

**University of California, Hastings College of the Law**  
**INDIAN LAW**  
**Spring Semester 2012**  
**Professor Lesly**

**Handout # 2**

**Eight: Federal Power over Indians: Treaty Abrogation**

**Questions on Dion (p. 313):**

1. What did the Treaty say regarding hunting or killing wildlife? Was the treaty right to hunt and fish explicit or implicit? Does it make a difference to the abrogation question whether it is? Cf. Menominee, p. 207.
2. Refresher question: What is the basis for Congress's power to abrogate treaties unilaterally?
3. What rules of interpretation (canons of construction) does the Court use here to determine whether Congress has actually abrogated a treaty? Must Congress use "magic words" like "the treaty is abrogated," or "notwithstanding any treaty" in the abrogating statute?
4. Should context count? For example, should courts demand stronger evidence that Congress intended to abrogate a treaty when the treaty right is central to tribal existence and culture, than when it is more peripheral? Should the courts be *more* or *less* willing to find treaty abrogation when the exercise of the treaty right was for *ceremonial or religious* rather than economic or commercial purposes? What was the context in Dion?
5. Did Dion change the approach of the courts to treaty abrogation issues? See the discussion of prior cases on pp. 319-326.
6. Have the courts consistently adhered to the Dion approach? See the discussion on pp. 323-26.
7. Because many tribes do not have and never had treaties with the U.S., the discussion on pp. 326-29 has wide applicability. Should the rights guaranteed in treaties, which are bilateral compacts between tribes and the U.S., be accorded *more* dignity and protection from subsequent abrogation than rights Indians may have that are *not* expressed in treaties; e.g., in statutes? That is, should the standard for measuring abrogation of Indian rights be *less* stringent when *non-treaty* rights of Indians are involved? Or should the courts and Congress avoid drawing this kind of distinction, and instead adopt uniform rules that apply to both treaty and non-treaty tribes? See, in this regard, footnote 8 in the Dion opinion, p. 318.
8. Notice that in San Manuel Indian Bingo and Casino v. NLRB, p. 329, the court did not apply the so-called Coeur d'Alene test (see p. 328) adopted by the Ninth Circuit, or the more tribal-

friendly test applied by the Tenth Circuit in Donovan. To the extent the National Labor Relations Act contains a general national policy on employer-employee relations for enterprises of a certain size and kind, should it apply to tribal enterprises that meet those standards, unless Congress chooses to exempt them? Or should Congress be required to make inclusion of tribal enterprises express?

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## **Nine: The Federal Trust Responsibility:**

### **Questions on Seminole (p. 329):**

1. Did the U.S. pay the money it owed? If so, why is the Tribe complaining?
2. At whose request did the U.S. pay the tribal treasurer and the creditors?
3. What principle of law is being applied here? What is its source? Is the principle and its application the same here as in non-Indian contexts; e.g., when Wells Fargo Bank acts as trustee managing funds for a (non-Indian) beneficiary of a trust?
4. Would the U.S. be liable if it did not have actual knowledge of fraud?
5. Is this notion of the trust responsibility a paternal one - an obligation to “save the Indians from themselves”? See the Menominee 1944 Court of Claims decision, note 1, p. 331. Is that an antiquated notion in modern times? Is it fundamentally inconsistent with the principle and modern policy of self-determination? One commentator has written: “[T]ribal sovereignty and the federal trust are, on their face, irreconcilable. On the one hand, sovereignty is about self-governance and self-determination; it is about tribal power. The trust, on the other hand, is about a federal duty to protect Indians; it is about the submission of tribal power to a higher authority.” Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 U. Md. L. Rev. 290 at 348 (2009). Do you agree?
6. Former Hastings Dean Nell J. Newton wrote: “Asserting the existence of the trust relationship between Indian tribes and the federal government is far easier than defining its contours.” Introduction, *The Indian Trust Doctrine after the 2002-2003 Supreme Court Term*, 39 Tulsa L. Rev. 237 (2003).

### **Questions on Navajo I (334) and II (340)**

1. Do these decisions leave anything left of a free-floating trust responsibility that can be judicially enforced? Would the majority that decided the Navajo cases have decided the Seminole case (329) the same way - that is, is Seminole effectively overruled? Similarly, is Mitchell II (333)

effectively overruled?

2. Did the Court offer any guidance on the question in note 1 in the White Mountain Apache case, decided the same day as Navajo I? See note 2, p. 340.

3. Is context important to measuring the reach of the trust responsibility? If the U.S. is handling the Indians' money, as opposed to managing an Indian natural resource like coal or timber, should the courts hold it to a more exacting trust responsibility? Reconsider this question after reading the Pyramid Lake case, next.

