Civil Rights and Tribal Employment

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THE LEGAL PROTECTION of civil rights is fundamental to American society. The Bill of Rights to the U.S. Constitution is a near-sacred document. The legal protection of tribal sovereignty is equally embedded in the law. Tribal sovereignty, however, is in tension with the application of American civil rights within tribal communities. "As separate sovereigns pre-existing the Constitution," Indian tribes are not constrained by the constitutional provisions "framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

This article explores the law concerning civil rights in tribal employment. The focus is upon employment within Indian tribes and their subdivisions.[1] Part I identifies the fundamental principles of tribal sovereignty that inform the analysis. Part II reviews the application of federal employment discrimination laws to tribal employment. Finally, Part III examines the Indian Civil Rights Act of 1968.

Tribal Sovereignty, Tribal Employment, and Civil Rights

Employment Relations and Tribal Sovereignty

Indian tribes have inherent authority to condition the presence of Indians and non-Indians within Indian reservations. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982); *Montana v. United States*, 450 U.S. 544, 565-66 (1981). Tribes have the power to regulate their "internal and social relations" and to "make their own substantive law in internal matters" without external interference. *Martinez*, 436 U.S. at 55. Thus, barring an affirmative act of Congress or a particular treaty provision, employment relations within Indian country generally are subject only to tribal jurisdiction. *See, e.g., National Labor Relations Board v. Pueblo of San Juan*, 30 F.Supp.2d 1348 (D.N.M. 1998) (National Labor Relations Act does not apply to employment relations on Indian land where it would preempt tribal law) (appeal pending); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990) (tribe has jurisdiction to enforce Indian employment preference law against non-Indian employer on reservation); *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965) (former tribal attorney could not sue tribal chair for interference with employment contract because dispute concerned tribe's internal affairs). *See also Penobscot Nation v. Fellencer*, 164 F.3d 706 (1st Cir. 1999), *cert. denied*, 119 S.Ct. 2367 (tribal council decision to terminate community health nurse is an "internal tribal matter").

"Civil Rights" and Tribal Sovereignty (Santa Clara Pueblo v. Martinez)

Because federal Indian tribes are not subject to the provisions of the Constitution that constrain the governmental authority of states or the federal government, any constraints upon the power of tribal governments in reference to the "civil rights" of individuals within Indian country must derive from the tribal community itself. This is the lesson of the Supreme Court's 1978 decision in *Santa Clara Pueblo v. Martinez*, which is the starting point for any understanding of the interaction between American concepts of "civil rights" and tribal sovereignty.

Martinez was a case of sex discrimination. Julia Martinez, a full-blooded member of the Santa Clara Pueblo, married a Navajo Indian with whom she had several children. A tribal ordinance prohibited the Martinez children from becoming members of the Pueblo because their father was not a tribal member. There was no similar bar to children of Santa Claran fathers who married outside of the Pueblo. Julia Martinez raised her children on the Santa Clara Pueblo reservation, but upon becoming adults, because of their exclusion from membership, they had no right to vote in tribal elections, no right to remain on the reservation in the event of their mother's death, and no right to inherit her home or her possessory interests in communal lands.

Julia Martinez and one of her daughters sued the tribe and its governor, Lucario Padilla, in federal court, in a class action to stop enforcement of the ordinance. They claimed that it violated their rights to equal protection of the law under the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et. seq* (ICRA). They prevailed before the Tenth Circuit, but the Supreme Court, in a decision written by former civil rights leader Thurgood Marshall, reversed. The Court first held that ICRA did not waive the tribe's sovereign immunity from suit. Without an express waiver of that immunity by Congress or the tribe, the tribe could not be sued under ICRA.

The Martinez's claims against Padilla were not barred by sovereign immunity. But the Court was persuaded that if such claims proceeded in a nontribal forum, essential attributes of tribal sovereignty would suffer unintended harm. The Court wrote:

> Even in matters of commercial and domestic relations we have recognized that subjecting a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves may undermine the authority of the tribal court and hence infringe on the right of the Indians to govern themselves.

Martinez, 436 U.S. at 59 (citations and quotations omitted). The Court concluded that, with the exception of *habeas corpus*, ICRA could be enforced only within tribal forums. *Id.* at 64-70. A federal cause of action "would undermine the authority of tribal forums" and "impose seri-

ous financial burdens on already financially disadvantaged tribes," results that Congress could not have intended upon enacting ICRA. *Id.* at 64-65.

The message of *Santa Clara Pueblo v. Martinez* stands in the background of every employment-discrimination case involving an Indian tribe: The contours of "civil rights" in reference to governmental authority are intimate matters of tribal sovereignty that must be worked out within tribal communities, not imposed from the outside. The limits of tribal authority in reference to race, sex, religion, national origin, the problems of equal protection under the laws, of due process of law — these must evolve from the organic fiber of a separate sovereign. Thus, apart from the extraordinary context of *habeas corpus*, in which an individual is seeking relief from physical constraint or imprisonment at the hands of tribal authorities, these civil rights and remedies must be addressed from within. It would be an affront to the dignity of Indian tribes to allow such rights to be decided by a federal judge or jury.

The inherent power of federal Indian tribes to control employment relations within Indian country and to determine "civil rights" limitations upon tribal authority serves as the backdrop for understanding the operation of discrimination laws in the context of tribal employment.

Federal Civil Rights Law and Tribal Employment

Absent an express grant of authority from Congress, states generally lack civil regulatory authority over the reservation activities of federal Indian tribes. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987). Thus, absent a grant of authority from Congress, where employment is by an Indian tribe or its subdivision, states have no authority to impose state employment-discrimination or other state civil rights laws upon tribal employers. *See id.* Since Congress has plenary authority over Indian tribes, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985), controversies regarding civil rights and tribal employment (outside of tribal forums) primarily arise in the context of federal, not state, civil rights laws. The differing sources of those federal laws and their application to tribal employment are considered below.

