The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians

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I. Introduction

A. BIA: Bossing Indians Around

Congress formally established the Bureau of Indian Affairs (BIA) in the Department of War in 1834, ostensibly to assist Indians, but also to subjugate and in some cases to exterminate them. Transferred to the newly created Department of the Interior in 1849, the BIA oversaw gradual but dramatic shifts in federal Indian policy, including the end of the Treaty Era in 1871. The nineteenth century movement of tribes onto Indian Reservations was followed by the breaking up of tribal land holdings and distribution of individual allotments to tribal members, with the “excess” lands becoming available for settlement by non-Indians.

In 1928, a study known as the Meriam Report delivered a harsh indictment of federal Indian policy, and called for sweeping changes. There followed a period known as the “Indian New Deal,” the centerpiece of which was the Indian Reorganization Act of 1934, which put an end to allotment of tribal lands, and promoted the revitalization of tribal governments. This tribal renaissance was short-lived, however, as Congress declared in 1953 a goal of terminating the special status of Indian tribes and repudiation of the federal trust responsibility. By the 1970s, Congress had again changed course, opting to reject policies of assimilation and termination in favor of policies that promote tribal self-determination.

Throughout the zigzag course of federal policy with respect to Indian affairs, administrative responsibility for those policies has rested primarily with the BIA, or its predecessor agency, principally under the direction of the Commissioner of Indian Affairs.
B. Bashing the BIA

Throughout its existence, the BIA may be the most maligned agency in the entire United States Government. The BIA has been vilified from all sides, adjudged “incapable” by a federal court, condemned by members of Congress, deemed “incompetent” by a Presidential Commission, and eviscerated in countless editorials. On many reservations, tribal members wryly joke that the acronym stands for “Bossing Indians Around.” Perhaps the harshest criticism has come from the most unexpected source, when, in the year 2000, the agency’s head offered a moving apology for “the fact that the works of this agency have at various times profoundly harmed the communities it was meant to serve.”

As the oldest federal agency in continuous existence, BIA has been the subject of criticism and proposals for its abolition almost since its birth. The Congressional Research Service reported to Congress in 1996 that there had been more than 1050 investigations, reports, commissions, and studies on BIA reorganization compiled since 1834. In recent decades, those calls for reform have been virtually continuous, and the criticism more strident.

A 1976 Report on BIA Management Practices to the American Indian Policy Review Commission (AIPRC) found “a notable absence of managerial and organizational capacity throughout the BIA.” The AIPRC Task Force on Federal Administration and Structure of Indian Affairs criticized in particular “Area Office staff [that] has been delegated too much authority by the Central Office and basically serves as a ‘bottle-neck’ designed and motivated to systematically undermine Indian self-development progress.”

The Presidential Commission on Indian Reservation Economies castigating the BIA in 1984 for “incompetent” management of trust assets; excessive regulations and “red tape;” “incompetent” technical assistance to tribes; and “deficient” performance of activities such as credit, finance, contracting, and procurement. The Commission recommended the abolition of the BIA and its replacement with a new agency to be called the “Indian Trust Services Administration,” which would have granted funds to tribes to contract for their own services.

A series of articles in the Arizona Republic in 1987 “startled” the Senate Committee on Indian Affairs into establishing a special committee to investigate stunning allegations of BIA mismanagement. The committee held extensive hearings in response to charges that included breach of trust, criminal fraud, child abuse in BIA schools. The committee’s investigation preceding the hearings had already led Senator DeConcini, its Chairman, to conclude that “[m]any of the Federal Indian programs are fraught with corruption and fraud. Most of the others are marred by mismanagement, and some by incompetence.”

In 1990, Secretary Lujan chartered a Joint Tribal/BIA/DOI Reorganization Task Force. Over the next four years, the Joint Reorganization Task Force met twenty-two times across the country and developed forty-four recommendations for BIA reorganization, regulatory reform, educational reform, and budgetary reform, reportedly with little success.

In 2000, the report of the National Academy of Public Administration questioned the overall competence of BIA management and administrative staff, citing in particular a lack of expertise in the areas of planning, budgeting, human resources management, and information resource management. The top job in the BIA continues to be a political hot potato, which often changes hands amidst charges of cronyism and incompetence.

C. Defending the BIA

Despite this constant drumbeat of disparagement, the BIA seems to have been remarkably immune to change. Moreover, when condemnation turns to calls for the abolition of the BIA, as it often does, prominent Indian leaders, tribes, and their supporters rush to the BIA’s defense. Some
critics have argued that the BIA manipulates such tribal demonstrations of support with the selective distribution of rewards and punishments, especially at the Area (now Regional) Office level.

Others might argue that Indian tribes view the BIA as their main advocate, however weak, within the federal bureaucracy, in part because BIA personnel are largely drawn from tribal ranks, thanks to Indian preference in BIA hiring. The long-time Director of the American Indian Law Center recently expressed his own ambivalence about the notion that “if you attack the Bureau of Indian Affairs, you are attacking Indians.”

Perhaps the main reason that tribal advocates continue to defend the BIA in the face of persistent attack, however, is that the BIA has become emblematic of the federal government’s commitment to tribal sovereignty and the individual well-being of Native Americans. This commitment, combined with the obligation to manage Indian lands and funds, is commonly referred to as the federal trust responsibility to Indians. Although rooted in the United States Constitution, the trust responsibility has been developed and defined through a series of opinions by the United States Supreme Court, and exercised primarily by the BIA. Threats to the continued existence of the BIA naturally arouse concern that the United States may be backing away from this commitment.

D. Reforming the BIA

Yet, in the wake of federal policies that for more than three decades have increasingly emphasized greater tribal control over Indian programs, many question whether a legitimate trust role remains for the BIA. This transfer of administrative responsibility from the BIA to the tribes, under the mantle of “Indian Self-Determination,” has led even the United States Supreme Court to suggest that the trust responsibility may be incompatible with Indian self-governance. A top Indian affairs official has forthrightly proposed the abolition of the BIA, the termination of the trust responsibility, and the transfer of all remaining responsibilities to the tribes themselves.

Such developments alarm tribal advocates, who fear that a policy they have encouraged and embraced for the past thirty years, Self-Determination, could turn out to be something of a Trojan horse, ushering in a full-scale assault on the single most cherished attribute of federal Indian policy—the federal trust responsibility. Although they raise serious questions about the motivations and objectives of some of the proponents of BIA reorganization, few tribal advocates deny that there is plenty of room for regulatory reform. Thus, they ask whether reform can be accomplished in a way that both strengthens tribal sovereignty and reinforces the federal trust responsibility.

The original architects of the Self-Determination policy suggested one possible answer. Believing that many of the alleged failures of the BIA were attributable less to incompetence of BIA employees than to institutional conflicts of interest within the Department of the Interior (DOI), which houses the BIA, and the Department of Justice (DOJ), the American Indian Policy Review Commission (AIPRC) recommended in 1977 that Indian affairs be elevated to cabinet-level status. President Nixon wrote to the Senate Indian Affairs Committee in 1989 to remind it of his twenty-year-old proposal to create an “Independent Trust Counsel Authority” to advocate for the trust responsibility to Indians. Numerous witnesses told the Committee of the need for independent legal representation of the trust responsibility, including such former administration officials as Reid Chambers (Associate Solicitor for Indian Affairs), Leonard Garment (Special Counsel to President Nixon), and Louis Clairborne (Solicitor General).

The Senate Indian Affairs Committee has observed that, “[d]espite the federal government’s long-standing obligation to protect Indian natural resources, they have been left unprotected, subject to, at best, benign neglect and, at worst, outright theft by unscrupulous companies.” The Committee laid much of the blame on agencies other than the BIA, including the Interior’s Bureau
of Land Management, Minerals Management Service, and Office of the Solicitor. Others note that it is not merely a lack of administrative capacity and bureaucratic independence that handicaps the BIA, but also federal policy itself. An Assistant Secretary for Indian Affairs commented upon this simple fact.

The mission of the Bureau of Indian Affairs has changed dramatically from its intended mission 150 years ago to what it has become today. In fact, the mission of the Bureau has changed on average about every 25 years as American Indian policy has changed. Simply stated, the mission of the Bureau is to promote and execute the policy of the day of any given Administration and Congress dealing with American Indians and their governing organizations.

United States Senator Ben Nighthorse Campbell, Chairman of the Indian Affairs Committee, acknowledges the role of Congress in creating the conditions that result in allegations of BIA failure.

For too many years, the bureau has been one of the most under-rated and overly-criticized agencies in the federal government. It is the agency that Indian country and appropriators love to hate. In recent years, the administrative capabilities of the bureau of Indian affairs have been decimated by government-down-sizing, early retirement authority, and diminishing resources. Nonetheless, we continue to charge the bureau with an ever-increasing and wider range of responsibilities — in furtherance of the United States trust responsibilities — while failing to provide the bureau with the resources any agency would need to carry out these duties. Add to that the impact of self-determination contracting and self-governance compacting on the ranks and functions of the bureau — and it is a small wonder that this agency is perceived by its critics to be operating under siege and unable to meet the task.

The U.S. Commission on Civil Rights recently issued a report that cites the inadequacy of federal programs intended to assist Native Americans not only at the U.S. Department of the Interior (“DOI”), but also at the U.S. Department of Justice (“DOJ”), the U.S. Department of Health and Human Services (“HHS”), the U.S. Department of Housing and Urban Development (“HUD”), the U.S. Department of Education (“DOEd”), and the U.S. Department of Agriculture (“DOA”). The Commission found that significant disparities in federal funding exist between Native Americans and other groups in our nation, as well as the general population. The Commission also reported a finding by the Congressional Research Service that, when adjusting for inflation between 1975 and 2000, Indian programs at the DOI experienced a yearly appropriations decline of $6 million, leaving unfunded $7.4 billion in unmet needs among Native Americans in 2000.

As a result, according to the Commission, “Native Americans continue to rank at or near the bottom of nearly every social, health, and economic indicator,” as compared to other groups in American society. Native Americans suffer “higher rates of poverty, lower educational achievement, more substandard housing, and higher rates of disease and illness.”

This multi-faceted critique of federal Indian policy provides a historic backdrop for today’s BIA-bashing and the current debate over BIA reorganization and reform. The most immediate impetus for renewed scrutiny of the BIA, however, is a class action lawsuit filed by Native American beneficiaries of individual Indian money (“IIM”) accounts held in trust by the BIA, seeking an accounting of all funds collected by the BIA on behalf of individual Indian landowners over the course of the last century. The DOI has launched a massive program of trust reform in response to a seemingly endless stream of court orders in Cobell v. Babbitt (renamed Cobell v. Norton after the substitution of the current Secretary of the Interior).

E. Understanding the BIA
Whereas there are serious issues to be addressed to ensure the fair and accurate accounting of individual trust funds, the current rush to reform may threaten to throw out the baby with the bathwater while failing to address more basic problems with federal Indian policy. This article attempts to chronicle proposals for BIA reform and reorganization in the context of the vast array of BIA duties and programs, the federal trust responsibility, and overall federal Indian policy. Rather than scapegoat the agency and its employees for the sometimes tragic consequences of such programs and policies, however, the article seeks to illuminate the many competing forces that historically shape such outcomes. At the same time, by focusing on the nuts and bolts of the agency’s work, the article seeks both to provide firm ground for reform proposals and to facilitate the implementation of the BIA’s truly admirable mission.

Today, that mission is ambitious in scope:

The [BIA’s] responsibility is the administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives. There are 562 federal recognized tribal governments in the United States. Developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure and economic development are all part of the agency’s responsibility. In addition, the Bureau of Indian Affairs provides education services to approximately 48,000 Indian students.

Part II of the article provides an overview of the BIA, its history, and its current structure and responsibilities. Thereafter, the article describes in some detail the ways in which the agency carries out its statutory mandates, citing the BIA’s regulatory code, highlighting current issues, noting conflicting federal policy priorities, and documenting the persistent shortage of resources to address unmet Indian needs. Administrative and judicial construction of the Indian laws and regulations, in the context of appeals from BIA actions, provides an additional counterpoint to each of the subsequent parts of this article.

The article concludes with observations regarding the prospects for a revitalized BIA, one that has the support and confidence of tribal governments and the resources to make a significant contribution, as pledged by a former BIA leader, to “the rebirth of joy, freedom, and progress for the Indian Nations.”

II. The BIA and the Federal Trust Obligation to American Indians

A. The BIA and the Department of the Interior

The DOI is a massive federal agency that manages one out of every five acres of land in the United States; provides the resources for nearly one-third of the Nation’s energy; provides water to thirty-one million citizens through 824 dams and reservoirs; administers 388 units of the national park system, 544 wildlife refuges and vast areas of multiple-use lands; facilitates hunting and fishing on millions of acres of public and private lands. It comprises numerous bureaus and offices, including the Fish and Wildlife Service; the Bureau of Reclamation; the Office of Surface Mining; the Minerals Management Service; the National Park Service; the Bureau of Land Management; and the U.S. Geological Survey. The Office of the Solicitor provides legal counsel to the various DOI agencies, and ultimately to the Secretary.

The BIA, in turn, is itself a complex organization, with twelve Regional offices, nearly 100 agencies and field offices located throughout the country, and approximately 10,000 employees. Although Indian preference creates a relatively small pool from which BIA fills its employee ranks, the history of relationships between the United States and the Indian Nations is marked by Indians’
deep and understandable mistrust of the government. The fact that BIA employees are drawn from tribal ranks helps to introduce a small measure of trust and is sometimes perceived as one small way in which the United States fulfills its trust—through the provision of employment and business contracting preference to Indians. Moreover, many BIA employees have demonstrated, at the grassroots level, that their commitment to serve Indians is more than just a job.

Like all federal employees, those at the BIA are subject to civil and/or criminal penalties for violation of certain laws concerning ethical conduct and financial conflict of interest. Among these are post-government employment restrictions against representing anyone in a matter that the former employee previously represented the government, and in which the government has a continuing interest. There is an exception, however, for former officers and employees of the United States who are employed by Indian tribes as agents or attorneys in such matters. Several ethics statutes are unique to DOI employees, including laws that prohibit certain employees from acquiring interests in federal lands.

Federal ethics regulations applicable to all federal employees provide that “[p]ublic service is a public trust, requiring employees to put loyalty to the Constitution, the laws, and ethical principles above private gain.” The regulations set forth fourteen general principles of ethical conduct and several sections of detailed rules regarding matters such as accepting gifts from outside sources, gifts between employees, conflicting financial interests, impartiality in performing official duties, seeking other employment, misuse of position, and outside activities. They also set forth a long list of related statutory authorities. Interior has promulgated supplemental regulations with specific standards of ethical conduct for DOI employees. Among other things, these regulations prohibit all DOI employees from acquiring rights granted by the Department in federal lands.

**B. Statutory and Regulatory Authorities**

Title 25 of the United States Code is dedicated exclusively to Indian affairs, with many of the statutes relating to the responsibilities of the Secretary of the Interior and the BIA. The AIPRC Task Force on Consolidation, Revision and Codification of Federal Indian Law recommended in its 1976 Report that Title 25 be thoroughly revised, noting that “Title 25 is now packed with statutory provisions which are either superceded by subsequent legislation, obsolete by virtue of passage of time, redundant to prior legislation, or in total conflict with present policies relating to the administration of Indian affairs.” Similarly, Title 25 of the Code of Federal Regulations (“CFR”) contains the rules the BIA has promulgated to implement these laws and the agency’s responsibilities thereunder. Title 43 of the CFR contains additional DOI rules, some of which pertain to the BIA.

In addition to regulations promulgated in the CFR, BIA publishes a mind-numbing series of instructions to its employees in form of the BIA Manual (“BIAM”). Although the content of the BIAM is beyond the scope of this article, it has been described as “a confusing, often contradictory, and generally inefficient compilation of policy and procedure ranging from generally inadequate . . . to absolutely unfathomable.” A Senate Committee once set out to require BIA to “revoke all provisions of the BIA Manual that are not promulgated as proposed regulations,” noting that the BIAM comprised some 14,000 pages at that time.

**C. Enforcement of the Federal Trust Responsibility**

Foremost among the responsibilities historically delegated to the BIA is the duty to manage Indian lands and funds, often thought of as the essence of the federal trust responsibility to Indians. Although its roots are in the United States Constitution, the federal trust responsibility has been developed and defined through a series of opinions by the United States Supreme Court. Chief Justice John Marshall first invoked the concept in 1831, characterizing the relation of the Cherokee Nation to the United States as that of a ward to his guardian.
Subsequent Court opinions have relied upon the guardian-ward analogy to uphold the “plenary power” of Congress to enact statutes extending federal criminal jurisdiction over Indians, and allotting tribal lands without obtaining tribal consent. The Court has also recognized that the trust relationship places some limits on the power of the government to infringe upon Indian property rights.

In the seminal case of *Mitchell v. United States* (*Mitchell II*), the Supreme Court held that statutes and regulations pertaining to timber management by the BIA created a judicially enforceable trust responsibility upon the U.S. to follow those statutes and regulations. In an earlier ruling (*Mitchell I*), the Court had found the General Allotment Act, 25 U.S.C. § 1331, created only a minimal trust relationship between the Indian landowner and the U.S. concerning timber management. In the second case, that responsibility was made enforceable in damages by the more specific laws regarding timber management.

In two cases decided in 2003, the Supreme Court clarified the parameters of the trust responsibility where there is no express statutory mandate. In *United States v. White Mountain Apache Tribe*, the Court ruled the United States was liable in money damages for failing to maintain and repair buildings placed into trust for the White Mountain Apache Tribe under a 1960 statute that allowed the BIA to use and occupy the buildings.

The Tribe had sued the United States for the amount necessary to rehabilitate the property occupied by the Government in accordance with standards for historic preservation, alleging that the United States had breached a fiduciary duty to maintain, protect, repair, and preserve the trust property. The Court of Federal Claims dismissed the complaint, reasoning that no statute or regulation could fairly be read to impose a legal obligation on it to maintain or restore the trust property, let alone authorize compensation for breach. The Federal Circuit reversed and remanded on the understanding that the Government’s property use under the 1960 Act triggered a common law trustee’s duty to act reasonably to preserve any property the Secretary chose to utilize, an obligation fairly interpreted as supporting a money damages claim.

The Supreme Court held that the 1960 Act gives rise to Indian Tucker Act jurisdiction in the Court of Federal Claims over the Tribe’s suit for money damages against the United States. The Court held that it is not necessary to find an explicit money-mandating provision in the relevant statute, but rather the less demanding requirement of “fair inference that the law was meant to provide a damage remedy for breach of a duty.”

The Supreme Court focused not just on the wording of the 1960 Act, but on the actual control asserted by the United States over the trust property.

As to the property subject to the Government’s actual use, then, the United States has not merely exercised daily supervision but has enjoyed daily occupation, and so has obtained control at least as plenary as its authority over the timber in *Mitchell II*. While it is true that the 1960 Act does not, like the statutes cited in that case, expressly subject the Government to duties of management and conservation, the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.

On the same day that it ruled in the *White Mountain Apache* case, the Court issued an opinion in *United States v. Navajo Nation*, holding the United States was not liable for damages in failing to obtain the highest possible royalty rate for the Tribe in a coal mining lease with a third party, where the relevant statute merely requires federal approval of the lease negotiated between the parties. Initially, the Court of Federal Claims found that the government owed general fiduciary duties to the Tribe, which the Secretary had “flagrantly dishonored by acting in the best interests of
Peabody Coal Company rather than the Tribe.” Nevertheless, the court concluded that the Tribe had entirely failed to link that breach of duty to any statutory or regulatory obligation that could be fairly interpreted as mandating compensation for the government’s fiduciary wrongs.

The court of appeals for the Federal Circuit reversed the Court of Federal Claims, finding that the government’s liability to the Tribe turned on whether “the United States controls the Indian resources.” The Court of Appeals determined that the measure of control the Secretary exercised over the leasing of Indian lands for mineral development sufficed to warrant a money judgment against the United States for breaches of fiduciary duties connected to coal leasing. The appeals court agreed with the Federal Claims Court that the Secretary “favored Peabody interests to the detriment of Navajo interests.”

The Supreme Court ultimately ruled against the Navajo Nation, holding that “to state a litigable claim, a tribal plaintiff must invoke a rights-creating source of substantive law that ‘can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.’” Justice Ginsberg’s majority opinion implied that the Government has a lesser trust responsibility where the tribe assumes more control over decision-making concerning its resources. “The IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties. (Citation omitted.) As the Court of Federal Claims recognized, ‘the ideal of Indian self-determination is directly at odds with Secretarial control over leasing.’”

Justice Souter’s dissenting opinion, joined by Justice Stevens and Justice O’Connor, suggested that the Tribe’s theoretical control was something of an illusion.

What is more, the Tribe has made a powerful showing that the Secretary knew perfectly well how his own intervention on behalf of Peabody had derailed the lease adjustment proceeding that would in all probability have yielded the 20 percent rate. After his ex parte meeting with Peabody’s representatives, the Secretary put his name on the memorandum, drafted by Peabody, directing Deputy Assistant Secretary Fritz to withhold his decision affirming the 20 percent rate; directing him to mislead the Tribe by telling it that no decision on the merits of the adjustment was imminent, when in fact the affirmance had been prepared for Fritz’s signature; and directing him to encourage the Tribe to shift its attention from the Area Director’s appealed award of 20 percent and return to the negotiating table, where 20 percent was never even a possibility. App. 117-118. The purpose and predictable effect of these actions was to induce the Tribe to take a deep discount in the royalty rate in the face of what the Tribe feared would otherwise be prolonged revenue loss and uncertainty. The point of this evidence is not that the Secretary violated some rule of procedure for administrative appeals, ante, at 21-22, or some statutory duty regarding royalty adjustments under the terms of the earlier lease. What these facts support is the Tribe’s claim that the Secretary defaulted on his fiduciary responsibility to withhold approval of an inadequate lease accepted by the Tribe while under a disadvantage the Secretary himself had intentionally imposed.