### **Executive Agency conflicts - Pyramid Lake, etc. (346).**

1. Try to answer the questions on p. 353. Is the approach for reviewing executive branch action used by Judge Gesell in the Pyramid Lake case still good law, after the more recent Supreme Court cases like Nevada v. U.S. (352) and Navajo I and II? Do the principles applicable to a private trustee have any force in contexts like water rights claims and enforcement?

2. The Campo Landfill Problem: When I was Solicitor of the Interior Department, the Secretary had to decide whether to approve a long-term lease between the Campo Band of Indians (with a small reservation east of San Diego) and a solid waste disposal company that would allow the company to build a large solid waste handling facility on tribal land, to handle waste generated in the San Diego metropolitan area. (Applicable tribal and federal law required secretarial approval of the lease.) The project offered significant economic benefits to the tribe and reservation residents, who favored the economic development. On the other hand, as the Secretary put it in his decision document (which I had a major hand in drafting):

Building large facilities on Indian reservations to handle largely non-Indian-generated waste, however, elicits a disturbing image of “wasting” Indian lands. Also, a project of this magnitude can permanently change the character of a reservation, particularly a comparatively small one. And there is always the possibility, no matter how tightly regulated, of long-term environmental risks. The Bureau of Indian Affairs is not an environmental regulatory agency, and existing law and practice do not always provide clear answers to questions concerning the extent to which tribal, federal and state environmental regulatory laws apply. Indeed, the exploitation of potential regulatory loopholes or vacuums may be behind some proposals to site such projects in Indian country. \* \* \*

### **What should the Secretary do in this situation? What are the key factors in making the decision, from the standpoint of the trust responsibility?**

Secretary Babbitt approved the lease, but for a variety of reasons, the project was never built. See Dan McGovern, The Campo Indian Landfill War: The Fight for Gold in California's Garbage (U. Okla. Press, 1995). His decision document laid out the following general approach:

Exercising the federal trust responsibility in this context is challenging. While respecting

tribal self-determination, I must also seek to prevent exploitation of tribal resources for the benefit of non-Indians, and must take longer-term costs and risks fully into account, balancing them against shorter-term benefits.

Weighing these considerations, I have decided that my approach to such proposals as Secretary and trustee will be as follows:

In general, I do not believe the Department should be in the business of encouraging proposals to build large waste facilities on Indian reservations primarily to handle non-Indian waste. I will be especially concerned when a waste project is large in relation to the size of the reservation, and when cultural, scenic and other special qualities of a particular reservation would be dramatically altered.

I will approve such projects only when I am convinced that

- tribal members have been fully apprised of the terms, conditions, and risks, and have approved them, through their tribal governments or, preferably (at least where large facilities are located on small reservations), through a referendum election specifically addressing the issue;

- a first-class regulatory system (tribal, federal, state, or some combination thereof) has been approved by the Tribe, is in place, and will exercise clear supervisory power over the facility, including long-term monitoring and the ability to bring effective enforcement actions; and

- the financial terms of these arrangements, including potential long-term liability of the Tribe and the United States from environmental contamination, are protective of tribal and federal interests.

**Does this cover all the appropriate considerations? Is it too paternal; i.e., not respectful enough of tribal interests? What would you add to or subtract from this statement?**

3. To whom is the trust responsibility owed? All tribes, nationally, or just a tribe at a time? All individual Indians, no matter where they live, on or off reservation? Currently living Indians? Generations yet unborn?

4. Sometimes neighboring tribes may have different and competing interests. The Crow Tribe in southern Montana at one time wanted to develop its coal resources and site coal-fired power plants on tribal land. Its neighbor to the east (and downwind), the Northern Cheyenne Tribe, was opposed to the industrialization and air pollution. If the Secretary has the responsibility to approve Crow Tribe coal leases, should he or she take the interests of the Northern Cheyenne into account? How?

5. Or consider this: What if the U.S. has to decide whether to file litigation on behalf of Tribe X making a controversial and uncertain claim to land on behalf of the tribe; e.g., ownership of the bed of a river that flows through a reservation, in light of Montana v. U.S. (see p. 253). Suppose also that this is not the best fact situation to bring such a claim, and if the U.S. loses, it could harm the interests of other tribes which have similar claims, but stronger factual settings for making them, but for one reason or another their claims are not ripe for litigation or they do not want to assert them at this time. Should the U.S. consider only the interests of Tribe X in deciding whether to file suit, or may it also consider the broader litigation interests of tribes generally? See, e.g., Fort Mojave Indian Tribe v. United States, 32 Ct. Cl. 29 (1994), *aff'd*, 64 F.3d 677 (Fed. Cir. 1995).

