IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

NOV DEC
2022
VOL.63
NO.06

"FURTHER BEYOND" – IMLA JOURNEYS TO SPAIN

CONTENTS

NOVEMBER / DECEMBER 2022

DEPARTMENTS

Cover: Detail from Alcazar floor tile, Seville, Spain

STAFF

EXECUTIVE EDITOR Amanda Karras
EDITOR Erich R. Eiselt
ART DIRECTION AND PRODUCTION Trujillo Design
MARKETING Caroline Storer

Understanding Tribal Sovereignty: An Essential Primer for Productive Native American Relations

JOSH NEWTON AND ELLEN GROVER, *Best Best & Krieger LLP, Bend, Oregon*

INTRODUCTION

American Indian tribes[1] possess ancient sovereignty predating the founding of our Republic. Tribal sovereignty is recognized and protected by the U.S. Constitution, which vests Congress with plenary authority over Indian affairs. Congressional policy supports tribal self-determination and self-government as separate political communities. There, however, remains a general lack of knowledge of their legal status and culture among local governments. This paper aims to provide legal professionals in the continental United States with a primer on tribal sovereignty and its relationship to local governments in the continental United States. The paper addresses this history of recognition of tribal sovereignty, tribal self-determination and self-governance, government-to-government relations with tribes, civil and criminal jurisdictional issues, taxation, and other contemporary issues.

I. Recognition of Tribal Sovereignty in the United States. American Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of self-government.[2] Tribal sovereignty is ancient in that it predates the founding of our Republic.[3] Before contact with European explorers, American Indian tribes were distinct political communities with the sovereign right to regulate their internal and social relations.[4] During the colonial period, Indian tribes did not lose their sovereignty; rather, they retained the right to govern their internal relations.[5] At that time, the settled doctrine of the law of nations was that "weaker power [did] not surrender its independence — its right to self government, by associating with a stronger [power], and taking its protection."[6]

Under British law, the "crown possessed 'centraliz[ed]' authority over diplomacy with Tribes to the exclusion of colonial governments."[7] After the American Revolution, the Constitutional Congress debated whether national or state authorities should manage Indian affairs and reached a compromise that "proved unworkable."[8] The Articles granted Congress the "sole and exclusive right and power of … regulating the trade and managing all affairs with the Indians."[9] The Articles also provided, however, that the "legislative right of any state[,] within its own limits," could not be infringed or violated."[10] Those provisions resulted in discord among the national and state governments over the authority to regulate Indian affairs.[11]

The flawed design of the Articles of Confederation vis-à-vis regulation of Indian affairs was one of the issues that the framers of the Constitution sought to remedy.[12] The Constitution vests the federal government with "broad general powers" over the Indian affairs.[13] While no longer "possessed of full attributes of sovereignty," tribes remain a "separate people, with the power of regulating their internal and social relations."[4] Indian tribes retain the sovereign power to make substantive law in internal matters and to enforce that law in their own forums.[15] But Indian tribes are not foreign nations or States; they are "domestic depen-

dent nations that exercise inherent sovereign authority."[16] Indian tribes are subject to plenary control by Congress, but they "'retain' their historic sovereign authority" in every respect "'unless and until' Congress acts."[17]

II. Tribal Self-Determination and Self-Governance.

After ratification of the U.S. Constitution, the United States federal government entered into hundreds of treaties with American Indian tribes.[18] In 1824, Secretary of War John C. Calhoun created the Bureau of Indian Affairs ("BIA"); the BIA was subsequently transferred to the United States Department of the Interior ("Interior") in 1849.[19] And, in 1871, Congress ended treaty making with Indian tribes.[20] Over the next hundred years or so, Congressional policy was uneven with respect to tribal self-determination and self-governance, arguably reaching its nadir on August 1, 1953, when it adopted House Concurrent Resolution 108.[21] The resolution provided, in part: "[I] t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship …".[22] While non-binding, the policy declared in the resolution "dominated Indian affairs" for much of the next decade, which became known as the "Termination Era."[23] During this time, Congress acted to terminate federal recognition of over seventy (70) tribes and bands. Id. The social and cultural harms to the terminated affected tribes, were profound.[24]