The majority did not completely close the door on the trust responsibility, leaving open the question of liability for breach of trust where the pertinent regulations impose more specific duties.

We rule only on the Government’s role in the coal leasing process under the IMLA. As earlier recounted, see supra, at 2-3, both the IMLA and its implementing regulations address oil and gas leases in considerably more detail than coal leases. Whether the Secretary has fiduciary or other obligations, enforceable in an action for money damages, with respect to oil and gas leases is not before us.

Nevertheless, the Supreme Court’s decision in United States v. Navajo Nation has caused a
good deal of concern over the future of the federal trust doctrine. Professor Raymond Cross has written a particularly alarming article concerning the Court’s apparent suggestion that the federal trust responsibility may be incompatible with Indian Self-Determination. Professor Mary Christina Wood had earlier proposed an alternative paradigm that seeks to harmonize the two, arguing that the federal trust duty should be seen as encompassing a sovereign trust in favor of Indian Self-Determination.

Whereas recent litigation has dealt with enforcement of the federal trust responsibility for management of trust resources, questions linger regarding the extent of such a responsibility with respect to issues of tribal sovereignty and the overall welfare of tribal members. Congress routinely acknowledges a trust responsibility for management of Indian lands, such as in the American Indian Agricultural Resource Management Act (“the United States has a trust responsibility to protect, conserve, utilize and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes”), and Indian funds, as in the American Indian Trust Fund Management Reform Act (“consistent with the trust responsibility of the United States”).

Explicit reference to the trust responsibility is contained as well in such statutes as the Indian Tribal Justice Act (“the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government.”); the Native American Housing Assistance and Self-Determination Act (“the Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status”); and the Higher Education Tribal Grant Authorization Act (“these services are part of the Federal Government’s continuing trust responsibility to provide education services to American Indian and Alaska Natives.”).

Other statutes appear to reference the trust responsibility without using the word “trust,” for example: The Indian Health Care Improvement Act (“special responsibilities and legal obligations to the American Indian people”); the Indian Self-Determination and Education Assistance Act (“the Federal Government’s historical and special legal relationship with, and resulting responsibilities to, American Indian people”); the Indian Child Welfare Act (“the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people”). Similar language is contained in the Indian Alcohol and Substance Abuse Prevention and Treatment Act, the Tribally Controlled Schools Act of 1988, and the Indian Child Protection and Family Violence Prevention Act.

The existence of the trust responsibility with respect to these various duties and programs is not in doubt, yet it is far from clear whether each of these laws may be enforced either by suits for damages or injunctive relief. Presumably, entitlement to damages would depend upon a court finding that the substantive law “can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.” Injunctive relief may require a lesser standard.

III. BIA Decision-Making, Records and Appeals

A. Administrative Appeals

Although carried out within the confines of policies established in Washington, the vast majority of BIA decisions and actions that directly affect tribes and tribal members are made every day on Indian reservations throughout the nation. Authority to make appealable decisions rests not with BIA social workers, educators, or realty officers, but normally with an Agency Superintendent, or, in smaller Field Offices, with Field Representatives. No decision is final for the DOI for purposes of administrative review under the Administrative Procedures Act (“APA”) so long as it is subject to appeal to superior authority in the Department. BIA decisions must include
written notice to all interested parties and, unless final for the Department, must include notice of
the right to appeal. BIA decisions are effective when the time for filing a notice of appeal has
expired and no appeal has been filed.

In appeals of actions of persons under the Regional Director’s authority, the Regional Director
must issue a written decision within sixty days after the time for all pleadings has expired. Within
thirty days of receipt of the Regional Director’s decision, an interested party may appeal the
decision to the Interior Board of Indian Appeals (“IBIA”). A copy of such an appeal must be sent
to the Assistant Secretary—Indian Affairs, who may assume jurisdiction of the appeal within fifteen
days of its receipt and issue a decision that is final for the Department. Decisions of the Assistant
Secretary are immediately final unless the decision provides otherwise.

Notice of appeal must be filed with the official whose decision is being appealed, with copies
sent to the officer who will hear the appeal and to all interested parties. A statement of reasons for
the appeal must be filed within thirty days after filing the notice of appeal. Any interested party
may file a written answer within thirty days after receipt of the statement of reasons. All documents
filed in an appeal must be served on all interested parties by personal service or mail. A document
filed in the wrong office will be forwarded to the correct office, however no extension of time will
be granted for the document to be filed in the correct office, unless the misdirection is the fault of
the government. An official deciding an appeal may for good cause grant an extension of time for
filing any document except the notice of appeal. Failure to timely file the notice of appeal will
result in summary dismissal.

An interested party who believes he or she may suffer substantial financial loss as a direct
result of the delay caused by an appeal may request that the appellant be required to post bond.
Appeals from inaction of officials of the BIA may be taken in the same manner if within ten days
of a written request, the official fails to either make a decision or establish a reasonable date by
which he or she will make a decision.

The Interior Board of Indian Appeals (“IBIA”) is one of three appeals boards within the
Appeals Division of the Department’s Office of Hearings and Appeals (“OHA”). The IBIA
exercises the authority of the Secretary to issue decisions in (1) appeals in Indian probate matters,
(2) appeals from decisions of BIA officials, and (3) other matters pertaining to Indians which are
referred to it by the Secretary.

The Interior Board of Land Appeals (“IBLA”) hears appeals from BIA decisions concerning
the use and disposition of public lands, including mineral resources, and the conduct of surface
coal mining. The IBLA is involved in Indian resource issues in matters such as Indian mineral
royalties, Bureau of Land Management (“BLM”) decisions concerning Indian allotments, Office of
Surface Mining (“OSM”) decisions regarding reclamation of Indian lands, and other decisions
concerning Alaskan Native lands.

The Interior Board of Contract Appeals (“IBCA”) hears appeals from decisions of BIA
contracting officers concerning BIA procurement contracts, including tribal contracts under the
Indian Self-Determination and Education Assistance Act (“ISDEAA”).

General delegations of authority to each of the Boards are found in 43 C.F.R. Part 4. General
regulations that apply to all of OHA, unless superseded by specific regulations of a particular
component, are found in Subpart B. Specific rules applicable to the IBCA are in Subpart C; IBIA
rules are in Subpart D; and IBLA rules are in Subparts E, J, and L. The OHA has a Hearings
Division as well as an Appeals Division.

Once an appeal is made to the IBIA, the regulations at 43 C.F.R. Part 4 supercede those of 25
C.F.R. Part 2. In addition, some BIA programs have special appeals procedures, including
procedures for establishing that an American Indian group exists as an Indian Tribe; decisions to
contract or not to contract with an Indian tribe under the ISDEAA; decisions of Education Program
officials, which are appealed not to the IBIA but to the Director of Education Programs then to the
Assistant Secretary; and decisions in tribal enrollment disputes and issues concerning an
individual’s degree of Indian blood, which are appealed to the Assistant Secretary.

Decisions of the OHA appeal boards since November 1, 1996 are reported on the Department’s website. Unfortunately, the Department is subject to an order of the United States District Court for the District of Columbia that limits its ability to utilize the Internet, due to a finding that inadequate Internet security measures put Indian trust assets at risk. A cursory review of reported OHA decisions shows that the vast majority of appeals from decisions of BIA officials are to the IBIA, rather than to the IBLA or IBCA. Unfortunately, IBIA review of cases regularly takes up to two years, or more, except for those that can be summarily decided (e.g. dismissals), and those subject to regulatory timetables requiring expedited consideration (i.e. certain ISDEA appeals). Normally, BIA decisions become effective only when the time for filing an appeal has passed without such appeal being filed, although the official to whom an appeal is made may declare that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately.

In an appeal to the IBIA, the burden is on the appellant to show that a notice of appeal was timely mailed or delivered. An untimely appeal cannot be cured by attempting to appeal on remand. An appeal filed more than thirty days after notice of the decision will be dismissed as untimely, even where it is related to an ongoing dispute. “Even where appellant has not received the Board’s order, that fact would not constitute extraordinary circumstances warranting reconsideration.” A third party may request to appear as amicus curiae before the IBIA.

The IBIA lacks jurisdiction to review decisions made by the Assistant Secretary–Indian Affairs, except where a matter is specially referred to the Board by the Secretary or the Assistant Secretary or where a right of review is established by regulation. Just as it lacks authority to review decisions made by the Assistant Secretary, the Board also lacks authority to review inaction by the Assistant Secretary. The IBIA also lacks jurisdiction to review a BIA decision when a program regulation makes that decision final for the Department.

The IBIA has stated on numerous occasions that it is not a court of general jurisdiction, but instead has only that authority delegated to it by the Secretary of the Interior. Although frequently requested by appellants, the IBIA has not been delegated authority to declare a duly promulgated Departmental regulation invalid. The Board has no authority to waive Departmental regulations. The Board may, however, refer a request for a waiver of the regulations to the Assistant Secretary–Indian Affairs.

The OHA, as an Executive Branch agency, has no authority to declare an act of Congress unconstitutional. Because they only have that authority delegated to them by the Secretary, the boards normally have no authority to review decisions of the Assistant Secretary or to award money damages against the BIA. The IBIA may not substitute its judgment for that of the BIA in a matter that involves the exercise of discretion, although the IBIA may review for abuse of discretion. An appellant who challenges a BIA discretionary decision bears the burden of proving that the BIA did not properly exercise its discretion.

The IBIA has repeatedly stated that it lacks authority to issue advisory opinions. An appellant who fails to make any allegation of error in the decision under appeal, let alone any argument in support of such an allegation, has not carried its burden of proof. The Board will not consider arguments or evidence presented for the first time on appeal. If Appellant believes it is entitled to an award of costs or attorney fees under any law, it may submit an application for such an award, identifying the law it believes is applicable.

To correct prior error, an official of the BIA may change an administrative interpretation of a statute as long as the reason for the change is clearly set forth and the departure from the prior administrative position is not arbitrary or capricious. Appellants have unsuccessfully sought to estop the Department in such situations. Estoppel will not run against the Government when it acts as trustee for Indians. The six-year statute of limitations for the commencement by the United States of civil actions for money damages does not limit administrative action within the
B. BIA Records

The DOI has established a national repository for the consolidated non-active records of the BIA and the OST. The American Indian Records Repository is located at the National Archives and Records Administration facility in Lenexa, Kansas. Haskell Indian Nations University, a BIA-operated post-secondary school located in Lawrence, Kansas, has simultaneously established an archival records management studies program to train and certify Indian students.

Although the BIA makes daily decisions affecting not only Indians and their property interests, but also many non-Indians, BIA records—like those of other federal agencies—are not always open to public review. The Privacy Act generally prohibits federal agencies from disclosing any record which is contained in a system of records, unless otherwise authorized. Authorization may be found in the Freedom of Information Act (“FOIA”), which mandates broad disclosure of government documents, except for certain exempt categories of information.

The BIA sometimes withholding records involving Indian trust property pursuant to Exemption Four, “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” For example, the Tenth Circuit Court of Appeals upheld the BIA’s refusal to release information related to a lease of Indian lands for storage of approximately 40,000 tons of spent nuclear fuel, on the basis of evidence demonstrating the existence of potential economic harm.

The BIA may also withhold records pursuant to Exemption Three to FOIA, which exempts information that is exempted from disclosure by another federal statute. For example, BIA has successfully relied on Exemption Three with reference to the Archeological Resources Protection Act of 1979 (“ARPA”), which generally prohibits the disclosure of information concerning the nature and location of archeological resources.

A “trustee is under a duty to the beneficiary not to disclose to a third person information which he has acquired as trustee where he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary.” Nevertheless, the Supreme Court has declined to recognize an “Indian trust responsibility” exception to the FOIA, at least in the context of Exemption Five for intra-agency communications.

The Department does not attempt to argue that Congress specifically envisioned that Exemption 5 would cover communications pursuant to the Indian trust responsibility, or any other trust responsibility. Although as a general rule we are hesitant to construe statutes in light of legislative inaction, see Bob Jones Univ. v. United States, 461 U.S. 574, 600, 76 L. Ed. 2d 157, 103 S. Ct. 2017 (1983), we note that Congress has twice considered specific proposals to protect Indian trust information, see Indian Amendment to Freedom of Information Act: Hearings on S. 2652 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess. (1976); Indian Trust Information Protection Act of 1978, S. 2773, 95th Cong., 2d Sess. (1978). We do so because these proposals confirm the commonsense reading that we give Exemption 5 today, as well as to emphasize that nobody in the Federal Government should be surprised by this reading.

Congress has specified certain types of Indian land ownership information that must be released to certain types of requesters. The Indian Land Consolidation Act (“ILCA”) provides that the BIA shall make available certain information about Indian landowners to certain categorical requesters, including other Indian owners of interests in trust or restricted lands within the same reservation; the tribe that exercises jurisdiction over the land; and prospective applicants for the leasing, use, or consolidation of interests in trust or restricted lands. FOIA and Privacy Act
regulations applicable to BIA are found at 43 C.F.R. Part 2. When BIA contracts with an Indian tribe or any other party to accomplish a Department function and the contract provides for the operation of a system of records, the contract must also require the contractor to comply with the Department’s Privacy Act regulations. The regulations provide for administrative appeal of a records denial by the BIA.

C. APA Review

The United States is immune from suit absent its express consent. The APA waives the sovereign immunity of the United States with respect to non-monetary claims to provide for judicial review of “final agency action.” The APA does not permit judicial review where a statute expressly or implicitly precludes review. Nor does the APA authorize judicial review of “agency actions committed to agency discretion by law.”

A jurisdictional barrier that frequently confronts those seeking judicial review of BIA administrative action is Rule 19 of the Federal Rules of Civil Procedure, which requires dismissal of an action where a necessary and indispensable party cannot be joined. Many BIA decisions affect one or more Indian tribes, who normally cannot be joined without their consent due to sovereign immunity. Accordingly, a Court is without subject matter jurisdiction pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure, and the complaint should be dismissed. However, a tribe will not be found to be indispensable in every case in which its interests are affected.

IV. Tribal Government

A. Federal Recognition of Indian Tribes

The United States maintains government-to-government relationships with 562 Indian tribes. Although only fourteen states are without federally recognized tribes, the tribes are concentrated primarily in the West. Absent federal recognition, a tribe could not exercise sovereign powers or receive services from the BIA, as described herein.

The United States Constitution grants Congress the power “to regulate Commerce . . . with the Indian Tribes.” Under long-standing precedent, the Supreme Court generally defers to a determination by the Congress or the Executive branch that a tribe exists. Federal recognition historically resulted from a course of dealing over time, a treaty, a statute, or executive order. Although Congress terminated recognition by treaty in 1871, it still may extend recognition to a particular tribe through special legislation.

Nevertheless, most groups seeking federal recognition today face a daunting administrative procedure. Until 1978, the BIA made tribal recognition decisions on a case-by-case basis, when it established a formal regulatory process for recognizing tribes. Now, BIA will grant recognition only to a petitioner who can meet a series of difficult tests: that it has been identified as an American Indian entity on a substantially continuous basis since 1900; that it has existed as a historically distinct community from historical times to the present; that it has maintained political influence or authority over its members from historical times to the present; that it maintains governing documents or procedures, including membership criteria; that its membership descends from a historical Indian tribe that functioned as a political entity; that its members are not members of any other tribe; and that it has not been the subject of congressional legislation expressly terminating the Federal relationship.

Before implementing the current recognition regulations, the BIA had received forty petitions from groups seeking formal tribal recognition. Since 1978, BIA has received an additional 254 petitions. As of February, 2004, a total of 57 petitions had been resolved, 13 petitions were ready for dispensation, 9 petitions were in active status, 2 in post-final decision appeals, 1 in litigation,
and 213 were not yet ready for evaluation. The glacial pace of the recognition process, combined with the high stakes and strong feelings associated with such decisions, have led to accusations of corruption and proposals to change the system.

Tribal recognition presents unique issues in several parts of the country. The BIA has extended federal recognition to more than 200 Alaska Native organizations as Indian tribes, however, Alaska Native groups have limited authority to govern Indian lands as “Indian country.” Nevertheless, Congress has included Alaska native villages and corporations as the equivalent of federally recognized Indian tribes in various legislation. The Alaska Inter-tribal Council is a statewide, tribally-governed non-profit organization that advocates on behalf of tribal governments throughout the state. The unique status of Indian lands in Alaska is discussed infra.

The United States has recognized no federal trust relationship with Native Hawaiians. Nevertheless, Congress has endorsed a process that may end in the establishment of a government-to-government relationship with Native Hawaiians. In 1993, Congress enacted a resolution extending an apology on behalf of the United States to Native Hawaiians for the illegal overthrow of the Native Hawaiian government 100 years earlier and calling for a reconciliation of the relationship between the United States and Native Hawaiians.

In December of 1999, the Departments of Interior and Justice initiated a process of reconciliation in response to the Apology Resolution, resulting in a report, entitled “From Mauka to Mauki: The River of Justice Must Flow Freely” (“Reconciliation Report”), issued on October 23, 2000. The principal recommendation contained in the Reconciliation Report is that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes.

In 1848, Mexico ceded to the United States more than 70 million acres in California, land to which the California Indians had aboriginal title. Over the next few years, the United States negotiated 18 treaties with 139 California Indian groups. The Senate refused to ratify the treaties, however, instead passing the California Land Claims Act of 1851, which effectively passed Indian aboriginal title into the public domain, except for lands occupied by certain bands of Mission Indians that had received Spanish land grants. California Indians continued to receive sparse federal aid, including the purchase of small parcels of land in central and northern California that became known as the California Rancheria System.

In the 1930s, many California tribes reorganized their tribal governments under the auspices of the IRA. The revival was short-lived, however, as the Rancheria Act of 1958 slated 41 California rancherias for termination of federal recognition. Eventually, most of the rancherias regained federal recognition, but another 40 tribes in California continue to be denied acknowledgement.

B. Tribal Constitutions

The Indian Reorganization Act of 1934 (“IRA”) authorized tribes to revitalize their tribal governments by adopting constitutions subject to the approval of both the tribal membership and of the Secretary of the Interior. The IRA also permitted tribes to incorporate under a charter issued by the Secretary and approved by tribal members. BIA regulations govern Secretarial elections concerning tribal constitutions adopted pursuant to the IRA. The IRA requires only that tribal constitutions and bylaws adopted thereunder, or amendments thereto, obtain BIA approval; it does not require that tribal ordinances be made subject to BIA approval. The Supreme Court has noted that tribes with ordinance approval provisions in their constitutions “are free, with the backing of the Interior Department, to amend their constitutions to remove the requirement of Secretarial approval.” In a Secretarial election for tribal constitutional amendments under the IRA, the Seventh Circuit Court of Appeals distinguished a federal responsibility imposed upon the BIA by an Act of Congress, and a BIA responsibility undertaken as a matter of tribal law.
At its base, this lawsuit is a challenge to the way certain federal officials administered an election for which they were both substantively and procedurally responsible. It bears emphasizing that Secretarial elections, such as the one at issue here, are federal—not tribal—elections. 25 C.F.R. § 81.1(s). Tribes are sovereign only to the extent that their sovereignty has not been qualified by statutes or treaties. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987). The IRA explicitly reserves to the federal government the power to hold and approve the elections that adopt or alter tribal constitutions. 25 U.S.C. § 476.

C. Tribal Resolutions and Elections

Where a tribe has given BIA formal authority to review tribal actions through its constitution or ordinances, that authority must be narrowly construed, and BIA review must be undertaken in such a way as to avoid unnecessary interference with the tribes’ right to self-government. Intra-tribal disputes, including disputes concerning the validity of tribal council actions, should be resolved in tribal forums. The guiding principle of these IBIA decisions is the federal policy of respect for tribal self-government, which counsels that the federal government should refrain from interfering in intra-tribal disputes.

There are, however, some circumstances in which the BIA must act. The courts have recognized that “the DOI has the authority and responsibility to ensure that the Nation’s representatives, with whom it must conduct government-to-government relations, are the valid representatives of the Nation as a whole.” The IBIA also recognizes that the BIA must at times intrude into intra-tribal disputes.

Both the Federal courts and the Board have recognized that there are times when, despite the lack of specific statutory authority, BIA must make determinations concerning intra-tribal disputes, most often those disputes involving tribal elections or the removal of tribal officials from office. BIA’s authority to make these determinations derives from its responsibility to carry out the government-to-government relationship and its concomitant need to know whether a tribal governing body is properly constituted and therefore qualified to represent the tribe in dealings with BIA. [Citations omitted.] Even in these circumstances, however, BIA must avoid unnecessary intrusions into tribal self-government.

The IBIA has also held that, in cases where the BIA has authority to review a tribal action, it has the authority and the responsibility to review the tribal action for violations of the Indian Civil Rights Act of 1968 (“ICRA”), which applies most of the provisions of the Bill of Rights to tribal governments. However, the IBIA has also held that ICRA is not an independent grant of authority and does not authorize BIA to scrutinize tribal actions not otherwise properly within its jurisdiction.

The IBIA has held that a valid tribal election held during the pendency of an appeal from a prior leadership dispute moots the earlier appeal. The Board has held on several occasions that individual tribal members lack standing to appeal a BIA action based on a personal assessment as to what is in the best interest of the tribe. Tribal remedies must normally be exhausted before a tribal member may seek relief from the IBIA.

