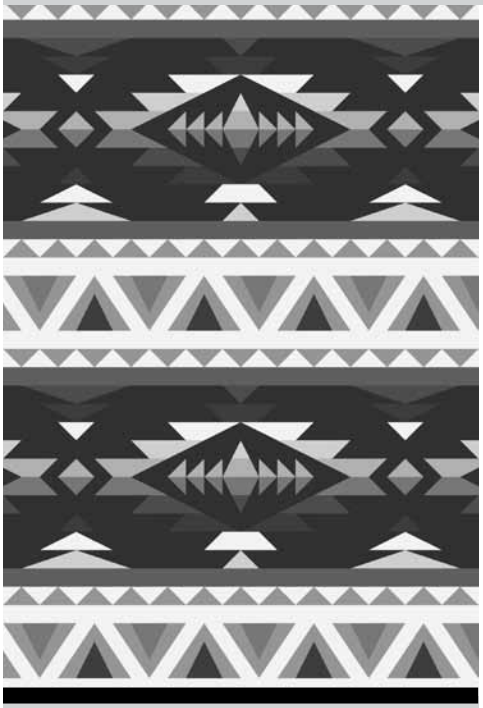
Oregon State Bar CLE Seminars

Powering Your Professional Development

Government Law and Indian Law: Critical Issues and Recent Developments



Cosponsored by the Government Law Section and the Indian Law Section

Friday, October 19, 2012
8:30 a.m.–5 p.m.

Oregon State Bar Center
Tigard, Oregon

6.25 General CLE or Access to Justice credits and 1 Ethics credit, plus .5 General CLE or Access to Justice for optional lunch presentation

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SCHEDULE

8:00 Registration

8:30 Indian Law 101: What Every Lawyer Should Know About Indian Law and Indian Tribes

- ✦ Tribal-state government-to-government process
- ✦ Structures of Oregon tribes and multi-tribal organizations
- ✦ Federal consultation and today's political process
- ✦ Trust and treaty training
- ✦ Intergovernmental agreements and sovereign immunity

Karen Quigley, *Oregon Legislative Commission on Indian Services, Salem*
Roy Sampsel, *Choctaw, Executive Director, Institute for Tribal Government, Portland State University, Portland*
Stephanie Striffler, *Native American Affairs Coordinator, Oregon Department of Justice, Salem*

9:30 Tribal Land Use and Economic Development

Ellen H. Grover, *Karnopp Petersen LLP, Bend*
Douglas C. MacCourt, *Ater Wynne LLP, Portland*
Wayne Shammel, *Cow Creek Band of Umpqua Indians, Roseburg*

10:30 Break

10:45 Trust Lands Process: From Fee to Trust

Jennifer Biesack, *The Confederated Tribes of the Grand Ronde Community of Oregon, Grand Ronde*
Mary Anne Kenworthy, *Office of the Solicitor, U.S. Department of the Interior, Portland*

Noon Lunch: "Tribal Economic Development and Relationships with Local Communities"

Bob Garcia, *Tribal Council Chair, Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, Coos Bay*

1:15 Criminal Jurisdiction and Law Enforcement Issues: The Changing Interaction of Federal, State, Local, and Tribal Law Enforcement

- ✦ *State v. Kurtz*
- ✦ SB 412
- ✦ Public Law 280 and Tribal Law and Order Act

Janet A. Klapstein, *Department of Justice Appellate Division, Salem*
Lauren J. Lester, *Karnopp Petersen LLP, Bend*
Tim Simmons, *United States Attorney's Office, Eugene*

2:30 Off-Reservation Rights: Natural and Cultural Resources

Robert A. Brunoe, *General Manager, Branch of Natural Resources, Confederated Tribes of the Warm Springs Reservation of Oregon, Warm Springs*
Dennis Griffin, *State Archaeologist for the Oregon State Historic Preservation Office, Oregon Heritage, Oregon Parks & Recreation Department, Salem*
Brent H. Hall, *Confederated Tribes of the Umatilla Indian Reservation, Department of Justice, Pendleton*

3:45 Break

SCHEDULE (Continued)

4:00 Ethics: Who Is Your Client?

- ✦ Working with tribal/nontribal governments, economic developments subsidiaries, and members of governing bodies
- ✦ Conflicts of interest and privilege in tribal/nontribal governments

Peter R. Jarvis, *Hinshaw & Culbertson LLP, Portland*
Peter Shepherd, *Harrang Long Gary Rudnick PC, Salem*

5:00 Adjourn

5:15 Government Law Section and Indian Law Section Annual Business Meetings

FACULTY

Jennifer Biesack, *The Confederated Tribes of the Grand Ronde Community of Oregon, Grand Ronde.* Ms. Biesack specializes in real estate and lands, housing, development and construction, public safety, and child welfare. Ms. Biesack previously worked for the Oneida Tribe of Indians of Wisconsin. She is admitted to practice in Oregon and Wisconsin, and she is the 2012 secretary for the Oregon State Bar Indian Law Section.

Robert A. Brunoe, *General Manager, Branch of Natural Resources, Confederated Tribes of the Warm Springs Reservation of Oregon, Warm Springs.*

Bob Garcia, *Tribal Council Chair, Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, Coos Bay.* Mr. Garcia currently chairs the Tribal Council, following the footsteps of his maternal grandfather, a Miluk Coos Indian elder who served as Tribal Chairman nearly 60 years ago. Since becoming Tribal Chair, Mr. Garcia has overseen a number of grant-funded projects, including $2 million in ARRA housing grants. Mr. Garcia also is the Assistant General Manager of Three Rivers Casino & Hotel in Florence, where he oversees 500 employees, manages a monthly budget of $4 million, and assists in leading all aspects of planning and operations. In addition, he serves as Treasurer of the Oregon Tribal Gaming Alliance, as a member of the Executive Committee of the National Indian Gaming Association for Oregon, Washington, Idaho, and Montana, and as an appointee to the Oregon State Legislative Commission on Indian Services. He speaks regularly at conferences on tribal economic matters.

Dennis Griffin, *State Archaeologist for the Oregon State Historic Preservation Office, Oregon Heritage, Oregon Parks & Recreation Department, Salem.* Dr. Griffin has served as the State Archaeologist with the Oregon State Historic Preservation Office for the past ten years. His duties and responsibilities include all aspects of public archaeology from Section 106 of the National Historic Preservation Act and state law review and compliance to liaison with public agencies and public education. Dr. Griffin oversees the state's archaeological permit process and serves as the primary liaison with the state's nine federally recognized Tribal Cultural Resource programs. His archaeological expertise includes extensive research throughout the Pacific Northwest and Alaska with an emphasis on oral history, land use history, and tribal collaborative projects. He has published several articles on Oregon state cultural resource laws.

Ellen H. Grover, *Karnopp Petersen LLP, Bend.* Ms. Grover concentrates her practice in the areas of land use, natural resources, Indian, and development law issues. Her practice also focuses on assisting the Confederated Tribes of the Warm Springs Reservation of Oregon on business development, renewable energy, hydroelectric, energy infrastructure, and other complex development projects. She advises the tribe on various natural resource regulatory programs and compliance matters. She is a member of the Oregon State Bar Sustainable Future Section Executive Committee and Environmental and Natural Resources Section Executive Committee. She also is a member of the Oregon State Bar Real Estate and Land Use Section and the Deschutes County Bar Association.

Brent H. Hall, *Confederated Tribes of the Umatilla Indian Reservation, Department of Justice, Pendleton.* Mr. Hall is an attorney in the Office of Legal Counsel for the Confederated Tribes of the Umatilla Indian Reservation. He advises the governing body of the Tribes on matters related primarily to treaty-reserved fishing and hunting rights and associated environmental, natural resources, and law enforcement issues. He also represents the Tribes in litigation involving those treaty-reserved rights in federal and state courts.

Peter R. Jarvis, *Hinshaw & Culbertson LLP, Portland.* Mr. Jarvis practices primarily in the area of attorney professional responsibility and risk management. He advises lawyers, law firms, and corporate legal departments in legal ethics, risk management, and disciplinary defense matters, and he serves as an expert witness in such matters. He is admitted to practice in Oregon, Washington, California, Alaska, and New York. He is a former board member and past president of the Association of Professional Responsibility Lawyers. Bar committees on which he has served include the Washington State Bar Association's Committee on the Future of the Profession, the Washington State Bar Committee to Define the Practice of Law and the Rules of Professional Conduct Committee, and the Oregon State Bar Legal Ethics Committee. Mr. Jarvis has participated in continuing legal education seminars for law firms and corporate legal departments and numerous public legal ethics/risk management seminars. He has also authored or coauthored many articles and chapters on attorney professional responsibility and risk management issues.

Mary Anne Kenworthy, *Office of the Solicitor, U.S. Department of the Interior, Portland.* Ms. Kenworthy specializes in Indian law and works on cases and issues concerning Indian lands and trust resources, including trust acquisitions, timber trespass, rights of way, and cultural resources issues. Ms. Kenworthy has provided training throughout the country to tribes, law enforcement personnel, and other federal agencies on the implementation and prosecution of violations under the Archaeological Resources Protection Act and the Native American Graves Protection Act. Before working at the Solicitor's Office, Ms. Kenworthy was an attorney for seven years at Alaska Legal Services Corporation in Anchorage, representing individual native allottees in administrative hearings and in federal court over their claims to land. Ms. Kenworthy is admitted to practice in Alaska and Oregon.

Janet A. Klapstein, *Department of Justice Appellate Division, Salem.*

Lauren J. Lester, *Karnopp Petersen LLP, Bend.* Ms. Lester's practice focuses on representing the Confederated Tribes of the Warm Springs Reservation of Oregon with respect to a wide variety of issues. Before joining the firm, she served as a judicial clerk to the Honorable Virginia L. Linder, who currently serves on the Oregon Supreme Court.

Douglas C. MacCourt, *Ater Wynne LLP, Portland.* Mr. MacCourt is chair of the firm's Indian Law Practice Group and cochair of its Sustainable Practices Advisory Group. Mr. MacCourt specializes in environmental law and regulation, energy development, land use, and government affairs for industry, local government, Native American tribes and Alaska Native corporations, and individual clients. He serves on the National Association of Local Government Environmental Professionals Board of Directors. He is coauthor of *Environmental and Natural Resources Law* (Oregon CLE 2002 & Supp 2006) and author of *Renewable Energy Development in Indian Country: A Handbook for Tribes* (National Renewable Energy Laboratory 2010).

Karen Quigley, *Oregon Legislative Commission on Indian Services, Salem.* Ms. Quigley has served as Executive Director of the Legislative Commission on Indian Services for 18 years. This statutory commission considers matters regarding Oregon tribal-state relations, serves as a clearinghouse for information on Oregon tribes and Oregon's Indian population, and is the advisory body to the Executive and Legislative Branches on Indian issues. She has spoken or provided training to tribal governments, state agencies, organizations, associations, and universities in Alaska, Nevada, Colorado, Oregon, and Wisconsin on tribal-state government-to-government relations, consultation with tribal governments, and other topics. She authored a chapter in *Inside the Minds: Emerging Issues in State Tribal Relations,* Aspatore (Thomson-Reuters), 2009 ed.

Roy Sampsel, *Choctaw, Executive Director, Institute for Tribal Government, Portland State University, Portland.* Roy Sampsel is a board member of the Institute for Tribal Government and the Tribal Leadership Forum, and he is president of Global Resources Inc., a natural resources and management consulting firm in Portland. During the past 30 years, he has worked extensively with Northwest and other tribal governments on inter-governmental relations and the development and implementation of fish, wildlife, water, and energy policy. Mr. Sampsel received his B.A. in Political Science from Portland State University. He is a member of the Choctaw and Wyandotte tribes.

Wayne Shammel, *Cow Creek Band of Umpqua Indians, Roseburg.* Mr. Shammel has experience as general counsel in the areas of construction, banking, capital and government financing, utility and infrastructure development, water, intellectual property, gaming, Indian law, lobbying and government affairs, legislative counsel, government contracting, corporate counsel, civil litigation, corporate, bankruptcy, business development, natural resources development, and project management. He is admitted to practice in Oregon and Colorado, and he is a member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

Peter Shepherd, *Harrang Long Gary Rudnick PC, Salem.* Mr. Shepherd is a member of the firm's government and litigation practices. Mr. Shepherd has nearly three decades of experience in government affairs, litigation, and public administration. After practicing law in Eugene, he served successively as Legislative Assistant to the late state Senator William (Bill) Frye, Deputy District Attorney in Marion County, Assistant Attorney General in the Organized Crime Section of the Oregon Department of Justice (DOJ) under Attorney General Frohnmayer, and Attorney in Charge of DOJ's Financial Fraud/ Consumer Protection Section under Attorneys General Kulongoski and Myers. Attorney General Myers later selected Mr. Shepherd as one of two Special Counsel to the Attorney General. From 2001 through 2009, he served as the Deputy Attorney General, also by appointment of Attorney General Myers. He is a past member of the Oregon State Bar Criminal Law and Consumer Law section executive committees and the House of Delegates.

Tim Simmons, *United States Attorney's Office, Eugene.* Mr. Simmons has been an Assistant United States Attorney in the District of Oregon since 1995. Mr. Simmons serves as one of three Tribal Liaisons in the U.S. Attorney's Office. As part of his duties, Mr. Simmons works with tribal representatives to address matters impacting the respective tribal nations and the United States Attorney's Office. Prior to joining the United States Attorney's Office, Mr. Simmons was a staff attorney at the Native American Program Oregon Legal Services for three years.

Stephanie Striffler, *Native American Affairs Coordinator, Oregon Department of Justice, Salem.* Ms. Striffler is a Senior Assistant Attorney General in the Oregon Department of Justice's Appellate Division and the department's Native American Affairs Coordinator. She also serves on the governor's team negotiating tribal gaming compacts. During her years at the Oregon Department of Justice, she has also held the positions of Special Counsel to the Attorney General and Attorney-in-Charge of the Special Litigation Unit. Ms. Striffler has spoken at many CLE events and trainings on Indian law and natural resources issues. For the last several years, she has been responsible for updating the Conference of Western Attorneys General's *American Indian Law Deskbook* chapter on "Cooperative Agreements with Tribes."

Chapter 1A

Relationship of State Agencies with Indian Tribes

Karen Quigley
Oregon Legislative Commission on Indian Services
Salem, Oregon

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I. Relationship of State Agencies with Indian Tribes—Statutes 1A–1
II. Legislative Commission on Indian Services Website. 1A–1
III. Resources 1A–1

I. RELATIONSHIP OF STATE AGENCIES WITH INDIAN TRIBES—STATUTES

- ORS 182.162, definitions for ORS 182.162 to 182.168.
- ORS 182.164, state agencies to develop and implement policy on relationship with tribes; cooperation with tribes.
- ORS 182.166, training of state agency managers and employees who communicate with tribes; annual meetings of representatives of agencies and tribes; annual reports by state agencies.
- ORS 182.168, No right of action created by ORS 182.162 to 182.168.

II. LEGISLATIVE COMMISSION ON INDIAN SERVICES WEBSITE

1. The Legislative Commission on Indian Services website is at www.leg.state.or.us. It includes:

- Key contact information for the nine federally recognized tribal governments in Oregon;
- Links to tribal government websites; and
- Oregon Directory of American Indian Resources.

2. Other links of interest:

- Agendas and minutes of meetings of the Legislative Commission on Indian Services; and
- 100 frequently asked questions (and answers) about American Indians.

III. RESOURCES

- *American Indian Law in a Nutshell.*
- *American Indian Reporter* (current news) (available online).
- Oregon tribal newspapers (current news) (some available online).
- Indian Law Reporter: U.S. Supreme Court, Courts of Appeals, U.S. District Courts, U.S. Court of Federal Claims, state courts, tribal courts, and miscellaneous proceedings and topical index and table of cases (monthly) (law libraries).
- State library.
- Oregon Historical Society.

Chapter 1B

Tribal Agreements—Presentation Slides

Stephanie Striffler
Native American Affairs Coordinator
Oregon Department of Justice
Salem, Oregon

TRIBAL AGREEMENTS

Stephanie Striffler
Senior Assistant Attorney General
Oregon Department of Justice
Native American Affairs Coordinator
October 19, 2012

Authority

Tribal Authority

What entity are you dealing with? Is it a federally recognized Indian Tribe?

Each Tribe is different.

Constitution, Ordinances, Corporate Charter

Indian Reorganization Act may apply
25 U.S.C. Sec. 461-479

Who are you dealing with? Is that person authorized to speak or act on behalf of the Tribe?

Apparent authority may not bind the Tribe.

Chance v. Coquille Indian Tribe, 327 Or 318, 963 P2d 638 (1998)
(Under tribal law tribal corporation president did not have authority to waive tribal sovereign immunity in employment contract without approval of corporation's Board of Directors)

State or local government authority

ORS 190.110

(1) In performing a duty imposed upon it, in exercising a power conferred upon it or in administering a policy or program delegated to it, a unit of local government or a state agency of this state may cooperate for any lawful purpose, by agreement or otherwise, with * * * an American Indian tribe or an agency of an American Indian tribe.

(2) The power conferred by subsection (1) of this section to enter into an agreement with an American Indian tribe or an agency of an American Indian tribe extends to any unit of local government or state agency that is not otherwise expressly authorized to enter into an agreement with an American Indian tribe or an agency of an American Indian tribe.

***

With regard to an American Indian tribe, the power described in subsections (1) and (2) of this section includes the power of the Governor or the designee of the Governor to enter into agreements to ensure that the state, a state agency or unit of local government does not interfere with or infringe on the exercise of any right or privilege of an American Indian tribe or members of a tribe held or granted under any federal treaty, executive order, agreement, statute, policy or any other authority. Nothing in this subsection shall be construed to modify the obligations of the United States to an American Indian tribe or its members concerning real or personal property, title to which is held in trust by the United States.

(4) A unit of local government or state agency of this state may exclude any clause or condition required by ORS 279B.220, 279B.225, 279B.230, 279B.235, 279B.270 or 279C.500 to 279C.530 from an agreement under subsection (1) of this section if the agreement is with:

***.

(e) An American Indian tribe.

(f) An agency of an American Indian tribe.

State ex rel State Office for Services to Children and Families v. Klamath Tribe, 170 Or App 106, 11 P3d 701 (2000)

(Indian Child Welfare Act agreement exceeded state agency statutory authority)

State legal sufficiency review, ORS 291.047

(Attorney General review of personal services contracts over $75,000 and others over $100,000)

Federal authority

Federal law may affect the subject matter of the agreement.

e.g. treaties, Indian Gaming Regulatory Act, Indian Child Welfare Act

Federal approval may be required.

Does the agreement involve tribal lands?

25 USC Sec. 81

25 USC Sec. 476

Public records laws

Federal, state and local government are subject to public records laws.

Tribes generally do not have similar laws.

Dispute Resolution

How can the agreement be enforced or disputes resolved?

Sovereign immunity

Tribes (and tribal agencies), like other governments, enjoy sovereign immunity from suit.

Tribes may waive sovereign immunity (as has the state legislature for state and local government, ORS 30.320).

Waiver must be express.

"exacting standard" - *Chance v. Coquille Indian Tribe*

Venue

Federal, state or tribal court?

Federal court may not have jurisdiction.

Tribal courts differ from each other.

Tips

Learn about the Tribe.

Operate from mutual respect.

Listen.

Don’t assume.

Avoid approaching with a standard form agreement.

Address approval processes early – understand each other's decisionmaking structures, including timelines.

Agree not to agree.

- Focus on practical solutions rather than jurisdictional disputes.

Don't give up.

Chapter 2A

Land Use Attributes of Development on Tribal Trust Land—Presentation Slides

Ellen H. Grover
Karnopp Petersen LLP
Bend, Oregon

Land Use Attributes of Development on Tribal Trust Land

----*Ellen H. Grover, Karnopp Petersen LLP*



Developer Expectations

Education

- On-Reservation development is often viewed by developers as complicated and foreign and involving federal "red tape".
- Several federal tax policies are intended to encourage on-reservation development.
- But, don't overlook the land use approval process: it has significant potential benefits:
  - It can be faster
  - It can be more flexible
  - It can be less costly to the developer
  - A tribe may be able to share in these benefits
- So, it is important to educate a potential developer about the differences between off-reservation and on-reservation development in the context of your commercial terms discussion.

Developer Expectations

Off Reservation

- Oregon Land Use System
- Other statewide agency approval; e.g., Oregon Energy Facility Siting Council
- Environmental permit approvals (largely state administered)
- Avoidance of federal consultation nexus; e.g., NEPA, ESA, NHPA

Developer Expectations

Oregon Land Use Attributes

This system has its benefits, but can be cumbersome.

- Oregon Land Use System:
  - Highly regulated through statewide goals adopted and implemented locally through comprehensive plans and zoning regulations.
  - Highly complex, particularly in rural areas.
  - Standards-based; limited flexibility.
  - Standards can require costly system development charges, transportation improvements, or other exactions.
  - Any person can intervene regardless of constitutional standing.
  - This can lead to lengthy and expensive local hearings and approval processes along with potential appeals of right to LUBA and OR Court of Appeals.

Developer Expectations

Oregon State Regulation

Know the state system and come prepared with any information on reduced regulatory burdens and attainability of compliance in tribal system.

- Other State Permitting Jurisdiction:
  - Depending on the activity, may involve further state board or council review and approval.
  - EFSC is one important example related to energy facility developments. It has similar attributes to Oregon land use law in its comprehensive standards-based review and fairly liberal intervener rights.
  - Environmental Permitting can include both federal delegated programs (e.g., CWA, CAA) and independent state programs and standards that may be more restrictive (e.g., ODFW's fish passage requirements, habitat rules).

Developer Expectations

Federal Nexus

Tribal Capacity is Key to Streamlining/Self-Determination within Tribal System

- NEPA will be required for leases/rights of way/Section 81 agreements usually required for third party development participation, and this triggers federal compliance under ESA and NHPA, among others.
  - Tribally-adopted land use and resource plans and studies can streamline NEPA, ESA and NHPA compliance.
  - 638 Contracts—Actively seek to assume activities that can help to streamline federal compliance obligations.
  - CTWS IRMP—NEPA-like study, but with conditioning authority; permits BIA to evaluate and hopefully rely on for NEPA compliance.
  - Secretarial Order #3206—deference given to tribal conservation and management plans.
  - Tribal Historic Preservation Officer.
  - Develop treatment in same manner as state under various Clean Water Act and Clean Air Act programs—Even if at tribe doesn't assume permitting obligations, it develops important relationships with federal permitting agencies.

Developer Expectations

Tribal System

- Even though there may be benefits to land use siting on tribal lands, developers may not understand or trust the tribal system: Flexibility has attributes, but it may mean less certainty in the process and ultimate outcome.
  - Develop letters of intent or term sheets that describe the process/lay out expectations
  - Stage feasibility/development
  - Keep developer engaged in/informed of the process
  - Where possible, create win-win scenarios to align interests
  - Know how to articulate how the tribal/federal standards address legitimate regulatory considerations and scope any compliance issues early

Local/State/Tribal Coordination

- Important to maintain communication with local and state managers and economic development agencies—zoning is jurisdiction-specific but not all resources are; economic development is a matter of regional importance/impact.
- Tribal participation in local land use system can help raise awareness and comfort about tribal management standards and vice versa.
- Co-management or intergovernmental agreements may be necessary or helpful for common development goals or for certain types of resources or mutually beneficial zoning or tax districts (e.g., Reservation Partnership Zone—Madras/Warm Springs under development).

Inter-jurisdictional Coordination

Cascade Crossing Project

- 200 mile, double circuit 500 kV transmission line—Boardman-Salem.
- No single agency with permitting jurisdiction
- Three major permitting jurisdictions:
  - Feds (USFS, BLM use permits, BIA ROW, Navy, Corps 404)—NEPA, plus federal consultations (ESA, NHPA)
  - State (EFSC Site Certificate)
  - Tribe (Land use, natural resource and cultural approvals)—IRMP process

Inter-jurisdictional Coordination

Cascade Crossing Project

- Major jurisdictional considerations:
  - Overlapping EFSC/Federal standards/plans on federal lands, excluding tribal lands—not all standards are complementary
  - WS Reservation reserved for "exclusive use" of Tribe—Separate binding IRMP standards; tribal privacy concerns
  - Coordination of BIA, USFS, BLM and other federal agency NEPA compliance—Lead agency; Interagency Rapid Response Team for Transmission
  - Coordination of NHPA compliance on reservation and off reservation—Programmatic Agreement
  - ESA consultation on reservation and off reservation; Secretarial Order #3206

For More Information

- Ellen H. Grover, Karnopp Petersen LLP
  - ehg@karnopp.com
  - 541-382-3011

Chapter 2B

Tribal Land Use and Economic Development—Presentation Slides

Douglas C. MacCourt
Ater Wynne LLP
Portland, Oregon

ATER WYNNE LLP
ATTORNEYS AT LAW

Opportunities for Tribes and Local Government

Economic Development and Land Use in Oregon

Douglas C. MacCourt, Ater Wynne LLP

Chair
Indian Law Practice Group
Ater Wynne LLP
dcm@aterwynne.com
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Past Chair, Executive Committee
Indian Law Section
Oregon State Bar Association

NALGEP, NEBC Board of Directors

Government Law and Indian Law:
Critical Issues and Recent Developments
October 19, 2012
Oregon State Bar Offices, Tigard, OR

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Overview of Discussion

- **Common issues and interests between Tribes and Local Government**
- **Some basic federal Indian Law and Oregon land use law concepts helpful to Tribal and local Economic Development**
- **Community-scale and utility-scale energy as economic development on tribal lands**
- **Goal 5 tribal/city collaboration case study**
- **Select resources for further consideration**

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Tribes and Local Governments in Oregon Share Common Economic Development Issues

- Lack of financial capital
  - Access to traditional small business capital (family, real estate, credit) particularly limited for tribal members
- Human capital limitations and competition from larger urban areas
- Remote locations
  - Distance to markets; increased transportation costs

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Common Issues, continued

- Infrastructure deficiencies
- Planning more dependent on funds than needs
- Local natural resources shape economic activity
- Poverty and unemployment
- Local leadership
- Growth potential

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The "Development" of Economic Development

- **Project development a long-term strategy**
- **Successful projects, *no matter how large or small*, require 3 elements:**
  - **Efficient business structures**
  - **Standardized and fair regulatory processes administered by reliable, stable and transparent government authorities**
  - **Enforceable, fair and balanced contracts**
- **Once a level playing field is established, these three elements can foster a wide variety of economic opportunities**

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Harvard Project on American Indian Ec.Dev.

- **Sovereignty Matters.**
  - **When Native nations make their own decisions about what development approaches to take, they consistently out-perform external decision makers on matters as diverse as governmental form, natural resource management, economic development, health care, and social service provision.**

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Harvard Project Finding #2

- **Institutions Matter.**
  - **For development to take hold, assertions of sovereignty must be backed by capable institutions of governance. Nations do this as they adopt stable decision rules, establish fair and independent mechanisms for dispute resolution, and *separate politics from day-to-day business and program management.***

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Harvard Project Finding #3

- **Culture Matters.**
  - **Successful economies stand on the shoulders of legitimate, culturally grounded institutions of self-government. Indigenous societies are diverse; each nation must equip itself with a governing structure, economic system, policies, and procedures that fit its own contemporary culture.**

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Finding #4

- **Leadership Matters.**
  - **Nation building requires leaders who introduce new knowledge and experiences, challenge assumptions, and propose change. Such leaders, whether elected, community, or spiritual, convince people that things can be different and inspire them to take action.**

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Tribal Economic Development

- **Tribal Roles:**
  - **act as the *principal actor* in development efforts**
  - **as a *catalyst* or supporter of private efforts**
  - **as the *regulator* and *monitor* of a positive development environment**
- **In some cases, the Tribe may play multiple roles depending on the project**

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The Land Also Matters

- **Oregon courts and LUBA recognize principles of federal Indian law**
- **President Clinton's Executive Order EO 13,007 (1996) and Governor Kitzhaber's EO 96-30 (1996) kicked off an era in Oregon of gathering valuable input from tribes in all government initiatives, especially land and resource agencies**
- **SB 770 (ORS 182.162-.168) codified EO 96-30 requiring state agencies to develop and implement policies on tribal relations**

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SB 770 Policy Requirements

- **Agencies must develop and implement a policy that**
  - **Identifies agency staff responsible for developing and implementing agency programs**
  - **Establishes a process to identify agency programs that affect Tribes**
  - **Promotes communication between the agency and the Tribes**

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SB 770, continued

- – Promotes positive government to government relations
- – Establishes a method of notifying agency staff of the statutory provisions and agency policy
- DLCD response has been impressive
  - – www.oregon.gov/LCD/Pages/govtogov.aspx#Annual_Report_to_the_Governor

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Land Use Goals and Economic Development

- In 3 months, Oregon will celebrate the 40th birthday of its statewide land use planning program.
- The foundation of that program is a set of 19 Statewide Planning Goals – the goals express the state's policies that are achieved through local comprehensive planning.
- Each city and county must adopt a comprehensive plan and the zoning and land-division ordinances needed to put the plan into effect.

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Goal 9 – Economic Development

- **To provide *adequate opportunities***
- ***throughout the state***
- **for a *variety of economic activities***
- ***vital* to the *health, welfare, and prosperity* of**
- ***Oregon's citizens*.**
  - **OAR 660-015-0000(9)**

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Details of Goal 9

- **Comprehensive plans and policies shall contribute to a stable and healthy economy in all regions of the state. Such plans shall be based on *inventories* of areas suitable for increased economic growth and activity after taking into consideration….(numerous factors)**
- **Nonbinding Guidelines suggest a framework for incorporating Goal 9 into local comp plans**

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State and Local Land Use Laws

- **In the absence of Congressional action, state and local land use laws *do not apply* to tribal allotments, trust lands, and in Indian Country.**
  - ***"A state's authority over the land within its boundaries is subject to the sovereignty of an Indian tribe over its lands."***
    - ***City of Lincoln City v. U.S. Dep't of Interior*, 229 F. Supp. 2d 1109, 1118 (D. Or. 2001)**

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LUBA

- **Regarding land outside of a reservation, if it is owned in fee by the tribe and is free from any restrictions on alienation, it "*is subject to the jurisdiction of the state government and its political subdivisions*."**
- **Conversely, if land is held by the Secretary in trust for the tribes, it is "*not subject to the jurisdiction of the states* . . . ."**
  - **Kelley and Mislick v. City of Cascade Locks, Luba No. 99-107, at *3 (1999).**

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LUBA and Local Regulation of Trust Land

- **For land held in trust by the Secretary of Interior for a tribe, a "*city lacks authority to regulate the use of the tract, even if the tract were inside the city limits and UGB* [Urban Growth Boundary]."**
  - **Todd v. City of Florence, Luba No. 2006-068, at *2 (2006).**

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State and Local Land Use Laws

- **Distinguishing State Jurisdiction Across Allotment, Trust, and Indian Country Lands**
  - **In a nutshell, tribal allotments, trust, and Indian country lands are treated similarly for purposes of determining tribal, versus state, government control.**

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Key Drivers for Energy Project Development

- **Tax benefits: Accelerated depreciation and Production Tax Credits (renewables)**
- **Serve local energy demands (small projects) or economic development with utility scale projects with revenues to participants**
- **Cash flow to equity investors**
- **Affiliate contracts**
- **Economic Development and Other Policy**
  - **State/federal incentives**
  - **Environmental/social benefits**

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The #1 Trend: Development Opportunity

- **Estimated renewable energy potential on tribal lands (NREL 2010 for lower 48 states):**
  - **535 billion kWhr/year wind = 14% total US annual energy generation**
  - **17,600 billion kWhr/year solar = 4.5 X total US energy generation in 2004**
- **Significant fossil fuel and transmission resource potential**

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Historical Paradigm

- Energy facilities in Indian Country owned by non-tribal entities
- Typical business model
  - Lease/royalty arrangement
  - Some exceptions, but very few
- Tribal employment common, but management less common
- Federal control over development of tribal energy resources

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The Trend

- Increasing tribal ownership of energy facilities to serve local and wholesale demand
- Significant tribal investment positions
- Greater emphasis on tribal management and labor in construction and operation

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Reasons for the trends

- Energy as an economic development play
- Enhanced tribal capacity for conducting business, attracting investment, and planning options for future economic development
- Strengthening sovereignty
- Tribal employment and contracting
  - Including tribal preference
- Protecting tribal assets

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Case Studies: Community Wind and Solar

- Solar
  - Canoncito Band of Navajo/Albuquerque NM – state has aggressive RPS
  - 35 MW solar pv on trust lands
  - US DOE Tribal Energy Program grants
- Wind
  - Winnebago Tribe of Nebraska – state has no RPS
  - 10 MW wind project on fee lands
  - US Department of Interior grant funds

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Case Study: Solar PV on Mining Waste



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Project Basics

- **The ASARCO Mission Mine Complex is a commercial open pit / underground copper mine**
- **The facility is located near Sahuarita, Arizona (18 miles south of Tucson).**
- **The mine site covers approximately 19,000 acres (29 square miles) and includes an open pit 2.5 miles long and 1.5 miles across, associated crushing, grinding and flotation facilities, tailings areas, waste rock dumps, and warehouse and administrative areas**

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Tribal Interests

- A portion of the mine complex is located on leased lands within the San Xavier District of the Tohono O'odham Indian Nation
- The lands within the District, referred to collectively as "San Xavier Reservation lands," consist of both Nation Trust Lands and individually-allotted Trust Lands
- Tucson Electric Power (TEP) and Tribe negotiating lease of brownfield to site and operate solar pv for delivery of electricity to TEP customers

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Energy from Large Scale Brownfields



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Goal 5: Historic Areas and Open Spaces

- **To protect natural resources and conserve scenic and historic areas and open spaces. OAR 660-015-0000(5)**
  - **Local governments shall adopt programs that will protect natural resources and conserve scenic, historic, and open space resources for present and future generations. These resources promote a healthy environment and natural landscape that contributes to Oregon's livability.**
  - **12 resource types require inventory**

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City of Portland Goal 5 Case Study

- **Tribal officials visit City Council and request Government to Government action, including cultural resource inventory**
- **City transportation bureau takes lead**
- **Kicks off with Tribal Council visits to affected tribes as determined by SHPO**
- **Process developed to select consultant with team that includes tribal reps**
- **Inventory conducted**
- **Zoning rules adopted based on inventory**

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Additional Resources

- **Joanna M. Wagner, *Improving Native American Access to Federal Funding for Economic Development through Partnerships with Rural Communities*, 32 Am. Indian L. Rev. 525 (2007)**
- **Harvard Project on American Indian Economic Development, www.hpaied.org**
- **Felix S. Cohen, Cohen's Handbook of Federal Indian Law (2005; 2007 Supp.)**
- **Douglas C. MacCourt, *Renewable Energy in Indian Country: A Handbook for Tribes*, National Renewable Energy Laboratories (2010)**

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Hot Off the Press

- **NALGEP/EPA Primer for Local Governments on Cultivating Green Energy on Brownfields**
- **www.nalgep.org**



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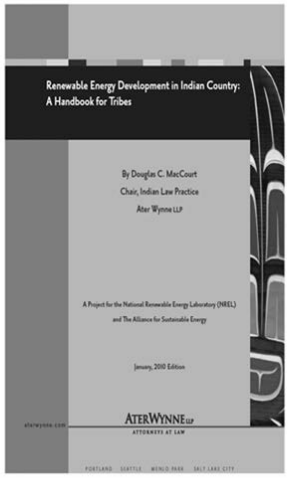
National Renewable Energy Laboratory

- **Renewable Energy Development in Indian Country: A Handbook for Tribes**
- **Project essentials**
- **http://www.nrel.gov/docs/fy10osti/48078.pdf**
- **Updates 2013**



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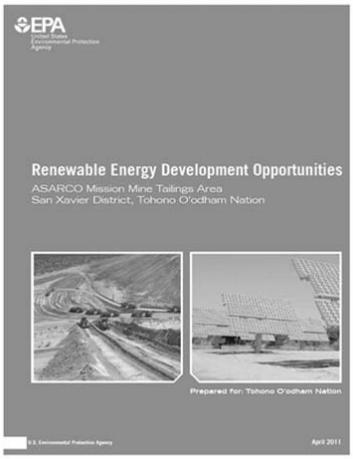
EPA Report on Asarco Mine Tailing Project



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Additional Notes on Federal Indian Law Cases on State/Tribal and Tribal Regulatory Jurisdiction

Slides 39-50

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State and Local Land Use Laws

- **Allotments:**
  - **In both *trust allotments—where* title is held by the government—and *restricted allotments*—where title is held by a tribe or individual Indian subject to restrictions on alienation—the United States possesses a supervisory control to ensure the land inures to the sole use and benefit of the allottee.**
    - **United States v. Ramsey, 271 U.S. 467, 471 (1926).**

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State and Local Land Use Laws

- **Allotments:**
  - **Both trust and restricted allotments are Indian country for purposes of state jurisdiction, *regardless of whether the lands are within or outside of a reservation*.**
    - **Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1022 (8th Cir. 1999).**

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State and Local Land Use Laws

– **Trust Lands:**

- **Since federal jurisdiction over tribal trust lands is exclusive and precludes state or local jurisdiction, it is understood that the Indians for whom trust land was acquired "*would be able to use the land free from state or local regulation*."**
  – **Chase v. McMasters, 573 F.2d 1011, 1018 (8th Cir. 1978), *cert. denied*, 439 U.S. 965 (1978).**

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State and Local Land Use Laws

– **Indian Country:**

- **Even *fee land* can be Indian country if there is sufficient indicia of 1) a federal set-aside and 2) federal superintendence.**
  – ***See* United States v. Sandoval, 231 U.S. 28, 40, 48–49 (1913).**

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State and Local Land Use Laws

- **Indian Country:**
  - **For example, the Tenth Circuit barred Oklahoma from regulating the Creek Nation's bingo operations on fee simple land, finding the land was Indian country and noting *Indian fee title* and *reservation status* are not inconsistent concepts.**
    - **Indian Country, U.S.A., Inc. v. Oklahoma, 829 F.2d 967, 974 (10th Cir. 1987)**

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Tribal Regulatory Jurisdiction over Nonmembers

- **Tribal Sovereignty, generally:**
  - **1) a tribe possesses all the power of a sovereign state**
  - **2) although "conquest" renders a tribe subject to federal legislation and terminates external sovereignty, it does not affect internal sovereignty (self government)**
  - **3) but internal sovereignty is subject to qualification by treaty and the express intent of Congress**

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Tribal Regulatory Jurisdiction over Nonmembers

- ***Montana v. United States*, 450 U.S. 544 (1981)**
  - **In barring the Crow Nation's regulation of nonmember hunting and fishing on nonmember fee land in the reservation, the Court reasoned:**
    - **a tribe's *inherent sovereign powers* do not extend to the activities of nonmembers**
    - **but, a tribe retains power to exercise *civil jurisdiction* over nonmembers if regulation is related to self-government or internal relations**

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Tribal Regulatory Jurisdiction over Nonmembers

- **The resultant framework:**
  - **1) tribes are with regulatory power over nonmembers who enter into consensual (usually contractual) relationships with members**
  - **2) tribes are with civil authority over nonmember acts on tribal allotment, trust, and *nonmember fee lands* if the acts threaten a tribe's:**
    - ***political integrity, economic security, or health & welfare***

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Tribal Regulatory Jurisdiction over Nonmembers

- ***Montana*, as applied:**
  - **creates a *rebuttable presumption* that tribes don't have civil jurisdiction over nonmember fee lands ...**
    - **the presumption is strongest on nonmember fee land**
    - **and weakest on tribal allotment or trust land**
  - **and, pursuant to the "Accommodation Doctrine," if a tribe defers in exercising sovereign authority, a state may *usurp* the tribe's regulatory role.**

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Tribal Regulatory Jurisdiction over Nonmembers

- ***Montana*'s progeny:**
  - **In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), the Court held that the Cheyenne River Sioux Tribal Court lacks jurisdiction to hear a discrimination claim because the Tribe lacks the civil authority to regulate the Bank's sale of its fee simple land to nonmembers.**

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Tribal Regulatory Jurisdiction over Nonmembers

- **The Court in *Plains Commerce Bank* relied on:**
  - ***Montana*: a tribe's inherent sovereign powers *do not extend* to activities of nonmembers**
  - ***Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978): tribes presumptively lost the right to govern anyone but themselves on the reservation**
  - ***Strate v. A-1 Contractors*, 520 U.S. 438 (1997): the restriction on tribal authority is strongest when the nonmember's activity occurs on nonmember fee land**

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Tribal Regulatory Jurisdiction over Nonmembers

- **The *Plains Commerce Bank* Court also held that regulation of a sale of land would not qualify for a *Montana* exception because the activity did not constitute *conduct* …**
  - **since the activity at issue did not have a *discernible effect* on the tribe or its members.**
    - **But the Court listed the following as *conduct* that would likely qualify under a *Montana* exception:**
      - » **contract *disputes*; *taxes* on economic activities, natural resources, leaseholds in tribal land; sales taxes on nonmember on-reservation businesses; hunting & fishing *licensing requirements*.**

Chapter 3A

Fee to Trust Process

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Office of the Solicitor
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Fee to Trust Process

Oregon State Bar CLE
October 19, 2012

Mary Anne Kenworthy
Office of the Regional Solicitor

Statutory Authority

- 25 U.S.C. § 465 – discretionary authority
  - Survived constitutional challenges by states
- Mandatory statutes
- 25 C.F.R. Part 151

Land Acquisition Policy 151.3

- Authorized by Congress
- Trust to trust must be approved by Secretary
- Restricted fee to trust must be approved by Secretary 151. 4

Land May Be Acquired

- Within the exterior boundaries; adjacent or within TLCA
- Tribe already owns an interest in land
- Necessary to facilitate
  - Self-determination
  - Economic development
  - Indian housing

Fractional Interests 151.7

- Buyer already owns an interest
- Interest being acquired is in fee
- Buyer acquires remaining interest for FMV
- Specific statute
- Owners of other interests consent

Tribal consent for nonmembers 151.8

- Tribe may acquire land in trust on other reservation ONLY
  - When Tribe with jurisdiction consents in writing
  - BUT NOT IF
    - Tribe already owns an undivided or trust interest

On Reservation 151.10

- Notify State and Local Governments
  - Unless Mandatory
- Allow Local Governments 30 Days to Comment
- Provide Comments to Tribe for Response

On Reservation Criteria

- Statutory authority
- Need
- Purposes
- Jurisdictional Problems
- Impact of removal from tax rolls
- Bureau equipped to handle
- Environmental compliance

Off Reservation Criteria 151.11

- All of On Reservation Criteria PLUS
  - Location of land relative to state/reservation boundaries
    - Business Plan
    - Notification to State and Local Jurisdictions

Final Notice 151.12(b)

- Publish notice of intent to transfer land into trust
- Secretary will not act w/i 30 days
- Applies to Discretionary and Mandatory Acquisitions

Title Examination 151.13

- Tribe must submit title evidence meeting DOJ standards
- All liens, encumbrances, or infirmities must be removed if make land unmarketable
  - DOJ waiver

Formal Acceptance 151.14

- Secretary issues or approves and instrument of conveyance
- Record deed

Mandatory Acquisitions

- SHALL - and usually in addition
- Certain specific conditions over which the Secretary has no control

Mandatory Statutes

- Coquille Restoration Act 25 U.S.C. § 715c
  - 1000 acres
  - Coos and Curry counties
  - Shall be part of the reservation
- Klamath Restoration Act, 25 U.S.C. § 566d
- Confederated Tribes of Coos, Lower Umpqua and Suislaw Restoration Act, 25 U.S.C. § 714e

Carcieri v. Salazar

Tribe must be "under federal jurisdiction" as of June 18, 1934

Court did not define "under federal jurisdiction"

- Department reviews applications on a case by case basis

Patchak

- QTA did not bar review by neighbor because not a quiet title action
- Neighbor is within zone of interests under § 465 and has standing
- Regulatory and implementation questions
  - 151.12(b)
  - Notice

PART 151—LAND ACQUISITIONS

Sec.
151.1 Purpose and scope.
151.2 Definitions.
151.3 Land acquisition policy.
151.4 Acquisitions in trust of lands owned in fee by an Indian.
151.5 Trust acquisitions in Oklahoma under section 5 of the I.R.A.
151.6 Exchanges.
151.7 Acquisition of fractional interests.
151.8 Tribal consent for nonmember acquisitions.
151.9 Requests for approval of acquisitions.
151.10 On-reservation acquisitions.
151.11 Off-reservation acquisitions.
151.12 Action on requests.
151.13 Title examination.
151.14 Formalization of acceptance.
151.15 Information collection.

AUTHORITY: R.S. 161: 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat. 1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d–10, 1466, 1495, and other authorizing acts.

CROSS REFERENCE: For regulations pertaining to: The inheritance of interests in trust or restricted land, see parts 15, 16, and 17 of this title and 43 CFR part 4; the purchase of lands under the BIA Loan Guaranty, Insurance and Interest Subsidy program, see part 103 of this title; the exchange and partition of trust or restricted lands, see part 152 of this title; land acquisitions authorized by the Indian Self-Determination and Education Assistance Act, see parts 900 and 276 of this title; the acquisition of allotments on the public domain or in national forests, see 43 CFR part 2530; the acquisition of Native allotments and Native townsite lots in Alaska, see 43 CFR parts 2561 and 2564; the acquisition of lands by Indians with funds borrowed from the Farmers Home Administration, see 7 CFR part 1823, subpart N; the acquisition of land by purchase or exchange for members of the Osage Tribe not having certificates of competency, see §§ 117.8 and 158.54 of this title.

SOURCE: 45 FR 62036, Sept. 18, 1980, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1982.

§ 151.1 Purpose and scope.

These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. Acquisition of land by individual Indians and tribes in fee simple status is not covered by these regulations even though such land may, by operation of law, be held in restricted status following acquisition. Acquisition of land in trust status by inheritance or escheat is not covered by these regulations. These regulations do not cover the acquisition of

land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or it members.

§ 151.2 Definitions.

(a) *Secretary* means the Secretary of the Interior or authorized representative.

(b) *Tribe* means any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, including the Metlakatla Indian Community of the Annette Island Reserve, which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs. For purposes of acquisitions made under the authority of 25 U.S.C. 488 and 489, or other statutory authority which specifically authorizes trust acquisitions for such corporations, ''Tribe'' also means a corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477) or section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 503).

(c) *Individual Indian* means:

(1) Any person who is an enrolled member of a tribe;

(2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation;

(3) Any other person possessing a total of one-half or more degree Indian blood of a tribe;

(4) For purposes of acquisitions outside of the State of Alaska, *Individual Indian* also means a person who meets the qualifications of paragraph (c)(1), (2), or (3) of this section where ''Tribe'' includes any Alaska Native Village or Alaska Native Group which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.

(d) *Trust land* or *land in trust status* means land the title to which is held in trust by the United States for an individual Indian or a tribe.

(e) *Restricted land* or *land in restricted status* means land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations.

(f) Unless another definition is required by the act of Congress authorizing a particular trust acquisition, *Indian reservation* means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, *Indian reservation* means that area of land constituting the former reservation of the tribe as defined by the Secretary.

(g) *Land* means real property or any interest therein.

(h) *Tribal consolidation area* means a specific area of land with respect to which the tribe has prepared, and the Secretary has approved, a plan for the acquisition of land in trust status for the tribe.

[45 FR 62036, Sept. 18, 1980, as amended at 60 FR 32879, June 23, 1995]

§ 151.3 Land acquisition policy.

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

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

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or

(2) When the tribe already owns an interest in the land; or

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

(b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding

land in trust or restricted status, land may be acquired for an individual Indian in trust status:

(1) When the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or

(2) When the land is already in trust or restricted status.

§ 151.4 Acquisitions in trust of lands owned in fee by an Indian.

Unrestricted land owned by an individual Indian or a tribe may be conveyed into trust status, including a conveyance to trust for the owner, subject to the provisions of this part.

§ 151.5 Trust acquisitions in Oklahoma under section 5 of the I.R.A.

In addition to acquisitions for tribes which did not reject the provisions of the Indian Reorganization Act and their members, land may be acquired in trust status for an individual Indian or a tribe in the State of Oklahoma under section 5 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465), if such acquisition comes within the terms of this part. This authority is in addition to all other statutory authority for such an acquisition.

§ 151.6 Exchanges.

An individual Indian or tribe may acquire land in trust status by exchange if the acquisition comes within the terms of this part. The disposal aspects of an exchange are governed by part 152 of this title.

§ 151.7 Acquisition of fractional interests.

Acquisition of a fractional land interest by an individual Indian or a tribe in trust status can be approved by the Secretary only if:

(a) The buyer already owns a fractional interest in the same parcel of land; or

(b) The interest being acquired by the buyer is in fee status; or

(c) The buyer offers to purchase the remaining undivided trust or restricted interests in the parcel at not less than their fair market value; or

(d) There is a specific law which grants to the particular buyer the right to purchase an undivided interest or interests in trust or restricted land without offering to purchase all of such interests; or

(e) The owner of a majority of the remaining trust or restricted interests in the parcel consent in writing to the acquisition by the buyer.

§ 151.8 Tribal consent for nonmember acquisitions.

An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

§ 151.9 Requests for approval of acquisitions.

An individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary. The request need not be in any special form but shall set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part.

§ 151.10 On-reservation acquisitions.

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when

the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

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

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

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

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

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

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

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

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

[45 FR 62036, Sept. 18, 1980, as amended at 60 FR 32879, June 23, 1995]

§ 151.11 Off-reservation acquisitions.

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

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

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

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

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

[60 FR 32879, June 23, 1995, as amended at 60 FR 48894, Sept. 21, 1995]

§ 151.12 Action on requests.

(a) The Secretary shall review all requests and shall promptly notify the applicant in writing of his decision. The Secretary may request any additional information or justification he considers necessary to enable him to reach a decision. If the Secretary determines that the request should be denied, he shall advise the applicant of that fact and the reasons therefor in writing and notify him of the right to appeal pursuant to part 2 of this title.

(b) Following completion of the Title Examination provided in § 151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall publish in the FEDERAL REGISTER, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no

sooner than 30 days after the notice is published.

[45 FR 62036, Sept. 18, 1980. Redesignated at 60 FR 32879, June 23, 1995, as amended at 61 FR 18083, Apr. 24, 1996]

§ 151.13 Title examination.

If the Secretary determines that he will approve a request for the acquisition of land from unrestricted fee status to trust status, he shall acquire, or require the applicant to furnish, title evidence meeting the *Standards For The Preparation of Title Evidence In Land Acquisitions by the United States*, issued by the U.S. Department of Justice. After having the title evidence examined, the Secretary shall notify the applicant of any liens, encumbrances, or infirmities which may exist. The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition and he shall require elimination prior to such approval if the liens, encumbrances, or infirmities make title to the land unmarketable.

[45 FR 62036, Sept. 18, 1980. Redesignated at 60 FR 32879, June 23, 1995]

§ 151.14 Formalization of acceptance.

Formal acceptance of land in trust status shall be accomplished by the issuance or approval of an instrument of conveyance by the Secretary as is appropriate in the circumstances.

[45 FR 62036, Sept. 18, 1980. Redesignated at 60 FR 32879, June 23, 1995]

§ 151.15 Information collection.

(a) The information collection requirements contained in §§ 151.9; 151.10; 151.11(c), and 151.13 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq*. and assigned clearance number 1076–0100. This information is being collected to acquire land into trust on behalf of the Indian tribes and individuals, and will be used to assist the Secretary in making a determination. Response to this request is required to obtain a benefit.