By the early 1960s, however, the pendulum of Congressional policy began to swing back towards tribal self-determination.[25] And, in 1971, the U.S. Senate passed Concurrent Resolution 26, which reversed the federal termination policy and announced a commitment to a government-wide effort of tribal self-determination.[26] Since that time, Congress has passed many acts promoting tribal sovereignty and self-determination. Two of the primary acts are the Indian Self-Determination and Education and Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. § 5301 et seq.) and the Tribal Self-Governance Act of 1994, Pub. L. 103-413, tit. III, 108 Stat 4270 (codified at 25 U.S.C. § 5361 et seq.) The express Congressional policy underpinning both actions includes recognition of the "obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities."[27] Some observers have concluded that the Acts have provided a "chance for tribal governments to govern."[28]

III. Tribal Sovereignty and Municipal Governments

A. Government-to-Government Relations

American Indian tribes have sovereign-to-sovereign relationships with the United States and state governments. Tribes have jurisdiction over nearly all levels of governmental service — e.g., public safety and courts, economic development and commerce, human services, healthcare, natural resource management, transportation and roads, infrastructure and utilities, housing, environmental regulation, energy development, telecommunications, and education and culture. The United States has a trust responsibility to assist in providing some of these services, but such responsibilities are chronically under-funded. This creates an imperative for Indian tribes to engage in economic development activities, such as gaming or timber management, to generate tribal revenues to support governmental services and economic sovereignty. In "Indian country,"[29] economic development activity is a governmental activity, which is often administered by wholly-owned tribal business enterprises. This dynamic provides unique and pervasive opportunities for consultation, cooperation and coordination with tribes, as well as mutual aid and assistance. State laws typically authorize local governments to enter into intergovernmental agreements for a variety of

Continued on page 8

Best Best & Krieger LLP Partner **Ellen Grover** concentrates her practice in the areas of land use, natural resources, Native American and development law. She advises clients on complex Oregon land use and energy siting law issues, natural resource regulatory programs, compliance matters and business development matters. She can be reached at ellen.grover@bbklaw.com.

Best Best & Krieger LLP Partner **Josh Newton** advises clients on environmental and natural resource issues along with providing general counsel advice. He focuses on complex civil dispute resolution, which includes federal and state court litigation at both the trial and appellate level. His practice includes the representation of Native American tribes, providing a suite of general and special counsel services. Josh also has substantial experience with alternative dispute resolution, including mediation and arbitration. He can be reached at josh.newton@bbklaw.com.

purposes; however, this authority should be examined to determine if a proposed area of coordination may require additional statutory or regulatory authorization.

Tribal forms of government vary. For example, tribes organized under the Indian Reorganization Act, typically have elected tribal councils, but these can vary with internal heritage or cultural appointments. When considering consultation with a tribe, the local jurisdiction should recognize that tribes are diverse and do not all share the same interests. Indian tribes may have competing claims or dispute authority of other tribes. It is not the role of a municipal governmental to mediate or determine any such disputes. A municipal government should understand consultation and available coordination resources and policies and become knowledgeable about the governing structure of the tribe(s), as well as their governmental affairs functions.

Your state's policies related to engagement with tribal nations can provide a helpful framework on policies for engagement. Some policies may require or encourage tribal consultation at the state level as well as for specific local government actions.[30] State resources can include executive and legislative commissions and state historic preservation offices. Many states have ongoing agreements or understandings related to co-management of resources, such as hunting, fishing, water rights, and water quality standards. The co-management of these resources can originate from reserved treaty rights or federal law delegations (among other sources), such as reserved treaty fishing and hunting rights and Clean Water Act treatment in same manner as a state for water quality standards and Section 401 certification.