D. Tribal Membership

“Indian” is a term that has different meanings for different purposes. In the most common sense, the term implies that a person has some Indian blood, and is recognized as an Indian by the relevant community. However, an even broader definition is employed in the U.S. Census, where being “Indian” is a purely a matter of self-identification as part of a racial or ethnic group. At the other extreme, as a matter of political status, to be considered an Indian one must be a member of a
federally recognized Indian tribe. Normally, tribes retain complete control over their membership determinations. Several federal courts have held that the IRA does not confer jurisdiction to consider claims of improper membership determinations or election procedures. The Tenth Circuit Court of Appeals has found the tribal government to be indispensable in intra-tribal membership disputes on at least two occasions. In *Davis ex rel Davis v. United States*, plaintiffs alleged the BIA wrongfully allowed the Seminole Nation of Oklahoma to deny to members of African ancestry certain benefits routinely provided to other members of the Tribe. Plaintiffs did not sue the Tribe itself but instead brought suit against the United States and various federal agencies and officials. Plaintiffs sought an order requiring the BIA to issue Certificates of Degree of Indian Blood (“CDIBs”) to members of the Plaintiff-bands. The district court dismissed the case for failure to join an indispensable party, the Seminole Nation. The Court of Appeals held that: (1) the district court did not abuse its discretion in determining that the Seminole Nation is an indispensable party with respect to the wrongful exclusion claim, and (2) the district court correctly ruled that it lacked jurisdiction to hear the CDIB claim because Plaintiffs failed to show that they had exhausted their administrative remedies. In a suit against the government seeking a change in federally mandated membership for the Osage Tribe, the Tenth Circuit ruled that the Tribe itself is still an indispensable party.

Tribal Defendants were necessary parties whether this test is applied in relation to the relief requested by Individual Plaintiffs, the invalidation of the franchise restriction and what amounted to the revival of the tribal government under the 1881 Constitution, or in relation to the relief actually granted, the franchise extension and a new constitution and government. The relief requested in the second amended complaint posed a practical threat to the ability of Tribal Defendants to protect their interest as the sole governing body of the Tribe as well as to meet their obligations to protect the Osage mineral estate, while the actual results of the district court proceedings directly compromised those interests. Moreover, Tribal Defendants were indispensable because the case, essentially an internal tribal dispute, could not in equity and good conscience proceed in their absence, Fed. R. Civ. P. 19(b), in light of Tribal Defendants’ interests. We have dismissed cases under Rule 19(b) when a tribe cannot be joined to a suit on account of sovereign immunity. (Citations omitted.)

Congress has the power to determine tribal d the BIA of any wrongdoing in the matter. Critics similarly failed to prove wide-ranging charges of corruption at a May 5, 2004, hearing before the House Government Reform Committee. The DOI’s inspector general testified that his investigations uncovered membership for federal administrative purposes and that definition of membership may differ from one established by the tribe itself. Congress normally exercises this power where federal recognition is restored to a tribe or to provide a basis for the distribution of judgment funds. BIA regulations at 25 C.F.R. Part 61 govern the compilation of “Rolls of Indians” where federal statutes place that responsibility with the Secretary of the Interior.

**E. The Politics of Tribal Recognition**

The BIA has been harshly criticized for allegedly allowing political considerations to enter into recognition determinations regarding tribal status, membership and leadership. Charges of influence peddling have been lodged against both the Clinton and Bush Administrations. Additionally, both the BIA and the Office of the Solicitor have been criticized for violating the due process rights of petitioners. Critics also contend that some Interior decisions affecting casinos are politically motivated. A Deputy Assistant Secretary was promptly fired after his former business partner reportedly asked at least three tribes for a high consulting fee and implied an ability to influence decisions pending before the BIA.
The Federal Bureau of Investigation, Interior’s Inspector General, and the General Accounting Office of Congress all launched an investigation into claims that the lure of gaming profits led BIA officials in California to manipulate tribal membership rolls in order to gain enrollment for themselves and their families and to override tribal resistance to establishment of a potentially lucrative casino. The Inspector General subsequently cleared “harassment” of the staff that handles recognition, but by top officials at the BIA, not by lobbyists. He also contended that the recognition process is “one of the more transparent processes at Interior.”

More recently, the DOI Inspector General found no wrongdoing in the federal recognition of the Schaghticoke Indians of Connecticut. The investigation found that despite spending more than $12 million on recognition efforts, the Tribe did not improperly influence BIA officials. The state’s top elected officials, who oppose the tribe’s recognition, responded angrily to the report. Connecticut Governor M. Jodi Rell termed the Schaghticoke decision “incomprehensible.” Attorney General Richard Blumenthal said he was “disgusted and disappointed” with the report, and U.S. Rep. Rob Simmons called it “just a bunch of b.s.”

Critics say gambling interests, in particular, have too much influence over the recognition process, with some claiming that two-thirds of groups seeking federal recognition as Indian tribes are being bankrolled by casino investors. The National Indian Gaming Association (“NIGA”), an organization of gaming tribes, has endeavored to dispel the notion that tribal recognition decisions are linked to gaming interests. NIGA notes that of fifteen Tribes that have received federal recognition since 1988, only one has gaming.

Yet there is no question but that recognition efforts have attracted powerful financial backing. Over the past decade, for example, Donald Trump invested more than $10 million in a group seeking recognition as the Paucatuck Eastern Pequots in Connecticut. However, in June 2002, the BIA granted recognition to another group claiming to represent the tribe, which then “fired” Trump in favor of its own financial backers. Trump is asking a court to order the Tribe to return his money.

V. Law and Order in Indian Country

A. Tribal Jurisdiction

The United States has consistently recognized Indian tribes as “distinct, independent political communities,” with inherent powers of self-government. The Supreme Court long ago upheld “the right of reservation Indians to make their own laws and be ruled by them.” The Court has recognized the authority of tribal governments to provide for the protection of health and safety of reservation residents and the political integrity of the tribe.

Tribal courts have repeatedly been recognized as “appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.” The Supreme Court has acknowledged the breadth of tribal court jurisdiction, stating: “If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law.” The Court has ruled that a question of a tribal court’s jurisdiction over a reservation-based suit against a non-Indian must be determined in the first instance not in federal court but in tribal court. The Court has also observed that “[n]onjudicial tribal institutions have also been recognized as competent law-applying bodies.”

Although tribes retain considerable authority over the conduct of both tribal members and nonmembers on Indian land, or land held in trust for a tribe by the United States, Congress and the Court have imposed a number of restrictions on tribal jurisdiction, sometimes by expanding state and federal jurisdiction into Indian country. A series of Congressional enactments in the 19th century extended federal criminal jurisdiction into Indian country, without eliminating concurrent
tribal jurisdiction, beginning with the Indian Country Crimes Act and culminating in the Major Crimes Act.

Congress extended state jurisdiction into Indian country in 1953 with the passage of Public Law 280, which gave several states extensive criminal and civil jurisdiction over Indian Country and allowed others to acquire such jurisdiction at their option. Although Public Law 280 was initially intended to extend state criminal jurisdiction to certain California reservations, by the time the bill was passed, it had been transformed into a general measure conferring criminal and civil jurisdiction on several states.

Public Law 280 eliminates federal criminal jurisdiction for certain crimes committed in Indian Country, however, the federal government retains authority to enforce federal criminal laws of general application in Indian Country. Public Law 280 also granted states concurrent civil jurisdiction with regard to most matters in Indian country. This grant did not include the application of local law, nor does it include the power to regulate land use.

The most important affirmative limitation imposed by Congress on tribal criminal jurisdiction is the Indian Civil Rights Act of 1968 ("ICRA"), which applies most of the provisions of the Bill of Rights to tribal governments and limits the maximum sentence that may be imposed by a tribal court to one year in prison and a $5,000 fine. The ICRA also amended Public Law 280 by making further state assumption of jurisdiction contingent upon tribal consent.

The Supreme Court has held that the Indian Civil Rights Act did not give jurisdiction to Federal courts to review tribal compliance with the Act, except in the case of a petition for a writ of habeas corpus. The Court stated “[t]ribal forums are available to vindicate rights created by the ICRA . . . .” The Court also suggested an additional alternative to federal habeas corpus and tribal enforcement of the ICRA where tribal constitutions required that the Secretary of the Interior approve new ordinances so that the Department of the Interior might enforce the ICRA.

The Second Circuit Court of Appeals has rendered some of the more expansive opinions regarding the existence of federal court habeas jurisdiction under the ICRA. In one such case, the court found “banishment” from the reservation to be the equivalent of a restraint on liberty sufficient to invoke the habeas relief available under the ICRA. In a subsequent case, however, the court declined to find the legal equivalent of banishment in the seizure and destruction of tribal members’ homes, allegedly with the specific intent to punish them for exercising various protected rights. Other courts have recognized that when a tribal official acts beyond his lawful authority, the official may be sued.

The IBIA has held that in cases where the BIA has authority to review a tribal action, it has the authority and the responsibility to review the tribal action for violations of the ICRA. However, the IBIA has also held that ICRA is not an independent grant of authority and does not authorize BIA to scrutinize tribal actions not otherwise properly within its jurisdiction.

The Supreme Court has also recognized far-reaching limitations on tribal jurisdiction. Beginning in the late 1970s, the Court has increasingly found inherent limitations on tribal sovereignty, including the lack of criminal jurisdiction over non-Indians, freedom from state taxation of on-reservation sales to non-Indians, ability to prohibit hunting and fishing by non-Indians on reservation fee lands, and to zone reservation fee lands. The Court has inferred congressional intent to diminish a reservation, to permit state taxation of Indian-owned reservation allotments held in fee, to authorize state taxation of commerce with Indian tribes, and to restrict the ability of tribes to tax the activities of nonmembers on fee simple land within reservation boundaries, or to try non-member Indians.

More recently, the Court has found tribal courts lack jurisdiction to hear a case involving a highway accident on a right-of-way through tribal trust lands or to hear a civil claim against state officers who enter tribal land to execute a search warrant against a tribal member suspected of having violated state law outside the reservation. The Court has also found that Alaska tribes lack jurisdiction over Indian lands. Additionally, the Court has ruled that states retain jurisdiction to
enter reservations to investigate and prosecute off-reservation violations.

Congress, acting to curb what it deemed to be abusive practices by state courts, gave tribal courts presumptive jurisdiction over many child custody matters in the Indian Child Welfare Act of 1978. The Indian Child Welfare Act provides that Indian tribes may reassert jurisdiction over child custody proceedings on those reservations over which states obtained jurisdiction pursuant to Public Law 280. BIA regulations set out procedures for tribes to petition to reassert jurisdiction over child custody proceedings.

Although the U.S. Constitution requires states to give full faith and credit to the judgments of the courts of other states, it does not mention tribes. Nevertheless, some states extend full faith and credit to judgments of tribal courts, whereas other state and federal courts have recognized tribal judgments as a matter of comity.

B. Courts of Indian Offenses

The BIA is normally precluded from imposing federal standards on tribal court administration and conduct. Each Tribe controls its own judicial system, although intertribal court systems are not uncommon. However, where tribes have not established tribal courts, the BIA has established “Courts of Indian Offenses” on certain Indian reservations under the authority vested in the Secretary of the Interior by the Snyder Act, which authorizes appropriations for “Indian judges,” and pursuant to more generalized authority.

These BIA funded courts operate pursuant to regulations of 25 C.F.R. Part 11 and are commonly called “C.F.R. Courts” (for the Code of Federal Regulations). C.F.R. Courts are considered both agencies of the Federal government and tribal courts. Due to the unique history of the tribes located in the former “Indian Territory,” many of the C.F.R. Courts are located within the boundaries of present day Oklahoma.

C.F.R. Courts enforce federal regulations concerning criminal and civil causes of action, domestic relations, probate, children, juvenile offenders, and minors in need of care as well as any tribal ordinances that have been approved by the Department. Criminal jurisdiction is limited to tribal members and civil jurisdiction is limited to suits wherein the defendant is Indian unless the parties stipulate to the court’s jurisdiction. The statute of limitations for criminal actions is five years and three years for civil actions. Unless authorized by the tribal government, no C.F.R. Court may exercise jurisdiction over tribal election disputes, internal tribal government disputes, or suits against the tribe. A decision of the BIA on who is a tribal official is binding on a C.F.R. Court.

Each C.F.R. Court has a trial and appellate division. Appeals are heard by a panel of three magistrates and are not subject to further appeal within the Department. Magistrates are appointed by the Department and confirmed by the tribe and they serve four-year terms but may be removed by the Department for cause. Court records are considered to be records of the Department and are subject to the Privacy Act and the Freedom of Information Act. The Department also appoints a prosecutor for each court. Practice is permitted by attorneys and lay counsel.

Criminal laws and procedures are detailed in the regulations. Criminal defendants are entitled to counsel at their own expense. Sentences may not exceed six months imprisonment and a $500 fine. The civil law to be applied includes federal statutes or regulations, tribal ordinances or customs, or in the absence of the foregoing, the law of the State in which the dispute arises. There are detailed federal regulations concerning domestic relations, probate of non-trust assets, appellate proceedings, children’s court, juvenile offenders, and minors in need of care. The IBIA has no jurisdiction to review decisions made by tribal officials, tribal governing bodies, or tribal courts including C.F.R. Courts.

The BIA operates twenty-two Courts of Indian Offenses. Tribes operate others under contract/compact agreements with performance monitoring subject to negotiation with each tribe. Within the BIA’s Tribal Priority Allocation (“TPA”) program, tribal governments determine
annual allocations among thirty-five programs including tribal court operations. In fiscal year (“FY”) 2003, TPA funds total $772 million, of which $26 million is available for tribal courts. The White House Office of Management & Budget (“OMB”) has criticized the BIA because the tribal courts program lacks long-term goals and annual performance measures and because tribal courts are not required to report on staffing, caseloads, time for adjudication, appeals to non-tribal courts, case dispositions, or other performance indicators. According to the OMB, the BIA has conducted no credible independent evaluations and none are planned.

The BIA has no current inventory of tribal courts, but estimates about 275 general, special (i.e., traffic, juvenile, family) and appellate courts serve about 40 tribes. Most tribes have adopted modern and customary codes that are usually based on federal and state statutes. It is estimated that about 42% of tribal court cases concern criminal matters with potential jail time.

C. Law Enforcement

The BIA is responsible for overall policy development and implementation of the Indian Law Enforcement Reform Act, for its own law enforcement programs and for law enforcement activities contracted to tribes. The Office of Law Enforcement Services (“OLES”) is a semi-autonomous agency within the BIA that carries out these responsibilities. In addition to its own officers commissioned to enforce applicable federal criminal statutes, the OLES may issue law enforcement commissions to other federal, state, tribal and local law enforcement officers. With the permission of the tribe, OLES officers may enforce tribal law as well.

It is common for the BIA and tribes to have difficulty getting local or State law enforcement to respond to crimes on the reservations. For example, it is difficult to get local law enforcement to respond to domestic violence calls and illegal disposal activities in Indian country. Often, tribal law enforcement officers are limited to restraining these perpetrators until a county, State, or Federal officer arrives. In response to these complex jurisdictional hurdles, BIA has adopted a policy of entering into agreements whereby it grants special law enforcement commissions to tribal and local law enforcement officers.

The BIA placed a moratorium on the issuance of deputation agreements in response to a federal court ruling that prohibited such deputized tribal officers from driving police vehicles equipped with emergency light bars on California highways that connect the various parts of the tribe’s reservation. Another tribe successfully challenged the moratorium and established its right to contract for the programs under the Indian Self-Determination and Education Assistance Act, and thereby seek to qualify for the special law enforcement commission.

In 2000, the BIA and tribal agencies employed about 2,300 full time law officers and 1,160 support personnel. Other federal agencies employed over 88,000 officers and 72,000 support personnel. The Federal Bureau of Investigation (“FBI”) conducts felony (criminal) investigations on Indian reservations. State/local agencies employed over 708,000 officers and 311,000 support personnel. In FY 2002, the BIA supported 206 Indian police agencies. Tribes managed 163 (79%) of local agencies under Indian self-determination contract or compact agreements. The BIA managed 43 (21%) agencies. In 2002, DOI’s Inspector General conducted a department-wide review of law enforcement programs, and cited the BIA as a model for personnel and training standards, operations manuals, staffing redeployment, records systems, and incident reporting.

The OLES has recommended that over the next three years an additional 1,500 Native American officers be hired to complement the approximately 2,700 who presently patrol the reservations. Instead, it appears that 759 police positions on reservations will lose their federal funding by 2006. Interestingly, especially in light of these conditions, Indian tribal police departments have been outspoken in their support of the concept of civilian oversight, unlike their counterparts in police departments throughout the United States.

BIA regulations set standards for Indian Country detention facilities and programs whether
operated by the BIA or by tribes that receive federal funds. The regulations are promulgated to ensure compliance with the Indian Country Law Enforcement Reform Act of 1990 and the Indian Alcohol and Substance Abuse Prevention Act. Unfortunately, the nation’s reservation jails have repeatedly been found to violate the most basic health and safety standards, posing serious risks to over 2,000 inmates as well as their guards.

The 74 detention centers on reservations hold 1,699 adults and 307 juveniles, according to most recent federal figures from 2002. The BIA operates 20 of the prisons and provides funding for 46 others, whereas eight facilities are run by tribes. A recent investigation by DOI’s Inspector General catalogued hundreds of suicide attempts and escapes at the 27 prisons they visited, and several unreported deaths. The report states that the BIA’s jails are a “national disgrace with many facilities having conditions comparable to those found in third-world countries,” adding that “BIA appears to have a ‘laissez-faire’ attitude in regard to these horrific conditions at its detention facilities.” OLES officials admitted that none of their detention facilities “come close” to meeting the BIA’s standards for operation, which derive from nationally recognized detention standards.

In response to concerns raised by the Senate Committee on Indian Affairs, David W. Anderson, Assistant Secretary–Indian Affairs, testified that the BIA is already working on corrective actions, including: closing unsafe facilities; revising the procedures for reporting and reviewing serious incidents; inspecting Indian Country detention centers for compliance with national law enforcement, facility, safety and environmental standards; initiating capital improvements to correct imminently hazardous or mission critical deficiencies; identifying funds to address immediate shortfalls in law enforcement staffing and operations for BIA-funded facilities; and standardizing detention facility inspections. Anderson also testified that the BIA will spend $6.4 million on prison operations in 2004, up from $1.4 million in the previous year.

The Indian Tribal Justice Act established an Office of Tribal Justice Support within the BIA to further the development, operation and enhancement of tribal justice systems and Courts of Indian Offenses. The Indian Tribal Justice Technical and Legal Assistance Act of 2000 authorizes DOJ to award grants to (1) Indian tribes for development/operation of judicial systems, (2) national/regional organizations to provide training/technical assistance to tribes, and (3) non-profit entities to provide criminal/civil legal assistance to tribes and tribal members.

In 1999, DOJ began awarding Community Oriented Policing Services (“COPS”) grants directly to tribal governments to support new police officer, criminal investigator, dispatcher, detention officer, and other positions. The COPS grants may cover 75% of additional salary, training, and equipment expenses for 3 years and are renewable for two years. The OMB has noted that the BIA and the DOJ have no formal coordination on tribal COPS grant applications, awards, and compliance oversight. During FYs 1999-2002, a total of 48 BIA and tribal police operations received three annual COPS grants. Up to 125 COPS funded positions will expire by FY 2005, but BIA has no plans to assume these positions in its budget.

Since the BIA-DOJ Indian law enforcement initiatives, BIA funding has increased from $96.3 million in FY 1999 to $159 million in FY 2003. The BIA’s FY 2004 Budget requested $169 million for police and detention facility operations. The DOJ funding has increased from $182 million in FY 1999 to $209 million in FY 2003. The DOJ’s FY 2004 Budget requests $214.9 million, including $30 million for COPS and $35 million for new detention facilities. Twenty new detention centers funded by DOJ grants have been constructed and staffed by the BIA.

D. Unequal Justice

In spite of the combined efforts of the BIA and the DOJ, findings by the U.S. Commission on Civil Rights indicate that:

[All three components of law enforcement—policing, justice, and corrections—are substandard]
in Indian Country as compared with the rest of the nation. Native Americans are twice as likely as any other racial/ethnic group to be the victims of crime. Yet per capita spending on law enforcement in Native American communities is roughly 60% of the national average. Correctional facilities in Indian Country are more overcrowded than even the most crowded state and federal prisons.

Native American women are 50% more likely to be victimized than the next highest group (African American men). Indian Country crimes are twice as likely to be violent than are those committed elsewhere. Native Americans in rural areas are more than twice as likely to be victims of crime than are rural whites, even though most violent crimes against Native Americans occur in urban areas. Native Americans are more likely than other groups “to experience violence at the hands of someone of a different race.”

Although there are disproportionately few law enforcement officers in Indian Country, Native Americans are incarcerated at a rate 38% higher than the national per capita rate. Federal prisons hold 50 percent more Native American youth than they did in 1994.

Several observers have remarked on the inequities suffered by both Native American victims and offenders through the application of federal laws in Indian country. Under the Federal Sentencing Guidelines, Indians may be likely to receive longer sentences imposed by federal courts as compared to non-Indians offenders who would be sentenced under generally more lenient state laws. On the other hand, the Federal Guidelines do not currently recognize the sentences of tribal courts in weighing the past criminal conduct of a defendant in the federal sentencing regime. One advocate has proposed changes in the law to allow civil suits for prospective injunctive relief against Indian law enforcement officials who fail to enforce protective orders from other states or tribes.

VI. Indian Land and Water

The BIA is responsible for the administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives. Developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure and economic development are all part of the agency’s responsibility. Records of Indian land holdings are not normally recorded, as are fee holdings, with county officials. Rather, the BIA Land Title and Records Offices record and maintain custody of records that affect title to Indian lands and examine title and provide title status reports.

A. Acquisition of Indian Lands

One of the most controversial aspects of federal policy with respect to Indian lands is that of acquiring lands for tribes. The primary authority for taking land into trust for Indians or tribes is the following provision of the IRA:

The Secretary of the Interior is 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.

In addition to this general land acquisition authority, Congress has adopted numerous statutes mandating acquisition of land in trust for particular tribes. The Secretary of the Interior may
proclaim that lands acquired in trust for a tribe become part of that tribe’s reservation. Federal law also permits the use of funds derived from the sale or condemnation of Indian trust or restricted lands for the purchase of replacement land to be held in trust.

Several federal statutes provide for the acquisition of surplus or donated property. The DOI may accept donations of property for the advancement of Indians. The General Service Administration (“GSA”) may transfer excess federal land within an Indian reservation to the DOI to be held in trust for that tribe. Tribes may acquire surplus federal property from federal agencies, specifically including the BIA, IHS and GSA, for the performance of a contract function under the ISDEAA. Tribes may also acquire excess military property under the Base Realignment and Closure Act ("BRAC").

