *The Highway Beautification Act: Cosmetic for the City?,* 20 CATH. U.L. REV. 69 (1970).

[101] 72 Stat. 96.

[102] 79 Stat. 1028

[103] 79 Stat. 1028, 23 U.S.C. 131.

[104] 79 Stat. 1030, 23 U.S.C. 136.

[105] 79 Stat. 1032, 23 U.S.C. 319.

[106] 23 U.S.C. 131(g) provides, *inter alia*, as follows:

> *Just compensation shall be paid* upon the removal of any outdoor advertising sign, display or device lawfully erected under State law and not permitted under subsection (c) of this section whether or not removed pursuant to or because of this section, whether or not removed pursuant to or because of this section...Such compensation shall be paid for the following: (A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and (B) the taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

In addition, Section 401 of the Act, 79 Stat. 1033, provided: "Nothing in this Act or the amendments made by this Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act."

In November 1966, Acting Attorney General Ramsey Clark, issued his opinion "that section 131 is to read as requiring each State to afford just compensation as a condition of avoiding the 10% reduction of subsection (b)." (42 Op. Atty. Gen. No. 26 (1966)). *See also* Roger A. Cunningham, *Billboard Control Under the Highway Beautification Act of 1965*, 71 MICH. L. REV. 1295, 1309-1326 (1973).

[107] 23 U.S.C. 131(c) provides, *inter alia*, that:

> Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975,...if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and

and as set out in agreements to be entered into with the Secretary of Commerce (now the Secretary of Transportation).[108] While legally the states can choose not to provide such effective control of outdoor advertising, as a practical matter they must comply or become subject to a penalty equal to 10 percent of their federal-aid highway funds.[109]

II. CONTROL OF OUTDOOR ADVERTISING ON INDIAN LANDS

A. Applicability of Title I of the Highway Beautification Act of 1965 to Indian Lands

1. *Subsection 131(h) and Its Interpretation*

a. General.—Subsection 131(h) of Title 23, U.S.C., remains unchanged from its original enactment by Congress in 1965: "(h) *All public lands or reservations of the United States* which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary."[110] (Emphasis added.)

As previously noted in Section I.B., *supra*, the Bonus Act, while alluding to sign control on "public lands or reservations of the United States," simply authorized, but did not direct, that the Secretary of Commerce make arrangements for such sign control through "agreements" with each jurisdictional federal agency holding lands adjacent to any portion of the Interstate system. The language made it clear that the desired control on such lands and reservations was not a responsibility of the states, but would be accomplished, if at all, through permissive action of the Secretary of Commerce, cooperating with the jurisdictional federal agencies, pursuant to individual agreements. These agencies were authorized and "directed" to cooperate.

Subsection 131(h), on the other hand, is written in the passive voice, making it unclear who has the responsibility and authority for compliance, the states or the federal jurisdictional agencies. In addition, it is not clear as to its applicability to Indian reservations. The legislative history of subsection 131(h) is of little help in clarifying these issues. The language originated in the Senate bill (S. 2084) and was revised in House Report 1084 to add the phrase (1) "of the United States," and (2) that the national standards be "promulgated by the Secretary." There were no floor amendments or discussion during debate in either the Senate or the House, and no executive communications relative to this subsection. The only statement relating to Subsection 131(h) appeared in the House Report and makes no reference to who has the responsibility for enforcement on public lands or reservations, or whether such lands include Indian reservations:

> This section simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or primary system the same controls covering other roads which are subject to this legislation. The committee expects in the case where portions of public lands or reservations are leased for commercial operations that such portions will have the same exception from control as are given by this legislation to areas zoned or used for commercial or industrial purposes in a State.

b. Federal Agency Interpretations / Positions.—A few months after enactment of the Highway Beautification Act of 1965, the Commissioner of Indian Affairs sought an opinion of the Solicitor of DOI as to the interpretation of "reservation of the United States" as used in the Act. The Solicitor's Office issued a Memorandum Opinion, dated April 7, 1967. The memorandum noted that Congress had sought the advice of DOI from time to time while the legislation was being considered, and "the Secretary and the various Bureaus, including the Bureau of Indian Affairs, supported it...[and] [n]one of

notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection the term "free coffee" shall include coffee for which a donation may be made, but is not required.

[108] 23 U.S.C. 131(d) provides, *inter alia*, that:

> In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices *whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary*, may be erected and maintained...within areas adjacent to the...[highway]...which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas *as may be determined by agreement between the several States and the Secretary*. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the states in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreements in the zoned commercial and industrial areas within the geographical jurisdiction of such authority...

[109] 23 U.S.C. 131(b):

> Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices...shall be reduced by amounts equal to 10 per centrum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control...

[110] 79 Stat. 1029 (23 U.S.C. 131(h).

the available correspondence, reports, or other documents in the files indicates that Indian reservations were regarded as excluded from its operation." The opinion advised the Commissioner as follows:

> We believe that "reservations of the United States" as used in the subsection includes Indian reservations. The phrase "all public lands and reservations of the United States" is one of art used by the Congress when it means to encompass all lands in which the United States has an interest, and has been consistently so interpreted by the courts and this Department.

This opinion referred to an earlier secretarial decision that addressed a similar question raised under Section 18 of the Act of March 3, 1891, 26 Stat. 1095, granting rights-of-way over the "public lands and reservations of the United States" for purposes of irrigation. In this decision, reported as 27 L.D. 421 (1898), reversing an earlier, contrary decision (14 L.D. 265 (1892)), the Secretary held that the phrase included Indian reservations. Also cited as authority was *United States v. Celestine,*[111] where the Court, in discussing the scope of the term "reservation," compared the scope of the term "Indian country," as used in a certain statute, and concluded that "reservation" includes any body of land for which Congress has power to provide.

While the Secretary of the Interior appears to have taken no formal action to implement the HBA relative to Indian reservations, the Secretary, in December 1970, issued new regulations respecting special land use permits on public domain lands administered by the Bureau of Land Management (BLM), another unit of DOI. This regulation provided, in pertinent part, as follows:

> No permits will be issued for lands within rights-of-way, within 660 feet of the edge of rights-of-way of the National System of Interstate and Defense Highways (Interstate System) and the primary system (title 23, United States code), or for displays which would be visible from such highways.[112]

Notice was given sign owners with existing BLM sign permits of the impending change in regulations almost 2 years prior to its promulgation. Pursuant to regulations these permits were revocable at any time upon notice.[113] Ryan Outdoor Advertising, Inc., and Sun Outdoor Advertising, Inc., owned and maintained advertising signs on BLM land in Nevada, under such BLM permits. Each of the permits provided for revocation at any time upon notice. These sign companies were notified in December 1973, along with all sign owners under BLM permit in Nevada, that their signs would have to be removed in accordance with Regulation 2921.0-6. Upon failure to comply, two signs belonging to one of the companies were removed by the government. Sun and Ryan filed suit seeking declaratory and injunctive relief, which was denied in a summary judgment in favor of the government on March 3, 1976. On appeal, the U.S. Court of Appeals for the Ninth Circuit, in *Ryan Outdoor Advertising v. United States*, affirmed the judgment.[114]

In *Ryan*, the sign companies contended that Reg. 2921.0-6 contravened the HBA, 23 U.S.C. 131(h), asserting that this legislation superseded and preempted any pre-existing authority of the Secretary of Interior over public lands adjacent to federally funded highways, and that the regulations conflicted with the guidelines expressed by the HBA. The court of appeals, while noting the existence of certain discrepancies and inconsistencies between the specifics of Reg. 2921.0-6 and the HBA, found that this did not mean that the Secretary of Interior was without independent authority to issue the regulations. This authority was derived from 43 U.S.C. 1201, the general congressional grant of authority to the Interior Secretary. The court held as follows:

> If the Secretary of the Interior chooses to permit signs on public lands, they are to conform to the standards set by the Department of Transportation under the Highway Beautification Act. But if the Secretary of the Interior, in the exercise of his authority over federal lands, decides that no outdoor advertising will be permitted on public lands whatsoever, the Highway Beautification Act simply does not apply...Since these signs were not removed pursuant to the Highway Beautification Act, but rather under the general authority of the Secretary of the Interior over public lands, the provisions of 23 U.S.C. 131(g) [right of sign owners to just compensation on removal] are not applicable...In the instant case the permits were revocable in the Government's discretion at any time upon notice.[115]

Following passage of the Department of Transportation Act in 1966 (P.L. 89-670, 80 Stat. 931), the Federal Highway Administration (FHWA) became responsible for administering the HBA. In 1974, the FHWA Office of Chief Counsel developed a proposed Executive Order titled, "Control of the Visual Quality of the Environment on Federal Lands." One of the stated purposes of this proposed Executive Order was to provide for federal agency control of outdoor advertising in accordance with the provisions of the HBA, implementing subsection 131(h). The language of the proposed order, *inter alia*, included DOI permitting of outdoor advertising on Indian lands and reservations, "provided such use conforms with the terms and provisions of State law and regulations established in compliance with Section 131, Title 23, U.S.C. by the State in which the Indian reservation is located." This would indicate that FHWA, at that time, considered such Indian lands and reservations to be covered by the HBA, with enforcement a federal responsibility. It is not clear whether FHWA's intention to bring the sign control into conformity with each State's laws was based upon a legal or policy position. While this proposed order was circulated to the affected federal agencies for comment, there is no rec-

[111] 215 U.S. 278 (1909).