(b) Public reporting for this information collection is estimated to average 4 hours per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the information collection. Direct comments regarding the burden estimate or any other aspect of this information collection to the Bureau of Indian Affairs, Information Collection Clearance Officer, Room 337–SIB, 18th and C Streets, NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs [Project 1076–0100], Office of Management and Budget, Washington, DC 20502.

[60 FR 32879, June 23, 1995; 64 FR 13895, Mar. 23, 1999]

555 U.S. 379, *; 129 S. Ct. 1058, **;
172 L. Ed. 2d 791, ***; 2009 U.S. LEXIS 1633

DONALD L. CARCIERI, GOVERNOR OF RHODE ISLAND, et al., Petitioners v. KEN L. SALAZAR, SECRETARY OF THE INTERIOR, et al.

No. 07-526

SUPREME COURT OF THE UNITED STATES

555 U.S. 379*; *129 S. Ct. 1058*; *172 L. Ed. 2d 791*; *2009 U.S. LEXIS 1633*; *21 Fla. L. Weekly Fed. S 629

November 3, 2008, Argued
February 24, 2009, Decided

PRIOR HISTORY:

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Carcieri v. Kempthorne, 497 F.3d 15, 2007 U.S. App. LEXIS 17628 (2007)

DISPOSITION: *497 F.3d 15*, reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner State of Rhode Island brought an action challenging the authority of respondent Secretary of the Interior to accept into trust for an Indian tribe a parcel of land which was purchased by the tribe, and thereby to allow the tribe to avoid local regulation. Upon the grant of a writ of certiorari, the State appealed the judgment of the U.S. Court of Appeals for the First Circuit which upheld the Secretary's authority.

OVERVIEW: The Secretary was authorized to accept land in trust for an Indian tribe, and "Indian" was defined in *25 U.S.C.S. § 479* as a member of a "recognized tribe now under Federal jurisdiction." The State contended that the word "now" referred to the date of enactment of the Indian Reorganization Act (IRA), of which *§ 479* was a part, and that the tribe was not federally recognized at that time. The Secretary argued that "now" referred to the time when the Secretary accepted the land in trust, and that the tribe was federally recognized at that time. The U.S. Supreme Court held that the term "now under Federal jurisdiction" unambiguously referred to those tribes that were under federal jurisdiction when the IRA was enacted and, because the tribe was not under federal jurisdiction at that time, the Secretary lacked the authority to take the land into trust. At the time of enactment of the IRA, the ordinary meaning of the word "now" was "at this moment" or "at the time of speaking," which clearly referred in *§ 479* solely to matters existing contemporaneous with the enactment of the IRA, and such definition aligned with the natural reading of the word within the context of the IRA.

OUTCOME: The judgment upholding the Secretary's authority to accept the land in trust was reversed. 6-3 Decision; 1 Concurrence; 2 Dissents.

LexisNexis(R) Headnotes

Governments* > *Native Americans* > *Indian Reorganization Act
Governments* > *Native Americans* > *Property Rights

[HN1] The Indian Reorganization Act (IRA) authorizes the Secretary of the Interior to acquire land and hold it in trust for the purpose of providing land for Indians. *25 U.S.C.S. § 465*. The IRA defines the term "Indian" to include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction. *25 U.S.C.S. § 479*.

Governments* > *Native Americans* > *Indian Reorganization Act
Governments* > *Native Americans* > *Property Rights

[HN2] For purposes of *25 U.S.C.S. § 479*, the phrase "now under Federal jurisdiction" refers to an Indian tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, *§ 479* limits the authority of the Secretary of the Interior to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the Indian Reorganization Act was enacted in June of 1934.

Governments* > *Legislation* > *Interpretation

[HN3] Under settled principles of statutory construction, a court must first determine whether statutory text is plain and unambiguous. If it is, the court must apply the statute according to its terms.

Governments > Native Americans > Indian Reorganization Act
Governments > Native Americans > Property Rights
[HN4] The Secretary of the Interior may accept land into trust only for the purpose of providing land for Indians. *25 U.S.C.S. § 465*.

Governments > Native Americans > Indian Reorganization Act
[HN5] See *25 U.S.C.S. § 479*.

Governments > Legislation > Interpretation
[HN6] When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Governments > Native Americans > Indian Reorganization Act
[HN7] The word "now" in *25 U.S.C.S. § 479* limits the definition of "Indian," and therefore limits the exercise of the trust authority of the Secretary of the Interior under *25 U.S.C.S. § 465* to those members of tribes that were under federal jurisdiction at the time the Indian Reorganization Act was enacted.

Governments > Legislation > Interpretation
[HN8] The susceptibility of a word to alternative meanings does not render the word, whenever it is used in a statute, ambiguous, particularly where all but one of the meanings is ordinarily eliminated by context.

Governments > Legislation > Interpretation
[HN9] A court is obliged to give effect, if possible, to every word Congress uses in a statute.

Governments > Legislation > Interpretation
[HN10] Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Governments > Legislation > Interpretation
[HN11] When Congress has enacted a definition with detailed and unyielding provisions, a court must give effect to that definition even when it could be argued that the line should have been drawn at a different point.

Governments > Native Americans > Property Rights
[HN12] See *25 U.S.C.S. § 2202*.

Governments > Native Americans > Indian Reorganization Act
[HN13] See *25 U.S.C.S. § 478*.

Governments > Legislation > Expirations, Repeals & Suspensions
[HN14] Absent a clearly expressed congressional intention, an implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.

Governments > Native Americans > Indian Reorganization Act
[HN15] The term "now under Federal jurisdiction" in *25 U.S.C.S. § 479* unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the Indian Reorganization Act was enacted in 1934.

DECISION:

[***791] Secretary of Interior held to lack authority to accept land in trust for Indian tribe, since (1) under *25 U.S.C.S. § 479*, "Indian" was member of tribe "now" under federal jurisdiction; and (2) Indian Reorganization Act of 1934 (*25 U.S.C.S. § 461 et seq.*) was enacted when tribe was not federally recognized.

SUMMARY:

Procedural posture: Petitioner State of Rhode Island brought an action challenging the authority of respondent Secretary of the Interior to accept into trust for an Indian tribe a parcel of land which was purchased by the tribe, and thereby to allow the tribe to avoid local regulation. Upon the grant of a writ of certiorari, the State appealed the judgment of the U.S. Court of Appeals for the First Circuit which upheld the Secretary's authority.

Overview: The Secretary was authorized to accept land in trust for an Indian tribe, and "Indian" was defined in *25 U.S.C.S. § 479* as a member of a "recognized tribe

now under Federal jurisdiction." The State contended that the word "now" referred to the date of enactment of the Indian Reorganization Act (IRA), of which *§ 479* was a part, and that the tribe was not federally recognized at that time. The Secretary argued that "now" referred to the time when the Secretary accepted the land in trust, and that the tribe was federally recognized at that time. The U.S. Supreme Court held that the term "now under Federal jurisdiction" unambiguously referred to those tribes that were under federal jurisdiction when the IRA was enacted and, because the tribe was not under federal jurisdiction at that time, the Secretary lacked the authority to take the land into trust. At the time of enactment of the IRA, the ordinary meaning of the word "now" was "at this moment" or "at the time of speaking," which clearly referred in *§ 479* solely to matters existing contemporaneous [***792] with the enactment of the IRA, and such definition aligned with the natural reading of the word within the context of the IRA.

Outcome: The judgment upholding the Secretary's authority to accept the land in trust was reversed. 6-3 Decision; 1 Concurrence; 2 Dissents.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

INDIANS §43

INDIAN REORGANIZATION ACT -- LAND

Headnote:[1]

The Indian Reorganization Act (IRA) authorizes the Secretary of the Interior to acquire land and hold it in trust for the purpose of providing land for Indians. *25 U.S.C.S. § 465*. The IRA defines the term "Indian" to include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction. *25 U.S.C.S. § 479*. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

[***LEdHN2]

INDIANS §43

INDIAN REORGANIZATION ACT -- LAND

Headnote:[2]

For purposes of *25 U.S.C.S. § 479*, the phrase "now under Federal jurisdiction" refers to an Indian tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, *§ 479* limits the authority of the Secretary of the Interior to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the Indian Reorganization Act was enacted in June of 1934. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

[***LEdHN3]

STATUTES §164

PLAIN LANGUAGE

Headnote:[3]

Under settled principles of statutory construction, a court must first determine whether statutory text is plain and unambiguous. If it is, the court must apply the statute according to its terms. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

[***LEdHN4]

INDIANS §43

LAND IN TRUST

Headnote:[4]

The Secretary of the Interior may accept land into trust only for the purpose of providing land for Indians. *25 U.S.C.S. § 465*. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

[***LEdHN5]

INDIANS §43

FEDERAL JURISDICTION -- TRIBAL MEMBERS -- LAND

Headnote:[5]

See *25 U.S.C.S. § 479*, which provides in part: "The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. . . . The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. . . ." (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

[***LEdHN6]

STATUTES §108.2

LANGUAGE -- DIFFERENT SECTIONS

Headnote:[6]

When Congress includes particular language in one section of a statute [***793] but omits it in another

section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

[***LEdHN7]

INDIANS §43

FEDERAL JURISDICTION -- LAND

Headnote:[7]

The word "now" in *25 U.S.C.S. § 479* limits the definition of "Indian," and therefore limits the exercise of the trust authority of the Secretary of the Interior under *25 U.S.C.S. § 465* to those members of tribes that were under federal jurisdiction at the time the Indian Reorganization Act was enacted. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

[***LEdHN8]

STATUTES §113 STATUTES §163

ALTERNATIVE MEANINGS -- CONTEXT

Headnote:[8]

The susceptibility of a word to alternative meanings does not render the word, whenever it is used in a statute, ambiguous, particularly where all but one of the meanings is ordinarily eliminated by context. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

[***LEdHN9]

STATUTES §110

CONSTRUCTION

Headnote:[9]

A court is obliged to give effect, if possible, to every word Congress uses in a statute. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

[***LEdHN10]

STATUTES §80

CONSTRUCTION

Headnote:[10]

Courts must presume that a legislature says in a statute what it means and means in a statute what it says there. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

[***LEdHN11]

COURTS §103

LEGISLATIVE DEFINITION

Headnote:[11]

When Congress has enacted a definition with detailed and unyielding provisions, a court must give effect to that definition even when it could be argued that the line should have been drawn at a different point. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

[***LEdHN12]

INDIANS §43

ACQUISITION OF LAND

Headnote:[12]

See *25 U.S.C.S. § 2202*, which provides: "The provisions of *section 465* of this title shall apply to all tribes notwithstanding the provisions of *section 478* of this title: *Provided*, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s)." (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

[***LEdHN13]

INDIANS §43

ACQUISITION OF LAND

Headnote:[13]

See *25 U.S.C.S. § 478*, which provides in part: "This Act shall not apply to any reservation wherein a majority of the adult Indians . . . shall vote against its application." (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

[***LEdHN14]

STATUTES §229

IMPLIED REPEAL

Headnote:[14]

Absent a clearly expressed congressional intention, an implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute. (Thomas, J., joined by [***794] Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

[***LEdHN15]

INDIANS §43

FEDERAL JURISDICTION -- LAND

Headnote:[15]

The term "now under Federal jurisdiction" in *25 U.S.C.S. § 479* unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the Indian Reorganization Act was enacted in 1934. (Thomas, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Breyer, and Alito, JJ.)

SYLLABUS

[*379] [**1058] The Indian Reorganization Act (IRA), enacted in 1934, authorizes the Secretary of the Interior, a respondent here, to acquire land and hold it in trust "for the purpose of providing land for Indians," *25 U.S.C. § 465*, [**1059] and defines "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," *§ 479*. The Narragansett Tribe was placed under the Colony of Rhode Island's formal guardianship in 1709. It agreed to relinquish its tribal authority and sell all but two acres of its remaining reservation land in 1880, but then began trying to regain its land and tribal status. From 1927 to 1937, federal authorities declined to give it assistance because they considered the Tribe to be under state, not federal, jurisdiction. In a 1978 agreement settling a dispute between the Tribe and Rhode Island, the Tribe received title to 1,800 acres of land in petitioner Charlestown in exchange for relinquishing claims to state land based on aboriginal title; and it [***795] agreed that the land would be subject to state law. The Tribe gained formal recognition from the Federal Government in 1983, and the Secretary of the Interior accepted a deed of trust to the 1,800 acres in 1988. Subsequently, a dispute arose over whether the Tribe's plans to build housing on an additional 31 acres of land it had purchased complied with local regulations. While litigation was pending, the Secretary accepted the 31-acre parcel into trust. The Interior Board of Indian Appeals upheld that decision, and petitioners sought review. The District Court granted summary judgment to the Secretary and other officials, determining that *§ 479*'s plain language defines "Indian" to include members of all tribes in existence in 1934, but does not require a tribe to have been federally recognized on that date; and concluding that, since the Tribe is currently federally recognized and was in existence in 1934, it is a tribe under *§ 479*. In affirming, the First Circuit found *§ 479* ambiguous as to the meaning of "now under Federal jurisdiction," applied the principles of *Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694*, and deferred to the Secretary's construction of the provision to allow the land to be taken into trust.

[*380] *Held:*

Because the term "now under Federal jurisdiction" in *§ 479* unambiguously refers to those tribes that were under federal jurisdiction when the IRA was enacted in 1934, and because the Narragansett Tribe was not under federal jurisdiction in 1934, the Secretary does not have the authority to take the 31-acre parcel into trust. Pp. 7-16.

(a) When a statute's text is plain and unambiguous, *United States v. Gonzales, 520 U.S. 1, 4, 117 S. Ct. 1032, 137 L. Ed. 2d 132*, the statute must be applied according to its terms, see, *e.g., Dodd v. United States, 545 U.S. 353, 359, 125 S. Ct. 2478, 162 L. Ed. 2d 343*. Here, whether the Secretary has authority to take the parcel into trust depends on whether the Narragansetts are members of a "recognized Indian tribe now under Federal jurisdiction," which, in turn, depends on whether "now" refers to 1998, when the Secretary accepted the parcel into trust, or 1934, when Congress enacted the IRA. The ordinary meaning of "now," as understood at the time of enactment, was at "the present time; at this moment; at the time of speaking." That definition is consistent with interpretations given "now" by this Court both before and after the IRA's passage. See, *e.g., Franklin v. United States, 216 U.S. 559, 569, 30 S. Ct. 434, 54 L. Ed. 615*; *Montana v. Kennedy, 366 U.S. 308, 310-311, 81 S. Ct. 1336, 6 L. Ed. 2d 313*. It also aligns with the word's natural reading in the context of the IRA. Furthermore, the Secretary's current interpretation is at odds with the Executive Branch's construction of *§ 479* at the time of enactment. The Secretary's additional arguments in support of his contention that "now" is ambiguous are unpersuasive. [**1060] There is also no need to consider the parties' competing views on whether Congress had a policy justification for limiting the Secretary's trust authority to tribes under federal jurisdiction in 1934, since Congress' use of "now" in *§ 479* speaks for itself and "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254,* [***796] *112 S. Ct. 1146, 117 L. Ed. 2d 391*. Pp. 7-13.

(b) The Court rejects alternative arguments by the Secretary and his *amici* that rely on statutory provisions other than *§ 479* to support the Secretary's decision to take the parcel into trust for the Narragansetts. Pp. 13-15.

497 F.3d 15, reversed.

COUNSEL: Theodore B. Olson argued the cause for petitioners. **Deanne E. Maynard** argued the cause for respondents.

JUDGES: Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Breyer, and Alito, JJ., joined. Breyer, J., filed a concurring opinion, post; p. ___. Souter, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg, J., joined, post; p. ___. Stevens, J., filed a dissenting opinion, post; p. ___.

OPINION BY: THOMAS

OPINION

[*381] Justice **Thomas** delivered the opinion of the Court.

[HN1] [***LEdHR1] [1] The Indian Reorganization Act (IRA or Act) authorizes the Secretary of the Interior, a respondent in this case, to acquire land and hold it in trust "for the purpose of providing [*382] land for Indians." § 5, 48 Stat. 985, *25 U.S.C. § 465*. The IRA defines the term "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *§ 479*. The Secretary notified petitioners--the State of Rhode Island, its Governor, and the town of Charlestown, Rhode Island--that he intended to accept in trust a parcel of land for use by the Narragansett Indian Tribe in accordance with his claimed authority under the statute. In proceedings before the Interior Board of Indian Appeals (IBIA), the District Court, and the Court of Appeals for the First Circuit, petitioners unsuccessfully challenged the Secretary's authority to take the parcel into trust.

[**1061] In reviewing the determination of the Court of Appeals, we are asked to interpret the statutory phrase "now under Federal jurisdiction" in *§ 479*. Petitioners contend that the term "now" refers to the time of the statute's enactment, and permits the Secretary to take land into trust for members of recognized tribes that were "under Federal jurisdiction" in 1934. Respondents argue that the word "now" is an ambiguous term that can reasonably be construed to authorize the Secretary to take land into trust for members of tribes that are "under Federal jurisdiction" at the time that the land is accepted into trust.

We agree with petitioners and hold that,[HN2] [***LEdHR2] [2] for purposes of *§ 479*, the phrase "now under Federal jurisdiction" refers to a tribe that was under federal jurisdiction at the time of the statute's enactment. As a result, *§ 479* limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934. Because the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority [*383] to take the parcel at issue into trust. We reverse the judgment of the Court of Appeals.

I

At the time of colonial settlement, the Narragansett Indian Tribe was the indigenous occupant of much of what is now the State of Rhode Island. See *Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (1983)* (hereinafter Final [***797] Determination). Initial relations between colonial settlers, the Narragansett Tribe, and the other Indian tribes in the region were peaceful, but relations deteriorated in the late 17th century. The hostilities peaked in 1675 and 1676 during the 2-year armed conflict known as King Philip's War. Hundreds of colonists and thousands of Indians died. See E. Schultz & M. Tougias, King Philip's War 5 (1999). The Narragansett Tribe, having been decimated, was placed under formal guardianship by the Colony of Rhode Island in 1709. *48 Fed. Reg. 6177, 6178*.[1]

1 The Narragansett Tribe recognized today is the successor to two tribes, the Narragansett and the Niantic Tribes. The two predecessor Tribes shared territory and cultural traditions at the time of European settlement and effectively merged in the aftermath of King Philip's War. See *Final Determination, 48 Fed. Reg. 6177, 6178.*

Not quite two centuries later, in 1880, the State of Rhode Island convinced the Narragansett Tribe to relinquish its tribal authority as part of an effort to assimilate tribal members into the local population. See *Narragansett Indian Tribe v. National Indian Gaming Comm'n, 332 U.S. App. D.C. 429, 158 F.3d 1335, 1336 (CADC 1998).* The Tribe also agreed to sell all but two acres of its remaining reservation land for $5,000. *Ibid.* Almost immediately, the Tribe regretted its decisions and embarked on a campaign to regain its land and tribal status. *Ibid.* In the early 20th century, members of the Tribe sought economic support and other assistance from the Federal [*384] Government. But, in correspondence spanning a 10-year period from 1927 to 1937, federal officials declined their request, noting that the Tribe was, and always had been, under the jurisdiction of the New England States, rather than the Federal Government.

Having failed to gain recognition or assistance from the United States or from the State of Rhode Island, the Tribe filed suit in the 1970's to recover its ancestral land, claiming that the State had misappropriated [**1062] its territory in violation of the Indian Non-Intercourse Act, *25 U.S.C. § 177*.[2] The claims were resolved in 1978 by enactment of the Rhode Island Indian Claims Settlement Act, 92 Stat. 813, *25 U.S.C. § 1701 et seq.*

Under the agreement codified by the Settlement Act, the Tribe received title to 1,800 acres of land in Charlestown, Rhode Island, in exchange for relinquishing its past and future claims to land based on aboriginal title. The Tribe also agreed that the 1,800 acres of land received under the Settlement Act "shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." *§ 1708(a)*; see also *§ 1712(a)*.

> 2 Title *25 U.S.C. § 177* provides, in pertinent part, that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

The Narragansett Tribe's ongoing efforts to gain recognition from the United States Government finally succeeded in 1983. *48 Fed. Reg. 6177*. In granting formal recognition, the Bureau of Indian Affairs (BIA) determined that "the Narragansett community and its predecessors have existed autonomously since first contact, despite undergoing many modifications." *Id., at 6178*. The BIA referred to the Tribe's "documented history dating from 1614" and noted that "all of the current membership [***798] are believed to be able to trace to at least one ancestor on the membership lists of the Narragansett community prepared after the 1880 Rhode [*385] Island 'detribalization' act." *Ibid.* After obtaining federal recognition, the Tribe began urging the Secretary to accept a deed of trust to the 1,800 acres conveyed to it under the Rhode Island Indian Claims Settlement Act. *25 CFR § 83.2 (2008)* (providing that federal recognition is needed before an Indian tribe may seek "the protection, services, and benefits of the Federal government"). The Secretary acceded to the Tribe's request in 1988. See *Charlestown v. Eastern Area Director, Bur. of Indian Affairs, 18 IBIA 67, 69 (1989)*.[3]

> 3 The Tribe, the town, and the Secretary previously litigated issues relating to the Secretary's acceptance of these 1,800 acres, and that matter is not presently before this Court. See generally *Charlestown, 18 IBIA 67*; *Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (CA1 1994)*; *Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (CA1 2006)*.

In 1991, the Tribe's housing authority purchased an additional 31 acres of land in the town of Charlestown adjacent to the Tribe's 1,800 acres of settlement lands. Soon thereafter, a dispute arose about whether the Tribe's planned construction of housing on that parcel had to comply with local regulations. *Narragansett Indian Tribe v. Narragansett Elec. Co., 89 F.3d 908, 911-912 (CA1 1996)*. The Tribe's primary argument for noncompliance--that its ownership of the parcel made it a "dependent Indian community" and thus "Indian country" under *18 U.S.C. § 1151* --ultimately failed. *89 F.3d at 913-922*. But, while the litigation was pending, the Tribe sought an alternative solution to free itself from compliance with local regulations: It asked the Secretary to accept the 31-acre parcel into trust for the Tribe pursuant to *25 U.S.C. § 465*. By letter dated March 6, 1998, the Secretary notified petitioners of his acceptance of the Tribe's land into trust. Petitioners appealed the Secretary's decision to the IBIA, which upheld the Secretary's decision. See *Charlestown v. Eastern Area Director, Bureau of Indian Affairs, 35 IBIA 93 (2000)*.

[**1063] Petitioners sought review of the IBIA decision pursuant to the Administrative Procedure Act, *5 U.S.C. § 702*. The [*386] District Court granted summary judgment in favor of the Secretary and other Department of Interior officials. As relevant here, the District Court determined that the plain language of *25 U.S.C. § 479* defines "Indian" to include members of all tribes in existence in 1934, but does not require a tribe to have been federally recognized on that date. *Carcieri v. Norton, 290 F. Supp. 2d 167, 179-181 (RI 2003)*. According to the District Court, because it is currently "federally-recognized" and "existed at the time of the enactment of the IRA," the Narragansett Tribe qualifies "as an 'Indian tribe' within the meaning of *§ 479*." *Id., at 181*. As a result, "the secretary possesses authority under *§ 465* to accept lands into trust for the benefit of the Narragansetts." *Ibid.*

The Court of Appeals for the First Circuit affirmed, first in a panel decision, *Carcieri v. Norton, 423 F.3d 45 (2005)*, and then sitting en banc, *497 F.3d 15 (2007)*. Although the Court of Appeals acknowledged that "[o]ne might have an initial instinct to read the word 'now' [in *§ 479*] . . . to mean the date of [the] enactment of the statute, June 18, 1934," the court concluded that there was "ambiguity [***799] as to whether to view the term . . . as operating at the moment Congress enacted it or at the moment the Secretary invokes it." *Id., at 26*. The Court of Appeals noted that Congress has used the word "now" in other statutes to refer to the time of the statute's application, not its enactment. *Id., at 26-27*. The Court of Appeals also found that the particular statutory context of *§ 479* did not clarify the meaning of "now." On one hand, the Court of Appeals noted that another provision within the IRA, *25 U.S.C. § 472*, uses the term "now or hereafter," which supports petitioners' argument that "now," by itself, does not refer to future events. But on the other hand, *§ 479* contains the particular application date of "June 18, 1934," suggesting that if Congress had wanted to refer to the date of enactment, it could have done so more [*387] specifically. *497 F.3d at 27*.

The Court of Appeals further reasoned that both interpretations of "now" are supported by reasonable policy explanations, *id., at 27-28*, and it found that the legislative history failed to "clearly resolve the issue," *id., at 28*.

Having found the statute ambiguous, the Court of Appeals applied the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*, and deferred to the Secretary's construction of the provision. *497 F.3d at 30*. The court rejected petitioners' arguments that the Secretary's interpretation was an impermissible construction of the statute. *Id., at 30-34*. It also held that petitioners had failed to demonstrate that the Secretary's interpretation was inconsistent with earlier practices of the Department of the Interior. Furthermore, the court determined that even if the interpretation were a departure from the Department's prior practices, the decision should be affirmed based on the Secretary's "reasoned explanation for his interpretation." *Id., at 34*.

We granted certiorari, *552 U.S. 1229128 S. Ct. 1443, 170 L. Ed. 2d 274 (2008)*, and now reverse.

II

[HN3] [***LEdHR3] [3] This case requires us to apply settled principles of statutory construction under which we must first determine whether the statutory text is plain and unambiguous. *United States v. Gonzales, 520 U.S. 1, 4, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997)*. If it is, we must apply the [**1064] statute according to its terms. See, *e.g., Dodd v. United States, 545 U.S. 353, 359, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005)*; *Lamie v. United States Trustee, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004)*; *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000)*; *Caminetti v. United States, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917)*.

[HN4] [***LEdHR4] [4] The Secretary may accept land into trust only for "the purpose of providing land for Indians." *25 U.S.C. § 465*. "Indian" is defined by statute as follows:

> [*388] [HN5] [***LEdHR5] [5]"The term 'Indian' as used in this Act shall include all persons of Indian descent who are *members of any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. . . . The term 'tribe' [***800] wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. . . ." *§ 479* (emphasis added).

The parties are in agreement, as are we, that the Secretary's authority to take the parcel in question into trust depends on whether the Narragansetts are members of a "recognized Indian Tribe now under Federal jurisdiction." *Ibid.* That question, in turn, requires us to decide whether the word "now under Federal jurisdiction" refers to 1998, when the Secretary accepted the 31-acre parcel into trust, or 1934, when Congress enacted the IRA.

We begin with the ordinary meaning of the word "now," as understood when the IRA was enacted. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 272, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994)*; *Moskal v. United States, 498 U.S. 103, 108-109, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990)*. At that time, the primary definition of "now" was "[a]t the present time; at this moment; at the time of speaking." Webster's New International Dictionary 1671 (2d ed. 1934); see also Black's Law Dictionary 1262 (3d ed. 1933) (defining "now" to mean "[a]t this time, or at the present moment," and noting that "'[n]ow' as used in a statute *ordinarily* refers to the date of its taking effect . . ." (emphasis added)). This definition is consistent with interpretations given to the word "now" by this Court, both before and after passage of the IRA, with respect to its use in other statutes. See, *e.g., Franklin v. United States, 216 U.S. 559, 568-569, 30 S. Ct. 434, 54 L. Ed. 615 (1910)* (interpreting a federal criminal statute to have "adopted such punishment as the laws of the [*389] State in which such place is situated *now* provide for the like offense" (citing *United States v. Paul, 31 U.S. 141, 6 Pet. 141, 8 L. Ed. 348 (1832)*, (internal quotation marks omitted)); *Montana v. Kennedy, 366 U.S. 308, 310-311, 81 S. Ct. 1336, 6 L. Ed. 2d 313 (1961)* (interpreting a statute granting citizenship status to foreign-born "children of persons who *now* are, or have been, citizens of the United States" (internal quotation marks omitted; emphasis deleted)).

It also aligns with the natural reading of the word within the context of the IRA. For example, in the original version of *25 U.S.C. § 465*, which provided the same authority to the Secretary to accept land into trust for "the purpose of providing land for Indians," Congress explicitly referred to current events, stating "[t]hat no part of such funds shall be used to acquire additional land outside of the exterior boundaries of [the] Navajo Indian Reservation . . . in the event that the proposed Navajo boundary extension measures *now* [**1065]

pending in Congress . . . become law." IRA, § 5, 48 Stat. 985 (emphasis added).[4] In addition, elsewhere in the IRA, Congress expressly drew into the statute contemporaneous *and* future events by using the phrase "now or hereafter." See *25 U.S.C. § 468* (referring to "the geographic boundaries of any Indian reservation now existing or established hereafter"); *§ 472* (referring to "Indians who may be appointed [***801] . . . to the various positions maintained, now or hereafter, by the Indian Office"). Congress' use of the word "now" in this provision, without the accompanying phrase "or hereafter," thus provides further textual support for the conclusion that the term refers solely to events contemporaneous with the Act's enactment. See *Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002)* ([HN6] [***LEdHR6] [6] "[W]hen Congress includes particular language in one section of a statute [*390] but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)).

> 4 The current version of *§ 465* provides "[t]hat no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation . . . in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law."

Furthermore, the Secretary's current interpretation is at odds with the Executive Branch's construction of this provision at the time of enactment. In correspondence with those who would assist him in implementing the IRA, the Commissioner of Indian Affairs, John Collier, explained:

> "Section 19 of the Indian Reorganization Act of June 18, 1934 (48 Stat. L., 988), provides, in effect, that the term 'Indian' as used therein shall include--(1) all persons of Indian descent who are members of any recognized tribe *that was under Federal jurisdiction at the date of the Act* . . . ." Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936), Lodging of Respondents (emphasis added).[5]

> 5 In addition to serving as Commissioner of Indian Affairs, John Collier was "a principal author of the [IRA]." *United States v. Mitchell, 463 U.S. 206, 221, n. 21, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983).* And, as both parties note, he appears to have been responsible for the insertion of the words "now under Federal jurisdiction" into what is now *25 U.S.C. § 479*. See Hearings on S. 2755 et al.: A Bill to Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise, before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p 266 (1934). Also, the record contains a 1937 letter from Commissioner Collier in which, even after the passage of the IRA, he stated that the Federal Government still lacked any jurisdiction over the Narragansett Tribe. App. 23a-24a. Commissioner Collier's responsibilities related to implementing the IRA make him an unusually persuasive source as to the meaning of the relevant statutory language and the Tribe's status under it. See *Christensen v. Harris County, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000)* (explaining that an Executive Branch statutory interpretation that lacks the force of law is "entitled to respect . . . to the extent that those interpretations have the 'power to persuade'" (internal quotation marks omitted)).

Thus, although we do not defer to Commissioner Collier's interpretation of this unambiguous statute, see *Estate of* [*391] *Cowart v. Nicklos Drilling Co., 505 U.S. 469, 476, 112 S. Ct. 2589, 120 L. Ed. 2d 379 (1992)*, we agree with his conclusion that [HN7] [***LEdHR7] [7] the word "now" in *§ 479* limits the definition of "Indian," and therefore limits the exercise of the Secretary's trust authority under *§ 465* to those members of tribes that were under federal jurisdiction at the time the IRA was enacted.

[**1066] The Secretary makes two other arguments in support of his contention that the term "now" as used in *§ 479* is ambiguous. We reject them both. First, the Secretary argues that although the "use of 'now' can refer to the time of enactment" in the abstract, "it can also refer to the time of the statute's application." Brief for Respondents 18. But [HN8] [***LEdHR8] [8] the susceptibility of the word "now" to alternative meanings "does not render the word . . . whenever it is used, ambiguous," particularly where "all but one of the meanings is ordinarily eliminated by [***802] context." *Deal v. United States, 508 U.S. 129, 131-132, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993).* Here, the statutory context makes clear that "now" does not mean "now or hereafter" or "at the time of application." Had Congress intended to legislate such a definition, it could have done so explicitly, as it did in *§§ 468* and *472*, or it could have

omitted the word "now" altogether. Instead, Congress limited the statute by the word "now" and [HN9] [***LEdHR9] [9] "we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp., 442 U.S. 330, 339, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*.

Second, the Secretary argues that *§ 479* left a gap for the agency to fill by using the phrase "shall include" in its introductory clause. Brief for Respondents 26-27. The Secretary, in turn, claims to have permissibly filled that gap by defining "'Tribe'" and "'Individual Indian'" without reference to the date of the statute's enactment. *Id.*, at 28 (citing *25 CFR §§ 151.2(b), (c)(1) (2008)*). But, as explained above, Congress left no gap in *25 U.S.C. § 479* for the agency to fill. Rather, it explicitly and comprehensively defined the term by including only three discrete definitions: "[1] members of any recognized Indian tribe now under Federal jurisdiction, [*392] and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and . . . [3] all other persons of one-half or more Indian blood." *Ibid.* In other statutory provisions, Congress chose to expand the Secretary's authority to particular Indian tribes not necessarily encompassed within the definitions of "Indian" set forth in *§ 479*.[6] Had it understood the word "include" in *§ 479* to encompass tribes other than those satisfying one of the three *§ 479* definitions, Congress would have not needed to enact these additional statutory references to specific Tribes.

> 6 See, *e.g., 25 U.S.C. § 473a* ("*Sections . . . 465 . . .* and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska"); *§ 1041e(a)* ("The [Shawnee] Tribe shall be eligible to have land acquired in trust for its benefit pursuant to *section 465* of this title . . ."); *§ 1300b-14(a)* ("*[Sections 465* and *479* of this title are] hereby made applicable to the [Texas] Band [of Kickapoo Indians] . . ."); *§ 1300g-2(a)* ("[*Sections 465* and *479*] shall apply to the members of the [Ysleta del Ser Pueblo] tribe, the tribe, and the reservation").

The Secretary and his *amici* also go beyond the statutory text to argue that Congress had no policy justification for limiting the Secretary's trust authority to those tribes under federal jurisdiction in 1934, because the IRA was intended to strengthen Indian communities as a whole, regardless of their status in 1934. Petitioners counter that the main purpose of *§ 465* was to reverse the loss of lands that Indians sustained under the General Allotment Act, see *Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650, n. 1, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001)*, so the statute was limited to tribes under federal jurisdiction at that time because they were the tribes who lost their lands. We need not consider these competing policy views, because Congress' use of the word "now" in *§ 479* speaks for itself and [HN10] [***LEdHR10] [10] "courts must presume that a legislature says in a statute [**1067] what it means and means in a statute what it says there." [*393] *Connecticut Nat. Bank v.* [***803] *Germain, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)*.[7]

> 7 Because we conclude that the language of *§ 465* unambiguously precludes the Secretary's action with respect to the parcel of land at issue in this case, we do not address petitioners' alternative argument that the Rhode Island Indian Claims Settlement Act, 92 Stat. 813, *25 U.S.C. § 1701 et seq.*, precludes the Secretary from exercising his authority under *§ 465*.

III

The Secretary and his supporting *amici* also offer two alternative arguments that rely on statutory provisions other than the definition of "Indian" in *§ 479* to support the Secretary's decision to take this parcel into trust for the Narragansett Tribe. We reject both arguments.

First, the Secretary and several *amici* argue that the definition of "Indian" in *§ 479* is rendered irrelevant by the broader definition of "tribe" in *§ 479* and by the fact that the statute authorizes the Secretary to take title to lands "in the name of the United States in trust for the *Indian tribe* or individual Indian for which the land is acquired." *§ 465* (emphasis added); Brief for Respondents 12-14. But the definition of "tribe" in *§ 479* itself refers to "any *Indian* tribe" (emphasis added), and therefore is limited by the temporal restrictions that apply to *§ 479*'s definition of "Indian." See *§ 479* ("The term 'tribe' wherever used in this Act shall be construed to refer to any *Indian* tribe, organized band, pueblo, or the Indians residing on one reservation" (emphasis added)). And, although *§ 465* authorizes the United States to take land in trust for an Indian tribe, *§ 465* limits the Secretary's exercise of that authority "for the purpose of providing land for Indians." There simply is no legitimate way to circumvent the definition of "Indian" in delineating the Secretary's authority under *§§ 465* and *479*.[8]

> 8 For this reason, we disagree with the argument made by Justice Stevens that the term "Indians" in *§ 465* has a different meaning than the definition of "Indian" provided in *§ 479*, and that the term's meaning in *§ 465* is controlled by later-enacted regulations governing the Secretary's recognition of tribes like the Narragansetts. See *post, at* ____ - ____, ____ - ____, *172 L. Ed. 2d,*

at 809-811, 812-814 (dissenting opinion). [HN11] [***LEdHR11] [11] When Congress has enacted a definition with "detailed and unyielding provisions," as it has in *§ 479*, this Court must give effect to that definition even when "'it could be argued that the line should have been drawn at a different point.'" *INS v. Hector, 479 U.S. 85, 88-89, 107 S. Ct. 379, 93 L. Ed. 2d 326 (1986) (per curiam)* (quoting *Fiallo v. Bell, 430 U.S. 787, 798, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977))*.

[*394] Second, *amicus* National Congress of American Indians (NCAI) argues that *25 U.S.C. § 2202*, which was enacted as part of the Indian Land Consolidation Act (ILCA), Title II, 96 Stat. 2517, overcomes the limitations set forth in *§ 479* and, in turn, authorizes the Secretary's action. *Section 2202* provides:

> [HN12] [***LEdHR12] [12]"The provisions of *section 465* of this title shall apply to all tribes notwithstanding the provisions of *section 478* of this title: *Provided*, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s)."

NCAI argues that the "ILCA independently grants authority under *Section 465* for the Secretary to execute the challenged trust acquisition." NCAI Brief 8. We do not agree.

The plain language of *§ 2202* does not expand the power set forth in [***804] *§ 465*, which requires that the Secretary take land into [**1068] trust only "for the purpose of providing land for Indians." Nor does *§ 2202* alter the definition of "Indian" in *§ 479*, which is limited to members of tribes that were under federal jurisdiction in 1934.[9] See *supra, at ____ - ____, 172 L. Ed. 2d, at 799-803*. Rather, *§ 2202* by its terms simply ensures that tribes may benefit from *§ 465* even if they opted out of the IRA pursuant to [*395] *§ 478*, which allowed tribal members to reject the application of the IRA to their tribe. *§ 478* ([HN13] [***LEdHR13] [13] "This Act shall not apply to any reservation wherein a majority of the adult Indians . . . shall vote against its application"). As a result, there is no conflict between *§ 2202* and the limitation on the Secretary's authority to take lands contained in *§ 465*. Rather, *§ 2202* provides additional protections to those who satisfied the definition of "Indian" in *§ 479* at the time of the statute's enactment, but opted out of the IRA shortly thereafter.

9 NCAI notes that the ILCA's definition of "tribe" "means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust." *§ 2201*. But *§ 2201* is, by its express terms, applicable only to Chapter 24 of Title 25 of the United States Code. *Ibid.* The IRA is codified in Chapter 14 of Title 25. See *§ 465*. *Section 2201*, therefore, does not itself alter the authority granted to the Secretary by *§ 465*.

NCAI's reading of *§ 2202* also would nullify the plain meaning of the definition of "Indian" set forth in *§ 479* and incorporated into *§ 465*. Consistent with our obligation to give effect to every provision of the statute, *Reiter, 442 U.S., at 339, 99 S. Ct. 2326, 60 L. Ed. 2d 931*, we will not assume that Congress repealed the plain and unambiguous restrictions on the Secretary's exercise of trust authority in *§§ 465* and *479* when it enacted *§ 2202*. "We have repeatedly stated . . . that [HN14] [***LEdHR14] [14] absent 'a clearly expressed congressional intention,' . . . [a]n implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith, 538 U.S. 254, 273, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (2003)* (plurality opinion) (quoting *Morton v. Mancari, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)*, and *Posadas v. National City Bank, 296 U.S. 497, 503, 56 S. Ct. 349, 80 L. Ed. 351 (1936))*.

IV

We hold that [HN15] [***LEdHR15] [15] the term "now under Federal jurisdiction" in *§ 479* unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934. None of the parties or *amici*, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934. And the evidence in the record is to the contrary. *48 Fed. Reg. 6177*. Moreover, the petition for writ of certiorari filed in this case specifically represented that "[i]n 1934, the Narragansett Indian Tribe . . . was neither federally recognized nor under the jurisdiction [*396] of the federal government." Pet. for Cert. 6. Respondents' brief in opposition declined to contest this assertion. See Brief in Opposition 2-7. Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case. See this Court's *Rule 15.2*. We therefore reverse the judgment of the Court of Appeals.

It is so ordered.

CONCUR BY: BREYER; SOUTER (In Part)

CONCUR

[***805] JUSTICE BREYER, concurring.

I join the Court's opinion with three qualifications. *First*, I cannot say that the statute's language by itself is determinative. Linguistically speaking, the word "now" in the phrase "now under Federal [**1069] jurisdiction," *25 U.S.C. § 479*, may refer to a tribe's jurisdictional status as of 1934. But one could also read it to refer to the time the Secretary of the Interior exercises his authority to take land "for Indians." *§ 465*. Compare *Montana v. Kennedy, 366 U.S. 308, 311-312, 81 S. Ct. 1336, 6 L. Ed. 2d 313 (1961)* ("now" refers to time of statutory enactment), with *Difford v. Secretary of Health and Human Servs., 910 F.2d 1316, 1320 (CA6 1990)* ("now" refers to time of exercise of delegated authority); *In re Lusk's Estate, 336 Pa. 465, 467-468, 9 A.2d 363, 365 (1939)* (property "now" owned refers to property owned when a will becomes operative). I also concede that the Court owes the Interior Department the kind of interpretive respect that reflects an agency's greater knowledge of the circumstances in which a statute was enacted, cf. *Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944)*. Yet because the Department then favored the Court's present interpretation, see *infra, at ___, 172 L. Ed. 2d, at 805*, that respect cannot help the Department here.

Neither can *Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*, help the Department. The scope of the word "now" raises an interpretive question of considerable importance; the provision's legislative history makes clear that Congress focused directly upon that language, believing it definitively resolved a specific underlying [*397] difficulty; and nothing in that history indicates that Congress believed departmental expertise should subsequently play a role in fixing the temporal reference of the word "now." These circumstances indicate that Congress did not intend to delegate interpretive authority to the Department. Consequently, its interpretation is not entitled to *Chevron* deference, despite linguistic ambiguity. See *United States v. Mead Corp., 533 U.S. 218, 227, 229-230, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001)*.

Second, I am persuaded that "now" means "in 1934" not only for the reasons the Court gives but also because an examination of the provision's legislative history convinces me that Congress so intended. As I read that history, it shows that Congress expected the phrase would make clear that the Secretary could employ *§ 465*'s power to take land into trust in favor only of those tribes in respect to which the Federal Government already had the kinds of obligations that the words "under Federal jurisdiction" imply. See Hearings on S. 2755 et al.: A Bill to Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise, before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, pp. 263-266 (1934). Indeed, the very Department official who suggested the phrase to Congress during the relevant legislative hearings subsequently explained its meaning in terms that the Court now adopts. See Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936), Lodging of Respondents (explaining that *§ 479* included "persons of Indian descent who are members of any recognized tribe that [***806] was under Federal jurisdiction at the date of the Act").

Third, an interpretation that reads "now" as meaning "in 1934" may prove somewhat less restrictive than it at first appears. That is because a tribe may have been "under Federal jurisdiction" in 1934 even though the Federal Government did not believe so at the time. We know, for example, [*398] that following the Indian Reorganization Act's enactment, the Department compiled a list of 258 Tribes covered by the Act; and we also know that it wrongly left certain tribes off the list. See Brief for Law Professors Specializing in Federal Indian Law as *Amicus Curiae* 22-24; Quinn, Federal Acknowledgment of American Indian [**1070] Tribes: Historical Development of a Legal Concept, 34 Am. J. Legal Hist. 331, 356-359 (1990). The Department later recognized some of those Tribes on grounds that showed that it should have recognized them in 1934 even though it did not. And the Department has sometimes considered that circumstance sufficient to show that a tribe was "under Federal jurisdiction" in 1934 -- even though the Department did not know it at the time.

The statute, after all, imposes no time limit upon recognition. See *§ 479* ("The term 'Indian' . . . shall include all persons of Indian descent who are members of *any recognized* Indian tribe now under Federal jurisdiction . . . " (emphasis added)). And administrative practice suggests that the Department has accepted this possibility. The Department, for example, did not recognize the Stillaguamish Tribe until 1976, but its reasons for recognition in 1976 included the fact that the Tribe had maintained treaty rights against the United States since 1855. Consequently, the Department concluded that land could be taken into trust for the Tribe. See Memorandum from Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980), Lodging of Respondents 6-7. Similarly, in 1934 the Department thought that the Grand Traverse Band of Ottawa and Chippewa Indians had long since been dissolved. *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney for Western*

Dist. of Mich., 369 F.3d 960, 961, and n. 2 (CA6 2004). But later the Department recognized the Tribe, considering it to have existed continuously since 1675. *45 Fed. Reg. 19321* [*399] *(1980).* Further, the Department in the 1930's thought that an anthropological study showed that the Mole Lake Tribe no longer existed. But the Department later decided that the study was wrong, and it then recognized the Tribe. See Memorandum from the Solicitor to the Commissioner of Indian Affairs 2758, 2762-2763 (Feb. 8, 1937) (recognizing the Mole Lake Indians as a separate Tribe).

In my view, this possibility -- that later recognition reflects earlier "Federal jurisdiction" -- explains some of the instances of early Department administrative practice to which JUSTICE STEVENS refers. I would explain the other instances to which JUSTICE STEVENS refers as involving the taking of land "for" a tribe with members who fall under that portion of the statute that defines "Indians" to include "persons of one-half or more Indian blood," *§ 479*. See 1 Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917-1974, pp. 706-707 (Shoshone Indians), 724-725 (St. Croix Chippewas), 747-748 (Nahma and Beaver Indians) (1979).

[***807] Neither the Narragansett Tribe nor the Secretary has argued that the Tribe was under federal jurisdiction in 1934. Nor have they claimed that any member of the Narragansett Tribe satisfies the "one-half or more Indian blood" requirement. And I have found nothing in the briefs that suggests the Narragansett Tribe could prevail on either theory. Each of the administrative decisions just discussed involved post-1934 recognition on grounds that implied a 1934 relationship between the Tribe and Federal Government that could be described as jurisdictional, for example, a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office. I can find no similar indication of 1934 federal jurisdiction here. Instead, both the State and Federal Government considered the Narragansett Tribe as under *state*, but not under *federal*, jurisdiction in 1934. And until the 1970's there was "little Federal [**1071] contact with the Narragansetts [*400] as a group." Memorandum from Deputy Assistant Secretary -- Indian Affairs (Operations) to Assistant Scretary -- Indian Affairs, Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island Pursuant to 25 CFR 83, p. 8 (July 29, 1982). Because I see no realistic possibility that the Narragansett Tribe could prevail on the basis of a theory alternative to the theories argued here, I would not remand this case.

With the qualifications here expressed, I join the Court's opinion and its judgment.

DISSENT BY: Souter; Ginsburg (In Part)

DISSENT

Justice **Souter,** with whom Justice **Ginsburg** joins, concurring in part and dissenting in part.

Save as to one point, I agree with Justice Breyer's concurring opinion, which in turn concurs with the opinion of the Court, subject to the three qualifications Justice Breyer explains. I have, however, a further reservation that puts me in the dissenting column.

The disposition of the case turns on the construction of the language from *25 U.S.C. § 479*, "any recognized Indian tribe now under Federal jurisdiction." Nothing in the majority opinion forecloses the possibility that the two concepts, recognition and jurisdiction, may be given separate content. As Justice Breyer makes clear in his concurrence, the statute imposes no time limit upon recognition, and in the past, the Department of the Interior has stated that the fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at that time. See Memorandum from Associate Solicitor, Indian Affairs, to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980), Lodging of Respondents 7. And giving each phrase its own meaning would be consistent with established principles of statutory interpretation.

[*401] During oral argument, however, respondents explained that the Secretary's more recent interpretation of this statutory language had "understood recognition and under Federal jurisdiction at least with respect to tribes to be one and the same." Tr. of Oral Arg. 42. Given the Secretary's position, it is not surprising that neither he nor the Tribe raised a claim [***808] that the Tribe was under federal jurisdiction in 1934: they simply failed to address an issue that no party understood to be present. The error was shared equally all around, and there is no equitable demand that one side be penalized when both sides nodded.

I can agree with Justice Breyer that the current record raises no particular reason to expect that the Tribe might be shown to have been under federal jurisdiction in 1934, but I would not stop there. The very notion of jurisdiction as a distinct statutory condition was ignored in this litigation, and I know of no body of precedent or history of practice giving content to the condition sufficient for gauging the Tribe's chances of satisfying it. So I see no reason to deny the Secretary and the Narragansett Tribe an opportunity to advocate a construction of the "jurisdiction" phrase that might favor their position here.

I would therefore reverse and remand with opportunity for respondents to pursue a "jurisdiction" claim and respectfully dissent from the Court's straight reversal.*

> * Depending on the outcome of proceedings on remand, it might be necessary to address the second potential issue in this case, going to the significance of the Rhode Island Indian Claims Settlement Act, *25 U.S.C. § 1701 et seq.* There is no utility in confronting it now.

[**1072] Justice **Stevens,** dissenting.

Congress has used the term "Indian" in the Indian Reorganization Act of 1934 to describe those individuals who are entitled to special protections and benefits under federal Indian law. The Act specifies that benefits shall be available to individuals who qualify as Indian either as a result of [*402] blood quantum or as descendants of members of "any recognized Indian tribe now under Federal jurisdiction." *25 U.S.C. § 479.* In contesting the Secretary of the Interior's acquisition of trust land for the Narragansett Tribe of Rhode Island, the parties have focused on the meaning of "now" in the Act's definition of "Indian." Yet to my mind, whether "now" means 1934 (as the Court holds) or the present time (as respondents would have it) sheds no light on the question whether the Secretary's actions on behalf of the Narragansett were permitted under the statute. The plain text of the Act clearly authorizes the Secretary to take land into trust for Indian tribes as well as individual Indians, and it places no temporal limitation on the definition of "Indian tribe."[1] Because the Narragansett Tribe is an Indian tribe within the meaning of the Act, I would affirm the judgment of the Court of Appeals.

> 1 In *25 U.S.C. § 479,* Congress defined both "Indian" and "tribe." *Section 479* states, in relevant part: "The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. . . . The term 'tribe' wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." Notably the word "now," which is used to define one of the categories of Indians, does not appear in the definition of "tribe."

I

This case involves a challenge to the Secretary of the Interior's acquisition of a 31-acre parcel of land in Charlestown, Rhode Island, to be held [***809] in trust for the Narragansett Tribe.[2] [*403] That Tribe has existed as a continuous political entity since the early 17th century. Although it was once one of the most powerful tribes in New England, a series of wars, epidemics, and difficult relations with the State of Rhode Island sharply reduced the Tribe's ancestral landholdings.

> 2 In 1991, the Narragansett Tribe purchased the 31-acre parcel in fee simple from a private developer. In 1998, the Bureau of Indian Affairs notified the State of the Secretary's decision to take the land into unreserved trust for the Tribe. The Tribe "acquired [the land] for the express purpose of building much needed low-income Indian Housing via a contract between the Narragansett Indian Wetuomuck Housing Authority (NIWHA) and the Department of Housing and Urban Development (HUD)." App. 46a.