**Does the trust responsibility limit the power of Congress? Sioux Nation, p. 355:**

1. Try to answer the questions in the notes on pp. 365-66. A major question is whether Sioux Nation is explained by its special facts and history—which included two special acts of Congress (adopted in 1920 and 1978) authorizing the courts to address the Tribe’s takings claim --- or whether it constitutes a significant doctrinal retreat from Lone Wolf. Which do you think is the case?
2. Can the U.S. still take Indian land without the consent of the tribe, and in violation of a treaty it had entered with the tribe? Must it pay if it does?
3. Is the standard of payment fair market value? Fair market value of what? The land? Or should the tribe be compensated for its loss of authority to veto the deal? How would you put a value on that? If Congress decides upon a measure of payment, should the courts review the fairness of the amount?
4. Recall that an ordinary fifth amendment takings judgment accrues interest, but an Indian Claims Commission judgment for “dishonorable dealings” does not (p. 269). And recall that in the Indian Claims Commission, the tribe could not get the land back, only money damages (p. 271).

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**Ten: The Reach of Tribal Sovereignty:**

**Questions on Talton v. Mayes (p. 373)**

1. Where was defendant tried? Were the interests of the individual defendant and the interests of the tribe the same?
2. Why doesn’t the U.S. Constitution, including its Bill of Rights, apply to and constrain the actions of tribal governments?
3. Notice this decision was rendered 12 years after the allotment and assimilation policy was

adopted (see pp. 165-87). Was it consistent with that policy?

**Questions on Wheeler (p. 376)**

1. Does Wheeler do anything more than apply Talton in the modern era?
2. Is the federal prosecution a constraint on tribal sovereignty?
3. Consider how double jeopardy works in the federal system; e.g., if a state like California prosecutes an individual for a crime under state law, can the federal government prosecute the same individual for the same act under federal law? Can a local California government like the city and County of San Francisco prosecute the same individual for the same act under local law?
4. Suppose the Navajo Nation had a constitution that required the federal government to approve tribal laws (in fact, it does not), and the Secretary had approved the Navajo criminal code here applied to Wheeler. Same result?
5. Same result if the defendant in Wheeler was not a Navajo, but instead a member of the neighboring Hopi Tribe?

**The Indian Civil Rights Act (ICRA) (379-81).**

1. Is the ICRA a congressional intrusion on tribal sovereignty? Does it diminish the independence of the tribes?
2. Notice it was adopted at the same time Congress was ending the termination era and embracing tribal self-determination. Was it consistent with that policy trend? Why do you suppose Congress enacted it?
3. Notice that some of the rights protected by the U.S. Constitution are not included -- establishment of religion, right to vote, right to jury trial in civil cases, free counsel for the indigent accused, and guarantee of a republican form of government. What do you suppose was Congress's rationale for not including these specific parts?

**Questions on Santa Clara Pueblo v. Martinez (381).**

1. What part of the ICRA was allegedly violated by the Tribe here?
2. What does the Court say about the merits of that claim? Compare what the lower courts did.
3. Can the tribe be sued? Why or why not?

4. The context here was tribal membership. Are such questions particularly sensitive to cultural differences, so that tribal decisions on such matters should not be subject to federal review, in federal court or in the Interior Department or the Congress? As you can see, the decision has spawned a lively debate in the journals; see pp. 389-94. Professor Angela R. Riley recently wrote that there is cultural value in the “illiberalism” of Indian tribes. She specifically noted that to eradicate illiberal outcomes such as the one in *Santa Clara Pueblo* would undermine tribal cultures; namely, in the development of Indian justice systems, and tribal government leadership based in gender and religion. See Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 835-47 (2007). She concluded (847-48):

Political theorists have recently noted an increased desire on the part of contemporary liberals to impose liberalism on indigenous groups. This is a mistake. Despite heavy criticism fueled largely by *Santa Clara Pueblo*, evidence indicates that violations of civil liberties by tribal governments are, in fact, rare. And because Indian tribes vary dramatically in their governmental structures, cultures, and contemporary lives, Congress and the Supreme Court have recognized that the federal courts are ill-equipped to differentiate between them. Thus, forcing a one-size-fits-all approach to civil liberties onto Indian tribes is not only unjustified, it would seriously endanger Indian differentness.

Undoubtedly, Indian tribal governments owe duties to the tribal polity. And these duties should not be taken lightly. But these issues are better addressed by tribes themselves, who are in the best position to shape change in ways consistent with tribal values and traditions. This enables Indian nations to continue their own internal processes of cultural evolution and growth. Thus, as indigeneity as a way of life is increasingly threatened by an encroaching dominant culture, it is critical that the federal government take no further steps to force the assimilation and potential destruction of America’s indigenous peoples.