It is equally important for local governments to understand that federal agencies, as a companion for their federal trust responsibilities, have consultation obligations to tribes. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (November 6, 2000) requires all executive departments and agencies to engage in regular, meaningful, and robust consultation with tribal officials in the development of tribal policies that have tribal implications. Tribal governments also have numerous collaborative-management agreements with federal agencies, for example related to wildfire management or fisheries. Most federal agencies have tribal affairs functions such as appointed tribal liaison positions. National, regional or industry specific intertribal organizations, may also be relevant for the specific consultation effort.[31]

"Consultation" (with a capital "C") is considered a formal two-way government-togovernment dialogue between official representatives of the tribes and of the municipal government. Indian tribes can engage in informal (staff level) consultation as well. Requests for consultation should be respectful of the difference. Typically, a tribal governmental affairs office can help coordinate such engagement and the appropriate manner in which to request consultation, coordinate agendas, and determine attendance.

The most effective way to have productive coordination with tribes is to invest in the resources and policies that can support relationships with tribes. For a local government with ongoing or regular tribal government coordination, it is best practice to designate a tribal liaison or primary point of contact. While tribal communities are often comprised of distinct geographic homelands, tribal members and their member and non-member family members are still part of the broader local community, both physical and politically. Adoption of "good neighbor" policies can assist in productive and pragmatic relationships with tribal governments.

B. Civil and Criminal Jurisdictional Issues

Civil and criminal jurisdictional issues in Indian country are notoriously complex. The jurisdictional determination often turns on some combination of whether the defendants are nonIndians and whether the cause of action arose on "trust" or "fee" lands.

1. Civil Jurisdiction

a. Tribal Civil Jurisdiction. With respect to civil jurisdiction, Indian tribes are generally understood to have exclusive authority to regulate and adjudicate their internal relations among their members.[33] Indian tribes also retain "the inherent sovereign authority to 'regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.'"[33] Indian tribes also retain "'inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'"[35] Indian tribes may also "regulate the conduct of nonmembers on non-Indian fee land when that regulation is expressly authorized by federal statute or treaty."[35] There is also a presumption against tribal jurisdiction over nonmember activity on non-Indian fee land.[36] Indian tribes bear the burden of rebutting that presumption.[37]

b. State Civil Jurisdiction. Absent contrary federal law, Indians going beyond reservation boundaries have generally been held "subject to non-discriminatory state law otherwise applicable to all citizens of the State."[38] Within Indian country, however, state courts lack jurisdiction over Indians absent Congressional authorization.[39] Common law immunity from suit, however, is one of the "core aspects of sovereignty" retained by Indian tribes.[40] Sovereign immunity from suit is a "necessary corollary to Indian sovereignty and self-governance."[41] An Indian tribe is subject to suit "only where Congress has authorized the suit or the tribe has waived its immunity."[42]

2. Criminal Jurisdiction

a. Tribal Criminal Jurisdiction. Indian tribes have inherent sovereign authority to punish tribal offenders.[43] Tribes, however, mostly lack criminal jurisdictions over non-Indians absent Congressional authorization.[44]

b. State Criminal Jurisdiction. The general rule is that "states lack jurisdiction in Indian country absent a special grant of jurisdiction." In 1953, however, Congress enacted Public Law 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326; 28 U.S.C. §§ 1360, 1360 note). Among other things, Congress delegated to the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin the "jurisdiction over offenses committed by or against Indians in … Indian country."[45] States may also assume criminal jurisdiction over criminal offenses committed by or against Indians in Indian country with the consent of the tribe.[46] Finally, the Supreme Court has recently determined that the State of Oklahoma has jurisdiction to prosecute crimes by non-Indians against Indians in Indian country in that state.[47]

C. Taxation

1. Tribal Taxes. Indian tribal authority to impose taxes is an "essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."[1] Indian tribes have broad authority to impose taxes on non-Indians for activity on tribal trust lands. Id. The Montana test, however, applies to (and limits) taxation of non-Indians on non-Indian fee lands.[49]