Two blows, delivered centuries apart, exacted a particularly high toll on the Tribe. First, in 1675, King Philip's War essentially destroyed the Tribe, forcing it to accept the Crown as sovereign and to submit to the guardianship of the Colony of Rhode Island. Then, in 1880, the State of Rhode Island passed a "detribalization" law that abolished tribal authority, ended the State's guardianship of the Tribe, and attempted to sell all tribal lands. The Narragansett originally assented to detribalization and ceded all but two acres of its ancestral land. In return, the Tribe received $5,000. See Memorandum from Deputy Assistant Secretary-Indian Affairs (Operations) to Assistant Secretary-Indian Affairs (Operations) 4 (July 29, 1982) (Recommendation for Acknowledgment).

[**1073] Recognizing that its consent to detribalization was a mistake, the Tribe embarked on a century-long campaign to recoup its losses.[3] Obtaining federal recognition was critical to this effort. The Secretary officially recognized the Narragansett as an Indian tribe in 1983, *Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177,* and with that recognition the Tribe qualified for the bundle of federal benefits established in the Indian Reorganization Act of 1934 (IRA or [*404] Act),[4] *25 U.S.C. § 461 et seq.* The Tribe's attempt to exercise one of those rights, the ability to petition the Secretary to take land into trust for the Tribe's benefit, is now vigorously contested in this litigation.

> 3 Indeed, this litigation stems in part from the Tribe's suit against (and subsequent settlement with) Rhode Island and private landowners on the

ground that the 1880 sale violated the Indian Non-Intercourse Act of June 30, 1834, § 12, 4 Stat. 730, which prohibited sales of tribal land without "treaty or convention entered into pursuant to the Constitution."

4 The IRA was the cornerstone of the Indian New Deal. "The intent and purpose of the [IRA] was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973)* (quoting H. R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). See generally F. Cohen, Handbook of Federal Indian Law § 1.05 (2005) (hereinafter Cohen); G. Taylor, The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934-45 (1980).

II

The Secretary's trust authority is located in *25 U.S.C. § 465*. That provision grants the Secretary power to take "in trust for [an] Indian tribe or individual Indian" "any interest in lands . . . for the purpose of providing land for Indians."[5] The Act's language could not be clearer: To effectuate the Act's broad mandate to [***810] revitalize tribal development and cultural self-determination, the Secretary can take land into trust for a tribe or he can take land into trust for an individual Indian.

5 *Section 465* reads more fully: "The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians. "Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

Though Congress outlined the Secretary's trust authority in *§ 465*, it specified which entities would be considered [*405] "tribes" and which individuals would qualify as "Indian" in *§ 479*. An individual Indian, *§ 479* tells us, "shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction" as well as "all other persons of one-half or more Indian blood." A tribe, *§ 479* goes on to state, "shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." Because federal recognition is generally required before a tribe can receive federal benefits, the Secretary has interpreted this definition of "tribe" to refer only to recognized tribes. See *25 CFR § 83.2 (2008)* (stating that recognition "is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes"); *§ 151.2* (defining "tribe" for the purposes [**1074] of land acquisition to mean "any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs").[6]

6 The regulations that govern the tribal recognition process, 25 CFR § 83 *et seq.* (2008), were promulgated pursuant to the President's general mandate established in the early 1830's to manage "all Indian affairs and . . . all matters arising out of Indian relations," *25 U.S.C. § 2*, and to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs," *§ 9*. Thus, contrary to the argument pressed by the Governor of Rhode Island before this Court, see Reply Brief for Petitioner Carcieri 9, the requirement that a tribe be federally recognized before it is eligible for trust land does not stem from the IRA.

Having separate definitions for "Indian" and "tribe" is essential for the administration of IRA benefits. The statute reflects Congress' intent to extend certain benefits to individual Indians, *e.g., 25 U.S.C. § 471* (offering loans to Indian students for tuition at vocational and trade schools); *§ 472* (granting hiring preferences to Indians seeking federal employment related to Indian affairs), while directing other benefits to tribes, *e.g., § 476* (allowing tribes to adopt constitutions [*406] and bylaws); *§ 470* (giving loans to Indian-chartered corporations).

Section 465, by giving the Secretary discretion to steer benefits to tribes and individuals alike, is therefore unique. But establishing this broad benefit scheme was undoubtedly intentional: The original draft of the IRA presented to Congress directed the Secretary to take land into trust only for entities such as tribes. Compare H. R. 7902, 73d Cong., 2d Sess., 30 (1934) ("Title to any land acquired pursuant to the provisions of this section shall be taken in the name of the United States in trust *for the Indian tribe or community for whom the land is acquired*" (emphasis added)), with [***811] *25 U.S.C. § 465* ("Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United

States in trust *for the Indian tribe or individual Indian for which the land is acquired*" (emphasis added)).

The Secretary has long exercised his *§ 465* trust authority in accordance with this design. In the years immediately following the adoption of the IRA, the Solicitor of the Department of the Interior repeatedly advised that the Secretary could take land into trust for federally recognized tribes and for individual Indians who qualified for federal benefits by lineage or blood quantum.

For example, in 1937, when evaluating whether the Secretary could purchase approximately 2,100 acres of land for the Mole Lake Chippewa Indians of Wisconsin, the Solicitor instructed that the purchase could not be "completed until it is determined whether the beneficiary of the trust title should be designated as a band or whether the title should be taken for the individual Indians in the vicinity of Mole Lake who are of one half or more Indian blood." Memorandum from Solicitor to Commissioner of Indian Affairs 2758 (Feb. 8, 1937). Because the Mole Lake Chippewa was not yet recognized by the Federal Government as an Indian tribe, the Solicitor determined that the Secretary had two options: "Either the Department should provide recognition [*407] of this group, or title to the purchased land should be taken on behalf of the individuals who are of one half or more Indian blood." *Id.*, at 2763.

The tribal trust and individual trust options were similarly outlined in other post-1934 opinion letters, including those dealing [**1075] with the Shoshone Indians of Nevada, the St. Croix Chippewa Indians of Wisconsin, and the Nahma and Beaver Island Indians of Michigan. See 1 Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917-1974, pp 706-707, 724-725, 747-748 (1979). Unless and until a tribe was formally recognized by the Federal Government and therefore eligible for trust land, the Secretary would take land into trust for individual Indians who met the blood quantum threshold.

Modern administrative practice has followed this well-trodden path. Absent a specific statute recognizing a tribe and authorizing a trust land acquisition,[7] the Secretary has exercised his trust authority--now governed by regulations promulgated in 1980 after notice-and-comment rulemaking, *25 CFR § 151 et seq. 45 Fed. Reg. 62034* --to acquire land [*408] for federally recognized Indian tribes like the [***812] Narragansett. The Grand Traverse Band of Ottowa and Chippewa Indians, although denied federal recognition in 1934 and 1943, see Dept. of Interior, Office of Federal Acknowledgement, Memorandum from Acting Deputy Commissioner to Assistant Secretary 4 (Oct. 3, 1979) (GTB-V001-D002), was the first tribe the Secretary recognized under the 1980 regulations, see *45 Fed. Reg. 19322*. Since then, the Secretary has used his trust authority to expand the Tribe's land base. See, *e.g.*, 49 Fed. Reg. 2025-2026 (1984) (setting aside a 12.5-acre parcel as reservation land for the Tribe's exclusive use). The Tunica-Biloxi Tribe of Louisiana has similarly benefited from administrative recognition, *46 Fed. Reg. 38411 (1981)*, followed by tribal trust acquisition. And in 2006, the Secretary took land into trust for the Snoqualmie Tribe which, although unrecognized as an Indian tribe in the 1950's, regained federal recognition in 1999. See *71 Fed. Reg. 5067* (taking land into trust for the Tribe); *62 Fed. Reg. 45864 (1997)* (recognizing the Snoqualmie as an Indian tribe).

> 7 Although Congress has passed specific statutes granting the Secretary authority to take land into trust for certain tribes, it would be a mistake to conclude that the Secretary lacks residual authority to take land into trust under *25 U.S.C. § 465* of the IRA. Some of these statutes place explicit limits on the Secretary's trust authority and can be properly read as establishing the outer limit of the Secretary's trust authority with respect to the specified tribes. See, *e.g.*, *§ 1724(d)* (authorizing trust land for the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe of Maine, and the Penobscot Tribe of Maine). Other statutes, while identifying certain parcels the Secretary will take into trust for a tribe, do not purport to diminish the Secretary's residual authority under *§ 465*. See, *e.g.*, *§ 1775c(a)* (Mohegan Tribe); *§ 1771d* (Wampanoag Tribe); *§ 1747(a)* (Miccosukee Tribe). Indeed, the Secretary has invoked his *§ 465* authority to take additional land into trust for the Miccosukee Tribe despite the existence of a statute authorizing and directing him to acquire certain land for the Tribe. See Post-Argument En Banc Brief for National Congress of American Indians et al. as *Amici Curiae* 7 and App. 9 in No. 03-2647 (CA1).

This brief history of *§ 465* places the case before us into proper context. Federal recognition, regardless of when it is conferred, is the necessary condition that triggers a tribe's eligibility to receive trust land. No party has disputed that the Narragansett Tribe was properly recognized as an Indian tribe in 1983. See 48 Fed. Reg. 6178. Indeed, given that the Tribe has a documented history that stretches back to 1614 and has met the rigorous criteria for administrative recognition, Recommendation for Acknowledgment 1, 7-18, it would be difficult to sustain an objection to the Tribe's status. With this in mind, and in light of the Secretary's longstanding authority under the plain text of the IRA to acquire tribal trust land, it is perfectly clear that the Sec-

retary's land [**1076] acquisition for the Narragansett was entirely proper.

[*409] III

Despite the clear text of the IRA and historical pedigree of the Secretary's actions on behalf of the Narragansett, the majority holds that one word ("now") nestled in one clause in one of *§ 479*'s several definitions demonstrates that the Secretary acted outside his statutory authority in this case. The consequences of the majority's reading are both curious and harsh: curious because it turns "now" into the most important word in the IRA, limiting not only some individuals' eligibility for federal benefits but also a tribe's; harsh because it would result in the unsupportable conclusion that, despite its 1983 administrative recognition, the Narragansett Tribe is not an Indian tribe under the IRA.

In the Court's telling, when Congress granted the Secretary power to acquire trust land "for the purpose of providing land for *Indians*," *25 U.S.C. § 465* (emphasis added), it meant to permit land acquisitions for those persons whose tribal membership qualify them as "Indian" as defined by *§ 479*. In other words, the argument runs, the Secretary can acquire trust land for "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *§ 479*. This strained construction, advanced by petitioners, explains the majority's laser-like focus on the meaning of "now": If the Narragansett Tribe was not recognized or under federal jurisdiction in 1934, the Tribe's members do not belong to an Indian tribe "now under Federal jurisdiction" [***813] and would therefore not be "Indians" under *§ 465* by virtue of their tribal membership.

Petitioners' argument works only if one reads "Indians" (in the phrase in *§ 465* "providing land for Indians") to refer to individuals, not an Indian tribe. To petitioners, this reading is obvious; the alternative, they insist, would be "nonsensical." Reply Brief for Petitioner State of Rhode Island 3. This they argue despite the clear evidence of Congress' intent to provide the Secretary with the option of acquiring [*410] either tribal trusts or individual trusts in service of "providing land for Indians." And they ignore unambiguous evidence that Congress used "Indian tribe" and "Indians" interchangeably in other parts of the IRA. See *§ 475* (discussing "any claim or suit of any *Indian tribe* against the United States" in the first sentence and "any claim of such *Indians* against the United States" in the last sentence (emphasis added)).

In any event, this much must be admitted: Without the benefit of context, a reasonable person could conclude that "Indians" refers to multiple individuals who each qualify as "Indian" under the IRA. An equally reasonable person could also conclude that "Indians" is meant to refer to a collective, namely, an Indian tribe. Because "[t]he meaning--or ambiguity--of certain words or phrases may only become evident when placed in context," *FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000)*, the proper course of action is to widen the interpretive lens and look to the rest of the statute for clarity. Doing so would lead to *§ 465*'s last sentence, which specifies that the Secretary is to hold land in trust "for the Indian tribe or individual Indian for which the land is acquired." Put simply, in *§ 465* Congress used the term "Indians" to refer both to tribes and individuals.[8]

8 The majority continues to insist, quite incorrectly, that Congress meant the term "Indians" in *§ 465* to have the same meaning as the term "Indian" in *§ 479*. That the text of the statute tells a different story appears to be an inconvenience the Court would rather ignore.

[**1077] The majority nevertheless dismisses this reading of the statute. The Court notes that even if the Secretary has authority to take land into trust for a tribe, it must be an "*Indian* tribe," with *§ 479*'s definition of "Indian" determining a tribe's eligibility. The statute's definition of "tribe," the majority goes on to state, itself makes reference to "Indian tribe." Thus, the Court concludes, "[t]here simply is no legitimate way to circumvent the definition of 'Indian' in delineating [*411] the Secretary's authority under *§ 479*." *Ante, at ____, 172 L. Ed. 2d, at 803*.

The majority bypasses a straightforward explanation on its way to a circular one. Requiring that a tribe be an "Indian tribe" does not demand immediate reference to the definition of "Indian"; instead, it simply reflects the requirement that the tribe in question be formally recognized as an Indian tribe. As explained above, the Secretary has limited benefits under federal Indian law--including the acquisition of trust land--to recognized tribes. Recognition, then, is the central requirement for being considered an "Indian tribe" for purposes of the Act. If a tribe satisfies the stringent criteria established by the Secretary to qualify for federal recognition, including the requirement that the tribe prove that it "has existed as a community from historical times until the present," *25 CFR § 83.7(b) (2008)*, [***814] it is *a fortiori* an "Indian tribe" as a matter of law.

The Narragansett Tribe is no different. In 1983, upon meeting the criteria for recognition, the Secretary gave notice that "the Narragansett Indian Tribe . . . exists as an *Indian tribe*." *48 Fed. Reg. 6177* (emphasis added). How the Narragansett could be an Indian tribe in 1983 and yet not be an Indian tribe today is a proposition the majority cannot explain.

The majority's retort, that because "tribe" refers to "Indian," the definition of "Indian" must control which groups can be considered a "tribe," is entirely circular. Yes, the word "tribe" is defined in part by reference to "Indian tribe." But the word "Indian" is also defined in part by reference to "Indian tribe." Relying on one definition to provide content to the other is thus "completely circular and explains nothing." *Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992).*

The Governor of Rhode Island, for his part, adopts this circular logic and offers two examples of why reading the statute any other way would be implausible. He first argues [*412] that if *§ 479*'s definition of "Indian" does not determine a tribe's eligibility, the Secretary would have authority to take land into trust "for the benefit of any group that he deems, at his whim and fancy, to be an 'Indian tribe.'" Reply Brief for Petitioner Carcieri 7. The Governor caricatures the Secretary's discretion. This Court has long made clear that Congress--and therefore the Secretary--lacks constitutional authority to "bring a community or body of people within [federal jurisdiction] by arbitrarily calling them an Indian tribe." *United States v. Sandoval, 231 U.S. 28, 46, 34 S. Ct. 1, 58 L. Ed. 107 (1913).* The Governor's next objection, that condoning the acquisition of trust land for the Narragansett Tribe would allow the Secretary to acquire land for an Indian tribe that lacks Indians, is equally unpersuasive. As a general matter, to obtain federal recognition, a tribe must demonstrate that its "membership consists of individuals who descend from a historical Indian tribe or from historical [**1078] Indian tribes which combined and functioned as a single autonomous political entity." *25 CFR § 83.7(e) (2008).* If the Governor suspects that the Narragansett is not an Indian tribe because it may lack members who are blood quantum Indians, he should have challenged the Secretary's decision to recognize the Tribe in 1983 when such an objection could have been properly received.[9]

> 9 The Department of the Interior found "a high degree of retention of [Narragansett] family lines" between 1880 and 1980, and remarked that "[t]he close intermarriage and the stability of composition, plus the geographic stability of the group, reflect the maintenance of a socially distinct community." Recommendation for Acknowledgment 10. It also noted that the Narragansett "require applicants for full voting membership to trace their Narragansett Indian bloodlines back to the 'Detribalization Rolls of 1880-84.'" *Id.*, at 16. The record in this case does not tell us how many members of the Narragansett currently qualify as "Indian" by meeting the individual blood quantum requirement. Indeed, it is possible that a significant number of the Narragansett are blood quantum Indians. Accordingly, nothing the Court decides today prevents the Secretary from taking land into trust for those members of the Tribe who independently qualify as "Indian" under *25 U.S.C. § 479*. Although the record does not demonstrate how many members of the Narragansett qualify as blood quantum Indians, Justice Breyer nevertheless assumes that no member of the Tribe is a blood quantum Indian. *Ante, at ____, 172 L. Ed. 2d, at 806-807* (concurring opinion). This assumption is misguided for two reasons. To start, the record's silence on this matter is to be expected; the parties have consistently focused on the Secretary's authority to take land into trust for the Tribe, not for individual members of the Tribe. There is thus no legitimate basis for interpreting the lack of record evidence as affirmative proof that none of the Tribe's members are "Indian." Second, neither the statute nor the relevant regulations mandate that a tribe have a threshold amount of blood quantum Indians as members in order to receive trust land. Justice Breyer's unwarranted assumption about the Narragansett's membership, even if true, would therefore also be irrelevant to whether the Secretary's actions were proper.

[*413] In sum, petitioners' arguments --and the Court's conclusion--are [***815] based on a misreading of the statute. "[N]ow," the temporal limitation in the definition of "Indian," only affects an individual's ability to qualify for federal benefits under the IRA. If this case were about the Secretary's decision to take land into trust for an individual who was incapable of proving her eligibility by lineage or blood quantum, I would have no trouble concluding that such an action was contrary to the IRA. But that is not the case before us. By taking land into trust for a validly recognized Indian Tribe, the Secretary acted well within his statutory authority.[10]

> 10 Petitioners advance the additional argument that the Secretary lacks authority to take land into trust for the Narragansett because the Rhode Island Indian Claims Settlement Act, 92 Stat. 813, *25 U.S.C. § 1701 et seq.*, implicitly repealed the Secretary's *§ 465* trust authority as applied to lands in Rhode Island. This claim plainly fails. While the Tribe agreed to subject the 1,800 acres it obtained in the Settlement Act to the State's civil and criminal laws, *§ 1708(a)*, the 31-acre parcel of land at issue here was not part of the settlement lands. And, critically, nothing in the text of the Settlement Act suggests that Congress intended to prevent the Secretary from acquiring

additional parcels of land in Rhode Island that would be exempt from the State's jurisdiction.

IV

The Court today adopts a cramped reading of a statute Congress intended to be "sweeping" in scope. *Morton v. Mancari, 417 U.S. 535, 542, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)*. In so doing, the Court [*414] ignores the "principle deeply rooted in [our] Indian jurisprudence" that "'statutes are to be construed liberally in favor of the Indians.'" *County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 269, 112 S. Ct. 683,* [**1079] *116 L. Ed. 2d 687 (1992)* (quoting *Montana v. Blackfeet Tribe, 471 U.S. 759, 767-768, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985)*); see also Cohen § 2.02[1], p 119 ("The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians").

Given that the IRA plainly authorizes the Secretary to take land into trust for an Indian tribe, and in light of the Narragansett's status as such, the Court's decision can be best understood as protecting one sovereign (the State) from encroachment from another (the Tribe). Yet in matters of Indian law, the political branches have been entrusted to mark the proper boundaries between tribal and state jurisdiction. See *U.S. Const., Art. I, § 8, cl. 3*; *Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989)*; *Worcester v. Georgia, 31 U.S. 515, 6 Pet. 515, 559, 8 L. Ed. 483 (1832)*. With the IRA, Congress drew the boundary in a manner that favors the Narragansett. I respectfully dissent.

REFERENCES
25 U.S.C.S. § 479

4 Antieau on Local Government Law § 57.08 (Matthew Bender 2d ed.)

9 Powell on Real Property, Ch. 67 (Matthew Bender)

L Ed Digest, Indians § 43

L Ed Index, Indians

Supreme Court's views as to doctrine requiring exhaustion of tribal court remedies before some civil cases can proceed in federal court. *143 L. Ed. 2d 1085.*

132 S. Ct. 2199, *; 183 L. Ed. 2d 211, **;
2012 U.S. LEXIS 4659, ***; 80 U.S.L.W. 4483

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS, PETITIONER 11-246 v. DAVID PATCHAK ET AL. KEN L. SALAZAR, SECRETARY OF THE INTERIOR, 11-247 ET AL., PETITIONERS v. DAVID PATCHAK ET AL.

Nos. 11-246 and 11-247.

SUPREME COURT OF THE UNITED STATES

132 S. Ct. 2199*; *183 L. Ed. 2d 211*; *2012 U.S. LEXIS 4659*; *80 U.S.L.W. 4483*; *42 ELR 20126*; *23 Fla. L. Weekly Fed. S 393

April 24, 2012, Argued
June 18, 2012, Decided * *Together with No. 11-247, Salazar, Secretary of the Interior, et al. v. Patchak et al., also on certiorari to the same court.

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [***1]

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Patchak v. Salazar, 632 F.3d 702, 394 U.S. App. D.C. 138, 2011 U.S. App. LEXIS 2568 (2011)

DISPOSITION: Affirmed and Remanded.

SYLLABUS

[*2200] [**214] The Indian Reorganization Act (IRA) authorizes the Secretary of the Interior to acquire property "for the purpose of providing land to Indians." *25 U.S.C. § 465*. Petitioner Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Band), an Indian tribe federally recognized in 1999, requested [**215] that the Secretary take into trust on its behalf a tract of land known as [*2201] the Bradley Property, which the Band intended to use "for gaming purposes." The Secretary took title to the Bradley Property in 2009. Respondent David Patchak, who lives near the Bradley Property, filed suit under the Administrative Procedure Act (APA), asserting that *§ 465* did not authorize the Secretary to acquire the property because the Band was not a federally recognized tribe when the IRA was enacted in 1934. Patchak alleged a variety of economic, environmental, and aesthetic harms as a result of the Band's proposed use of the property to operate a casino, and requested injunctive and declaratory relief reversing the Secretary's decision to take title to the land. The Band intervened to defend the Secretary's [***2] decision. The District Court did not reach the merits of Patchak's suit, but ruled that he lacked prudential standing to challenge the Secretary's acquisition of the Bradley Property. The D. C. Circuit reversed and also rejected the Secretary's and the Band's alternative argument that sovereign immunity barred the suit.

Held:

1. The United States has waived its sovereign immunity from Patchak's action. The APA's general waiver of the Federal Government's immunity from suit does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" by the plaintiff. *5 U.S.C. § 702*. The Government and Band contend that the Quiet Title Act (QTA) is such a statute. The QTA authorizes (and so waives the Government's sovereign immunity from) a suit by a plaintiff asserting a "right, title, or interest" in real property that conflicts with a "right, title, or interest" the United States claims. *28 U.S.C. § 2409a(d)*. But it contains an exception for "trust or restricted Indian lands." *§ 2409a(a)*.

To determine whether the "Indian lands" exception bars Patchak's suit, the Court considers whether the QTA addresses the kind of grievance Patchak advances. [***3] It does not, because Patchak's action is not a quiet title action. The QTA, from its title to its jurisdictional grant to its venue provision, speaks specifically and repeatedly of "quiet title" actions, a term universally understood to refer to suits in which a plaintiff not only challenges someone else's claim, but also asserts his own right to disputed property. Although Patchak's suit contests the Secretary's title, it does not claim any competing interest in the Bradley Property.

Contrary to the argument of the Band and Government, the QTA does not more broadly encompass any "civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest." *§ 2409a(a)*. Rather, *§ 2409a* includes a host of indications that the "civil action" at issue is an ordinary quiet title suit. The Band and Government also contend that the

QTA's specific authorization of adverse claimants' suits creates the negative implication that non-claimants like Patchak cannot challenge Government ownership of land under any statute. That argument is faulty for the reason already given: Patchak is bringing a different claim, seeking different relief, from the kind the QTA addresses. [***4] Finally, the Band and Government argue that Patchak's suit should be treated the same as an adverse claimant's because both equally implicate the "Indian lands" exception's policies. That argument must be addressed to [**216] Congress. The "Indian lands" exception reflects Congress's judgment about how far to allow quiet title suits-not all suits challenging the Government's ownership of property. Pp. 4 - 14.

2. Patchak has prudential standing to challenge the Secretary's acquisition. A person suing under the APA must assert [*2202] an interest that is "arguable within the zone of interests to be protected or regulated by the statute" that he says was violated. *Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184*. The Government and Band claim that Patchak's economic, environmental, and aesthetic injuries are not within § 465's zone of interests because the statute focuses on land acquisition, while Patchak's injuries relate to the land's use as a casino. However, *§ 465* has far more to do with land use than the Government and Band acknowledge. *Section 465* is the capstone of IRA's land provisions, and functions as a primary mechanism to foster Indian tribes' economic [***5] development. The Secretary thus takes title to properties with an ey toward how tribes will use those lands to support such development. The Department's regulations make this statuory concern with land use clear, requiring the Secretary to qcquire land with it eventual use in mind, after assessing potential conflicts that use might create. And because *§ 465* encompasses land's use, neighbors to the use (like Patchak) are reasonable - indeed, predictable - challengers of the Secretary's decisions: Their interests, whether economic, enviromental, or aesthetic, come within § 465's regularory ambit. Pp. 14-18.

632 F.3d 702, 394 U.S. App. D.C. 138, affirmed and remanded.

JUDGES: KAGAN, J., delievered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion.

OPINION BY: KAGAN

OPINION

JUSTICE KAGAN delivered the opinion of the Court.

A provision of the Indian Reorganization Act (IRA), *25 U.S.C. § 465*, authorized the Secretary of the Interior (Secretary) to acquire property "for the purpose of providing land for Indians." Ch. 576, § 5, 48 Stat. 985. The Secretary here acquired land in trust for an Indian tribe seeking to open a casino. Respondent [***6] David Patchak lives near that land and challenges the Secretary's decision in a suit brough under the Administrative Procedure Act (APA), *5 U.S.C. § 701 et seq*. Patchak [*2203] claims that the Secretary lacked authority under *§ 465* to take title to the land, and alleges economic, environmental, and aesthetic harms from the casino's operation.

We consider two questions arising from Patchak's action. The first is whether the United States has sovereign immunity from the suit by virtue of the Quiet Title Act (QTA), 86 Stat. 1176. We think it does not. The second is whether Patchak has prudential standing to challenge the Secretary's acquisition. We think he does. We therefore hold that Patchak's suit may proceed.

[**217] I

The Match-E-Be-Nash-She-Wish band of Pottawatomi Indians (Band) is an Indian tribe residing in rural Michigan. Although the Band has a long history, the Department of the Interior (DOI) formally recognized it only in 1999. See *63 Fed. Reg. 56936 (1998)*. Two years later, the Band petitioned the Secretary to exercise her authority under *§ 465* by taking into trust a tract of land in Wayland Township, Michigan, known as the Bradley Property. The Band's application explained that the Band would [***7] use the property "for gaming purposes," with the goal of generating the "revenue necessary to promote tribal economic development, self-sufficiency and a strong tribal government capable of providing its members with sorely needed social and educational programs." App. 52, 41. [1]

1 Under the Indian Gaming Regulatory Act, *25 U.S.C. §§ 2701-2721*, an Indian tribe may conduct gaming operations on "Indian lands," *§ 2710*, which include lands "held in trust by the United States for the benefit of any Indian tribe," *§ 2703(4)(B)*. The application thus requested the Secretary to take the action necessary for the Band to open a casino.

In 2005, after a lengthy administrative review, the Secretary announced her decision to acquire the Bradley Property in trust for the Band. See *70 Fed. Reg. 25596*. In accordance with applicable regulations, the Secretary committed to wait 30 days before taking action, so that interested parties could seek judicial review. See *ibid.*; *25 CFR § 151.12(b) (2011)*. Within that window, an organization called Michigan Gambling Opposition (or

MichGO) filed suit alleging that the Secretary's decision violated environmental and gaming statutes. The Secretary held off taking title [***8] to the property while that litigation proceeded. Within the next few years, a District Court and the D.C. Circuit rejected MichGO's claims. See *Michigan Gambling Opposition v. Kempthorne, 525 F.3d 23, 27-28, 381 U.S. App. D.C. 91 (CADC 2008)*; *Michigan Gambling Opposition v. Norton, 477 F. Supp. 2d 1 (DC 2007)*.

Shortly after the D. C. Circuit ruled against MichGO (but still before the Secretary took title), Patchak filed this suit under the APA advancing a different legal theory. He asserted that *§ 465* did not authorize the Secretary to acquire property for the Band because it was not a federally recognized tribe when the IRA was enacted in 1934. See App. 37. To establish his standing to bring suit, Patchak contended that he lived "in close proximity to" the Bradley Property and that a casino there would "destroy the lifestyle he has enjoyed" by causing "increased traffic," "increased crime," "decreased property values," "an irreversible change in the rural character of the area," and "other aesthetic, socioeconomic, and environmental problems." *Id., at 30-31, 381 U.S. App. D.C. 91*. Notably, Patchak did not assert any claim of his own to the Bradley Property. He requested only a declaration that the decision to acquire the land [***9] violated the IRA [*2204] and an injunction to stop the Secretary from accepting title. See *id., at 38-39, 381 U.S. App. D.C. 91*. The Band intervened in the suit to defend the Secretary's decision.

In January 2009, about five months after Patchak filed suit, this Court denied certiorari in MichGO's case, *555 U.S. 1137, 129 S. Ct. 1002, 173 L. Ed. 2d 293*, and the Secretary took the Bradley Property into trust. That action mooted Patchak's request for an injunction to prevent the acquisition, and all parties agree that the suit now effectively seeks to divest the Federal Government of title to the land. See [**218] Brief for Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians 17 (herein-after Tribal Petitioner); Brief for Federal Petitioners 11; Brief for Respondent 24-25. The month after the Government took title, this Court held in *Carcieri v. Salazar, 555 U.S. 379, 382, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009)*, that *§ 465* authorizes the Secretary to take land into trust only for tribes that were "under federal jurisdiction" in 1934. [2]

> 2 The merits of Patchak's case are not before this Court. We therefore express no view on whether the Band was "under federal jurisdiction" in 1934, as *Carcieri* requires. Nor do we consider how that question relates to Patchak's allegation that the Band was not [***10] "federally recognized" at the time. Cf. *Carcieri, 555 U. S., at 397-399, 129 S. Ct. 1058, 172 L. Ed. 2d 791* (BREYER, J., concurring) (discussing this issue).

The District Court dismissed the suit without considering the merits (including the relevance of *Carcieri*), ruling that Patchak lacked prudential standing to challenge the Secretary's acquisition of the Bradley Property. The court reasoned that the injuries Patchak alleged fell outside *§ 465*'s "zone of interests." *646 F. Supp. 2d 72, 76 (DC 2009)*. The D. C. Circuit reversed that determination. See *632 F.3d 702, 704-707, 394 U.S. App. D.C. 138 (2011)*. The court also rejected the Secretary's and the Band's alternative argument that by virtue of the QTA, sovereign immunity barred the suit. See *id., at 707-712, 394 U.S. App. D.C. 138*. The latter ruling conflicted with decisions of three Circuits holding that the United States has immunity from suits like Patchak's. See *Neighbors for Rational Development, Inc. v. Norton, 379 F.3d 956, 961-962 (CA10 2004)*; *Metropolitan Water Dist. of South-ern Cal. v. United States, 830 F.2d 139, 143-144 (CA9 1987) (per curiam)*; *Florida Dept. of Bus. Regulation v. Department of Interior, 768 F.2d 1248, 1253-1255 (CA11 1985)*. We granted certiorari to review both of the D. C. Circuit's [***11] holdings, *565 U.S. ___, 132 S. Ct. 845, 181 L. Ed. 2d 548 (2011)*, and we now affirm.

II

We begin by considering whether the United States' sovereign immunity bars Patchak's suit under the APA. That requires us first to look to the APA itself and then, for reasons we will describe, to the QTA. We conclude that the United States has waived its sovereign immunity from Patchak's action.

The APA generally waives the Federal Government's immunity from a suit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." *5 U.S.C. § 702*. That waiver would appear to cover Patchak's suit, which objects to official action of the Secretary and seeks only non-monetary relief. But the APA's waiver of immunity comes with an important carve-out: The waiver does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" by the plaintiff. *Ibid.* [***12] That provision prevents plaintiffs from exploiting the APA's waiver to evade limitations on [*2205] suit contained in other statutes. The question thus becomes whether another statute bars Patchak's demand for relief.

The Government and Band contend that the QTA does so. The QTA authorizes (and so waives the Government's sovereign immunity from) a particular type of action, known as a [**219] quiet title suit: a suit by a plaintiff asserting a "right, title, or interest" in real prop-

erty that conflicts with a "right, title, or interest" the United States claims. *28 U.S.C. § 2409a(d)* . The statute, however, contains an exception: The QTA's authorization of suit "does not apply to trust or restricted Indian lands." *§ 2409a(a)*. According to the Government and Band, that limitation on quiet title suits satisfies the APA's carve-out and so forbids Patchak's suit. In the Band's words, the QTA exception retains "the United States' full immunity from suits seeking to challenge its title to or impair its legal interest in Indian trust lands." Brief for Tribal Petitioner 18.

Two hypothetical examples might help to frame consideration of this argument. First, suppose Patchak had sued under the APA claiming that [***13] *he* owned the Bradley Property and that the Secretary therefore could not take it into trust. The QTA would bar that suit, for reasons just suggested. True, it fits within the APA's general waiver, but the QTA specifically authorizes quiet title actions (which this hypothetical suit is) *except when* they involve Indian lands (which this hypothetical suit does). In such a circumstance, a plaintiff cannot use the APA to end-run the QTA's limitations. "[W]hen Congress has dealt in particularity with a claim and [has] intended a specified remedy"-including its exceptions-to be exclusive, that is the end of the matter; the APA does not undo the judgment. *Block v. North Dakota ex rel. Board of Univ. and School Lands, 461 U.S. 273, 286, n. 22, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983)* (quoting H. R. Rep. No. 94-1656, p. 13 (1976)).

But now suppose that Patchak had sued under the APA claiming only that use of the Bradley Property was causing environmental harm, and raising no objection at all to the Secretary's title. The QTA could not bar that suit because even though involving Indian lands, it asserts a grievance altogether different from the kind the statute concerns. JUSTICE SCALIA, in a former life as Assistant Attorney General, [***14] made this precise point in a letter to Congress about the APA's waiver of immunity (which we hasten to add, given the author, we use not as legislative history, but only for its persuasive force). When a statute "is not addressed to the type of grievance which the plaintiff seeks to assert," then the statute cannot prevent an APA suit. *Id.*, at 28 (May 10, 1976, letter of Assistant Atty. Gen. A. Scalia). [3]

> 3 According to the dissent, we should look only to the kind of relief a plaintiff seeks, rather than the type of grievance he asserts, in deciding whether another statute bars an APA action. See *post*, at 6 (opinion of SOTOMAYOR, J.). But the dissent's test is inconsistent with the one we adopted in *Block*, which asked whether Congress had particularly dealt with a "claim." See *Block v. North Dakota ex rel. Board of Univ. and School Lands, 461 U.S. 273, 286, n. 22, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983)*. And the dissent's approach has no obvious limits. Suppose, for example, that Congress passed a statute authorizing a particular form of injunctive relief in a procurement contract suit except when the suit involved a "discretionary function" of a federal employee. Cf. *28 U.S.C. § 2680(a)*. Under the dissent's method, [***15] that exception would preclude *any* APA suit seeking that kind of injunctive relief if it involved a discretionary function, no matter what the nature of the claim. That implausible result demonstrates that limitations on relief cannot sensibly be understood apart from the claims to which they attach.

[*2206] We think that principle controls Patchak's case: The QTA's "Indian lands" clause does not render the Government immune because the QTA addresses a kind of griev-ance different [**220] from the one Patchak advances. As we will explain, the QTA-whose full name, recall, is the Quiet Title Act-concerns (no great surprise) quiet title actions. And Patchak's suit is *not* a quiet title action, because although it contests the Secretary's title, it does not claim any competing interest in the Bradley Property. That fact makes the QTA's "Indian lands" limitation simply inapposite to this litigation.

In reaching this conclusion, we need look no further than the QTA's text. From its title to its jurisdictional grant to its venue provision, the Act speaks specifically and repeatedly of "quiet title" actions. See 86 Stat. 1176 ("An Act [t]o permit suits to adjudicate certain real property quiet title actions"); [***16] *28 U.S.C. § 1346(f)* (giving district courts jurisdiction over "civil actions . . . to quiet title" to property in which the United States claims an interest); *§ 1402(d)* (setting forth venue for "[a]ny civil action . . . to quiet title" to property in which the United States claims an interest). That term is universally understood to refer to suits in which a plaintiff not only challenges someone else's claim, but also asserts his own right to disputed property. See, *e.g.*, Black's Law Dictionary 34 (9th ed. 2009) (defining an "*action to quiet title*" as "[a] proceeding to establish a plaintiff's title to land by compelling the adverse claimant to establish a claim or be forever estopped from asserting it"); *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., 545 U.S. 308, 315, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)* ("[T]he facts showing the plaintiffs' title . . . are essential parts of the plaintiffs' [quiet title] cause of action" (quoting *Hopkins v. Walker, 244 U.S. 486, 490, 37 S. Ct. 711, 61 L. Ed. 1270 (1917)*)).

And the QTA's other provisions make clear that the recurrent statutory term "quiet title action" carries its ordinary meaning. The QTA directs that the complaint in such an action "shall set forth with particularity the

[***17] nature of the right, title, or interest which the plaintiff claims in the real property." *28 U.S.C. § 2409a(d)*. If the plaintiff does not assert any such right (as Patchak does not), the statute cannot come into play. [4] Further, the QTA provides an option for the United States, if it loses the suit, to pay "just compensation," rather than return the property, to the "person determined to be entitled" to it. *§ 2409a(b)*. That provision makes perfect sense in a quiet title action: If the plaintiff is found to own the property, the Government can satisfy his claim through an award of money (while still retaining the land for its operations). But the provision makes no sense in a suit like this one, where Patchak does not assert a right to the property. If the United States loses the suit, an award of just [*2207] compensation to the rightful owner (whoever [**221] and wherever he might be) could do nothing to satisfy Patchak's claim. [5]

> 4 The dissent contends that the QTA omits two other historical requirements for quiet title suits. See *post*, at 8. But many States had abandoned those requirements by the time the QTA was passed. See S. Rep. No. 92-575, p. 6 (1971) (noting "wide differences in State statutory [***18] and decisional law" on quiet title suits); Steadman, "Forgive the U.S. Its Trespasses?": Land Title Disputes With the Sovereign -- Present Remedies and Prospective Reforms, 1972 Duke L. J. 15, 48-49, and n. 152 (stating that cases had disputed whether a quiet title plaintiff needed to possess the land); *Welch v. Kai, 4 Cal. App. 3d 374, 380-381, 84 Cal.Rptr. 619, 622-623 (1970)* (allowing a quiet title action when the plaintiff claimed only an easement); *Benson v. Fekete, 424 S.W.2d 729 (Mo. 1968)* (en banc) (same). So Congress in enacting the QTA essentially chose one contemporaneous form of quiet title action.
>
> 5 The legislative history, for those who think it useful, further shows that the QTA addresses quiet title actions, as ordinarily conceived. The Senate Report states that the QTA aimed to alleviate the "[g]rave inequity" to private parties "excluded, without benefit of a recourse to the courts, from lands they have reason to believe are rightfully theirs." S. Rep. No. 92-575, at 1. Similarly, the House Report notes that the history of quiet title actions "goes back to the Courts of England," and provided as examples "a plaintiff whose title to land was continually being subjected [***19] to litigation in the law courts," and "one who feared that an outstanding deed or other interest might cause a claim to be presented in the future." H. R. Rep. No. 92-1559, p. 6 (1972). From top to bottom, these reports show that Congress thought itself to be authorizing bread-and-butter quiet title actions, in which a plaintiff asserts a right, title, or interest of his own in disputed land.

In two prior cases, we likewise described the QTA as addressing suits in which the plaintiff asserts an ownership interest in Government-held property. In *Block v. North Dakota ex rel. Board of Univ. and School Lands, 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1982)*, we considered North Dakota's claim to land that the United States viewed as its own. We held that the State could not circumvent the QTA's statute of limitations by invoking other causes of action, among them the APA. See *id., at 277-278, 286, n. 22, 103 S. Ct. 1811, 75 L. Ed. 2d 840*. The crux of our reasoning was that Congress had enacted the QTA to address exactly the kind of suit North Dakota had brought. Prior to the QTA, we explained, "citizens asserting title to or the right to possession of lands claimed by the United States" had no recourse; by passing the statute, "Congress sought to [***20] rectify this state of affairs." *Id., at 282, 103 S. Ct. 1811, 75 L. Ed. 2d 840*. Our decision reflected that legislative purpose: Congress, we held, "intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Id., at 286, 103 S. Ct. 1811, 75 L. Ed. 2d 840*. We repeat: "adverse claimants," meaning plaintiffs who themselves assert a claim to property antagonistic to the Federal Government's.

Our decision in *United States v. Mottaz, 476 U.S. 834, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986)*, is of a piece. There, we considered whether the QTA, or instead the Tucker Act or General Allotment Act, governed the plaintiff's suit respecting certain allotments of land held by the United States. We thought the QTA the relevant statute because the plaintiff herself asserted title to the property. Our opinion quoted the plaintiff's own description of her suit: "At no time in this proceeding did [the plaintiff] drop her claim for title. To the contrary, the claim for title is the essence and bottom line of [the plaintiff's] case." *Id., at 842, 106 S. Ct. 2224, 90 L. Ed. 2d 841* (quoting Brief for Respondent in *Mottaz*, O. T. 1985, No. 546, p. 3). That fact, we held, brought the suit "within the [QTA's] scope": "What [the plaintiff] seeks is a declaration that she alone [***21] possesses valid title." *476 U. S., at 842, 106 S. Ct. 2224, 90 L. Ed. 2d 841*. So once again, we construed the QTA as addressing suits by adverse claimants.

But Patchak is not an adverse claimant-and so the QTA (more specifically, its reservation of sovereign immunity from actions respecting Indian trust lands) cannot bar his suit. Patchak does not contend that he owns the Bradley Property, nor does he seek any relief corresponding to [**222] such a claim. He wants a

court to strip the United States of title to the land, but not on the ground that it is his and not so that he can possess it. Patchak's lawsuit therefore lacks a defining feature of a QTA [*2208] action. He is not trying to disguise a QTA suit as an APA action to circumvent the QTA's "Indian lands" exception. Rather, he is not bringing a QTA suit at all. He asserts merely that the Secretary's decision to take land into trust violates a federal statute-a garden-variety APA claim. See *5 U.S.C. §§ 706(2)(A), (C)* ("The reviewing court shall . . . hold unlawful and set aside agency action . . . not in ac-cordance with law [or] in excess of statutory jurisdiction [or] authority"). Because that is true -- because in then-Assistant Attorney General Scalia's words, the QTA [***22] is "not addressed to the type of grievance which [Patchak] seeks to assert," H. R. Rep. 94-1656, at 28-the QTA's limitation of remedies has no bearing. The APA's general waiver of sovereign immunity instead applies.

The Band and Government, along with the dissent, object to this conclusion on three basic grounds. First, they contend that the QTA speaks more broadly than we have indicated, waiving immunity from suits "to adjudicate a disputed title to real property in which the United States claims an interest." *28 U.S.C. § 2409a(a)*. That language, the argument goes, encompasses all actions contesting the Government's legal interest in land, regardless whether the plaintiff claims ownership himself. See Brief for Federal Petitioners 19-20; Reply Brief for Tribal Petitioner 4-6; *post*, at 8-9 (SOTOMAYOR, J., dissenting). The QTA (not the APA) thus becomes the relevant statute after all-as to both its waiver and its "corresponding" reservation of immunity from suits involving Indian lands. Reply Brief for Tribal Petitioner 6.

But the Band and Government can reach that result only by neglecting key words in the relevant provision. That sentence, more fully quoted, reads: "The United States [***23] may be named as a party defendant in *a civil action under this section* to adjudicate a disputed title to real property in which the United States claims an interest." *§ 2409a(a)* (emphasis added). And as we have already noted, "this section"-*§ 2409a*-includes a host of indications that the "civil action" at issue is an ordinary quiet title suit: Just recall the section's title ("Real property quiet title actions"), and its pleading requirements (the plaintiff "shall set forth with particularity the nature of the right, title, or interest which [he] claims"), and its permission to the Government to remedy an infraction by paying "just compensation." Read with reference to all these provisions (as well as to the QTA's contemporane ously enacted jurisdictional and venue sections), the waiver clause rebuts, rather than supports, the Band's and the Government's argument: That clause speaks not to any suit in which a plaintiff challenges the Government's title, but only to an action in which the plaintiff also claims an interest in the property.

The Band and Government next invoke cases holding that "when a statute provides a detailed mechanism for judicial consideration of particular issues [***24] at the behest of particular persons," the statute may "impliedly preclude[]" judicial review "of those issues at the behest of other persons." *Block v. Community Nutrition Institute, 467 U.S. 340, 349, 104* [**223] *S. Ct. 2450, 81 L. Ed. 2d 270 (1984)*; see *United States v. Fausto, 484 U.S. 439, 455, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988)*. Here, the Band and Government contend, the QTA's specific authorization of adverse claimants' suits creates a negative implication: *non*adverse claimants like Patchak cannot challenge Government ownership of land under any other statute. See Reply Brief for Tribal Petitioner 7-10; Reply Brief for Federal Petitioners 7-9; see also *post*, at 3-4. The QTA, says the Band, [*2209] thus "preempts [Patchak's] more general remedies." Brief for Tribal Petitioner 23 (internal quotation marks omitted).

But we think that argument faulty, and the cited cases inapposite, for the reason already given: Patchak is bringing a different claim, seeking different relief, from the kind the QTA addresses. See *supra*, at 7-10. To see the point, consider a contrasting example. Suppose the QTA authorized suit only by adverse claimants who could assert a property interest of at least a decade's duration. Then suppose an adverse claimant failing to meet that requirement [***25] (because, say, his claim to title went back only five years) brought suit under a general statute like the APA. We would surely bar that suit, citing the cases the Government and Band rely on; in our imaginary statute, Congress delineated the class of persons who could bring a quiet title suit, and that judgment would preclude others from doing so. But here, once again, Patchak is not bringing a quiet title action at all. He is not claiming to own the property, and he is not demanding that the court transfer the property to him. So to succeed in their argument, the Government and Band must go much further than the cited cases: They must say that in authorizing one person to bring one kind of suit seeking one form of relief, Congress barred another person from bringing another kind of suit seeking another form of relief. Presumably, that contention would extend only to suits involving similar subject matter-*i.e.*, the Government's ownership of property. But that commonality is not itself sufficient. We have never held, and see no cause to hold here, that some general similarity of subject matter can alone trigger a remedial statute's preclusive effect.

Last, the Band and Government argue [***26] that we should treat Patchak's suit as we would an adverse claimant's because they equally implicate the "Indian

lands" exception's policies. According to the Government, allowing challenges to the Secretary's trust acquisitions would "pose significant barriers to tribes['] . . . ability to promote investment and economic development on the lands." Brief for Federal Petitioners 24. That harm is the same whether or not a plaintiff claims to own the land himself. Indeed, the Band argues that the sole difference in this suit cuts in its direction, because non-adverse claimants like Patchak have "the most remote injuries and indirect interests in the land." Brief for Tribal Petitioner 13; see Reply Brief for Federal Petitioners 11-12; see also *post*, at 2, 7, 10. [6]

> 6 In a related vein, the dissent argues that our holding will undermine the QTA's "Indian lands" exception by allowing adverse claimants to file APA complaints concealing their ownership interests or to recruit third parties to bring suit on their behalf. See *post*, at 9-11. But we think that concern more imaginary than real. We have trouble conceiving of a plausible APA suit that omits mention of an adverse claimant's interest [***27] in property yet somehow leads to relief recognizing that very interest.

[**224] That argument is not without force, but it must be addressed to Congress. In the QTA, Congress made a judgment about how far to allow quiet title suits-to a point, but no further. (The "no further" includes not only the "Indian lands" exception, but one for security interests and water rights, as well as a statute of limitations, a bar on jury trials, jurisdictional and venue constraints, and the just compensation option discussed earlier.) Perhaps Congress would-perhaps Congress should-make the identical judgment for the full range of lawsuits pertaining to the Government's ownership of land. But that is not our call. The Band assumes that plaintiffs like Patchak have a lesser interest than those bringing quiet title actions, [*2210] and so should be precluded *a fortiori*. But all we can say is that Patchak has a different interest. Whether it is lesser, as the Band argues, because not based on property rights; whether it is greater because implicating public interests; or whether it is in the end exactly the same- that is for Congress to tell us, not for us to tell Congress. As the matter stands, Congress has not assimilated [***28] to quiet title actions all other suits challenging the Government's ownership of property. And so when a plaintiff like Patchak brings a suit like this one, it falls within the APA's general waiver of sovereign immunity.

III

We finally consider the Band's and the Government's alternative argument that Patchak cannot bring this action because he lacks prudential standing. This Court has long held that a person suing under the APA must satisfy not only Article III's standing requirements, but an additional test: The interest he asserts must be "arguably within the zone of interests to be protected or regulated by the statute" that he says was violated. *Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)*. Here, Patchak asserts that in taking title to the Bradley Property, the Secretary exceeded her authority under *§ 465*, which authorizes the acquisition of property "for the purpose of providing land for Indians." And he alleges that this statutory violation will cause him economic, environmental, and aesthetic harm as a nearby property owner. See *supra*, at 3. The Government and Band argue that the relationship between *§ 465* and Patchak's asserted [***29] interests is insufficient. That is so, they contend, because the statute focuses on land *acquisition*, whereas Patchak's interests relate to the land's *use* as a casino. See Brief for Tribal Petitioner 46 ("The Secretary's decision to put land into trust does not turn on any particular use of the land, gaming or otherwise[,] . . . [and] thus has no impact on [Patchak] or his asserted interests"); Brief for Federal Petitioners 34 ("[L]and may be taken into trust for a host of purposes that have nothing at all to do with gaming"). We find this argument unpersuasive.

The prudential standing test Patchak must meet "is not meant to be especially demanding." *Clarke v. Securities Industry Assn., 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987)*. We apply the test in keeping with Congress's "evident intent" when enacting the APA "to make agency action presumptively reviewable." [**225] *Ibid.* We do not require any "indication of congressional purpose to benefit the would-be plaintiff." *Id., at 399-400, 107 S. Ct. 750, 93 L. Ed. 2d 757*. [7] And we have always conspicuously included the word "arguably" in the test to indicate that the benefit of any doubt goes to the plaintiff. The test forecloses suit only when a plaintiff's "interests are so marginally related [***30] to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id., at 399, 107 S. Ct. 750, 93 L. Ed. 2d 757*.

> 7 For this reason, the Band's statement that Patchak is "not an Indian or tribal official seeking land" and does not "claim an interest in advancing tribal development," Brief for Tribal Petitioner 42, is beside the point. The question is not whether *§ 465* seeks to benefit Patchak; everyone can agree it does not. The question is instead, as the Band's and the Government's main argument acknowledges, whether issues of land use (arguably) fall within *§ 465*'s scope-because if they do, a neighbor complaining about such use may sue

to enforce the statute's limits. See *infra* this page and 16-17.