Do you agree?

5. Might the Martinez children have claims against the U.S.? See Prof. Resnik’s discussion of the BIA’s policy stance on tribal membership, p. 390.

6. While the Court in Martinez shows considerable respect tribal sovereignty, might it, in the longer run, undermine the case for tribal jurisdiction over non-Indians? That is, might the unavailability of federal court review of tribal court decisions help persuade Congress and the courts to cut back on tribal civil regulatory authority, at least over non-Indians or non-members of that tribe?

7. Could Congress amend the ICRA to reverse the result in Martinez? Should it? Why do you suppose it has not?

**ICRA and Criminal Law (notes 2-5, pp. 387-89):**

1. Suppose a tribal court denies a person accused of violating tribal criminal law effective assistance of counsel, or the right to cross-examine opposing witnesses, or introduces evidence that was obtained by an allegedly illegal search, etc. Can the defendant, once convicted and incarcerated in a tribal jail, go to federal court to seek review of his or her claim that the tribe violated his or her rights?
2. If so, in such a proceeding, do concepts like “effective assistance of counsel” or “due process” or “unreasonable search and seizure” mean exactly the same thing as they do in ordinary federal criminal proceedings? Why or why not? For example, should federal courts pay attention to specific tribal cultural values and traditions in deciding what “due process” means in tribal courts? How do the federal courts go about determining what tribal cultural values and traditions are?

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### **Eleven: Tribal Sovereign Immunity and Tribal Judicial Systems:**

#### Sovereign Immunity and the Kiowa decision (394):

1. What is the basis for tribal sovereign immunity - where is it legally grounded?
2. Is the Kiowa decision supportive of the idea of tribal sovereign immunity?
3. Can tribal sovereign immunity be waived by Congress? Note that there are circumstances under which the U.S. cannot waive states’ sovereign immunity, because of the Eleventh Amendment, see note 4, p. 400, even when Congress is acting to further the national interest in Indian affairs. Thus there are circumstances in which Indians cannot sue a state without the latter consenting to waive its sovereign immunity. This may be very important in the area of Indian gaming, taken up further below.
4. Is tribal sovereign immunity a good defense if the United States sues a tribe? See note 3, p. 399.
5. Is tribal sovereign immunity subject to the rule of Ex Parte Young? That case held that a state official may be sued for violating federal law, despite the state’s sovereign immunity, using the legal fiction that the state official loses the cloak of immunity by violating the law. This only works for suits seeking injunctive relief, and not damages. See first paragraph under IV, p. 384, in Martinez, and note 4, p. 400.
6. The general trend for decades has been to cut back on the scope of sovereign immunity of state and federal governments, and open up more of their actions to court challenge. This has been done by a combination of legislative, judicial and executive actions. Is continuing recognition of tribal sovereign immunity somewhat out of step with that prevailing legal culture? Are there still persuasive justifications for protecting it?

7. Can tribal sovereign immunity be waived by the tribes? See, e.g., notes 2, 5-7, pp. 399-401.

8. If you were a member of a tribal council, under what circumstances would you consider waiving tribal sovereign immunity? Would you vote for a proposed ordinance that creates a Tribal Housing Authority, and authorizes it to “sue and be sued”? Would you vote for a proposed long-term arrangement with an electric utility to build and operate a solar energy facility on tribal land, where the tribe would receive an equity interest in the facility, if the utility insisted that the tribe expressly waive its sovereign immunity as part of the deal?

“Sue and be sued” clauses have been extensively litigated. The Indian Reorganization Act of 1934 permitted tribes to form corporate and quasi-corporate entities that could enter into and compete in the world of commerce. Section 17 authorized tribes to form business corporations through which they could enter the world of commerce. Some tribes formed housing authorities under Section 17, with enabling ordinances that resemble articles of incorporation, a structure similar to a board of directors, and charters that often contained “sue and be sued” clauses. See note 5, p. 400. In Namekagon Development Co. v. Bois Forte Reservation Housing Authority, 395 F.Supp. 23 (D.Minn.1974), aff’d, 517 F.2d 508 (8th Cir.1975), the court determined that the clause waived tribal sovereign immunity.

9. Suppose a non-Indian owns a parcel of vacant land on an Indian reservation, and the tribe adopts a land use ordinance that forbids any development of that property. Does the non-Indian have a takings claim against the tribal government? Where can it be asserted? See note 10 on p. 402, and the Dry Creek Lodge exception. There is an argument that the existence of this exception is actually a good thing for tribal interests, and should not be overruled. What would such an argument look like?