Federal courts have frequently been asked to find that 25 U.S.C. § 465 is an unconstitutional delegation of legislative authority. The Eighth Circuit Court of Appeals accepted that argument but the decision was vacated by the United States Supreme Court. On remand from the Circuit, the district court upheld the constitutionality of Section 465. Other courts have reached the same conclusion.

The argument has been soundly rejected by the Tenth Circuit Court of Appeals, which determined that “Congress properly delegated to the Secretary of the Interior authority to make (trust) acquisitions, and the Secretary then granted a delegation of general authority to the Commissioner of Indian Affairs.” Indeed, the court expressed some exasperation at such challenges to the validity of the trust process, stating the “many arguments about the invalidity of the trust process, in this instance and in general, must finally be put to rest.”

BIA land acquisition policy states:

Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary:

(a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:

1. When the property is located within the exterior boundaries of the tribe’s reservation or adjacent thereto, or within a tribal consolidation area; or
2. When the tribe already owns an interest in the land; or
3. When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

(b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status:

1. When the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or
2. When the land is already in trust or restricted status.

A proposed land acquisition is examined under different criteria depending on whether the land is located contiguous to or within an Indian reservation or outside of and noncontiguous to a reservation. “Indian reservation” includes that area of land constituting the former reservation of an Oklahoma tribe.

The decision to acquire land into trust for a tribe is one within the discretion of the Secretary after due consideration of the factors set forth in the regulations. After the agency has considered the applicable factors, the proper standard for reviewing an agency’s discretionary decision is to determine whether the agency acted in a manner which is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
The IBIA has described its standard of review and the burden of proof in trust acquisition cases as follows:

[D]ecisions as to whether or not to take land into trust are discretionary. The Board does not substitute its judgment for BIA’s in decisions based upon an exercise of discretion. Rather, the Board reviews such decisions “to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion established in regulations.”

Most appeals from decisions to take land into trust come from local governments that fear a loss of jurisdiction over the land, a loss of tax revenue, or that the land may be put to an objectionable use such as gaming. Mere speculation that a tribe might at some future time attempt to use trust land for gaming purposes does not, however, require the BIA to consider potential gaming in deciding whether to acquire the property in trust.

The BIA must consider the loss of taxes actually assessed and paid on the property as well as comply with applicable environmental laws, such as the National Environmental Policy Act (“NEPA”). Such review is not required for acquisitions that are made mandatory under a relevant statute, however, since the Secretary’s decision is then ministerial rather than discretionary.

Appeals from non-governmental parties are usually accompanied by appeals filed by governmental entities. Therefore, the IBIA normally does not address the standing of the non-governmental appellants. However, the IBIA has held that a citizens’ group lacked standing to challenge an acquisition of land into trust by a tribe. Although state law allows individuals to bring suit in the public interest without requiring them to meet ordinary standing requirements, the Board declined to recognize an appeal made in the capacity of a “private attorney general.” The IBIA cannot order the BIA to take land into trust, where the acquisition involves the exercise of discretion. The IBIA lacks the authority to revoke a completed trust acquisition even upon a finding that the transaction did not meet statutory or regulatory requirements. The Secretary may withdraw approval of the trust acquisition at any time prior to acceptance of the deed actually conveying the property to the United States.

B. Selling or Leasing Indian Lands

Just as federal consent is needed to take land into trust, federal law prohibits the transfer of individual and tribal trust or restricted property without the approval of the Secretary of the Interior. The Non-Intercourse Act invalidates any conveyance of an interest in tribal lands made without the approval of the United States. A party seeking to challenge U.S. title to Indian land pursuant to an unauthorized transfer faces an insurmountable barrier. Congress established the Quiet Title Act of 1972 as the exclusive means to adjudicate a disputed title to real property in which the United States claims an interest. The Quiet Title Act displaces APA review of administrative decisions affecting title to land in which the United States claims an interest based on the land’s status as trust or restricted Indian land. This Act expressly reserves sovereign immunity in disputes involving property held in trust for Indian tribes. Preservation of immunity under the Indian lands exception to the Act applies as long as the government has a “colorable claim” regarding its title as trustee to the land at issue.

Indian trust lands may be sold with the consent of both the owner and the Secretary. The Secretary may approve an application to sell Indian land if, after careful consideration of the circumstances, the transaction appears clearly to be justified in light of the long-range best interests of the owner. An appraisal is to be obtained prior to approving a sale. However, a sale may only be made by advertised sale and not by individually negotiated sale, unless the purchaser pays fair market value and the sale is for a public purpose, to the tribe or another Indian, or the Secretary
determines it is impractical to advertise. Advertised sales are made by sealed bid and the tribe may match the highest bid. Thus, the Bureau’s regulations normally do not permit a negotiated sale with a non-Indian. An individual Indian owner of trust land may, with BIA approval, execute a mortgage or deed of trust to such land. In the event of foreclosure, the Indian owner is treated as if he or she has an unrestricted fee simple title to the land and the United States is not a necessary party to the action.

An Indian landowner also may apply to have Indian land removed from trust status. However, an application for a fee patent in order to sell land free of the above restrictions is subject to additional limitations. The Secretary may withhold action on any application which would adversely affect the best interests of other Indians or the tribe until they have had a reasonable opportunity to acquire the land from the applicant. Prior to considering such an application, the tribe must be given an opportunity to match the purchase price that has been offered for the trust land involved. If the landowner conveys the trust land to another Indian or tribe, the purchaser would be barred for a period of five years from seeking removal of restrictions. Thereafter, the Tribe would again have the right to match any purchase price.

Federal law generally limits the leasing of Indian lands for any purpose to a maximum term of twenty-five years, although there are several exceptions to this rule. The maximum lease term has been extended to ninety-nine years for leases on the Agua Caliente Reservation, the Navajo Reservation, and certain others. The Native American Housing Assistance and Self-Determination Act of 1996 (“NAHASDA”) authorizes leases for housing development and residential purposes for a primary term of up to fifty years. The maximum primary term for other types of leases remains twenty-five years, and non-agricultural leases may provide for a single renewal period of up to twenty-five years. The American Indian Agricultural Resource Management Act of 1993 (“AIARMA”) limits leases of Indian rangeland and farmland to ten years, and up to twenty-five years only where a “substantial investment” is required.

Section 105(c) of AIARMA authorizes the owners of a majority of the trust interests in a tract to grant an agricultural lease or permit, and thus bind the minority owners upon BIA approval. In contrast, Section 219 of the Indian Land Consolidation Act Amendments of 2000 (“ILCA”) authorizes the owners of a “sliding percentage” of the trust ownership of a given allotment to grant a “non-agricultural” lease, again subject to BIA approval. The “minimum consent” requirement for these “non-agricultural” leases is a bare majority for tracts with twenty or more Indian owners and 90% for tracts with five owners or less. In the case of agricultural leases and permits the requisite “majority consent” must come from the Indian landowners themselves, but under the ILCA Amendments the BIA is allowed to also grant consent on behalf of decedents’ estates and owners whose whereabouts are unknown and count those interests toward the applicable “minimum consent” requirement.

Leases of Indian trust lands are subject to the National Environmental Policy Act (“NEPA”) and other federal land use statutes. Leases which have been granted or approved without proper NEPA documentation have been voided even after the lessee has acted in reliance on the approval. A State may not levy a tax directly on Indian tribes or their members inside Indian country absent clear congressional authorization. If the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax. Additionally, if the balance of federal, state, and tribal interests favors the State and federal law is not to the contrary, the State may impose its levy. A state possessory interest tax imposed on the leasehold interest carved from the tax exempt federally owned fee is sufficiently indirect and remote as to be permissible.

BIA regulations for leasing and permitting Indian lands for most purposes are set forth at 25 C.F.R. Part 162. The leasing regulations are broken into general provisions (Subpart A), use-specific provisions relating to agricultural leases (Subpart B), residential leases (reserved - Subpart C), and business leases (reserved - Subpart D), respectively, with the subparts on residential and business leases being reserved for publication at a later date. Pending promulgation of rules for
Subparts C and D within Part 162, residential and business leases are covered by Subpart F which incorporates enforcement provisions identical to those found in Subpart B. Regulations for forestry are found in 25 C.F.R. Part 163, grazing permits are found in 25 C.F.R. Part 166, and mineral leasing in 25 C.F.R Parts 200-227.

C.F.R. Part 162 general leasing regulations specify certain types of land use agreements that are not covered by the regulations, including those covered under separate regulations discussed infra for mineral leases, grazing permits, timber contracts, management contracts and joint venture agreements, and easements. Subpart A specifies that only the owner of 100% of the interests in Indian land may take possession of the land without a lease and provides for treatment of unauthorized possession as trespass. In addition to the regulations, leases may be subject to federal laws of general applicability, tribal laws, and if the lease so provides, state laws (not to be confused with jurisdiction).

A common misunderstanding about the role of the Secretary in approving a lease or permit is that the BIA is somehow made a party to the lease. The Supreme Court has ruled otherwise. The BIA exercises discretion in deciding whether or not to approve a lease of Indian land. However, once a lease has been approved, the parties acquire legal rights under it and a BIA decision concerning the lease must thereafter be based upon the law and the terms of the lease itself. The IBIA has consistently held that the BIA is bound by the terms of leases it has approved when the leases are not in conflict with governing regulations. The BIA acts as trustee for the Indian lessor and thus has an affirmative duty to enforce his or her rights. As to the rights of the other parties vis-à-vis each other, the BIA is no more than an adjudicator and acts in this capacity only where necessary to administer the lease. It is an abuse of discretion, however, for the BIA to withhold approval of assignments or subleases for the sole purpose of permitting Indian lessors to negotiate more favorable lease terms.

The construction of contracts approved on behalf of Indians by the Secretary of the Interior in her fiduciary capacity is a question of federal law. The federal statutes and regulations governing the leasing of Indian lands constitute a comprehensive regulatory scheme which preempts the application of state and local laws. Leases disguised as another type of agreement nevertheless require BIA approval and without such approval they are void, according rights to neither party. Acceptance of rentals by the lessor subsequent to default on specific provisions of the lease by the lessee does not constitute waiver of the items in default, in the absence of showing that the lessor voluntarily and intentionally waived the requirements under the lease.

The BIA may collect reasonable fees in connection with work performed for individual Indians or tribes to be paid by vendees, lessees, or assignees or deducted from the proceeds of sales, leases, or other sources of revenue.

C. Agricultural Lease Regulations

The agricultural lease regulations provide that leases must conform to any agricultural resource management plan developed by the tribe having jurisdiction over the land. Leases may be negotiated directly with the landowners subject to BIA approval. The BIA will assist potential lessees upon request, including providing the names and addresses of the Indian landowners. Normally, the BIA will advertise Indian land for agricultural leases. Approval by a majority of ownership interests must be obtained in order to lease fractionated land. The BIA may consent on behalf of persons who have been declared non compos mentis for undetermined heirs, for persons whose whereabouts are unknown, for orphaned minors, for those who have given the BIA a power of attorney, and for owners who have been unable to agree on a lease for three months where the land is not being used by any of them.

The BIA must determine by any appropriate valuation method the fair market rental of the land before approval of a lease unless the lease may be approved at less than fair market rental. A lesser
amount may be permitted when payment is based on percentage of income or under special circumstances where nominal rent is appropriate. Before approval, the BIA must review the lease, status of any legal entities, bond if required, environmental reports, and compliance with tribal law. The lease becomes effective upon BIA approval unless by its terms it is made effective at some past or future time (not more than one year after approval). Approval is effective immediately notwithstanding appeal.

There are no standard lease forms. Certain provisions are required pertaining to enforceability by the United States, trust status of the land, and compliance with applicable laws. The lease must identify the landowners and their respective interests, be executed by those with binding authority, and cite regulatory authority for approval. The lease must include a legal description or other sufficient description and must identify any fee interests.

A lease must provide for payment of fair market rental at the beginning of the lease term and at specified times during the lease except where the tribe has negotiated the rent for tribal land or where the tenant is a member of the landowners’ immediate family, a co-owner in the lease tract, or has some other special relationship or circumstances exist that the BIA deems sufficient to warrant approval. Fair market rental, if based on a fixed amount, must be reviewed for possible adjustment at least every fifth year.

Rental payments are due when specified by the lease regardless of whether notice is received and may not be paid more than one year in advance. The lease must specify what interest and penalties may apply and notice will not be required unless so provided by the lease. The lease must specify to whom rent is to be paid.

The term of an agricultural lease is limited to ten years, unless a substantial investment is required, in which case the term may be for up to twenty-five years. A lease may be amended, assigned, sublet or mortgaged if the required landowners’ consents are obtained and the BIA finds the amendment to be in the best interests of the landowners. A lease may designate a representative, including the BIA, to consent to an amendment, but such representative may not consent to an amendment that would reduce payments to the landowners, terminate or modify the term of the lease or the lease area.

Construction of improvements under an agricultural lease will not require consent, approval or amendment of the lease as long as they are generally described in the lease. The lease must specify who will own any improvements at the end of the lease, providing for them to remain on the premises in satisfactory condition, or for their timely removal.

Leases must require lessees to indemnify the United States and landowners from any loss or liability resulting from lessee’s use of the premises and from any hazardous materials on the premises, regardless of fault. Unless otherwise specified in a lease the landowners are entitled to any payments arising from actions that diminish the value of the land or improvements such as insurance proceeds, trespass damages or condemnation awards.

Leases may provide for negotiated remedies in the event of lease violations, to be exercised in addition to the BIA’s right of cancellation, but must specify how landowners may exercise those remedies. Leases may provide for resolution through a court of competent jurisdiction or alternative dispute resolution, although the BIA may not be bound by such decisions made in such forums. A lessee must provide a bond unless otherwise specified by the tribe or a majority of landowners. The lease may require the lessee to maintain insurance with the landowner and the United States as additional insured parties.

The BIA may charge administrative fees for each approval of a lease, amendment, assignment, sublease or related document. The BIA may issue rent due notices but the lessee’s obligation to pay is independent of receipt of any such notice. Upon lessee’s failure to pay rent in a timely manner the BIA will send notice of a violation of the lease. Failure to cure within the time provided may result in cancellation of the lease or other remedies available under the lease or applicable law. The regulations establish a schedule of fees for delinquent rental payments. In the event of a lease
violation, the BIA will provide notice, consult with the landowners, and determine whether to cancel the lease or pursue other remedies, pending appeal rights under 25 C.F.R. Part 2.

Although the bond provisions of 25 C.F.R. Part 2 will not apply to appeals from lease cancellation decisions, the BIA may require the lessee to post an appeal bond; if the bond is not posted, the BIA may dismiss the appeal. A cancellation decision will be stayed if the lessee perfects an appeal under Part 2. The BIA may take emergency action to protect the leased premises from immediate and significant harm.

D. Residential and Business Lease Regulations

On February 10, 2004, the BIA published its Proposed Rule for Residential and Business Leases. This Rule would replace Subpart F with the new Subparts C, Residential Leases, and D, Business Leases. Subpart F currently provides general leasing regulations for all non-agricultural leasing but does not differentiate between business and residential leases. Although the Proposed Rule treats these two types of leases separately many of the provisions are common to both business and residential leases. Subpart A of the General Provisions is modified to define several new terms. The definition of “Immediate Family,” for example, is expanded to include “when some other special relationship exists between the lessor and the lessee or special circumstances exists (sic) that in the opinion of the Secretary warrant the approval of the residential lease . . . .”

The regulations cover ground leases as well as leases of developed land. Leases which authorize the construction of single-family homes and public housing are covered by the residential lease regulations while leases for multi-family developments and for single family residential developments for profit are covered under the business regulations. Leases may be negotiated directly with the landowners subject to BIA approval. The BIA will assist upon request including providing the names and addresses of the Indian landowners.

Approval by the required percentage of ownership interests must be obtained in order to lease fractionated land. If there are five or less owners, 100% of the ownership interests must approve; if there are five to ten owners, 80% of the interests must approve; if eleven to nineteen owners, 60% approval is required; if twenty or more owners exist, over 50% approval must be obtained. Although the intent of the regulation is that the percentage of undivided interests is counted, rather than the percentage of owners, the actual wording of the regulation is contradictory. The BIA may consent on behalf of undetermined heirs, whereabouts unknown, legal disability, orphaned minors, power of attorney, and those owners who, after notice, are unable to agree on a lease for three months and are not using the land.

The BIA must determine by any appropriate valuation method the fair market rental of the land before approval of a lease even if the lease is approved at less than fair market rental. The BIA must use an appraisal for a business lease, except that a tribe may waive appraisal of tribal land for residential or business leases. Before approval, the BIA must review the lease, status of any legal entities, bond if required, environmental reports, and compliance with tribal law. The BIA must determine in writing that the lease is in the best interests of the landowners. The BIA will act on complete lease proposals within thirty days for residential and sixty days for business. Denial or inaction is subject to appeal under Part 2 of 25 C.F.R. The lease becomes effective upon BIA approval, unless by its terms it is made effective at some past or future time, but not more than one year after approval. Approval is effective immediately notwithstanding appeal.

There are no standard residential or business lease forms. Certain provisions are required, however, pertaining to enforceability by the United States, trust status of the land, and compliance with applicable laws. The lease must identify the landowners and their respective interests, be executed by those with binding authority, and cite regulatory authority for approval. Signatures on a business lease, in addition, may be required to be notarized or witnessed by two individuals. The lease must include a legal description or other sufficient description, and must identify any fee
interests.

A residential lease must provide for payment of fair market rental at the beginning of the lease and at specified times during the lease except where the tribe has negotiated the rent for tribal land, or where the tenant is a member of the landowners’ immediate family, a co-owner in the lease tract, or some other special relationship or circumstances exist that the BIA deems sufficient to warrant approval. A business lease must provide for initial payment of fair market rental, based on a fixed amount, a percentage of income, or a combination of both, except where the tribe has negotiated the rent for tribal land or where the tenant is a member of the landowners’ immediate family, a co-owner in the lease tract or a participant in a joint venture with the landowners. The lease may provide for reduced rent in pre-development and construction periods. Non-consenting minority owners must be paid fair market rental. Fair market rental, if based on a fixed amount, must be reviewed for possible adjustment at least every fifth year.

Residential lease rent adjustments are required only as provided in the lease. Business lease rental adjustments required by the BIA must be specified in the lease. Rental payments are due when specified by the lease, regardless of whether notice is received, and may not be paid more than one year in advance. The lease must specify what interest and penalties may apply and notice will not be required unless so provided by the lease. The lease must specify to whom rent is to be paid.

The term of a residential lease is limited to fifty years, including renewals, unless otherwise provided by statute. The term of a business lease is limited to twenty-five years, plus a twenty-five year renewal, unless otherwise provided by statute. Leases of land on certain reservations, including the Agua Caliente Band of Cahuilla Indians, are authorized for up to ninety-nine years.

A lease may be amended if the required landowners’ consents are obtained and the BIA finds the amendment to be in the best interests of the landowners. A business lease may designate a representative, including the BIA, to consent to an amendment but such representative may not consent to an amendment that would reduce payments to the landowners, terminate or modify the term of the lease or the lease area. Leases may be assigned without the consent of the landowners if specified in the lease and the assignee agrees to assume the lessee’s obligations. Whereas assignment of a business lease requires BIA approval a residential lease may be assigned without BIA approval if the assignee is a leasehold mortgagee that agrees any tenant will be a tribal member, tribal housing authority, or the tribe. If none of these wish to lease the property the lease may be transferred to another Indian, consistent with tribal law; if none is available the lease may be transferred to a non-Indian consistent with tribal law.

A lease may provide for subleasing without the consent of the landowners when the lease is part of a residential or commercial development for which the BIA has approved a general plan and sublease form. The lease may provide that BIA approval of a sublease is not required. If a residential lease was approved at less than fair market rent and the sublessee is not a co-owner or member of the landowners’ immediate family the sublease must require fair market rent. Leases may be mortgaged without the consent of the landowners if specified in the lease and approved by the BIA. The BIA will take action on a business lease amendment, assignment, sublease or mortgage within sixty days of receipt.

Construction of improvements under a residential lease will not require consent, approval or amendment of the lease as long as they are generally described in the lease. Similarly, a business lease must describe any improvements to be constructed and must also provide a construction schedule approved by tribal officials. The lease must specify who will own any improvements at the end of the lease, providing for them to remain on the premises in satisfactory condition, or for their timely removal. A business lease may provide for reimbursement of the residual value of the improvements.

Leases must require lessees to indemnify the United States and landowners from any loss or liability resulting from lessee’s use of the premises and from any hazardous materials on the
premises regardless of fault. Under a business lease there is no such indemnity with respect to hazardous materials if the liability arises from the gross negligence or willful misconduct of the landowner. Unless otherwise specified in a residential lease, the landowners are entitled to any payments arising from actions that diminish the value of the land or improvements such as insurance proceeds, trespass damages or condemnation awards. Business leases must specify the distribution of such payments.

Leases may provide for negotiated remedies in the event of lease violations, to be exercised in addition to the BIA’s right of cancellation, but must specify how landowners may exercise those remedies. Leases may provide for resolution through a court of competent jurisdiction or alternative dispute resolution although the BIA may not be bound by the decisions made in such forums. The business lease regulation explains that BIA may not be bound by such decisions, for example, where such a resolution would diminish the BIA’s trust responsibilities or violate federal law. A lessee must provide a bond unless otherwise specified in the lease and if it’s determined by the BIA to be in the best interest of the landowner. The lease may require the lessee to maintain insurance with the landowner and the United States as additional insured parties.

The BIA may charge administrative fees for each approval of a lease, amendment, assignment, sublease or related document. The BIA may issue rent due notices but the lessee’s obligation to pay is independent of receipt of any such notice. Upon lessee’s failure to pay rent in a timely manner the BIA will send notice of a violation of the lease. Failure to cure within the time provided may result in cancellation of the lease or other remedies available under the lease or applicable law. The regulations establish a schedule of fees for delinquent rental payments. In the event of a lease violation, the BIA will provide notice, consult with the landowners, and determine whether to cancel the lease or pursue other remedies pending appeal rights under Part 2.