Constitutional Provisions

The constitutional provisions most commonly applied in the employment context are the due process and equal protection clauses of the 14th Amendment. These provisions, as discussed above, do not apply to federal Indian tribes. *Martinez*, 480 U.S. at 56; *Talton v. Mayes*, 163 U.S. 376 (1896). Rather, provisions similar to those set forth in the Bill of Rights, including due process and equal protection, are imposed upon tribal governments pursuant to ICRA and are enforceable only in tribal forums. The application of ICRA is discussed in more detail below.

Federal Civil Rights Acts

During the Civil War era, Congress enacted several laws protecting newly freed slaves from discriminatory treatment. These laws include 42 U.S.C. § 1983 (prohibiting violations of federal constitutional protections by persons acting under color of state law),[2] 42 U.S.C. § 1981 (prohibiting race discrimination in contracts),[3] and 42 U.S.C. § 1985 (prohibiting conspiracies to deprive individuals of equal protection under the law).[4] Federal Indian tribes, tribal officials, and subdivisions of tribal governments, including Indian housing authorities, are not subject to suit under these laws. *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10th Cir. 1989) (tribe not subject to race discrimination claims under §§ 1981, 1985, and 1986 for denying membership to former slaves owned by tribe); *Wheeler v. Swimmer*, 835 F.2d 259, 262 (10th Cir. 1987) (tribe not subject to claims under § 1985 for alleged wrongful conduct of tribal election); *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985); *Wardle v. Ute Indian Tribe*, 623 F.2d 670 (10th Cir. 1980) (tribe not subject to § 1981 race discrimination claim for terminating white police officer); *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp. 740, 745 (D.S.D. 1995) (tribe not subject to § 1985 claim for alleged favoritism in distribution of casino profits).

To assert a claim under either § 1983 or § 1985, a plaintiff must allege that he or she has suffered a violation of his/her federal constitutional rights. *Wheeler v. Swimmer*, 835 F.2d at 262. Indian tribes, and tribal officials, acting under color of tribal authority, however, are not subject to the constitutional provisions that constrain the power of states. When asserted against tribal authority, these federal constitutional protections extend to individual Indians and non-Indians "only to the extent incorporated in the ICRA." *Nero*, 892 F.2d at 1462. Since the ICRA provisions, with the limited exception of *habeas corpus* relief, are enforceable only within tribal forums, there exists no cognizable federal constitutional violation to support claims against tribal authorities under §§ 1983 and 1985. In addition, § 1983 requires that any alleged federal law violation be under "color of state law." Unless acting in concert with state officials, Indian authorities cannot be said to act "under color of state law" because tribes are not states. *See R.J. Williams*, 719 F.2d at 982.

Section 1981, on its face, does not have the same constraints (*i.e.*, state action and violation of a federal consti-

tutional provision) as actions under §§ 1983 and 1985. *See supra* note 3. However, it has been held not to apply to tribal employment. In *Wardle v. Ute Indian Tribe*, the tribe terminated the plaintiff, a non-Indian police officer, and gave his job to a tribal member. The plaintiff sued the tribe for race discrimination under § 1981 and other statutory and constitutional provisions. The Tenth Circuit rejected his claim, holding that he had no federal cause of action under § 1981.[5] The Court explained:

> The statutory provisions upon which plaintiff relies do not provide him a cause of action, even assuming that these provisions would otherwise apply to Indian tribes and that the discharge in this case was racially discriminatory. ... Each of the statutes invoked by plaintiff is a broad, general provision guaranteeing equal rights and equal protection or prohibiting racial discrimination. These broad civil rights provisions do not specifically prohibit preferential employment of tribal members by Indian tribes. On the other hand, 42 U.S.C. § 2000e specifically exempts Indian tribes from compliance with the prohibition against discriminatory discharge from employment. Under such circumstances, the specific provisions control over the more general ones. *See Morton v. Mancari*, 417 U.S. at 550-51.

Id. at 673. In *Stroud v. Seminole Tribe of Florida*, 606 F. Supp. 678 (S.D. Fla. 1985), the federal district court likewise rejected a race discrimination claim under § 1981 and other federal civil-rights provisions brought by a tribe's former education director, who asserted she was fired because she was white. The court held that Congress had not "expressly or impliedly extended § 1981 to the employment practices of the Indian tribes." *Stroud*, 606 F. Supp. at 679-80 (citing *Wardle*).

Morton v. Mancari

Wardle relied heavily upon the Supreme Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974). *Mancari* involved a challenge by non-Indians to the implementation of Native American employment preferences within the Bureau of Indian Affairs. Those preferences were mandated under the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et. seq.* (IRA). The non-Indians claimed that by enacting the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e, *et. seq.* (EEOA), Congress implicitly repealed the IRA Indian employment preferences. In the face of new policies giving express preference to Indians over non-Indians for promotions, the non-Indians brought suit, asserting that the policies violated the EEOA and the due process clause of the Fifth Amendment. *See Mancari*, 417 U.S. at 540-41.

The Supreme Court held that the EEOA did not repeal the IRA Native American employment preference provision. It said that these preferences reflected "the long standing federal policy of providing a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment." *Mancari*, 417 U.S. at 548. The justices noted that Congress exempted Indian tribes and, in certain circumstances, non-Indian employers on or near reservations, from the employment discrimination provisions of Title VII of the Civil Rights Act of 1964 in recognition of the "unique legal status of tribal and reservation-based activities" and in furtherance of Indian self-government. *Id.* at 546. Finally, with regard to the Fifth Amendment challenge, the Court said that the employment preferences for Indians over non-Indians was not "race discrimination." *Id.* at 553-54. "Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency." *Id.* at 554. *Accord Mullenberg v. United States*, 857 F.2d 770, 772 (Fed. Cir. 1988); *Krueth v. Independent School Dist. 38*, 496 N.W.2d 829, 836 (Minn. App. 1993).