[112] 43 C.F.R. 2921.0-6(a).

[113] 43 C.F.R. 2920.3(a).

[114] 559 F.2d 554 (1977).

[115] *Id.* at 556.

ord of it having been finalized and issued as an Executive Order.

A second FHWA memorandum, dated January 23, 1976, addressed the issue of "[w]hether 131(h) of Title 23, United States Code, is applicable to Indian reservations, thereby providing a basis for jurisdiction to the States to enforce their respective laws, regulations, and rules promulgated pursuant to section 131, et. seq., on Indian reservations." The opinion concluded as follows:

> Although statutory construction leads us to the conclusion that Indian reservations are technically within the meaning of the phrase "reservations of the United States" as used in the [HBA]...failure of the Act to delegate either to the [FHWA]...or the [DOI]...the explicit authority to implement the Act on Indian reservations results in nonapplicability 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 reservations 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. The most logical and practical solution to this dilemma is for Congress to amend the Act to delegate specific jurisdiction and authority to an appropriate governmental agency to achieve uniform implementation of the Beautification Act on Indian reservations.

A November 16, 1976, memorandum from FHWA's Real Property Acquisition Division to all FHWA Regional Administrators, titled, "Application of 23 U.S.C., Sections 131 and 136, to Indian Lands," summarized the FHWA January 23, 1976, Memorandum of Law and advised of efforts seeking administrative solutions to "this legislative defect," including meetings with the BIA. The memorandum alludes to two main problems: (1) control responsibility and (2) origin of the 25 percent matching funds for acquisition of nonconforming signs (i.e., the normal state share in acquisition of signs). The memorandum went on to conclude "that an administrative solution, other than voluntary compliance, is untenable," and that corrective legislation would be sought.

Notwithstanding these FHWA and DOI memorandums, the BIA appears to have made some effort to limit signs on Indian lands to those meeting the requirements of the HBA. These efforts are reflected in the cases reviewed in the next section.

c. Case Law Relating to 23 U.S.C. 131(h), and the Erection of Signs on Indian Lands.—

(1) Appeal of the Morongo Band of Mission Indians v. Area Director, BIA[116]—This administrative appeal to the Interior Board of Indian Appeals involved the March 14, 1978, BIA Area Director's decision, affirming a superintendent's decision, refusing to approve a lease agreement between the Band and the Naegele Outdoor Advertising Co., Inc., of California, for the purpose of erecting and maintaining outdoor advertising structures on the Morongo Indian Reservation. Approval of the lease was required by 25 U.S.C. 415 (1976), which provides that restricted Indian lands, whether tribally or individually owned, may be leased only with the approval of the Secretary of the Interior. While the director's decision did not recite specific findings of fact or conclusions of law, it referred to, *inter alia*, the Solicitor's Opinion dated April 7, 1967 (See *supra*, page 18), indicating that the lease disapproval was on the grounds that California and federal laws controlling outdoor advertising along Interstate highways were not satisfied by the provisions of the lease. The appeal depended upon the following question: *"To what extent, if any, does the Highway Beautification Act of 1965...apply to Indian reservations?"* (Emphasis added.)

The administrative opinion concluded that the April 7, 1967, opinion of the Solicitor for Indian Affairs that "reservations of the United States" as used in 23 U.S.C. 131(h) included Indian reservations, "does not reflect the state of the law on this subject." The opinion pointed out that, notwithstanding the solicitor's opinion, no regulations had been issued by the secretary with respect to Indian lands, as had been done for the BLM, indicating that DOI did not consider the HBA applicable to Indian lands. It further concluded that the absence of statutory language expressly including or excluding Indian reservations as territory subject to the HBA rendered the term "reservations" in Section 131(h) "ambiguous." The opinion referenced FHWA's memorandum of December 19, 1977, *supra*, which, recognizing this ambiguity, aimed at bringing Indian reservations areas within the HBA. Finding nothing in the legislative history to clarify this ambiguity, the opinion concluded that, *"Under the circumstances, we find that the legislative history of the [HBA] supports the conclusion that Congress did not intend to include Indian reservations within the class of reservations affected thereby....doubtful statutory language must be interpreted in favor of the Indians."*[117]

The board's primary rationale for holding the HBA inapplicable to Indian reservations was the fact that enforcement of the HBA relied on state action through the necessary powers of zoning and condemnation, which the states could not exercise on Indian reservations "absent clear Congressional license." The board recognized that Congress's plenary authority over Indian affairs gave it the power to subject Indian reservations to the type of state regulation generally authorized in the HBA, but it was the board's position, based upon principles enunciated in *Williams v. Lee*,[118] regarding limits of state power over Indian affairs, that, *"[A]bsent clear Congressional license to the states to control outdoor advertising on Indian reservations, such an intrusion by the states into 'the right of reservations Indians to make their own laws and be ruled by them' is without sanction."*[119]

[116] 7 IBIA 299, 86 I.D. 680 (1979).

[117] *Id.* at 86 I.D. 688.

[118] 358 U.S. 217 (1959).

[119] *Id.* at 687.

The board relied on the definitive decision of the Supreme Court in *Bryan v. Itasca County*[120] to conclude that P.L. 280 did not give California the authority to impose the California Outdoor Advertising Act on the Indian land in question. The board considered the exercise of the Secretary's authority to impose as lease terms the state's standards regarding placement, illumination, maintenance, etc., of outdoor advertising structures as being sound, but only if the BIA could "insure that its own actions serve to protect tribal sovereignty." The board suggested that this could be accomplished initially by "acquiring the Band's consent to the use of State standards."[121]

(2) People v. Naegele Outdoor Advertising Company of California.[122]—This decision by the California Supreme Court resulted from an injunctive action brought in July 1978, by the California Department of Transportation (Caltrans) against Naegele Outdoor Advertising Company (Naegele), following its erection of 16 billboards along Interstate 10, as it transverses the Morongo Band of Mission Indians' reservation in Riverside County, California. Naegele erected the signs pursuant to agreement with the Band, during pendency of the Band's appeal to the Interior Board of Indian Affairs, discussed *supra*. Thus, both cases involved the same signs and some of the same issues. Caltrans' complaint alleged that Naegele's 16 outdoor advertising structures violated Section 5350 of the Business and Professions Code, which requires display permits, and in addition, violated various provisions of the Outdoor Advertising Act. In a consolidated action by Desert Outdoor Advertising, Inc. (Desert), Desert charged Naegele with nuisance, unfair competition, intentional interference with prospective economic benefit, and negligent interference with prospective economic benefit. The superior court granted Desert's unfair competition cause of action and enjoined Naegele from maintaining advertising structures on the reservation without complying with the Outdoor Advertising Act. The noncomplying structures were ordered removed.

On appeal, Caltrans argued that Congress had delegated to the State the power to regulate outdoor advertising on Indian reservations pursuant to and in accordance with the HBA, which the State had done through its Outdoor Advertising Act (Bus. & Prof. Code, Section 5200 *et seq.*). Naegele and the Band (by amicus curiae brief) argued that this was a misinterpretation of the federal law and that the phrase "public lands or reservations of the United States" was not intended to include Indian reservations, as found by the Interior Board of Indian Appeals, *supra*, *Appeal of Morango Band*. The California Supreme Court considered the board's interpretation of the HBA "debatable," but found it unnecessary to resolve that issue because *"it does not follow that Congress has authorized state enforcement of the act on such reservations."* After a review of the legislative history of the HBA, the DOI Solicitor's opinion in 1970, the Court of Appeals for the Ninth Circuit decision in *Ryan Outdoor Advertising, Inc., supra,* and recent precedents finding state regulation on federal property to be permitted only "when and to the extent that there is 'a clear congressional mandate,'" the California Supreme Court "discern[ed] no such explicit mandate in the [HBA]," for state regulation of outdoor advertising on Indian reservations, citing *State of Washington v. Environmental Protection Agency* (9th Cir. 1985) 752 F.2d 1465.[123] (Emphasis added.)

The California Supreme Court noted that the HBA contemplated state use of zoning and eminent domain, but that tribally owned Indian reservation land was not subject to state eminent domain,[124] and that states were not authorized to enforce their land-use regulations on Indian reservations.[125] The court further noted that the Supreme Court had held that while Congress can authorize suits against Indian nations, a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.[126] The court went on to hold:

> It appears logically imperative that, had Congress intended the states to enforce the provisions of the Highway Beautification Act against nonconforming advertising displays located on Indian tribal lands, it would have empowered the relevant state authorities to condemn reservation lands, to regulate tribal land use, and to sue Indian tribes. No such authorization can be found in the Highway Beautification Act. We therefore conclude that, even if Congress intended the outdoor advertising standards of the [HBA] to apply on Indian reservations, it did not intend that these standards be enforced through assertion of state power. *Thus, we reject the Department's argument that the [HBA] authorizes state regulation of outdoor advertising on Indian reservation lands...* In our opinion, Congress may have intended the act's provisions to apply on Indian reservations. But if so, it reserved to federal authorities the responsibility for enforcing the act's provisions upon federal lands and reservations. For this reason, *we conclude that the state's regulatory authority in this area is preempted by the operation of federal law and the judgment in favor of the Department must be reversed.*[127] (Emphasis supplied.)