Although the bond provisions of Part 2 will not apply to appeals from lease cancellation decisions the BIA may require the lessee to post an appeal bond. If the bond is not posted, the BIA may dismiss the appeal. A cancellation decision will be stayed if the lessee perfects an appeal under Part 2. The BIA may take emergency action to protect the leased premises from immediate and significant harm. If the lease provides an option for early termination it must specify the manner and time in which it may be exercised. A lease may be mutually terminated by lessee and the applicable percentage of landowners required for approval, subject to BIA approval.

If a residential lessee fails to diligently develop or abandons the leased premises the lessee and its sureties continue to be responsible for their obligations under the lease. The residential lease may specify a time after which the leased premises must be developed or a period of non-use after which the premises will be considered abandoned. There are no such rules for business leases other than the general statement that abandonment of the premises does not relieve the lessee and its sureties of obligations under the lease.

E. Grazing Permits

Regulations for Grazing Permits on Indian Lands are found in separate subparts for management planning, trespass, and agriculture education. Most disputes regarding grazing permits have to do with the rental rate. In reviewing a grazing rental rate adjustment or rental value determination the IBIA does not substitute its judgment for that of the BIA. Instead, it reviews the BIA’s decision to determine whether it is reasonable; that is, whether it is supported by law and by substantial evidence. The burden is on the appellant to show that the BIA’s action is unreasonable. The BIA may set a rental rate at the start of a new grazing term where the rate is supported by substantial evidence, however, grazing permits with terms of five years or less are not subject to an increase in the grazing rental rate even where the permit provides otherwise.

Trespass is another issue that arises with regularity on Indian grazing lands. The BIA has jurisdiction to enforce trespass regulations for any unauthorized use or occupation of Indian lands.
A tribe may also assume direct responsibility for enforcement of federal regulations found at 25 C.F.R. Part 166 Subpart I – Trespass, which provides for concurrent tribal jurisdiction. The BIA may respond to a trespass on Indian agricultural lands by impounding livestock or other property involved in the trespass and assessing damages and penalties. The BIA determinations of trespass are not subject to administrative appeal within the agency.

F. Indian Forest Lands

General forestry regulations are promulgated pursuant to the National Indian Forest Resources Management Act. The Act directs the BIA to take part in management of Indian forests either directly or through contracts with tribes and permits the BIA to deduct the cost of its management activities from the proceeds of forest product sales. The Act also directs the BIA to adopt trespass regulations with tribes having concurrent enforcement authority and to institute a program of financial support for tribal forestry programs.

Indian forests cover over 17 million acres on 275 reservations in 26 states with a commercial timber volume of approximately 42 billion board feet with an annual allowable harvest of 779 million board feet. The OMB has recommended a reduction in funds for the BIA’s forestry program because BIA has not met its harvest goal for the past several years. The criticism of the BIA seems unwarranted, for as OMB acknowledges, Indian forests often are valued by the tribes for ceremonial or cultural purposes rather than as a source of revenue and public forests experienced a similar harvest decline in the 1990s as ecological concerns gained ground on timber production goals.

G. Restricted Lands Held by Members of the Five Civilized Tribes

There are laws peculiar to sale and lease of lands of members of the Five Civilized Tribes. Section 3 of the Act of April 12, 1926 (1926 Act) provides that the plaintiff, defendant, or intervener to a suit involving restricted lands, including quiet title to restricted lands, can bind the government and all parties by serving notice on the Eastern Oklahoma Regional Director for the BIA. Most commonly, such cases involve actions to quiet title to lands formerly or currently held in restricted status by Five Tribes allottees or their heirs. Other types of cases affected include partition actions, mortgage foreclosures, condemnation actions, and actions to abate nuisances. The Tulsa Field Solicitor may elect to remove the case to the United States District Court for the district within which the subject property is located. Any time restricted Indian property in a partition action goes to forced sale, the Department may exercise a right of preferential purchase. After partition, the property remains restricted in the hands of a co-tenant of at least one-half Indian blood who elected to take the property. It loses its restricted status if sold by forced sale.

Under Section 1 of the 1947 Act, state courts have exclusive jurisdiction concerning alienation of property interests inherited from Indian allottees of the Five Civilized Tribes by Indians of a half-blood or more. This process typically involves petitions filed in state court for the approval of deeds or oil and gas leases previously executed by competent adult Indian landowners. The Tulsa Field Solicitor appears in these proceedings, on behalf of the Secretary of the Interior, to protect the interests of the Indian petitioners. In addition, the Tulsa Field Solicitor has discretionary authority under Section 4 of the 1947 Act to appear and represent any restricted member of the Five Civilized Tribes in the courts of the State of Oklahoma in any other matter in which the restricted Indian may have an interest.

H. Alaska Native Landholding

Congress created a unique system of landholding for Alaska Natives that was completely
Unlike anything that had ever been a part of federal Indian policy. Not being a military threat to an expanding nation, Alaska Natives initially escaped the various policies that had whittled away at Indian landholdings in the mainland. The earliest statement of federal policy toward Alaska Natives was contained in the 1867 Treaty of Cession from Russia which proclaimed that “the uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.” The Alaska Organic Act of 1884 provided that “the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.”

Alaska Natives became eligible for allotments in 1906 and for townsite plots in 1926. The Supreme Court held in 1955 that Alaska Natives retained aboriginal rights to lands subject to extinguishment by the federal government without compensation. The Alaska Statehood Act disclaimed state title to lands held by natives but also allowed the state to select large tracts from the vacant public lands. Finally, in 1971, the Alaska Native Claims Settlement Act (“ANCSA”) extinguished Alaskan aboriginal title and created a unique system of Native landholding.

ANCSA authorized Native groups to select large parcels of public land in or near Native villages and individual Natives to claim homesites of up to 160 acres. The Act provided for establishment of regional corporations throughout the State in which individual Natives would receive corporate stock. Native villages within each region formed village corporations which acquired title to the surface of lands selected within each respective region whereas the regional corporations acquired the mineral rights. The Native corporations received their land in fee although later amendments have provided some protections against involuntary alienation.

A 1980 statute, the Alaska National Interest Lands Conservation Act (“ANILCA”), attempted inter alia to protect subsistence hunting and fishing uses of Alaska Natives. ANILCA also granted many of the land claims that had remained pending under the Allotment Act of 1906. Legislative approval of a Native allotment application pursuant to ANILCA precludes any inquiry into whether the Native’s use and occupancy of the land was sufficient to entitle the Native to approval of the allotment.

The BLM has determined that preference rights to Native allotments took precedence over subsequent state right-of-way claims. In an Appeal from a decision of the BLM’s Alaska State Office declaring a right-of-way null and void in part, the IBLA held that the failure of the State of Alaska to appeal a decision finding a native allotment to be legislatively approved by the State prohibits a subsequent challenge to any of the predicate facts determined by BLM in its initial decision. However, a highway right-of-way grant for land which was withdrawn and the withdrawal then converted to an easement reserved for highway purposes is a valid existing right to which a native allotment is subject where the use and occupancy began after the land was withdrawn.

I. Navajo and Hopi Relocation

In the 1934 Navajo Reservation Act, Congress sought to consolidate and enlarge the Navajo Reservation by appropriating all vacant, unreserved, and unappropriated lands within certain boundaries. Included in the land set aside was the Hopi Reservation established by Executive Order in 1882. Subsequent litigation between the tribes led to a ruling that they were joint owners of approximately 1.8 million acres of land since known as the Joint Use Area.

The Navajo-Hopi Land Settlement Act of 1974 led to further litigation and eventual partition of the area. It also created the Navajo and Hopi Indian Relocation Commission which assumed from the BIA all responsibility to assist in the relocation of Indian households and their livestock from lands partitioned to the tribe of which they are not members. DOI regulations govern the manner in which the Commission carries out the relocation provisions of the law. Relocation has
long been a highly controversial and heart-wrenching issue for the tribes involved as well as for policy-makers and other observers.

J. Easements, Rights-of-Way, and Indian Roads

The 1887 General Allotment Act explicitly reserved the power of Congress to grant rights-of-way through Indian lands for railroads and highways, for other public uses, and to condemn such lands. Congress exercised this power in a series of enactments over the following several decades. A statute adopted in 1899 authorized the Secretary of the Interior to grant rights-of-way over Indian lands, except in Oklahoma, for railroads, telegraph and telephone lines. The authority was extended to the granting of rights-of-way for highways in 1901. Another 1901 statute authorized rights-of-way for telephone and telegraph lines in general and yet another 1901 law granted to states the power to condemn the trust lands of individual Indians for public purposes in federal court. Ten years later, Congress authorized Interior to grant fifty-year rights-of-way over Indian lands for electric power and communication lines and poles. The Federal Power Act authorizes the Federal Energy Regulatory Commission ("FERC") to grant rights-of-way for hydroelectric dams and transmission lines but permits Interior to place conditions on such licenses.

In 1948, Congress enacted a series of general statutes to govern all of the rights-of-way on Indian lands except for hydroelectric projects that remained under FERC jurisdiction. Under these statutes, tribal consent is required for a right-of-way across tribal lands. Indians must be justly compensated for grants of rights-of-way. The BIA has promulgated regulations to implement the array of statutes governing grants of rights-of-way.

Rights-of-way granted under the earlier statutes are unaffected by the 1948 enactments. A 1904 law limited the terms of pipeline rights-of-way granted under that statute to a term of twenty years with the possibility of renewal for another twenty years. The 1948 enactment contains no term limitations. The Ninth Circuit Court of Appeals rejected a challenge to BIA approval of a rights-of-way under the latter statute rather than limiting it to twenty years in accordance with the 1904 Act. In a case which concerned a challenge by the Blackfeet Tribe to five pipeline rights-of-way approved between 1961 and 1969, the Ninth Circuit Court of Appeals held that the two statutes co-existed and that BIA had properly approved the rights-of-way for fifty year terms under the 1948 Act in accordance with consent given by the Tribe.

Where a public road had been opened within the Crow Reservation pursuant to approval given by the DOI in 1934, the IBIA found that a telephone company had a right to place a buried telephone cable in the road right-of-way in accordance with Montana law without obtaining the approval of any DOI official or the consent of the owners of trust land crossed by the right-of-way. This ruling was in keeping with prior decisions of federal courts interpreting rights of way granted under different statutory authority.

The Supreme Court has held that tribes do not retain jurisdiction over non-Indian use of public roads maintained pursuant to a state right-of-way. BIA roads, on the other hand, are considered tribal roads and thus tribes retain jurisdiction. The BIA constructs such roads on reservations “to provide an adequate system of road facilities serving Indian lands.” A BIA road is considered an “Indian reservation road” even where a road serves both Indian and non-Indian land and even though BIA roads are generally open to public use. An “Indian reservation road” serving Indian land and held in trust for a tribe is a “tribal road.”

The BIA has published a final rule establishing new policies and procedures governing the Indian Reservation Roads (IRR) Program. The rule expands transportation activities available to tribes and tribal organizations and provides guidance for planning, designing, constructing, and maintaining transportation facilities. It also establishes a funding distribution methodology called the Tribal Transportation Allocation Methodology.
K. Indian Irrigation Projects

Regulations governing the operation and maintenance of various Indian Irrigation Projects are found in 25 C.F.R. Part 171. The regulations vest a great deal of responsibility and discretion in the “Officer in Charge” (normally the Agency Superintendent or Project Engineer) for setting rates, establishing the irrigation season, determining whether to provide domestic and stock water, establishing delivery points, distribution and apportionment of water, recording irrigation water deliveries, management of surface drainage, construction and maintenance of facilities, preparation of annual project crops and statistical reports, carriage agreements and water rights applications, recording assessments and payments, and enforcing health and sanitation standards. Irrigation water normally will not be delivered until the Indian landowner or lessee has paid or made satisfactory arrangements for payment of annual operations and maintenance assessments. Disputes are subject to the Part 2 appeals procedures.

Individual regulations are set forth respectively designating Pueblo Indian lands benefited by irrigation and drainage works of the Middle Rio Grande Conservancy District, New Mexico; governing concessions, permits and leases on lands withdrawn or acquired in connection with the San Carlos, Fort Hall, Flathead and Duck Valley or Western Shoshone irrigation projects; and for the use and distribution of the San Carlos Apache Tribe Development Trust Fund and Lease Fund. The Indian Dams Safety Act of 1994 requires the BIA to ensure the long term maintenance and safety of some fifty-three dams on Indian lands that provide flood control and water for irrigation, municipal, industrial, domestic, livestock, recreation, and for fish and wildlife habitats.

L. Indian Water Rights

The BIA regulations do not address the subject of Indian water rights nor are they defined by statute. The BIA performs a limited role in assisting tribes to litigate or more often seek to settle their water rights claims. In some cases, the BIA has been given a role in assisting tribes to implement a water rights settlement.

State courts have jurisdiction to adjudicate federally-reserved water rights under a 1952 law known as the McCarran Amendment. This jurisdiction extends to adjudication of rights held by the United States as trustee for Indian water rights although subject to federal substantive law.

The source of Indian water rights is found in the 1908 Supreme Court decision of Winters v. United States which held that the creation of the Fort Belknap Indian Reservation in Montana under a treaty entered into in 1888 by necessity implied the reservation of sufficient water rights to fulfill the purposes of the reservation. The Court revisited this holding in 1963 when it ruled in the case of Arizona v. California that the creation of reservations for tribes along the Colorado River similarly implied a reservation of water sufficient to irrigate all of the “practically irrigable acreage” on the reservations.

Despite the method of measuring these so-called “Winters” rights, Indian tribes are free to use their water for other than agricultural purposes including maintenance of fish habitat. Allotment of tribal lands resulted in the transfer of tribal water rights to the allottees. A non-Indian who succeeds to the allotment also acquires water rights although their nature is changed in some respects. Indian water rights may be leased to non-Indians along with a lease of Indian lands.

The Arizona Supreme Court has concluded that federal reserved rights apply to both surface and subsurface sources of water, and that federal reserved rights enjoy greater protection from groundwater pumping than do state water rights. The Wyoming Supreme Court had earlier declined to apply Winters rights to groundwater. It is likely that the Supreme Court will ultimately decide this question.

M. Federal Landlord
Perhaps more than anything else, the BIA is regularly criticized with respect to its management of Indian lands. States are often upset because Indian lands are not within their tax base and regulatory jurisdiction. Tribes and individual beneficial owners sometimes complain that the BIA approval they require in order to develop their lands seems to be arbitrarily withheld or inordinately delayed. Third parties who wish to lease Indian lands many times are frustrated by what appear to be arcane rules and bureaucratic procedures (although they often escape even more burdensome state regulation).

Reform of BIA’s leasing regulations, now underway, could help to resolve some of these problems. Despite their exhaustive detail, the regulations currently do little to limit the discretion of BIA officials to withhold approval for various types of land use. Whereas BIA officials must protect against the improvident conveyance of property interests, if their only incentive is to avoid such acts, the natural tendency is to be conservative in the extreme. As a result, Indian lands may go unused and the owners receive no benefit. Amendments to the leasing regulations that would require the BIA to act within specified timelines may be helpful in this regard.

The BIA also appears to lack the resources to effectively monitor and enforce compliance with its land use regulations and leases. Especially in complex leases, where rents may be based on a percentage of income (with an alternative minimum), the BIA and the landowners must provide for regular audits to ensure that trespass by non-Indians, particularly on agricultural lands, also continues to be a major problem.

VII. Indian Energy and Minerals

A. Indian Mineral Leasing Act

The primary authorization for leasing of Indian minerals is the Indian Mineral Leasing Act (IMLA) of 1938. The IMLA provides that “unallotted lands within any Indian reservation” or otherwise under federal jurisdiction “may, with the approval of the Secretary . . . be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians.” The Act aims to provide Indian tribes with a profitable source of revenue and to foster tribal self-determination by giving Indians a greater say in the use and disposition of the resources on their lands.

Unlike federal statutes and regulations that invest the BIA with overall responsibility for management of certain Indian resources, such as those pertaining to timber management that were at issue in Mitchell II, the IMLA and its implementing regulations merely requires Federal approval of the lease negotiated between the parties. Thus, even where the Secretary failed to obtain the highest possible royalty rate for the tribe in a coal mining lease with a third party, the Supreme Court held in United States v. Navajo Nation that the United States was not liable in damages to the tribe.

B. IMLA regulations

The DOI’s IMLA regulations at 25 CFR Part 200 govern leases and permits for the development of Indian tribal oil and gas, geothermal, and solid mineral resources. Tribal mineral resources are governed by regulations at Part 211 whereas Part 212 regulations govern individual Indian minerals. There are separate regulations, in addition, for leasing and development of energy and minerals for specific tribes, including members of the Five Tribes of Oklahoma, the Osage Nation, and the Wind River Reservation. Some of these regulations are long out-of-date, such as those concerning lead and zinc mining operations and leases at the Quapaw Agency.

The BLM is responsible for resource evaluation, approval of drilling permits, mining and
reclamation, production plans, mineral appraisals, inspection and enforcement, and production verification. The OSM is the regulatory agency for surface coal mining and reclamation operations on Indian lands. Within the OSM, the Minerals Management Service ("MMS") is responsible for reporting, accounting, and auditing functions.

BIA regulations recognize that Indian mineral owners may lease their land for mining purposes only with the approval of the Secretary. Mineral leases must first be offered for bidding at an advertised lease sale although the Secretary may grant tribal mineral owners permission to negotiate leases for minerals other than oil and gas. DOI may also grant geological or geophysical exploration permits with no preference rights to development and with all data to be shared with DOI and the Indian mineral owner. Lessees must post a bond and a statewide or nationwide bond may suffice if approved by the Secretary. A lessee may acquire more than one lease but no single lease may exceed 2,560 acres for coal and 640 acres for oil and gas and all other minerals. Nondiscriminatory state gross production and excise taxes on petroleum production may be imposed on the lessee of mineral rights in restricted Indian lands.

Leases are for a primary term of ten years and normally continue as long thereafter as the minerals specified in the lease are produced in paying quantities. When an oil and gas lease provides for a primary term and "as much longer thereafter as oil and/or gas is produced in paying quantities" the lease expires by operation of law when production ceases and not because of any action taken by the BIA.

The BIA is not required to follow lease cancellation procedures when giving notice that a lease has expired by operation of law. Where a lease had expired by operation of law for non-production, the Board held it could not have been validated by lessee’s subsequent payment of annual rent to Minerals Management Service. The IBIA expressed some discomfort, however, noting:

[I]t is not clear from the record in this case how the three Interior bureaus involved in Indian oil and gas leasing (i.e., BIA, MMS, and the Bureau of Land Management) communicate with each other concerning cases like this. It seems possible that MMS was not aware, when it sent Appellant a bill in September 1999, that BIA was shortly to determine that the lease had expired.

A long period of non-production caused by a mechanical breakdown or accident might excuse non-production had Appellant shown that he had made repairs and resumed production within a reasonable time. The burden is on the Appellant to show that his period of non-production was excusable.

The Secretary may approve well spacing and unitization and communitization agreements in the interests of promoting conservation and efficient utilization of minerals. Provisions of tribal law not inconsistent with federal statutes may supersede DOI’s regulations for tribal leases. DOI regulations provide minimum royalty rates and rentals, which may be altered by agreement. The lessee must exercise diligence in prevention of waste and a lease may be suspended, surrendered, assigned, or cancelled. The DOI may also impose penalties for violations of the lease or the regulations which like other DOI decisions may be appealed pursuant to 25 CFR Part 2.

The DOI has considerable discretion under the IMLA and DOI regulations regarding the computation of royalty owed on natural gas produced from Indian oil and gas leases. The six-year statute of limitations for the commencement by the United States of civil actions for money damages does not limit administrative action within the DOI such as MMS orders to recalculate and pay additional royalty due under an Indian lease.

Part 216 contains regulations for protection and conservation of non-mineral resources during exploration and production of mineral resources other than oil and gas. In connection with an application for a permit or lease the BIA conducts a technical examination of the prospective effects of mining on the environment and formulates requirements for protection of non-mineral resources.
resources as part of the permit or lease. Before operations may commence the United States Geological Survey ("USGS") must approve the exploration plan and mining plan. The operator must post a reclamation bond and submit annual operations reports. The mining operations are subject to inspection and suspension or cancellation of the permit or lease for noncompliance. BIA decisions are subject to appeal pursuant to 25 CFR Part 2 and USGS decisions may be appealed pursuant to 30 C.F.R. Parts 211 and 231.

C. Indian Mineral Development Act

Tribes play an increasingly leading role with respect to Indian minerals and national energy policies. Congress has recognized the greater role desired by tribes in managing their own resources. The Indian Mineral Development Act of 1982 ("IMDA") authorizes agreements for the development of Indian owned minerals whereby the mineral owners have greater control over the mineral leasing. The IMDA permits any tribe, subject to BIA approval, to enter into an agreement for the development of minerals in which the tribe owns an interest. Such agreements may also include individually owned mineral interests. Where the BIA has approved a minerals agreement the United States is not liable for any losses sustained by Indian mineral owners under such agreement although the federal trust responsibility remains. BIA regulations authorized by the IMDA are found at 25 CFR Part 225.

D. Conflicts of Interest

To some, the actions of the Secretary of the Interior in assisting Peabody Coal to negotiate a lower royalty rate with the Navajo Nation may merely confirm the historic inability of the DOI to honor its trust obligations to Indians when striking bargains with powerful mining interests. Yet objections to such perceived conflicts are increasingly being voiced by tribes and within the DOI itself. The NCAI, for example, lobbied vociferously against the federal court nomination of a former Solicitor it felt had favored mining and grazing industries over the interests of tribes.

Interior’s Inspector General, reporting recently on “a series of cases in which we have observed an institutional failure to consider the appearance of conflicts of interest by Interior Department employees and officials,” nevertheless spoke expectantly about “changes [in] the ethical culture in the Department.”