Mancari suggests two fundamental rules of law with regard to civil-rights challenges to tribal employment decisions. First, there is a "unique legal status" accorded tribal employment, grounded in principles of tribal self-determination and self-government. Second, tribal or on-reservation-based employment decisions that favor Indians over non-Indians do not constitute discrimination on the basis of race. They are political, not racial, classifications. The Indian hiring preferences found throughout federal law (*e.g.*, 25 U.S.C. §§ 450e(b) & 472) and Congress' express exclusion of Indian tribes from the employment-discrimination provisions of Title VII reflect Congress' long-standing policy to protect and promote tribal employment opportunities and self-government.

Thus, for instance, application of § 1981 to tribal employment decisions would fly in the face of those specific laws and policies of Congress. *See Wardle*, 623 F.2d at 673 (citing *Mancari*).

Federal Employment Discrimination Laws

Congress has enacted specific laws prohibiting employment discrimination. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, sex, national origin, and religion. The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employment discrimination on the basis of age. The Americans with Disabilities Act (ADA) prohibits employment discrimination on the basis of disability. Congress expressly excluded Indian tribes from the provisions of Title VII and the ADA but did not address tribes in the ADEA and other anti-discrimination laws. Congress' silence about the application of the ADEA and other laws to federal Indian tribes has generated debates within the courts about the statutes' application to tribal employment.

Exemptions under Title VII

The most often-invoked federal employment-discrimination law, Title VII, excludes Indian tribes from its provisions. 42 U.S.C. § 2000e(b) (excluding Indian tribe from the definition of "employer").[6] Sen. Mundt, of South Dakota, who introduced this exemption, stated that it was

to protect "the welfare of our oldest and most distressed American minority, the American Indians" and to allow them to "conduct their own affairs" without facing the liabilities imposed under the act. 110 CONG.REC. 13702 (1964).

Title VII provides an additional exemption for both Indian and non-Indian businesses "on or near reservations." Such employers cannot be sued for race, sex, color, or national-origin discrimination upon treating non-Indians differently from Indians if such treatment is pursuant to "any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation." 42 U.S.C. § 2000e-2(i). *See Little v. Devils Lake Sioux Manufacturing Corp.*, 607 F. Supp. 700 (D.N.D. 1985) (on-reservation manufacturing company, owned 51 percent by tribe and 49 percent by non-Indian corporation, and subject to Indian employment preference laws, not subject to race-discrimination claim for denying grievance to former white employee). Indeed, where a non-Indian employer has a significant presence within an Indian reservation, a tribe may have inherent authority to require the company to provide employment preferences to tribal members. *See FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990).

This exemption is a source of much controversy due to the recent decision of the Ninth Circuit in *Dawavendewa v. Salt River Project Agricultural Improvement and Water District*, 154 F.3d 1117 (9th Cir. 1998), *petition for cert. filed April 9, 1999*. In *Dawavendewa*, the Ninth Circuit held that a non-Indian employer, engaged in business on the Navajo reservation, could be sued for national-origin discrimination under Title VII for giving employment preference to a Navajo over a Hopi. The employer had a policy of providing employment preferences to Navajo. This was a condition of its lease with the Navajo Nation and consistent, Navajo tribal law. *See Dawavendewa*, 154 F.3d at 1118. Nevertheless, the Ninth Circuit held that the exemption from liability provided by § 2000e-2(i) would not apply in this setting. The court concluded that this "Indian hiring preference" was meant to apply to all Indians and not to just members of a particular tribe. It said:

> An employment practice of giving preference to members of a particular tribe does not afford preference to an applicant "because he is an Indian," but rather because he is a member of "a particular tribe." Such a preference is not consistent with the objectives of the Indian Preferences exemption. While the statute exempts the hiring of Indians from the force of the anti-discrimination in employment provisions, it does so in order to compensate for the effects of past and present unjust treatment, not in order to authorize another form of discrmination against particular groups on Indians — tribal discrimination.

Id. at 1121-22. The Navajo Nation was not a party to the action and did not file an amicus brief in the Ninth Circuit. The U.S. Equal Employment Opportunity Commission, however, did and argued the position adopted by the court. Ignoring the Navajo Nation's law and lease provision, the Ninth Circuit rejected the employer's assertion that the employment preference for Navajo tribal members was related to tribal self-government.

Exemptions under the ADA

The more recently enacted ADA, which prohibits employment discrimination on the basis of disability and requires employers to provide reasonable accommodations for employees with disabilities, likewise expressly excludes Indian tribes from its provisions. *See* 42 U.S.C. § 1211(5)(B)(i) (term "employer" does not include an Indian tribe). Title III of the ADA, which requires places of public accommodation to be accessible to persons with disabilities, does not exclude Indian tribes. Nevertheless, the Eleventh Circuit has held that Title III cannot be enforced by private persons against Indian tribes in non-Indian forums because Congress did not unequivocally waive Indian tribes' sovereign immunity from suit. *Florida Paraplegic Association Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999).

What Entities Qualify for the "Indian tribe" Exemptions?

Several cases have addressed whether a particular entity meets the definition of "Indian tribe" to qualify for the exemptions under Title VII and the ADA.