### **Tribal Courts (403-412)**

1. In historical context, Williams v. Lee (405) was a watershed decision. Does it represent a return to John Marshall’s view of state authority vis-à-vis Indians, as expressed in Worcester v. Georgia? As Prof. Wilkinson observes in note 1 on p. 407, it came at the dawn of and helped fuel the modern era of Indian law with its emphasis on tribal sovereignty and self-determination. But from a doctrinal and practical standpoint, it raises more questions than it answers. Try to answer the questions in note 2 on p. 407.

2. Could this action have been brought by the federally licensed non-Indian trader in federal court?

3. Could the Indian debtor have sued the trader in state court, alleging violation of some state consumer protection law?

4. Suppose the non-Indian trader had committed an assault on one of his non-Indian customers. Could the state prosecute this crime in state court?

5. Suppose the debtor in this case was a Hopi Indian, even though the transaction giving rise to the debt took place on the Navajo Reservation. What result?

**Proceedings in tribal courts, ADR, intertribal common law,  
sex and race-based laws, tribal constitutions**

(pp. 426, starting with subsection b, to end of chapter on p. 446).

These materials are largely self-explanatory. Try to answer the questions sprinkled around them.

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**Twelve: Federal Limitations on Tribal Sovereignty and Jurisdiction:**

This stuff can get very complex. The concept of “Indian Country” started out as a relatively simple idea, but, as explained on pp. 448-49, over the years and in the wake of the allotment era and drastic changes in federal policy toward Indians, it has become a morass of complications. Try to answer the questions in note 1 on p. 456. Keep in mind the wide variety of questions that may implicate jurisdiction that turns on Indian country; e.g., taxation, regulation, application of criminal law, family law, etc.

**The “disestablishment” cases.** These are a series of cases in which the courts addressed the question whether or not, in opening up “surplus” reservation land to non-Indians as part of the allotment era, the U.S. formally shrank Indian country and tribal jurisdiction. The problem is well-stated in Justice Marshall’s opinion in Solem, on pp. 451-52.

1. The cases are hardly the paragon of simplicity or consistency. Here’s a scorecard: Seymour (1962), tribe wins; Mattz (1973), tribe wins; DeCoteau (1975), tribe loses; Rosebud (1977), tribe mostly loses; Solem (1984), tribe wins; Hagen (1994), tribe loses; and Yankton (1998), p. 459, tribe loses.

2. Solem was unanimous, unlike many of these other cases, which suggests that the Solem Court was trying to sum up the prior cases and provide an analytical structure for the future so that outcomes could be more predictable. Predictability would seem to be an especially important value because these cases often arise in the context of criminal jurisdiction, where due process concerns are heightened because loss of liberty is at stake. Did the Court in Solem succeed in making outcomes more predictable?

3. A fundamental issue lurking in the background of all of these cases is how the court should interpret a statute enacted in an era of, and reflecting, a federal policy toward Indians that has been thoroughly rejected. See the questions in note 4 on p. 472.

4. Examine footnote 13 in Solem closely (p. 453). Are you persuaded that “subsequent demographic history” is or should be relevant in these cases? It may be politically relevant, if Congress was legislating, but is it legally relevant whether Indians have over the years become far outnumbered by non-Indians in a particular disputed area? Does that approach open the door too wide to limiting Indian jurisdiction?

On the other hand, might subsequent demographic history sometimes work to expand tribal jurisdiction? For example, the Navajo population has grown substantially in recent decades, and many communities near but not on the reservation now have predominantly Indian populations. Does that support a claim that these communities are now in Indian country?

Did subsequent demographic history help or hurt the tribe in Solem?

5. The City of Sherrill case on p. 290 was a kind of a disestablishment case, because the question was whether the land was Indian country over which the state’s jurisdiction was limited. See discussion on p. 463. How different is the test the Court applied in Sherrill? Same result in Solem as in Sherrill if the tribe in Solem had bought land within the reservation boundaries from non-Indians?

6. Is it relevant how governments have treated the lands in question for jurisdictional purposes over the years? See note, p. 459. Can a government be estopped from changing its position on jurisdiction, if it has acquiesced in the exercise of sovereignty by another? That is, can a government yield sovereignty by default or silent acquiescence? Ordinarily, the black letter rule of federal law is that the federal government cannot be estopped. States for the most part apply the same principle. The idea is based at least partially based on the notion of sovereign immunity. Is the Court saying states or Indian governments can be estopped, despite their sovereign immunity?

**Section 5 of the IRA -, pp. 463-70: Taking Indian Land in Trust.** Tribes may own land in ordinary fee simple, but there are various advantages to a Tribe having the Secretary of the Interior take title to the land in trust for the Tribe. That is, taking land in trust may have important implications for tribal and state and local jurisdiction over the land and activities on that land, as explained on pp. 463-64, including (but not limited to) gaming.