Patchak's suit satisfies that standard, because *§ 465* has far more to do with land [*2211] use than the Government and Band acknowledge. Start with what we and others have said about *§ 465*'s context and purpose. As the leading treatise on federal Indian law notes, *§ 465* is "the capstone" of the IRA's land provisions. F. Cohen, Handbook of Federal Indian Law § 15.07[1][a], p. 1010 (2005 ed.) (hereinafter Cohen). And those provisions play a key role in the IRA's [***31] overall effort "to rehabilitate the Indian's economic life," *Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973)* (internal quotation marks omitted) . "Land forms the basis" of that "economic life," providing the foundation for "tourism, manufacturing, mining, logging, . . . and gaming." Cohen § 15.01, at 965. *Section 465* thus functions as a primary mechanism to foster Indian tribes' economic development. As the D. C. Circuit explained in the *MichGO* litigation, the section "provid[es] lands sufficient to enable Indians to achieve self-support." *Michigan Gambling, 525 F. 3d, at 31* (internal quotation marks omitted); see *Morton v. Mancari, 417 U.S. 535, 542, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)* (noting the IRA's economic aspect). So when the Secretary obtains land for Indians under *§ 465*, she does not do so in a vacuum. Rather, she takes title to properties with at least one eye directed toward how tribes will use those lands to support economic development.

The Department's regulations make this statutory concern with land use crystal clear. Those regulations permit the Secretary to acquire land in trust under *§ 465* if the "land is necessary to facilitate tribal self-determination, economic development, or Indian [***32] housing." *25 CFR § 151.3(a)(3)*. And they require the Secretary to consider, in evaluating any acquisition, both "[t]he purposes for which the land will be used" and the "potential conflicts of land use which may arise." *§§ 151.10(c), 151.10(f)*; see *§ 151.11(a)*. For "off-reservation acquisitions" made "for business purposes"-like the Bradley Property- the regulations further provide that the tribe must "provide a plan which specifies the anticipated economic benefits associated with the proposed use." *§ 151.11(c)*. DOI's regulations thus show that the statute's [**226] implementation centrally depends on the projected use of a given property.

The Secretary's acquisition of the Bradley Property is a case in point. The Band's application to the Secretary highlighted its plan to use the land for gaming purposes. See App. 41 ("[T]rust status for this Property is requested in order for the Tribe to acquire property on which it plans to conduct gaming"); *id.*, at 61-62 ("The Tribe intends to . . . renovate the existing . . . building into a gaming facility . . . . to offer Class II and/or Class III gaming"). Similarly, DOI's notice of intent to take the land into trust announced that the land would "be [***33] used for the purpose of construction and operation of a gaming facility," which the Department had already determined would meet the Indian Gaming Regulatory Act's requirements. *70 Fed. Reg. 25596*; *25 U.S.C. §§ 2701-2721*. So from start to finish, the decision whether to acquire the Bradley Property under *§ 465* involved questions of land use.

And because *§ 465*'s implementation encompasses these issues, the interests Patchak raises -- at least arguably -- fall "within the zone . . . protected or regulated by the statute." If the Government had violated a statute specifically addressing how federal land can be used, no one would doubt that a neighboring landowner would have prudential standing to bring suit to enforce the statute's limits. The difference here, as the Government and Band point out, is that *§ 465* specifically addresses only land acquisition. But for the reasons already given, decisions under the statute are [*2212] closely enough and often enough entwined with considerations of land use to make that difference immaterial. As in this very case, the Secretary will typically acquire land with its eventual use in mind, after assessing potential conflicts that use might create. See *25 CFR §§ 151.10(c),* [***34] *151.10(f), 151.11(a)*. And so neighbors to the use (like Patchak) are reasonable -- indeed, predictable -- challengers of the Secretary's decisions: Their interests, whether economic, environmental, or aesthetic, come within *§ 465*'s regulatory ambit.

* * *

The QTA's reservation of sovereign immunity does not bar Patchak's suit. Neither does the doctrine of prudential standing. We therefore affirm the judgment of the D. C. Circuit, and remand the case for further proceedings consistent with this opinion.

It is so ordered.

DISSENT BY: SOTOMAYOR

DISSENT

JUSTICE SOTOMAYOR, dissenting.

In enacting the Quiet Title Act (QTA), Congress waived the Government's sovereign immunity in cases seeking "to adjudicate a disputed title to real property in which the United States claims an interest." *28 U.S.C. § 2409a(a)*. In so doing, Congress was careful to retain the Government's sovereign immunity with respect to particular claimants, particular categories of land, and particular remedies. Congress and the Executive Branch considered these "carefully crafted provisions" essential to the immunity waiver and "necessary for the protection of

the national public interest." *Block v. North Dakota ex rel.* [**227] *Board of Univ. and School Lands, 461 U.S. 273, 284-285, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983)*.

The [***35] Court's opinion sanctions an end-run around these vital limitations on the Government's waiver of sovereign immunity. After today, any person may sue under the Administrative Procedure Act (APA) to divest the Federal Government of title to and possession of land held in trust for Indian tribes -- relief expressly forbidden by the QTA -- so long as the complaint does not assert a personal interest in the land. That outcome cannot be squared with the APA's express admonition that it confers no "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *5 U.S.C. § 702*. The Court's holding not only creates perverse incentives for private litigants, but also exposes the Government's ownership of land to costly and prolonged challenges. Because I believe those results to be inconsistent with the QTA and the APA, I respectfully dissent.

I

A

Congress enacted the QTA to provide a comprehensive solution to the problem of real -- property disputes between private parties and the United States. The QTA strikes a careful balance between private parties' desire to adjudicate such disputes, and the Government's desire to impose [***36] "'appropriate safeguards'" on any waiver of sovereign immunity to ensure "'the protection of the public interest.'" *Block, 461 U.S., at 282-283, 103 S. Ct. 1811, 75 L. Ed. 2d 840*; see also S. Rep. No. 92-575, p. 6 (1971).

Section 2409a(a) provides expansively that "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest." That language mirrors the title proposed by the Executive Branch for the legislation that Congress largely adopted: "A Bill To permit suits to adjudicate disputed titles to lands in which [*2213] the United States claims an interest." *Id.*, at 7.

The remainder of the Act, however, imposes important conditions upon the Government's waiver of sovereign immunity. First, the right to sue "does not apply to trust or restricted Indian lands." *§ 2409a(a)*. The Indian lands exception reflects the view that "a waiver of immunity in this area would not be consistent with specific commitments [the Government] ha[s] made to the Indians through treaties and other agreements." *Block, 461 U.S., at 283, 103 S. Ct. 1811, 75 L. Ed. 2d 840* (internal quotation marks omitted). By exempting Indian lands, Congress ensured that the Government's [***37] "solemn obligations" to tribes would not be "abridg[ed] . . .without the consent of the Indians." S. Rep. No. 92-575, at 4.

Second, the Act preserves the United States' power to retain possession or control of any disputed property, even if a court determines that the Government's property claim is invalid. To that end, *§ 2409a(b)* "allow[s] the United States the option of paying money damages instead of surrendering the property if it lost a case on the merits." *Block, 461 U.S., at 283, 103 S. Ct. 1811, 75 L. Ed. 2d 840*. This provision was considered essential to addressing the Government's "main objection in the past to waiving sovereign immunity" where federal land was concerned: that an adverse judgment "would make possible [**228] decrees ousting the United States from possession and thus interfer[e] with operations of the Government." S. Rep. No. 92-575, at 5-6. *Section 2409a(b)* "eliminate[d] cause for such apprehension," by ensuring that-even under the QTA-the United States could not be stripped of its possession or control of property without its consent. *Id.*, at 6.

Finally, the Act limits the class of individuals permitted to sue the Government to those claiming a "right, title, or interest" in disputed property. *§ 2409a(d)*. [***38] As we have explained, Congress' decision to restrict the class entitled to relief indicates that Congress precluded relief for the remainder. See, *e.g., Block v. Community Nutrition Institute, 467 U.S. 340, 349, 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984)* ("[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded"). That inference is especially strong here, because the QTA was "enacted against the backdrop of sovereign immunity." S. Rep. No. 94-996, p. 27 (1976). *Section 2409a(d)* thus indicates that Congress concluded that those without any "right, title, or interest" in a given property did not have an interest sufficient to warrant abrogation of the Government's sovereign immunity.

Congress considered these conditions indispensible to its immunity waiver. [1] "[W]hen Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block, 461 U.S., at 287, 103 S. Ct. 1811, 75 L. Ed. 2d 840*. Congress and the Executive Branch intended the [*2214] scheme to be the [***39] exclusive procedure for resolving property title disputes involving the United States. See *id., at 285, 103 S. Ct. 1811, 75 L. Ed. 2d 840* (describing Act as a "careful and thorough remedial scheme"); S. Rep. No. 92-575, at 4 (*§ 2409a* "provides a *complete*, thoughtful approach to the problem of

disputed titles to federally claimed land" (emphasis added)).

> 1 As we explained in *Block v. North Dakota ex rel. Board of Univ. and School Lands, 461 U.S. 273, 282-283, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983),* Congress' initial proposal lacked such provisions. The Executive Branch, however, strongly opposed the original bill, explaining that it was "too broad and sweeping in scope and lacking adequate safeguards to protect the public interest." Dispute of Titles on Public Lands: Hearings on S. 216 et al. before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., 21 (1971). Congress ultimately agreed, largely adopting the Executive's substitute bill. See *Block, 461 U.S., at 283-284, 103 S. Ct. 1811, 75 L. Ed. 2d 840*.

For that reason, we held that Congress did not intend to create a "new supplemental remedy" when it enacted the APA's general waiver of sovereign immunity. *Block, 461 U.S., at 286, n. 22, 103 S. Ct. 1811, 75 L. Ed. 2d 840*. "'It would require the suspension of [***40] disbelief,'" we reasoned, "'to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.'" *Id., at 285, 103 S. Ct. 1811, 75 L. Ed. 2d 840* (quoting *Brown v.GSA, 425 U.S. 820, 833, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976)*). If a plaintiff could oust the Government of title to land by means of an APA action, "all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted," and the "Indian lands exception to the [**229] QTA would be rendered nugatory." *Block, 461 U.S., at 284-285, 103 S. Ct. 1811, 75 L. Ed. 2d 840.* We therefore had little difficulty concluding that Congress did not intend to render the QTA's limitations obsolete by affording any plaintiff the right to dispute the Government's title to any lands by way of an APA action-and to empower any such plaintiff to "disposses[s] [the United States] of the disputed property without being afforded the option of paying damages." *Id., at 285, 103 S. Ct. 1811, 75 L. Ed. 2d 840.*

It is undisputed that Patchak does not meet the conditions to sue under the QTA. He seeks to challenge the Government's title to Indian trust land (strike one); he seeks to force the Government to relinquish possession and title outright, leaving it no alternative to pay compensation [***41] (strike two); and he does not claim any personal right, title, or interest in the property (strike three). Thus, by its express terms, the QTA forbids the relief Patchak seeks. Compare *ante,* at 3 ("[A]ll parties agree that the suit now effectively seeks to divest the Federal Government of title to the [Indian trust] land"), with *United States v. Mottaz, 476 U.S. 834, 842, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986)* (*Section 2409a(a)*'s Indian lands exclusion "operates solely to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians"). Consequently, Patchak may not avoid the QTA's constraints by suing under the APA, a statute enacted only four years later. See *5 U.S.C. § 702* (rendering the APA's waiver of sovereign immunity inapplicable "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought").

B

The majority nonetheless permits Patchak to circumvent the QTA's limitations by filing an action under the APA. It primarily argues that the careful limitations Congress imposed upon the QTA's waiver of sovereign immunity are "simply inapposite" to actions in which the plaintiff advances a different "grievance" [***42] to that underlying a QTA suit, *i.e.*, cases in which a plaintiff seeks to "strip the United States of title to the land . . . not on the ground that it is his," but rather because "the Secretary's decision to take land into trust violates a federal statute." *Ante,* at 7, 10. This analysis is unmoored from the text of the APA.

Section 702 focuses not on a plaintiff 's motivation for suit, nor the arguments on which he grounds his case, but only on whether another statute expressly or impliedly [*2215] forbids the relief he seeks. The relief Patchak admittedly seeks-to oust the Government of title to Indian trust land-is identical to that forbidden by the QTA. Conversely, the Court's hypothetical suit, alleging that the Bradley Property was causing environmental harm, would not be barred by the QTA. See *ante,* at 6. That is not because such an action asserts a different "grievance," but because it seeks different relief-abatement of a nuisance rather than the extinguishment of title. [2]

> 2 The majority claims, *ante,* at 7, n. 3, that this test has "no obvious limits," but it merely applies the text of *§ 702* (which speaks of "relief," not "grievances"). In any event, the majority's hypothetical, *ibid.*, [***43] compares apples to oranges. I do not contend that the APA bars all injunctive relief involving Indian lands, simply other suits-like this one-that seek "to adjudicate a disputed title to real property in which the United States claims an interest." *28 U.S.C. § 2409a(a).* That result is entirely consistent with *Block*-which stated that the APA "specifically confers no 'authority to grant relief if any other statute . . . expressly or impliedly forbids the relief which is sought.'" *461 U.S. at 286, n. 22, 103*

S. Ct. 1811, 75 L. Ed. 2d 840 (quoting *5 U.S.C. § 702*).

[**230] In any event, the "grievance" Patchak asserts is no different from that asserted in *Block*-a case in which we unanimously rejected a plaintiff 's attempt to avoid the QTA's restrictions by way of an APA action or the similar device of an officer's suit. [3] That action, like this one, was styled as a suit claiming that the Government's actions respecting land were ""not within [its] statutory powers."" *461 U.S., at 281, 103 S. Ct. 1811, 75 L. Ed. 2d 840*. Cf. *ante*, at 10 ("[Patchak] asserts merely that the Secretary's decision to take land into trust violates a federal statute"). The relief requested was also identical to that sought here: injunctive relief directing the United States to "'cease [***44] and desist from . . . exercising privileges of ownership"' over the land in question. *461 U.S., at 278, 103 S. Ct. 1811, 75 L. Ed. 2d 840*; see also App. 38.

3 An officer's suit is an action directly against a federal officer, but was otherwise identical to the kind of APA action at issue here. Compare *Block, 461 U.S., at 281, 103 S. Ct. 1811, 75 L. Ed. 2d 840* (seeking relief because agency official's actions were " '"not within [his] statutory powers" '"), with *5 U.S.C. § 706(2)(C)* ("The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations"). 8 MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS *v.* PATCHAK

The only difference that the majority can point to between *Block* and this case is that Patchak asserts a weaker interest in the disputed property. But that is no reason to imagine that Congress intended a different outcome. As the majority itself acknowledges, the harm to the United States and tribes when a plaintiff sues to extinguish the Government's title to Indian trust land is identical "whether or not a plaintiff claims to own the land himself." *Ante*, at 12. Yet, if the majority is correct, Congress intended the APA's waiver of immunity [***45] to apply to those hypothetical plaintiffs differently. Congress, it suggests, intended to permit anyone to circumvent the QTA's careful limitations and sue to force the Government to relinquish Indian trust lands-anyone, that is, except those with the strongest entitlement to bring such actions: those claiming a personal "right, title, or interest" in the land in question. The majority's conclusion hinges, therefore, on the doubtful premise that Congress intended to waive the Government's sovereign immunity wholesale for those like Patchak, who assert an "aesthetic" interest in land, *ante*, at 1, while retaining the Government's sovereign immunity against those who assert a constitutional interest in land -- the deprivation of property without due process of law. This is highly implausible. Unsurprisingly, the majority does not even [*2216] attempt to explain why Congress would have intended this counterintuitive result.

It is no answer to say that the QTA reaches no further than an "ordinary quiet title suit." *Ante*, at 11. The action permitted by *§ 2409a* is not an ordinary quiet title suit. At common law, equity courts "permit[ted] a bill to quiet title to be filed only by a party in *possession* [***46] [of land] against a defendant, [**231] who ha[d] been ineffectually seeking to establish a legal title by repeated actions of ejectment." *Wehrman v. Conklin, 155 U.S. 314, 321-322, 15 S. Ct. 129, 39 L. Ed. 167 (1894)* (emphasis added). *Section 2409a* is broader, requiring neither prerequisite. Moreover, as the majority tells us, see *ante*, at 7, an act to quiet title is "universally understood" as a proceeding "to establish a plaintiff 's *title* to land." Black's Law Dictionary 34 (9th ed. 2009) (emphasis added). But *§ 2409a* authorizes civil actions in cases in which neither the Government, nor the plaintiff, claims title to the land at issue. See *§ 2409a(d)* ("The complaint shall set forth . . . the *right*, title, or *interest* which the plaintiff claims" (emphasis added)). [4] A plaintiff may file suit under *§ 2409a*, for instance, when he claims only an easement in land, the right to explore an area for minerals, or some other lesser right or interest. See S. Rep. No. 92-575, at 5. Notwith-standing its colloquial title, therefore, the QTA plainly allows suit in circumstances well beyond "bread-and-butter quiet title actions," *ante*, at 3, n. 3. [5]

4 The majority notes that some States permit a broader class of claims under the rubric [***47] of "quiet title," and points to the " 'wide differences in State statutory and decisional law' on quiet title suits" at the time of the Act. *Ante*, at 8, n. 4. But that substantial variation only illustrates the artificiality of the majority's claim that the Act only "addresses quiet title actions, as *ordinarily* conceived." *Ante*, at 9, n. 5.

5 I recognize, of course, that the QTA is titled "[a]n Act to permit suits to adjudicate certain real property quiet title actions." 86 Stat. 1176. But "the title of a statute . . . cannot limit the plain meaning of [its] text." *Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-529, 67 S. Ct. 1387, 91 L. Ed. 1646 (1947)*. As explained above, the substance of Congress' enactment plainly extends more broadly than quiet title actions, mirroring the scope of the title proposed by the Government. See *supra*, at 2.

The majority attempts to bolster its reading by emphasizing an unexpected source within *§ 2409a*: the

clause specifying that the United States may be sued "'in *a civil action under this section*.'" *Ante*, at 11. The majority understands this clause to narrow the QTA's scope (and its limitations on the Government's immunity waiver) to quiet title claims only. But "this section" [***48] speaks broadly to civil actions "to adjudicate a disputed title to real property in which the United States claims an interest." *§ 2409a*. Moreover, this clause is read most straightforwardly to serve a far more pedestrian purpose: simply to state that a claimant can file "a civil action under this section"-*§ 2409a*-to adjudicate a disputed title in which the United States claims an interest. Regardless of how one reads the clause, however, it does not alter the APA's clear command that suits seeking relief forbidden by other statutes are not authorized by the APA. And the QTA forbids the relief sought here: injunctive relief forcing the Government to relinquish title to Indian lands.

Even if the majority were correct that the QTA itself reached only as far as ordinary quiet title actions, that would establish only that the QTA does not expressly forbid the relief Patchak seeks. The APA, however, does not waive the Government's sovereign immunity where any other statute "expressly *or impliedly* forbids the [*2217] relief which is sought." *5 U.S.C. § 702* (emphasis added). The text and history of the QTA, as well as this Court's precedent, make clear that the United States intended to retain [**232] its [***49] sovereign immunity from suits to dispossess the Government of Indian trust land. Patchak's suit to oust the Government of such land is therefore, at minimum, impliedly forbidden. [6]

6 Because I conclude that sovereign immunity bars Patchak's suit, I would not reach the question of whether he has standing.

II

Three consequences illustrate the difficulties today's holding will present for courts and the Government. First, it will render the QTA's limitations easily circumvented. Although those with property claims will remain formally prohibited from bringing APA suits because of *Block*, savvy plaintiffs and their lawyers can recruit a family member or neighbor to bring suit asserting only an "aesthetic" interest in the land but seeking an identical practical objective-to divest the Government of title and possession. *§§ 2409a(a), (b)*. Nothing will prevent them from obtaining relief that the QTA was designed to foreclose.

Second, the majority's holding will frustrate the Government's ability to resolve challenges to its fee-to-trust decisions expeditiously. When a plaintiff like Patchak asserts an "aesthetic" or "environmental" concern with a planned use of Indian trust land, he may bring [***50] a distinct suit under statutes like the National Environmental Policy Act of 1969 and the Indian Gaming Regulatory Act. Those challenges generally may be brought within the APA's ordinary 6-year statute of limitations. Suits to contest the Government's decision to take title to land in trust for Indian tribes, however, have been governed by a different rule. Until today, parties seeking to challenge such decisions had only a 30-day window to seek judicial review. *25 CFR § 151.12 (2011)*; *61 Fed. Reg. 18,082-18,083 (1996)*. That deadline promoted finality and security -- necessary preconditions for the investment and "economic development" that are central goals of the Indian Reorganization Act. *Ante*, at 16. [7] Today's result will promote the opposite, retarding tribes' ability to develop land until the APA's 6-year statute of limitations has lapsed. [8]

7 Trust status, for instance, is a prerequisite to making lands eligible for various federal incentives and tax credits closely tied to economic development. See, *e.g.*, App. 56. Delayed suits will also inhibit tribes from investing in uses other than gaming that might be less objectionable-like farming or office use.

8 Despite notice of the [***51] Government's intent through an organization with which he was affiliated, Patchak did not challenge the Government's fee-to-trust decision even though the organization did. See *Michigan Gambling Opposition v. Kempthorne, 525 F.3d 23, 381 U.S. App. D.C. 91 (CADC 2008)*. Instead, Patchak waited to sue until three years after the Secretary's intent to acquire the property was published. App. 35, 39.

Finally, the majority's rule creates substantial uncertainty regarding who exactly is barred from bringing APA claims. The majority leaves unclear, for instance, whether its rule bars from suit only those who "claim any competing interest" in the disputed land in their complaint, *ante*, at 7, or those who could claim a competing interest, but plead only that the Government's title claim violates a federal statute. If the former, the majority's holding would allow Patchak's challenge to go forward even if he had some personal interest in the Bradley Property, so long as his complaint did not assert it. That result is difficult to square with *Block* and *Mottaz*. If the latter, matters [**233] are even more peculiar. Because a shrewd plaintiff will avoid referencing her own property claim in her [*2218] complaint, the Government may [***52] assert sovereign immunity only if its detective efforts uncover the plaintiff 's unstated property claim. Not only does that impose a substantial burden on the Government, but it creates perverse incentives for private litigants. What if a plaintiff has a weak claim, or a claim that she does not know about? Did Congress re-

ally intend for the availability of APA relief to turn on whether a plaintiff does a better job of overlooking or suppressing her own property interest than the Government does of sleuthing it out?

As these observations illustrate, the majority's rule will impose a substantial burden on the Government and leave an array of uncertainties. Moreover, it will open to suit lands that Congress and the Executive Branch thought the "national public interest" demanded should remain immune from challenge. Congress did not intend either result.

* * *

For the foregoing reasons, I would hold that the QTA bars the relief Patchak seeks. I respectfully dissent.

Chapter 3B

Restoration and Fee-to-Trust

Jennifer Biesack
The Confederated Tribes of the Grand Ronde Community of Oregon
Grand Ronde, Oregon

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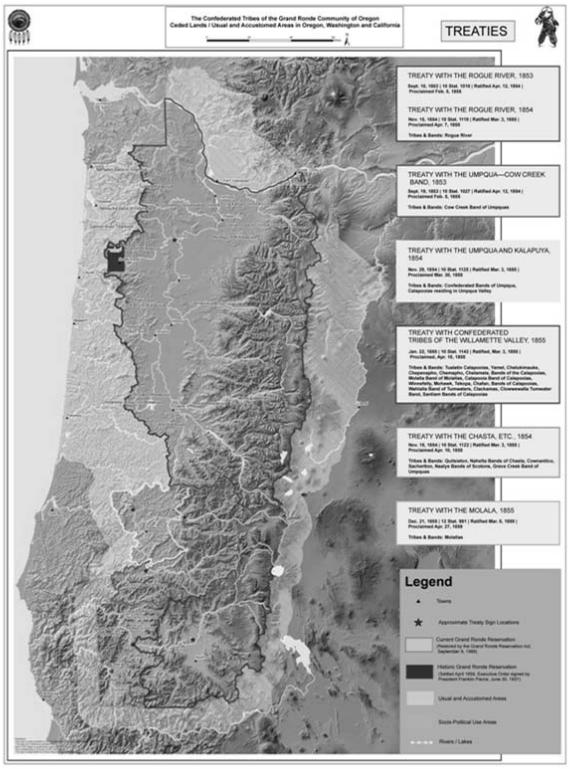
Fee-to-Trust Process Brochure 3B–47

The Confederated Tribes of the Grand Ronde Community of Oregon

Restoration and Fee-to-Trust





Historical Landholdings

Original Reservation



OREGON.

Grande Ronde Reserve.

DEPARTMENT OF THE INTERIOR,
Washington, June 30, 1857.

SIR: I have the honor to submit to you, herewith, a report of the Commissioner of Indian Affairs recommending, and a report of the Commissioner of the General Land Office concurring in the recommendation that the lands enclosed in townships 5 and 6 south, of range 8 west, and parts of townships 5 and 6 south, of range 7 west, Willamette district, Oregon, as indicated in the accompanying plat, be withdrawn from sale and entry, and established as an Indian reservation for the colonization of Indian tribes in Oregon, and particularly for the Willamette tribes, parties to treaty of January, 1855.

I respectfully recommend that the proposed reservation be established, and have accordingly prepared a form of indorsement on the plat of the same for your signature, in case the recommendation is approved.

The "Coast Reservation" alluded to in some of the accompanying papers was established by order of your predecessor, November, 1855.

I am, very respectfully, your obedient servant,

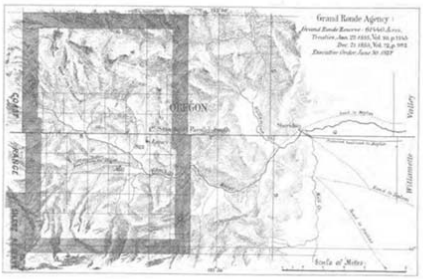
J. THOMPSON, *Secretary.*

The PRESIDENT.

EXECUTIVE OFFICE,
Washington City, June 30, 1857.

Townships 5 and 6 south, of range 8 west, and parts of townships 5 and 6 south, of range 7 west, as indicated hereon by red lines, are hereby withdrawn from sale and entry and set apart as a reservation for Indian purposes till otherwise ordered.

JAMES BUCHANAN.



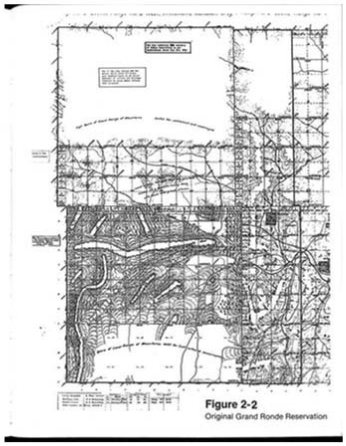
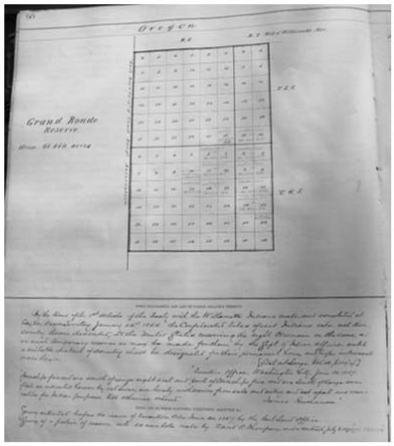
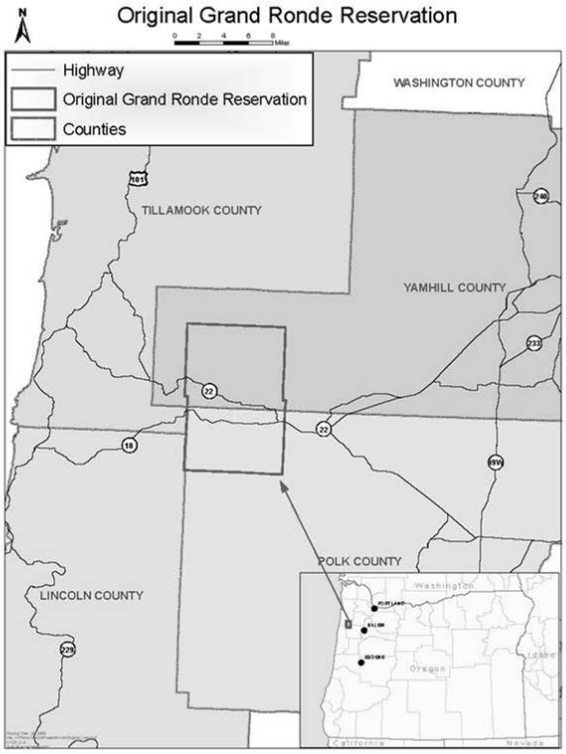


Figure 2-2
Original Grand Ronde Reservation

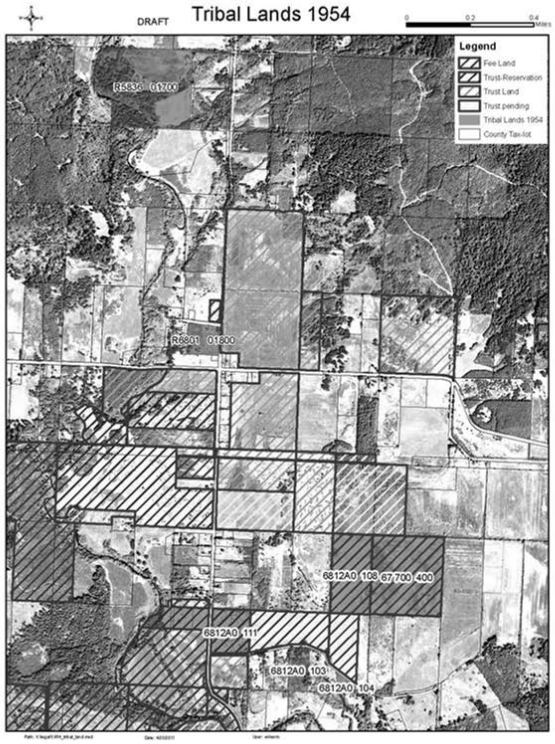




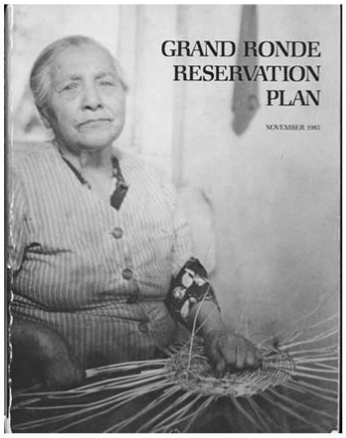
Reservation Location

Allotment and Termination

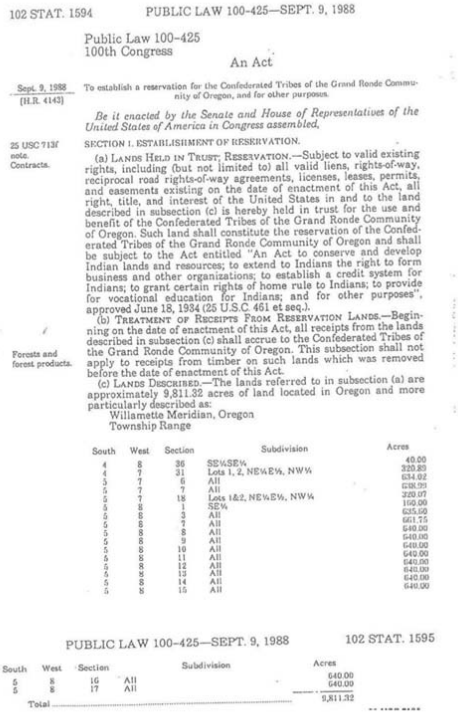
As a result of the federal government's allotment and termination policies, Grand Ronde lost both its federal recognition and its original reservation of more than 60,000 acres.



Restoration and Reservation Acts



Following the Tribe's termination in 1954, Tribal members and the Tribal government worked tirelessly to rebuild the Grand Ronde community. In 1983, these efforts resulted in the Grand Ronde Restoration Act, followed by the Grand Ronde Reservation Act in 1988, which restored 9,811 acres of the Tribe's original reservation to the Grand Ronde people. Since 1988, the Tribe has pursued the goal of securing its sovereignty by acquiring additional parcels of its original reservation and providing on-reservation jobs and services to Tribal members.



102 STAT. 1594 PUBLIC LAW 100-425—SEPT. 9, 1988

Public Law 100-425
100th Congress

An Act

Sept. 9, 1988 [H.R. 4143]

To establish a reservation for the Confederated Tribes of the Grand Ronde Community of Oregon, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

25 USC 713f note. Contracts.

SECTION 1. ESTABLISHMENT OF RESERVATION.

(a) LANDS HELD IN TRUST; RESERVATION.—Subject to valid existing rights, including (but not limited to) all valid liens, rights-of-way, reciprocal road rights-of-way agreements, licenses, leases, permits, and easements existing on the date of enactment of this Act, all right, title, and interest of the United States in and to the land described in subsection (c) is hereby held in trust for the use and benefit of the Confederated Tribes of the Grand Ronde Community of Oregon. Such land shall constitute the reservation of the Confederated Tribes of the Grand Ronde Community of Oregon and shall be subject to the Act entitled "An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes", approved June 18, 1934 (25 U.S.C. 461 et seq.).

(b) TREATMENT OF RECEIPTS FROM RESERVATION LANDS.—Beginning on the date of enactment of this Act, all receipts from the lands described in subsection (c) shall accrue to the Confederated Tribes of the Grand Ronde Community of Oregon. This subsection shall not apply to receipts from timber on such lands which was removed before the date of enactment of this Act.

Forests and forest products.

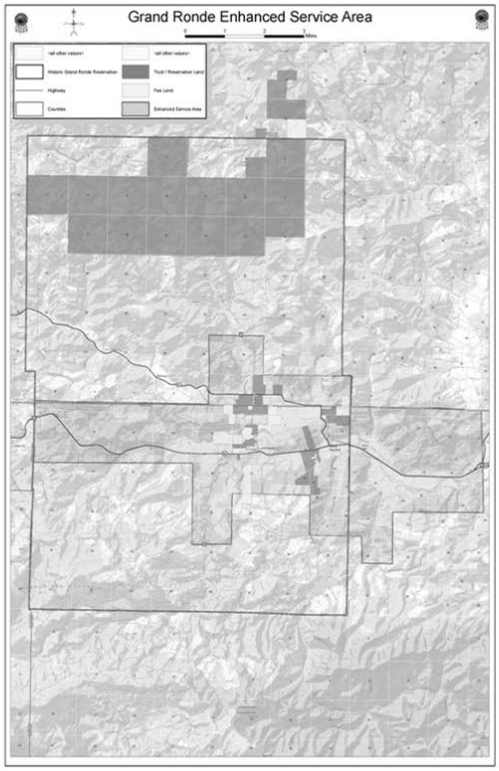
(c) LANDS DESCRIBED.—The lands referred to in subsection (a) are approximately 9,811.32 acres of land located in Oregon and more particularly described as:

Willamette Meridian, Oregon
Township Range

South	West	Section	Subdivision	Acres
4	8	36	SE¼SE¼	40.00
4	7	31	Lots 1, 2, NE¼E¼, NW¼	320.89
5	7	6	All	634.02
5	7	7	All	638.99
5	7	18	Lots 1&2, NE¼E¼, NW¼	320.07
5	8	1	SE¼	160.00
5	8	3	All	625.59
5	8	7	All	661.75
5	8	8	All	640.00
5	8	9	All	640.00
5	8	10	All	640.00
5	8	11	All	640.00
5	8	12	All	640.00
5	8	13	All	640.00
5	8	14	All	640.00
5	8	15	All	640.00

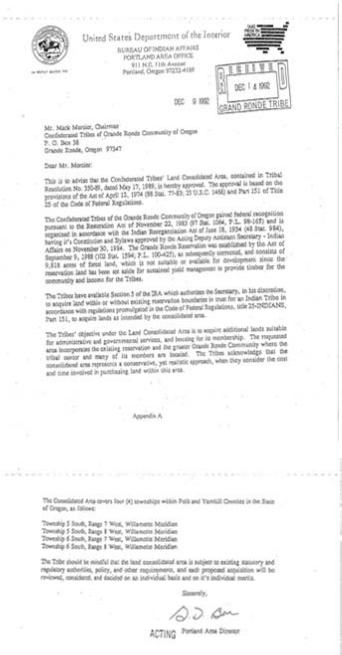
PUBLIC LAW 100-425—SEPT. 9, 1988 102 STAT. 1595

South	West	Section	Subdivision	Acres
5	8	16	All	640.00
5	8	17	All	640.00
Total				9,811.32



Restored Reservation

9,811 acres of forest land



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
PORTLAND AREA OFFICE
911 N.E. 11th Avenue
Portland, Oregon 97232-4169

DEC 9 1992

RECEIVED
DEC 14 1992
GRAND RONDE TRIBE

Mr. Mark Mercier, Chairman
Confederated Tribes of Grande Ronde Community of Oregon
P. O. Box 38
Grande Ronde, Oregon 97347

Dear Mr. Mercier:

This is to advise that the Confederated Tribes' Land Consolidated Area, contained in Tribal Resolution No 550-89, dated May 17, 1989, is hereby approved. The approval is based on the provisions of the Act of April 12, 1974 (88 Stat. 77-82; 25 U.S.C. 1452) and Part 151 of Title 25 of the Code of Federal Regulations.

The Confederated Tribes of the Grande Ronde Community of Oregon gained federal recognition pursuant to the Restoration Act of November 22, 1983 (97 Stat. 1064, P.L. 98-165) and is organized in accordance with the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), having it's Constitution and Bylaws approved by the Acting Deputy Assistant Secretary - Indian Affairs on November 30, 1984. The Grande Ronde Reservation was established by the Act of September 9, 1988 (102 Stat. 1594; P.L. 100-425), as subsequently corrected, and consists of 9,810 acres of land, which is not suitable or available for development since the reservation land has been set aside for sustained yield management to provide timber for the community and income for the Tribes.

The Tribes have available Section 5 of the IRA which authorizes the Secretary, in his discretion, to acquire land within or without existing reservation boundaries in trust for an Indian Tribe in accordance with regulations promulgated in the Code of Federal Regulations, title 25-INDIANS, Part 151, to acquire lands as intended by the consolidated area.

The Tribes' objective under the Land Consolidated Area is to acquire additional lands suitable for administrative and governmental services, and housing for its membership. The requested area incorporates the existing reservation and the greater Grande Ronde Community where the tribal owner and many of its members are located. The Tribes acknowledge that the consolidated area represents a conservative, yet realistic approach, when they consider the cost and time involved in purchasing land within this area.

Appendix A

The Consolidated Area covers four (4) townships within Polk and Yamhill Counties in the State of Oregon, as follows:

Township 5 South, Range 7 West, Willamette Meridian
Township 5 South, Range 8 West, Willamette Meridian
Township 6 South, Range 7 West, Willamette Meridian
Township 6 South, Range 8 West, Willamette Meridian

The Tribe should be mindful that the land consolidated area is subject to existing statutory and regulatory authorities, policy, and other requirements, and each proposed acquisition will be reviewed, considered, and decided on an individual basis and on it's individual merits.

Sincerely,

ACTING Portland Area Director



Resolution No. 550-89

WHEREAS, the Grand Ronde Tribal Council pursuant to Article III, Section 1, of the Tribal Constitution approved November 30, 1984, by the Acting Deputy Assistant Secretary of Indian Affairs, is empowered to exercise all tribal legislative and executive authority not specifically vested in the General Council of the Confederated Tribes of Grand Ronde Community, and;

WHEREAS, the Bureau of Indian Affairs considers the Confederated Tribes of Grand Ronde to adopt a Land Consolidation Plan, pursuant to 25 CFR, subsection 151.3 (a)(3), for Grand Ronde Tribal Lands to be held in trust by the Bureau of Indian Affairs; and,

WHEREAS, the Confederated Tribes of Grand Ronde wishes to purchase additional lands suitable for administrative and governmental services, and housing to be held in trust for the Tribe by the Bureau of Indian Affairs.

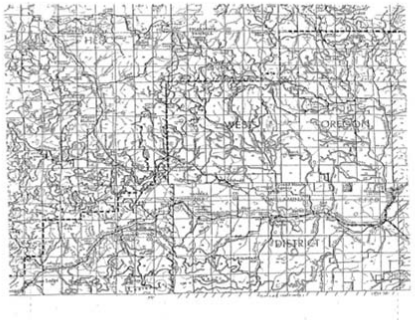
NOW THEREFORE BE IT RESOLVED, the Grand Ronde Tribal Council request the Bureau of Indian Affairs to approve the Grand Ronde Land consolidation plan described as T5S, R8W; T6S, R8W; T5S, R7W; T6S, R7W; in the County of Polk and Yamhill, in Oregon.

CERTIFICATION: the Tribal Council for the Confederated Tribes of Grand Ronde Community of Oregon passed this resolution at a regularly scheduled meeting with a quorum present as required by the Grand Ronde Tribal Constitution, held on May 17, 1989 by a vote of 6 Yes, 0 No, and 0 abstentions.

Mark Mercier, Tribal Chairman

Sandy Robertson, Vice-Chairperson

May 17, 1989
Date



Grand Ronde Consolidation Area

Fee – to – Trust

Statutory Authority
Indian Reorganization Act and Grand Ronde Restoration Act

The Indian Reorganization Act of June 18, 1934, (48 Stat. 984); 25 U.S.C. §§ 465, "Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption," states in relevant part:

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

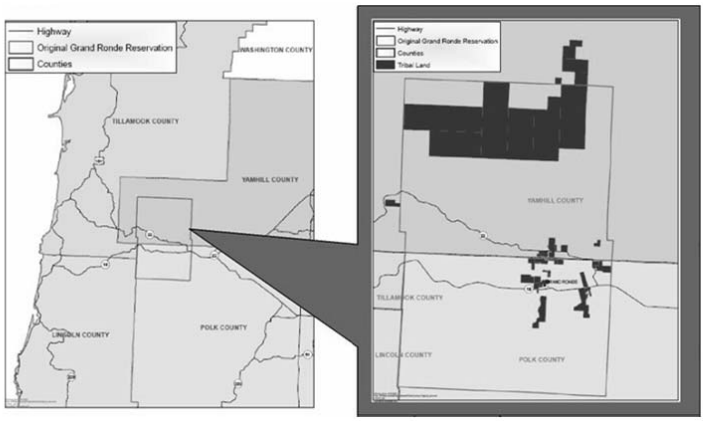
The Grand Ronde Restoration Act of November 22, 1983, Public Law 98-165 and Section 5 of the Indian Reorganization Act of 1934 (48 Stat. 984) provide the authority for this acquisition. Section 4 of the Restoration Act states:

> (b) RESTORATION OF RIGHTS AND PRIVILEGES. – …. [A]ll rights and privileges of the tribe and the members of the tribe under any federal treaty, executive order, agreement, or statute, or under any other Federal authority, which may have been diminished or lost under the Act approved August 13, 1954 are restored.
>
> (c) FEDERAL SERVICES AND BENEFITS. - … [t]he tribe and its members shall be eligible, on and after the date of the enactment of this Act, for all Federal services and benefits furnished to federally recognized Indian tribes without regard to the existence of a reservation for the tribe.

25 C.F.R. 151.3 (a) further authorizes this action when it states:

> Subject to the provisions contained in the acts of Congress which authorize land acquisitions, 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 within a tribal consolidation area; or 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.

Rebuilding the Reservation Community



After the Tribe acquires a parcel in fee, it must prepare a fee-to-trust application package for the BIA. The BIA then processes the application as either an "on-reservation acquisition" or an "off-reservation acquisition." Because the Tribe does not have exterior reservation boundaries (instead it has distinct parcels deemed reservation through legislation), all parcels are being processed under the more rigorous off-reservation acquisition regulations – even if the parcel is located within the boundaries of the original reservation. After the land is accepted into trust, the Tribe must take an additional step of amending its Reservation Act to include the trust parcels in order for the land to be deemed reservation land. This process is unduly time consuming and often takes years to complete.

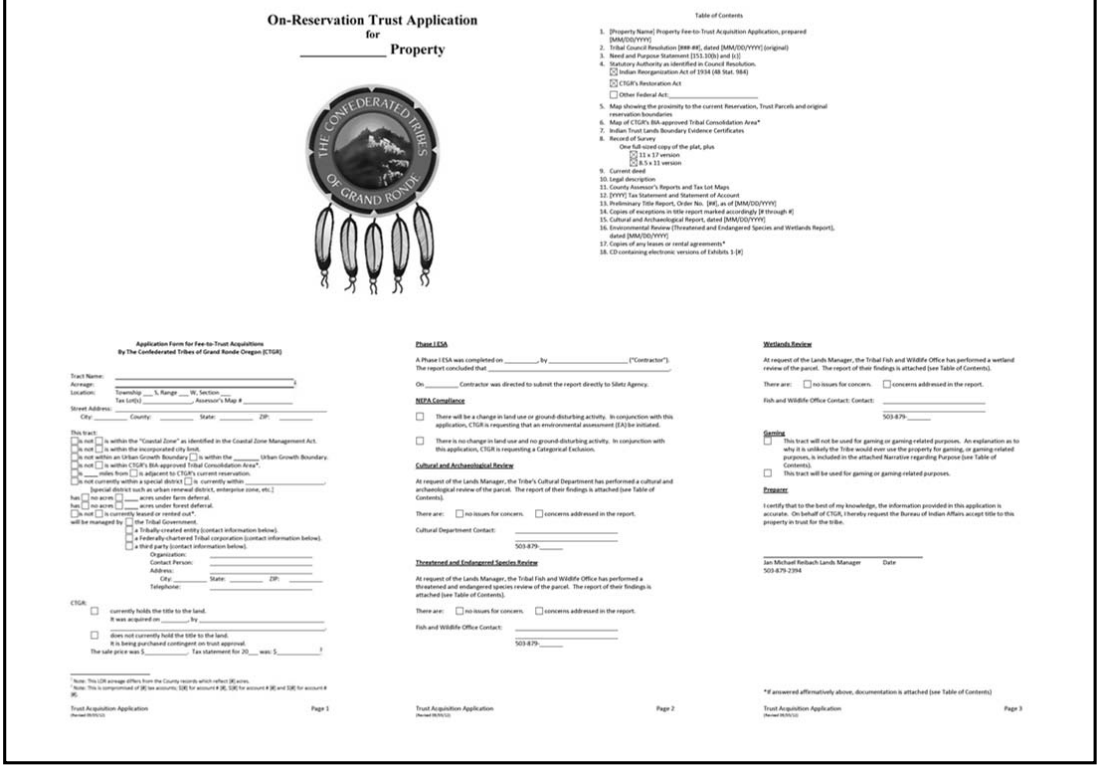
151.10 On Reservation Acquisition Criteria:

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

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
(b) The need of the individual Indian or the tribe for additional land;
(c) The purposes for which the land will be used;
(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
(f) Jurisdictional problems and potential conflicts of land use which may arise; and
(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

151.11 Additional Off Reservation Acquisition Criteria:

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:
(a) The criteria listed in §151.10 (a) through (c) and (e) through (h);
(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.
(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.
(d) Contact with state and local governments pursuant to §151.10 (e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.



On-Reservation Trust Application
for
_____ Property

THE CONFEDERATED TRIBES OF GRAND RONDE

Table of Contents

1. [Property Name] Property Fee-to-Trust Acquisition Application, prepared [MM/DD/YYYY]
2. Tribal Council Resolution [###-##], dated [MM/DD/YYYY] (original)
3. Need and Purpose Statement (151.10(b) and (c))
4. Statutory Authority as identified in Council Resolution.
   - ☒ Indian Reorganization Act of 1934 (48 Stat. 984)
   - ☒ CTGR's Restoration Act
   - ☐ Other Federal Act:_____
5. Map showing the proximity to the current Reservation, Trust Parcels and original reservation boundaries
6. Map of CTGR's BIA-approved Tribal Consolidation Area*
7. Indian Trust Lands Boundary Evidence Certificates
8. Record of Survey
   - One full-sized copy of the plat, plus
   - ☒ 11 x 17 version
   - ☒ 8.5 x 11 version
9. Current deed
10. Legal description
11. County Assessor's Reports and Tax Lot Maps
12. [YYYY] Tax Statement and Statement of Account
13. Preliminary Title Report, Order No. [##], as of [MM/DD/YYYY]
14. Copies of exceptions in title report marked accordingly [# through #]
15. Cultural and Archaeological Report, dated [MM/DD/YYYY]
16. Environmental Review (Threatened and Endangered Species and Wetlands Report), dated [MM/DD/YYYY]
17. Copies of any leases or rental agreements*
18. CD containing electronic versions of Exhibits 1-[#]

Application Form for Fee-to-Trust Acquisitions
By The Confederated Tribes of Grand Ronde Oregon (CTGR)

Tract Name: _____
Acreage: _____[1]
Location: Township ___ S, Range ___ W, Section ___,
Tax Lot(s) _____, Assessor's Map # _____
Street Address: _____
City: _____ County: _____ State: _____ ZIP: _____

This tract:
☐ is not ☐ is within the "Coastal Zone" as identified in the Coastal Zone Management Act.
☐ is not ☐ is within the incorporated city limit.
☐ is not within an Urban Growth Boundary ☐ is within the _____ Urban Growth Boundary.
☐ is not ☐ is within CTGR's BIA-approved Tribal Consolidation Area*.
☐ is ____ miles from ☐ is adjacent to CTGR's current reservation.
☐ is not currently within a special district ☐ is currently within _____ [special district such as urban renewal district, enterprise zone, etc.]
has ☐ no acres ☐ ____ acres under farm deferral.
has ☐ no acres ☐ ____ acres under forest deferral.
☐ is not ☐ is currently leased or rented out*.
will be managed by ☐ the Tribal Government,
☐ a Tribally-created entity (contact information below),
☐ a Federally-chartered Tribal corporation (contact information below),
☐ a third party (contact information below).
Organization: _____
Contact Person: _____
Address: _____
City: _____ State: _____ ZIP: _____
Telephone: _____

CTGR:
☐ currently holds the title to the land.
It was acquired on _____, by _____
☐ does not currently hold the title to the land.
It is being purchased contingent on trust approval.
The sale price was $_____. Tax statement for 20___ was: $_____.

[1] Note: This LOR acreage differs from the County records which reflect [#] acres.
* Note: This is comprimised of [#] tax accounts, [OR] for account # [#], [OR] for account # [#] and [OR] for account # [#].

Trust Acquisition Application — Page 1

Phase I ESA

A Phase I ESA was completed on _____, by _____ ("Contractor").
The report concluded that _____.

On _____ Contractor was directed to submit the report directly to Siletz Agency.

NEPA Compliance

☐ There will be a change in land use or ground-disturbing activity. In conjunction with this application, CTGR is requesting that an environmental assessment (EA) be initiated.

☐ There is no change in land use and no ground-disturbing activity. In conjunction with this application, CTGR is requesting a Categorical Exclusion.

Cultural and Archaeological Review

At request of the Lands Manager, the Tribe's Cultural Department has performed a cultural and archaeological review of the parcel. The report of their findings is attached (see Table of Contents).

There are: ☐ no issues for concern. ☐ concerns addressed in the report.

Cultural Department Contact: _____
503-879-_____

Threatened and Endangered Species Review

At request of the Lands Manager, the Tribal Fish and Wildlife Office has performed a threatened and endangered species review of the parcel. The report of their findings is attached (see Table of Contents).

There are: ☐ no issues for concern. ☐ concerns addressed in the report.

Fish and Wildlife Office Contact: _____
503-879-_____

Trust Acquisition Application — Page 2

Wetlands Review

At request of the Lands Manager, the Tribal Fish and Wildlife Office has performed a wetland review of the parcel. The report of their findings is attached (see Table of Contents).