In *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373 (10th Cir. 1986), five former female employees of the Denver office of the Council of Energy Resource Tribes (CERT) sued CERT under Title VII for sex discrimination. The Tenth Circuit observed that CERT comprised 35 Indian tribes, who had "joined together to manage collectively their energy resources" and that the member tribes had "exclusive control over the operations of CERT." *Id.* at 374. The court further observed that the legislative history of the Title VII exemption showed that "Congress intended to allow Indian tribes to further their economic interests through a variety of forms" without facing the requirements of that law. *Id.* at 375. Noting the "critical importance of natural resources to the Indian tribes which hold the rights to these resources," the court stated that "[t]he creation of CERT to advance the economic conditions of its 39 member tribes is precisely the type of activity that Congress sought to encourage by exempting Indian tribes from the requirements of Title VII." *Id.* Given all these factors, including the necessity of construing the exemption liberally in favor of tribal interests, the Tenth Circuit held that CERT constituted an "Indian tribe" for the purpose of the exemption under Title VII. *Accord Pink v. Moduc Indian Health Project Inc.*, 157 F.3d 1185 (9th Cir. 1998) (off-reservation non-profit corporation formed and controlled by two Indian tribes to provide health services is "tribe" for purposes of Title VII exemption).

More recently, a federal district court in South Dakota considered whether a school board for a reservation school fell within the "Indian tribe" exemption. In *Giedosh v. Little Wound School Bd.*, 995 F. Supp. 1052 (D.S.D.

1997), four former white employees of the Little Wound School sued their employer, the Little Wound School Board, for race discrimination under Title VII.[7] The employees had worked at Little Wound School, located on Pine Ridge Indian Reservation, and were employed by the Little Wound School Board, a nonprofit corporation incorporated under the laws of South Dakota. *Id.* at 1054. Tracking the rationale of *Dille*, the court held that the board was exempt as an "Indian tribe." It summarized its reasons as follows:

> Like in *Dille*, the members of the organization, in this case the Board, are made up of members of the Tribe. For good reason, the Oglala Sioux Tribe may even step in and assume the operation of the Little Wound School. Like in *Dille*, the purpose of establishing the organization is to further the development, in this case the educational development, of the children living in Indian country, and to involve the Indian community in the education of the Indian children. In reaching its conclusion that the Board fits within the definition of an "Indian tribe" under Title VII, this Court also takes into account the following factors: First, the Board had contracted with the BIA under the ISDEAA. The Indian Self-Determination and Education Assistance Act emphasizes the importance of parental and community control in the educational process. See 25 U.S.C. § 450(b)(3). The school is tribally chartered. The Board was formed with the consent and authorization of the Tribe and is required to comply with tribal regulations and ordinances. The Board is made up of members of the Tribe, and those members are democratically elected. The school, which is operated by the Board, services tribally enrolled members in the Kyle community and the surrounding area of the Pine Ridge Indian Reservation.

Id. at 1057. Given the close connection of the Board to the tribal community, the fact that the Board was a nonprofit corporation under the laws of South Dakota was immaterial to the Court's decision. *Id.* at 1058 (citing *Sage v. Sicangu Oyate Ho. Inc.*, 473 N.W.2d 480 (S.D. 1991)).

Thus, in discerning whether a particular employer qualifies as an "Indian tribe" for the exemption under the ADA and Title VII, courts consider both the control that federal Indian tribes have over the employer and the nature of the employing entity's business as it relates to tribal independence, economic development, and political or cultural integrity. *See also Barker v. Menominee Nation Casino*, 897 F. Supp. 389 (E.D. Wis. 1995) (Menominee Nation Casino and Menominee Tribal Gaming Commission, as subordinate economic enterprises of the Menominee Indian Tribe could not be sued under Title VII by former table game operator); *Myrick v. Devils Lake Sioux Manufacturing Corp.*, 718 F. Supp. 753 (D.N.D. 1989) (North Dakota corporation owned 51 percent by Devils Lake Sioux Tribe and 49 percent by Delaware corporation and engaged in manufacturing on reservation not exempt as "Indian tribe" under Title VII); *Setchell v. Little Six Inc.*, 1996 WL 162560 (Minn. App. 1996) (Little Six Inc., d/b/a Mystic Lake Casino, a corporation wholly owned by the Mdewakanton Sioux Community and incorporated under tribal law but holding a Minnesota license to do business in Minnesota as a "foreign corporation," falls within "Indian tribe" exemption of ADA).[8]

The Age Discrimination in Employment Act of 1967

Like Title III of the ADA, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 630(b), *et. seq.*, does not, by its terms, exclude Indian tribes. Two cases have arisen in which employees have brought suit against Indian tribes or their businesses under the ADEA. The tribes prevailed in each case, but in the face of vigorous dissents.

The first case, *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989), involved a charge of age discrimination against the Cherokee Nation by a former employee of its health department. The United States agency in charge of enforcing the ADEA, the Equal Employment Opportunity Commission, attempted to assert jurisdiction over the tribe by issuing a subpoena for employee records, and the tribe resisted, claiming that the ADEA did not apply to it. This forced the EEOC to bring suit against the tribe to seek enforcement of its subpoena power.[9] The trial court granted the subpoena to the EEOC, and the tribe appealed.

The Tenth Circuit reversed and held that the EEOC had no jurisdiction over the tribe under the ADEA. Although the ADEA is a statute of general application and does not expressly exclude tribes, the court held that it could not be applied to the Cherokee Nation because it would interfere with the tribe's treaty-protected right to self-government. *Cherokee Nation*, 871 F.2d at 938-39. The Court recognized that under ordinary principles of statutory construction, Congress' silence with regard to the application of the ADEA to Indian tribes, as compared with its express exclusion of tribes from Title VII, would warrant the application of the ADEA to tribes. *Id.* at 939. But "normal rules of construction do not apply when Indian treaty rights, or even nontreaty matters involving Indians, are at issue." *Id.* Any ambiguities must be resolved to preserve "traditional notions of sovereignty and the federal policy of encouraging tribal independence." *Id.* (quotations omitted). Congress' silence about the application of the ADEA to Indian tribes rendered its intent ambiguous, especially in the face of the interference that such application would have upon the Cherokees' right to self-government.[10] Thus, the court resolved the ambiguity in favor of the tribe and held that the ADEA did not apply. *Id.*

The dissenting judge argued, to the contrary, that Congress knew exactly what it was doing and consciously chose not to exclude tribes from the ADEA. *See id.* (Tacha, J., dissenting).