VIII. Indian Probate

A. Indian Wills and Probate

The Secretary of the Interior is responsible for the probate of Indian trust property and the review as to form and approval of Indian wills. The Secretary’s probate decisions are “final and conclusive” and reviewable only for constitutional compliance. The Secretary’s approval or disapproval of an Indian will is subject to judicial review for abuse of discretion. The review as to form is conducted by the Office of the Solicitor to determine whether or not there are any obvious problems on the face of the will that may render it subject to attack during probate. Approval of the will, subject to appeal, is the responsibility of the Administrative Law Judge, Office of Hearings and Appeals. Claims against the estate are permitted by BIA regulations.

The substantive law applied to the inheritance of trust property normally is that of the state where the property is located, subject to federal law described infra, and to tribal law with regard to the determination of the legitimacy of heirs and validity of adoptions. Current law provides that interests in trust land may be devised only to another Indian or to the tribe with jurisdiction over the land. An attempted devise to a non-Indian conveys only a life estate. The remainder descends to
the decedent’s Indian spouse or Indian heirs of the first or second degree pursuant to the applicable laws of succession or if there are no such heirs then to collateral heirs who own interests in the land. If there are no such heirs, the remainder interest descends to the tribe subject to the right of any Indian co-owner of the land to purchase the decedent’s interest at fair market value. Notwithstanding the foregoing, the testator who does not have an eligible Indian heir may devise his interest to any non-Indian lineal or collateral heir of the first or second degree subject to the right of the tribe to purchase such interest at fair market value.

Rules of intestate succession provide that an interest in trust land may pass only to a decedent’s spouse or heirs of the first or second degree. A non-Indian heir may acquire only a life estate. The remainder from the life estate descends to the decedent’s collateral Indian heirs of the first or second degree who own interests in the land. If there are no such heirs, the remainder interest descends to the tribe, subject to the right of any Indian co-owner of the land to purchase the decedent’s interest at fair market value.

Under the American Indian Probate Reform Act of 2004, Indian landowners will soon have greater flexibility to pass on their property to lineal descendants, tribes will gain the ability to acquire small fractionated interests from individual Indians, a uniform probate code will apply in Indian Country, and there will be increased emphasis on estate planning and the development of wills. The Secretary is given 180 days to publish notice of the new law, with most of its provisions becoming applicable one year thereafter.

Subject to any applicable tribal probate code, the Probate Reform Act permits the owner of a trust interest in land to devise such interest to any lineal descendant; any co-owner of an undivided trust interest in the same parcel of land; the Indian tribe with jurisdiction over the interest in land; or any Indian. A trust interest in land may also be devised as a life estate to any person, with the remainder being devised as stated above, or as a fee interest. Trust personalty may be devised to any person or entity.

Trust property that is not disposed of by a valid will descends according to an applicable tribal probate code. In the absence thereof, a surviving spouse receives a life estate in the trust lands. Where there is no surviving spouse, or there is a remainder interest, the estate or remainder passes to lineal descendants, parents or siblings. If there are no such eligible heirs, then the estate passes to the Indian tribe with jurisdiction over the lands, except that an Indian co-owner may purchase an interest that would otherwise pass to the tribe.

Procedurally, when an Indian who owns trust property dies the BIA prepares information on the person’s trust estate and family history. The BIA does not have jurisdiction concerning non-trust property that must be probated in tribal or state court. An ALJ holds a probate hearing and issues a decision distributing the trust estate. All trust moneys of the deceased on hand or accrued at the time of death may be used for the payment of claims. An interested party who disagrees with the decision must seek a rehearing before the ALJ before appealing to the IBIA.

In order to increase the efficiency of the probate process the Department has recently adopted new regulations at 25 C.F.R. Part 15. The Agency Superintendent or Attorney Decision-Makers rather than an OHA ALJ may now make initial probate decisions. If the estate is worth less than $5,000, does not include land, and is not covered by a will, it is handled by the Agency Superintendent pursuant to 43 C.F.R. Part 4, Subpart D.

In most other cases the estate will be referred to an Attorney Decision-Maker who may issue a decision or refer it on to OHA after consideration of the following factors. The probate can be referred to OHA if the will disinherits children, is likely to be contested, is complex or ambiguous, is of questionable validity, or the dead person’s capacity to make a will is questionable. The probate can also be referred to OHA if there is a contest against a creditor claim or a claim made by a family member. Lastly, the probate can be referred to OHA if there are substantial questions about family relationships, there is a conflict in prior probates, there are evidence problems, the adoption of an heir is questionable, there is a need to establish a presumption of death, there are
minor heirs whose rights might be jeopardized, or any interested person is represented by an attorney.

The DOI does not have jurisdiction concerning probate, leasing or sale of the restricted property of members of the Five Civilized Tribes (Cherokee, Chickasaw, Creek, Choctaw, and Seminole). The Act of April 26, 1906, as amended by the Act of May 27, 1908 (“1908 Act”), requires state court approval of wills of full blood citizens of the Five Tribes, if the will disinherits a spouse, parent or child. The Act of June 14, 1918 (“1918 Act”) provides that a determination of the heirs of a deceased allottee leaving restricted heirs, made by the Oklahoma probate court “having jurisdiction to settle the estate of said deceased and conducted in the manner provided by the laws” of the state “shall be conclusive of said question.” The Act of August 4, 1947 (“1947 Act”) provides that the Oklahoma state courts shall have “exclusive jurisdiction” over all proceedings to administer estates or to probate wills of deceased Indians of the Five Tribes and “of all actions to determine heirs arising under section 1 of the Act of June 14, 1918 . . . .” Trial Attorneys from the Office of the Tulsa Field Solicitor appear in these proceedings representing the Secretary of the Interior to protect the restricted Indian interests.

If the estate of a deceased Five Tribes citizen contains no restricted land, but consists of a restricted interest in funds not exceeding $500 on deposit to the credit of the decedent, a special administrative procedure may be used under certain circumstances so that the funds may be distributed from the decedent’s estate. The Oklahoma state courts have no probate jurisdiction over property held in trust by the United States on behalf of individual Indians. Some citizens of the Five Tribes are the beneficial owners of this type of Indian trust property having acquired the property pursuant to the Oklahoma Indian Welfare Act of 1936 and/or the Indian Reorganization Act of 1934. When trust property is part of the estate of a deceased Five Tribes citizen it is subject to probate pursuant to 43 CFR Part 4.

Special provisions govern approval of wills executed by members of the Osage Nation. An attorney from the Office of the Tulsa Field Solicitor holds a will hearing and issues a recommended decision to the Superintendent of the Osage Agency. The Superintendent’s decision approving or disapproving the will may be appealed to the IBIA.

Federal law prohibits the devise of trust or restricted property without the approval of the Secretary. The DOI has long held that trust property cannot be made the subject of an overlying private trust, whether inter vivos or testamentary, because doing so would conflict with the federal trusteeship. DOI regulations on life estates and future interests provide that “State procedural laws concerning the appointment and duties of private trustees shall not apply.” Additionally, the DOI will not recognize the appointment of an executor as to trust property. In both testate and intestate trust estates, the BIA performs functions that an administrator or executor might otherwise, such as managing the estate pending distribution.

Because the BIA is an interested party in a dispute concerning an estate inventory the IBIA has established a procedure under which alleged errors in the BIA’s estate inventory are to be considered during a probate proceeding. The procedure requires that the Administrative Law Judge (“ALJ”) notify the BIA when such a dispute arises and invite participation by the BIA. As a part of the order concluding the probate proceedings the ALJ is to issue a recommended decision concerning the disputed inventory following which any interested party (including the BIA) may file objections with the Board. The IBIA does not have jurisdiction to entertain an appeal in a probate case unless rehearing has first been sought from the ALJ.

The Department’s regulation concerning renunciation of interests provides that “the property so renounced passes as if the person renouncing the interest has predeceased the decedent.” The regulation does not permit an heir to renounce an interest in trust or restricted property in favor of a particular person or persons. The IBIA has held that certain disclaimers, who clearly misunderstood the consequences of their disclaimers, must be given an opportunity to withdraw those disclaimers.
B. Probate Reform

The descent and distribution of Indian allotments over generations has led to a remarkable splintering of ownership interests to the point that hundreds or even thousands of individuals may own undivided interests in a single parcel. The BIA’s attempts to manage Indian trust lands and account for the rights of each of the owners is largely what has led to the trust fund mismanagement discussed under Part XVII of this article. Meanwhile, productive use of the land is more and more difficult as the number of owners who must be consulted increases, the cost of administration of the land continues to escalate, and the benefits received by individual owners declines.

There are approximately four million owner interests in the ten million acres of individually owned trust lands and ownership could expand to eleven million interests by the year 2030. There are parcels of land with ownership interests that are less than 0.000002 percent of the whole interest. According to the BIA, it costs an average of $1,400 to probate a decedent’s estate. As of December 31, 2002 there were 1,522 open estate accounts where the funds derived only from per capita or judgment payments (and not income from land interests) with a combined total value of $7,194. This averages out to under $5 per account. The total number cases awaiting probate at the BIA is estimated to be nearing 9,000 with some of these estates dating back to the 1940s. Indeed, an Indian landowners group testified to Congress that “[t]he 1996 Cobell suit could as easily been filed in 1913 when the department had a probate backlog of 40,000 cases involving estate assets worth $60 million dollars.”

Congress has made a couple of attempts to address this “fractionation” problem only to be rebuffed both times by the Supreme Court. A 1983 law provided that an undivided interest representing less than 2% of an allotted tract and yielding less than $100 annual income could not pass by intestacy or devise but instead escheated to the tribe. The Court held the provision to be an unconstitutional taking of property in violation of the Fifth Amendment. While that case was pending before the Court, Congress – perhaps seeing the writing on the wall – amended the law to require the income of less than $100 annually to persist over five years, to permit devise and descent of fractional interests to other holders of fractional interests in the same land, and to permit the tribe to adopt alternative remedies with BIA approval. This law was also held unconstitutional.

The attempt to force the uncompensated escheat of fractional interests was repealed in its entirety in 2000. Meanwhile, there is no lessening of interest in obtaining probate reform.

The American Indian Probate Reform Act of 2004 continues a program authorized under the Indian Land Consolidation Act of 2000 for federal acquisition of fractional ownership interests in Indian trust lands, to prevent further fractionation and attempt to consolidate land for tribal development. The BIA has been conducting the pilot program in the Midwest Region. The 2003 budget for Indian land consolidation through the acquisition of fractionated ownership interests was about $8 million. The BIA believes the pilot project has demonstrated that large numbers of owners are willing to sell fractionated ownership interests and that a purchase program can be administered at a reasonable cost. When the projects started there were approximately 87,000 interests on three target reservations. By May of 2003, BIA had purchased over 40,000 interests on those reservations. However, because of the runaway growth of fractionation there was the same number of outstanding interests as when the project began. It has been conservatively estimated that it would cost approximately $1.25 billion to buy every fractionated ownership interest that existed in Indian Country.

An OMB review of the purchase program criticized the BIA for carrying substantial fund balances early in the program due to lack of full-time staff available for processing pending applications from an unanticipated number of willing sellers. However, cumulative obligations were dramatically increased in 2002 as Midwest agency staff was expanded. The OMB and other
reviews have made a number of recommendations to improve BIA program management and accountability, such as: expanding the land acquisition and consolidation program to other regions and reservations; reducing unobligated fund balances; concentrating acquisitions on owners with active IIM accounts in order to close IIM accounts and thus avoid future probate cases.

Despite its projected costs, the administration has sought to expand the program. As of December 31, 2003 the DOI had purchased 68,938 individual interests equal to approximately 42,075 acres. The DOI is in the process of attempting to expand the program nationwide and plans to enter into agreements with “[t]ribes or tribal or private entities” to carry out aspects of the land acquisition program. The administration’s 2005 budget request included an unprecedented $75 million for this program an amount cut in the House appropriations bill from $28 million to $42 million.

The Five Civilized Tribes of Oklahoma support revision of the uniquely unfair system of probate regarding their members’ restricted property interests asking that it be amended along the lines of probate procedures applicable elsewhere in Indian country.

IX. Fish and Wildlife

A. Reserved Rights

The establishment of a reservation by treaty, statute or agreement includes an implied right of Indians to hunt and fish on that reservation free of state regulation. Congress retains the power to regulate such hunting and fishing. Pursuant to several federal statutes, BIA regulates Indian fishing in Alaska for the Annette Islands Reserve and the Karluck Indian Reservation; commercial fishing on the Red Lake Indian Reservation; use of Columbia River treaty fishing access sites and in-lieu fishing sites; and off-reservation treaty fishing.

B. Tribal Management

Tribes play the leading role in management of their own fish and wildlife resources. They have formed a number of inter-tribal organizations to assist in the administration of fish and wildlife programs. The Native American Fish & Wildlife Society (“NAFWS”) describes itself as “a national tribal organization incorporated in 1983 to develop a national communications network for the exchange of information and management techniques related to self-determined tribal fish and wildlife management.” According to the Northwest Indian Fisheries Commission (“NWIFC”), it “is a tribal organization established in 1974 to assist tribes in conducting orderly and biologically sound fisheries.” The Great Lakes Indian Fish and Wildlife Commission “is an agency of eleven Ojibwe nations in Minnesota, Wisconsin, and Michigan with off reservation treaty rights to hunt, fish, and gather in treaty-ceded lands.”

Joining these groups in testifying before the Senate Indian Affairs Committee in one hearing in 2003 were leaders of several individual tribes plus representatives of the Columbia River Inter-Tribal Fish Commission, Upper Columbia United Tribes, Southwest Tribal Fisheries Commission, and other inter-tribal groups. Senator Inouye acknowledged the proliferation of tribal expertise stating that:

Although it is widely recognized that tribal governments and inter-tribal fish and wildlife management organizations have been amongst the most effective stewards of natural resources, both on tribal lands and off, today it is more than ever clear that in many areas of Indian country, tribal governments are on the cutting edge of new technological advances that are assuring enhanced protections for fish and wildlife and plant resources.

C. Tribal Consultation
Outside of regulatory measures and technical assistance, the BIA often helps tribes to enforce various rights by obtaining the cooperation of other federal agencies. Pursuant to Executive and Secretarial Orders, tribes must be consulted by federal agencies when the agencies propose to take actions that may adversely affect tribal resources. The Fish and Wildlife Service of the DOI, in particular, is required to consult with tribes prior to designating reservation lands as critical habitat under the Endangered Species Act. Because such designations may create additional regulatory burdens on tribal governments and may potentially undermine tribal conservation efforts, the Secretarial Order requires tribal consultation “at the earliest indication that the need for federal conservation restrictions is being considered for any species” and “cooperative identification of appropriate management measures to address concerns for such species and their habitats.” Similarly, the Executive Order requires Federal agencies to extend to tribes increased opportunities for waiver of statutory or regulatory requirements.

D. A Question of Priorities

Numerous federal statutes and policies have adopted tribal consultation requirements in recent years, however, it is unclear whether they accord any substantive rights. Indeed, some critics suggest that such measures may actually undermine the federal trust responsibility by implying that it amounts to no more than a procedural right of access to decision-making.

Notwithstanding a professed deference to tribes, Interior’s land, minerals, water, fish and wildlife agencies have frequently been accused of sacrificing tribal interests in favor of competing agency priorities. The Ninth Circuit Court of Appeals castigated the DOI for failing to provide irrigation water to Indian farmers while providing it for non-Indians indicating that this behavior “borders on the shocking.”

More recently, Interior was heartily criticized by Indian tribes for diverting Klamath River water to non-Indian farmers that reportedly killed some 68,000 salmon in the process. A National Marine Fisheries Service (“NMFS”) biologist invoked whistleblower protection status after claiming that the Bureau of Reclamation (“BOR”) suppressed an NMFS report in order to support the DOI’s decision to restore water to the farmers.

The Supreme Court has acknowledged the difficulty of balancing such competing priorities within a single agency.

[I]t may well be that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this, and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well.

Some have suggested the Court reasoned that “a lesser standard necessarily applies to the Indian trust duty when the Secretary has to serve competing legitimate public interests.” Tribal advocates continue to argue that such competing interests should be harmonized with the Indian trust obligation.

X. Indian Gaming

A. The Indian Gaming Regulatory Act

Observers have noted that “[l]egalized gambling is the fastest-growing industry in the United
States (perhaps the world) . . . and Indian casinos are the fastest growing segment of this industry.” According to federal government statistics, “Indian gaming generated $12.7 billion in 2001 and accounted for about a quarter of the gaming market in the United States. As recently as 1997, annual gambling revenues were $7.4 billion, only slightly more than half of the 2001 revenues.”

Perhaps anticipating the explosive growth in Indian gaming, Congress established a comprehensive regulatory scheme in 1998. The Indian Gaming Regulatory Act (“IGRA”) created within the DOI a National Indian Gaming Commission (“NIGC”) with broad regulatory powers.

The Chairman of the Gaming Commission is authorized to issue orders to close gaming activities for substantial violations of the Act and to levy and collect civil fines. The Chairman also has approval authority for gaming management contracts. Detailed NIGC regulations cover, inter alia, approval of Class II and Class III tribal ordinances, management contracts, background investigations of persons having a management interest or management responsibility, internal control standards, monitoring and enforcement, and appeals before the Commission.

The IGRA authorizes Indian gaming only on “Indian lands,” defined to include reservation lands and lands held in trust by the United States, as well as “any lands title to which is . . . held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.” The IGRA forbids gaming on lands away from the tribe’s reservation and placed in trust after 1988, with some exceptions.

The IGRA divides Indian gaming into three classes with different regulations for each. Class I gaming consists of “social games for prizes of minimal value or traditional forms of Indian gaming connected with tribal ceremonies or celebrations.” Class I gaming is “within the exclusive jurisdiction of the Indian tribes” and is not regulated by the Act.

Class II gaming consists of bingo and similar games. Class II gaming is within the jurisdiction of tribes but is also subject to regulation by the NIGC. Tribes may engage in Class II gaming within a state that permits such gaming for any purpose by any person, organization or entity, but it must first have a tribal ordinance approved by the NIGC.

Class III gaming is defined as all other forms of gaming including typical casino games such as slot machines and banked card games. In order to conduct Class III gaming, a tribe must have a tribal ordinance approved by the NIGC and be located within a state that permits such gaming for any purpose. Additionally, it must enter into a compact with the State that may allocate civil and criminal jurisdiction with respect to such gaming.

The IGRA authorizes a tribe to bring an action in federal court against a state that refuses to negotiate in good faith for a state-tribal compact. The Supreme Court invalidated that provision, however, holding that Congress lacked the power to abrogate state Eleventh Amendment immunity under either the Indian or the Interstate Commerce Clause. Ironically, the loss of this remedy opens the door for a tribe that is unable to negotiate with a state to ask the Secretary of the Interior to prescribe regulations governing Class III gaming on the tribe’s lands. Another alternative successfully employed by tribes in some states has been to go around recalcitrant governors and directly to the voters.

The BIA’s role under the IGRA is quite limited. BIA must approve any tribal plan for allocation of revenue if the tribe plans to make per capita payments to its members from net gaming revenues. Tribes must first provide for tribal government services, economic and community development, general tribal welfare, charitable donations and any requirements for aid to local governments, before they file with the BIA for a revenue allocation plan. BIA also promulgates rules for the conduct of Class III Indian gaming when a State and a tribe are unable to voluntarily agree to a compact and the state has asserted its immunity from suit brought by a tribe under the provisions of the IGRA.

B. The Impact of Indian Gaming
Congress established the National Gambling Impact Study Commission ("NGISC") in 1996 to conduct a comprehensive legal and factual study of the social and economic implications of gambling in the United States, including impacts on tribal governments. The Commission’s report, which was released in 1999, lauds the tremendous social and economic benefits that have resulted from tribal gaming. The report notes that gaming has created a substantial number of jobs in depressed communities and that gaming revenues have been used to support tribal governmental services such as tribal courts, utilities, law enforcement, social welfare programs, as well as tribal language, history and cultural programs. In fact, the report states that there “was no evidence presented to the commission suggesting any viable approach to economic development across the broad spectrum of Indian country, in the absence of gambling.”

According to the National Indian Gaming Association ("NIGA"), a gambling industry group, tribal gaming produced revenue in 2002 of $14.5 billion (21% of total gaming industry) and created 400,000 jobs (75% filled by non-Indian employees). The NIGA says less than half of federally recognized Indian Tribes engage in Class II or Class III gaming with no tribal gaming at all in twenty-two states. Not all tribes benefit equally from gaming as some tribes choose not to undertake gaming operations, whereas others are not so geographically situated as to make gaming profitable. According to NIGC records, “for the fiscal year ending in 2000, 62% of all tribal gaming revenues were generated by only 12% of the gaming operations.”

An FBI-led working group of federal agencies has formed to protect tribal casinos from theft, embezzlement, fraud, organized crime and corrupting influences. The “Indian Gaming Working Group” was formed in 2003 in response to the growth of Indian gaming from approximately 100 tribes in a $100 million-a-year industry to 220 tribes and 359 separate sites generating $15 billion annually (a figure that is expected to exceed $16 billion in 2004). The figure exceeds the combined gaming revenues of Las Vegas and Atlantic City, according to the Indian Gaming Working Group.

In spite of the financial success enjoyed by some tribes, critics say gambling money has been bad for tribal members in other ways. In California, several tribes have engaged in intra-tribal membership disputes with some members attempting to strip others of their membership. The Pechanga Tribe, for example, has disenrolled over 10% of its 1,200 members in a phenomenon that observers say eventually could affect thousands of tribal members. Indian Casinos in California bring in $4 billion a year with profits going toward health, social, education, and housing programs but also to member per capita payments—in the case of Pechanga amounting to more than $120,000 a year.