2. State and Local Taxes. Absent federal authorization, States and local jurisdictions are "without power to tax" Indian tribes and their members inside Indian country.[50] The key question in Indian tax cases is "who bears the legal incidence of a tax." For example, if the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization.[51] On the other hand, if the legal incidence of the tax rests on non-Indians, there is "no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy."[52]

IV. Contemporary Issues.

A full review of the many contemporary issues affecting American Indian tribes and municipal governments is beyond the scope of this paper. Nonetheless, we highlight briefly two issues: The Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58, 135 Stat. 429 (2021); and the "Fee to Trust" land acquisition process administered by the BIA.

A. Infrastructure Investment and Jobs Act of 2021.

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act, which is commonly referred to the Bipartisan Infrastructure Law.[53] The Act provides $931 billion over five years beginning Fiscal Year 2022.[54] There is $550 billion in new investments for all modes of transportation, water, power and energy, environmental remediation, public lands, broadband and resilience.[55]

The Act will cause municipal governments to authorize and oversee once in a generation infrastructure projects in their jurisdictions, which may implicate Indian tribal interests in innumerable ways. We focus on two: the inadvertent discovery of Native American human remains or cultural items; and acquisition of rights-of-way across Indian lands.

1. Inadvertent Discovery of Native American Human Remains and Cultural Items. The infrastructure projects funded by the Act will cause millions of cubic yards of soil to be excavated, moved, or otherwise disturbed. Municipal governments should, therefore, be familiar with applicable federal and state laws governing the inadvertent discovery of Native American human remains and cultural items. At the federal level, the principal law is the Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. § 3001 et seq ("NAGPRA"). NAGPRA requires that any person who knows, or has reason to know, that such person has discovered Native American cultural items on federal or tribal lands to notify appropriate federal officials and the appropriate Indian tribe. 25 U.S.C. § 3002(d). If the discovery occurs in connection with an activity, the person

Continued on page 28

must "cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice" required under NAGPRA. Id. Some states have enacted similar laws.[56]

2. Obtaining Rights-of-Way Over Indian Lands. Rights-of-way over Indian land are governed by 25 C.F.R. Part 162. Examples of rights of way subject to the regulations include railroads, public highways, public water and sewer lines, oil and gas pipelines, electric transmission lines, and telecommunications facilities. These regulations impose a formal application process as well as consent and compensation requirements. Right-of-way grants are issued by the BIA unless the tribes has assumed the function in accordance with 25 C.F.R. Part 162.

A complete application requires title information, a consent for a land survey, and a grant consent from the Indian landowners. The BIA can provide contact information for Indian landowners for applicants to coordinate these consent requirements. Title to Indian trust lands is maintained by the BIA, Division of Land Titles and Records. The BIA can produce certified Title Status Reports (TSRs) that state the status of title ownership and encumbrances.

A complete application requires, among other requirements, a survey as well as environmental, and cultural resource/archeological assessments that satisfy the requirements of a federal action. The BIA will not grant a right-of-way without a majority of consent by the Indian owners. Compensation will be a key term. The federal standard is "fair market value," and the BIA will use market analyses, appraisals and other appropriate valuation methods. Such valuation reports can be waived by the tribe where compensation has been negotiated and the tribe determines that the negotiated amount is "in its best interests." The BIA will defer to the negotiated amount in this circumstance. Right-of-way terms are presumptively 50 years for purposes other than oil and gas related (20 years) but the BIA will defer to a tribe's determination of right-of-way term.