In the second case, *EEOC v. Fond du Lac Heavy Equipment and Construction Co.*, 986 F.2d 246 (8th Cir. 1993), the EEOC brought suit against the Fond du Lac Heavy Equipment and Construction Co. and the Fond du Lac Band of Lake Superior Chippewa. The tribe was the own-

er of the construction company, which had its principal place of business on the reservation but engaged in work both on and off reservation. A tribal member claimed that he was wrongfully denied employment because of his age, and the EEOC brought suit on his behalf against the tribe and the company in federal court. The court observed that an Indian tribe's right to self-governance may be based either upon a treaty, as in *Cherokee Nation*, or upon "statutes, executive agreements, and federal common law." *Id.* at 248. The court held that if the ADEA were applied to the tribe and its business, it would interfere with the "inherent" right of the tribe to resolve "an intramural matter that has traditionally been left to the tribe's self-government." *Id.* at 248-249.

The dissenting judge agreed with Judge Tacha's dissenting opinion in *Cherokee Nation*. He argued that upon enacting the ADEA, Congress knew that tribes were already excluded from Title VII and planned not to exclude them from the ADEA. He continued:

> Moreover, the reason for excluding Indian tribes from Title VII's coverage — to enable Indian tribes to give preference to Indians in tribal government employment — do not exist in the present case, at least on the basis of the record before us, for there is no evidence that Indian tribes have any long-standing cultural practices that favor the employment of younger rather than older members of the tribe (indeed, I do not understand the Fond du Lac Band's brief as making such an argument).

Id. at 251 (Wollman, J., dissenting).

The rule emerging from these two cases can be stated as follows: Given Congress' silence about applying the ADEA to Indian tribes, that law will not apply if it would interfere with tribal self-government (as conceived and protected by treaty, statute, or federal common law). Implicit in both cases is the view that a charge of discrimination against a tribal employer — be it a tribal health department, as in *Cherokee*, or a tribal construction company, as in *Fond du Lac Heavy Equipment* — is a dispute that the tribe should have the right to resolve without external interference as matter of tribal self-government.[11]

Other Federal Non-Discrimination Laws

Certain other federal laws may, from time to time, be incorporated by reference into federal programs for Indian tribes. So-called "638 contracts," under which tribes receive federal funding for governmental services, may contain "boilerplate" anti-discrimination provisions generally applicable to recipients of federal funds, such as Executive Order 11246 (prohibiting employment discrimination by federal procurement contractors) or § 504 of the Rehabilitation Act (prohibiting disability discrimination). *See Letter Opinion of Dr. Michael Trujillo, Director of Indian Health Services, to Penobscot Nation Re: Application of E.O. 11246 to P.L. 638 Funding Contract* (Jan. 14, 1999) ("boilerplate" reference to Executive Order 11246 in health care funding contract did not bind Penobscot Nation).[12]

Regulations recently promulgated under the Native American Housing Assistance and Self Determination Act (NAHASDA) by the U.S. Department of Housing and Urban Development, for instance, provide, in question-answer format, as follows:

> Sec. 1000.12 What nondiscrimination requirements are applicable?
>
> (a) The requirements of the Age Discrimination Act of 1975 (42 U.S.C. 6101-6107) and HUD's implementing regulations in 24 CFR part 146.
> (b) Section 504 of the Rehabilitation Act of 1975 (29 U.S.C. 794) and HUD's regulations at 24 CFR part 8 apply.
> (c) The Indian Civil Rights Act (Title II of the Civil Rights Act of 1968; 25 U.S.C. 1301-1303), applies to federally recognized Indian tribes that exercise powers of self-government.
> (d) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 et seq.) apply to Indian tribes that are not covered by the Indian Civil Rights Act. However, the Title VI and Title VIII requirements do not apply to actions by Indian tribes under section 201(b) of NAHASDA.

24 C.F.R. § 1000.12. *See also* 25 U.S.C. § 4114(b) (Labor standards for recipients); 24 C.F.R. § 1000.16 ("What labor standards are applicable?"). Whether and how these provisions would be enforced against an Indian tribe or its "tribally designated housing entity" is open to question. It is doubtful that either the Age Discrimination Act of 1975 or § 504 of the Rehabilitation Act of 1973 apply to Indian tribes or their governmental subdivisions.[13] Section 1000.12(d) of the HUD regulation is odd because the Indian Civil Rights Act, by its terms, applies to all tribal governments.[14] And it is doubtful that Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, would apply to federal Indian tribes or their designated housing authorities.[15] While noncompliance with these laws might place agency funding at risk, *see* U.S.C. § 4161 (remedies for noncompliance), it is unlikely that these provisions create a private right of action for individuals to sue tribal housing entities or officials. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49.

Indian Employment Preference Laws

Although not protective of "civil rights" per se, federal laws requiring Native American employment preference significantly affect civil rights cases involving employment on or near Indian reservations. Congress has long-protected employment preferences for Indians through myriad statutory provisions. *E.g.*, 25 U.S.C. § 450e(b)(1) (Indian employment preferences for recipients of federal funds under Indian Self-Determination and Education Assistance Act); *id. at* §§ 472, 472a (Indian employment preferences for positions within Bureau of Indian Affairs and Indian Health Services).