There are: ☐ no issues for concern. ☐ concerns addressed in the report.

Fish and Wildlife Office Contact: Contact: _____
_____
503-879-_____

Gaming

☐ This tract will not be used for gaming or gaming related purposes. An explanation as to why it is unlikely the Tribe would ever use the property for gaming, or gaming-related purposes, is included in the attached Narrative regarding Purpose (see Table of Contents).
☐ This tract will be used for gaming or gaming-related purposes.

Preparer

I certify that to the best of my knowledge, the information provided in this application is accurate. On behalf of CTGR, I hereby request the Bureau of Indian Affairs accept title to this property in trust for the tribe.

_____
Jan Michael Reibach Lands Manager Date
503-879-2394

* If answered affirmatively above, documentation is attached (see Table of Contents)

Trust Acquisition Application — Page 3

The Confederated Tribes of the Grand Ronde Community of Oregon

Tribal Land Management
Phone (503) 879-2394
Fax (503) 879-1353

9615 Grand Ronde Road
Grand Ronde, Oregon 97347

<DATE>

<Name of County> County Assessor Office
Attn:
<address >

Re: Temporary Tax Exemption for Property in <NAME> County

<NAME> County Assessor Office,

The Tribe has requested that the Department of Interior, Bureau of Indian Affairs hold title to the following real property in trust for the benefit of the Confederated Tribes of the Grand Ronde Community of Oregon.

"<NAME OF PROPERTY> Property"
Identified as *Tax Lot <number>*, located in Section <number>, <township, range>, of the W.M., <Name of County>, Oregon.

I am requesting an "EXEMPT" status for this parcel and have attached a copy of the letter from the Bureau of Indian Affairs for your review (previously received by your office direct from them).

If you have any questions, please contact me. I truly appreciate the great cooperation.

Respectfully,

Jan Michael Reibach
Tribal Lands Manager
503 879-2394

Umpqua Molalla Rogue River Kalapuya Chasta

Oregon Revised Statute

307.180 Property of Indians. The real property of all Indians residing upon Indian reservations who have not severed their tribal relations or taken lands in severalty, except lands held by them by purchase or inheritance, and situated on an Indian reservation, is exempt from taxation. However, the lands owned or held by Indians in severalty upon any Indian reservation and the personal property of such Indians upon reservations shall be exempt from taxation only when so provided by any law of the United States. [Amended by 1953 c.698 §7]

307.181 Land acquired by tribe within ancient tribal boundaries. (1) Land acquired by an Indian tribe by purchase, gift or without consideration is exempt from taxation if:

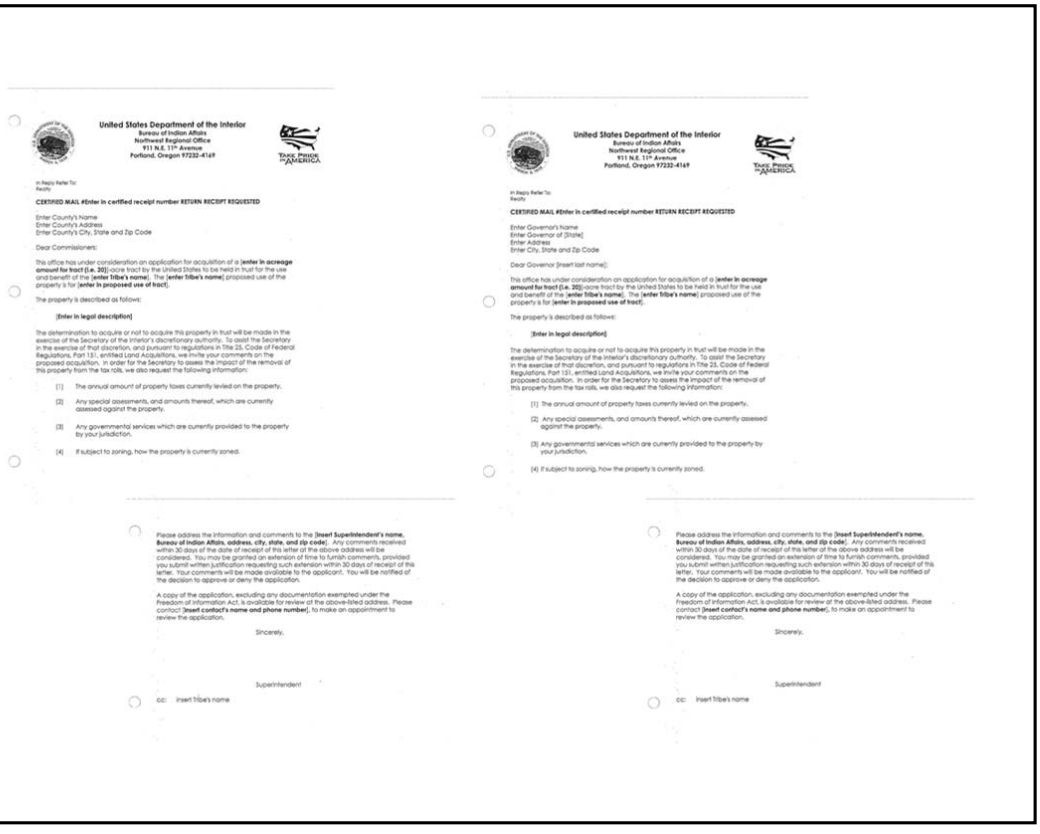
(a) The land is located within the ancient tribal boundaries of the tribe; and

(b) Acquisition of the land by the United States in trust status has been requested or is in process.

(2) The exemption under this section ceases if the federal government enters a final administrative determination denying the request for acquisition of the land in trust status and:

(a) The deadlines for all available federal administrative appeals and federal judicial review expire with no appeal or review initiated; or

(b) All federal administrative and judicial proceedings arising from or related to the request for or process of acquisition of the land in trust status that have been initiated are completed without overturning the administrative denial of the request. [1993 c.266 §2; 1995 c.748 §3; 2001 c.753 §29; 2009 c.453 §1]



United States Department of the Interior
Bureau of Indian Affairs
Northwest Regional Office
911 N.E. 11th Avenue
Portland, Oregon 97232-4169

TAKE PRIDE IN AMERICA

In Reply Refer To:
Realty

CERTIFIED MAIL #Enter in certified receipt number RETURN RECEIPT REQUESTED

Enter County's Name
Enter County's Address
Enter County's City, State and Zip Code

Dear Commissioners:

This office has under consideration an application for acquisition of a **[enter in acreage amount for tract (i.e. 20)]**-acre tract by the United States to be held in trust for the use and benefit of the **[enter Tribe's name]**. The **[enter Tribe's name]** proposed use of the property is for **[enter in proposed use of tract]**.

The property is described as follows:

[Enter in legal description]

The determination to acquire or not to acquire this property in trust will be made in the exercise of the Secretary of the Interior's discretionary authority. To assist the Secretary in the exercise of that discretion, and pursuant to regulations in Title 25, Code of Federal Regulations, Part 151, entitled Land Acquisitions, we invite your comments on the proposed acquisition. In order for the Secretary to assess the impact of the removal of this property from the tax rolls, we also request the following information:

(1) The annual amount of property taxes currently levied on the property.

(2) Any special assessments, and amounts thereof, which are currently assessed against the property.

(3) Any governmental services which are currently provided to the property by your jurisdiction.

(4) If subject to zoning, how the property is currently zoned.

Please address the information and comments to the **[Insert Superintendent's name, Bureau of Indian Affairs, address, city, state, and zip code]**. Any comments received within 30 days of the date of receipt of this letter at the above address will be considered. You may be granted an extension of time to furnish comments, provided you submit written justification requesting such extension within 30 days of receipt of this letter. Your comments will be made available to the applicant. You will be notified of the decision to approve or deny the application.

A copy of the application, excluding any documentation exempted under the Freedom of Information Act, is available for review at the above-listed address. Please contact **[insert contact's name and phone number]**, to make an appointment to review the application.

Sincerely,

Superintendent

cc: Insert Tribe's name

United States Department of the Interior
Bureau of Indian Affairs
Northwest Regional Office
911 N.E. 11th Avenue
Portland, Oregon 97232-4169

TAKE PRIDE IN AMERICA

In Reply Refer To:
Realty

CERTIFIED MAIL #Enter in certified receipt number RETURN RECEIPT REQUESTED

Enter Governor's Name
Enter Governor of [State]
Enter Address
Enter City, State and Zip Code

Dear Governor [insert last name]:

This office has under consideration an application for acquisition of a **[enter in acreage amount for tract (i.e. 20)]**-acre tract by the United States to be held in trust for the use and benefit of the **[enter Tribe's name]**. The **[enter Tribe's name]** proposed use of the property is for **[enter in proposed use of tract]**.

The property is described as follows:

[Enter in legal description]

The determination to acquire or not to acquire this property in trust will be made in the exercise of the Secretary of the Interior's discretionary authority. To assist the Secretary in the exercise of that discretion, and pursuant to regulations in Title 25, Code of Federal Regulations, Part 151, entitled Land Acquisitions, we invite your comments on the proposed acquisition. In order for the Secretary to assess the impact of the removal of this property from the tax rolls, we also request the following information:

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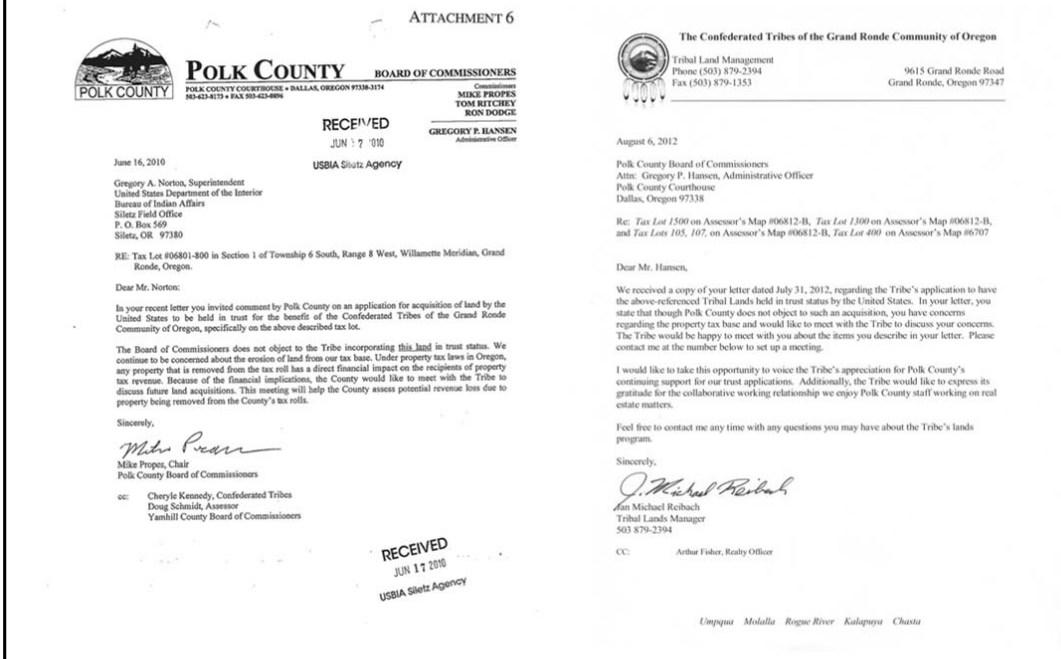
Sincerely,

Superintendent

cc: Insert Tribe's name



ATTACHMENT 6

POLK COUNTY BOARD OF COMMISSIONERS
POLK COUNTY COURTHOUSE • DALLAS, OREGON 97338-3174
503-623-8173 • FAX 503-623-0896
Commissioners
MIKE PROPES
TOM RITCHEY
RON DODGE
GREGORY P. HANSEN
Administrative Officer

RECEIVED
JUN 17 2010
USBIA Siletz Agency

June 16, 2010

Gregory A. Norton, Superintendent
United States Department of the Interior
Bureau of Indian Affairs
Siletz Field Office
P. O. Box 569
Siletz, OR 97380

RE: Tax Lot #06801-800 in Section 1 of Township 6 South, Range 8 West, Willamette Meridian, Grand Ronde, Oregon.

Dear Mr. Norton:

In your recent letter you invited comment by Polk County on an application for acquisition of land by the United States to be held in trust for the benefit of the Confederated Tribes of the Grand Ronde Community of Oregon, specifically on the above described tax lot.

The Board of Commissioners does not object to the Tribe incorporating this land in trust status. We continue to be concerned about the erosion of land from our tax base. Under property tax laws in Oregon, any property that is removed from the tax roll has a direct financial impact on the recipients of property tax revenue. Because of the financial implications, the County would like to meet with the Tribe to discuss future land acquisitions. This meeting will help the County assess potential revenue loss due to property being removed from the County's tax rolls.

Sincerely,

Mike Propes, Chair
Polk County Board of Commissioners

cc: Cheryle Kennedy, Confederated Tribes
Doug Schmidt, Assessor
Yamhill County Board of Commissioners

RECEIVED
JUN 17 2010
USBIA Siletz Agency

The Confederated Tribes of the Grand Ronde Community of Oregon
Tribal Land Management
Phone (503) 879-2394
Fax (503) 879-1353
9615 Grand Ronde Road
Grand Ronde, Oregon 97347

August 6, 2012

Polk County Board of Commissioners
Attn: Gregory P. Hansen, Administrative Officer
Polk County Courthouse
Dallas, Oregon 97338

Re: *Tax Lot 1500* on Assessor's Map #06812-B, *Tax Lot 1300* on Assessor's Map #06812-B, and *Tax Lots 105, 107,* on Assessor's Map #06812-B, *Tax Lot 400* on Assessor's Map #6707

Dear Mr. Hansen,

We received a copy of your letter dated July 31, 2012, regarding the Tribe's application to have the above-referenced Tribal Lands held in trust status by the United States. In your letter, you state that though Polk County does not object to such an acquisition, you have concerns regarding the property tax base and would like to meet with the Tribe to discuss your concerns. The Tribe would be happy to meet with you about the items you describe in your letter. Please contact me at the number below to set up a meeting.

I would like to take this opportunity to voice the Tribe's appreciation for Polk County's continuing support for our trust applications. Additionally, the Tribe would like to express its gratitude for the collaborative working relationship we enjoy Polk County staff working on real estate matters.

Feel free to contact me any time with any questions you may have about the Tribe's lands program.

Sincerely,

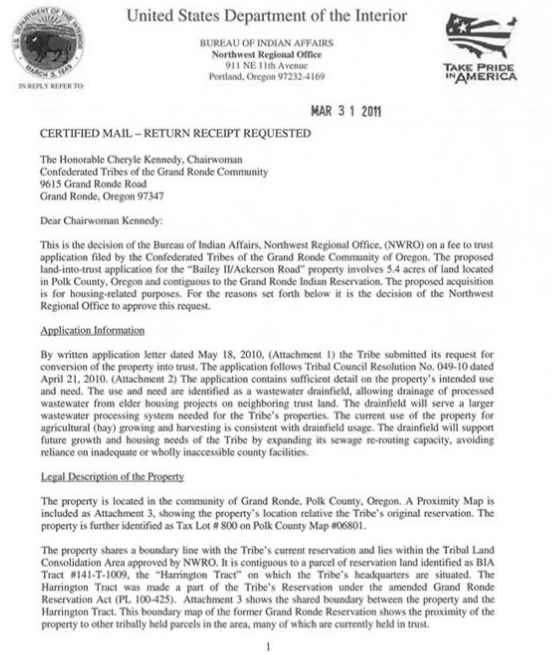
Jon Michael Reibach
Tribal Lands Manager
503 879-2394

CC: Arthur Fisher, Realty Officer

Umpqua Molalla Rogue River Kalapuya Chasta

Decision Letter

- Notice
- Need and Purpose
- Impact on State and Political Subdivisions
- Jurisdiction/Land Use Conflicts
- Additional Responsibilities
- NEPA/Hazardous Substance
- Title Examination
- Conclusion
- Appeal Rights



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Northwest Regional Office
911 NE 11th Avenue
Portland, Oregon 97232-4169

IN REPLY REFER TO:

TAKE PRIDE IN AMERICA

MAR 31 2011

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

The Honorable Cheryle Kennedy, Chairwoman
Confederated Tribes of the Grand Ronde Community
9615 Grand Ronde Road
Grand Ronde, Oregon 97347

Dear Chairwoman Kennedy:

This is the decision of the Bureau of Indian Affairs, Northwest Regional Office, (NWRO) on a fee to trust application filed by the Confederated Tribes of the Grand Ronde Community of Oregon. The proposed land-into-trust application for the "Bailey II/Ackerson Road" property involves 5.4 acres of land located in Polk County, Oregon and contiguous to the Grand Ronde Indian Reservation. The proposed acquisition is for housing-related purposes. For the reasons set forth below it is the decision of the Northwest Regional Office to approve this request.

Application Information

By written application letter dated May 18, 2010, (Attachment 1) the Tribe submitted its request for conversion of the property into trust. The application follows Tribal Council Resolution No. 049-10 dated April 21, 2010. (Attachment 2) The application contains sufficient detail on the property's intended use and need. The use and need are identified as a wastewater drainfield, allowing drainage of processed wastewater from elder housing projects on neighboring trust land. The drainfield will serve a larger wastewater processing system needed for the Tribe's properties. The current use of the property for agricultural (hay) growing and harvesting is consistent with drainfield usage. The drainfield will support future growth and housing needs of the Tribe by expanding its sewage re-routing capacity, avoiding reliance on inadequate or wholly inaccessible county facilities.

Legal Description of the Property

The property is located in the community of Grand Ronde, Polk County, Oregon. A Proximity Map is included as Attachment 3, showing the property's location relative the Tribe's original reservation. The property is further identified as Tax Lot # 800 on Polk County Map #06801.

The property shares a boundary line with the Tribe's current reservation and lies within the Tribal Land Consolidation Area approved by NWRO. It is contiguous to a parcel of reservation land identified as BIA Tract #141-T-1009, the "Harrington Tract" on which the Tribe's headquarters are situated. The Harrington Tract was made a part of the Tribe's Reservation under the amended Grand Ronde Reservation Act (PL 100-425). Attachment 3 shows the shared boundary between the property and the Harrington Tract. This boundary map of the former Grand Ronde Reservation shows the proximity of the property to other tribally held parcels in the area, many of which are currently held in trust.

1

NEPA

Department of the Interior
Departmental Manual

Effective Date: 5/27/04
Series: Environmental Quality Programs
Part 516: National Environmental Policy Act of 1969
Chapter 10: Managing the NEPA Process--Bureau of Indian Affairs

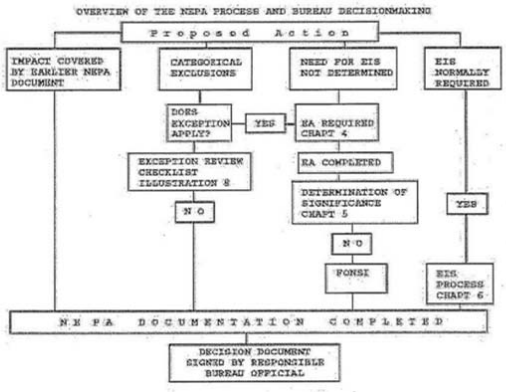
Originating Office: Bureau of Indian Affairs

10.5 **Categorical Exclusions**. In addition to the actions listed in the Department's categorical exclusions in Appendix 1 of 516 DM 2, many of which the BIA also performs, the following BIA actions are hereby designated as categorical exclusions unless the action qualifies as an exception under Appendix 2 of 516 DM 2. These activities are single, independent actions not associated with a larger, existing or proposed, complex or facility. If cases occur that involve larger complexes or facilities, an EA or supplement should be accomplished.

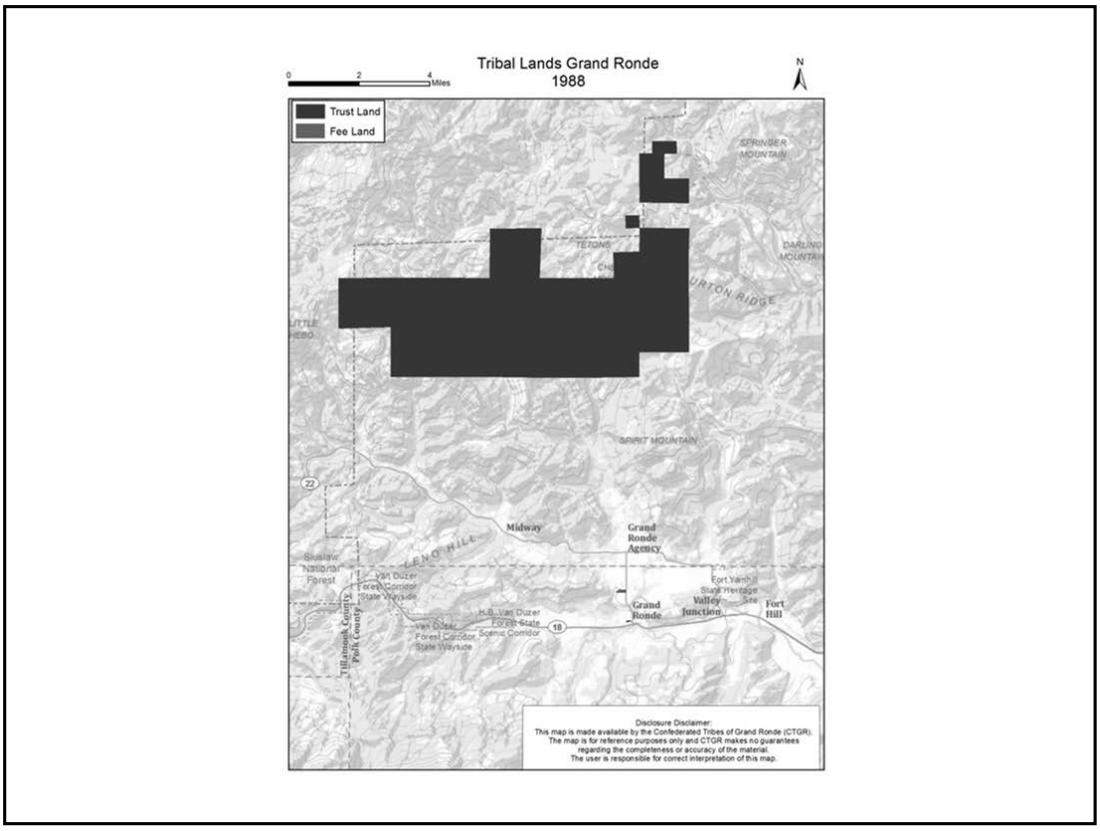
[...]

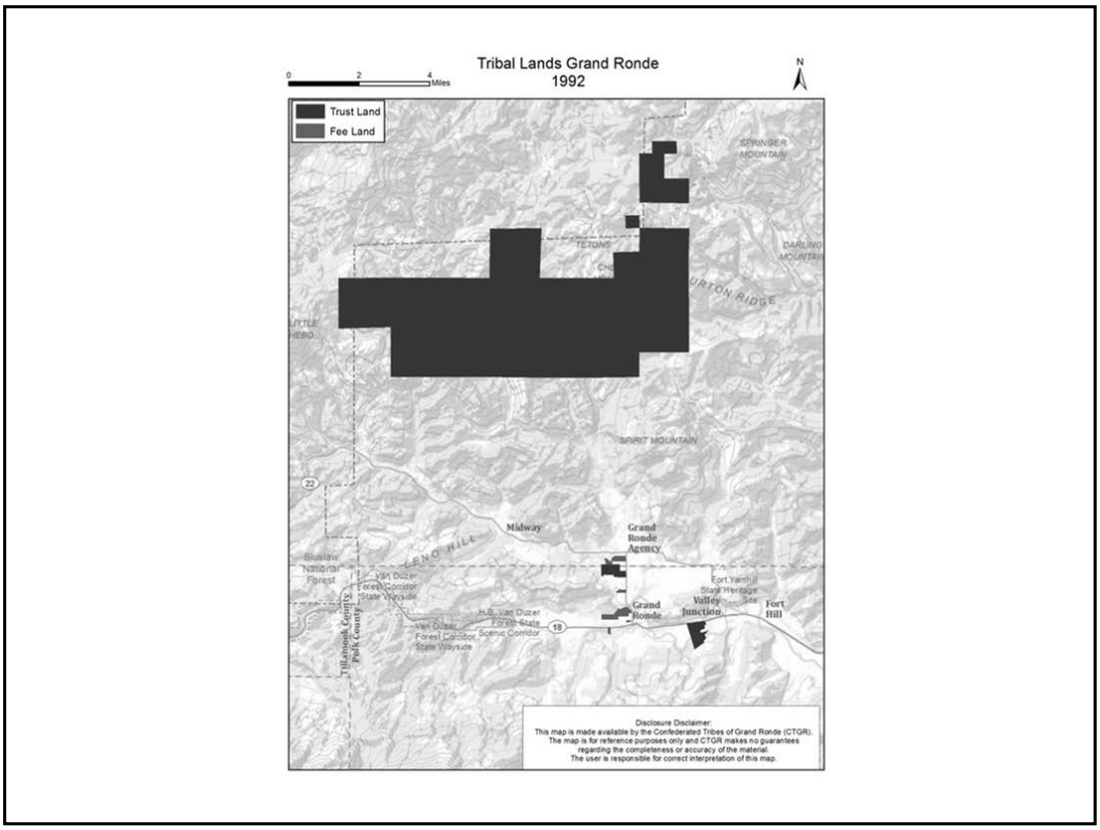
I. Land Conveyance and Other Transfers. Approvals or grants of conveyances and other transfers of interests in land where no change in land use is planned.

NEPA (continued)



If the acquisition is not a Categorical Exclusion or covered by an earlier NEPA document, then an EA or EIS is required.


Tribal Lands Grand Ronde
1988
0 2 4 Miles
N
Trust Land
Fee Land
SPRINGER MOUNTAIN
TETONS
DARLING MOUNTAIN
URTON RIDGE
SPIRIT MOUNTAIN
22
Midway
Grand Ronde Agency
LENO HILL
Siuslaw National Forest
Van Duzer Forest Corridor State Wayside
Tillamook County
Polk County
Fort Yamhill State Heritage Site
Grand Ronde
Valley Junction
Fort Hill
H.B. Van Duzer Forest State Scenic Corridor
18
Disclosure Disclaimer:
This map is made available by the Confederated Tribes of Grand Ronde (CTGR).
The map is for reference purposes only and CTGR makes no guarantees regarding the completeness or accuracy of the material.
The user is responsible for correct interpretation of this map.


Tribal Lands Grand Ronde
1992
0 2 4 Miles
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Trust Land
Fee Land
SPRINGER MOUNTAIN
TETONS
DARLING MOUNTAIN
URTON RIDGE
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22
Midway
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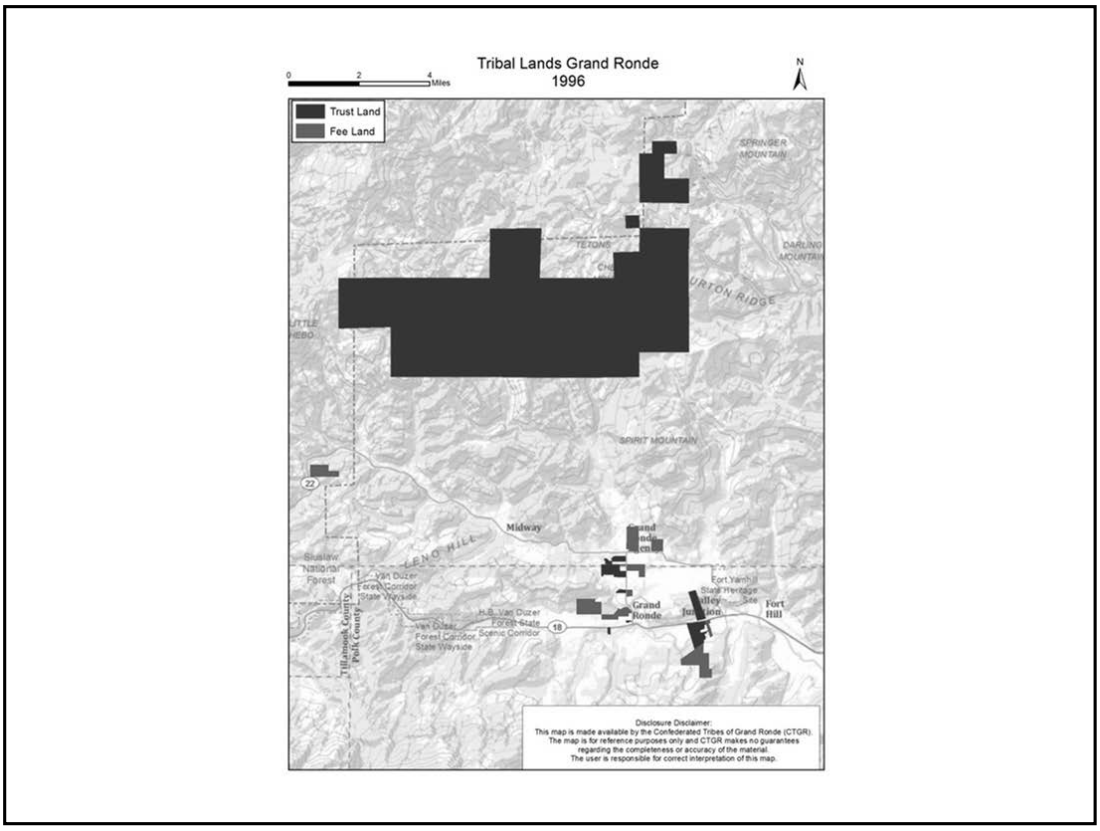
Tribal Lands Grand Ronde
1996
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Grand Ronde
Fort Yamhill State Heritage Site
Fort Hill
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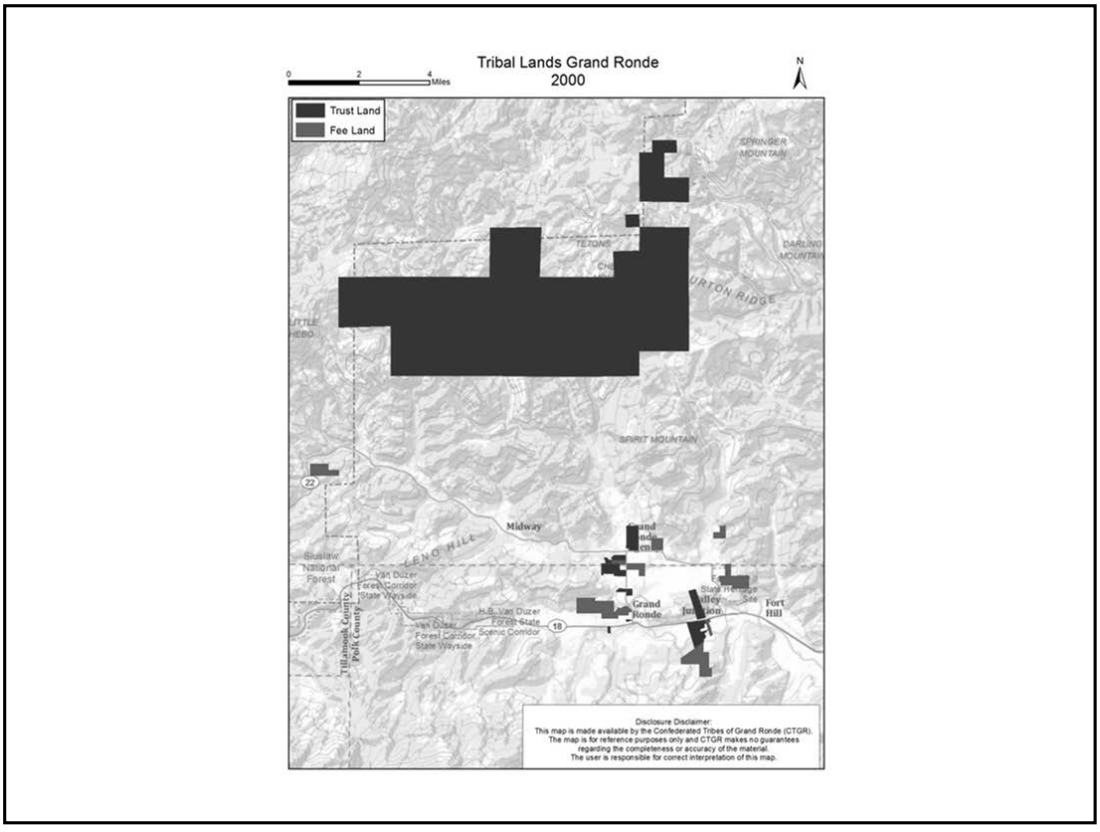
Tribal Lands Grand Ronde
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Fee Land
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TETONS
DARLING MOUNTAIN
URTON RIDGE
SPIRIT MOUNTAIN
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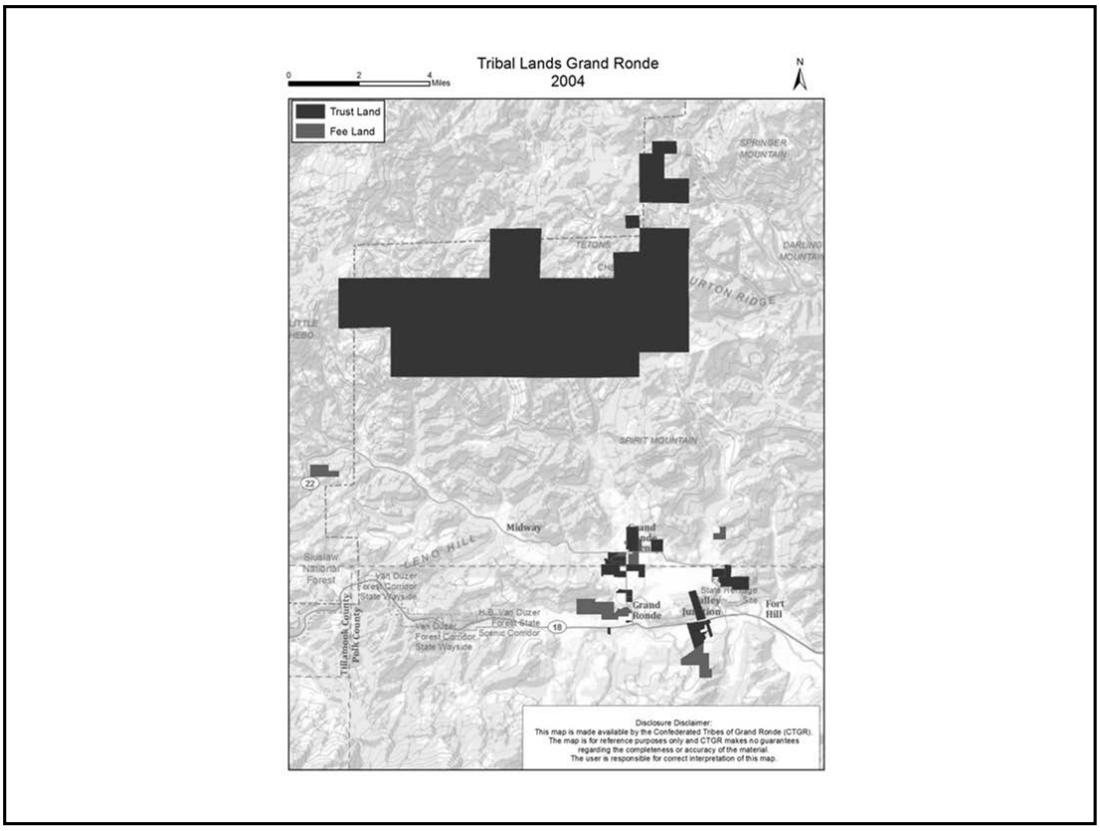
Tribal Lands Grand Ronde
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Trust Land
Fee Land
SPRINGER MOUNTAIN
TETONS
DARLING MOUNTAIN
SPIRIT MOUNTAIN
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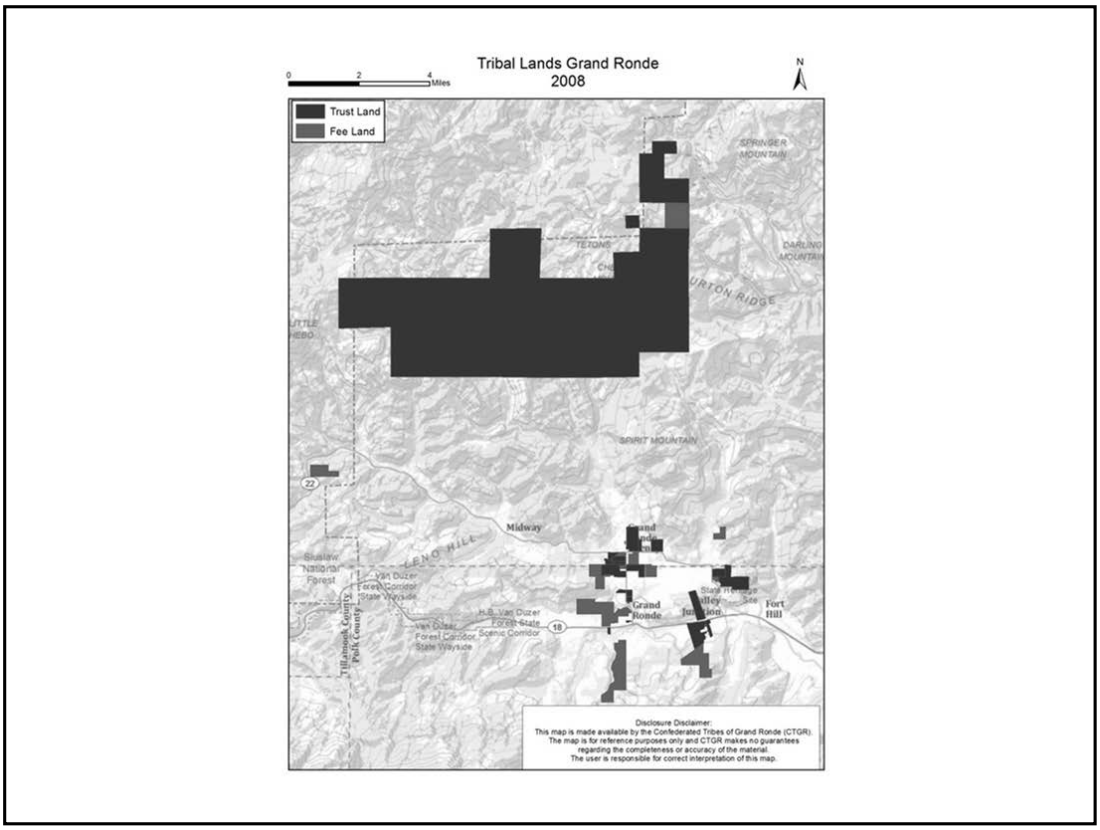
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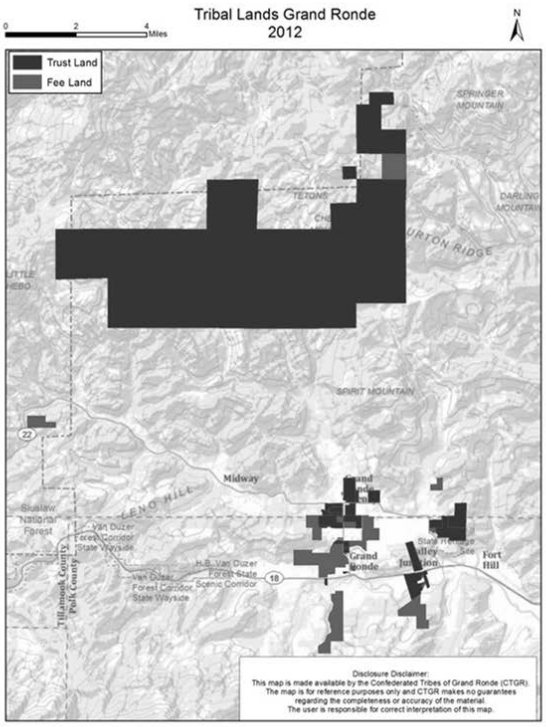
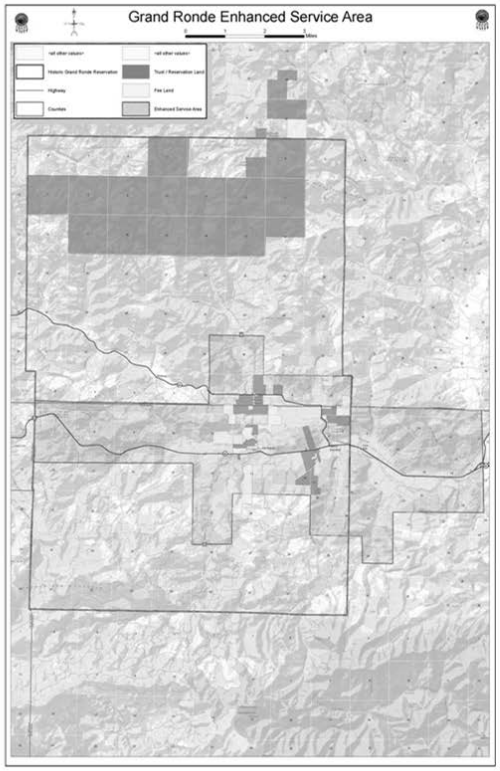


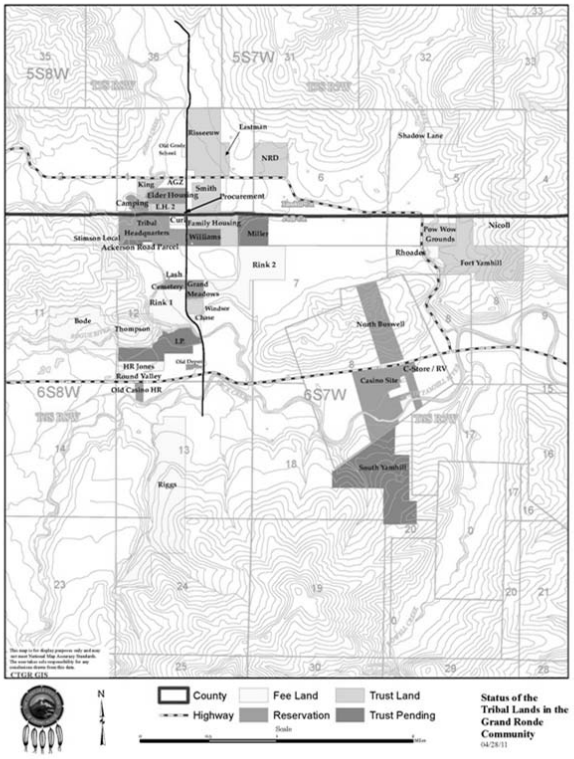


Acquisitions within the Original Reservation

The Tribe's restored reservation is located in the heart of the original Grand Ronde Reservation. Today, the Tribe owns a total of 12,535.70 acres of land, of which 11,182.24 have Reservation or trust status. 10,606.38 of the Reservation/trust acres are forested timber land.

Trust Lands

The remaining 575.86 acres accommodate the Tribe's headquarters, housing projects, casino complex, and supporting infrastructure. Approximately 1,353.46 remain in fee. The Tribe continues to acquire reservation parcels to further its self-determination.



Government – to – Government Partnerships and Community Development

BEFORE THE BOARD OF COMMISSIONERS
FOR POLK COUNTY, OREGON

In the Matter of Proposed Technical Corrections Amendment to Streamline The Interior Department Process

RESOLUTION NO. 10-05

WHEREAS, the Grand Ronde Restoration Act of 1983 (25 U.S.C. 713, et seq.) ("Restoration Act") was enacted to restore the recognition by the United States of the Confederated Tribes of the Grand Ronde Community of Oregon ("Tribe") and was followed by the Grand Ronde Reservation Act of 1988 (Pub. L. No. 100-425) ("Reservation Act"), which created a 9,811 acre reservation for the Tribe; and

WHEREAS, under the Restoration and Reservation Acts and the Indian Reorganization Act of 1934 (25 U.S.C. 465), as amended, the U.S. Department of Interior ("Interior Department") has the authority to take lands into trust for the benefit of the Tribe; and

WHEREAS, the original 1857 reservation of the Tribe, established by a federal Executive Order dated June 30, 1857, comprised 61,440 acres within the political boundaries of Polk and Yamhill Counties in Oregon ("Original Reservation"); and

WHEREAS, the Tribe is seeking a technical corrections amendment to the Restoration and Reservation Acts to streamline the Interior Department process by allowing land into trust applications for real property located within the Original Reservation boundaries of the Tribe to be processed as "on reservation" applications; and

WHEREAS, the proposed technical corrections amendment will also correct technical errors in the legal descriptions of the parcels included in the Reservation Act and will provide that once land is taken into trust it will become part of the Tribe's reservation; and

WHEREAS, this proposed technical corrections amendment is consistent with the government-to-government relationship between Polk County and the Tribe; now, therefore:

BE IT RESOLVED, that the Polk County Board of Commissioners expresses support for the proposed technical corrections amendment to streamline the Interior Department process.

ADOPTED this 2nd day of June 2010.

POLK COUNTY BOARD OF COMMISSIONERS

Mike Propst, Chairman

Tom Ritchey, Commissioner

Ron Dodge, Commissioner

Approved as to form:

Dave Doyle
County Counsel

100795

IN THE BOARD OF COMMISSIONERS OF THE STATE OF OREGON

FOR THE COUNTY OF YAMHILL

SITTING FOR THE TRANSACTION OF COUNTY BUSINESS

In the Matter of a Resolution In Support of a Proposed Technical Corrections Amendment to the Restoration and Reservation Acts

RESOLUTION 10-6-7-1

THE BOARD OF COMMISSIONERS OF YAMHILL COUNTY ("the Board") sat for the transaction of county business in special formal session on June 7, 2010, at 1:55 p.m. in the Oval Office of the Fenton House, Commissioners Kathy George, Mary P. Stern, and Leslie Lewis being present.

WHEREAS, the Grand Ronde Restoration Act of 1983 (25 U.S.C. 713, et seq.) ("Restoration Act") was enacted to restore the recognition by the United States of the Confederated Tribes of the Grand Ronde Community of Oregon ("Tribe") and was followed by the Grand Ronde Reservation Act of 1988 (Pub. L. No. 100-425) ("Reservation Act"), which created a 9,811-acre reservation for the Tribe; and

WHEREAS, under the Restoration and Reservation Acts and the Indian Reorganization Act of 1934 (25 U.S.C. 465), as amended, the U.S. Department of Interior ("Interior Department") has the authority to take lands into trust for the benefit of the Tribe; and

WHEREAS, the original 1857 reservation of the Tribe, established by a federal Executive Order dated June 30, 1857, comprised 61,440 acres within the political boundaries of Polk and Yamhill Counties in Oregon ("Original Reservation"); and

WHEREAS, the Tribe is seeking a technical corrections amendment to the Restoration and Reservation Acts to streamline the Interior Department process by allowing land into trust applications for real property located within the Original Reservation boundaries of the Tribe to be processed as "on reservation" applications; and

WHEREAS, the proposed technical corrections amendment will also correct technical errors in the legal descriptions of the parcels included in the Reservation Act and will provide that once land is taken into trust, it will become part of the Tribe's reservation; and

WHEREAS, this proposed technical corrections amendment is consistent with the government-to-government relationship between Yamhill County and the Tribe;

NOW, THEREFORE, BE IT RESOLVED, that the Yamhill County Board of Commissioners expresses support for the proposed technical corrections amendment to streamline the Interior Department process.

DONE this 7th day of June, 2010.

ATTEST
REBEKAH STERN DOLL
County Clerk
By Deputy ANNE BRITT

YAMHILL COUNTY BOARD OF COMMISSIONERS
KATHY GEORGE
Commissioner
MARY P. STERN
Commissioner
LESLIE LEWIS

APPROVED AS TO FORM:
RICK SANAJ
Assistant County Counsel







SPIRIT MOUNTAIN
COMMUNITY FUND

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Northwest Regional Office
911 NE 11th Avenue
Portland, Oregon 97232-4169

IN REPLY REFER TO:

TAKE PRIDE IN AMERICA

MAR 3 1 2011

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

The Honorable Cheryle Kennedy, Chairwoman
Confederated Tribes of the Grand Ronde Community
9615 Grand Ronde Road
Grand Ronde, Oregon 97347

Dear Chairwoman Kennedy:

This is the decision of the Bureau of Indian Affairs, Northwest Regional Office, (NWRO) on a fee to trust application filed by the Confederated Tribes of the Grand Ronde Community of Oregon. The proposed land-into-trust application for the "Bailey II/Ackerson Road" property involves 5.4 acres of land located in Polk County, Oregon and contiguous to the Grand Ronde Indian Reservation. The proposed acquisition is for housing-related purposes. For the reasons set forth below it is the decision of the Northwest Regional Office to approve this request.

Application Information

By written application letter dated May 18, 2010, (Attachment 1) the Tribe submitted its request for conversion of the property into trust. The application follows Tribal Council Resolution No. 049-10 dated April 21, 2010. (Attachment 2) The application contains sufficient detail on the property's intended use and need. The use and need are identified as a wastewater drainfield, allowing drainage of processed wastewater from elder housing projects on neighboring trust land. The drainfield will serve a larger wastewater processing system needed for the Tribe's properties. The current use of the property for agricultural (hay) growing and harvesting is consistent with drainfield usage. The drainfield will support future growth and housing needs of the Tribe by expanding its sewage re-routing capacity, avoiding reliance on inadequate or wholly inaccessible county facilities.

Legal Description of the Property

The property is located in the community of Grand Ronde, Polk County, Oregon. A Proximity Map is included as Attachment 3, showing the property's location relative the Tribe's original reservation. The property is further identified as Tax Lot # 800 on Polk County Map #06801.

The property shares a boundary line with the Tribe's current reservation and lies within the Tribal Land Consolidation Area approved by NWRO. It is contiguous to a parcel of reservation land identified as BIA Tract #141-T-1009, the "Harrington Tract" on which the Tribe's headquarters are situated. The Harrington Tract was made a part of the Tribe's Reservation under the amended Grand Ronde Reservation Act (PL 100-425). Attachment 3 shows the shared boundary between the property and the Harrington Tract. This boundary map of the former Grand Ronde Reservation shows the proximity of the property to other tribally held parcels in the area, many of which are currently held in trust.

The legal description of the property, confirmed under a survey reviewed by the Bureau of Land Management, is:

> THE SOUTHERLY 231 FEET OF EVEN WIDTH OF THE SOUTHWEST ONE-QUARTER (SW 1/4) OF THE SOUTHWEST ONE-QUARTER (SW 1/4) OF SECTION 1, TOWNSHIP 6 SOUTH, RANGE 8 WEST OF THE WILLAMETTE MERIDIAN IN POLK COUNTY, OREGON.
>
> ALSO ALL OF THE FOLLOWING DESCRIBED REAL PROPERTY LYING SOUTH AND WEST OF THE YAMHILL RIVER: THE SOUTHWEST ONE-QUARTER (SW 1/4) OF THE SOUTHWEST ONE-QUARTER (SW 1/4) OF SECTION 1, TOWNSHIP 6 SOUTH, RANGE 8 WEST, WILLAMETTE MERIDIAN IN POLK COUNTY, OREGON.
>
> SAVE AND EXCEPT THAT PORTION OF THE ABOVE DESCRIBED PROPERTY CONVEYED TO DOLLY BAKER BY DEED RECORDED SEPTEMBER 30, 1958 IN VOLUME 168, PAGE 179, DEED RECORDS FOR POLK COUNTY, OREGON.
>
> ALSO SAVE AND EXCEPT THAT PORTION OF THE ABOVE DESCRIBED PROPERTY LYING NORTH OF THE CENTERLINE OF THE YAMHILL RIVER.