B. Fee to Trust Land Acquisitions. Between 1887 and 1934, it is estimated that the United States took 90 million acres of tribal lands — or nearly 2/3 of tribal reservations. And, as noted above, the federal termination policy of the 1950s and 1960s further ruptured the territorial and cultural integrity of many tribes across the nation. Reconstituting Indian country is a central national policy to promote tribal self-determination and self-governance. The relationship between tribal lands and tribal sovereignty is particularly strong for lands for which title is held by the federal government in trust for tribes ("trust status"), where tribes exercise primary regulatory authority. Not all land owned by tribes, however, is held in trust status. Tribes can hold land in fee status for many purposes. For example, many tribes participate in cooperative mitigation or management programs that return aboriginal lands to tribes for conservation purposes. These lands remain subject to state regulatory jurisdiction but allow tribes to expand their traditional natural resource management programs.

Land can be placed into trust status directly by federal legislation or, as authorized by Indian Reorganization Act or other authorizing federal legislation, by the United States Secretary of the Interior ("Secretary") through an administrative fee-to-trust process under 25 C.F.R. Part 151. Municipal governments can play a direct role in the fee-to-trust acquisition process.[57]

Land may be acquired for a tribe in trust status when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or off-reservation subject to certain standards; when the tribe already owns an interest in the land; or when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.[58] Interior has initiated consultation with Indian tribes on draft revisions to the fee-to-trust regulations. Under the consultation draft, this statement of acquisition policy is under review for possible revision to the following:

> to strengthen self-determination and sovereignty, ensure that every tribe has protected homelands where its citizens can maintain their tribal existence and way of life, and consolidate land ownership to strengthen tribal governance over reservation lands and reduce checkerboard ownership. In addition, the consultation draft would create certain presumptions for trust acquisitions.

There are three primary categories of fee-to-trust acquisitions:

1. Discretionary Trust Acquisitions. A trust acquisition authorized by Congress that does not require the Secretary to acquire title to any interest in land to be held in trust by the United States on behalf of an individual Indian or a Tribe. The Secretary has discretion to accept or deny the request for any such acquisition. These acquisitions include consultation with state, local and tribal governments.

a. On-Reservation Discretionary Acquisitions and State/Local/Tribal Government Consultations, 25 C.F.R. § 151.10. On-reservation acquisitions include

land located within or contiguous to an Indian reservation. Subject to any specific legislative requirements, the Secretary will consider the need of the tribe for additional land, the purposes for which the land will be used, the impact (if any) on state and local property taxes, jurisdictional problems and potential land use conflicts, and the ability of the BIA discharge its trust responsibilities. This process includes consultation with state and local governments, including Tribal governments, having regulatory jurisdiction over the proposed acquisition property.

b. Off-Reservation Discretionary Acquisitions and State/Local/Tribal Government Consultations, 25 C.F.R. § 151.11. In addition to the criteria in 25 C.F.R. § 151.10, tribes must provide a plan which specifies the anticipated economic benefits associated with the proposed use for off-reservation discretionary acquisitions that are intended for economic purposes. The Secretary will also evaluate the location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation. This process includes consultation with state and local governments, including Tribal governments, having regulatory jurisdiction over the proposed acquisition property.

2. Mandatory Trust Acquisitions. A trust acquisition directed by Congress or a judicial order that requires the Secretary to accept title to land into trust, or hold title to certain lands in trust by the United States, for an individual Indian or Tribe. The Secretary does not have the discretion to accept or deny the request to accept title of land into trust. Because these are nondiscretionary, these acquisitions are not further addressed.

3. Gaming Acquisitions. For many tribes, Indian gaming can be an important means of tribal economic and community development. To qualify (non-exempt) new trust land acquisitions for gaming eligibility such requests must meet one of several exceptions to the prohibition on gaming on new lands after 1988. The exception most relevant to local governments is the Secretarial "two-part" Determination under 25 C.FR. Part 292 — viz., the gaming establishment on land subject to this part is in the best interest of the tribe and its members and is not detrimental to the surrounding community.[59] A favorable two-part determination is subject to concurrence by the Governor of the state.[60] This procedure and the related policies are complex and will not be addressed further in this presentation except to note that the process includes consultation with appropriate state and local officials, including officials of nearby Indian tribes.