These laws may affect "civil rights" claims involving tribal employment by providing a defense to charges of discrimination by non-Indians. *E.g., Little v. Devils Lake Sioux Manufacturing Corp.*, 607 F. Supp. 700 (D.N.D. 1985) (on-reservation manufacturing company subject to tribe's Indian employment preference laws cannot be sued for race discrimination by former white employee alleging disparate treatment). *See also* 42 U.S.C. § 2000e-2(i) (exercise of Native American employment preference policy by non-Indian employer on or near reservation is not actionable discrimination under Title VII). Alternatively, they may give rise to claims by Indian employees that non-Indian employers have violated the preference requirements. *E.g., Johnson v. Shalala*, 35 F.3d 402 (9th Cir. 1994) (addressing scope of Native American employment preferences in Indian Health Service); *Preston v. Heckler*, 734 F.2d 1359 (9th Cir. 1984) (same); *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979) (challenge to BIA employment decision); *Mescalero Apache Tribe v. Rhoades*, 804 F. Supp. 251 (D.N.M. 1992) (challenge to Indian Health Service employment decision).

The case of *Dawavendewa v. Salt River Project Agricultural Improvement and Water District*, 154 F.3d 1117 (9th Cir. 1998), *petition for cert. filed April 9, 1999*, discussed in subsection one, raises significant questions about the application of these hiring preferences when they are provided to tribal members as opposed to all "Indians."

The Indian Civil Rights Act of 1968

In 1968, Congress enacted the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, in order to impose most of the limitations contained in the Bill of Rights upon federal Indian tribes. Section 1302 of ICRA provides:

> No Indian tribe in exercising powers of self-government shall —
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
> (3) subject any person for the same offense to be twice put in jeopardy;
> (4) compel any person in any criminal case to be a witness against himself;
> (5) take any private property for a public use without just compensation;
> (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
> (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
> (9) pass any bill of attainder or ex post facto law; or
> (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. §1302. Subsection 8, providing for due process of law and equal protection of the laws, tracks the provisions of the 14th Amendment, which have given rise to claims of constitutional violations by public employees. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (public employee's "property interest" in job gives employee right to due process from governmental employer); *Notari v. Denver Water Dept.*, 971 F.2d 585, 587 (10th Cir. 1992) (race and sex discrimination claims by public employees grounded in Equal Protection Clause). Subsection 1, protecting free speech, tracks the First Amendment, which likewise has given rise to constitutional claims by public employees. *E.g. Roldan-Plumey v. Cerezo-Suarez*, 115 F.3d 58, 61-62 (1st Cir. 1997) (claim by public employee that discharge for political affiliation impermissible under First Amendment).

In the first 10 years after its enactment, ICRA was enforced in federal courts against Indian tribes and tribal officials, albeit with a self-conscious recognition that Anglo-Saxon constitutional concepts could not be grafted onto ICRA and applied within culturally distinct tribal communities. *E.g., Janis v. Wilson*, 385 F. Supp. 1143 (D.S.D. 1974); *McCurdy v. Steele*, 353 F. Supp. 629 (D.Utah 1973). But in 1978, the Supreme Court held in *Santa Clara Pueblo v. Martinez* that with the exception of claims of habeas corpus, ICRA could be enforced only through tribal forums. This was a landmark decision, for it recognized that the process of defining the contours of individual rights against tribal government authority was a problem of tribal sovereignty. *See Martinez*, 436 U.S. at 65-66. The Court emphasized that "tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply" for claims by both Indian and non-Indians alike. *Id.* at 65, 69. Thus, absent the extraordinary circumstance of a person being physically held against his or her will, ICRA rights and remedies must be resolved within tribal communities themselves,

without external interference. *See Martinez*, 436 U.S. at 71-72.

It is not always clear, however, whether a tribal forum will be available for the enforcement of ICRA's provisions. Notwithstanding Justice Marshall's statement in *Martinez* that, through ICRA, Congress changed the law which tribal forums are "obliged to apply," a tribe could take the position that it has neither waived sovereign immunity within its own tribal court, nor established remedies for ICRA violations. *Compare Long v. Mohegan Tribal Gaming Authority*, 25 Ind. L. Rep. 6111 (Mohegan Gaming Disputes Trial Court 1997) (noting tribe's adoption of ICRA remedies under constitution, but reserving judgment on whether tribe waived sovereign immunity for ICRA claims) *and Colville Tribal Civil Rights Act* (Confederated Tribes of the Colville Reservation adopting ICRA language and waiving sovereign immunity from claims for declaratory and/or injunctive relief). Absent express adoption of ICRA or a civil-rights code with similar provisions, tribes may face uncertainty in their own courts as to how ICRA will apply. *See Johnson v. Mashantucket Pequot Gaming Enterprise*, 25 Ind. L. Rep. 6011 (Mashantucket Pequot Court of Appeals 1996). If tribes fail to provide a clear avenue for resolution of civil-rights claims (under ICRA or tribal laws) or assert barriers such as sovereign immunity, they may face increasing attempts by disgruntled individuals to obtain federal court remedies or be perceived by individuals as lacking in fair procedures and respect for the rights of individuals.[16]

The Dry Creek Exception

Only one court has recognized an exception to the rule laid down in *Santa Clara Pueblo* that federal courts lack jurisdiction to hear ICRA claims. *Dry Creek Lodge Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981), involved a claim brought by non-Indians who owned a parcel of property in fee within the boundaries of the Wind River Reservation of the Shoshone and Arapahoe Indian Tribes. They built a small lodge, known as the Dry Creek Lodge, on the property to serve as a stopping-off point for persons entering wilderness areas. A dirt road linked the lodge to the highway and traversed property of an Indian family. On the day the lodge formally opened, the tribes, at the request of the Indian family, blocked the access road.