Following the United States Supreme Court's denial of certiorari in *People v. Naegele,* the FHWA Chief Counsel, in a March 7, 1986, memorandum to the Federal Highway Administrator, stated that "[a]lthough we do not agree that the [HBA] is preemptive, the FHWA has long recognized that the requirement in 23 U.S.C.

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[120] 496 U.S. 373, 390 (1976).

[121] *Id.* at 691-92.

[122] 38 Cal. 3d 509, 213 Cal. Rptr. 247, 698 P.2d 150 (1985).

[123] *Id.* at 519 and n.5.

[124] *Id.*, citing Minnesota v. United States (1939) 305 U.S. 382, 59 S. Ct. 292, 83 L. Ed. 235; United States v. 10.69 Acres of Land (9th Cir. 1970) 425 F.2d 317.

[125] *Id.*, citing Santa Rosa Band of Indians v. Kings County (9th Cir. 1975) 532 F.2d 655, *cert. denied* (1977) 429 U.S. 1038, 97 S. Ct. 731, 50 L. Ed. 2d 748.

[126] *Id.*, citing Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106.

[127] *Id.* at 520-522.

131(h) that outdoor advertising on public lands and reservations be controlled was unclear with respect to enforcement." He advised that the California decision

> *is consistent with the approach taken in the Department's proposed legislative changes to the HBA under which Section 119 of the Surface Transportation Reauthorization Act of 1986, H.R. 4144, would amend section 131(h) to vest authority to control outdoor advertising on public lands and reservations, expressly including Indian lands and reservations, in the Federal agency with jurisdiction over those lands.*

He further advised that the bill "would require each agency with such responsibilities to promulgate regulations regarding the control of advertising within one year of enactment." (Emphasis added.)

The Senate of the 99th Congress voted 99-0 to adopt S. 2405, the Senate version of the Federal-Aid Highway Act of 1986, which contained a highway beautification reform provision. While this provision did not become law, it was offered again in the 100th Congress as an amendment to S. 387. The Senate Committee on Environment and Public Works failed by a tie vote of 8-8 to agree to the amendment, and P.L. 100-17, 101 Stat. 132, the Surface Transportation and Uniform Relocation Assistance Act of 1987, became law without it. Subsection (a)(6) of that rejected bill would have amended Section 131(h) of Title 23 by clarifying that the federal agencies with jurisdiction or responsibility for lands and reservations owned or controlled by the United States are responsible for controlling outdoor advertising on their respective lands. Senate Report 100-4, accompanying S. 387, contained the views of Senators Stafford, Chafee, and Moynihan (sponsors of the HBA reform amendment), who made the following observation:[128]

> Last year the California Supreme Court [*People v. Naegele*] ruled that the State of California did not have jurisdiction to enforce the State's billboard laws on Indian reservations because section 131(h) of title 23 preempted State authority. *The Court was correct in finding it would be inappropriate to require a State to control billboard activities on lands or reservations under Federal jurisdiction or control.* Paragraph 131(h)(2) is added to ensure that billboard practices on federal lands and reservations are controlled by the appropriate Federal agency and that the controls are consistent with the laws of the state in which such land is located...Paragraph 131(h)(2) requires each federal agency affected to adopt billboard regulations that are consistent with the stricter of the requirements of section 131 of title 23 or the state in which the land is located. These regulations must be developed in consultation with the Secretary and promulgated within one year of the effective date of this Act.

In an October 4, 1995, memorandum the FHWA Office of Chief Counsel once again addressed the issue of state regulation of outdoor advertising on Indian reservations pursuant to the HBA. The memorandum acknowledged that since 1976, FHWA had taken the general position that States cannot be penalized for failure to enforce the HBA on federal Indian reservations because they lack authority to condemn Indian reservation land. The opinion was limited to regulation of outdoor advertising on land owned by non-Indians within Indian reservation land, and based upon *Brendale v. Confederated Tribes and Bands of Yakima Nation, supra*, concluded as follows:

> [A]s a general rule the States have the legal authority to enforce the HBA on land within an Indian Reservation owned in fee by non-Indians. The actual extent of their enforcement will vary due to the facts of the situation, but the States have to make a good faith effort to maintain effective control of outdoor advertising on such land to be in compliance with the HBA. If a State believes that it does not have the legal authority to enforce zoning on land within an Indian Reservation owned in fee by non-Indians...an opinion from the State Attorney General on the question [would be required].

B. Preemption of State Sign Control by the Creation of "Trust Land" Status

1. Background

Even though Indian tribes have been recognized as domestic dependent nations possessing the power to govern their members and territory, at the close of the nineteenth century, Congress adopted a policy of dismantling Indian tribal governments, allotting parcels of tribal land to individual members, and conveying "surplus" tribal land to non-Indians.[129] The purpose of this policy was to assimilate Indians into the non-Indian culture with the expectation that they would become farmers or ranchers.[130] However, the result was a loss of Indian land through tax forfeiture or otherwise. As a result, between 1887 and 1934, 60 percent of the tribal land base (138 million acres) had passed through individual Indian allotment status to non-Indian fee ownership.[131] This large-scale transfer of Indian lands undermined tribal communities and impoverished the tribes and their members.[132] The congressional response to this disastrous situation was enactment of the Indian Reorganization Act of 1934, 25 U.S.C. 461-479 (IRA), to stem the loss of Indian lands and to assist Indians in acquiring land adequate for self-support.[133] The "overriding purpose" of the IRA was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government,

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[128] 100th Cong., 1st Sess., S. REP. 100-4 (to accompany S. 387), at 116 (Jan. 27, 1987).[pp. 52, 53] U.S.C.C.A.N. vol. 2, 100th Congress, 1st Sess., 1987, Legis. Hist. p. 116.

[129] Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (The "Dawes Act"). *See also* JONES, *id.*, n.7, at 5.

[130] *See* County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 253-154 (1992); Shangreau v. Babbitt, 68 F.3d 208 (8th Cir. 1995).

[131] DESKBOOK, *supra*, n.16, at 19.

[132] HANDBOOK, *supra*, n.20, at 135-138.

[133] *See* Chase v. McMasters, 573 F.2d 1011, 1016 (8th Cir.), *cert. denied*, 439 U.S. 965, 99 S. Ct. 453, 58 L. Ed. 2d 423 (1978).

both politically and economically."[134] Congress sought "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."[135]

2. The Indian Reorganization Act of 1934, 25 U.S.C. 461, et seq.

a. General.—The IRA rejected assimilation as a goal and established a new goal of Indian self-determination. Congress recognized that one of the keys to such self-determination was the ability of the Indian tribes to retain, protect, and supplement their land base. Accordingly, the IRA expressly discontinued the allotment program,[136] indefinitely extended the periods of trust status of Indian trust lands,[137] authorized the Secretary of the Interior to restore unallotted surplus reservation lands to Indian ownership,[138] limited the sale or transfer of restricted Indian land,[139] and specifically addressed the problem of lost Indian land by authorizing the secretary to acquire land in trust "for the purpose of providing land for Indians."[140] In enacting Section 465, Congress, in providing that the legal condition would be trust status, doubtlessly intended and understood that Indians would be able to use the land free from state and local regulation or interference as well as free from taxation.[141]

b. Section 5 of the IRA, 25 U.S.C. 465, Provides, Inter Alia, *as Follows.*—

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> ....
>
> Title to any lands or rights acquired...shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

The DOI issued regulations implementing Section 465 in 1980, providing procedures for the Secretary's resolution of requests for placing Indian-owned land in trust status.[142] These regulations did not require the DOI to notify affected state and local governments of proposed acquisitions, nor provide for any consultation process, although internal procedures suggested such notification/contact. In June 1995, DOI revised the regulations to identify additional factors bearing on off-reservation acquisitions,[143] to provide for mandatory notice to affected state and local governments of proposed acquisitions and an opportunity for response,[144] and to provide a consultation process to resolve regulatory disputes between Indian tribes and states.[145]

In 1996, in response to the Court of Appeals for the Eighth Circuit decision in *State of South Dakota v. U.S. Department of the Interior*,[146] discussed *infra*, the DOI published a new regulation providing that "the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust," and that "the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published."[147]

c. DOI Land Acquisition Regulations: 25 C.F.R. Part 151.—(1) General.—The regulations in Part 151 set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. They do not cover acquisition of land by individual Indians and tribes in fee simple even though such land may, by operation of law, be held in restricted status following acquisition.[148] Under Section 151.3 of the regulations, and subject to the acts of Congress authorizing land acquisitions, land may be acquired for a *tribe* in trust status

> (a) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
>
> (b) when the tribe already owns an interest in the land or,

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[134] Morton v. Mancari, 417 U.S. 535, 542 (1974).

[135] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934); *see also* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 n.5 (1987); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335 (1983); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 168 (1980).

[136] IRA § 1, 25 U.S.C. 461.

[137] IRA § 2, 25 U.S.C. 462.

[138] IRA § 3, 25 U.S.C. 463.

[139] IRA § 4, 25 U.S.C. 464.