Tribes who have become relatively prosperous have sometimes instituted programs to buy back land they lost in the allotment era, or otherwise buy land to pursue economic opportunities, and they often seek to have the Interior Department take the land in trust. The combination of all of these factors have made Secretarial decisions on taking land in trust controversial and much litigated in recent years.

Section 5 reads, in its entirety:

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.

Questions on Section 5: What guidance has the Congress provided the Secretary for determining when to take land in trust? What factors should the Secretary consider? Interests of the Tribe? Non-Indians who may be affected? State and local governments? The environment?

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Here is what the National Congress of American Indians has to say about taking Indian land in trust: (<http://www.ncai.org/Land-Into-Trust.57.0.html?&print=1>):

### **Land-Into-Trust: Why is land so important to Indian tribes?**

Land is of great spiritual and cultural significance to Indian tribes, and many Indian communities are still reliant upon the land for subsistence through hunting, fishing, gathering or agriculture. Moreover, Indian lands are critical for the exercise of tribal self-governance and self-determination.

### **How much land do the tribes hold?**

Indian tribes hold over 50 million acres of land, approximately 2% of the United States. Most of these lands are in very arid and remote regions. The largest reservation is the Navajo Nation, which is as large as West Virginia. Some reservations are as small as a few acres, and some tribes hold no land at all.

### **What are tribal trust lands?**

The title to tribal lands is held by the federal government in a trust status for the benefit of current and future generations of tribal members. Most often this land is within the boundaries of a reservation. Trust status means that the land falls under tribal government authority and is generally not subject to state laws. Trust status also creates limitations on the use of the land and requires federal approval for most actions.

### **Can the tribes acquire more land in trust?**

The federal government and the tribes have the ability to acquire additional land in trust. Most often this land is purchased by the tribe or acquired from federal surplus lands. Trust status can be conferred only by the Secretary of Interior or the U.S. Congress by statute. The ability of the Department of Interior to take land into trust was created in the 1934 Indian Reorganization Act to begin to compensate for unjust takings of tribal lands.

### **Why should tribes be allowed to acquire more land?**

Between the years of 1887 and 1934, the U.S. Government took over 90 million acres, nearly 2/3 of reservation lands, from the tribes without compensation and gave it to settlers. In addition, the termination era of the 1940's and 50's resulted in similarly unjust losses of huge amounts of reservation land. The purpose of the Secretary of Interior's land-into-trust authority is to restore Indian land bases, to rehabilitate Indian economic life and to foster recovery from centuries of oppression. The need to take land into trust continues today. Since 1934, the Secretary has taken about 9 million acres back into trust status -- only about 10 percent of the total amount of land lost. The vast majority of reacquired lands has been within the boundaries of existing reservations. However, it is sometimes necessary for tribes to acquire land from outside reservation boundaries, particularly for tribes with extremely small reservations, those in remote areas far from the mainstream of economic life, and for those tribes whose reservations were diminished during the allotment or termination periods.

### **Do state and local governments have a say when land is taken into trust for a tribe?**

Specific regulations require that the Secretary consult state and local governments prior to making a determination on taking land into trust status and the Secretary must specifically consider the impact on state and local governments of removal of the land from the tax rolls. The regulations also give state and local governments the right to appeal a secretarial decision both within the Interior Department and in the federal courts.

### **Can tribes take land into trust for gaming?**

There are much greater limitations on land into trust if land is to be used by a tribal government for gaming purposes. The Indian Gaming Regulatory Act of 1988, 25 U.S.C. §2719, prohibits gaming on off-reservation lands acquired in trust after 1988, unless the Governor of the state concurs and the Secretary determines that gaming would not be detrimental to the surrounding community.

[END OF NCAI EXCERPT]

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### **We'll take up land into trust for gaming further below.**

From 1934 to 1980, the Interior Department had no regulations in place establishing a process and standards for making decisions about taking land in trust for Indians under Section 5 of the IRA. Its first regulations, adopted in 1980, did not distinguish between on- and off-reservation acquisitions. That distinction was introduced when the regulations were amended in 1995.

Going back to the earlier question about standards under section 5 governing the Secretary's land-into-trust decision, notice there has been extensive litigation (next to last paragraph, p. 464) over whether section 5 of the IRA is overbroad, giving the Interior Secretary complete, uncabined

discretion to decide whether to take land in trust for Indians, and thus in violation of the so-called nondelegation doctrine.