CONCLUSION

This article has sought to assist legal professionals representing municipal governments better understand American Indian tribal sovereignty and its implications for their clients. We hope that you find it useful. ML

NOTES

1. This article refers to the indigenous peoples of the continental United States as "American Indians" or "Indians" to be consistent with conventional legal nomenclature set forth in federal statute and judicial precedent. The scope of this article does not include the indigenous people of Alaska and Hawaii, which have a relationship with the United States that is historically and, at times, legally, distinct from the Indian tribes of the continental United States.
2. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (quoting Worcester v. Georgia, 6 Pet. 515, 559, 8 L.Ed. 483 (1832)).
3. *See id.* (tribes remain "separate sovereigns pre-existing the Constitution"); *see also* Oklahoma v. Castro-Huerta, 124 S.Ct. 2486, 2505 (2022) (Gorsuch, J. dissenting).
4. *Castro-Huerta*, 124 S.Ct. at 2505 (Gorsuch, J. dissenting).
5. *Id.* (citing Worcester, 6 Pet. at 561).
6. *Worcester*, 6 Pet. at 561.
7. *Castro-Huerta*, 124 S.Ct. at 2505 (Gorsuch, J. dissenting) (citing C. Berkey, United States-Indian Relations: The Constitutional Basis, in Exiled in the Land of the Free 192 (H. Lyons ed. 1992)).
8. *Castro-Huerta*, 124 S.Ct. at 2506 (Gorsuch, J. dissenting).
9. *Id.* (quoting Art. IX.).
10. *Id.*
11. *Id.* (citing G. Ablavsky, Beyond the Indian Commerce Clause, 124 Yale L.J. 1012, 1033-35 (2015)).
12. *Castro-Huerta*, 124 S.Ct. at 2506 (Gorsuch, J. dissenting).
13. United States v. Lara, 541 U.S. 193, 200 (2004).
14. *Id.* (quoting United States v. Kagama, 118 U.S. 375 (1886)).
15. *Id.* at 56.
16. Michigan v. Bay Mills Indian Community, 572 U.S. 782, 788 (2014) (quoting Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991)).
17. *Id.* (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).
18. See Self-Governance Communication and Education Tribal Consortium, Tribal Self-Governance Timeline, https://www.tribalselfgov.org/resources/milestones-tribal-self-governance/ (last visited Sept. 18, 2022).
19. *Id.*
20. *Id.*
21. Cohen's Handbook of Federal Indian Law (Nell Jessup Newton ed. 2012), § 1.06 at 90.
22. House Concurrent Resolution 108.
23. Cohen's Handbook, § 1.06 at 90.
24. *Id.* at 90-91.
25. *See* Self-Governance Communication and Education Tribal Consortium, Tribal Self-Governance Timeline, https://www.tribalselfgov.org/resources/ milestones-tribal-self-governance/ (last visited Sept. 18, 2022).
26. *Id.*

Continued on page 36

Homelessness *cont'd from page 33*

property, including park areas. The City's enforcement approach aimed to balance the safety and well-being of individuals experiencing homelessness, with the interests of the broader community, including access to green space for safe outdoor recreational activity.

In enforcing the City's Parks By-law, municipal law enforcement is the first point of contact when responding to Park By-law violations, which allows the housing outreach team to remain focused on their core role of engaging and connecting homeless individuals to housing and available services. Ticketing those who are homeless is not a course of action; however, if necessary after all efforts to connect individuals to appropriate alternative options are exhausted, a trespass notice is issued. Once a trespass notice is issued, the continued occupation is enforced by Hamilton Police Services. Often this results in homeless individuals being moved to another area within the City, rather than relying on police responses, such as ticketing or formally arresting individuals. Public works plays a significant ongoing role to ensure that encampment sites are cleaned and cleared in a timely fashion.