Notice of Application to State and Local Government

Notices of the proposed fee to trust conversion were sent to the Oregon Governor and to the Polk County Board of Commissioners on June 3, 2010. (Attachments 4 and 5) These Notices solicited comment on the proposed fee-to-trust conversion. The Siletz Agency received no responses from the Governor's Office. Polk County responded by letter stating that they have no objection to this acquisition (Attachment 6).

Background

The Confederated Tribes of the Grand Ronde Community of Oregon is recognized by the Secretary of the Interior as eligible for the special programs and services by the Bureau of Indian Affairs. The Tribe was restored to Federal Recognition under Public Law 98-165 (the Grand Ronde Restoration Act of November 22, 1983) and is listed in the Federal Register under Public Law 95-105. The Act of November 14, 1998 (Public Law 105-256) and the Native American Technical Corrections Act of March 2, 2004 (Public Law 108-204) amended the Recognition Act to provide for the acquisition of land into trust and establishment of a reservation.

REGULATORY REQUIREMENTS

The regulations governing all fee-to-trust acquisitions are published in 25 C.F.R. Part 151, Land Acquisitions. As required by Part 151, § 151.10, the following factors were considered in arriving at my decision: 1) the existence of statutory authority for the acquisition and any limitation contained in such authority; 2) the need for additional lands; 3) the purpose for which the land will be used; 4) if the land to be acquired is in unrestricted fee status the impact on the state and its political subdivisions resulting from the removal of the land from the tax rolls; 5) jurisdictional problems and potential conflicts of land use which may arise; 6) if the land acquired is in fee status whether the Bureau is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status; and 7) the extent to which the applicant has provided information that allows the Secretary to comply with 5 16 DM 6, Appendix 4, National Environmental Policy Act (NEPA) Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

25 C.F.R. 151.10 (a) - Statutory Authority

The Indian Reorganization Act of June 18, 1934, (48 Stat. 984); 25 U.S.C. §§ 465, "Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption," states in relevant part:

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

The Grand Ronde Restoration Act of November 22, 1983, Public Law 98-165 and Section 5 of the Indian Reorganization Act of 1934 (48 Stat. 984) provide the authority for this acquisition. Section 4 of the Restoration Act states:

> (b) RESTORATION OF RIGHTS AND PRIVILEGES. – .... [A]ll rights and privileges of the tribe and the members of the tribe under any federal treaty, executive order, agreement, or statute, or under any other Federal authority, which may have been diminished or lost under the Act approved August 13, 1954 are restored.
>
> (c) FEDERAL SERVICES AND BENEFITS. - ... [t]he tribe and its members shall be eligible, on and after the date of the enactment of this Act, for all Federal services and benefits furnished to federally recognized Indian tribes without regard to the existence of a reservation for the tribe.

25 C.F.R. 151.3 (a) further authorizes this action when it states:

> Subject to the provisions contained in the acts of Congress which authorize land acquisitions, 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 within a tribal consolidation area; or 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.

I find that the Tribe has met the requirements for acquisitions under 25 C.F.R. 151.3(a) for the following reasons: (1) the Tribe owns the property in fee, (Attachment 8 – Preliminary Title Report) and (2) the purpose of the acquisition is for tribal self-determination and Indian housing.

NEED AND PURPOSE

The Tribe explained the need and purpose for acquiring this land in the Need and Purpose Statement. A copy of that document is included as Attachment 9. Following is a brief summary.

25 C.F.R. 151.10 (b) - Need

As a result of the federal government's allotment and termination policies, the Tribe lost both its federal recognition and its 61,440-acre original reservation. Following the Tribe's termination in 1954, tribal members and the Tribe's government have worked consistently to rebuild the Grand Ronde community. Since 1988 when its reservation was re-established, the Tribe has pursued the goal of securing its sovereignty by acquiring additional parcels of its original reservation lands and using them to strengthen

the Tribe's economy and culture by providing on-reservation jobs, housing, health care and other services to Tribal members.

The Tribe's restored reservation is located in the heart of the original Grand Ronde Reservation. Today, the Tribe owns a total of 12,335.27 acres of land, 10,312.66 which has reservation or trust status. 10,052.38 acres of the reservation land is forested timber land, and the remaining 260.28 acres accommodates the Tribe's headquarters, housing projects, casino complex, and supporting infrastructure.

Housing, for tribal members and especially its elders, is critical to the Tribe's healthy growth and sovereignty objectives. The Tribe has identified an urgent need for additional land area in the reservation's developed core to extend its wastewater drainfield capacity for elder and other tribal housing. Drainfield capacity is needed to operate and expand tribal housing since disposal of treated wastewater is problematic in the region. Drainfield capacity, for an elders' housing project, defines the exact purpose of this application.

I find the need to have land acquired in trust to support tribal housing and wastewater treatment capacity is adequately justified in the application.

25 C.F.R. 151.10 (c) - Purpose

The property will be used as a drainfield to support current and future tribal housing, mainly by enhancing its housing-related sewage and wastewater treatment infrastructure. Construction of a drainfield to serve the Tribe's existing sewage treatment facilities is necessary for proper operation of these essential services by the Tribe. It will allow much needed housing expansion.

As described above and in greater detail in the Tribe's need and purpose statement, (Attachment 9) construction of a drainfield on the Bailey II Ackerson Road property to serve tribal wastewater treatment plants and operations is necessary for the plants to be fully operational and for them to serve both existing and future Tribal housing projects. The county system is not an option to meet this effluent demand. Acquisition of this trust parcel is necessary to allow installation of the drainfield.

I find that the purpose for which the Tribe intends to use the property addresses the needs it has identified in its application. The acquisition of this property in trust would further tribal efforts to supply much needed housing to its members and would further the Tribe's goals of self-determination and sovereignty by allowing the Tribe to operate wastewater treatment facilities, independent of those supplied by any outside government.

25 C.F.R. 151.10 (e) - Impact of the State and Political Subdivisions resulting from the removal of the land from the tax rolls

Notices of the proposed fee to trust conversion were sent to the Oregon Governor and to the Polk County Board of Commissioners on June 3, 2010. (Attachments 4 and 5) These Notices solicited comment on the proposed fee-to-trust conversion from the Governor, State of Oregon and the Polk County Board of Commissioners. The Governor's office did not respond. Polk County replied (Attachment 6) stating that the County had no objection to this acquisition, suggesting a dialogue about future acquisitions.

The Polk County Tax Collector provided the Tribe with a Statement of Tax Account for the property dated April 9, 2010. (Attachment 7) That Statement shows the Ad-Valorem Tax due for tax year 2009 as $39.11. In each tax year dating back to 1988 that tax amount was always less than $41.00.

As no response was received from the State of Oregon and Polk County stated no objection, and since property taxes for this tract would have totaled only $39.11 for 2009, I conclude that there would be minimal impact on state and local governments as a result of the removal of the property from the tax rolls.

25 C.F.R. 151.10 (f) - Jurisdictional Problem and Conflict of Land Use

If taken into trust, the Tribe will gain regulatory jurisdiction over the property. Absent comment by the State or County I cannot speculate whether any future zoning conflict(s) might occur. Since the agricultural use of the property will continue unchanged, the only change being installation of a sub-surface drainfield, my determination is that actual or potential zoning conflicts do not exist or will not present a problem.

Public Law 280, 28 U.S.C. § 1360 & 18 U.S.C. § 1162 establishes the State of Oregon as having criminal and civil jurisdiction over the reservation. Since the property is adjacent or contiguous to the Reservation the same (state) jurisdiction applies. In trust, the property will be served by the same state and municipal law enforcement agencies as now, without change, which I find will cause no change in impact to existing civil and criminal jurisdiction over the property.

25 C.F.R. 151.10 (g) - Additional Responsibilities

With conversion into trust and nominal addition of the property to the jurisdiction of the Siletz Agency, under the NWRO, I conclude that the property will remain, in large part, directly under management of the Tribe. I thus conclude that this acquisition will not result in a measurable increase of workload for BIA staff and that the Siletz Agency is equipped to handle any additional responsibilities resulting from acquisition of the property into trust status.

25 C.F.R. 151.10 (h) - NEPA Compliance and Hazardous Substance Determination

An Environmental Assessment (EA) was conducted on the property and a report (attached to the Tribe's Application as Tab 15) dated September 3, 2008 was produced. No comments were received during the statutory review and comment period. The EA was conducted in conformance with the scope and limitations of ASTM E1527. That Report concluded with a recommendation of no additional investigation with respect to the property. I concur, based primarily on the EA and on the Superintendent, Siletz Agency having issued a Finding of No Significant Impact (FONSI) on March 22, 2010. (Attachment 10)

Based on the EA and the FONSI I find that acquisition of the property for its proposed use poses no risk to protected or endangered species and will have no negative impact on any cultural or historic resources.

25 C.F.R. 151.13 - Title Examination

In accordance with 25 C.F.R. 151.13, the Siletz Agency requested an examination of the title evidence by the Northwest Field Solicitor, to determine whether title to the subject tract is marketable. On January 27, 2011 the Agency received a Preliminary Opinion of Title (Exhibit 11) providing instructions for compliance with 25 C.F.R. § 151.13 before the acquisition can be completed. The subject parcel will not be accepted into trust until all identified exceptions have been removed from title. The Tribe will be required to submit a letter stating that the remaining exceptions will not interfere with the intended use of the property and are found to be administratively acceptable.

Conclusion

I find that the Tribe has explained its need to acquire the property as trust land, both to expand its reservation land base and to increase its wastewater treatment capacity, avoiding reliance on the surrounding county waste water system which is inadequate even for present needs. The Tribe has complied with environmental and historic review mandates and all other criteria under the controlling 25 C.F.R. § 151.10 regulations.

After review and evaluation of the Tribe's completed Application I conclude that the acquisition of this parcel is legal, appropriate and in the best interest of the Tribe. Tribal management over these resources will facilitate self-determination in that ownership in trust status will allow the Tribe to plan future infrastructure needs and thereby enhance its own positive growth, independent of other governments. Since I have concluded that this Application meets the requirements found at 25 C.F.R. Part 151 – "Land Acquisitions," conversion into trust is in the best interest of the Tribe and this Letter grants approval of the Tribe's request.

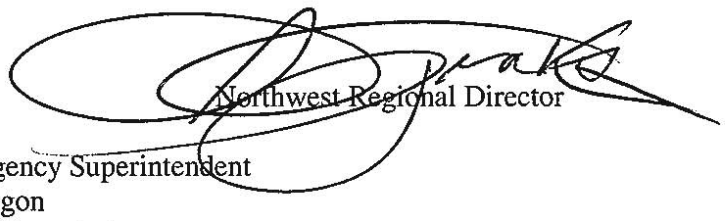
Appeal Rights

By a copy of this decision the applicant and other interested parties are hereby notified of the decision. This decision may be appealed to the Interior Board of Indian Appeals, United States Department of the Interior, 801 North Quincy Street, Suite 300, Arlington, Virginia 22203, in accordance with the regulations at 43 C.F.R. Sections 4.310-4.340. Your notice of appeal to the Board must be signed by you and your attorney and must be mailed within 30 days of the date you receive this decision. It should clearly identify the decision being appealed. If possible, attach a copy of this decision. You must send copies of your notice of appeal to: (1) United States Department of the Interior, The Office of the Assistant Secretary – Indian Affairs, 1849 C Street, N.W., M.S. 4140-MIB, Washington, D.C. 20240, (2) each interested party known to you, and (3) this office. Your notice of appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties. If you file a notice of appeal, the Board of Indian Appeals will notify you of further appeal procedures.

If no appeal is timely filed this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for the filing of a notice of appeal.

If you have any questions regarding this matter, please contact our Branch of Real Estate Services at (503) 231-6787.

Sincerely



Northwest Regional Director

c: Gregory A. Norton, Agency Superintendent
Governor, State of Oregon
Polk County Board of Commissioners
Jan Michael Reibach, Lands Manager, Grand Ronde Tribe (with attachments)
Jennifer Biesack, Legal Counsel, Grand Ronde Tribe

Attachments

No.	Description
1.	Tribe's "On Reservation Trust Application" (letter only)
2.	Tribal Council Resolution No. 049-10
3.	Reservation Map with property identification
4.	Notice Letter to Oregon Governor
5.	Notice Letter to Polk County Board of Commissioners
6.	Polk County Letter re: no objection to this parcel acquisition
7.	Tax Collector's Statement of Account
8.	Preliminary Title Report
9.	Need and Purpose Statement from the Tribe
10.	FONSI – Siletz Agency March 22, 2010
11.	Solicitor's Preliminary Opinion of Title (01/27/2011)

ATTACHMENT 1

The Confederated Tribes of the Grand Ronde Community of Oregon

Tribal Land Management
Phone (503) 879-2394 or
(503) 879-2380
Fax (503) 879-1353

9615 Grand Ronde Rd
Grand Ronde, OR 97347

May 18, 2010

Gregory A. Norton
Superintendent, Siletz Field Office
Bureau of Indian Affairs
P.O. Box 569
Siletz, Oregon 97380

Re: "Bailey II Ackerson Road Property" On-Reservation Trust Application

Dear Mr. Norton:

The Confederated Tribes of the Grand Ronde Community of Oregon hereby requests the Department of Interior, Bureau of Indian Affairs take and hold title to the "Bailey II Ackerson Road Property" in trust for the benefit of the Confederated Tribes of the Grand Ronde Community of Oregon. The "Bailey II Ackerson Road Property" is held by the Tribe pursuant to a deed from Jerry S. Bailey and Teresa E. Bailey to the Confederated Tribes of the Grand Ronde Community of Oregon, dated October 23, 2008, and recorded in Instrument No. 2008-012727 of the deed records of Polk County, Oregon and is located at Sec. 1, T. 6 S., R. 8 W., WM., Polk County, Oregon which is commonly known as Tax Lot 6801-800.

Enclosed please find the Application Package which includes the following:

- **Exhibit 1:** Application Assistance Sheet
- **Exhibit 2:** Purpose and Need Statement
- **Exhibit 3:** Resolution No. 049-10 (*original*)
- **Exhibit 4:** Grand Ronde Restoration Act (*PL 98-165, November 22, 1983*)
- **Exhibit 5:** Land Consolidation Area (*letter and attached map from Bureau of Indian Affairs to Chairman Mark Mercier dated December 9, 1992*)
- **Exhibit 6:** Deed (*Jerry S. Bailey and Teresa E. Bailey to the Confederated Tribes of the Grand Ronde Community of Oregon, dated October 23, 2008, and recorded in Instrument No. 2008-012727 in the deed records of Polk County, Oregon*)
- **Exhibit 7:** Location maps indicating parcel in relation to the Tribe's existing landholdings
- **Exhibit 8:** Preliminary Title Report (*No. 7129-1558904, dated May 12, 2010*)
- **Exhibit 9:** Easement referenced in Exception 11 of the Preliminary Title Report
- **Exhibit 10:** Easement referenced in Exception 12 of the Preliminary Title Report

- **Exhibit 11:** Seasonal hay license (*The Confederated Tribes of the Grand Ronde Community of Oregon and Anthony Leppin Farms, dated September 3, 2009; term of September 3, 2009, through September 1, 2010*)
- **Exhibit 12:** Statement of Tax Account (*Polk County Tax Collector, dated April 19, 2010*)
- **Exhibit 13:** Polk County Assessor's Summary Report Real Property Assessment Report for Assessment Year 2010 and Tax Lot Map
- **Exhibit 14:** Final survey package with Boundary Evidence Standard Documents (*including Land Description Review Certificate, Chain of Surveys Certificate, Certificate of Inspection and Possession, Boundary Assurance Certificate, and two full size copies, one 8½"x11" copy, and one electronic copy on a CD of the survey plat maps*)
- **Exhibit 15:** Phase I Environmental Site Assessment (*A. Ackerson Road Property, Tax Lot 800, T6S R8W Sec1, dated September 3, 2008*)
- **Exhibit 16:** Bureau of Indian Affairs Siletz Agency Notice of Availability & Finding of No Significant Impact (*Grand Ronde Elder Housing Phase II and Drainfield Project*)

Pursuant to our discussions, you are aware that the BIA Siletz Agency has reviewed the Environmental Assessment that was prepared as part of the Tribe's lease to GRTHA of land for a housing and infrastructure development that will include construction of a drainfield on the Bailey II Ackerson Road Parcel (Grand Ronde Elder Housing Phase II and Drainfield Environmental Assessment (EA), prepared by ESA Adolfson, March 2010) which includes an assessment of the "Bailey II Ackerson Road Property." The EA contains analysis of (i) cultural and historic resources, (ii) wetlands, and (iii) threatened and endangered species. The BIA Siletz Agency Superintendent accepted the EA and issued a "Finding of No Significant Impact." You stated that you have these documents available and will use them for purposes of this trust application.

Please contact me if I can be of further assistance throughout the trust acquisition process.

Thank you,

Jan Michael Reibach

Jan Michael Reibach
Tribal Lands Manager
503 879-2394
503 879-1353 (fax)

Umpqua Molalla Rogue River Kalapuya Chasta

The Confederated Tribes of the Grand Ronde Community of Oregon

Tribal Council
Phone (503) 879-2301
1-800 422-0232
Fax (503) 879-5964

9615 Grand Ronde Rd
Grand Ronde, OR 97347

ATTACHMENT 2

Resolution No. **049-10**

WHEREAS, the Grand Ronde Tribal Council, pursuant to Article III, Section I of the Tribal Constitution approved November 30, 1984, by the Acting Deputy Assistant Secretary of the Interior, Indian Affairs, is empowered to exercise all legislative and executive authority not specifically vested in the General Council of the Confederated Tribes of the Grand Ronde Community of Oregon; and

WHEREAS, the Tribe owns a parcel of land in the community of Grand Ronde, Polk County, Oregon designated as Tax Lot 800 on Polk County Map #06801, known as the "Bailey II Ackerson Rd Property"; and

WHEREAS, the land is vacant and the Tribe plans on utilizing the property for a drain field that shall support service to Tribal Housing and manage the remainder as vacant land; and

WHEREAS, acquisition of the land will facilitate the Tribes' plan to consolidate land near the reservation for tribal self-determination and for Indian housing; and

WHEREAS, the Bailey II Ackerson Rd Property is adjacent to land owned by the Tribe that is classified as Grand Ronde Reservation, known as BIA tract #141 T 1008, and lies within the Grand Ronde Tribal Land Consolidation area approved by the Portland Area Director, Bureau of Indian Affairs; and

WHEREAS, that the Tribe wishes to transfer title to the Bailey II Ackerson Rd Property in trust for the benefit of the Tribe.

NOW THEREFORE BE IT RESOLVED, under the Grand Ronde Restoration Act and the authority of the Secretary under the Indian Reorganization Act of 1934 (48 Stat. 984), as amended, to take land into trust for the benefit of Indian tribes, the Tribal Council does hereby requests that the Department of Interior, Bureau of Indian Affairs, take the real property known as the Bailey II Ackerson Rd Property into trust for the benefit of the Confederated Tribes of the Grand Ronde Community of Oregon.

BE IT FURTHER RESOLVED, that the Tribal Council Chairwoman is authorized to execute any documents necessary for said transfer of the Bailey II Ackerson Rd Property to the Department of the Interior.

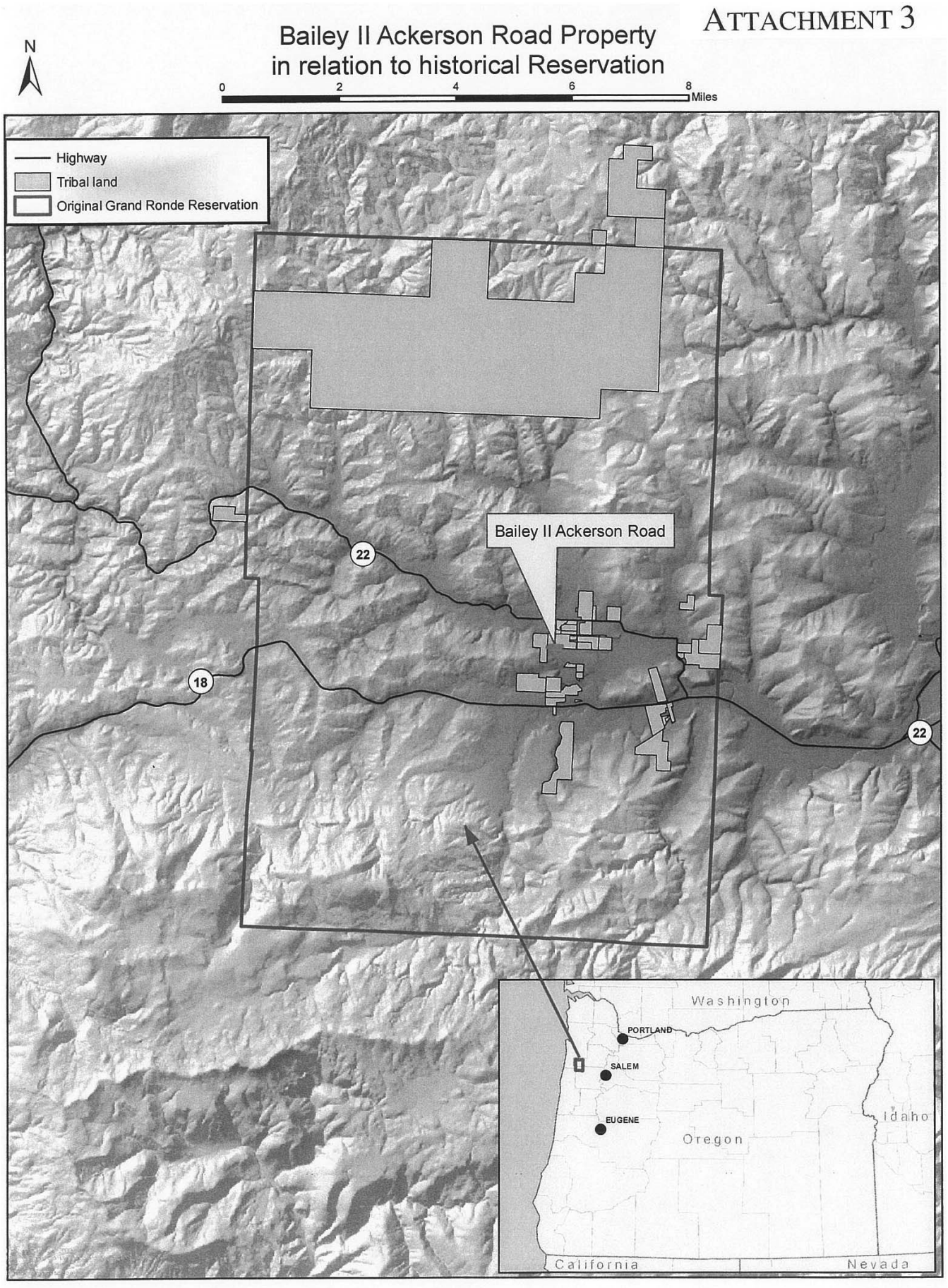
CERTIFICATION: the Tribal Council of the Confederated Tribes of the Grand Ronde Community of Oregon adopted this resolution at a regularly scheduled meeting, with a quorum present as required by the Grand Ronde Constitution, held on **April 21, 2010,** by a vote of **6** yes, **0** no and **0** abstentions.

Reynold L. Leno
Tribal Council Vice-Chairman

June Sell-Sherer
Acting Tribal Council Secretary

Umpqua Molalla Rogue River Kalapuya Chasta

ATTACHMENT 3



ATTACHMENT 4

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Siletz Agency
P.O. Box 569
Siletz, Oregon 97380

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:
Grand Ronde "Bailley II" tract
(Case P-141-2010-2168)

JUN 03 2010

CERTIFIED MAIL: 7009-1410-0001-8659-4041

Office of the Governor
Attn: Office of Legal Counsel
State of Oregon
160 State Capitol
Salem, OR 97310

Dear Governor Kulongoski:

This agency has under consideration an application for the acquisition of land by the United States to be held in trust for the benefit of the Confederated Tribes of the Grand Ronde Community of Oregon. The property consists of one rural residential lot. The Tribe is acquiring this vacant property to support existing elder housing infrastructure (with a sewer drainfield) and consolidate ownership near the Tribal Governance Center in Grand Ronde, Oregon. The Tribe currently raises hay on the property and plans to continue the practice.

The land, comprising 5.05 (surveyed) acres, is located on Ackerson Road (no street address assigned) in Grand Ronde. The property includes Tax Lot #06801-800 in Section 1 of Township 6 South, Range 8 West, Willamette Meridian, Grand Ronde, Oregon. The property is contiguous to reservation lands already held in trust for the Tribe as shown in the attached illustrations.

The determination whether to acquire this property in trust will be made in the exercise of discretionary authority, which is vested in the Secretary of the Interior. To assist us in the exercise of that discretion, pursuant to regulations published at 45 Fed. Reg. 62034 (September 18, 1980) and 60 Fed. Reg. 32879 (June 23, 1995), 25 CFR §151.10(e)&(f), we invite your comments on the proposed acquisition. In particular, information on the following matters is requested:

(1) The potential impacts of the acquisition on regulatory jurisdiction over the property, including any anticipated jurisdictional problems and potential conflicts of land use. This may include current zoning, location within an urban renewal area, governmental services currently provided to the property, etc.

(2) The potential impacts of the acquisition on real property taxes, including anticipated impacts of removal of the land from the tax rolls. This may include current taxes, special assessments levied against the property, impacts upon the county and other political subdivisions, impacts upon various agencies and organizations affected by loss of tax revenue, etc.

(3) Do you have any objections to this application? If so, please state your objections.

Please forward this request to any other officials, local governments, or special districts that may also have regulatory jurisdiction over this land or may be impacted by its acquisition by the United States. Their comments may be combined with yours or sent to us separately. We have already solicited comments from the Polk County Board of Commissioners.

Information and comments should be addressed to this agency, to the attention of the undersigned. Any comments received within 30 days of the date of you receive this letter will be considered. A copy of your comments will be made available to the applicant. A determination of whether to acquire the land in trust will be made by the Superintendent, Siletz Agency, Bureau of Indian Affairs, PO Box 569, Siletz, Oregon 97380. If you have submitted comments within 30 days of this letter, you will be notified of the decision.

Sincerely,

GREGORY A. NORTON

Gregory A. Norton
Superintendent

Enclosures: Illustration showing proximity to existing trust tracts
Illustration showing tract as contiguous to Tribal Headquarters
Assessor's Map

c: Grand Ronde Tribe

bc: chrono
subject

GNORTON/gn 06/02/2010

ATTACHMENT 5

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Siletz Agency
P.O. Box 569
Siletz, Oregon 97380

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:
Grand Ronde "Bailley II" tract
(Case P-141-2010-2168)

JUN 03 2010

CERTIFIED MAIL: 7009-1410-0001-8659-4058

Polk County Board of Commissioners
Polk County Courthouse
850 Main
Dallas, OR 97338

Dear Commissioners:

This agency has under consideration an application for the acquisition of land by the United States to be held in trust for the benefit of the Confederated Tribes of the Grand Ronde Community of Oregon. The property consists of one rural residential lot. The Tribe is acquiring this vacant property to support existing elder housing infrastructure (with a sewer drainfield) and consolidate ownership near the Tribal Governance Center in Grand Ronde, Oregon. The Tribe currently raises hay on the property and plans to continue the practice.

The land, comprising 5.05 (surveyed) acres, is located on Ackerson Road (no street address assigned) in Grand Ronde. The property includes Tax Lot #06801-800 in Section 1 of Township 6 South, Range 8 West, Willamette Meridian, Grand Ronde, Oregon. The property is contiguous to reservation lands already held in trust for the Tribe as shown in the attached illustrations.

The determination whether to acquire this property in trust will be made in the exercise of discretionary authority, which is vested in the Secretary of the Interior. To assist us in the exercise of that discretion, pursuant to regulations published at 45 Fed. Reg. 62034 (September 18, 1980) and 60 Fed. Reg. 32879 (June 23, 1995), 25 CFR §151.10(e)&(f), we invite your comments on the proposed acquisition. In particular, information on the following matters is requested:

(1) The potential impacts of the acquisition on regulatory jurisdiction over the property, including any anticipated jurisdictional problems and potential conflicts of land use. This may include current zoning, location within an urban renewal area, governmental services currently provided to the property, etc.

(2) The potential impacts of the acquisition on real property taxes, including anticipated impacts of removal of the land from the tax rolls. This may include current taxes, special assessments levied against the property, impacts upon the county and other political subdivisions, impacts upon various agencies and organizations affected by loss of tax revenue, etc.

(3) Do you have any objections to this application? If so, please state your objections.

Please forward this request to any other officials, local governments, or special districts that may also have regulatory jurisdiction over this land or may be impacted by its acquisition by the United States. Their comments may be combined with yours or sent to us separately. We have already solicited comments from the Governor.

Information and comments should be addressed to this agency, to the attention of the undersigned. Any comments received within 30 days of the date of you receive this letter will be considered. A copy of your comments will be made available to the applicant. A determination of whether to acquire the land in trust will be made by the Superintendent, Siletz Agency, Bureau of Indian Affairs, PO Box 569, Siletz, Oregon 97380. If you have submitted comments within 30 days of this letter, you will be notified of the decision.

Sincerely,

GREGORY A. NORTON

Gregory A. Norton
Superintendent

Enclosures: Illustration showing proximity to existing trust tracts
Illustration showing tract as contiguous to Tribal Headquarters
Assessor's Map

c: Grand Ronde Tribe

bc: chrono
subject

GNORTON/gn 06/02/2010

ATTACHMENT 6

POLK COUNTY

POLK COUNTY BOARD OF COMMISSIONERS

POLK COUNTY COURTHOUSE ★ DALLAS, OREGON 97338-3174
503-623-8173 ★ FAX 503-623-0896

Commissioners
MIKE PROPES
TOM RITCHEY
RON DODGE

GREGORY P. HANSEN
Administrative Officer

RECEIVED
JUN 17 2010
USBIA Siletz Agency

June 16, 2010

Gregory A. Norton, Superintendent
United States Department of the Interior
Bureau of Indian Affairs
Siletz Field Office
P. O. Box 569
Siletz, OR 97380

RE: Tax Lot #06801-800 in Section 1 of Township 6 South, Range 8 West, Willamette Meridian, Grand Ronde, Oregon.

Dear Mr. Norton:

In your recent letter you invited comment by Polk County on an application for acquisition of land by the United States to be held in trust for the benefit of the Confederated Tribes of the Grand Ronde Community of Oregon, specifically on the above described tax lot.

The Board of Commissioners does not object to the Tribe incorporating this land in trust status. We continue to be concerned about the erosion of land from our tax base. Under property tax laws in Oregon, any property that is removed from the tax roll has a direct financial impact on the recipients of property tax revenue. Because of the financial implications, the County would like to meet with the Tribe to discuss future land acquisitions. This meeting will help the County assess potential revenue loss due to property being removed from the County's tax rolls.

Sincerely,

Mike Propes, Chair
Polk County Board of Commissioners

cc: Cheryle Kennedy, Confederated Tribes
Doug Schmidt, Assessor
Yamhill County Board of Commissioners

RECEIVED
JUN 17 2010
USBIA Siletz Agency

ATTACHMENT 7

Statement of Tax Account

POLK COUNTY TAX COLLECTOR
POLK COUNTY COURTHOUSE
DALLAS, OREGON 97338-3184
(503) 623-9264

4/19/2010 3:29:59 PM

CONFEDERATED TRBS/GR RND C/OR
9615 GRAND RONDE RD
GRAND RONDE, OR 97347

Tax Account #	286590	**Lender**	
Account Status	Active	**Loan #**	
Roll Type	Real Property	**Property ID**	4408
Situs Address	No situs address for this account	**Interest To**	May 15, 2010

Tax Summary

Tax Year	Tax Type	Total Due	Current Due	Interest Due	Discount Available	Original Due	Due Date
2009	ADVALOREM	0.00	0.00	0.00	0.00	39.11	Nov 15, 2009
2008	ADVALOREM	0.00	0.00	0.00	0.00	40.06	Nov 15, 2008
2007	ADVALOREM	0.00	0.00	0.00	0.00	37.13	Nov 15, 2007
2006	ADVALOREM	0.00	0.00	0.00	0.00	36.28	Nov 15, 2006
2005	ADVALOREM	0.00	0.00	0.00	0.00	35.75	Nov 15, 2005
2004	ADVALOREM	0.00	0.00	0.00	0.00	34.63	Nov 15, 2004
2003	ADVALOREM	0.00	0.00	0.00	0.00	31.82	Nov 15, 2003
2002	ADVALOREM	0.00	0.00	0.00	0.00	33.10	Nov 15, 2002
2001	ADVALOREM	0.00	0.00	0.00	0.00	32.12	Nov 15, 2001
2000	ADVALOREM	0.00	0.00	0.00	0.00	29.57	Nov 15, 2000
1999	ADVALOREM	0.00	0.00	0.00	0.00	32.36	Nov 15, 1999
1998	ADVALOREM	0.00	0.00	0.00	0.00	30.69	Nov 15, 1998
1997	ADVALOREM	0.00	0.00	0.00	0.00	30.55	Dec 15, 1997
1996	ADVALOREM	0.00	0.00	0.00	0.00	31.82	Nov 15, 1996
1995	ADVALOREM	0.00	0.00	0.00	0.00	29.73	Nov 15, 1995
1994	ADVALOREM	0.00	0.00	0.00	0.00	36.03	Nov 15, 1994
1993	ADVALOREM	0.00	0.00	0.00	0.00	38.94	Nov 15, 1993
1992	ADVALOREM	0.00	0.00	0.00	0.00	40.91	Nov 15, 1992
1991	ADVALOREM	0.00	0.00	0.00	0.00	40.08	Nov 15, 1991
1990	ADVALOREM	0.00	0.00	0.00	0.00	19.21	Nov 15, 1990
1989	ADVALOREM	0.00	0.00	0.00	0.00	19.33	Nov 15, 1989
1988	ADVALOREM	0.00	0.00	0.00	0.00	18.70	Nov 15, 1988
	Total	0.00	0.00	0.00	0.00		

ATTACHMENT 8

First American

First American Title Insurance Company of Oregon
PO Box 451 Dallas, OR 97338
807 Main St,Dallas, OR 97338
Phn - (503)623-5513
Fax - (866)712-4648

TITLE DEPARTMENT
(503) 623-5513

Larry A. Bick
Manager/Title Officer
lbick@firstam.com

Confederated Tribes of Grand Ronde
9615 Grand Ronde Rd
Grand Ronde, OR 97347-9712

Order No.: 7129-1558904
May 12, 2010

Attn: Jan Reibach
Phone No.: (253)262-2600 - Fax No.: (253)262-2606
Email: jan.reibach@grandronde.org

Re:

Preliminary Title Report

2006 ALTA Owners Standard Coverage	Liability	$	TBD	Premium $	TBD STR
2006 ALTA Owners Extended Coverage	Liability	$		Premium $	
2006 ALTA Lenders Standard Coverage	Liability	$		Premium $	
2006 ALTA Lenders Extended Coverage	Liability	$		Premium $	
Endorsement 9, 22 & 8.1				Premium $	100.00
Govt Service Charge				Cost $	
Other				Cost $	

Proposed Insured: United States of America in Trust for The Confederated Tribes of the Grand Ronde Community of Oregon
Policy to be an ALTA 9/28/91

We are prepared to issue Title Insurance Policy or Policies in the form and amount shown above, insuring title to the following described land:

The land referred to in this report is described in Exhibit A attached hereto.

and as of April 02, 2010 at 8:00 a.m., title to the fee simple estate is vested in:

The Confederated Tribes of the Grand Ronde Community of Oregon

This report is for the exclusive use of the parties herein shown and is preliminary to the issuance of a title insurance policy and shall become void unless a policy is issued, and the full premium paid.

9. Rights of the public and of governmental bodies in and to that portion of the premises herein described lying below the mean high water mark of Yamhill River and the ownership of the State of Oregon in that portion lying below the high water mark of Yamhill River .

10. Any adverse claim based upon the assertion that some portion of said land has been removed from or brought within the boundaries thereof by an avulsive movement of the Yamhill River or has been formed by the process of accretion or reliction or has been created by artificial means or has accreted to such portion so created.

11. Easement, including terms and provisions contained therein:
Recording Information: May 29, 1980 Book 149 and Page 510, Book of Records

12. Easement, including terms and provisions contained therein:
Recording Information: October 25, 1985 Book 190 and Page 590, Book of Records
In Favor of: Grand Ronde Sanitary District, a Political subdivision
For: Sewer

13. Unrecorded leases or periodic tenancies, if any.

- END OF EXCEPTIONS -

NOTE: This Preliminary Title Report does not include a search for Financing Statements filed in the Office of the Secretary of State, or in a county other than the county wherein the premises are situated, and no liability is assumed if a Financing Statement is filed in the Office of the County Clerk covering Crops on the premises wherein the lands are described other than by metes and bounds or under the rectangular survey system or by recorded lot and block.

NOTE: Taxes for the year 2009-2010 PAID IN FULL
Tax Amount: $39.11
Map No.: 06801-00-00800
Property ID: 286590
Tax Code No.: 4408

NOTE: Taxes for the year 2009-2010 PAID IN FULL
Tax Amount: $2.93
Map No.: 06801-00-00800
Property ID: 443342
Tax Code No.: 4411

NOTE: According to the public record, the following deed(s) affecting the property herein described have been recorded within 24 months of the effective date of this report: Statutory Warranty Deed recorded October 23, 2008 as Document No. 2008-012727, Book of Records from Jerry S. Bailey and Teresa E. Bailey to The Confederated Tribes of the Grand Ronde Community of Oregon.

Situs Address as disclosed on Polk County Tax Roll:

Not Assigned, Grand Ronde, OR 97347

First American Title Insurance Company of Oregon

SCHEDULE OF EXCLUSIONS FROM COVERAGE

ALTA LOAN POLICY (06/17/06)

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (i) the occupancy, use, or enjoyment of the Land;
   (ii) the character, dimensions, or location of any improvement erected on the Land;
   (iii) the subdivision of land; or
   (iv) environmental protection;
   or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.
   (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims, or other matters
   (a) created, suffered, assumed, or agreed to by the Insured Claimant;
   (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
   (c) resulting in no loss or damage to the Insured Claimant;
   (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 11, 13, or 14); or
   (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage.
4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business laws of the state where the Land is situated.
5. Invalidity or unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth-in-lending law.
6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is
   (a) a fraudulent conveyance or fraudulent transfer, or
   (b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy.
7. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the Insured Mortgage in the Public Records. This Exclusion does not modify or limit the coverage provided under Covered Risk 11(b).

ALTA OWNER'S POLICY (06/17/06)

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
   (i) the occupancy, use, or enjoyment of the Land;
   (ii) the character, dimensions, or location of any improvement erected on the Land;
   (iii) the subdivision of land; or
   (iv) environmental protection;
   or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.
   (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims, or other matters
   (a) created, suffered, assumed, or agreed to by the Insured Claimant;
   (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
   (c) resulting in no loss or damage to the Insured Claimant;
   (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risks 9 and 10); or
   (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Title.
4. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction vesting the Title as shown in Schedule A, is
   (a) a fraudulent conveyance or fraudulent transfer; or
   (b) a preferential transfer for any reason not stated in Covered Risk 9 of this policy.
5. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the deed or other instrument of transfer in the Public Records that vests Title as shown in Schedule A.

SCHEDULE OF STANDARD EXCEPTIONS

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records; proceedings by a public agency which may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of such agency or by the public records.
2. Facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an inspection of the land or by making inquiry of persons in possession thereof.
3. Easements, or claims of easement, not shown by the public records; reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.
4. Any encroachment (of existing improvements located on the subject land onto adjoining land or of existing improvements located on adjoining land onto the subject land), encumbrance, violation, variation, or adverse circumstance affecting the title that would be disclosed by an accurate and complete land survey of the subject land.
5. Any lien" or right to a lien, for services, labor, material, equipment rental or workers compensation heretofore or hereafter furnished, imposed by law and not shown by the public records.

NOTE: A SPECIMEN COPY OF THE POLICY FORM (OR FORMS) WILL BE FURNISHED UPON REQUEST

TI 149 Rev. 7-22-08

First American Title

ATTACHMENT 9

PURPOSE AND NEED STATEMENT
BAILEY II ACKERSON ROAD TRUST APPLICATION

I. Need (25 CFR 151.10(b))

Include in this narrative a brief history and overview of the Tribe. Also provide information on the current land base and the land restoration efforts. You must adequately establish the need that the acquisition of the property will address. However, focus on the need, not the purpose (save that for the next section). For example, you could state that the Tribe "needs land for low-income housing opportunities" and back it up with facts related to tribal population, income, housing availability, etc. The stronger need you establish, the better chance your application has of receiving a favorable review.

As a result of the federal government's allotment and termination policies, Grand Ronde lost both its federal recognition and its 61,440-acre original reservation. Following the Tribe's termination in 1954, Tribal members and the Tribal government have worked tirelessly to rebuild the Grand Ronde community. In 1983, these efforts resulted in the Grand Ronde Restoration Act, followed by the Grand Ronde Reservation Act in 1988, which restored 9,811 acres of the Tribe's original 61,440-acre reservation to the Grand Ronde people. Since 1988, the Tribe has pursued the goal of securing its sovereignty by acquiring additional parcels of its original reservation and providing on-reservation jobs and services to Tribal members.

The Tribe's restored reservation is located in the heart of the original Grand Ronde Reservation. Today, the Tribe owns a total of 12,335.27 acres of land, 10,312.66 which has reservation status. 10,052.38 acres of the reservation land is forested timber land, and the remaining 260.28 acres accommodates the Tribe's headquarters, housing projects, casino complex, and supporting infrastructure.

The Tribe has a need to acquire more on-reservation parcels in furtherance of its self-determination and community development. The Tribe has also identified a need additional land to extend Tribal sewer utilities to existing Tribal housing.

A. Tribal Self-Determination.

As described above, the Tribe has been involved in rebuilding the Grand Ronde Community since termination. Following restoration, the Tribe secured a 9,811 acre reservation which was primarily forestland. The Tribe began to purchase additional lands throughout the area in an effort to recover lands that were lost and allow the Tribe a land base to re-establish governance of an on-Reservation Tribal member population. Many Tribal members who had been displaced by the allotment and termination eras returned to the reservation, and more return each year. In response, the Tribal government has focused on acquiring more reservation land, developing on-reservation housing communities, and expanding jobs and services on the reservation to meet the needs of its members.

The Confederated Tribes of Grand Ronde has identified the need to continue to acquire additional lands in the Grand Ronde community and to consolidate ownership and jurisdiction over its lands to further its tribal self-determination goals. The Tribe's trust and Reservation

Though Goal 11 rules were amended to allow residential development to connect to existing sewer mains in certain circumstances, extension of the sewer main to serve a new development is prohibited. This restriction impedes development and was the impetus for development of Tribal wastewater treatment and disposal facilities, which would serve trust land not subject to statewide planning goals.

In light of the situation with the Grand Ronde Sanitary District and restrictions on sewer service to new developments, the Grand Ronde Tribal Housing Authority constructed two Membrane Bio-Reactor Sewer Treatment plants for the Family and Elder Housing Communities respectively. One plant currently services the second phase of the Family Housing project (the "CMI Plant") while the other plant services the Elder Activity Center and Adult Foster Care facilities (the "Elder Plant"). Construction of a drainfield to serve both plants is necessary for disposal of treated effluent from these facilities. Additional trust land is necessary to support construction of such a drainfield.

II. Purpose (25 CFR 151.10 (c)).

Please provide the following in a narrative and include with your application:

Identify the intended use of this property. This should be a detailed explanation of the proposed use identified in the Tribal resolution. Do not just say that you want the land acquired for economic development, housing, or tribal self-determination. Be specific.
Explain how the conversion of this tract addresses the need as established in Section 3(a) above.
Explain how the intended use might differ from the current use of the property. (Be as specific as possible)

A. Management of Vacant Land/Consolidation of Tribal Land Base.

The Tribe's current use of the property is management of vacant agricultural land through hay production and harvest, and the Tribe intends to continue this use. Hay production and harvesting is currently being facilitated through seasonal hay license agreements (see the trust application at Exhibit 12 for a copy of the current hay license agreement). No portion of the property is leased for agricultural purposes. Additionally, the Tribe plans to use the 1.5 acres of the parcel for the construction and management of a drainfield on 1.5 to support its Sewer Rerouting Project. The area where the drainfield will be located will be covered with soil and seeded to continue hay production in that area. This is consistent with the use of the parcel as vacant agricultural land.

Further, because the parcel is adjacent to current reservation land, trust conversion will contribute land consolidation. The conversion of this tract into trust addresses the need of the Tribe for tribal self-determination by allowing the Tribe to exert jurisdiction over its lands and provide utility services to its lands and members, as well as enabling the development future housing projects to increase the opportunities for Tribal members to reside on the Reservation. The acquisition of this tract in trust allows the Confederated Tribes of Grand Ronde to consolidate its holdings and jurisdiction as it is contiguous to the Tribes' main headquarters and complex which is located on Reservation land. This additional open space will also be available recreational and cultural uses.

As described above, construction of a drainfield on the Bailey II Ackerson Road property to serve both plants is necessary for the plants to be fully operational and for them to serve both existing and future Tribal housing projects. Acquisition of this trust parcel is necessary to achieve construction of such a drainfield.

ATTACHMENT 10

Bureau of Indian Affairs
Siletz Agency
Notice of Availability &
Finding of No Significant Impact
Grand Ronde Elder Housing Phase II and Drainfield Project

Confederated Tribes of Grand Ronde
Grand Ronde, Polk and Yamhill Counties, Oregon

Background
An interdisciplinary team of consultants representing the Confederated Tribes of Grand Ronde of Oregon (Tribe) have analyzed a range of alternatives for implementing residential development and wastewater treatment facility activities in the community of Grand Ronde, Oregon. The analysis looks at two proposed alternatives. The first alternative is the No Action Alternative followed by Alternative B that analyzes the construction of the Elder Housing Phase II residential complex and drainfield and force main for wastewater treatment.

Location
The proposed project is located in unincorporated Grand Ronde in Yamhill and Polk Counties, Oregon, in Section 1, Township 6 South, Range 8 West, Willamette Meridian. The proposed Elder Housing Phase II project site covers 10 acres in Yamhill County and is bounded by Blacktail Drive to the north, private property and the Tribal Headquarters to the south, Salmon Drive to the west, and Grand Ronde Road to the east. The proposed drainfield project site covers 1.6 acres in Polk County and is bounded by an access road to the north, agricultural land to the east and south, and a patch of forest to the west.

Proposed Project
On August 12, 1998, the Tribal Council adopted a resolution approving a ground lease agreement between the Confederated Tribes of the Grand Ronde Community of Oregon and the Grand Ronde Tribal Housing Authority (GRTHA) for the trust property located at 25280 Grand Ronde Road, Grand Ronde, Yamhill County, Oregon for the purpose of developing an elder housing community (Phase I). The lease was executed on August 19, 1998 and, as required by federal regulation governing leases of trust lands, approved by the Bureau of Indian Affairs on November 5th, 1998. GRTHA now wishes to pursue further development of the elder housing project on the adjacent property located to the south, which is also held in trust. On September 10, 2008, the Tribal Council adopted a resolution approving an amendment to the ground lease to include that parcel for the purpose of expanding the elder housing project (Phase II). This amendment must also be approved by the Bureau of Indian Affairs.

The proposed Elder Housing Phase II residences would be constructed on approximately 4.5 acres in the northeast portion of the site. The complex would consist of 17 to 23 residential units consisting of duplex, triplex, and fourplex structures. The structures would be one-story and the maximum capacity of the complex would be 46 resident tenants. Amenities associated with the construction of the housing complex would include landscaping, sidewalks, walking paths, curbs, access roads, parking garages, parking spaces, and underground reclaimed water storage tanks. The reclaimed water storage tanks would consist of three 30,000 gallon tanks, approximately 10' x 15' in size. Open space would total about four to five acres and would include the natural wetland, forested area, and pervious areas adjacent to the housing complex. The proposed action would include constructing an access road from

the northern boundary through the center of the project site The road would likely consist of two lanes with curbs and sidewalks

The proposed drainfield would consist of a network of perforated pipes laid in gravel-filled trenches to treat effluent The drainfield area would include approximately 1 2 acres of the 1 6 acre parcel to factor in setbacks A force main would be located along the access road going north-south between the rodeo grounds and the Governance Center The effluent would consist of highly treated wastewater stemming from a membrane bioreactor (Kubota) system utilized by the Community and Elder Housing Phase II

Supporting Documents
The Environmental Assessment (EA) is tied to Tribal Resolution No 149 08 which was passed on September 10, 2008

Alternative A- No Action and Alternative B- construction of the Elder Housing Phase II residences and the wastewater treatment drainfield are described in the document entitled *Grond Ronde Elder Housing Phase II and Drainfield Environmental Assessment*

Finding of No Significant Impact
Pursuant to the Endangered Species Act (ESA), the consultant, on behalf of the Tribe, completed consultation with the BIA Based on inventory and species lists secured from the USFWS a determination of "No Effect" has been made for the following species Marbled Murrelet, Northern Spotted Owl, Streaked Horned Lark, Oregon Chub, Fender's Blue Butterfly, Oregon Silverspot Butterfly, Golden Paintbrush, Willamette Daisy, Water Howllia, Bradshaw's Desert Parsley, and Kincaid's Lupine These species had no suitable habitat present in the project area Nelson's Checker-mallow was located and transplanted as per the Conservation Agreement between the Tribe and USFWS

A "No Effect" Determination was made for the Steelhead Upper Willamette River DPS and the Chinook Salmon Upper Willamette River DPS No Critical Habitat would be affected by the proposal Essential Fish Habitat requirements have been met and no adverse impacts were expected

On February 23, 2010, the BIA Northwest Regional Biologist issued a Letter of Concurrence for the No Effect determination on listed species Based on the information provided and the level and extent of detail, no further consultation with USFWS or NMFS was deemed necessary

The project will not adversely impact any sites of cultural or historical significance The State Historic Preservation Office (SHPO) was informed of the cultural resource findings in accordance with 36 CFR 800 5(b)

Estimation of the effects was based on research, professional judgment, consultation with the Tribe and state and federal agencies, and the experience of the interdisciplinary team members. With the implementation of Best Management Practices (BMPs) and mitigation proposed in the EA, there are no known negative effects on:

- *Environmental Justice*
- *Cultural and Historic Resources*
- *Socioeconomic Resources/Demographic Character*
- *Threatened and Endangered Species*
- *Earth Resources*
- *Traffic and Safety*
- *Aesthetics and Environmental Design*
- *Noise*
- *Air Quality*
- *Wetlands*
- *Community Facilities and Services*
- *Surface Water*
- *Vegetation and Wildlife*

Some short- term, temporary impacts as a result of construction such as: noise, traffic, air quality, and diminished visual quality; as well as site-preparation activities such as removing native and non-native vegetation and the displacement of common wildlife species are expected to occur and are addressed in the EA. The design features incorporated into the proposed actions ensure that no significant adverse impacts to the human environment will arise.

Determination
Based on information contained in the EA, and all other information available to me, it is my determination that none of the alternatives analyzed constitutes a major Federal action affecting the quality of the human environment.

In accordance with section 102(2)(c) of the National Environmental Policy Act of 1969, as amended, an Environmental Impact Statement (EIS) will not be necessary and will not be prepared.