[140] IRA § 5, 25 U.S.C. 465.

[141] Chase v. McMasters, 573 F.2d 1011 (1978), *cert. denied*, 99 S. Ct. 453, 439 U.S. 965, 58 L. Ed. 2d 423.

[142] Originally codified at 25 C.F.R. Part 120a (1981), but recodified in 1982 at 25 C.F.R. Part 151 (*See* 47 Fed. Reg. 13,326-27 (1982)).

[143] 25 C.F.R. 151.10.

[144] 25 C.F.R. 151.11(d).

[145] *See* 60 Fed. Reg. 32,874-877 (1995).

[146] 69 F.3d 878 (8th Cir. 1995).

[147] 25 C.F.R. 151.12. *See* 61 Fed. Reg. 18082 (1996). The preamble states that it is being adopted "[i]n response to a recent court decision, State of South Dakota v. U.S. Department of the Interior, 69 F.3d 878 (8th cir. 1995)," and that the procedure set forth "permits judicial review before transfer of title to the United States." Both the DOI and the U.S. Department of Justice now take the position that judicial review of an IRA land trust acquisition may be obtained by filing suit within the 30-day waiting period, although action taken after the United States formally acquires title will continue to be barred by the Quiet Title Act, 28 U.S.C. 2409a, which waives immunity from suit for suits to quiet title, but not to trust or restricted Indian lands. 28 U.S.C. 2409a(a).

[148] 25 C.F.R. 151.1.

(c) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing. (Emphasis supplied.)

Land may be acquired for an *individual Indian* in trust status (a) when the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or (b) when the land is already in trust or restricted status.

Requests for the Secretary's approval of trust status shall be filed in writing. The request need not be in any special form but must set out the identity of the parties, a description of the land, and other information showing that the trust acquisition comes within the regulations.[149]

(2) General Criteria Used to Evaluate Requests (Sections 151.10 and 151.11)—For both *on-reservation acquisitions* and *off-reservation* acquisitions (nongaming), which are not mandated, the Secretary shall consider the following requirements in evaluating requests for trust status:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(e) If the land to be acquired is in unrestricted fee status, *the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;*

(f) *Jurisdictional problems and potential conflicts of land use which may arise;* and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with...National Environmental Policy Act Revised Implementing Procedures, and...Hazardous Substances Determinations...(Emphasis supplied.)

(3) Additional Criteria To Be Considered.—For on-reservation acquisitions: If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs.[150]

For off-reservation acquisitions: The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: *As the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised by state and local governments concerning impacts on regulatory jurisdiction, real property taxes, and special assessments.*[151] Where land is being acquired for business purposes, the tribe shall provide a plan that specifies the anticipated economic benefits associated with the proposed use.[152]

(4) Notice to State and Local Governments.—Both on-reservation and off-reservation acquisition requests trigger notification requirements to state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice is to inform these governments of the 30-day written comment opportunity relative to "potential impacts on regulatory jurisdiction, real property taxes and special assessments."[153]

Prior to acquiring title in the United States as to trust status land, the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area, a notice of his/her decision to take land into trust "no sooner than 30 days after notice is published."[154]

d. Recent Litigation Challenging Actions Under 25 U.S.C. 465.—(1) *State of South Dakota v. United States Department of the Interior*, 69 F.3d 878 (8th Cir. 1995), *cert. granted*, judgment vacated, 65 LW 3291, ___U.S. ____, 136 L. Ed. 2d 205, 117 S. Ct. 286 (1996) (remanded to Eighth Circuit with instructions to vacate judgment of district court and remand to Secretary of Interior for reconsideration of administrative decision). This case involves judicial review, under the Administrative Procedure Act (APA), of a decision by the Assistant Secretary for Indian Affairs approving an application under 25 U.S.C. 465 for acquisition of 91 acres of land in trust for the Lower Brule Tribe of Sioux Indians, to create an industrial park. The land is owned in fee by the tribe and is located 7 miles from the tribe's reservation, adjacent to an Interstate highway and partially within the City of Oacoma, South Dakota. The application, filed in March 1990, was followed by written protest from the State and the City (hereinafter plaintiffs). Plaintiffs then appealed to the Interior Board of Indian Affairs (IBIA) when notified in March 1991 that the application would be approved. Because the application had been approved in December 1990, the IBIA dismissed for want of jurisdiction.[155] Plaintiffs filed suit against the DOI in U.S. District Court seeking review under the APA, 5 U.S.C. 701-706, as parties aggrieved by the acquisition because it deprived them of tax revenues and placed the land beyond their regulatory powers.[156]

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[149] 25 C.F.R. 151.9.

[150] 25 C.F.R. 151.10(d).

[151] 25 C.F.R. 151.11(b) and (d).

[152] 25 C.F.R. 151.11(c).

[153] 25 C.F.R. 151.10 and 151.11(d).

[154] 25 C.F.R. 151.12.

[155] State of South Dakota & Town of Oacoma v. Aberden Area Director, BIA, 22 I.B.I.A. 126 (1992).

[156] State of South Dakota v. U.S. Dept. Of Interior, 69 F.3d 878 (8th Cir. 1995), where at 69 F.3d 883-884 the Court notes that the South Dakota Attorney General asked the Secretary of the Interior whether the City of Oacoma's ordinances, including its zoning ordinances, would be enforceable against

Plaintiffs contended the acquisition was invalid because Section 465 is an *unconstitutional delegation of legislative power*. In addition, *inter alia*, plaintiffs contended that the tribe planned to develop the land as a gaming casino and the Secretary, aware of these intentions, failed to comply with the approval procedures of the Indian Gaming Regulatory Act, 25 U.S.C. 2701-2721.

In November 1992, the DOI took title to the lands in trust for the tribe and in January 1994, moved to dismiss the suit on the grounds that a Section 465 acquisition is action "committed to agency discretion by law" and not subject to judicial review.[157] The district court, in dismissing the action, concluded that Section 465 was not an unconstitutional delegation of legislative power, and, without reaching the "committed to agency discretion" issue, held, *sua sponte*, that it had no jurisdiction because the Quiet Title Act (QTA), 28 U.S.C. 2409a, which permits the United States to be sued to resolve real property disputes, "does not apply to trust or restricted Indian lands."

On appeal to the U.S. Court of Appeals for the Eighth Circuit the court reversed and remanded, holding that *"the total absence of procurement principles and safeguards in section 465 violates the nondelegation doctrine"* rendering that statute unconstitutional, and *"the Secretary had no authority to acquire the lands in question in trust for the Tribe."*[158] The United States petitioned for *certiorari,* abandoning the government's position that decisions under Section 465 were not reviewable under the APA and advising the U.S. Supreme Court as follows:

> The Department of Interior has accordingly determined (and the Department of Justice agrees) that a decision to acquire land in trust under Section 5 of the IRA is subject to judicial review under the APA, see 5 U.S.C. 706(2), taking into account the factors identified in the Secretary's regulations as relevant in making such decisions.
>
> In conjunction with that determination, the Department of the Interior has promulgated a procedural regulation to provide an opportunity for judicial review before the land is actually taken into trust. *See* Land Acquisitions (Nongaming), 61 Fed. Reg. 18,082 (1996) (to be codified at 25 C.F.R. 151.12)...That regulation states that the secretary must provide public notice of a final decision to acquire land in trust at least 30 days before the formal transfer of title to the United States...A person who objects to the Secretary's land acquisition decision will then have an opportunity during that period to file a judicial challenge before the formal conveyance of the property to the United States in trust. Once the property is actually conveyed to the United States, *however, a suit seeking to disturb title would be barred, because the QTA, 28 U.S.C. 2409a, "does not apply to trust or restricted Indian lands." 28 U.S.C. 2409(a). See United States v. Mottaz*, 476 U.S. 8344 (1986); *Block v. North Dakota*, 461 U.S. 273, 284-285 (1983).[159] (Emphasis supplied.)

The Solicitor General concluded the government's petition for *certiorari* by suggesting that the judgment of the court of appeals be vacated, and the case remanded to the court of appeals with instructions to vacate the judgment of the district court and remand the matter to the Secretary of the Interior for reconsideration of his administrative decision. *He took the position that "[v]acatur of the district court's judgment and remand would in turn be subject to judicial review under the APA before title passed to the United States" and "would obviate any need to consider" the QTA preclusion question.*[160]

The Supreme Court granted *certiorari* and, following the suggestion of the Solicitor General, vacated the judgment of the U. S. Court of Appeals for the Eighth Circuit and remanded with instructions to vacate the judgment of the United States District Court and remand the matter to the Secretary of the Interior for reconsideration of his administrative decision. Justice Scalia, with whom Justice O'Connor and Justice Thomas joined, issued a scathing dissenting opinion. Justice Scalia stated, *inter alia*, that:

> The decision today—to grant, vacate, and remand in light of the Government's changed position—is both unprecedented and inexplicable. This court has in recent years occasionally entered a "GVR" in light of a position newly taken by the Solicitor General *where the United States was the prevailing party below* [citations omitted]. But we have never before GVR'd simply because the Government, having *lost* below, wishes to try out a new legal position. The unfairness of such a practice...is obvious.
>
> ....
>
> What makes today's action inexplicable as well as unprecedented is the fact that the government's change of legal position *does not even purport to be applicable to the present case.* The Government now concedes only that APA review is available before the secretary's taking of title under the IRA; it has not altered its view that once title has passed to the United States APA review is precluded by the QTA...Since in this case title has passed, the Government's position in the present litigation remains what it was: Judicial review is unavailable.[161]

(2) *Shivwits Band of Paiute Indians and Kunz Outdoor Advertising v. State of Utah, Utah Department of Transportation and St. George City,* No. 2:95CV 1025S (D. Utah, filed Nov. 17, 1995). In 1993 Kunz Outdoor

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the property if it was taken in trust. The Secretary's field solicitor responded:

> If the parcel is not declared to be part of the reservation, then ordinances which are civil or regulatory in nature and which do not affect the proprietary interest of the United States, acquired by virtue of acquisition of title to the land, may apply. *See State of Florida, supra;* Mescalero Apache Tribe v. Jones [411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973)].