The Eighth Circuit's 1995 decision in the *South Dakota* case, noted there, involved an application by the Tribe to take into trust a parcel of land seven miles from the reservation, partially within the boundaries of a (non-Indian) municipality, to create an industrial park adjacent to an interstate highway interchange. After the Interior Department amended its 1980 regulations in 1995, the state renewed its challenge, but the Eighth Circuit again rejected it, in an en banc decision in 2007 cited on p. 464. The court relied on the language and legislative history of the IRA, but not on the revised regulations:

[We look at] the broader context of the Act to determine whether the delegation in 25 U.S.C. § 465 includes guidance sufficient to withstand a challenge based upon nondelegation doctrine grounds. We may look solely to the language and the context of the statute in determining its constitutionality and may not consider any particular agency interpretation as determinative in our constitutional inquiry.\*\*<sup>1</sup>

We conclude that the purposes evident in the whole of the IRA and its legislative history sufficiently narrow the delegation and guide the Secretary's discretion in deciding when to take land into trust. The IRA, enacted in 1934, "reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment. It gave the Secretary of the Interior power to create new reservations, and tribes were encouraged to revitalize their self-government ...." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).\*\*\*

\* \* \* The scope of the power conferred in § 465 is broad, but \*\*\* it does not involve granting to the executive authority to unilaterally enact a sweeping regulatory scheme that will affect the entire national economy. We believe that it is possible to "ascertain whether the will of Congress has been obeyed" when examining an application of the Secretary's authority under § 465 based upon the guidance in the IRA and its legislative history.

In the D.C. Circuit 2008 case reaching the same result, one judge dissented, as follows:

[T]he majority nominally performs a nondelegation analysis but actually strips the doctrine of any meaning. It conjures standards and limits from thin air to construct a supposed intelligible principle for the § 5 delegation. Although I agree the nondelegation principle is extremely accommodating, the majority's willingness to imagine bounds on delegated authority goes so far as to render the principle nugatory. Analyzing the statute using ordinary tools of statutory construction, as the Supreme Court has always done in nondelegation cases, I am forced to conclude § 5 is unconstitutional.

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\*\*<sup>1</sup> Instructor note: See the note on Whitman v. American Trucking further below.

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To summarize, the statutory language lacks any discernible boundaries. To rely on the purpose of “providing land for Indians” does nothing to cabin the Secretary's discretion over providing land for Indians because it is tautological. To say the purpose is to provide land for Indians in a broad effort to promote economic development (with a special emphasis on preventing land loss) is tautology on steroids. Making a different selection from the same smorgasbord, I might posit quite different principles-to provide land for landless Indians; to acquire trust lands to be used for farming; to supplement grazing and forestry lands; to provide lands in close proximity to existing reservations; to consolidate checkerboarded reservations. All of these goals would be reasonable, but none can be derived from the text of the IRA. The very fact that so many standards can be proposed merely highlights the fact that the statute itself fails to describe how the power conveyed is to be exercised. Thus, the Secretary's assertion of unguided power is not subject to any judicial check; nor, conversely, can he be required to act whenever he voluntarily refrains from using his discretionary power.

*Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 34, 37 (D.C. Cir. 2008) (Brown, C.J., dissenting).

**Questions:** 1. The Eighth Circuit’s refusal to look at the Interior Department’s regulations, which supplied some standards for deciding when to take land in trust, that arguably narrowed the discretion provided by the statute, followed the Supreme Court’s guidance in a non-Indian delegation case, Whitman v. American Trucking Ass’n, 537 U.S. 457 (2001). Whitman, a unanimous decision authored by Justice Scalia, held that a narrowing interpretation of a statute by the implementing federal agency would not save an otherwise overbroad, unconstitutional delegation. On the other hand, the Court in that case upheld a very broad delegation of authority to EPA to set clean air standards.

2. Should the courts apply a different standard for reviewing delegations of authority in the area of Indian affairs?

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**Excerpts from the current land-into-trust regulations**  
**(found at 25 C.F.R. Part 151)**

151.10 On-reservation acquisitions.

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that

each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

\* \* \*

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

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

\* \* \*

(e) \* \* \* the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

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

(g) \* \* \* whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with [environmental laws like the National Environmental Policy Act].