Further it is also my determination and decision that Alternative B will best meet the short and long-term needs of the Tribe for providing housing to aging members and providing wastewater effluent treatment for the Grand Ronde Community and therefore will be implemented.

Implementation date
This decision to implement Alternative B will go into effect 30 days following initial publication of the Legal Notice in the McMinnville News Register, McMinnville, Oregon.

Comments
Copies of the Environmental Assessment and the Notice of Availability/FONSI for this project are available for public review at Grand Ronde Tribal Housing Authority, 28450 Tyee Road, Grand Ronde, Oregon 97347 and the BIA Siletz Agency at 178 NE Metcalf, Siletz, Oregon 97380.

Individuals and entities that may be significantly affected by, or interested in, the proposed action may provide comments about the adequacy of the EA to support the Finding of No Significant Impact (FONSI) to this office until April 23, 2010. Comments will be considered by this office prior to implementing the proposed action. This opportunity to comment is not a right to appeal this FONSI or EA.

3

Apr 08 10 10:21a

Written comments should be directed to: Superintendent, BIA Siletz Agency, PO Box 569, Siletz Oregon 97380.

Questions regarding the project should be directed to Carina Kistler, Executive Director, Grand Ronde Tribal Housing Authority, 28450 Tyee Road, Grand Ronde, Oregon 97347. Contact by telephone at (503) 879-2403.

Notice of Availability

Appeal Rights

The publication of the Decision Notice and Finding of No Significant Impact constitutes the Federal Officials Decision for purposes of appeals and Notice of availability of the EA and FONSI. The 30 day notice of availability and 30 day appeal period shall run concurrently and commence upon March 22, 2010 and end upon April 23, 2010. Any appeals to the decision to implement the Elder Housing Phase II residences and the drainfield and force main for wastewater treatment must be in accordance with 25 CFR Part 2.

This decision may be appealed to the Northwest Area Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland Oregon 97232-4182.

Your notice of Appeal to the Northwest Area Director must be signed by you or your attorney. Submission of an appeal must be labeled or titled Notice of Appeal, identify the decision being appealed, statement of the reason for the appeal. If possible attach a copy of the decision documentation. You must send copies of your notice of appeal to each interested party known to you including the Grand Ronde Tribal Housing Authority, at the address listed above in the Comments section, and the Bureau of Indian Affairs Siletz Agency, P.O. Box 569, Siletz, Oregon 97380-0569 or 178 N.E. Metcalf Avenue, Siletz, Oregon 97380-0569. Your Notice of Appeal must certify that you have sent copies to these parties. If you file a notice of appeal, the Northwest Regional Director will notify you of further appeal procedures. If there are no appeals filed timely this decision is final at the expiration of the appeal filing period.

Gregory A. Norton, Superintendent
BIA Siletz Agency

ATTACHMENT 11

United States Department of the Interior

OFFICE OF THE SOLICITOR
Pacific Northwest Region
805 S.W. Broadway Street, Suite 600
Portland, Oregon 97205-3346

IN REPLY REFER TO:
BIA.PN.11858

JAN 27 2011

RECEIVED
JAN 31 2011
USBIA Siletz Agency

Memorandum

To: Superintendent, Siletz Agency
Bureau of Indian Affairs

From: Colleen Kelley, Attorney Colleen Kelley

Subject: Preliminary Opinion of Title

Tract No. Grand Ronde (Bailey II/Ackerson Road)
County: Polk State: Oregon
Estate to be Acquired: Fee simple Consideration: none
Acreage: 5.05 acres
Vendor: Confederated Tribes of the Grand Ronde Community of Oregon
Title Evidence: 7129-1558904, April 2, 2010
Prepared by: First American Title Insurance Company of Oregon

An examination has been made of the title data relating to the above tract of land in which interests are to be acquired under authority of existing legislation.

The title evidence and accompanying data disclose the title to the land to be vested as set forth in the title evidence attached subject to the objections noted in Schedule B and also subject to:

1. All taxes and assessments.
2. Rights or claims of persons in possession, if any, not shown of record.
3. Mechanics' liens, if any, not shown of record.

Prior to the consummation of this purchase, it should be definitely determined that the deed and the title evidence include all the land described in the option, purchase agreement, or application for acquisition.

The above objections numbered 1 through 3 and items 6-7, 8 of the Special Exceptions in Schedule B of the preliminary title evidence must be satisfactorily eliminated or addressed as explained in the Additional remarks/requirements section.

According to the administrative approval of your agency, the interest is to be acquired subject to items 9-13 of the Special Exceptions in schedule B of the preliminary title evidence, and to

existing easements for public roads and highways, railroads, pipelines and public utilities, if any, not shown of record, that are therefore waived.

Additional remarks/requirements:

1. The final title evidence must be on ALTA U.S. Policy – 9/28/91.

2. The final title package must have evidence that a timely contaminant survey in accordance with current BIA requirements has been completed and approved.

3. 25 C.F.R. 151.12(b) requires that BIA provide public notice of its intent to acquire this property in trust at least 30 days before an official accepts the deed. The final title package must contain a copy of the public notice from the newspaper or Federal Register.

4. Item #8 in the title evidence identifies "statutory powers, and regulations, including levies, assessments, drainage rights and easements of Grand Ronde Sewer" as an exception to coverage. To the extent this exception overlaps with the easement described in item #12, it is acceptable. However, BIA should investigate whether any levies or assessments exist with respect to Grand Ronde Sewer and make sure none are due or outstanding prior to accepting title to the property. Additionally, please report your findings in the cover memorandum when you request the final opinion of title.

When the necessary requirements and objections have been eliminated or otherwise met, a satisfactory conveyance from the owners to the United States, drawn in accordance with the Standards of the Attorney General, duly executed and properly stamped, has been recorded, and the final title evidence, continued to a date subsequent to the recordation of the deed, has been obtained, disclosing that nothing has occurred since the date of the present certification to affect the title adversely, and showing the vesting of a valid title in the United States of America, the title will be approved subject to those rights which have been administratively determined to be acceptable, and to any reservation contained in the option or purchase agreement which may be made under existing statutes.

Your file is returned herewith.

Attachment

Fee-to-Trust
Step-by-Step Process for
On-Reservation (Discretionary)

STEP 1
Review of Written Request or Application

STEP 2
Encode Fee-to-Trust System of Record

STEP 3
Respond to Incomplete Request/Application

STEP 4
Site Visit and Certificate of Inspection & Possession (CIP)

STEP 5
Preparing Preliminary Title Opinion (PTO)

STEP 6
Preparing Notice of Application (NOA)

STEP 7
Environmental Compliance Review

STEP 8
Comments to Notice of Application

STEP 9
Clearance of PTO objections before Notice of Decision (NOD)

STEP 10
Prepare Analysis & Notice of Decision (NOD)

STEP 11
Preparing the Publication Notice

Steps Continued

STEP 12
Preparing Final CIP

STEP 13
Acceptance of Conveyance

STEP 14
Final Title Opinion and Recordation

STEP 15
Recording at Land Titles and Records Office

STEP 16
Completed Application Packet

For more information about this process contact:

UNDERSTANDING THE

Fee-to-Trust Process
For Discretionary Acquisitions

U.S DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

Frequently Asked Questions

1. What is a fee-to-trust land acquisition? A fee-to-trust land acquisition is a transfer of land title from an eligible Indian /tribe or eligible Indian individual(s) to the United States of America, in trust, for the benefit of the eligible Indian Tribe or eligible Indian individual(s).

2. Who is eligible to apply for a fee-to-trust land acquisition? Indian tribes and individual Indian persons who meet the requirements established by federal statutes and further defined in federal regulations are eligible to apply for a fee-to-trust land acquisition. See 25 Code of Federal Regulations (CFR) § 151.2; 25 United States Code (USC) § 479and § 2201.

3. If you are eligible, how do you submit an application? All applications for a fee-to-trust acquisition must be in writing and specifically request that the Secretary of the Interior take land into trust for the benefit of the applicant. If you are an eligible Indian tribe, the request may be in the form of a tribal resolution. See 25 CFR § 151.9.

4. Where should an eligible applicant submit an application ? Applications shall be submitted to the Bureau of Indian Affairs (BIA) office that has jurisdiction over the lands contained in the application. If the applicant does not know which BIA office has jurisdiction the applicant should contact the BIA Division of Real Estate Services at (202) 208-7737 or at http://www.bia.gov/WhoWeAre/RegionalOffices/index.htm

5. What information is the applicant required to provide to accompany the application for a fee-to-trust acquisition? The applicant must provide a legal description of the land to be acquired, the legal name of the eligible Indian tribe or individual, proof of an eligible Indian tribe or eligible person, the specific reason the applicant is requesting that the United States of America acquire the land for the applicant's benefit, a title insurance commitment addressing the lands to be acquired and information that allows the Secretary of the Interior to comply with the National Environmental Policy Act (NEPA) and 602 Departmental Manual 2 (602 DM 2) – Hazardous Substances.

6. What laws, regulations and standards apply to a fee-to-trust acquisition? There are different laws that must be satisfied. Most acquisitions are authorized under 25 USC § 465, Section 5 Indian Reorganization Act (1934) and reviewed under 25 CFR § 151. However, the Interior Department must comply with all federal laws, including compliance with NEPA, 602 DM 2 Hazardous Substances Determinations, National Historical Preservation Act (NHPA) and U.S. Department of Justice Title Standards. See 25 CFR § 151.13.

7. What are the applicant's responsibilities if they receive a written request from the Bureau of Indian Affairs requesting additional information to process an application? The applicant must reply back to the BIA within the time frames identified in the written correspondence requesting additional information. All correspondence from the BIA requesting additional information will include each specific document needed to proceed with processing the application and will include the specific time the applicant has to provide the requested information. It is very important that the applicant maintain written communication with the BIA throughout the process when the applicant is contacted by the BIA. If the applicant needs additional time to respond to a request for additional information, they must contact the BIA as soon as possible and make the request for an extension of time in writing. The BIA will reasonably accommodate requests from applicants for additional time to provide information, and will notify applicants in writing of the decision regarding the request.

8. What happens if I do not respond? If the applicant does not respond in the time stated in the letter or any extension, the BIA will either return the application or take into consideration failure to provide the information. If the applicant has failed to provide information on a non-critical title issue, the BIA will take into consideration that there is insufficient or negative information in forming BIA's decision on the application and may result in a denial.

9. Are there entities that will be provided notice of an application for a fee-to-trust acquisition? Yes. State and local governments, including tribal governments having regulatory jurisdiction over the land contained in the application, will be notified upon written receipt of an application for a fee-to-trust acquisition. The notice will inform the entities that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

10. Will all applications from eligible Indian tribes and eligible Indian individuals result in a fee-to-trust acquisition? No. Each application will be evaluated to determine if the applicable criteria defined in the CFR has been addressed (25 CFR § 151.10). The official authorized to accept the fee-to-trust acquisition will decide whether or not to accept the fee-to-trust acquisition. All decisions to accept or deny a fee-to-trust acquisition shall be in writing. If the acquisition is denied, the applicant will be advised of the reasons for the denial and will be notified of the right to appeal the decision and where the applicant's appeal must be filed.

11. How long does the process take? The length of time to complete the process varies depending on the required steps. The required steps differ for on-reservation or off-reservation trust acquisitions and mandatory or discretionary acquisitions.

12. Can I get a report on the progress of my application? Yes. The BIA tracks the steps and progress of applications and they will provide you a report upon your request.

Chapter 4A

Statutory Authority of Tribal Officers to Enforce State Law, as Oregon "Peace Officers" or "Police Officers"

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I. GOVERNING STATUTES (ALL PRE-2011, PRE-SB 412)

A. Relevant Definitions

Prior to 2011, the Oregon Motor Vehicle Code defined *"police officer"* as: "'Police officer' *includes* a member of the Oregon State Police, a sheriff, a deputy sheriff or a city police officer." ORS 801.395 (emphasis added).

Prior to 2011, the Oregon Criminal Code provided the following definition of *"peace officer":*

> As used in chapter 743, Oregon Laws 1971, and ORS 166.635, unless the context requires otherwise:
>
> . . . .
>
> (4) "Peace officer" means a sheriff, constable, marshal, municipal police officer, member of the Oregon State Police, investigator of the Criminal Justice Division of the Department of Justice or investigator of a district attorney's office *and such other persons as may be designated by law.*

ORS 161.015(4) (emphasis added).

ORS 133.005(3), governing searches and seizures states that "peace officer" "means a member of the Oregon State Police or a sheriff, constable, marshal, municipal police officer, investigator of a district attorney's office if the investigator is or has been certified as a peace officer in this or any other state, or an investigator of the Criminal Justice Division of the Department of Justice of the State of Oregon."

ORS 181.610, governing certification of officers, defines "police officer":

> (14) "Police officer" means an officer, member or employee of a *law enforcement unit* who is employed full time as a peace officer *commissioned by a* city, port, school district, mass transit district, county, county service district authorized to provide law enforcement services under ORS 451.010, *Indian reservation,* the Criminal Justice Division of the Department of Justice, the Oregon State Lottery Commission or the Governor or who is a member of the Department of State Police and who is responsible for enforcing the criminal laws of this state or laws or ordinances relating to airport security or is an investigator of a district attorney's office if the investigator is or has been certified as a peace officer in this or any other state.

(Emphasis added). ORS 181.610 also includes tribal officers as part of a "law enforcement unit":

> (12) (a) "Law enforcement unit" means a police force or *organization of* the state, a city, port, school district, mass transit district, county, county service district authorized to provide law enforcement services under ORS 451.010, *Indian reservation,* Criminal Justice Division of the Department of Justice, the Department of Corrections, the Oregon State Lottery Commission or common carrier railroad whose primary duty, as prescribed by law, ordinance or directive, is any one or more of the following:
>
> (A) *Detecting crime and enforcing the criminal laws of this state*[.] . . .

(Emphasis added.)

The common dictionary meaning of "police officer" defines the phrase as meaning "a member of a police force." *Webster's Third New International Dictionary,* 1754 (unabridged ed. 2002).

B. Stop and Arrest Authority

ORS 810.410(3) provides stop authority for traffic offenses:

> A *police officer:*
>
> . . . .
>
> (b) May stop and detain a person for a traffic violation for the purposes of investigation reasonably related to the traffic violation, identification, and issuance of citation.

ORS 810.410(1) provides arrest authority for traffic offenses: "A *police officer* may arrest or issue a citation to a person for a traffic crime at any place within or outside the jurisdictional authority of the governmental unit by which the police officer is authorized to act as provided by ORS 133.235 and 133.310."

ORS 131.615(1) provides stop authority, to investigate crimes: "A *peace officer* who reasonably suspects that a person has committed or is about to commit a crime may stop the person and, after informing the person that the peace officer is a peace officer, make a reasonable inquiry."

ORS 133.310(1) provides arrest authority: "A *peace officer* may arrest a person without a warrant if the officer has probable cause to believe that the person has committed any of the following [offenses, including felonies and misdemeanors.]"

ORS 133.235(2) provides in pertinent part: "A *peace officer* may arrest a person for a crime, pursuant to ORS 133.310 (1), *whether or not such crime was committed within the geographical area of such peace officer's employment,* and the peace officer may make such arrest within the state, regardless of the situs of the offense."

II. DEVELOPING CASE LAW (1998–2011)

A. *State v. Pamperien*, 156 Or App 153, 967 P2d 503 (1998)

Authority of tribal officer to stop traffic offender on Warm Springs Reservation for violation of state traffic laws. Held: ability to stop traffic offender on reservation lands was part of "tribe's inherent power as a sovereign" to maintain order and safety within its lands. Concurrence would also hold tribal officer was a "police officer."

B. *State v. Jim (Lester)*, 178 Or App 553, 37 P3d 241, *rev dismissed* 335 Or 91 (2002)

Stop and arrest of tribal member by Wasco County deputy for traffic offenses at Celilo Indian Village. Challenge to state court jurisdiction to prosecute. Held: locale is subject to state jurisdiction, rather than federal, because not part of the Warm Springs Reservation, but is held in trust for three tribes. *See* 18 U.S.C. § 1162(a) (P.L. 280).

C. *State v. Schaff*, 185 Or App 61, 57 P3d 907 (2002), *rev den* 335 Or 355 (2003)

Challenge to authority of Burns-Paiute officer's authority to conduct breath test of DUII arrestee. Held: because tribal officer was trained and certified to conduct such tests, officer's lack of cross-deputization did not preclude admission of otherwise valid breath test results.

D. *State v. Oakes*, 193 Or App 341, 89 P3d 1274 (2004)

Authority of Coquille tribal officer to stop traffic offender off tribal lands. Held: because officer was cross-deputized by the county sheriff, he was authorized to conduct stop and arrest, even though he did not identify himself to driver as a deputy sheriff. Not reaching issue of whether tribal officer who is *not* cross-deputized may do same, when off tribal lands.

E. *State v. Kurtz*, 350 Or 65, 249 P3d 1271 (2011)

Whether a Warm Springs tribal police officer can arrest a person who commits a traffic violation on the reservation but is not stopped until after the person crosses the reservation boundary and is in

Jefferson County. Held: "the legislature has recognized that tribal police are an integral part of the public safety system in this state." A tribal officer is both a "police officer" and a "peace officer" when acting under authority of his sovereign employer. Such an arrest is proper, and accused may be prosecuted for both attempting to elude a "police officer" and resisting arrest of "peace officer." *Reversing State v. Kurtz,* 233 Or App 573, 228 P3d 583 (2010).

F. *State v. Smith,* 246 Or App 614, 268 P3d 644 (2011)

Challenge to stop and arrest by Jefferson County deputy on Warm Springs Reservation. Held: stop and arrest proper under "hot pursuit" provisions of tribal code. Provisions apply both to tribal police acting outside of their jurisdiction (i.e., following offender off reservation) and nontribal police acting outside of their ordinary jurisdictional area (i.e., following offender onto reservation lands).

Chapter 4B

Summary of Senate Bill 412 (Oregon Laws 2011, Chapter 644)

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In July 2011, Governor Kitzhaber signed into law Senate Bill 412 ("SB 412"), which gives officers employed by a federally recognized Indian tribe located within the boundaries of the state of Oregon the power to enforce state law provided that certain requirements are met. Those requirements are summarized below.

I. REQUIREMENTS FOR AN OREGON TRIBE TO EMPLOY OFFICERS AUTHORIZED TO ENFORCE STATE CRIMINAL LAW UNDER SB 412

A. Oregon Department of Public Safety Standards and Training (DPSST) Requirements

With respect to a participating tribe's employment of state-certified police officers exercising law enforcement authority under SB 412, the tribe must be in compliance with DPSST requirements regarding employing agencies, which include (1) not employing as a police officer, corrections officer, or parole and probation officer any person under the age of 21 (ORS 181.645), and (2) commencing training/certification of officers within a specified period of time (ORS 181.652; ORS 181.665).

B. Insurance

A participating tribe must submit to DPSST a resolution declaring that the tribe is self-insured or has purchased and maintains in force public liability and property damage insurance for vehicles operated by tribal officers enforcing state law and police professional liability insurance from a company licensed to sell insurance in Oregon, and the tribe must attach to the resolution a declaration that the tribe has complied with SB 412 and a complete copy of the insurance policies or a description of the tribe's self-insurance program that contains certain elements set forth in SB 412 (these documents will be kept on file by DPSST and will be available for inspection and copying).

C. Tort Claim Law

A participating tribe must have in place laws that waive the tribe's sovereign immunity as to tort claims asserted in the tribal government's court that arise from the conduct of a tribal police officer while enforcing state law in a manner similar to the Oregon Tort Claims Act and must allow for recovery against the tribal government in an amount equal to or greater than the amounts described in the Oregon Tort Claims Act that are applicable to a local public body.

D. Deadly Physical Force Plan

With respect to state law enforcement activities, a participating tribe must adopt a law requiring the tribe to participate in, and agree to be bound by, a deadly physical force plan developed under a multi-agency process set out in Oregon statutes to the same extent that county sheriffs are required to participate in or be bound by the plan (plans are approved and published by the Oregon Attorney General).

E. Police Records Resulting from Exercise of SB 412C Authority

1. Record Retention. A participating tribe must adopt a law that requires the tribe to retain records related to the exercise of the state law enforcement authority granted under SB 412 in a manner substantially similar to the manner in which Oregon public records laws require the Department of State Police to retain public records.

2. Records Availability. A participating tribe must adopt a law that provides members of the general public with the right to inspect police records of the tribe related to the exercise of the state law enforcement authority granted under SB 412C in a manner substantially similar to the manner in which Oregon public records laws require the Department of State Police to make available such records for inspection by the public.

F. Preservation of Evidence

A participating tribe must adopt a law that requires the tribe to preserve biological evidence in a manner substantially similar to Oregon law regarding handing of biological evidence when the evidence is collected by a tribal officer as part of a criminal investigation into certain serious offenses such as aggravated murder, murder, manslaughter in the first or second degree, rape in the first degree, sodomy in the first degree, unlawful sexual penetration in the first degree, and aggravated vehicular homicide.

G. Pretrial Discovery Policy

A participating tribe must adopt a written pretrial discovery policy that describes how a tribal government and its authorized officers will assist the district attorney in criminal prosecutions conducted in state court in which a tribal police officer using SB 412 authority arrested or cited the defendant. The tribe may meet this requirement in one of two ways (and must do so within 90 days): (1) it may create and adopt its own written pretrial discovery policy that meets the requirements set forth in Oregon statutes, or (2) it may adopt the written pretrial discovery policy adopted by the sheriff of a county with land that is contiguous to the land of the tribal government. The tribe is exempt from this requirement if the sheriff of any county with land that is contiguous to the land of the tribal government has not, on the date the sheriff receives a request from the tribe for a copy of the policy, adopted a written pretrial discovery policy.

H. "Reciprocity" Negotiation/Reporting

If OSP or the sheriff from a neighboring county applied to a tribe by October 18, 2011 (90 days from the SB 412 effective date), for their officers to enforce tribal and/or state law on the reservation, the affected tribe was required to negotiate in good faith (but did not need to approve the application) if it wanted to participate in SB 412. If the affected tribe were to have denied the application, and if the tribe continued to seek to enforce state law under SB 412, the tribe and the applicant would have been required to collect data on the frequency of instances in which officers employed by the applicant encountered, but were forced to release without further action due to lack of authority, persons suspected of committing violations of law while on tribal lands and report such data to the legislature.

II. REQUIREMENTS FOR OREGON TRIBAL OFFICERS ENFORCING STATE LAW UNDER SB 412

A. Scope of Employment

The officer must be acting within the scope of his or her employment as a tribal police officer.

B. DPSST Certified

The officer must be certified by the Oregon Department of Public Safety Standards and Training ("DPSST").

C. DPSST Compliant

The officer must be in compliance with any rules adopted by DPSST under SB 412.

D. Employed by Qualifying Tribe

The officer must be employed by a tribal government that meets the requirements set forth above.

III. LIMITATIONS ON AUTHORITY

A. First Two Years Limitations

SB 412 provides that, for a period of two years (until July 2013), tribal police officers working for authorized tribes that otherwise meet the requirements set forth above may not enforce state law

outside of Indian country (i.e., qualified tribal officers have full authority to enforce state law within Indian country) unless:

1. The officer is investigating an offense alleged to have been committed within Indian country;

2. The officer leaves Indian country in fresh pursuit (i.e., pursuit without unreasonable delay of a person who has committed a felony or who reasonably is suspected of having committed a felony);

3. The officer is acting in response to an offense committed in the officer's presence; or

4. The officer has received the express approval of a law enforcement agency that has jurisdiction over the area in which the tribal officer is acting.

These limitations will cease to exist on July 1, 2013. So, from July 2013 until SB 412 sunsets in July 2015, qualified tribal officers would have full authority to enforce state law regardless of circumstance or location.

B. No Forfeiture

SB 412 also provides that a tribal government or tribal police department is not a seizing agency for the purposes of Oregon's criminal forfeiture statutes. Thus, tribal police officers enforcing state law cannot seize, take title in, and dispose of property subject to forfeiture (*see* ORS 131.558).

C. Sunset in 2015

SB 412 sunsets on July 1, 2015, at which time tribal police officers may exercise any state law enforcement authority granted under the *Kurtz* decision (unless, of course, the legislature reauthorizes SB 412).

Chapter 4C

Tribal Law and Order Act and Public Law 280

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PRESENTATION OUTLINE

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2. Prosecution of crimes in Indian Country.
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4. Tribal court sentencing authority.
5. Indian Country crime data collection and information sharing

C. Public Law 280

D. TLOA Impact on PL 280

E. TLOA with Regard to Assumption Process

Tribal Law and Order Act & Public Law 280

Tim Simmons
Assistant United States Attorney
Tribal Liaison
District of Oregon

OUTLINE OF PRESENTATION

I. TRIBAL LAW AND ORDER ACT OVERVIEW

II. PUBLIC LAW 280

III. TLOA IMPACT ON PL 280

IV. TLOA RE-ASSUMPTION PROCESS

TRIBAL LAW AND ORDER ACT OVERVIEW

- The Tribal Law and Order Act (TLOA) was passed by the Senate June 23, 2010
- TLOA was attached as an amendment to the "Indian Arts and Crafts Amendments" and sent to the House
- House passed H.R. 725 on July 21, 2010
- President signed the TLOA into law on July 29, 2010

TLOA OVERVIEW: SIX SUBTITLES

(1) Federal Accountability and Coordination
(2) State Accountability and Coordination
(3) Empowering Tribal Law Enforcement Agencies and Tribal Governments
(4) Tribal Justice Systems
(5) Indian Country Crime Data Collection and Information Sharing
(6) Domestic Violence and Sexual Assault Prosecution and Prevention

TLOA Overview: LAWS AMENDED BY TLOA (not exclusive)

- 25 U.S.C. § 1302(a) and 1321: Indian Civil Rights Act
- 25 U.S.C. § 2801: Indian Law Enforcement Act
- 28 U.S.C. § 543: Appointment of Special Counsel
- 28 U.S.C. § 450: Indian Self-Determination and Educational Assistance Act (ISDEAA)
- 28 U.S.C. § 534: Acquisition, preservation, and exchange information

TLOA Overview: Federal Accountability

- Developing and providing dispatch and emergency services
- Conducting meaningful and timely consultation with tribal leaders in development of regulatory policies affecting public safety and justice services
- Annual report regarding Indian Country Crime data
- Annual report regarding spending in Indian Country
- Report summarizing the technical assistance, training, and other support provided tribal law enforcement and correction agencies that operate under a 638 contract

TLOA Overview: Tribal Detention Programs

- Long term plan for Tribal detention programs
- Address incarceration in Indian Country
- New construction
- Contracting with state and local authorities
- Alternatives to incarceration

TLOA Overview: Prosecution of Crimes

- SAUSAs: Appointment of qualified tribal prosecutors and other qualified attorneys to assist in prosecuting federal offenses committed in Indian Country
- Codifies Tribal Liaisons in U.S. Attorney Offices – no less than 1 tribal liaison in each USAO with Indian Country

TLOA Overview: Prosecution Declinations

- If USAO declines to prosecute an alleged violation of Federal criminal law in Indian Country, the USAO shall coordinate with the appropriate tribal justice officials regarding the status of the investigation and the use of evidence relevant to the case in a tribal court with authority over the crime alleged
- Annual report to Native American Issues Coordinator regarding declinations

TLOA Overview: Tribal Database Access

- Access to National Criminal Information Database
- Amends 28 U.S.C. § 534
- Permits Tribal law enforcement direct access and enter information into federal criminal information databases and to obtain information from the database
- Must meet applicable federal or state requirements for access

TLOA Overview: Tribal Court Sentencing Authority

- Amends the Indian Civil Rights Act (ICRA)
- Prior to TLOA: Tribal court limited to sentences of 1 year or a fine up to $5,000
- TLOA: Enhances Tribal Court sentencing authority: Option to impose sentences up to 3 years and fine up to $15,000
- Total penalty limited to 9 years
- Must provide indigent defendants with a licensed defense attorney at tribal expense; Tribal judges must be licensed and law trained; tribal criminal laws publicly available

TLOA Overview: Tribal Court Sentencing Authority

Offenses greater than 1 year or fine of $5,000 only if:

(1) previous conviction of same or comparable offense by any jurisdiction in U.S.

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the U.S. or any of the states

TLOA Overview: Tribal Court – Defendant Rights

If tribe is exercising a total term of more than 1 year must:

(1) provide the right to effective assistance of counsel at least equal to that guaranteed by the U.S. Constitution;

(2) at the expense of the tribal government, provide an indigent defendant assistance of a defense attorney licensed to practice law by any jurisdiction in the U.S. that applies appropriate licensing standards and effectively ensures the competence and professional responsibilities of its licensed attorneys

TLOA Overview: Tribal Court - Judges

Requires that each judge presiding over the applicable criminal case:

(i) have sufficient legal training; and

(ii) be licensed to practice law in any jurisdiction in the United States (state, federal, or tribal)

TLOA Overview: Tribal Court – Rules & Records

- Prior to charging the defendant, make publicly available the criminal laws, rules of evidence, criminal rules of the tribal government
- Must maintain a record of the criminal proceeding (audio or other recording)

TLOA Overview: Tribal Court - Sentences

Defendant may be ordered to serve time in:

(A) tribal correctional center

(B) appropriate federal facility, at the expense of the U.S. pursuant to Bureau of Prisons tribal prisoner pilot project

(C) state or local government approved per agreement

(D) in an alternative rehab center of the Tribe

TLOA Overview: Bureau of Prisons

- Bureau of Prisons pilot project: Four year pilot program to accept certain tribal offenders sentenced in tribal courts for placement in BOP institutions
- Conviction must be for a violent crime
- Must be incarcerated for 2 years or more
- Limit of 100 tribal offenders at any time

TLOA Overview: Prisoner Re-entry

- BOP must notify tribe's chief law enforcement officer when releasing to tribal jurisdiction a prisoner convicted of violent crime, drug trafficking, or sex offense
- Authorizes Federal Pretrial & Probation Services to appoint officers in Indian Country which can provide for substance abuse & other treatment services

TLOA Overview: Report on Effectiveness

- No later than 4 years, DOJ and BIA must submit a report to Congress on the effectiveness of the enhanced sentencing authority in curtailing crime and a recommendation on whether the enhanced sentencing should continue

TLOA: Criminal Jurisdiction Assumption

- TLOA provides a process for tribes to request that DOJ re-assume PL 280 Jurisdiction

PUBLIC LAW 280

- Passed in 1953
- Authorized state criminal jurisdiction on reservations in six states, including Oregon (mandatory PL-280)
- Public Law 280 did not reduce or expand tribal criminal jurisdiction: Only altered the allocation of federal and state criminal jurisdiction
- Withdrew two categories of federal criminal jurisdiction: crimes between Indians and non-Indians (General Crimes Act – 18 U.S.C. § 1152), and major crimes involving only Indians (Major Crimes Act – 18 U.S.C. § 1153)

TLOA IMPACT ON PL 280

- Authorizes tribal governments to request DOJ re-assume criminal jurisdiction. 25 U.S.C. § 1321(a); 18 U.S.C. § 1162(a)
- If the DOJ grants the request, the federal government may once again prosecute § 1152 and § 1153 cases arising from Indian Country
- Does not change state or tribal jurisdiction
- Concurrent jurisdiction: Federal Tribal, and State governments
- "Retrocession" is still available
- Rule regarding assumption : 28 C.F.R. § 50.25

TLOA Re-Assumption Process

- Request made to Office of Tribal Justice
- Must be signed by the chief executive of the tribe
- Shall explain why concurrent juris will improve public safety, criminal law enforcement and reduce crime
- Shall identify each local or state agency that currently has juris
- Within 30 days, notice in federal register seeking comments

TLOA Re-Assumption Process

- The Attorney General has delegated the authority to Deputy Attorney General (DAG)
- The DAG makes his or her decision after receiving recommendations from the Office of Tribal Justice, the Executive Office for United States Attorneys, and the Federal Bureau of Investigation
- The recommendations are made after consultation with the tribe has taken place and federal, state, and local entities have had an opportunity to comment on the request
- Unlike the “retrocession” process, the state need not concur in the request

TLOA Re-Assumption Factors

DOJ assess whether assumption of federal criminal jurisdiction will make the tribal community safer. Will look at the following factors:

- Whether or not granting the request will increase the law enforcement, judicial, and/or corrections resources available to the tribe
- Comments and information received from the Federal Bureau of Investigation, the United States Attorney's Office, Department of Homeland Security, Bureau of Indian Affairs, state/local law enforcement agencies, information received during tribal consultation, and other information may be considered

TLOA Re-Assumption Decision

- Requests received by February 28 will be prioritized for decision by July 31
- Requests received by August 31 will be prioritized for decision by January 31 of the following year
- Tribe will be notified of the final decision by a written notice which will explain the basis for the decision
- If request denied: Tribe has the option of submitting a new request at a later date
- If request granted: Notice will be published in the *Federal Register* to announce the assumption of concurrent federal criminal jurisdiction to the public.

CONTACT INFORMATION

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tim.simmons@usdoj.gov

28 C.F.R. § 50.25

Title 28: Judicial Administration

PART 50—STATEMENTS OF POLICY

§ 50.25 Assumption of concurrent Federal criminal jurisdiction in certain areas of Indian country.

(a) Assumption of concurrent Federal criminal jurisdiction. (1) Under 18 U.S.C. 1162(d), the United States may accept concurrent Federal criminal jurisdiction to prosecute violations of 18 U.S.C. 1152 (the General Crimes, or Indian Country Crimes, Act) and 18 U.S.C. 1153 (the Major Crimes, or Indian Major Crimes, Act) within areas of Indian country in the States of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin that are subject to State criminal jurisdiction under Public Law 280, 18 U.S.C. 1162(a), if the tribe requests such an assumption of jurisdiction and the Attorney General consents to that request. Once the Attorney General has consented to an Indian tribe's request for assumption of concurrent Federal criminal jurisdiction, the General Crimes and Major Crimes Acts shall apply in the Indian country of the requesting tribe that is located in any of these "mandatory" Public Law 280 States, and criminal jurisdiction over those areas shall be concurrent among the Federal Government, the State government, and (where applicable) the tribal government. Assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d) does not require the agreement, consent, or concurrence of any State or local government.

(2) Under 25 U.S.C. 1321(a)(2), the United States may exercise concurrent Federal criminal jurisdiction in other areas of Indian country as to which States have assumed "optional" Public Law 280 criminal jurisdiction under 25 U.S.C. 1321(a), if a tribe so requests and after consultation with and consent by the Attorney General. The Department's view is that such concurrent Federal criminal jurisdiction exists under applicable statutes in these areas of Indian country, even if the Federal Government does not formally accept such jurisdiction in response to petitions from individual tribes. This rule therefore does not establish procedures for processing requests from tribes under 25 U.S.C. 1321(a)(2).

(b) Request requirements. (1) A tribal request for assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d) shall be made by the chief executive official of a federally recognized Indian tribe that occupies Indian country listed in 18 U.S.C. 1162(a). For purposes of this section, a chief executive official may include a tribal chairperson, president, governor, principal chief, or other equivalent position.

(2) The tribal request shall be submitted in writing to the Director of the Office of Tribal Justice at the Department of Justice. The first page of the tribal request shall be clearly marked: "Request for United States Assumption of Concurrent Federal Criminal Jurisdiction." The tribal request shall explain why the assumption of concurrent Federal criminal jurisdiction will improve public safety and criminal law enforcement and reduce crime in the Indian country of the requesting tribe. The tribal request shall also identify each local or State agency that currently has jurisdiction to investigate or prosecute criminal violations in the Indian country of the tribe and shall provide contact information for each such agency.

(c) Process for handling tribal requests. (1) Upon receipt of a tribal request, the Office of Tribal Justice shall:

(i) Acknowledge receipt; and

(ii) Open a file.

(2) Within 30 days of receipt of a tribal request, the Office of Tribal Justice shall:

(i) Publish a notice in the Federal Register, seeking comments from the general public;

(ii) Send written notice of the request to the State and local agencies identified by the tribe as having criminal jurisdiction over the tribe's Indian country, with a copy of the notice to the governor of the State in which the agency is located, requesting that any comments be submitted within 45 days of the date of the notice;

(iii) Seek comments from the relevant United States Attorney's Offices, the Federal Bureau of Investigation, and other Department of Justice components that would be affected by consenting to the request; and

(iv) Seek comments from the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, other affected Federal departments and agencies, and Federal courts.

(3) As soon as possible but not later than 30 days after receipt of a tribal request, the Office of Tribal Justice shall initiate consultation with the requesting tribe, consistent with applicable Executive Orders and Presidential Memoranda on tribal consultation.

(4) To the extent appropriate and consistent with applicable laws and regulations, including requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a, governing personally identifiable information, and with the duty to protect law enforcement sensitive information, the Office of Tribal Justice may share with the requesting tribe any comments from other parties and provide the tribe with an opportunity to respond in writing.

(5) An Indian tribe may submit a request at any time after the effective date of this rule. However, requests received by February 28 of each calendar year will be prioritized for decision by July 31 of the same calendar year, if feasible; and requests received by August 31 of each calendar year will be prioritized for decision by January 31 of the following calendar year, if feasible. The Department will seek to complete its review of prioritized requests within these time frames, recognizing that it may not be possible to do so in each instance.

(d) Factors. Factors that will be considered in determining whether or not to consent to a tribe's request for assumption of concurrent Federal criminal jurisdiction include the following:

(1) Whether consenting to the request will improve public safety and criminal law enforcement and reduce crime in the Indian country of the requesting tribe.

(2) Whether consenting to the request will increase the availability of law enforcement resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(3) Whether consenting to the request will improve access to judicial resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(4) Whether consenting to the request will improve access to detention and correctional resources for the requesting tribe, its members, and other residents of the tribe's Indian country.

(5) Other comments and information received from the relevant United States Attorney's Offices, the Federal Bureau of Investigation, and other Department of Justice components that would be affected by consenting to the request.

(6) Other comments and information received from the Department of the Interior (including the Bureau of Indian Affairs), the Department of Homeland Security, other affected Federal departments and agencies, and Federal courts.

(7) Other comments and information received from tribal consultation.

(8) Other comments and information received from other sources, including governors and State and local law enforcement agencies.

(e) Decision. (1) The decision whether to consent to a tribal request for assumption of concurrent Federal criminal jurisdiction shall be made by the Deputy Attorney General after receiving written recommendations from the Office of Tribal Justice, the Executive Office for United States Attorneys, and the Federal Bureau of Investigation.

(2) The Deputy Attorney General will:

(i) Consent to the request for assumption of concurrent Federal criminal jurisdiction, effective as of some future date certain within the next twelve months (and, if feasible, within the next six months), with or without conditions, and publish a notice of the consent in the Federal Register;

(ii) Deny the request for assumption of concurrent Federal criminal jurisdiction; or

(iii) Request further information or comment before making a final decision.

(3) The Deputy Attorney General shall explain the basis for the decision in writing.

(4) The decision to grant or deny a request for assumption of concurrent Federal criminal jurisdiction is not appealable. However, at any time after a denial of such a request, a tribe may submit a renewed request for assumption of concurrent Federal criminal jurisdiction. A renewed request shall address the basis for the prior denial. The Office of Tribal Justice may provide appropriate technical assistance to any tribe that wishes to prepare and submit a renewed request.

(f) Retrocession of State criminal jurisdiction. Retrocession of State criminal jurisdiction under Public Law 280 is governed by 25 U.S.C. 1323(a) and Executive Order 11435 of November 21, 1968. The procedures for retrocession do not govern a request for assumption of concurrent Federal criminal jurisdiction under 18 U.S.C. 1162(d).

[AG Order 3314–2011, 76 FR 76042, Dec. 6, 2011]

Chapter 5A

Oregon State Cultural Resource Laws and the Role of the SHPO—Presentation Slides

Dennis Griffin
State Archaeologist for the Oregon State Historic Preservation Office
Oregon Heritage
Oregon Parks & Recreation Department
Salem, Oregon

Oregon State Cultural Resource Laws and the Role of the SHPO

Government Law and Indian Law Seminar
October 19, 2012

Dennis Griffin, Ph.D. RPA
State Archaeologist
Oregon State Historic Preservation Office (SHPO)

What is the State Historic Preservation Office? (SHPO)

- SHPO was created under federal law (NHPA) in 1966 to oversee the protection of cultural resources in each state and to review proposed project developments in order to avoid adverse impacts to significant cultural resources.
- SHPO works with federal, state, and local agencies, as well as the general public and the tribes, to assist in compliance with state or local regulations.

SHPO Review and Compliance Program

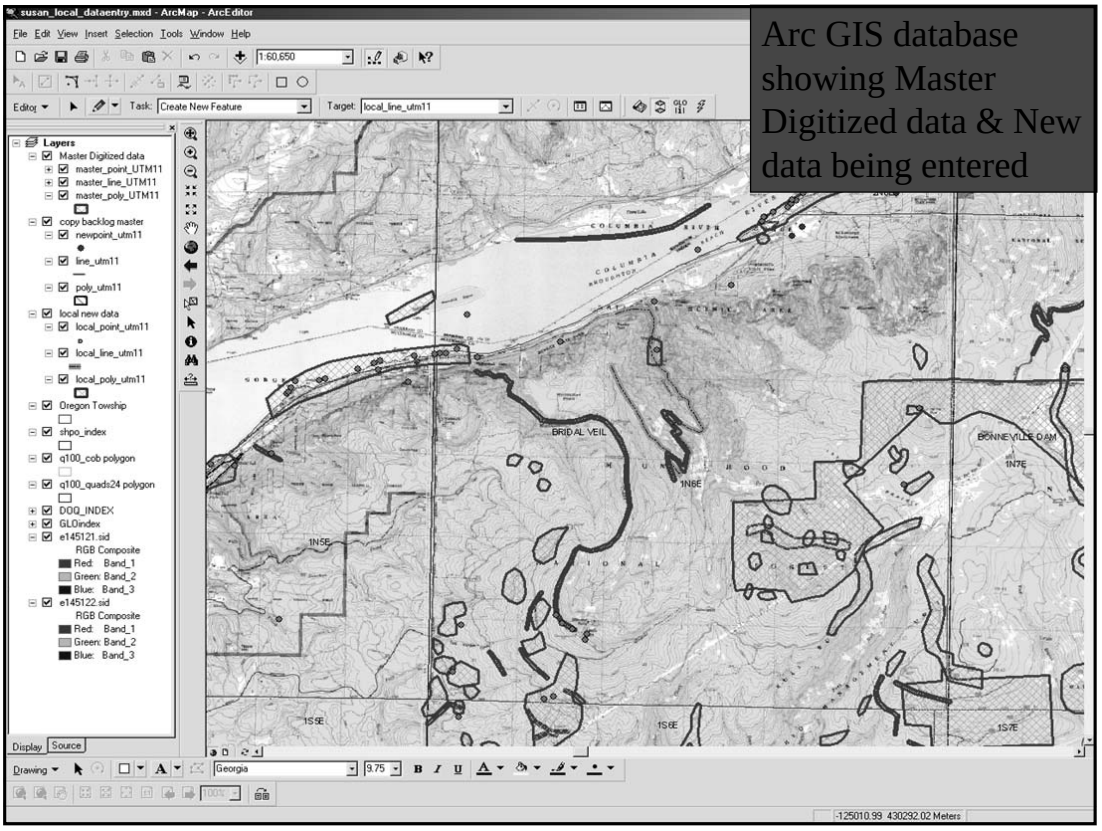
- SHPO works with federal agencies to assist them in complying with Section 106 of the National Historic Preservation Act of 1966. This program assists in reviewing federal undertakings, both archaeological and above-ground, for their impact upon cultural resources.
- We consult with federally recognized Tribes regarding impacts to Traditional Cultural Properties (TCP).
- The R&C program assists clients to identify and evaluate resources, assess effects upon those resources and look for productive ways to avoid or mitigate adverse project effects.



Oregon SHPO Archaeological Services

- SHPO houses a statewide GIS database of known archaeological sites in Oregon (30,000+).
- Library of approximately 25,000 previous archaeological investigations on file and accessible to qualified researchers.
- Reviews state and federal projects for potential effects on proposed projects (>3,000 annually).

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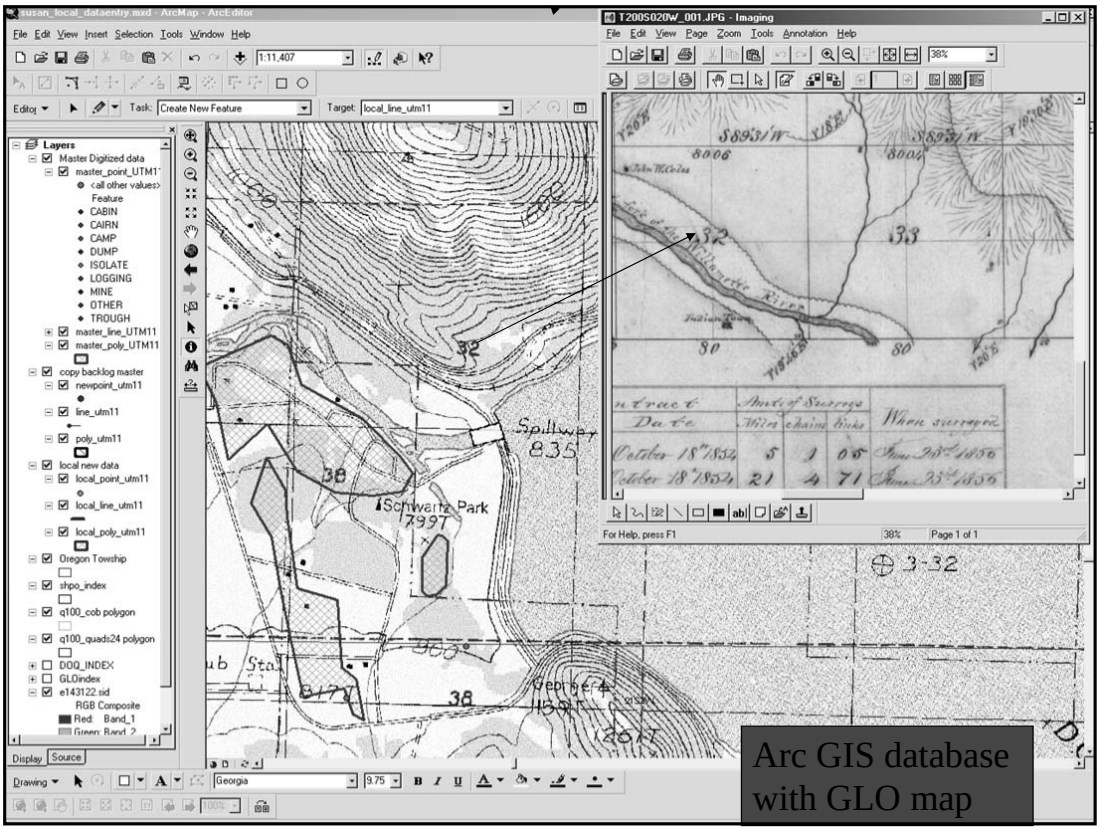
Arc GIS database showing Master Digitized data & New data being entered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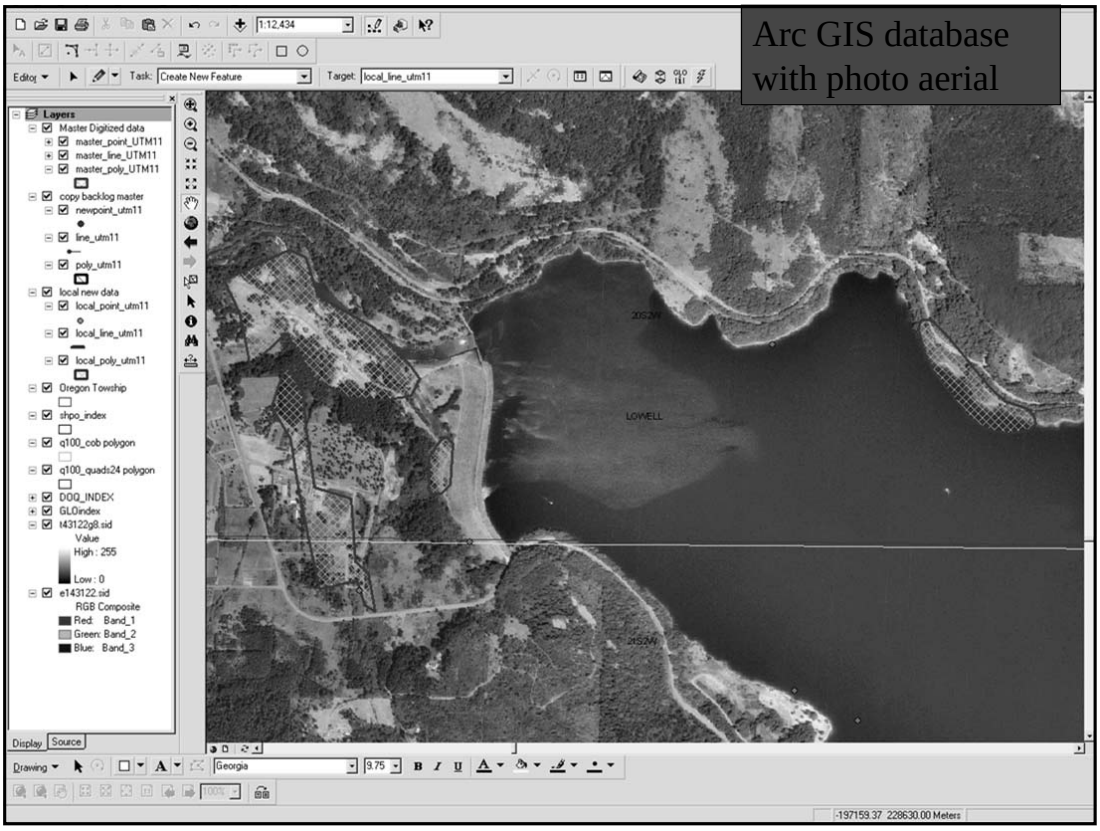
Schwartz Park
7997
Spillway
835
Arc GIS database with GLO map



Interaction with State Judicial System

- Review state and federal projects for effects to cultural resources;
- Issue state archaeology permits;
- Provide state standards/guidelines regarding archaeological fieldwork and reporting;
- Assist state agencies with cultural resource issues;
- Serve as expert witness in court cases.

Cultural Resources Laws to be Aware of

- Federal Laws- applicable on federal and Tribal lands as well as any project with a federal nexus (i.e., federal permit, federal funding, federal agency involvement).
- State Laws- applicable on all non-federal public (e.g., city, county, state) and private lands.

Primary Federal Cultural Resources Regulations

- Section 106 of the National Historic Preservation Act (NHPA) of 1966, amended through 2000
- National Environment Policy Act of 1969 (NEPA)
- Archeological and Resource Protection Act (ARPA)
- Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)
- Abandoned Shipwreck Act (43 USC Part 39, 1988)

When federal laws apply to a project there is usually a federal lead agency who will ensure that cultural resource protection measures are in place.

Section 106 of the NHPA

- Under Section 106 of NHPA the SHPO participates in the review of all federal undertakings that have the potential to impact historic or archaeological resources listed in, or eligible for listing in, the National Register of Historic Places (NRHP).
- Tribal consultation required.
- Because almost half of the state is in federal ownership, Oregon's program is one of the most active in the U.S.