[157] *See* 5 U.S.C. 701(a)(2); Heckler v. Chaney, 470 U.S. 821, 828-30, 105 S. Ct. 1649, 1654-55, 84 L. Ed. 2d 714 (1985).

[158] *Id.* at 884-885.

[159] Petition For A Writ of Certiorari, United States Department of the Interior, et al., Petitioners v. State of South Dakota and City of Oacoma, No. 95-1956, in the Supreme Court of the United States (June 1996), at p. 7.

[160] *Id.* at 26-27.

[161] 65 LW 3291-92.

Advertising proposed to the Shivwits Band of Paiute Indians, through the field office of the BIA in St. George, Utah, a business venture by which property along Interstate 15 would be purchased by the band, using money furnished by Kunz. The property would then be leased to Kunz on a long-term basis for placement of outdoor advertising signs. The lease payments would be used to repay the loan. The Shivwits Band Council accepted the proposal and on August 9, 1994, purchased two parcels, using money furnished by Kunz. At the same time the band conveyed the property to the United States of America in trust for the Shivwits Band, but later submitted, on May 9, 1995, a formal request that the property be accepted in trust by the BIA. The BIA accepted the property in trust status on August 31, 1995. The BIA prepared an Environmental Assessment (EA) to address the lease and issued a Finding of No Significant Impact (FONSI) on March 31, 1995. No formal publication of the EA was made and no draft EA was issued for public comment, nor was there any effort to notify the public, including the state and city, of its contents. The EA did not reveal that the lands, by being placed in trust, would thereby avoid the application of state and city laws relating to sign control. On September 11, 1995, the Secretary of DOI approved the five 20-year leases. Under terms of the leases, five large (14 feet by 48 feet) advertising billboards were to be erected on the property. Kunz has two similar transactions pending with other bands of the Paiute Indians.

While there were contacts made in the summer of 1994 between BIA and the city relative to what was planned, the facts are in dispute as to what was said and whether written notice was addressed to the Mayor. No notice of the proposed transaction was given to the State of Utah, and no effort was made to notify or involve members of the public in the decision-making process.

This litigation commenced on November 17, 1995, in a complaint filed by Shivwits Band of Paiute Indians (Band), and Kunz & Co., (Kunz), a California corporation, seeking declaratory judgment of plaintiff's rights under 25 U.S.C. 465, and 25 C.F.R. Part 151. Plaintiffs sought judgment declaring that two parcels of real property in question were "therefore exempt from any regulation of outdoor advertising under city or state ordinances, statutes or laws." In addition, plaintiffs moved for a temporary restraining order restraining the city and its officers "from imposing any stop work order, or otherwise interfering with or hindering the construction of [five outdoor advertising structures with ten billboard faces]...pending final resolution of this action." Plaintiffs also sought a preliminary injunction against the state of Utah and the Utah Department of Transportation, preventing interference with the construction of the billboard structures.

By answer, counterclaim, and third-party claim against the Secretary of DOI et al., the state of Utah, Utah Department of Transportation, and St. George City, Utah, (hereinafter "Defendants") alleged:

(i) The unconstitutionality of 25 U.S.C. 465;

(ii) Violations of procedural requirements of 25 C.F.R. 151 and 25 C.F.R. 2.7;

(iii) Violation of state law implementing the federal Highway Beautification Act of 1965, 23 U.S.C. 131;

(iv) Violation of a city ordinance governing signs;

(v) Violation of the Paiute Indian Tribe of Utah Restoration Act (PIRA), 25 U.S.C. 766(d); and

(vi) Violation of the National Environmental Policy Act (NEPA) in connection with acceptance of the lands in trust and in approval of the leases between the Band and Kunz.

On December 8, 1995, the district court issued a bench ruling granting the plaintiffs injunctive relief, enjoining the city from imposing its stop-work order, and enjoining the state and city from otherwise interfering with the construction of the billboards, subject to the condition that Kunz must not travel on or use an existing BLM roadway connecting the two parcels unless and until the BLM completes an environmental assessment and grants a right-of-way permit.

In ruling on the merits of the case, the district court judge, addressing the constitutionality of 25 U.S.C. 465 and 25 C.F.R. 1.4, expressed reservations about the Eighth Circuit's decision in *State of South Dakota v. United States Department of Interior.* The court could not conclude that there was a showing of substantial likelihood of the state and city prevailing on the merits. He then found that the regulations in 25 C.F.R. 151.1–151.14, in effect at the time in question, did not specifically require notice and the new Section 151.11(d), which became effective in July 1995, almost a year after the application was submitted, "may not be applied retroactively." Next the court found that 25 U.S.C 766(d), the PIRA, did not apply to current land acquisitions by the Band, but was part of the plan under which the Band enlarged its lands in the early 1980s. It then concluded that state and local laws were not enforceable on the subject property because they were Indian country by reason of having been placed in federal trust status, and that by enactment of Section 465 and regulation Sections 1.4 and Part 151, Congress had effectively preempted the field, intending federal law to apply to property acquired in trust for Indian tribes, and leaving no room or provision for the application of state and local law. In addition, it held that it did not appear that the HBA applied, citing the appeal of the *Morongo Band of Mission Indians v. Area Director, supra.* Finally, the opinion concluded that plaintiffs had complied with the requirements of both NEPA and the Endangered Species Act.

Judge Sam made the following pertinent findings, *inter alia*, in support of awarding injunctive relief to the plaintiffs:

> First,...the Band will be irreparably harmed without injunctive relief because its opportunity to improve its economic and financial status, one of the purposes behind trust land acquisition, will be frustrated, thus undermining congressional intent. Moreover, the application of

local regulation will unlawfully infringe upon the Band's tribal sovereignty.

Second, the threat of irreparable injury to Kunz and the Band outweighs the threat of aesthetic harm to the state and the city in the form of five additional billboards in an area where there are already several billboards of similar size.

Third, no public interest or policy would be jeopardized by the additional billboards because commercial development, including several similar billboards, already exists in the general area of the subject property.

Fourth,...Kunz and the Band have shown a substantial likelihood of prevailing on the merits in view of the U.S. Supreme Court and Tenth Circuit law recognizing that property held in trust is Indian country, exempt from state regulation. Pursuant to 25 U.S.C. Section 465 and, more particularly, 25 C.F.R. Section 1.4 promulgated thereunder, neither the state nor the city may regulate property held in trust for the benefit of the Band.

In March 1997, the plaintiffs and defendants filed motions for summary judgment, and the United States filed a motion to dismiss or for summary judgment. The case has been submitted to the U.S. District Court on these pleadings, and the court still had them under advisement in November 1997. The government has raised jurisdictional issues, contending that the court lacks jurisdiction because there is no waiver of sovereign immunity. It contends that the APA does not waive sovereign immunity in this case because of the Indian lands exception to the QTA, 28 U.S.C. 2409a, discussed in the South Dakota litigation, *supra*.

The state of Utah, among other arguments, contends that the involvement of the Shivwits Band solely to validate the billboards constitutes *"marketing an exemption,"* a practice condemned in *State of Washington v. Confederated Tribes of the Colville Indian Reservation, supra*. It argues that if the tribe and the sign company succeed in avoiding enforcement of the applicable federal, state, and local laws restricting the placement of billboards by the *"contrivance employed here, a giant loophole will have been created that has the potential of completely undermining the Highway Beautification Act,"* opening the door to numerous activities that are contrary to state and local law, and illustrating the danger of unrestricted delegation of legislative authority to an administrative agency.

(3) City of Fife v. George (No. C96-6008 FDB, W.D. Wash., filed December 6. 1996) This case involves the placement of a sign 20 feet by 60 feet, rising approximately 80 feet above the ground, on property situated within the boundaries of the city of Fife, Washington, and the Puyallup Indian Reservation (the city is encompassed within the reservation). The property is owned in fee by defendant Loraine Ann George, a tribal member. On January 24, 1996, the BIA notified the Puyallup Tribe of Indians of approval of the transfer of defendant George's property from fee to trust status. In February 1996, the tribe, also a defendant in the case, issued George a permit to erect a large sign, thereby, allegedly asserting jurisdiction and governmental authority over the property. However, the permit was issued "subject to the acceptance and approval of the deed and lease by the [BIA]," or trust status. Thus, at the time the permit was issued, the subject parcel was non-trust property. Thereafter, Ms. George, by and through the BIA, entered into a lease agreement with 3M Media, subject to the land being taken in trust. On September 30, 1996, the BIA agency superintendent determined that the property would be accepted into trust and approved the lease with 3M. On November 6, 1996, the BIA took the subject property into trust for the benefit of Ms. George. However, the BIA decision was appealed by an interested tribal member on December 3, 1996. Plaintiff contends that if this appeal was timely under 25 C.F.R. 2.6(a), the BIA decision would not be final.