On March 30, 2022, Hamilton City Council gave approval to step up enforcement and the dismantling of encampments in City parks. City Council voted in favour of issuing trespass notices within 72 hours after a first complaint is received and implementing a seven-day-a-week municipal law enforcement operation. Despite the challenges, the City reimaged the opportunity it was presented,:to meet timelines staff sought approval to create a Coordinated Response Team ("CRT"), made up of stakeholders from a variety of municipal departments, including housing, municipal law enforcement and public works-parks. The CRT comprises a Director, Manager, Senior Project Manager, Supervisor, and four municipal law enforcement officers. The CRT leads daily roundtable discussions with a variety of agencies, including the police, to discuss daily challenges including encampment locations, cleanliness, risk factors, number of individuals, whether the encampment is on private or publicly owned property, and agreed upon next steps. This coordinated approach has allowed for greater service integration and has allowed staff to maximize enforcement efforts, while minimizing the impact on those who need assistance.

Since March 2022, the CRT have actioned approximately 737 encampment investigations on public and private property, resulting in 32 notices of trespasses issued. Voluntary compliance was achieved at the remaining sites.

NOTES

1. In Canada approximately 235,000 people experience homelessness per year. Strobel, S., Burcul, I., Dai, J. H., Ma, Z., Jamani, S., & Hossain, R. (2021). Characterizing people experiencing homelessness and trends in homelessness using population-level emergency department visit data in Ontario, Canada. Health Reports, 32(1), 13–23. https://doi.org/10.25318/82-003-x202100100002-eng
2. 2021 ONSC 7224.
3. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.
4. *Ibid*.
5. Court File No. CV-20-73435
6. The Enforcement Protocol provides that: Prohibited Areas: all individuals experiencing homelessness in encampments – even when deemed high acuity or engaged with outreach in the 14-day grace period outlined above – are subject to the following restrictions and may be removed or moved if not in compliance with them:
   - No more than 5 in an encampment;
   - No encampments on sidewalks, roadways or boulevards;
   - Encampments must not encumber an entrance or exit or deemed fire route;
   - Encampments must be 50 metres from a playground, school or childcare centre;
   - No encampments within any property with an environmental or heritage designation; and
   - Situations where health and safety concerns exist for those living within or adjacent to an encampment will be addressed in a reasonable fashion, in good faith, on a case by case basis by the City in its sole discretion that balances the needs of both the person experiencing homelessness/encamped individuals and community members. In these situations, the City will consult with the Encampment Task Force and the City's Mental Health and Street Outreach team to determine how to best balance the needs of persons experiencing homelessness/encamped individuals and other community members.
7. Poff v. City of Hamilton, 2021 ONSC 7224 at para. 13.
8. [1994] 1 S.C.R. 311.
9. Section 7 of the Charter provides for "life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
10. Para. 247.
11. Para. 249.
12. Para. 244.

Tribal Sovereignty *cont'd from page 29*

27. 25 U.S.C. § 5302(a).
28. Cohen's Handbook, § 1.07 at 99.
29. "Indian country" generally includes "formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 n. 2 (1995) (internal quotation marks and citation omitted).
30. *See e.g.*, Oregon Executive Order 96-30, codified into Senate Bill 770 (2001).
31. *See, e.g.*, https://www.ncai.org/tribal-directory/tribal-organizations (listing of Regional Intertribal Organizations and National Intertribal Organizations); see also, e.g., https://www.itcnet.org/ (Intertribal