The Dry Creek Lodge brought an action in tribal court to open the access road. The Tribal Court, however, held that it lacked jurisdiction to entertain the lawsuit without the consent of the Tribal Council. The Tribal Council refused to grant its consent and directed the parties to attempt to resolve their differences on their own. The plaintiffs then filed suit against the tribes under ICRA in state court, and the case was removed to federal court.

The case was tried to a jury prior to the Supreme Court's decision in *Santa Clara*. The jury returned a verdict against the tribes and awarded damages. The federal court, however, granted a new trial on the issue of damages. While the new trial was pending, the Supreme Court decided *Santa Clara Pueblo*, and in light of that decision, the court dismissed the case for lack of jurisdiction. *Dry Creek Lodge Inc.*, 623 F.2d at 683. On appeal, the Tenth Circuit reversed. It held that under the extraordinary circumstances of the case, where the plaintiffs were deprived of their personal and property rights and had no remedy in a tribal forum, the federal court had jurisdiction to entertain their ICRA suit against the tribes. *Id.* at 685. Judge Holloway dissented, reasoning that *Santa Clara Pueblo* left no room for the exception carved out by the majority's decision. *Id.* at 685-86 (Holloway, C.J., dissenting).

Other courts have suggested that *Dry Creek* was wrongly decided. *See R.J. Williams Co. v. Fort Belknap Housing Auth.*, 719 F.2d 979, 981 (9th Cir. 1983) (*Santa Clara* forecloses any federal court action under ICRA other than requests for habeas corpus). The Tenth Circuit, itself, has emphasized "the minimal precedential value of *Dry Creek*," *Ordinance 59 Ass'n v. U.S. Dept. of Interior Secretary*, 163 F.3d 1150 (10th Cir. 1998), and noted that "[w]ith the exception of *Dry Creek*, itself, we have *never* found federal jurisdiction based on the *Dry Creek* exception." *Id.* at 1159 (emphasis in original). It has further made clear that before there can ever be federal jurisdiction of an ICRA claim, "the aggrieved party must have actually sought a tribal remedy, not merely have alleged its futility." *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984). "This is not merely a requirement that the exhaustion of tribal remedies is a prerequisite to federal jurisdiction, but instead, that tribal remedies, if existent, are exclusive." *Id.* To meet the *Dry Creek* exception in the Tenth Circuit, an aggrieved party must show that the dispute involves a non-Indian party, there is no tribal forum available, and the dispute involves an issue falling outside of internal tribal affairs. *Ordinance 59 Ass'n*, 163 F.3d at 1156.

Conclusion

The goals of federal Indian policy have followed a zigzag course through history, at times focusing upon the destruction of tribal sovereignty and at other times striving to preserve it. *See generally*, William C. Canby Jr., *American Indian Law* (West 1998) at 10-32. At all times, the law has played a prominent role. Early in the country's history, French historian Alexis De Tocqueville observed:

> The conduct of the United States Americans toward the natives was inspired by the most chaste affection for legal formalities.
>
> ...
>
> The Spaniards, by unparalleled atrocities which brand them with indelible shame, did not succeed in exterminating the Indian race and could not even prevent them from sharing their rights; the United States Americans have attained both these results with wonderful ease, quietly, legally, and philanthropically. ... It is impossible to destroy men with more respect for the laws of humanity.

De Tocqueville, *Democracy in America* (1848) (Double-

day Edition 1969) at 339.

The Indian Civil Rights Act of 1968 marked the end of the so-called "Termination Era" of federal Indian policy, during which Congress terminated Indian tribes and granted states civil and criminal jurisdiction over Indian reservations. Section 1302 of ICRA, while seeking to impose most of the Bill of Rights upon Indian tribes, revealed a newfound respect on the part of Congress for the continued existence of tribal governments. Indeed, certain of its provisions protected unique tribal values. For instance, § 1302(1) prohibits interference with the free exercise of religion, but unlike the First Amendment, it does not prohibit the establishment of religion by a tribe. This was "in conscious recognition of the fact that in some tribes, especially the Pueblos, government and religion and all the rest of life are inextricably interwoven." Canby, *supra* at 246. A separate ICRA provision curtailed the extension of state jurisdiction over tribes. 25 U.S.C. §§ 1321-22, 26.

The enactment of ICRA ushered in the new era of "Tribal Self-Determination" in federal Indian policy. That policy continues up to the present. *See* Canby *supra*, at 28-29.

The case law addressing civil rights and tribal employment, from *Santa Clara Pueblo v. Martinez* onwards, shows a commitment in the law to preserve the "inherent right" of federal Indian tribes to address these sensitive issues from within. Even before *Martinez* held that ICRA could be enforced only in tribal forums, federal courts had self-consciously striven to define these rights from a tribal perspective, *e.g., Janis v. Wilson*, 385 F. Supp. 1143, and required exhaustion of tribal remedies before resort to federal court, *e.g., O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973).

But the era of self-determination and the law's respect for tribal sovereignty is vulnerable, especially with the American public viewing Indian gaming as a unique economic boom across Indian country. Just last year a thin majority of the Supreme Court begrudgingly upheld the doctrine of tribal sovereign immunity, and flagged for Congress "a need to abrogate tribal immunity." *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.*, 118 S.Ct. 1700, 1705 (1998). Three of the Supreme Court justices were ready to set the doctrine aside, at least for off-reservation conduct. *Id.* at 1707 (Stevens, J., with whom Thomas, J., and Ginsburg, J., dissenting). Luckily, Sen. Slade Gorton's bill, which would have waived tribal sovereign immunity for ICRA claims and allowed federal courts to review tribal court ICRA decisions, died in committee. *See* S. 2298, "A Bill to Provide for Enforcement of Title II of the Civil Rights Act of 1968," 105th Congress, 2d Session (introduced by Senator Gorton, July 14, 1998, no carryover).