Large amounts of gaming funds also have profound effects on the politics of the nation, as demonstrated most shockingly by a recent influence peddling scandal in which a powerful Republican lobbyist and his associate reportedly took several tribes for $66 million in fees, while secretly supporting their gaming opponents and meddling in intra-tribal politics. The Senate Indian Affairs Committee, the FBI and a task force of five federal agencies are all investigating the scheme, which includes campaign contributions the tribes were told to make to members of Congress. The Chairman of the Senate Indian Affairs Committee expressed outrage that the two men “regularly referred to their clients using contemptuous, even racist, language.”

Even prior to the lobbyists’ scandal, some observers had come to perceive gaming tribes as having an undue influence on political campaigns and political deal making. Such influence may be one reason that public opinion seems to be turning against any further expansion of tribal gaming. According to one cynical columnist, “[s]ince 1998, casino tribes have spent $175 million on California elections. No other interest group has come close. Republican and Democratic lawmakers alike receive contributions from the tribes. They don’t directly praise slot machines. Rather, they speak of the sanctity of Indian sovereignty.”

As state governments increasingly look to tribal gaming revenues to shore up state budgets, the political and financial influence wielded by tribes seems likely to grow. For example, California Governor Arnold Schwarzenegger promised in his gubernatorial campaign to solve the State’s
financial problems in part by renegotiation of tribal gaming compacts to require tribes to pay their “fair share.” California and other states have been criticized for such over-reliance on tribal gaming, especially slot machines, which have been called the “crack cocaine of gambling.”

XI. Tribal Economic Development

A. Regulating Commerce with the Indians

Beginning in 1790, Congress enacted a number of statutes to regulate non-Indian trade with Indians. Among other things, the Trade and Intercourse Acts limited trade with reservation Indians to those persons licensed by the Commissioner of Indian Affairs. BIA regulations under these statutes provide for acquiring a license, describe conditions under which a license may be revoked or an unlicensed trader may be excluded, and specify the limited circumstances under which a BIA employee may contract or trade with Indians.

The BIA has been criticized for lax enforcement of the statutes, especially in remote areas served by isolated trading posts. On the other hand, the Senate Indian Affairs Committee has noted that, at least with respect to BIA employees, the laws have become archaic. “Although these statutes served an admirable purpose when enacted in the 1800s, they are now relics of a very different era. The important public purposes served by the original Trading with Indians Act are now adequately protected by the Standards of Ethical Conduct for Employees of the Executive Branch.”

Businesses operated by non-tribal members on the Navajo, Hopi and Zuni Reservations are subject to detailed regulations that require licenses, consent to the jurisdiction of the tribes, and compliance with certain consumer protection standards. The “Alaska Resupply Operation” provides consolidated purchasing, freight handling and distribution, and transportation to and from Alaska in support of the BIA’s mission and responsibilities. BIA may provide power and water utilities or sell other goods and services to non-Federal users in Indian country where the goods and services are not otherwise available or it is in the best interests of the Indians.

B. BIA Loans

In the Indian Financing Act of 1974, Congress sought to provide Indians access to loan funds for economic development to raise the standard of living in Indian communities to the equivalent of “that enjoyed by non-Indians in neighboring communities.” The Act authorized BIA to adopt regulations to carry the programs authorized by Congress into effect. The regulations provide for loans from an Indian Revolving Loan Fund to “relending organizations” and tribes for a variety of economic development ventures. BIA may also guarantee or insure any loans made by commercial financial institutions. The BIA’s Indian Business Development Program makes grants of equity capital to establish and expand profit-making Indian-owned economic enterprises on or near reservations.

To maintain the guaranty certificate in full force and effect a lender must follow BIA’s procedures after a borrower defaults on a loan guaranteed by the BIA. BIA is not required to show specific prejudice resulting from the lender’s failure to follow the procedures. Any amounts disbursed for purposes other than those provided in the loan agreement must be excluded in computing the amount for which the lender may be reimbursed in the event of a loss on a loan. There is no liability on the part of the United States to reimburse a lender on a guaranteed loan for that amount of the guaranteed loss caused by the lender’s willful or negligent action that permitted a fraud, forgery or misrepresentation. Even in a case where the BIA has been imprudent a lender is not relieved of its responsibilities under the regulations.
C. Department of Commerce

The Native American Business Development, Trade, Promotion and Tourism Act of 2000 established an Office of Native American Business Development within the Department of Commerce. The Secretary of Commerce has the task of coordinating the federal programs relating to Indian economic development including programs of the DOI. The Act also creates a Native American export and trade promotion program and tourism program.

The GAO has analyzed all grants made to Indian tribes from 1993-2002 by the Economic Development Administration (“EDA”) within the Commerce Department. Whereas 143 tribes and tribal organizations received $112 million in EDA grants, this represented a small portion of EDA’s awards to all organizations. The GAO found that tribes have used the EDA grants to create businesses, build roads and other infrastructure, and create economic development plans, but concluded the grants had limited success in generating jobs, income, and private sector investment.

D. Revenue Bonds

Notwithstanding these BIA programs, Indian tribal governments, like state and local governments, must find revenue to pay for capital improvement projects. These projects may be those traditionally considered to be the exclusive province of government, such as schools, roads, sewer and water systems, health and housing facilities, parks, and government administration buildings. They may also be partly commercial, such as a convention center or a sports arena. Governments often use “revenue bonds” to borrow money to finance these activities in anticipation of repayment with future tax revenues or through earnings made possible by the projects themselves.

Although the Indian Tribal Government Tax Status Act of 1982 permits tribes to issue tax-exempt revenue bonds, tribal bond proceeds may be used only for “essential government functions.” These are generally considered to be such things as government office buildings, schools, streets and sewers. State and local governments, on the other hand, may finance a range of projects such as convention centers, golf courses, and gaming facilities; they may also serve as conduits, in effect loaning the proceeds of the bonds to eligible third parties, such as nonprofit corporations and tribes. Lacking the statutory flexibility of other governments, tribes view conduit financing as an interim solution and are asking Congress to pass the Tribal Tax Exempt Bond Fairness Act that would repeal the “essential government function” test for on-reservation financings. Meanwhile, some tribes are seeking local government conduit financing of projects including casinos with the local government receiving hefty fees.

E. Tribal Contracts

The Tribal Economic Development and Contract Encouragement Act of 2000 requires BIA’s approval of contracts that could “encumber” tribal land for a period of seven or more years. The statute requires disapproval if the contract: (1) violates federal law, or (2) does not contain either a remedies provision or a disclosure or waiver of the tribe’s sovereign immunity. The amendment also expressly preserves the “management contract” approval requirements of the National Indian Gaming Commission and any contract approval requirements found in tribal law while eliminating any federal approval requirements for tribal attorney contracts. BIA regulations specify several types of contracts and agreements that do not require Secretarial approval under the Act including those governed under other applicable law or regulations, such as leases of tribal lands.

F. IRA Corporations
Some tribes have taken advantage of a provision of the IRA that allows tribes to form tribal corporations. Section 17 of the IRA states:

Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefore interests in corporate property, and such powers as may be incidental to the conduct of the corporate business, not inconsistent with the law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

The Act provides that a charter may convey to the incorporated tribe the power to acquire, manage, and dispose of property. Federal regulations at 25 C.F.R. Part 162 do not apply to leases of land made under a corporate charter except to the extent that the authorizing statutes require Secretarial enforcement of the leases.

\[G. \text{ Employment and Labor Laws}\]

Tribes still face unique issues in pursuing economic development including the determination of what law applies to tribal business ventures. Tribes are excluded from coverage under certain federal employment and labor laws. Title VII of the Civil Rights Act of 1964 excludes Indian tribes from the definition of employers who may not discriminate on the basis of race, color, religion, sex, and national origin. Tribes are excluded from the definition of “employer” under the Americans with Disabilities Act that prohibits discrimination on the basis of disability. However, most federal labor statutes are silent as to their applicability to Indian tribes. Where the statute itself is silent, courts have reached different results in attempting to discern congressional intent regarding application to Indian tribes.

In what may foreshadow more widespread application of federal labor laws to tribes, the National Labor Relations Board (“NLRB”) recently ruled that tribal governments and their enterprises might be subject to the National Labor Relations Act (“NLRA”). Previously, the Board held the NLRA does not apply to tribes. In light of the expansion of tribal economic development, fueled by the gaming industry, the NLRB now will look at the specific tribal enterprise to determine jurisdiction on a case-by-case basis. The factors the NLRB considers include the nature of the enterprise, whether it is commercial or governmental, and whether the business employs or caters to non-Indians.

\[H. \text{ Unequal Development}\]

The Supreme Court has noted that tribes have increasingly diversified their reservation economies in recent years, citing the growth of “modern, wide-ranging tribal enterprises,” including “ski resorts, gambling, and sales of cigarettes to non-Indians.” However, the relatively few pockets of prosperity, often fueled by gaming revenues, belie the grinding poverty and unemployment that continues to characterize most of Indian country. As noted by the U.S. Civil Rights commission,

On some reservations, unemployment levels have reached 85%. According to the 2000 census, the average unemployment on reservations is 13.6% more than twice the national rate. Likewise, 31.2% of reservation inhabitants live in poverty and the national poverty rate for Native Americans is 24.5% percent. In contrast, the national poverty rate in the United States between 1999 and 2001 was 11.6%.
XII. Indian Heritage Preservation

A. Archaeological Resources Protection Act

The Archaeological Resources Protection Act (“ARPA”) states the policy of the United States is to protect archaeological resources and sites that are on public and Indian lands. The Act prohibits unauthorized excavation of such archaeological resources and authorizes federal land management agencies to grant permits to excavate or remove such resources. A few reported decisions have interpreted the key criminal and civil penalty provisions under ARPA, as well as the application of the Federal Sentencing Guidelines to criminal violations under the Act.

BIA regulations set forth procedures for obtaining a permit to excavate or remove such resources from lands owned or managed by the BIA. Consent of the Indian landowner and the tribe having jurisdiction over the lands, if any, is required. More extensive DOI regulations implementing ARPA provisions are found in Title 43 of the C.F.R. These regulations are promulgated jointly by Interior, the Secretaries of Agriculture and Defense, and the Tennessee Valley Authority. Subpart B contains supplemental DOI regulations including permitting procedures for Indian lands and civil penalty hearings procedures.

B. Native American Graves Protection and Repatriation Act

The Native American Graves Protection and Repatriation Act (“NAGPRA”) establishes three mechanisms to ensure the protection of Indian cultural property. First, it creates procedures through which culturally affiliated Indian tribes can recover human remains and funerary objects from federally funded museums. Secondly, NAGPRA criminalizes the trafficking of Indian human remains and cultural items. Finally, it sets forth notification and consultation procedures for intentional or inadvertent excavation of Native American human remains and cultural objects on tribal and federal lands.

Part 10 of 43 C.F.R. contains regulations to carry out provisions of the Act. The regulations describe the process for determining the rights of lineal descendants and Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects sacred objects, or objects of cultural patrimony with which they are affiliated. On April 3, 2003, the BIA published final rules under NAGPRA for assessing civil penalties on museums that fail to comply with applicable provisions of the Act. Museums that fail to properly repatriate, sell or otherwise transfer human remains, funerary objects, sacred objects or objects of cultural patrimony in violation of NAGPRA, face civil fines including penalties of $1,000 a day for continuing violations of the Act.

Critics contend that loopholes in NAGPRA leave many Indian burial grounds unprotected. One significant obstacle is that in litigation under NAGPRA there is a threshold requirement of establishing a significant connection between the remains and the plaintiffs. In the recent “Kennewick Man” case the Ninth Circuit held that plaintiff tribes failed to establish any relationship between the ancient remains and presently existing American Indians. The court reasoned that because the tribe is not federally recognized and the disturbance took place on private lands, the Gabrieleno Indians in Southern California were unable to stop the wholesale removal of hundreds of burials during the construction of a luxury resort. Nothing in NAGPRA prevents even the placement of strategically located gaming sites atop or adjacent to burial grounds.

C. American Indian Religious Freedom Act

The American Indian Religious Freedom Act (“AIRFA”) states that the policy of the United States is to protect and preserve for American Indians their inherent right to believe, express, and
exercise their traditional religions, their ability to access ancient religious sites, their use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites. However, AIRFA confers no judicially enforceable private right of action. In litigation over a Forest Service road, the Supreme Court held that the government was free to develop its property regardless of interference with religious practices, so long as it did not coerce individuals into violating their religious beliefs or punish religious activity by denying them rights available to others. Against a similar claim, the Ninth Circuit upheld the Forest Service’s approval of a uranium mine near the Grand Canyon.

In a case involving religious use of peyote, the Supreme Court held that if the object of a generally applicable law is not to prohibit or burden religion, its incidental effect upon religion cannot give rise to a free exercise claim. Congress reacted to the decision by enacting the Religious Freedom Restoration Act, which prohibits government from substantially burdening a person’s exercise of religion unless it can show that the burden furthers a compelling governmental interest and is the least restrictive means of doing so. The Supreme Court subsequently held the Act unconstitutional as applied to the states ruling that Congress lacked the power to expand the constitutional right of free expression by statute.

D. Indian Arts and Crafts

The Indian Arts and Crafts Act of 1990 prohibits misrepresentation in marketing of Indian arts and crafts products within the United States. The law makes it illegal to offer or display for sale or sell any art or craft product in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization that is resident within the United States. For a first time violation of the Act, an individual can face civil or criminal penalties up to a $250,000 fine or a five-year prison term or both. If a business violates the Act it can face civil penalties or can be prosecuted and fined up to $1,000,000. The Act also creates a civil cause of action for misrepresentation of goods as being Indian produced, authorizing injunctive or equitable relief, and punitive damages. The action may be instituted by an Indian, Indian tribe, or Indian arts and crafts organization, or by the Attorney General on behalf of such persons. Any amount recovered is payable to such party.

The law established an “Indian Arts and Crafts Board” within the Department of the Interior. The Board is charged with promoting the economic welfare of Indians and Indian tribes through the development of Indian arts and crafts and the expansion of markets for such products. The Board may refer complaints of violations of the Act to the Federal Bureau of Investigation and subsequently to recommend to the Attorney General that criminal proceedings be instituted. BIA regulations define the nature and Indian origin of products protected under the Act.

Although there has been relatively little litigation under the Arts and Crafts Act it has been tremendously controversial among many Indians and non-Indians alike. One critic argues that the statute is an ineffective attempt to foster cultural survival because it fails to acknowledge the historical development of both Indian tribes and Indian arts and crafts, and fails to appreciate the ways that contemporary Indian identity is constructed.

XIII. Human and Health Services

A. Social Services

Congress has tasked BIA with responsibility “for the benefit, care, and assistance of the Indians throughout the United States.” The Snyder Act of 1921 authorizes the BIA to “direct,
supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States” for purposes including “[g]eneral support and civilization,” “relief of distress and conservation of health[,]” and assistance with property, employment, and “administration of Indian affairs.” Although phrased in terms of expending “such moneys as Congress may from time to time appropriate,” the statute broadly delegates responsibility for matters including general assistance, education, health, economic development, administration of Indian property, public facilities, law enforcement, and transportation. The statute is liberally construed for the benefit of Indians.

In recent years, Congress has curbed the use of appropriated funds for general assistance where equivalent state programs are available, where benefit levels are in excess of state levels or where tribes have restricted eligibility or benefit levels in order to use savings for other tribal priorities. BIA regulations govern the provision to eligible Indians of financial assistance and social services including adult care assistance, burial assistance, child assistance, disaster assistance, emergency assistance, general assistance, services to children, elderly and families, and work experience. Such programs are secondary to other sources of Federal, state or local assistance, and are subject to annual Congressional appropriations. Tribes operating assistance programs under BIA contracts may establish different eligibility criteria or benefit levels. A tribe may use savings from a redesign of its program to fund other tribal priorities. BIA decisions to decrease or terminate financial assistance may be appealed pursuant to 25 C.F.R. § 2 (2005). An applicant or recipient may appeal decisions from tribally administered programs only through the process set forth in the relevant BIA contract or if none exists, “through the appropriate tribal forum.”

President Clinton’s “welfare reform” made sweeping changes to the nation’s welfare system substituting a program called Temporary Assistance for Needy Families (“TANF”) in place of the old Aid to Families with Dependent Children (“AFDC”) program. TANF was intended “to increase the flexibility of States” in operating welfare programs by shifting administration of welfare benefits almost entirely from the federal government to the states. TANF ensures that the state will provide aid to tribal members who are not part of a tribal assistance program. For a state to be eligible for TANF funds the state must certify that it “will provide each member of an Indian tribe, who is domiciled in the State and is not eligible for assistance under a tribal family assistance plan . . . with equitable access to assistance under the State program funded under this part attributable to funds provided by the Federal Government.”

In addition, TANF authorizes Indian tribes to apply for welfare funds. TANF’s provision for “direct funding and administration by Indian tribes” directs the Secretary of Health and Human Services (“HHS”) to “pay to each Indian tribe that has an approved tribal family assistance plan a tribal family assistance grant for the fiscal year.” TANF mandates that “each Indian tribe to which a grant is made . . . shall use the grant for the purpose of operating a program to make work activities available to such population and such service area or areas as the tribe specifies.” Finally, TANF gives Indian tribes somewhat more flexibility than states in applying for block grants. The Secretary of Labor, for instance, is permitted to waive or modify a set of limitations normally imposed on states, “to the extent necessary to enable the Indian tribe to operate a more efficient or effective program.” TANF is not a contractible program under the self-determination provisions of the ISDEAA.

The Indian Child Welfare Act of 1978 tasks the BIA with helping to notify tribes and Indian families of foster care and adoption proceedings, providing assistance, and maintaining records on Indian child adoptions. The BIA is also responsible for making grants to tribal governments for establishment and operation of child and family services programs as well as similar grants to off-reservation Indian organizations. The BIA also operates programs to assist Indians to obtain permanent employment and vocational training programs. Congress has authorized tribes to consolidate such BIA assistance together with employment and training assistance provided by other federal agencies in order to create a single comprehensive program under tribal
B. Health Care

Although the Snyder Act provided basic authorization for Indian health care the BIA was ill equipped to carry out the mandate. Responsibility for Indian health care was transferred in 1955 from the BIA to the Public Health Service (“PHS”), which at the time was a division of the Department of Health, Education, and Welfare (“HEW”) and is now part of the Department of Health and Human Services (“HHS”). The Indian Health Service (“IHS”) within the PHS is directly responsible for Indian health care.

Congress reaffirmed Federal responsibility for Indian health care with the passage of the Indian Health Care Improvement Act (“IHCIA”) of 1976 and its 1992 amendments. The IHCIA permits the Secretary of the Interior “to expend funds . . . for the purposes of eliminating the deficiencies in health status and resources of all Indian tribes.” Specifically, it authorizes the Secretary’s expenditure of funds for, among other things, “meeting the health needs of Indians” and “augmenting the ability of the [Indian Health] Service to meet . . . health service responsibilities . . . with respect to those Indian tribes with the highest levels of health status and resource deficiencies.” Unlike TANF, the IHCIA is notable for “Congress’ recognition of federal responsibility for Indian health care.” Tribal advocates have taken a strong and persistent role in helping to fashion federal Indian health policy. A leading voice for tribes is the National Indian Health Board (“NIHB”), a non-profit organization established in 1972, that represents Tribal Governments operating their own health care delivery systems through contracting and compacting, as well as those receiving health care directly from the Indian Health Service (“IHS”).

The IHS is the primary source of medical care for most American Indians and Alaska Natives. Care is provided through a network of forty-nine hospitals and over five hundred outpatient clinics and smaller facilities located primarily in the Southwest, Oklahoma, the Northern Plains, and Alaska. The IHS also purchases medical care for Indian people from non–IHS hospitals and health providers and funds thirty-four urban Indian health organizations. In addition to providing medical treatment, the IHS carries out substantial prevention and wellness activities including diabetes prevention and disease management, sanitation construction to provide water and waste disposal for Indian communities, injury prevention, mental health services, and alcohol/substance abuse treatment and prevention.

The House of Representatives approved a FY 2005 IHS budget of $3 billion that was $66 million above the White House request. After a delay of two years, apparently due to concerns over potential costs, the Administration recently lent its support to reauthorization of the Indian Health Care Improvement Act.

The IHS has not completely escaped the type of criticism otherwise reserved for the BIA. At a 1989 Hearing on “Mismanagement of Indian Health Service,” the Indian Affairs Committee even compared the agency unfavorably to the BIA. Yet, despite the Committee’s characterization of the IHS, Congress’ own Office of Technology Assessment (“OTA”) recognized with diplomatic understatement, that there was plenty of blame to go around. “Given the scarce resources available to IHS to achieve its mission,” a researcher testified, “OTA cannot conclude that the inadequacies in the IHS system can be held entirely responsible for the continuing poor health of Indian [sic].”

C. Administration for Native Americans

Another HHS agency that plays a leading role in programs designed specifically for tribes and individual Indians is the Administration for Native Americans (“ANA”). ANA was created in 1974 to promote the goal of self-sufficiency for Native Americans by providing social and economic development opportunities through financial assistance, training, and technical assistance to
eligible Tribes and Native American organizations. To achieve this mission, ANA provides funding through discretionary grants to eligible Tribes and Native organizations on a competitive basis. In Fiscal Year 2003, Congress appropriated $45.5 million for Social and Economic Development Strategies (SEDS) Projects, Environmental Regulatory Enhancement Projects, and Native Language Preservation and Maintenance Projects.

Examples of the range of projects which help to promote the economic and social development of Native Americans are: creation of new jobs and development or expansion of business enterprises and social service initiatives; establishment of new Tribal employment offices; formulation of environmental ordinances and training in the use and control of natural resources; enactment of new codes and management improvements to strengthen the governmental functions of Tribes and Native American organizations; and establishment of local court systems. The Commissioner of the ANA is the Chair of the Intra-Departmental Council on Native American Affairs (“ICNAA”) within HHS and advises the Secretary on Native American issues.

D. “A Quiet Crisis”

Despite the array of social programs administered by the BIA and HHS, the U.S. Commission on Civil Rights notes that “nearly a quarter of Native Americans—more than twice the national average—continue to live in poverty.” Native Americans are more than twice as likely as the general population to face “hunger and food insecurity” at any given time.