Several months after issuing the sign permit to defendant George, the tribe enacted a sign code that restricted the placement of signs on the Puyallup reservation, including a requirement that signs must be placed 2,000 feet apart.

The 3M sign, if erected, would be approximately 300 feet from an existing sign and thus in violation of the Puyallup tribal sign code. However, if the sign was "grandfathered" by reason of having been permitted prior to the sign code enactment, it would not be subject to the sign code. In addition, placement of the sign violates the Fife Municipal Code on signs. The plaintiff city alleges that the acts of the Puyallup Tribe of Indians in issuing the sign permit over non-trust land are in violation of the Settlement Agreement of 1988 and P.L. 101-41, 103 Stat. 83, between the Puyallup Tribe of Indians, local governments in Pierce County, the state of Washington, the United States of America, and certain private property owners. Under this agreement, the tribe agreed "not to assert or attempt to assert any type of jurisdiction and governmental authority, existing or potential...as to (a) non-trust lands; (b) any activity on non-trust lands; (c) any non-Indian individual or business on non-trust lands." Settlement Agreement, par. VIII(a)(1)(b).

The city of Fife filed suit on December 6, 1996, asking that the tribe be declared to be in violation of the Settlement Agreement of 1988, that the tribe be enjoined from issuing sign permits over non-trust property within the city of Fife, that the sign permit issued to defendant George be declared null and void and in violation of the 1988 agreement, and that an injunction be issued prohibiting placement of a sign on the subject property. The City's motion for temporary restraining order to restrain construction of the sign was denied on December 17, 1996.

On March 4, 1997, the National Advertising Company, doing business as 3M Media, was granted leave to intervene as a party defendant. The court dismissed Loraine Ann George and the BIA from the case. Pierce County, Washington, a signatory to the 1988 Settlement Agreement, was granted leave to intervene and filed its complaint in intervention on June 24, 1997. The county identifies the "core dispute" as involving interpretation of the 1988 agreement, paragraph

VIII(a)(1)(b), which was raised in the city's complaint. The county prays for the following relief:

> (i) judgment declaring the February 1966 permit to have been issued in violation of the 1988 Settlement Agreement;
>
> (ii) judgment declaring that the Tribe, under the Agreement, has forever relinquished any authority to issue any sign permit or other land use permit, conditional or otherwise, concerning any property not then in trust status.

It is noteworthy that this litigation does not raise any issue under the HBA or under the Washington state laws implementing the HBA. However, the record in the case includes an affidavit by one of the attorneys for the National Advertising Company, attaching as an exhibit (Exhibit D) a true and correct copy of comments regarding the FONSI issued under NEPA for the Fee-to-Trust Conversion, including the BIA response to those comments. Comments on the FONSI were provided by all four of the affected local jurisdictions: Pierce County, the city of Tacoma, the city of Fife and the city of Milton. The summary of comments and the BIA response are attached as Attachment A. In response to comments by the cities of Tacoma and Milton that the prospective sign board would violate the HBA, "which would apply to Indian trust land," the BIA responded:

> The Board of Indian Appeals has ruled that the Act does not apply to trust lands on Indian reservation. (Administrative Appeal of the Morongo Band of Mission Indians, [etc.] 7 IBIA 229, 86 I.D. 680, 1979 WL 21375). A recent U.S. District...court case (Case No. 2 95 CV1025S (D. Utah February 7, 1996) concludes that the Federal act does not apply to property taken into Trust for Indians.

Comments by Tacoma and by Pierce County charge that the BIA has failed to examine the cumulative impact of the proliferation and concentration of billboards in the immediate area and has "[i]nadequately address[ed] the frenzy of construction of outdoor signs, resulting from other approved fee-to-trust conversions."

The BIA responded that its study/report concluded that the cumulative impact was not significant and that *"[t]he on-site and off-site signage found in the vicinity, do not have any different visual impact" from existing signs in the I-5 corridor.* BIA further responded that *"[t]he number of outdoor signs which the Tribe has approved and proposed, is only a small fraction of the total number of billboards and other signage found in the vicinity on other local jurisdictions."*

e. State/Local Government Opposition to BIA Fee-to-Trust Acquisitions.—The situations described at the outset of this report and the factual circumstances of the three cases just reviewed reflect the frustration of state and local governments at having a patchwork of regulatory islands immune from state and local land-use control, power of eminent domain, and taxing authority, by reason of BIA fee-to-trust acquisitions. The frustration is magnified when, as in the *Shivwits Band* case, there is no advance notice and little or no opportunity for comment by the affected jurisdictional agencies on the proposed acquisition. The frustration is deepened when, as in the *South Dakota* case, even though input was given, there is no right to judicial review of the federal decision. These problems have been corrected, in part, by the promulgation of new regulations in 25 C.F.R. Part 151, providing not only mandatory notice and opportunity for comment and consultation, but also the right of judicial review under the APA. However, as the *Fife v. Puyallup Tribe* case demonstrates, thus far, even with notice and opportunity for comment, state and local government concerns may not have been given sufficient weight. The proliferation of signs around Tacoma and Pierce County has led to the perception that BIA is simply a "rubber stamp" for fee-to-trust applications, paying only lip service to the criteria set forth in the regulation. It is hoped that this perception will change based upon future BIA actions. In addition, where, as in that case, the protest/appeal of the final BIA decision is considered to be untimely and the property acquires trust status, the QTA, 28 U.S.C. 2409, as asserted by the Solicitor General in the South Dakota case, *supra*, preserves sovereign immunity, foreclosing review of the BIA decision.

f. State/Local Government Input to Proposed Part 151 Acquisitions/Leases.—The "particularized inquiry" into the nature of the state, federal, and tribal interests, called for in *Bracker,* is a balancing analysis that is very fact specific. State and local governments must provide specific factual input to the BIA during the Part 151 process because there must be a strong state/local interest established to overcome the economic interests expected to be shown by the applying tribe. If possible, a showing should be made that the tribal contribution to a proposed enterprise is *de minimis* (*New Mexico v. Mescalero Apache Tribe,* citing *Washington v. Confederated Tribes*). It is also important to demonstrate that the tribe is "marketing an exemption," if that is the state's belief and contention.

III. SUMMARY

A. The Problem Restated

Western states are beginning to experience a proliferation of unregulated outdoor advertising signs along their highways, as a result of signs being erected on Indian trust lands both on and off Indian reservations. Sign companies seem to have found a way to circumvent state and local sign control laws, including those implementing the HBA, by cooperating with Indian tribes and the BIA to get desired sign sites taken into fee-to-trust status, where they become "Indian country," leased to the sign company and no longer subject to state/local law.[162] BIA does not currently regulate outdoor advertising, nor does it require Indian tribes to do so. While some tribes have adopted comprehensive zoning ordinances, they are not required to be compati-

[162] *See* 25 C.F.R. 1.4.

ble with state and local laws, or to reflect the standards of the HBA. The state and local governments being impacted by these unregulated signs are frustrated because they are required to comply with a federal law, the HBA, under threat of a 10 percent penalty, but the BIA and Indian tribes have so far been spared any compliance with this 32-year-old law. There is a need for clarification as to the applicability of the HBA to signs erected on Indian trust lands.

B. Federal Law Relative to Jurisdiction over Indians and Indian Lands

All authority over Indians, Indian tribes, and Indian land lies with the United States Congress. Tribal sovereignty is dependent on, and subordinate to, the federal government, not the states.[163] While there is a presumption against state jurisdiction in Indian country, state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided, and otherwise in very limited circumstances, *id.* Further, state jurisdiction is preempted "if it interferes or is incompatible with federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[164] However, express congressional preemption is not required.[165]

The court should make a particularized inquiry into the nature of the state, federal, and tribal interests at stake "in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."[166] There is no rigid rule by which to resolve the question of whether a particular state law may be applied to an Indian reservation or to tribal members, which allows for consideration of the state's legitimate interests.[167] The classification of land as "Indian country" is the benchmark for allocating federal, tribal, and state authority with respect to Indians and Indian lands.[168] Whether land is Indian country does not turn upon whether it is denominated "trust land" or "reservation," but whether it has been set apart for use of Indians under the superintendence of the government.[169]

The IRA, in Section 5, 25 U.S.C. 465, authorizes the Secretary of the Interior to acquire any interest in lands, within or without existing reservations, for the benefit of Indians and Indian tribes. Land taken under this trust status action becomes "Indian country," and within Indian country the federal and tribal governments have exclusive jurisdiction over the conduct of Indians and interests in Indian property.[170] There is authority holding that 25 U.S.C. 465 and the regulations at 25 C.F.R. 1.4 preempt local regulation.[171] The U.S. District Court in the *Shivwits Band* case, *supra*, in denying a temporary restraining order to the state and local government, held that by enacting Section 465 with implementing regulations at 25 C.F.R 1.4, Congress effectively preempted the field, intending federal law to apply to trust property and leaving no room or provision for the application of state and local law.