Yet popular opinion is not in favor of tribal sovereignty when it comes to individual rights or discrimination matters. The reaction from even liberal-minded people is that *Santa Clara Pueblo v. Martinez* allows tribes to "get away with" race and sex discrimination. While ICRA changed the substantive law that tribal forums must apply, there may be a right without a remedy if tribes do not empower tribal forums to enforce ICRA or provide comparable remedies under tribal law.

Thus far, federal courts have balanced the scales in favor of tribal sovereignty over the "rights of individuals" within Indian country. That balance, however, may shift if Indian tribes are not protective of individual rights. The trends are apparent in the *Dry Creek* exception, in HUD's NAHASDA regulations, and in the dissenting opinions in *EEOC v. Cherokee Nation* and *EEOC v. Fond du Lac Heavy Equipment*. The employment context provides fertile ground for experimentation in tribal laws and procedures for protecting civil rights, consistent with the unique political and cultural communities of tribes. Ironically, given the trends apparent in non-Indian courts, the enactment and enforcement of such laws within tribal forums will help protect the sovereign right of tribes to resolve these matters without external interference. TFL

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Endnotes

[1]Thus, unless context suggests otherwise, the term "tribal employment" as used in this paper, means employment directly by Indian tribes or their subdivisions.

[2]Section 1983 provides, in pertinent part, as follows:

> Every person who, under color of any [state law] subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. ...

[3]Section 1981 provides, in pertinent part, as follows:

> (a) Statement of equal rights — all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other; (b) "Make and enforce contracts" defined — for purposes of this section, the term "make and enforce contracts" includes the making, performance, modifica-

tion, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship; (c) Protection against impairment — the rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

[4]Section 1985 provides, in pertinent part, as follows: If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ..., whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

[5]The district court had dismissed the case on several grounds: lack of a federally protected right, sovereign immunity, and failure to exhaust tribal remedies. The Tenth Circuit agreed with the district court's first ground, the absence of any federal cause of action, and saw no need to decide the other issues. *Wardle*, 623 F.2d at 672.

[6]The statute provides:

For the purposes of this subchapter — (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include ... an Indian tribe.

[7]Some of the employees also claimed disability discrimination under the ADA. The court applied the same analysis to the Title VII and ADA claims in ascertaining whether the board qualified for the "Indian tribe" exemption under both statutes.

[8]The Title VII and ADA exemptions for "Indian tribes" should not turn on the nature of the economic activity of the "subordinate economic enterprise" of a particular tribe. As the *Setchell* court pointed out, the purpose of the provision was to allow federal Indian tribes "to conduct their own affairs and *economic activities* without consideration of the provisions of the bill [Title VII]." *Setchell v. Little Six Inc.*, 1996 WL 162560 *2 (citing and quoting Sen. Mundt's discussion of the exemption at 110 CONG. REC. 13702 (1964)). In any event, "raising revenue and redistributing it for the welfare of a sovereign nation is manifestly a governmental purpose." *Cohen v. Little Six Inc.*, 543 N.W.2d 376, 379 (Minn. App. 1997). *Accord Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900, 906 (9th Cir. 1986), *aff'd*, 480 U.S. 202 (1987). For a related discussion see Kaighn Smith, *Tribal Sovereignty and Economic Development: The Structure of Tribal Enterprises, Sovereign Immunity, and the Application of Federal Labor and Employment Laws* (Conference Paper, ABA Fifth Annual Natural Resources Management & Environmental Enforcement on Indian Lands Conference, Albuquerque, 1993).

[9]The tribe could not claim sovereign immunity from suit because the action was brought against it by an agency of the United States. *See United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987).

[10]Indeed, the Congress must give a "clear indication" if it intends to abrogate the inherent powers of a tribe. *See Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18-19 (1987). "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence is that the sovereign power remains intact." *Id.* at 18 (quotations and citation omitted). Nor can the "mere passage of time with its erosion of the full exercise of the sovereign powers of a tribal organization ... constitute such an implicit divestiture." *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1066 (1st Cir. 1979).

[11]The Ninth Circuit pointed to the Cherokee Nation's treaty right "to make and carry into effect all such law as they may deem necessary for the government and protection of the persons and property within their own country." *Cherokee Nation*, 871 F.2d at 938 n.2. The Eighth Circuit said that subjecting an employment dispute between a tribal member and his tribe regarding age discrimination to federal regulation would dilute the inherent right of the tribe to resolve such matters from within. Fond du Lac Heavy Equipment, 986 F.2d at 249. In either case, the right to tribal self-government cannot be divested by Congress by mere implication. There must be a "clear indication." *See* note 10 *supra*.

[12]*See generally*, V. Limas, *Sovereignty as a Bar to Enforcement of Executive Order 11246 in Federal Contracts with Native American Tribes*, 26 N.M.L.REV. 257 (1996).

[13]By their terms, these statutes apply only to state or local government recipients of federal funding. 29 U.S.C. § 794(b); 42 U.S.C. § 6107(4). Indian tribes are neither. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

[14]The NAHASDA statute itself requires tribally designated housing authorities to certify compliance with ICRA "to the extent that such title is applicable." 25 U.S.C. § 41112(c)(5).

[15]Section 2000d, prohibits "race, color, or national origin" discrimination by any "program or activity receiving Federal financial assistance." Like the Age Discrimination Act of 1975 and § 504 of the Rehabilitation Act, the term "program or activity" is defined as instrumentalities or agencies of state or local governments. 42 U.S.C. § 2000d-4a. Indian tribes are neither. *See* note 13 *supra*.

[16]*See generally*, V. Limas, *Employment Suits against Indian Tribes: Balancing Sovereign Rights and Civil Rights*, 70 DENV.U.L.REV. 359 (1993).