Timber Council), https://critfc.org/ (Columbia River Intertribal Fish Commission).
32. *See, e.g.,* Fisher v. Dist. Ct. , 424 U.S. 382, 389 (1976) (exclusive tribal court jurisdiction for tribal member adoption proceedings).
33. FMC Corporation v. Shoshone-Bannock Tribes, 942 F.3d 916, 932 (9th Cir. 2019)(quoting Montana v. United States, 450 U.S. 544, 565 (1981).
34. *Id*. (quoting *Montana*, 450 U.S. at 566).
35. *Id*.
36. *Id*.
37. *Id*.
38. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973).
39. *See* Williams v. Lee, 358 U.S. 217 (1959); *see also* 28 U.S.C. § 1360 (providing jurisdiction to six states over civil causes of action between Indians or to which Indians are parties with arise in Indian country); 25 U.S.C. § 1322 (state may assume civil jurisdiction with tribal consent).
40. *Bay Mills Indian Community*, 572 U.S at 788.
41. *Id*. (quoting Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 890 (1986)).
42. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998).
43. United States v. Wheeler, 435 U.S. 313, 327-28 (1978); accord Denezpi v. United States, 142 S.Ct. 1838, 1845 (2022).
44. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (Indian tribes do not have inherent criminal jurisdiction over non-Indians); see also United States v. Lara, 541 U.S. 193 (2004) (Congress may relax restrictions on Indian tribes criminal jurisdiction over nonmember Indians).
45. 18 U.S.C. § 1162.
46. 25 U.S.C. § 1321.
47. *See generally Castro-Huerta*, 142 S.Ct. 2486 (2022).
48. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).
49. Atkinson Trading Co. v. Shirley, 532 U.S. 654, 652-53 (2001).
50. Oklahoma Tax Comm'n, 515 U.S. at 458.
51. *Id*. at 459.
52. *Id*.
53. National Association of Counties Executive Summary of The Bipartisan Infrastructure Law, https://www.naco.org/sites/default/files/documents/2022%20IIJA_ExecSumm_update_v1.pdf (last visited Sept. 18, 2022).
54. *Id*.
55. *Id*.
56. S*ee, e.g.,* Cal. Pub. Resources Code, § 5097.98; Or. Rev. St. 97.745.
57. *See* https://www.bia.gov/bia/ots/fee-to-trust for more resources.
58. 25 C.F.R. § 151.3.
59. Under Secretarial Order 3400, Delegation of Authority for Non-Gaming Off-Reservation Fee-to-Trust Acquisitions (April 27, 2022), all non-gaming off-reservation fee to trust applications have been re-delegated to the Regional BIA offices, which all off-reservation gaming fee to trust applications remains with the Assistant Secretary for Indian Affairs.
60. 25 C.F.R. § 292.23.

Unionization *cont'd from page 35*

51. C.R.S. § 8-3.3-103(5).
52. C.R.S. § 8-3.3-104(1).
53. C.R.S. § 8-3.3-104(2).
54. C.R.S. § 8-3.3-104(3)(b).
55. C.R.S. § 8-3.3-104(3)(a).
56. C.R.S. § 8-3.3-104(3).
57. C.R.S. § 8-3.3-104(4).
58. C.R.S. § 8-3.3-115(1)

Amicus *cont'd from page 27*

for local governments presented itself in *Baker v. McKinney*. This case is reminiscent of one in which IMLA participated as an amicus in *Lech v. Jackson* back in 2018 and unfortunately, it is the kind of case that draws a lot of media attention and amici on the other side.[10]

In this case, an armed fugitive entered the home of Vicki Baker with a fifteen-year-old hostage. Baker's daughter, Deanna Cook, was in the home at the time and left when the suspect arrived and called the police to inform them of the hostage situation. When police arrived, they surrounded the home, and the suspect released the hostage. Cook informed the police that the suspect, who she knew, had several guns, and did not intend to come out alive.

The officers followed standard procedures to compel the armed suspect to surrender, first using tear gas, and eventually breaking down both the front and garage door. They also knocked down part of the backyard fence. Once the officers made it inside the home, they found the suspect had taken his own life. While the police actions were lawful and proper, they caused damage to the home.

Baker sued under Section 1983, claiming the police actions amounted to an unlawful taking under the Fifth Amendment and sought $50,000 for the damage to her home. The City moved to dismiss the case for failure to state a claim and the district court concluded that it would not adopt a rule foreclosing recovery for the destruction of private property arising out of the valid exercise of a local government's police power. Thus, even though nobody disputes that the police acted lawfully in exercising their police power, the district court allowed the claim to go forward to determine if the officers should pay just compensation for a taking.[11]

Continued on page 38