C. Control of Outdoor Advertising on Indian Lands under HBA

The HBA in 23 U.S.C. 131(h) requires "all public lands or reservations of the United States" to have "effective control" of outdoor advertising, in accordance with the Act. The failure of Congress to expressly cover Indian reservations, and the lack of legislative history indicating such coverage, has left the Act open to varying interpretations by courts and administrative agencies as to whether Indian country is covered. Another problem of interpretation is what governmental entities have jurisdiction to enforce the Act on "public lands or reservations." The rule that laws of general applicability apply to all persons throughout the United States, including Indians and non-Indians in Indian country,[172] would appear not to apply because the HBA is structured so as to leave enforcement up to the states, using their inherent police power and eminent domain authority. However, federal case law does not permit states to use eminent domain on Indian reservations without express congressional authority, which is missing in the HBA. The BIA follows the ruling of the Board of Indian Appeals, which held in 1976 that Congress did not intend to include Indian reservations by the HBA, and that the states could not control outdoor advertising on Indian reservations without express authority. The California Supreme Court, while not agreeing that Indian reservations were not covered by the HBA, held in 1985 that the Act did not authorize state regulation of outdoor advertising on Indian reservations, and that any such regulatory authority was preempted by operation of federal law. The U.S. District Judge in *Shivwits Band*, *supra*, was of the opinion that the HBA does not apply to property taken in trust for Indian tribes, citing the IBIA decision in *Morongo Band of Mission Indians, supra*. FHWA, the federal agency with jurisdiction to implement the HBA, concluded in 1976 that failure of the Act to delegate either

[163] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980).

[164] *Id.* (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[165] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

[166] *Id.*, and New Mexico, *Id.*

[167] Rice v. Rehner, 463 U.S. 713 (1983).

[168] DeCoteau v. District Court, 420 U.S. 425 (1975).

[169] United States v. John, 437 U.S. 634 (1978).

[170] Oklahoma Tax Comm'n v. Citizen Bank Patawatomi Indian Tribe, 498 U.S. 505 (1991), citing Indian Country U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d 967 (10th Cir. 1987).

[171] Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1985).

[172] See Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116.

to the FHWA or DOI the explicit authority to implement the Act on Indian reservations resulted in nonapplicability to Indian reservations, due in part to the lack of delegation of state authority. Attempts to obtain control through DOI, using its general regulatory powers, proved unsuccessful. FHWA attempted to amend the HBA in 1986 to provide that "effective control" of outdoor advertising on Indian reservations would be a federal responsibility. Later, the United States Senate unanimously agreed to this approach in the 99th Congress (S. 2405), but Congress failed to make it law.

D. State Jurisdiction over Non-Indians in Indian Country

As noted in Section III.B., *supra*, there is a presumption against state jurisdiction in Indian country, and when on-reservation conduct involves only Indians, state law is generally inapplicable because the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. But the issues are more difficult when a state asserts authority over the conduct of non-Indians engaging in activity on the reservation. Clearly, there is no presumption of state jurisdiction simply because non-Indian conduct is at issue. As has been noted, in such cases the Supreme Court has established distinct analytical standards calling for "a particularized inquiry" into the nature of the state, federal, and tribal interests at stake to determine whether, in the specific context, the exercise of state authority would violate federal law.[173] It is during such particularized inquiry that the tests of "infringement" and "preemption" come into play.[174]

In regard to the "infringement" test, it was noted at Section I.B.3.c.(2) that there remain two basic tests for determining inherent sovereign power of a tribe to exercise 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 preemption of state sign control jurisdiction by creation of "trust land" status was discussed, *supra.*, at Section II.B, and at Section III.C. In the leading case on a state's attempt to enforce its sign code in Indian country, *People v. Naegele Outdoor Advertising Co. of California*, *supra*, the action was against the *non-Indian company*, challenging its *on-reservation conduct*, which was not in accord with the California statute. The California Supreme Court, *inter alia*, concluded that the state's regulatory authority was preempted by operation of federal law. In the pending *Shivwits Band* case, *supra*, the U.S. District Court, in its preliminary ruling on injunctive relief, held that the federal government had preempted the state and local regulation in Indian country by congressional enactment of 25 U.S.C. 465, and the BIA promulgation of 25 C.F.R. 1.4 and Part 151.

The more significant cases recognizing/rejecting state jurisdiction have involved taxation, hunting and fishing, gaming, liquor control, and zoning (see Section I.B.1.c., *supra*), with a substantial portion of the disputes arising in the area of taxation.[175] The most common taxing situations addressed by the cases involve state taxes on transactions between tribes or tribal members and nonmembers on Indian reservations. It was in such a tax case, *White Mountain Apache, supra*, that the Court established the "particularized inquiry," and in many subsequent cases the Supreme Court has conducted this particularized inquiry to determine whether a state law could be enforced in Indian country. In two such cases, *Moe v. Confederated Salish and Kootenai Tribes*[176] and *Washington v. Confederated Tribes of Colville Indian Reservation*,[177] the Court upheld the State's cigarette tax on reservation sales to non-Indians. In the more recent case of *Cotton Petroleum Corp. v. New Mexico*,[178] the Court upheld a severance tax on oil and gas produced by a non-Indian company on tribal land even though the tribe already imposed a similar tax.

Noteworthy on the issue of outdoor advertising control is the decision in *Washington v. Confederated Tribes*, which established that the principles of preemption and tribal self-government did not authorize Indian tribes to "market an exemption" from state law for non-Indians in Indian country.[179] In the later case of *California v. Cabazon Band of Mission Indians*,[180] the Court, while rejecting the contention, recognized that a state's claim of jurisdiction may be stronger where a tribe is merely marketing an exemption from state laws. As noted in Section II.B.2.d.(3), the State of Utah contends in the pending *Shivwits Band* case, *supra*, that the tribe was "marketing an exemption" to state and local laws when it leased billboard space to Kunz Outdoor Advertising.

In *Rice v. Rehner*,[181] the Supreme Court sustained a state liquor license requirement against a non-Indian trader operating on an Indian reservation, finding no preemption by federal law and no tradition of self-

[173] White Mountain Apache Tribe v. Bracker, *supra.*, 448 U.S. at 144-45.

[174] *See* I.B.1.b., *supra*.

[175] DESKBOOK, *supra.*, n.16 at p. 110.

[176] 425 U.S. 463 (1976).

[177] 447 U.S. 134 (1980).

[178] 490 U.S. 163 (1989).

[179] Washington at 155.

[180] 480 U.S. 202, 219-20 (1987).

[181] 463 U.S. 713 (1983).

government relating to liquor transactions that would invoke the "infringement test." The Court's analysis and principles were applied by the Wisconsin Supreme Court in *County of Vilas v. Chapman*,[182] to uphold a county's jurisdiction to enforce a noncriminal traffic ordinance against an Indian for an offense occurring on a public highway on the reservation. Because the tribe has no motor vehicle code, the State has a dominant interest in regulating traffic. In those situations where state or local authorities seek to sustain jurisdictional control over outdoor advertising in Indian country, the case will be much stronger where it can be shown that the tribe has no tradition of self-government relating to outdoor advertising regulation. No state statute on outdoor advertising control has been found that specifically targets or attempts to regulate the conduct of non-Indians in the leasing of lands for oudoor advertising.

The only case law dealing with outdoor advertising control in Indian country, having found federal preemption of state law, presents a significant barrier to state enforcement of sign codes. However, the tax cases discussed above, particularly the *Washington v. Confederated Tribes* case denouncing the marketing of an exemption and the *Rice v. Rehner* decision, which supports state regulation where the tribe has no tradition of regulation, seem to provide some basis for overcoming the "infringement" and "preemption" arguments.

IV. CONCLUSIONS

There is serious doubt that Congress intended to apply the HBA to Indian reservations. The application of Section 131(h) to Indian reservations is doubtful simply because Congress did not use the term "Indian country" instead of "reservations of the United states." The term "Indian country" was developed by the Supreme Court and adopted by Congress in its 1948 revision of Title 18, U.S.C. Why was this term ignored in enacting the HBA, unless Indian reservations were intended to be excluded from coverage? Even if Congress intended the Act to apply to Indian reservations there are serious deficiencies that make it difficult or impossible to implement. The most obvious deficiency is the lack of express police power and eminent domain authority granted to the states to implement a law that is clearly designed for state enforcement. While *Ryan Outdoor Advertising v. United States*,[183] provides clear precedent for the Department of the Interior to use its general authority to enforce HBA and its standards in Indian country, such action has not been considered to be mandatory under terms of the Act.

Unless and until the HBA is revised so as to expressly cover Indian country, the states should continue to work at reaching agreement with tribal governments and the BIA to get comprehensive zoning established by the tribe, including a sign code that is consistent with state and local sign codes, and the HBA. Where a tribe does not have a sign code, and no tradition of regulating outdoor advertising, the principles established in *Rice v. Rehner*,[184] and followed in *County of Vilas v. Chapman*,[185] would seem to afford a basis for a state jurisdiction to impose its sign code on the Indian lands.