Native Americans have a lower life expectancy—nearly six years less—and higher disease occurrence than other racial/ethnic groups. Roughly 13% of Native American deaths occur among those under the age of twenty-five, a rate three times more than that of the total U.S. population. Native American youth are more than twice as likely to commit suicide, and nearly 70% of all suicidal acts in Indian Country involve alcohol. Native Americans are 670% more likely to die from alcoholism, 650% more likely to die from tuberculosis, 318% more likely to die from diabetes, and 204% more likely to suffer accidental death when compared with other groups.

The U.S. Commission on Civil Rights has criticized the inadequacy of not only BIA and HHS programs, but also USDA’s Food Distribution Program on Indian Reservations (“FDPIR”) that “lost funding when accounting for inflation between 1999 and 2003, reducing available food resources.” The Commission noted that the Administration’s 2004 budget proposed to reduce funding by more than 18.2% from 2003.

The Commission on Civil Rights notes that most Native Americans do not have private health insurance and thus rely exclusively on the IHS for health care. Yet, according to the Commission’s calculations, the IHS operates with only 59% of the amount necessary to stem the crisis in Indian health. The Commission found that:

[H]ealth facilities are frequently inaccessible and medically obsolete and preventive care and specialty services are not readily available . . . The federal government spends less per capita on Native American health care than on any other group for which it has this responsibility including Medicaid recipients, prisoners, veterans, and military personnel. Annually, IHS spends 60% less on its beneficiaries than the average per person health care expenditure nationwide.

. . . .

The IHS, although the largest source of federal spending for Native Americans, constitutes only 0.5% of the entire HHS budget.

The staff of the Civil Rights Commission has followed up the “Quiet Crisis” report by
releasing a more detailed draft report on Indian health problems and lack of adequate health care. “Broken Promises: Evaluating the Native American Health Care System” notes that

Native Americans are 770 percent more likely to die from alcoholism, 650 percent more likely to die from tuberculosis, 420 percent more likely to die from diabetes, 280 percent more likely to die from accidents, and 52 percent more likely to die from pneumonia or influenza than the rest of the United States, including white and minority populations.

While criticizing Congress for failing to adequately fund Indian health programs, the report also urges IHS to eliminate social, cultural and “structural” barriers that may affect delivery of health care. These include cultural training; partnerships with tribes; improved investigation and handling of bias and discrimination complaints; fully funding tribal contract support costs; and changing the contract health services (“CHS”) system to allow all Native Americans, regardless of location, to receive services.

XIV. Housing

A. BIA’s Housing Improvement Program

The federal government’s recognition of its responsibility to provide adequate Indian housing stretches back for two centuries, although the promise remains largely unkept. Today, the BIA plays a secondary role in Indian housing to that of HUD. Indeed, BIA’s “Housing Improvement Program” (“HIP”) offers assistance to only “the neediest of the needy Indian families who have no other resource for standard housing.” HIP provides grants for the cost of services to repair, renovate, replace, or provide housing. Tribal administration of the HIP program is “encouraged to the maximum extent possible.” The BIA may approve the mortgage of a landowner’s interest in individual allotment lands and leasehold interests in individual or tribal trust property.

B. HUD & NAHASDA

Like BIA, HUD gives tribal governments a large say in its Indian housing programs, having radically deregulated tribal housing in the 1990s eliminating several separate programs of assistance and replacing them with a single block grant program, the Native American Housing Assistance and Self-Determination Act of 1996 (“NAHASDA”). NAHASDA is administered through HUD’s Office of Native American Programs (“ONAP”). Tribes design their own housing plans and submit them to ONAP, which makes block grants directly to tribes. Eligible activities include buying, building, or improving homes as well as funding services like counseling and crime prevention. The Act allows grant recipients to apply for loan guarantees backed by the full faith and credit of the United States. Leasehold terms are permitted for up to fifty years to encourage private lending.

C. Promises Unkept

The U.S. Civil Rights Commission reports that there is a significant need for safe and sanitary housing in Indian country.

Roughly 90,000 Indian families are homeless or under-housed; more than 30% of reservation households are crowded and 18% are severely crowded. Roughly 16% of Native American homes are without telephones, while only 6% of non-Native households lack telephone service . . . Fewer than 50% of homes on reservations are connected to a public sewer system.
Funding for Native American programs at HUD, according to the Commission, increased only slightly over the past four years (8.8%), significantly less than the agency as a whole (62%). The Commission notes that the “tribal housing loan guarantee program lost nearly 70% of its purchasing power over the last four years...” As in other areas of importance to tribes, they have banded together to make their collective voice heard on housing policy issues. The National American Indian Housing Council (“NAIHC”) is a leading advocacy organization that provides technical assistance and advocacy for tribal housing programs.

IX. Education

A. “A National Tragedy”

In 1819, Congress authorized the President to institute education programs for Indians, including instruction in agriculture as well as reading, writing, and arithmetic. Vacant military posts and barracks were converted for use as schools. Churches were given control of Indians’ treaty rations and granted land patents for purposes of operating mission schools, a practice not formally ended until 1968. Early Indian education policies sought to assimilate Indian children and to essentially terminate their Indian culture.

Federal policy began a gradual shift after the 1928 Meriam Report focused national attention on the grossly inadequate state of federal Indian policies, including education. In 1934, through the Johnson-O’Malley Act, Congress provided for contracts and grants to integrate Indian education into state school systems. In 1950, Congress adopted legislation popularly known as “Impact Aid,” authorizing federal subsidies to state operated public schools for the education of children "connected" with federal lands exempt from taxation, including Indian reservations. The Elementary and Secondary Education Act of 1965 established funds for Indian students. Still, at the end of the sixties in a Senate report subtitled “A National Tragedy – A National Challenge,” Indian education was said to be characterized by a “dismal record of absenteeism, dropouts, negative self-image, low achievement, and, ultimately, academic failure for many Indian children.”

B. The Self-Determination Era

A renewed focus on improving Indian education resulted in a series of new laws, including the Indian Education Assistance Act of 1975 (authorizing contracts with states for school construction on Indian lands); the Indian Self-Determination and Education Assistance Act of 1975 (permitting tribes to operate federally funded educational programs); the Tribally Controlled Schools Act of 1988 (directing BIA to make grants to tribes operating BIA-funded schools); Part B of Title XI of the Education Amendments of 1978; the National Fund for Excellence in American Indian Education (directs BIA to make grants to tribes to permit the tribes to provide financial assistance to individual Indian students for the costs of attendance at institutions of higher education); and the American Indian Education Foundation (a federally chartered corporation intended to further educational opportunities for American Indians).

The primary legislation that authorizes federal spending on education, the Elementary and Secondary Education Act (“ESEA”) was reauthorized in January of 2002, now known as the “No Child Left Behind” Act (“NCLB”) of 2001. NCLB requires states to set twelve-year goals to ensure that all students meet state academic standards and to close achievement gaps between rich and poor and minority and non-minority students. In addition, the NCLB specifically addresses...
programs for Indian, Native Hawaiian, and Alaska Native Education, in amendments known as the Native American Education Improvement Act of 2001 that states:

It is the policy of the United States to fulfill the Federal Government’s unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children and for the operation and financial support of the Bureau of Indian Affairs-funded school system to work in full cooperation with tribes toward the goal of ensuring that the programs of the Bureau of Indian Affairs-funded school system are of the highest quality and provide for the basic elementary and secondary educational needs of Indian children, including meeting the unique educational and cultural needs of those children.

Although Congress coupled the new reforms in ESEA with historic increases in funding and targeting schools with high percentages of low-income children, Indian leaders charge that the President’s FY05 Budget under-funds ESEA by $9.4 billion below the authorized level.

On April 30, 2004, President Bush signed Executive Order 13336 on American Indian and Alaska Native Education, declaring support for tribal sovereignty, tribal traditions, languages and cultures; establishing an interagency working group to develop a federal interagency plan that recommends initiatives, strategies and ideas for actions to promote the purposes of the Executive Order; calling for a multi-year study of American Indian and Alaska Native education with the purpose of improving Native students’ ability to meet the standards of the No Child Left Behind Act; calling for a report to the President; and seeking enhancement of research capabilities of tribal-level educational institutions. The Task Force is to convene a forum on the No Child Left Behind Act to identify means to enhance communication, collaboration, and cooperative strategies to improve the education of Native students attending federal, state, Tribal and other schools.

C. BIA’s Office of Indian Education

The Office of Indian Education Programs (“OIEP”) within the BIA is charged with the responsibility for administering BIA’s education programs. There are approximately 541,000 elementary and secondary-aged Indian students in the United States, about 49,000 of whom are enrolled in 185 federal Indian schools, 64 of which are operated by the BIA, with the remainder operated by Indian tribes. The BIA school system includes elementary, secondary, and boarding schools located on 63 reservations in 23 states. BIA also provides for the education of about 30,000 adult Indian students at 25 BIA-funded Tribally controlled community colleges and universities and an additional 1,600 Indian adults at two colleges operated by BIA.

The majority of funding for the OIEP is provided through the Department of the Interior’s annual appropriation. The OIEP receives additional funding from the U.S. Department of Education and other sources. The OIEP distributes the majority of appropriated funds to schools under the Indian School Equalization Program (“ISEP”) that provides direct funding for the instruction and residential care of Indian children. For budget fiscal year 2001/2002, the OIEP spent approximately $728 million in funding received from all sources. Of the $728 million, $667 million was used by schools and education field offices and about $61 million was used by the OIEP Central Office.

Current OIEP policy is “to facilitate Indian control of Indian affairs in all matters relating to education.” Eligibility for BIA education programs is limited to students who are tribal members or at least one-quarter Indian blood descendant of a tribal member and who reside on or near an Indian reservation or meet criteria for attendance at BIA off-reservation boarding schools. Eligibility may be extended to certain other students, for example, dependents of BIA employees.

The OIEP has established minimum academic standards for the basic education of Indian children and national criteria for dormitory housing. There are stringent standards for employment
of education personnel. The Indian School Equalization program has rules to ensure uniform direct funding of BIA and tribally operated schools. Other regulations govern educational loans and grants, grants to tribally controlled community colleges, maintenance of student records in BIA schools, and adult education.

Because OIEP employees are in contact with Indian children they are subject to statutes that require federal agencies involved with the provision of services to children under age eighteen to assure that all existing and newly hired employees undergo a criminal background check. In addition, OIEP is also subject to the Indian Child Protection and Family Violence Protection Act of 1990 that requires background investigations of individuals who are employed or being considered for employment in a position that has regular contact with or control over Indian children. Individuals are not eligible for appointment if they have been found guilty of, or entered a plea of no contest or guilty to, any felony offense or any two or more misdemeanor offenses under federal, state, or Tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; crimes against persons; or offenses committed against children.

Pursuant to the Act, the BIA has established minimum standards of character and suitability for employment not just for school employees but for all individuals whose duties and responsibilities allow them regular contact with or control over Indian children, and to establish the method for distributing funds to support tribally operated programs to protect Indian children and reduce the incidence of family violence in Indian country. Tribal employers are required to conduct background investigations of all prospective employees whose responsibilities allow them regular contact with or control over Indian children and to employ only those individuals who meet standards of character no less stringent than those established for BIA employees.

D. Failing Grades

The importance of education to tribes cannot be overstated, as evidenced by the activities of the NIEA and other advocacy organizations. The American Indian Higher Education Consortium (“AIHEC”), for example, was founded in 1972 by six tribal colleges and has grown to represent thirty-four colleges in the United States and one Canadian institution. Another prominent organization, the American Indian Science & Engineering Society (“AISES”), promotes educational opportunities for Native students in science, engineering, and technology.

Groups such as these have made great strides in helping to improve Indian education, but for some, the changes are too little, too late. Former students at church-run schools in South Dakota recently filed a $25 billion class-action lawsuit against the federal government alleging that federally-funded church schools were little more than “labor camps” rife with “round-the-clock” physical and sexual abuse that continued into the 1970s.

Decades later, Indian education provided by the BIA continues to be markedly inferior to public school education. A 2001 report of the General Accounting Office (“GAO”) on BIA schools found that students’ academic achievement and performance on college admission exams and statewide assessment tests were “far below the performance” of public school students. The GAO report found that one in five BIA students was enrolled in a special education program and that nearly 60% had limited English proficiency. Recruiting and retention of qualified staff remained an issue as did a nearly $1 billion backlog of repairs and construction. The GAO report also emphasized the negative impact of social problems, including poverty, unemployment, and substance abuse on the academic achievement of Indian students.

In the last decade, one in three Native American students failed to graduate from high school. Native American students are far more likely than other students to drop out of primary and secondary schools. Additionally, Individuals working in Indian education are typically underpaid in comparison to colleagues in non-Indian schools. Tribal college full-time faculty, for example, are paid about half as much on average as their counterparts at non-tribal two-year institutions.
The amount currently spent per student at BIA schools is equivalent to “an amount per student that public schools were spending twenty-years ago.” The Commission on Civil Rights reports that “funding for DOE’s Office of Indian Education (‘OIE’) has remained a relatively small portion of the department’s total discretionary budget (ranging from 0.2 to 0.3%) between 1998 and 2003.”

XVI. Self-Determination and Self Governance

A. Indian Self-Determination

The Indian Self-Determination and Education Assistance Act (“ISDEAA”), directs the Secretary of the Interior and the Secretary of Health and Human Services, upon the request of an Indian Tribe, to turn over to that Tribe the direct operation of its federal Indian programs. Once a Tribe requests control of its programs the Secretary and the Tribe enter into a “self-determination contract” which the statute specifies must incorporate the provisions of a mandatory model contract included in the text of the ISDEAA.

The ISDEAA requires the Secretary to provide program funding, known as “base funding,” to contractors in an amount no less than the Secretary would have spent had he retained operation of the program. In addition to base funding, the Act requires the Secretary to provide funding of contract support costs (“CSCs”) although the obligation to provide CSCs is expressly subject to the availability of appropriations.

Federal appeals courts in two circuits have held that federal agencies can’t award full CSCs to tribes where Congress has not made sufficient funds available. These decisions essentially view self-determination agreements not as government procurement contracts, but rather, as governmental funding arrangements under which the tribes are substituted for a federal agency both in furnishing governmental services and in receiving federal funding for that purpose. More recently, however, the Federal Circuit Court of Appeals held that the Cherokee Nation was owed full contract support costs for administering such programs. Both the Government and the Cherokee Nation have asked the Supreme Court to resolve the dispute.

There are specific programs administered by the BIA that are not subject to contract under the ISDEAA because they are inherently federal functions, also called residual functions. The Secretary is precluded from contracting for programs that would impair her ability to discharge her trust responsibility to any Indian tribe or individuals and the Secretary must reserve funds for other tribes who would also be eligible for the administration of programs.

The Indian Health Service (“IHS”) is another major source of tribal self–determination contracts. Such contracts accounted for over half of the IHS FY 2004 budget of $3.7 billion and funded tribal operation of almost one-third of IHS hospitals and three-quarters of its clinics and smaller facilities. Tribes and tribal groups, through contracts and compacts with the IHS operate 13 hospitals, 172 health centers, 3 school health centers, and 260 health stations (including 176 Alaska Native village clinics). The IHS, tribes, and tribal groups also operate 9 regional youth substance abuse treatment centers and 2,252 units of staff quarters.

Upon receipt of a contract proposal, the Department must review and approve or decline the proposal within ninety-days; failure to act within the ninety-day period results in the award of a contract by operation of law. A proposal may be declined only for one of five specific reasons. An appeal of the decision complained of must be filed within thirty-days. A tribe filing an appeal may also go directly to federal court at any point.

Generally, funds paid to a tribe and not expended or used for the purposes for which paid must be repaid to the Treasury of the United States. Tribes are required to submit to the Secretary a single-agency audit report for each fiscal year during which it receives or expends contract funds. The Department is barred from recovering disallowed costs unless it has given notice of such
disallowance within 365 days of receipt of the tribe’s single audit. There are special rules for post-award contract disputes. The ISDEAA imposes criminal penalties, including fines and imprisonment, upon officials and employees of contract recipients who willfully misapply or embezzle funds.

An Indian tribe or tribal organization may retrocede a self-determination contract, in whole or in part. A “retrocession” is the voluntary return to the Secretary of a contracted program, in whole or in part, for any reason, before the expiration of the term of the contract. The Secretary may initiate a “reassumption” of a self-determination contract based upon a finding of gross negligence or mismanagement of the contract.

B. Tribal Self-Governance

Self-Governance is an extension of the self-determination program, whereby tribes assume even greater control over a larger range of programs, with minimal federal oversight. Congress created the Self-Governance program under Title II of the Indian Self-Determination and Education Assistance Act Amendments of 1994. The Office of Self-Governance ("OSG") is the office within DOI responsible for administering Tribal Self-Governance as it relates to BIA programs. OSG may accept up to fifty tribes or consortia of tribes each year to participate in the program. Separate regulations specify the process for tribes seeking entry into the program.

An Annual Funding Agreement ("AFA") entered into by the BIA and a tribe specifies the programs transferred to the tribe and those retained by BIA. An AFA may not include programs, services, functions, or activities that are inherently federal or where the statute establishing the existing program does not authorize the type of participation sought by the tribe. The AFA must include an amount equal to what the tribe would have been eligible to receive under contracts and grants for direct programs and contract support costs under the self-determination program plus a negotiated share of any other funds otherwise available to tribes. An AFA may also be negotiated for non-BIA programs including DOI programs of special geographic, historical, or cultural significance to participating tribes.

Self-governance tribes also must negotiate a self-governance “compact” which differs from the AFA in that parts of the compact apply to all bureaus within the DOI rather than just a single Bureau. DOI regulations detail the negotiation process for a compact and an AFA.

BIA funding of an AFA must not result in a reduction of services or funds for which another tribe is eligible. All regulations that govern the operation of programs included in an AFA apply as well to self-governance tribes unless waived by the Secretary. DOI may reassume any program operated pursuant to an AFA upon a finding of imminent jeopardy to a physical trust asset, a natural resource, or public health and safety. A tribe may also retrocede a program included in an AFA.

Annually, each AFA tribe as well as the Secretary must prepare a report on the self-governance program. Tribes may appeal Department decisions under the self-governance program to the IBIA for certain pre-AFA disputes and to the IBCA for certain post-AFA disputes though alternative dispute resolution is preferred.

The Secretary is required to publish annually: (1) A list of non-BIA programs, services, functions, and activities, or portions thereof, that are eligible for inclusion in agreements negotiated under the self-governance program and (2) programmatic targets for these bureaus. Nevertheless, there are only a handful of Annual Funding Agreements between self-governance tribes and non-BIA bureaus of the Department.

C. Contractor Tort Liability

For the first dozen years under the ISDEAA, tribal contractors generally assumed liability for
accidents or torts (civil wrongdoings) caused by their employees. However, beginning in the late 1980s the federal government assumed this liability when Congress extended coverage under the Federal Tort Claims Act (“FTCA”) to tribal ISDEAA contractors. The FTCA permits the United States to be sued “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

DOI regulations explain the coverage of the FTCA for medical and non-medical claims and the procedures for filing FTCA claims. A report by the General Accounting Office to the Senate Committee on Indian Affairs identified 342 claims filed from 1997 through 1999 with one-third of them against Indian Health Service contractors and two-thirds against BIA contractors that mostly involved law enforcement. The claims involved a small number of tribes but sought $700 million in damages.

The Report identifies, but does not attempt to resolve, four unique legal issues arising from FTCA coverage of tribal contractors: 1) the FTCA does not provide statutory authority for removing FTCA cases filed in tribal courts, unlike state courts, 2) questions have arisen whether adjudication of claims should be based on tribal law or state law, 3) it has been argued that tribal law enforcement officers should be considered federal law enforcement officers, thus subjecting them to claims for intentional as well as negligent torts, and 4) it is unclear to what extent tribal council members and other indirect tribal employees may be covered by the FTCA.

D. Self-Governance and the Trust Responsibility

The fact that a tribe performs BIA realty functions under a Self-Governance compact does not diminish the trust responsibility of the United States for that tribe’s trust land even when the tribe provides BIA services to its own land. The United States, not the Tribe, will be the trustee regardless of whether BIA or the Nation provides BIA realty services to the land. The regulations include provisions for a system of trust evaluations when a tribe performs trust functions under an AFA.

Tribes naturally want to preserve the benefits of the trust, for example, assistance with management of tribal resources and the ability to sue the government for failure to protect resources. However, many tribes do not want even minimal government oversight of tribal management. In testimony before the Senate Committee on Indian Affairs, the vice-president of the NCAI bitterly attacked recommendations by the National Academy of Public Administration that called for increased BIA funding in order to improve its management and administrative capacity in regard to Self-Determination and other programs. NCAI vice-president W. Ron Allen suggested that a stronger BIA might imperil tribal self-governance and he challenged the Academy’s suggestion that lack of BIA oversight creates a potential for tribal abuse. Allen dismissed much of the Academy’s report as being “more focused on the BIA’s loss of control over the tribes than the success of the devolution movement in the Self-Governance initiative.”

Yet without such oversight, it may be difficult to reconcile the trust responsibility with tribal self-governance, as recognized by the Tribal Government Task Force of the AIPRC.

Clearly, the trust responsibility of the Federal Government, as exercised by BIA officials, requires that they have authority to control the use, management and disposition of tribal trust resources or income from trust resources. The theory for this source of authority is not viewed as objectionable by the tribes. They recognize that under the law, one simply cannot be a trustee and at the same time have no control over the corpus of the trust. If Indian Tribal Governments were to be recognized as possessing ultimate control over the use and disposition of tribal trust resources, then under the law, there is no way that the Federal Government could be held responsible. In effect, this would imply a termination of the trust responsibility.
Moreover, the courts have held that the federal government has a legitimate need and responsibility to ensure that federal and tribal trust resources are not misused, and that failure to do so may itself be a breach of trust. Federal officials are frequently required to investigate allegations of financial mismanagement, corruption and abuse of power by tribal officials.