#### 151.11 Off-reservation acquisitions.

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in § 151.10(a) through (c) and (e) through (h);

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

(d) Contact with state and local governments pursuant to § 151.10(e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

### **Questions on the Part 151 regulations**

1. Why distinguish between on- and off-reservation acquisitions in trust?
2. How much influence do the regulations give state and local governments over the Secretary's decision? Does it approach veto power? Could the Secretary give state and/or local governments veto power?
3. Suppose a Tribe applies to take into trust a 5 acre parcel of land it now owns in fee simple. Case 1: The parcel is 25 miles away from the reservation boundary. Case 2: The parcel is inside the reservation boundaries. The Tribe wants to build on the parcel a temporary storage facility for nuclear fuel rods. It has signed a contract with a consortium of electric utilities who have agreed to pay the tribe handsomely to build and operate the facility. The residents around the parcel are adamantly opposed, as is the governor and state legislature of the state. What does the Secretary need to do to take the land in trust in each case? If the state and/or local non-Indian governments are adamantly opposed to having a nuclear waste facility within their borders, what recourse do they have?
4. In early 2008, the Bush Administration announced new guidance for interpreting these regulations, particularly applicable to off-reservation land-in-trust applications. It built on the idea found in section 151.11(b), above, that the distance between the tribe's reservation and the land to be taken in trust was a factor in the Secretary's decision. Basically, the 2008 guidance said, with respect to anticipated tribal benefits resulting from trust land acquisitions, land to be taken into trust should not exceed a "commutable distance" from the tribe's reservation, because beyond this distance there is less likelihood for positive consequences (economic or otherwise) for reservation life. For example, the guidance noted that tribal members are unlikely to be able to take advantage of job opportunities at a gaming facility if the facility is not within a commutable distance of the reservation. As for the issue of granting greater weight to the concerns of state and local governments, DOI's guidance provides a number of examples of problems associated with off-reservation land acquisitions, including local concerns related to "checkerboard patterns of jurisdiction" and various land use/zoning issues. The guidance also explicitly notes the importance of intergovernmental agreements, and indicates that the failure to achieve such agreements should weigh heavily against the approval of land-into-trust applications.

At the same time it released the 2008 guidance, Interior's BIA had before it land-into-trust applications from 22 tribes, and fourteen of them had applied to obtain trust status for land more than 100 miles from their reservation land.

**QUESTION:** Regarding the Bush Administration's 2008 "guidance" on how to interpret the regulations, should this have been done through the rulemaking processes of the Administrative Procedure Act (with opportunity for notice and comment)? Does the guidance in any way amend the regulations? The Obama Administration suspended the 2008 policy and replaced it with an innocuous Secretarial statement which can be found at:

<http://www.indianaffairs.gov/idc/groups/public/documents/text/idc009901.pdf>

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**CARCIERI v. SALAZAR, p. 465.** Notes and Questions:

1. None of the Justices addressed the Indian canons of construction. Why not? Is the IRA ambiguous on this point? How might the Indians have understood it?
2. How did the Interior Department interpret this statute? Did it take a formal position on the issue in advance of the litigation? Should the Secretary's interpretation receive deference from the Court? Here's what the Court said in the leading case of Chevron USA v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984):

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

"The power of an administrative agency to administer a congressionally created \* \* \* program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly and explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."

" \* \* \* If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

In its decision in Carcieri, the First Circuit applied Chevron. Why didn't the Supreme Court?

3. The legislative history of the IRA actually strongly suggested that the phrase "now under federal jurisdiction" was added to preserve the Secretary's power to exclude or terminate Indians from federal supervision that the Secretary thought were assimilated:

This legislative history demonstrates that the Supreme Court's decision in *Carcieri v. Salazar* is exactly backwards. The addition of the phrase "now under federal jurisdiction" to the definition of "Indian" was not intended to fix application of the Act to only those under jurisdiction in 1934. Senator Wheeler repeatedly stated that he was concerned about Indians that were, at the time, admittedly under federal jurisdiction. The phrase in question was inserted to ensure that the Secretary would continue to have discretion to decide that individual Indians who had fully assimilated would no longer be granted the benefits of the IRA. "Now" must therefore refer to the date that the Act is being applied to the particular Indian in question.

Hearing on the Supreme Court Decision *Carcieri v. Salazar*: Ramifications to Indian Tribes, House of Representatives Committee on Natural Resources, 111th Cong., 1st Sess. (2009) (Statement of Colette Routel, Visiting Assistant Professor, University of Michigan Law School).

4. *Carcieri* created an immediate reaction from Indian tribes and state and local governments as soon as it was released. No one knows with certainty how many Indian tribes not federally recognized in 1934 will be affected because the Court left hanging many questions as to what "under federal jurisdiction" means. The resulting uncertainty virtually guarantees that Indian tribes will be litigating their status dating back to 1934 in order to qualify for the fee to trust statute.

5. Could the Secretary still take land in trust for individual Narragansett Indians, if they can show they are of "one half or more Indian blood," as provided in 25 U.S.C. § 479? Compare Morton v. Mancari, discussed earlier. Would you advise the Secretary to do this? Would it raise equal protection/racial classification issues, or not?