[182] 361 N.W.2d 699 (Wis. 1985).

[183] 559 F.2d 554 (9th Cir. 1977).

[184] 463 U.S. 713 (1983).

[185] 361 N.W.2d 699 (1985).

ATTACHMENT A

SUMMARY OF COMMENTS REGARDING THE FONSI FOR LORAINE GEORGE FEE-TO-TRUST CONVERSION

Comment: In violation of the Federal Highway Beautification Act (23 U.S.C.) and which would apply to Indian trust land. (Tacoma, Milton)

The Board of Indian Appeals has ruled that the Act does not apply to trust lands on Indian reservation. (Administrative Appeal of the Morongo Band of Mission Indians, the Area Director, Sacramento Area Office, 7 IBIA 229, 86 I.D. 680, 1979 WL 21375.) A recent U.S. District, District of Utah, Shivwits Band of Paiute Indian v. State of Utah court case (Case No. 2 95 CV1025S (D.Utah February 7, 1996) concludes that the Federal Act does not apply to property taken into Trust for Indians.

Comment: Delay approval of the project until the Tribe approves their land use regulations. (Fife, Milton)

The Settlement Agreement contains no specific timeframe for the Tribe to adopt and approve land use regulations. It is up to the Tribal government under the Federal Government Self-determination policy to develop these regulations and ordinances. The Puyallup Tribe has recently adopted and approved land use ordinance for outdoor signage. We have requested that the Tribe determine where the applicant meets the ordinance requirements or is covered by the grandfathered clause. We were notified on September 27, 1996, that the applicant meets the requirements of the sign ordinance in terms of being grandfathered. Further delaying the project, in light of an approved ordinance, makes no sense. The ordinance provides relevant standards against which to measure the appropriateness of outdoor signage, as well as a mechanism for Tribal members to appeal, and provides a grandfather mechanism for pending and existing signage projects on trust lands.

Comment: Failure to examine the cumulative impact of the proliferation and concentration of billboards in the immediate area. (Tacoma, Pierce)

The applicant's EA has attempted to adequately address this issue. Prior to issuing a decision whether to approve the fee-to-trust transaction and commercial lease, the Federal Officer has commissioned a report utilizing Bureau staff to examine this issue. The report concluded that the cumulative impacts to various natural and environmental elements from this proposed and other similar signage projects, is not significant. The report examines cumulative impacts to the following elements: soil, groundwater, wetland, & air quality; vegetation & wildlife; land use; noise; lights; cultural resources; socioecononomic conditions; human health & safety; and aesthetics. The cumulative effect of this proposed project, along with past and reasonably foreseeable future signage projects, does not significantly impact the environment. The proposed project is consistent with other outdoor signs found along the I-5 corridor. This portion of the Interstate corridor is highly developed with many businesses which display significant signage. The overall visual impact of additional signage, resulting from this proposed project, will not be significant.

Comment: Violation of the Land Settlement Agreement, Technical Document No. 7, Section B(2). The project is inconsistent with the obligation to give appropriate consideration to the land use guidelines established under the Agreement. (Milton, Pierce)

The Puyallup Settlement Agreement requires the tribe to consider local plans and ordinances in the absence of a Tribal plan and ordinances, not automatically to adhere to such regulations or ordinances, and to consider the factors listed in Section B(2) through (k) in Technical Document No. 7. The Puyallup Tribe has done this, as described in their letter to Pierce County dated May 9, 1996. While each government is under an obligation to take into account the concerns of the other governments, including their land use regulations, the Settlement Agreement leaves to each government the right to make the final decision on such matters.

Comment: Inadequately addressing the frenzy of construction of outdoor signs, resulting from other approved fee-to-trust conversions. (Tacoma)

Prior to issuing a decision whether to approve the fee-to-trust transaction and commercial lease, the Federal Officer has commissioned a report utilizing Bureau staff to examine this issue. The conclusion of the report is that there is no major impact to the environment from the placement of additional outdoor signage along the I-5 corridor. The report concluded that the cumulative impact to various natural and environmental elements from this proposed and other similar signage projects, is not significant. The on-site and off-site signage found in the vicinity, do not have any different visual impact. The number of outdoor signs which the Tribe has approved and proposed, is only a small fraction of the total number of billboards and other signage found in the vicinity on other local jurisdictions.

Comment: Unclear whether the project is consistent with the Tribe's proposed land use regulations. With no approved Tribal land use regulations, it is not possible to determine whether the project is compatible. (Tacoma, Pierce)

The Puyallup Tribe has adopted or approved a land use regulations ordinance for commercial outdoor signage for on and off site business and product advertisements. The

applicant will be subject to these regulations. The ordinance provides for existing signage and proposed signage which have applications for permits, may be grand fathered in. Subject to the conditions of the ordinance, all new applicants would be subject to the Tribal regulations.

The Bureau has encouraged the Puyallup Tribe to enact land use regulations, but there is no administrative basis upon which to force the Tribe to adopt such regulations. Under Federal Indian policy, the Tribes are sovereign and the Bureau works with the Tribe on a Government to Government basis. It would be inappropriate for the Bureau to make a decision to reject the project, when such a project is permitted under the adopted land use signage ordinance approved by the Tribal Council.

Comment: EA analysis addresses only construction aspects of the project and nothing about the land conversion. (Tacoma)

Construction related and post construction issues were addressed in the revised EA that accompany the FONSI. Many of these construction related issues were raised by the local jurisdiction in response to the original EA document. Potential impacts to public traffic safety, disturbances to domestic water aquifers, ground water quality, noise, lighting, and development patterns in the vicinity of the proposed project were included in the EA documents.

Comment: No other commercial development projects were considered for meeting the landowner's objectives. (Tacoma, Pierce)

Under NEPA regulations, the minimum requirement for developing alternatives for a environmental assessment is to formulate an alternative for the proposed action and a no action alternative. The applicant can propose whatever number of alternatives that she/he feels meet their objectives. There is no set number of alternatives that must be included in an EA. The applicant's EA document did contain an Action and No Action Alternatives and therefore, meet the minimum requirements for alternative development.

Comment: Illegal use of the property. (Milton)

A recent US District, District of Utah, Shivwits Band of Paiute Indian v. State of Utah court case concludes that 25 U.S.C. Section 766 does not apply to current land acquisitions by the Tribe nor to the subject land acquisitions. The court concluded that 25 U.S.C. Section 766 does not specifically authorize the State, which would include the local governments, to apply statutes, regulatory laws, or zoning ordinances to Indian Reservations.

Comment: Do not support the request to change the property from residential use to commercial use, which will lead directly to inevitable conflict with the surrounding residential use. (Pierce)

The application received by the Bureau, indicated that the use would include outdoor signage. It appears that the use of the property has changed since the Tribe's letter of October 1995. The Environmental documents which have been made available to the public, have indicated that signage is being planned for the property. The proposed project is consistent with other outdoor signs found along the I-5 corridor. This portion of the Interstate corridor is highly developed with many businesses, including businesses along 18th Street East. The court has upheld that the local jurisdictions' zoning codes do not apply to lands held in trust on Indian Reservations.

Comment: Take exception to the BIA FONSI conclusion that there is no significant adverse impact for approving the fee-to-trust conversion and the commercial lease. (Tacoma, Milton, Pierce)

The Superintendent of the Puget Sound Agency on June 21, 1996, issued a FONSI for the proposed action. The decision concluded that this project is not a major action significantly affecting the environment, requiring the issuance of an EIS. We have provide an opportunity for interested or affected parties to comment on the FONSI prior to implementing the proposed action. The Puyallup Tribe agrees with the conclusion in the Bureau FONSI that there is no significant impacts to the environment. This will be the jurisdiction where the trust property eventually would be located and would be subject to their current regulations or ordinances in force at the transfer.

Comment: Request a public hearing. (Tacoma)

There is no administrative requirement to hold such a hearing. From the comments submitted, in response to the notification of the fee to trust transactions, for the EA document and FONSI, the potential interested parities have expressed their concerns to the Federal Officer.

Comment: Most of the comments from Pierce County's letter of April 24 still apply to this project. A brief summary of the comments is as follows: The Tribe needs to finalize their land use regulations before approving this conversion. The County will continue to oppose any proposed conversion. The County will participate in the consultation process, under the Settlement Agreement of the proposed land use regulations. The County question special benefit of signage on Trust land versus non-trust lands. There were no other commercial development projects were considered for meeting the landowner's objectives. The County does not support the idea that they need to agree to a billboard, in order for the Indian owner to purchase the property. The County objects to growing trend of Tribal members' disregard for local zoning, prior to conversion to trust status.

Many of the same comments were made in response to the FONSI. Most of the above Pierce County comments have been previously discussed in the Summary of Comments Regarding the FONSI for the Loraine George Fee-To-Trust Conversion. We are not aware of any Indian-owned properties, which are in fee ownership status, which are not in compliance with local zoning regulations. We are not aware of any buildings that has been constructed without Puyallup Tribal permits. We have provided several opportunities for the various jurisdictions to express their concerns. If they decide that they do not want to support any proposed fee to trust proposals, they have that right. The Federal Government has the same options. Many development projects in both arenas, often are completed, without full or limited support from other jurisdictions.

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