Oregon State Cultural Resources Regulations

- Indian Graves and Protected Objects (ORS 97.740- 97.760)
- Archaeological Objects and Sites (ORS 358.905- 358.961)
- Permit and Conditions for Archaeological Excavation (ORS 390.235)
- Administrative Rules for Applying for an Archaeological Permit to Excavate a Site (OAR 736-051-0080 to -0090)



Indian Graves and Protected Objects (ORS 97.740-97.760)

- Protects Native American cairns, graves and associated funerary objects, sacred objects, and objects of cultural patrimony.
- Disturbance of Native American human remains or associated objects is considered a Class C Felony. Fines up to $10,000 can be issued.
- A qualified archaeologist has to obtain an Archaeological Permit from SHPO before a site can be disturbed.
- Applicable on both private and public lands.

Archaeological Objects and Sites (ORS 358.905- 358.961)

- Provides definitions of archaeological sites (75 yrs or older), sites of archaeological significance, and cultural patrimony.
- Prohibits the sale, purchase, trade, barter or exchange of any archaeological objects.
- Prohibits the excavation, injury, destruction, or alteration of an archaeological site or removal of artifacts on public or private land in Oregon unless it is authorized by an Archaeological Permit.
- Applicable on both public (1935) and private (1993) lands.
- Violation of law is a Class B Misdemeanor.



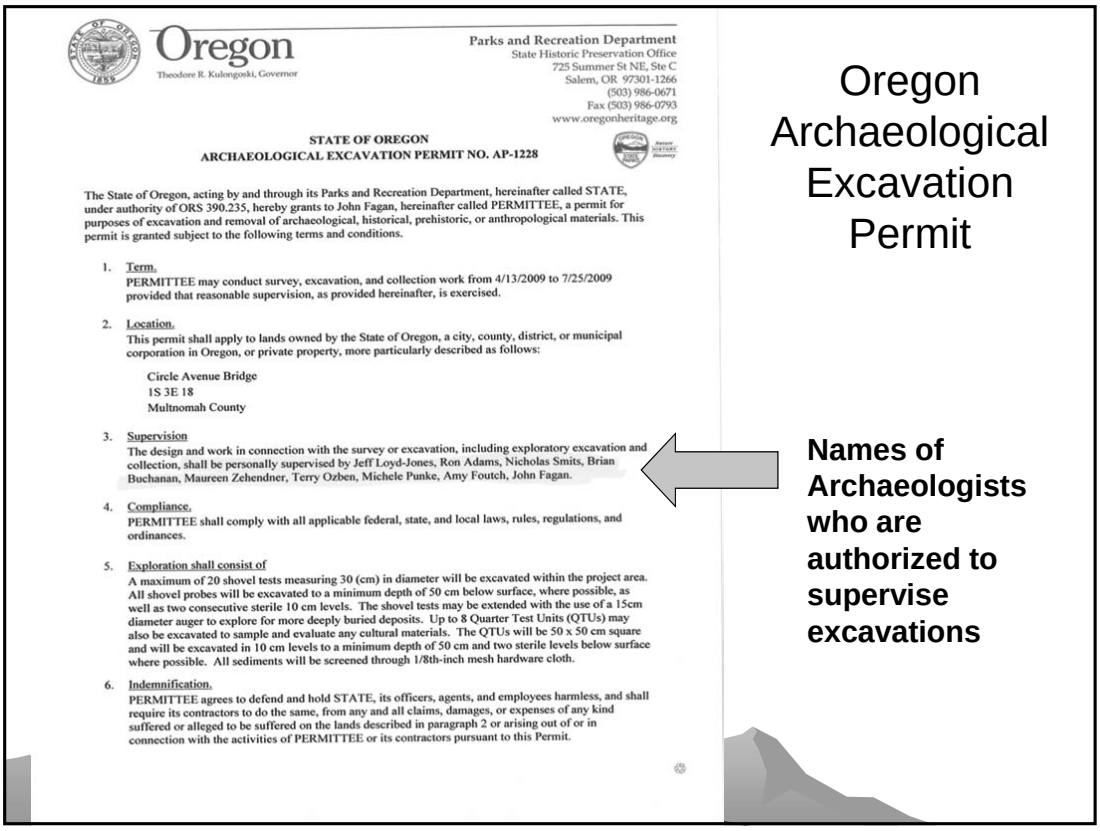
Permits & Conditions for Archaeological Excavation (ORS 390.235)

- Prohibits the excavation of a known archaeological site on both public and private land or to conduct exploratory excavations to determine the presence of a site on public lands without first obtaining a permit from SHPO.
- Requires consultation with the appropriate tribes and public agencies (e.g., planning offices, OSMA, CIS).



Administrative Rules for Permits & Conditions for Excavation on Public and Private Lands (OAR 736-051-0080 to -0090)

- Outlines the policies and procedures SHPO uses in the issuance of an Archaeological Permit.
- Establishes the policies and procedures for curation of archaeological objects uncovered as a result of excavation under an Archaeological Permit.
- Summarizes the policies and procedures for an Expedited Archaeological Permit (i.e., 48 hours) when the normal 30-day review period would result in extreme hardship or undue risk to public health, life or safety, or an undue threat to the site or burial.



Summary of Federal and Oregon State Cultural Resources Regulations

- Oregon law provides protection for archaeological sites on both non-federal public and private lands;
- requires a permit to excavate a known site on public or private land or conduct exploratory excavation on public land;
- criminal & civil penalties limited to Class C Felony for Native American burials and Class B Misdemeanor for archaeological sites.
- Federal law provides protection for archaeological sites on federal land or having federal connection;
- requires a permit to excavate on federal land whether exploratory or within a known site;
- criminal and civil penalties are stronger than Oregon state law.

What exactly is an archaeological site?

- An **archaeological site** is defined as ten or more artifacts likely to have been generated by *patterned cultural activity* within a surface area reasonable to that activity;
- or the presence of any *archaeological feature*, with or without associated artifacts;
- Archaeological sites relate to both prehistoric and historic land use.



Some prehistoric site types found in Oregon include:



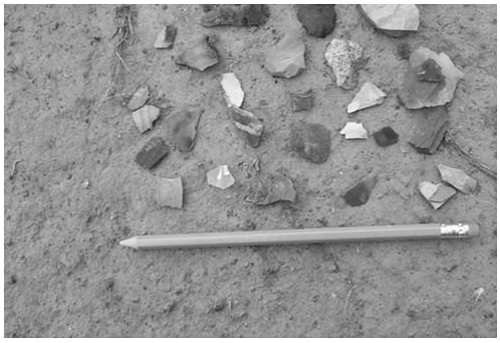
Shell Middens



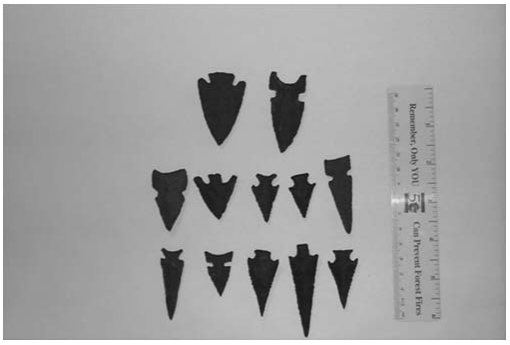
Culturally-modified Trees



Lithic Scatters



Lithic Flakes or Debitage



Projectile Points or Arrowheads





Stone Tools

Historic site types found in Oregon include:



Wagon Roads



Refuse Scatters



Foundations

Cultural Resource Protection

Unlawful Activity:

- **Generally speaking it is unlawful for any one to do any kind of …**
  - **- Digging,**
  - **- excavating,**
  - **- altering**
  - **- damaging or**
  - **- defacing**

  an archaeological site

  or…

  - remove any archaeological objects from a site without a permit.



Artifacts found in looter's pit at Chinatown site in Portland

Is digging for arrowheads a Crime?

Yes!

- **Digging for an arrowhead or any other archeological object is a crime under state and federal law.**
- **It is unlawful to do any kind of digging or excavation without the use of a permit.**
- **Collection of <u>an</u> (i.e., only 1) arrowhead from the SURFACE of public (non-federal) or private land is permitted if collection can be accomplished without the use of any tool.**



Just a little bit of bottle collecting, no harm done!! RIGHT?



COLLECTING HISTORIC ARTIFACTS IS ALSO ILLEGAL!

Who is the victim?

* **Tribes that are affected by the looting.**
* **The state of Oregon or federal government.**
* **Once sites are damaged and artifacts are removed or destroyed, they are lost to everyone... so in effect <u>WE ALL</u> are victims.**



The looting of archaeological sites does not only happen in deserted areas after dark…



Historic Chinese site in downtown Portland

Contacts Upon Discovery of Looted Sites or Human Remains

- Oregon State Police [ORS 97.745(4)]
- State Historic Preservation Office (SHPO)
- Commission on Indian Services (CIS)



Protocol for the Discovery of Native American Human Remains

- If discovered human remains are not clearly modern, then there's a high probability that they are Native American and therefore ORS 97.745(4) applies.
- Immediately notify the State Police, SHPO, CIS, and all appropriate Native American Tribes.
- CIS is the state agency that determines the appropriate Native American Tribes for discoveries on private & non-federal public lands. It should be noted that there may be more than one appropriate Tribe to be contacted.
- If the human remains are possibly Native American, then the area should be secured from further disturbance or traffic. The human remains and all associated objects should not be disturbed, manipulated, or transported from their original location until a plan is developed in consultation with the above named parties.
- You should work with all parties involved and the appropriate Native American Tribes to implement a cultural sensitive plan for reburial.

Tribal Consultation with Oregon's Native American Tribes

- Nine federally recognized Tribes in Oregon
- CIS will provide the name of the appropriate Tribes.
- Cultural Resource Contact Person information given by CIS or can be found on SHPO website-



Tribes maintain an interest in archaeological sites throughout their traditional territories; not only on their reservation lands!

OUR WEBSITE ADDRESS IS…….

http://www.oregonheritage.org/OPRD/HCD/ARCH/index.shtml

Chapter 5B

Off-Reservation Treaty Reserved Fishing and Hunting Rights—Presentation Slides

Brent H. Hall
Confederated Tribes of the Umatilla Indian Reservation
Office of Legal Counsel
Pendleton, Oregon

Off–Reservation Treaty Reserved Fishing and Hunting Rights

PRESENTED BY:
BRENT H. HALL

Topics Covered

I. Off-Reservation Fishing Rights: Origins of US v. Oregon
II. US v. Oregon Case Proceedings
III. The 2008 – 2017 US v. Oregon Management Agreement
IV. Off-Reservation Hunting Rights

- In 1855, the United States entered into several treaties with Indian tribes and bands living along the Columbia River and its tributaries in what are now the states of Oregon, Washington and Idaho.
- The 1855 treaties were cession agreements in which the Tribes reserved homelands, sovereignty, and other rights, including fishing and hunting rights.



1855 Stevens and Palmer Treaties

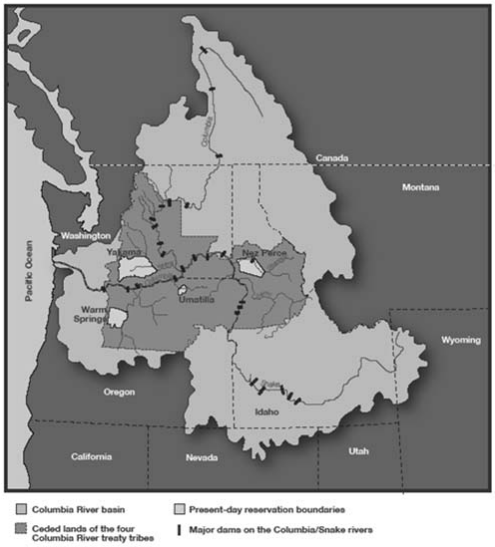
The Fishing Clause



- The treaties expressly provide: "That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with the citizens of the United States . . . ."
- The treaty minutes are clear that the tribes would not have entered into the treaties without the United States' promise to secure the fishing right.

Ceded Lands

- The treaties cleared title to ceded lands that opened much of the interior Columbia River Basin to non-Indian settlement.



Early Fishing Conflicts





- Beginning in the 1870's, large-scale non-Indian fisheries are developed on the Columbia River, and fishing conflicts soon arose over Indian access to their traditional fishing areas.
- By the late 1800's the United States filed several lawsuits against non-Indian individuals who are preventing tribal fishermen from fishing at the usual and accustomed places.

Fishing conflicts move to the Courts



- Several of these cases reach the U.S. Supreme Court, which affirms the Tribes' treaty rights, but opens the door for "conservation" regulation.
- Cases affirming access to all usual and accustomed places: Winans, Seufert Brothers, Brookfield Fisheries.
- State and federal regulation of treaty fishery only for conservation: Tulee, Maison, Puyallup.

Changes to the Shape of the River



Changes to the Shape of the River



- In 1957, The Dalles Dam is completed inundating Celilo Falls.
- The Columbia River Compact restricts commercial fishing between Bonneville Dam and Miller Island upstream from The Dalles Dam.
- The Compact prohibits all commercial salmon fishing (treaty Indian & non-Indian) above Miller Island.

Conflicts Leading to *U.S. v. Oregon*

- The states of Oregon and Washington attempt to enforce these regulations on tribal fishermen, confrontations ensue and tensions run high.



- There are frequent state criminal court proceedings against individual tribal members.
- Tribal attorneys and U.S. attorneys assist in defending Indian fishermen in state courts.

Sohappy v. Smith

- In July 1968, fourteen members of the Yakama Nation filed suit in federal district court in Oregon against the Oregon Fish Commission (*Sohappy v. Smith*).



- The tribal fishermen seek a decree that would define their treaty fishing rights and a clarification on the manner and extent to which the State of Oregon may regulate Indian fishing.

U.S. v. Oregon

Confederated Tribes of the Warm Springs Indian Reservation of Oregon

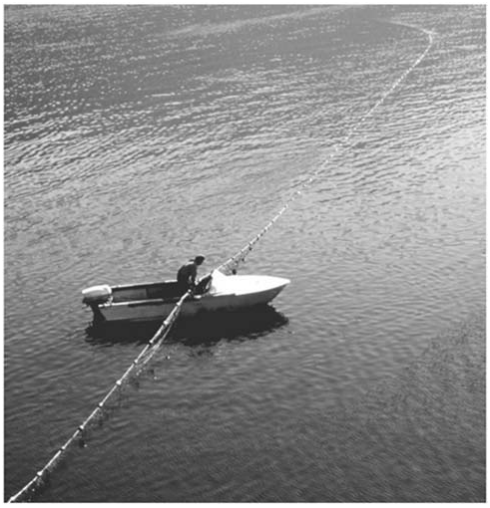
- In September 1968, the United States files suit in federal district court in Oregon against the State of Oregon to enforce Indian off-reservation fishing rights in the Columbia River Basin (*United States v. Oregon*).
- The Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Nez Perce Tribe, and the Confederated Tribes of the Warm Springs Reservation of Oregon intervene in *U.S. v. Oregon* as plaintiffs.

In 1969, Judge Belloni renders his decision in *Sohappy v. Smith/U.S. v. Oregon* holding that:

- The tribes have a right to a fair share of the available harvest and the state is limited in its power to regulate the exercise of the Indians' federal treaty rights.
- The state may regulate treaty fisheries only when reasonable and necessary for conservation, the state's conservation regulations must not discriminate against the Indians and must be the least restrictive means.

U.S. v. Oregon

- Judge Belloni also finds:
  - That it is patently unfair to manage the Columbia Basin salmon such that few fish survive to reach the tribes' usual and accustomed fishing places.
  - That the tribes have an absolute right to that fishery and thus are entitled to a fair share of the fish <u>produced</u> by the Columbia River system.



Belloni's 1974 Decision in *U.S. v. Oregon*

- "The Indian treaty fishermen are entitled to have the opportunity to take up to 50% of the spring Chinook run destined to reach the tribes' usual and accustomed grounds and stations. By `destined to reach . . . ' I am referring to that portion of the spring run which would, in the normal course of events, instinctively migrate to these places except for prior interception by non-treaty harvesters or other artificial factors." (emphasis added).
- This language is subsequently reflected in "conservation necessity principles."

Conservation Necessity Principles



- Is the application of conservation measures to the Indians necessary to preserve the fish?
- As part of the conservation necessity principle, the regulation of Indian treaty activities is only permissible if it is **not possible** to achieve the conservation measures by imposing restrictions on non-treaty activities that impact the treaty resource.

Court-Managed Fisheries

- From 1970-77, the tribes and U.S. continually challenge the Columbia River Compact's fishing seasons to assure the tribes a fair share of the fishery.
- The court repeatedly finds that the states' regulations are not reasonable and necessary for conservation and urges the parties to adopt a comprehensive plan to assure a fair share of the fish to all parties.
- In 1977, the *U.S. v. Oregon* parties adopt a "Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Tributaries Above Bonneville Dam" (aka Five Year Plan).

U.S. v. Oregon Court Adopted Fishery Management Plans

- 1988 – Columbia River Fish Management Plan (CRFMP) expired in 1998 and parties enter into a series of short term agreements.
- 2005-2007 Interim Agreement.
- August, 2008 Judge King adopts a ten-year management agreement signed by Oregon, Washington, Idaho, the tribes, and the federal government.

2008-2017 U.S. v. Oregon Management Agreement

- Part I: Structure and Process
  - Governance and Implementation
- Part II: Harvest
  - Stock by stock fishery agreements
- Part III: Hatchery Production Commitments
  - General agreements, specific program by program details, and identification of outstanding issues

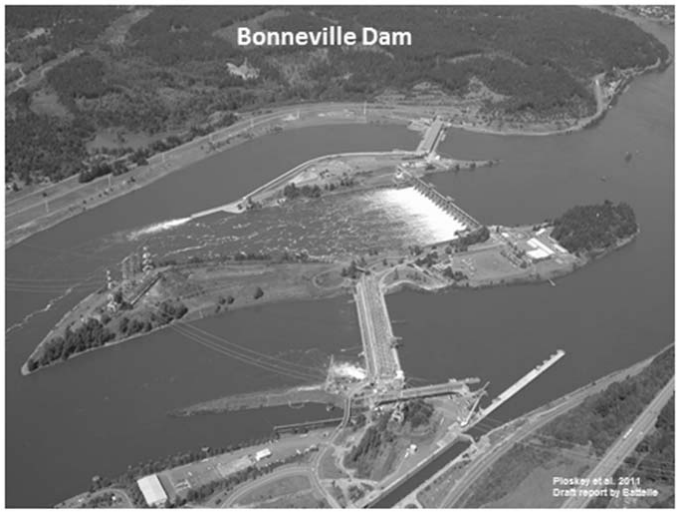


2008-2017 U.S. v. Oregon Management Agreement Part I – Structure and Process

- Framework:
  - Policy Committee –Decision-making body made up of policy and legal representatives. Decisions require consensus.
  - Technical Advisory Committee (TAC) – Run status, harvest issues.
  - Production Advisory Committee (PAC) – Production mods, escapements, broodstock.
  - Regulatory Coordination Committee – regulatory consistency and referral agreements.
  - Strategic Work Group – issues as they arise.
  - Dispute Resolution Process.

2008-2017 U.S. v. Oregon Management Agreement Part I – Structure and Process

- Performance Measures, Commitments and Assurances:
  - Monitor progress towards rebuilding through performance measure evaluations of indicator stocks



2008-2017 U.S. v. Oregon Management Agreement Part II – Harvest

- "This Agreement describes specific provisions for managing mainstem fisheries and certain tributary fisheries. Harvest plans for the Parties' other tributary fisheries will be developed cooperatively by the management entities with primary management responsibility in respective sub-basin [as identified in the Agreement]."



2008-2017 U.S. v. Oregon Management Agreement Part II – Harvest

- Covers 11 different species-specific harvest regimes.
- Employs sliding scale abundance-based frameworks.
- Disputes over 50% harvest sharing, aka catch-balancing, in first two years.

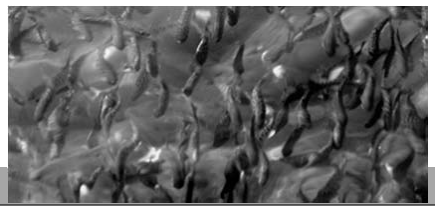


2008-2017 U.S. v. Oregon Management Agreement Part III –Production Actions

- Management Principles:
  - " The Parties intend to use artificial production techniques where appropriate, among other strategies, to assist in rebuilding weak runs and mitigating for lost production."
  - "These production actions, in conjunction with other enhancement efforts, habitat protection, hydrosystem management, and harvest management, are intended to ensure that Columbia River fish runs continue to provide a broad range of benefits in perpetuity."
  - RM&E, Mass marking, broodstock needs, Mitchell Act Funding







2008-2017 U.S. v. Oregon Management Part III –Production Actions

- Juvenile Release Production Tables by Species
  - Release location
  - Rearing facility
  - Broodstock source
  - Target release number
  - Number and type of marks and
  - Number of unclipped (adipose fin) fish
  - Program purpose – Fishery or Supplementation
  - Funding source



The Hunting Clause

- "[T]he privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them." Treaty with the Walla Walla, Cayuse, and Umatilla Tribes, June 9, 1855. 12 Stat. 945.

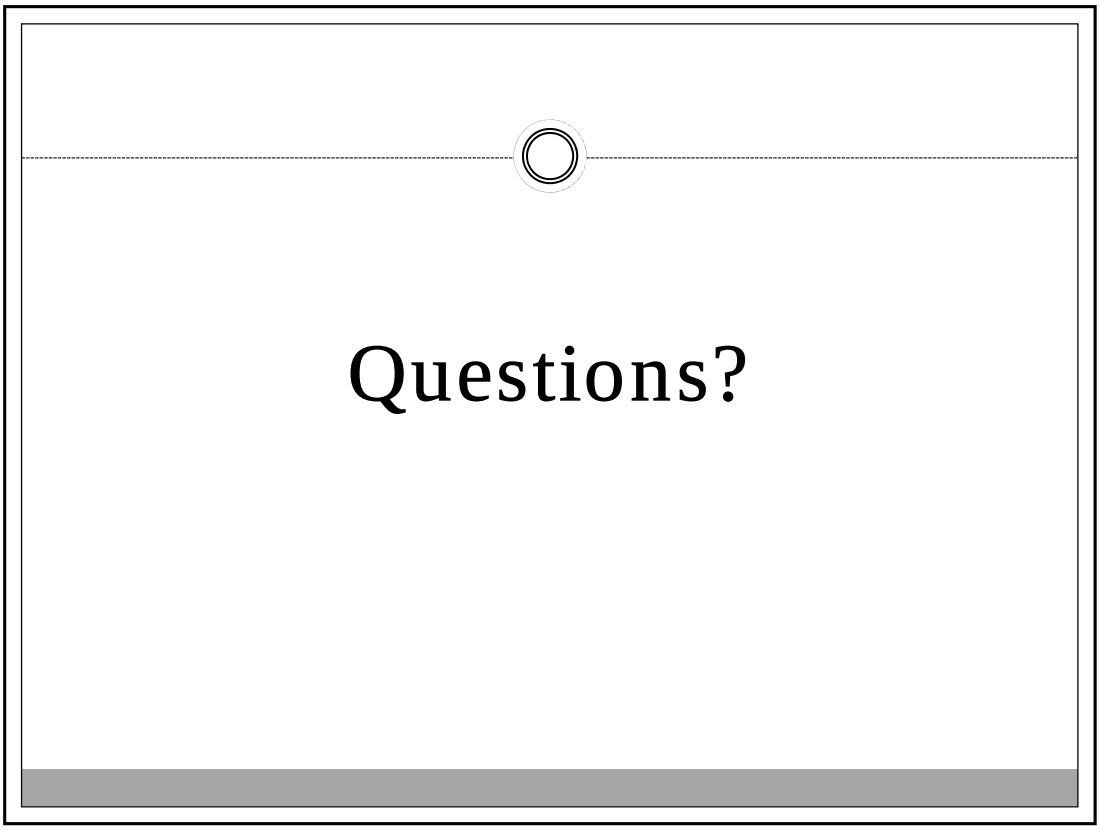
- Treaty Minutes contain the words of Governor Stevens explaining the off-reservation right:
  - "We do not want you to agree not to get roots and berries, and not to go off to the Buffalo; we want you to have your roots and to get your berries, and to kill your game; we want you if you wish to mount your horses and go the Buffalo plains, and we want more; we want you to have peace there."
  - "You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all…outside the Reservation."

Hunting Rights – Key Attributes

- State cannot regulate tribal hunting on unclaimed lands customarily hunted by tribal members. *CTUIR v. Maison*, 262 F.Supp 871 (D.Or. 1966).
- No requirement that lands be within ceded area, so long as they were traditionally used. Some courts have conflated the analysis of traditional use with the legal test for a tribe's historical ownership of land, referred to as aboriginal title.
  - Important issue: What is the test for geographical scope of a tribe's treaty hunting rights? Traditional use or aboriginal title?

Hunting Rights - Key Attributes

- National forest lands and state wildlife areas are open and unclaimed. *State v. Buchanan*, 978 P.2d 1070, 1081-2 (Wash. 1999) (collecting authorities).
- Some treaties use the word "unoccupied" which has been construed more narrowly than "open and unclaimed." *State v. Cutler*, 708 P.2d 853, 859 (Idaho 1985).
- Conservation doctrine of state regulation applies. *Antoine v. Washington,* 420 U.S. 194 (1975).
- Not as expansive as fishing right: lands must be "open and unclaimed."
  - Defeasible right: actual settlement/ occupation terminates the right on that land.


Questions?


Thank You!
http://www.umatilla.nsn.us/



Chapter 5C

Off-Reservation Rights: Natural and Cultural Resources—Presentation Slides

Robert A. Brunoe
General Manager, Branch of Natural Resources
Confederated Tribes of the Warm Springs Reservation of Oregon
Warm Springs, Oregon

Confederated Tribes of Warm Springs

Tribal Historic Preservation Office

Tribal Historic Preservation Office

- Tribal Historic Preservation Officer status was granted in 1996 through a Memorandum of Agreement with the National Parks Service
- THPO Jurisdiction includes:
  - Tribal federal trust lands – on and off reservation
  - Warm Springs Reservation

What type of work is being done?

- Work is based on federal and tribal proposed projects that have the potential to cause land disturbance such as:
  - Timber sales
  - FERC projects
  - New roads and reconstruction of roads
  - New buildings and reconstruction of buildings
  - New under ground pipes and replacement of pipes
  - Fence construction

CTWSRO / THPO Cultural Resource Processes

- CTWSRO has a staff of 7 archaeologist that meet Secretarial Standard (i.e., Masters degree in Anthropology/Archaeology)
- All projects in the THPO jurisdiction are inventoried by an archaeologist that meets the secretarial standard; a report of findings is compiled that includes site documentation and management recommendations or mitigation measures.
- If the project is **tribally** funded the report is reviewed by the Cultural Resource Manager and a letter request for concurrence is submitted along with the report to the THPO for review and concurrence.
- The report will than be reviewed by the THPO for concurrence.
- If the project is funded by a **federal agency** the report is reviewed by the Cultural Resource Manager, then is submitted to the agency official for review; the Federal agency will then submit a letter to the THPO for review and concurrence.

CTWSRO / THPO Program

- The CTWSRO THPO reviews approximately 40-50 reports yearly
- In 2011 the CRD recorded over 280 historic properties (archaeological and above ground) within the THPO jurisdiction
- The THPO office submits a yearly report to the National Parks Service on work completed

Other work

- Off reservation Section 106 review of all federal projects
- Off reservation cultural resource review of all state, county, local municipalities, and private projects
- Native American Grave Repatriation and Protection Act
  - In 2011 – the CRD conducted six repatriations
- Inadvertent Discoveries (ID) of ancestral remains
- Archaeological Repatriation Protection Act (ARPA)
  - CRD works with federal land managers on ARPA violations

Chapter 6A

Ethics: Who Is Your Client?

Peter R. Jarvis
Hinshaw & Culbertson LLP
Portland, Oregon

Contents

Kirschner v. K & L Gates LLP, 2012 WL 1662075 (Pa.Super.) (2012) 6A–1
Leonard v. Dorsey & Whitney LLP, 553 F.3d 609 (2009). 6A–27

--- A.3d ----, 2012 WL 1662075 (Pa.Super.), 2012 PA Super 102
(Cite as: 2012 WL 1662075 (Pa.Super.))

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Superior Court of Pennsylvania.
Mark KIRSCHNER, in his capacity as the Liquidation Trustee of the Le–Nature's Liquidation Trust, Appellant
v.
K & L GATES LLP, Sanford Ferguson, Pascarella & Wiker, LLP, and Carl A. Wiker.

Argued Oct. 25, 2011.
Filed May 14, 2012.
Reargument Denied July 19, 2012.

Background: After initiation of involuntary bankruptcy proceedings against corporation due to receiver's uncovering of massive fraud, bankruptcy trustee brought professional negligence action against law firm and investigative company, which had previously been retained to investigate allegations of fraud. The Court of Common Pleas, Allegheny County, Civil Division, No. GD–09–015557,Wettick, J., dismissed action. Trustee appealed.

Holdings: The Superior Court, No. 154 WDA 2011,Musmanno, J., held that:
(1) attorney-client relationship existed between firm and corporation;
(2) trustee sufficiently alleged, to defeat preliminary objection, firm's breach of contract based on a contract for legal representation of corporation;
(3) trustee sufficiently alleged, to defeat preliminary objection, that firm and investigative company had master-servant relationship, as would allow for vicarious liability of firm; and
(4) defense of imputation, under in pari delicto theory, did not bar action.

Reversed and remanded.

West Headnotes

[1] Pleading 302 189

302 Pleading
302V Demurrer or Exception
302k189 k. Nature and office of demurrer, and pleadings demurrable. Most Cited Cases

A preliminary objection in the nature of a demurrer is properly granted where the contested pleading is legally insufficient. Rules Civ.Proc., Rule 1028(a)(4), 42 Pa.C.S.A.

[2] Pleading 302 216(1)

302 Pleading
302V Demurrer or Exception
302k216 Scope of Inquiry and Matters Considered on Demurrer in General
302k216(1) k. In general. Most Cited Cases

Preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer. Rules Civ.Proc., Rule 1028(a)(4), 42 Pa.C.S.A.

[3] Appeal and Error 30 837(4)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k837 Matters or Evidence Considered in Determining Question
30k837(4) k. Pleadings and rulings thereon. Most Cited Cases

In determining whether the trial court properly sustained preliminary objections, the appellate court must examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred. Rules Civ.Proc., Rule 1028(a)(4), 42 Pa.C.S.A.

[4] Appeal and Error 30 863

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30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In general. Most Cited Cases

Appeal and Error 30 960(1)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k960 Rulings on Motions Relating to Pleadings
30k960(1) k. In general. Most Cited Cases

Reviewing court will reverse the trial court's decision regarding preliminary objections only where there has been an error of law or abuse of discretion; when sustaining the trial court's ruling will result in the denial of claim or a dismissal of suit, preliminary objections will be sustained only where the case is free and clear of doubt. Rules Civ.Proc., Rule 1028(a)(4), 42 Pa.C.S.A.

[5] Attorney and Client 45 64

45 Attorney and Client
45II Retainer and Authority
45k64 k. What constitutes a retainer. Most Cited Cases

Corporations and Business Organizations 101 1799

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(C) Authority and Functions
101k1799 k. Committees. Most Cited Cases

Attorney-client relationship existed between firm retained to investigate alleged corporate mismanagement and corporation, as required to support legal malpractice claim, even though retention letter expressly identified special committee of board of directors as client; as committee of the board, special committee had fiduciary duty to act in best interests of not only the shareholders but also the corporation, board authorized special committee to retain firm to conduct investigation "on behalf of the company," under law of state of incorporation, board could not authorize special committee to act solely on behalf of investors, and cover memorandum for firm's findings set forth specific findings and recommendations for corporation.

[6] Attorney and Client 45 129(4)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(4) k. Damages and costs. Most Cited Cases

Damages sought by bankruptcy trustee for corporation, in professional negligence action against firm, were appropriate traditional tort damages rather than deepening insolvency damages, in case arising out of firm's failure to uncover massive fraud at corporation after being retained to investigate alleged fraud, even if corporation was already insolvent at time firm prepared its report, where damages sought included corporation's increased liabilities, and decreased asset values and losses.

[7] Attorney and Client 45 105.5

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases

When it is alleged that an attorney has breached his professional obligations to his client, an essential element of a professional negligence cause of action is proof of actual loss.

[8] Damages 115 104

115 Damages
115VI Measure of Damages
115VI(B) Injuries to Property
115k104 k. Discretion as to amount of damages. Most Cited Cases

Damages 115 188(1)

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115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k188 Loss of or Damage to Property
115k188(1) k. Extent of damage in general. Most Cited Cases

Once the fact that damages occurred has been established in a professional negligence claim, the jury is permitted to determine the extent of those damages; nevertheless, the plaintiff has the burden of presenting sufficient evidence by which damages can be determined on some rational basis and other than by pure speculation or conjecture.

[9] Negligence 272 1713

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1712 Proximate Cause
272k1713 k. In general. Most Cited Cases

Proximate cause must be determined by the judge and it must be established before the question of actual cause is put to the jury.

[10] Negligence 272 380

272 Negligence
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinctions
272k380 k. Substantial factor. Most Cited Cases

To determine proximate causation, the question is whether the defendant's conduct was a substantial factor in producing the injury.

[11] Negligence 272 1713

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1712 Proximate Cause
272k1713 k. In general. Most Cited Cases

Unless the evidence is such that reasonable people cannot disagree, the question of whether a defendant's conduct is the cause of the plaintiff's injury or loss is for the jury.

[12] Attorney and Client 45 109

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k109 k. Acts and omissions of attorney in general. Most Cited Cases

Bankruptcy trustee for corporation sufficiently alleged, to defeat preliminary objection, firm's breach of contract based on a contract for legal representation of corporation, in case in which firm was retained to investigate potential fraud at corporation and failed to uncover massive fraud, where trustee averred that firm employee misrepresented his investigation expertise, firm improperly limited scope of its investigation, firm allowed director who was suspected of fraud to play integral role in investigation, and firm failed to discover specific suspicious and fraudulent activities.

[13] Attorney and Client 45 109

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k109 k. Acts and omissions of attorney in general. Most Cited Cases

A claim based on breach of an attorney-client agreement is a contract claim, and the attorney's liability must be assessed under the terms of the contract.

[14] Attorney and Client 45 107

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k107 k. Skill and care required. Most Cited Cases

An attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those ex-

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pected of the profession at large.

[15] Attorney and Client 45 106

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k106 k. Nature of attorney's duty. Most Cited Cases

Fiduciary duty existed between law firm and corporation, as would support breach of fiduciary duty claim, in case in which firm was hired to investigate alleged fraud by corporate director, where attorney-client relationship existed between firm and corporation.

[16] Attorney and Client 45 106

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k106 k. Nature of attorney's duty. Most Cited Cases

Attorney and Client 45 113

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k113 k. Acting for party adversely interested. Most Cited Cases

An attorney who undertakes representation of a client owes that client both a duty of competent representation and the highest duty of honesty, fidelity, and confidentiality; such duty demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest, and breach of such duty is actionable.

[17] Attorney and Client 45 129(2)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(2) k. Pleading and evidence. Most Cited Cases

Fraud 184 46

184 Fraud
184II Actions
184II(C) Pleading
184k46 k. Reliance and inducement and action thereon. Most Cited Cases

Bankruptcy trustee for corporation sufficiently alleged, to defeat preliminary objection, that law firm and investigative company retained by law firm provided information that it knew would be relied on in corporation's business endeavors, as required to state claim for negligent misrepresentation, in case in which firm was retained to investigate potential fraud at corporation and failed to uncover massive fraud, where trustee averred that firm and investigative company drafted and edited a report which contained numerous misrepresentations, that investigative company confirmed its understanding that information provided in report would be used to give legal advice to corporation, and complaint specifically identified the alleged material misrepresentations.

[18] Attorney and Client 45 30

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k30 k. Partnership of attorneys; law firms. Most Cited Cases

Labor and Employment 231H 3089(1)

231H Labor and Employment
231HXVIII Rights and Liabilities as to Third Parties
231HXVIII(B) Acts of Employee
231HXVIII(B)2 Actions
231Hk3086 Pleading
231Hk3089 Scope of Employment
231Hk3089(1) k. In general. Most Cited Cases

Bankruptcy trustee for corporation sufficiently alleged, to defeat preliminary objection, that law firm and investigative company had master-servant relationship, as would allow for vicarious liability of firm for investigative company's alleged negligence in investigation of fraud at corporation, in case in which firm was retained to investigate potential fraud at corporation and failed to uncover massive fraud,

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where trustee alleged that investigative company was selected to assist firm as financial expert, that firm dictated parameters of investigative company's work on daily basis, that firm set interview schedules, provided assignments and deadlines to investigative company and approved methods employed by investigative company, that firm selectively communicated investigative company's findings to corporation, and that firm included investigative company's charges as part of firm's monthly invoices to corporation.

[19] Contracts 95 187(1)

95 Contracts
95II Construction and Operation
95II(B) Parties
95k185 Rights Acquired by Third Persons
95k187 Agreement for Benefit of Third Person
95k187(1) k. In general. Most Cited Cases

Corporation was an intended third-party beneficiary of contract between law firm and investigative company, after law firm was retained to investigate alleged fraud by corporate director and law firm then retained investigative company, where retention letter for investigative company expressly acknowledged its understanding that it was retained to assist in investigation of certain transactions involving corporation and that its assistance would help firm provide legal advice to corporation.

[20] Contracts 95 187(1)

95 Contracts
95II Construction and Operation
95II(B) Parties
95k185 Rights Acquired by Third Persons
95k187 Agreement for Benefit of Third Person
95k187(1) k. In general. Most Cited Cases

In order for a third party beneficiary to have standing to recover on a contract, both contracting parties must have expressed an intention that the third party be a beneficiary, and that intention must have affirmatively appeared in the contract itself.

[21] Contracts 95 187(1)

95 Contracts
95II Construction and Operation
95II(B) Parties
95k185 Rights Acquired by Third Persons
95k187 Agreement for Benefit of Third Person
95k187(1) k. In general. Most Cited Cases

In order for one to achieve third party beneficiary status in regard to a contract, that party must show that both parties to the contract so intended, and that such intent was within the parties' contemplation at the time the contract was formed.

[22] Action 13 4

13 Action
13I Grounds and Conditions Precedent
13k4 k. Illegal or immoral transactions. Most Cited Cases

Bankruptcy 51 2154.1

51 Bankruptcy
51II Courts; Proceedings in General
51II(B) Actions and Proceedings in General
51k2154 Rights of Action by or on Behalf of Trustee or Debtor
51k2154.1 k. In general; standing. Most Cited Cases

Defense of imputation, under in pari delicto theory, did not bar action by bankruptcy trustee of corporation against law firm and investigative company, alleging failure to uncover massive fraud orchestrated by corporation's top executive after firm was retained to investigate such fraud, where trustee alleged that firm and investigative company did not act in good faith in conducting investigation, and any material misrepresentations of corporate financial information, so as to hide executive's looting of company, did not provide any benefit to corporation.

Roy E. Leonard, Pittsburgh, Hector Torres, New York, New York and Cara M. Ciuffani, New York, New York, for appellant.

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Craig D. Singer, Washington, D.C., for Ferguson and K & L Gates, appellees.

Patricia L. Dodge, Pittsburgh, for Pascarella & Wiker and Wiker, appellees.

BEFORE: MUSMANNO, ALLEN and MUNDY, JJ.

OPINION BY MUSMANNO, J.:

***1** Mark Kirschner ("Trustee"), in his capacity as the Liquidation Trustee of the Le–Nature's Liquidation Trust,[FN1] appeals from the Order sustaining the Preliminary Objections to the Amended Complaint filed on behalf of K & L Gates LLP and Sanford Ferguson ("Ferguson") (collectively, "K & L Gates"), and Pascarella & Wiker, LLP ("P & W"), and Carl A. Wiker (collectively, "Defendants"). We reverse the Order of the trial court and remand for further proceedings.

The facts, as alleged in Trustee's Amended Complaint, are as follows. In 1992, Greg Podlucky ("Podlucky") founded Le–Nature's, Inc. ("Le–Nature's"), a Delaware corporation. Amended Complaint at ¶ 30. Le–Nature's held itself out as an innovator in the bottled beverage industry, in particular, its use of cutting edge technologies and distribution methods. *Id.* at ¶ 31.

In 2000 and in 2002, Le–Nature's issued over eight million shares of convertible preferred stock. *Id.* at ¶ 32. Two investment funds purchased shares: SW Pelham Fund, L.P. (affiliated with Smith Whiley & Company) (the "Pelham Fund"), and the George K. Baum Employee Equity Fund, L.P. (Affiliated with George K. Baum Merchant Banc, L.L.C.) (the "Baum Funds") (the Pelham Fund and the Baum Funds hereinafter collectively referred to as the "Minority Shareholders"). *Id.* The amended certificate governing the shares granted the Minority Shareholders the right to appoint directors ("Independent Directors") to the Board of Directors of Le–Nature's. Also on the Board were Podlucky and certain interested corporate officers (collectively, the "Inside Directors") (Inside Directors and Independent Directors collectively referred to as the "Board of Directors" or "Board"). *Id.* The Independent Directors were to approve all extraordinary capital expenditures and compel a sale of Le–Nature's by no later than September 2006. *Id.*

In August 2003, Ernst & Young ("E & Y"), Le–Nature's auditor, conducted its quarterly review of Le–Nature's financial statements. *Id.* at ¶ 33. Richard J. Lipovich ("Lipovich"), the E & Y audit partner responsible for the audit, met with Chief Financial Officer ("CFO") John Higbee ("Higbee"), Chief Administrative Officer ("CAO") Jennifer Fabry ("Fabry"), and Vice President of Administration Stacy Juchno ("Juchno") (collectively, "Senior Financial Managers"). *Id.* During the August 13, 2003 meeting, Lipovich solicited the concerns of Le–Nature's Senior Financial Managers regarding the company's financial activities, inquiring whether the Senior Financial Managers suspected fraudulent activity. *Id.* Such inquiries were part of standard E & Y audit procedures. *Id.* At this meeting, each member of Le–Nature' Senior Financial Managers expressed concerns about the accuracy of Le–Nature's sales figures. *Id.*

The next day, Higbee, a veteran auditor with more than 20 years of experience, resigned. *Id.* at ¶ 34. Fabry and Juchno also submitted written resignation letters to Le–Nature's Chief Executive Officer ("CEO"), Podlucky. *Id.* In their resignation letters, the Senior Financial Managers stated that they suspected Podlucky of engaging in improper conduct with Le–Nature's tea suppliers, equipment vendors and certain customers. *Id.* The Senior Financial Managers expressed serious concerns about recent "unusual" transactions "surrounding bulk tea sold in tankers and about possible unlawful collusion between Podlucky and the suppliers, vendors and customers." *Id.* In particular, the Senior Financial Managers reported a large increase in tea inventory and raw material, and the extraordinary level of "equipment deposits." *Id.*

***2** In his resignation letter, CFO Higbee explained that he repeatedly had asked Podlucky for access to documentation supporting Le–Nature's general ledger details. *Id.* at ¶ 35. Podlucky's refusal, according to Higbee, constituted "an astonishing and extremely improper restriction for any chief executive officer to impose upon a company's chief financial officer." *Id.* Higbee explained that by conducting business transactions "without any normal review by others, such as the CFO," Podlucky had rendered it impossible for Higbee to discharge his duties and responsibilities to Le–Nature's. *Id.* In conclusion, Higbee stated to Podlucky,

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> I consider 1) the absolute control you maintain over the Company's detail[ed] financial records[,] 2) the lack of checks and balances related to deposits on equipment[,] 3) the lack of checks and balances related to deposits on tea leaf [, and] 4) the lack of checks and balances related to the sale of bulk tea concentrate and bulk tea leaf to be material weaknesses in the Company's internal controls.
>
> *Id.*

Upon being informed of the concerns of Senior Financial Managers and their resignations, E & Y wrote a letter requesting that Le–Nature's hire "competent independent legal counsel to conduct a thorough and complete investigation of the allegation made by the [Senior Financial Managers]." *Id.* at ¶ 37 (emphasis omitted) (quoting E & Y Letter, 8/22/03). E & Y further advised Le–Nature's that, because of the resignations of the Senior Financial Managers, E & Y

> [would] be unable to be associated with any unaudited interim financial statements or historical audited financial statements, including issuing any consents or comfort letters, until the allegations are investigated thoroughly by independent counsel, we complete our review of the report of the investigation, we perform any additional procedures we consider necessary in the circumstances, and we interview the former employees[.]

Amended Complaint at ¶ 37 (emphasis omitted) (quoting E & Y Letter, 8/22/03).

On August 26, 2003, the Le–Nature's Board of Directors passed a unanimous consent resolution ("Resolution") declaring that it was "*in the best interest of the Company* to appoint a special committee of independent directors to conduct an investigation into the reasons underlying the resignations of the Senior Financial Managers." *Id.* at ¶ 38 (emphasis added). Accordingly, the Board of Directors unanimously consented to the creation of a special committee (the "Special Committee") to investigate the circumstances underlying the resignation of the Senior Financial Managers. *Id.* Of particular note, the Board's Resolution authorized the Special Committee to "provide findings and recommendations to the Board of Directors as a result of such investigation." Amended Complaint, Exhibit E (Resolution), at 1. The Board of Directors authorized the Special Committee to retain legal counsel and accountants "to assist in the investigation." Amended Complaint at ¶ 38 (emphasis added).

***3** The Board appointed three independent, non-employee directors to serve on the Special Committee. *Id.* at ¶ 39. Lacking the expertise necessary to conduct internal corporate investigations, the Special Committee determined that "it was critical to retain *on behalf of the company,* legal counsel with experience in conducting such investigations." *Id.* at ¶ 40 (emphasis added). Ferguson, a partner at K & L Gates, represented to the members of the Special Committee "that he personally possessed precisely the type of investigative experience required by the Special Committee." *Id.* Relying on Ferguson's representations, the Special Committee retained K & L Gates to conduct the Le–Nature's investigation "*on behalf of the Company.*" *Id.* (emphasis added). At its first meeting on August 28, 2003, the Special Committee authorized K & L Gates to investigate the circumstances underlying the resignation of the Senior Financial Managers. *Id.* at ¶ 41.

By a letter dated August 28, 2003 ("Retention Letter") to the Special Committee, K & L Gates confirmed its understanding of the scope of and nature of its engagement. The Retention Letter provided, in relevant part, as follows:

> You have asked us to represent the Special Committee ("Special Committee") of the Outside directors of Le–Nature's Beverages, Inc. ("Company") in connection with a review of the circumstances attendant upon the recent resignation of three members of the finance staff of the company.
>
> It is our Firm's practice to confirm in writing the identity of the client whom we represent, the nature of our undertaking on behalf of that client and our billing and payment arrangements with respect to our legal services.
>
> **We understand that we are being engaged to act as counsel for the special committee and for no other individual or entity, including the Company or any affiliated entity, shareholder, director, officer or employee of the Company not specifically identified herein. We further understand that we are to assist the Committee**

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in investigating the facts and circumstances surrounding the aforementioned resignations and assist the Special Committee in developing any findings and recommendations to be made to the full Board of the Company with respect thereto. The attorney-client relationship with respect to our work, including our work product, shall belong to the Committee. Only the Committee can waive any privilege relating to such work.

Our firm currently represents Star Associates in connection with a contract dispute with the Company. This matter is substantively unrelated to the scope of the work of the Special Committee. We believe that our ongoing representation of Star Associates will not adversely affect our exercise of independent professional judgment on behalf of the Special Committee. Nonetheless, we will establish a "Chinese Wall" between those of our personnel working on the Star Associates matter and those working on the Special Committee matter. In view of the ongoing duties of loyalty we would owe to both Star Associates and the Special Committee, we wish to confirm at the outset of our engagement by the Special Committee that you concur with our conclusions set forth above and that you waive any potential or actual conflict of interest relating thereto.

***4** ...

It is our Firm's practice to render statements for professional services and related charges on a monthly basis. We will expect payment to be made within thirty days of your receipt of our statement, without regard to the outcome of any matter. In the event that our statements are not timely paid, we reserve the right to suspend our services until satisfactory payment arrangements are made or, if necessary, to terminate such services. Our clients, of course, may terminate our services at any time.

Id., Ex. A at 1–2 (emphasis added).

Subsequently, K & L Gates retained P & W to assist in the investigation. P & W confirmed its understanding of the engagement in a letter to K & L Gates, dated September 12, 2003 (the "P & W Retention Letter"). The P & W Retention Letter provided, in relevant part, as follows:

UNDERSTANDING OF P & W'S ROLE

It is understood that P & W is being retained to assist K & L [Gates] as a financial expert related to the special investigation of certain transactions involving Le[-]Nature's, Inc. [ ] **P & W shall provide general consulting, financial accounting, and investigative or other advice as requested by K & L [Gates] to assist it in rendering legal advice to Le[-]Nature's.** Acting as a consultant to counsel, we understand that all work and communications relating to this engagement are expected to be confidential and privileged and will be so treated unless otherwise directed by you, or required by law or court order.

STAFFING AND FEES

...

P & W will render monthly invoices to K & L [Gates]. K & L [Gates] will then include our charges as part of its regular monthly invoices to Le[-]Nature's. We understand that under the terms of K & L [Gates's] engagement by Le [-]Nature's, K & L [Gates's] invoices are payable within thirty days of submission. We reserve the right to cease all work if any K & L [Gates] invoice to Le[-]Nature's becomes past due, without regard to the status of our services or any related procedures. K & L [Gates] will promptly pay our invoices as the funds therefore are received from Le[-]Nature's. It is understood that K & L [Gates] will not be otherwise responsible for payment of fees and expenses to P & W, as such responsibility ultimately rests with Le[-]Nature's, Inc.

Id., Ex. B at 1–2 (emphasis added).

The Special Committee provided K & L Gates with, *inter alia*, the August 22, 2003 letter from E & Y, which requested that Le–Nature's conduct a competent, independent and thorough investigation of allegations made by the Senior Financial Managers. *Id.* at ¶¶ 36, 41. Ferguson led the investigation for K & L Gates. *Id.* at ¶ 42. Details of the investigation will be discussed in greater detail, *infra*.

On November 25, 2003, the Defendants provided

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a draft of their Report to Podlucky. *Id.* at ¶ 75. Podlucky was not a member of the Special Committee. *Id.* Notwithstanding the fact that the Special Committee had not received the Report, Podlucky immediately called a meeting of the Board of Directors for the purpose of discussing the draft Report. *Id.* Podlucky also provided comments on the draft Report to K & L Gates. *Id.* On December 5, 2003, K & L Gates provided the draft Report to the Special Committee. *Id.*

***5** P & W approved the Report, which Ferguson then signed, representing that the Defendants "found no evidence of fraud or malfeasance with respect to any of the transactions" subject to the investigation. *Id.* at ¶¶ 76, 77 (emphasis omitted) (quoting Report at 1). The Special Committee attached a cover memorandum ("Memorandum") to the Report. Amended Complaint at ¶ 77. The Memorandum, which was reviewed by K & L Gates, stated the following:

> The Special Committee of the Board of Directors of [Le–Nature's] hereby submits the report attached herein prepared by the Committee's Counsel, [K & L Gates,] and its financial consultants[, P & W].
>
> The Special Committee was formed in August 2003 to investigate certain specific business transactions identified by three former [Le–Nature's Senior Financial Officer], all of whom resigned in mid-August 2003. The Special Committee consists of two outside directors who are representatives of the [Pelham Fund,] and one director representing [the Baum Fund].
>
> Upon the advice of [K & L Gates], the [Special] Committee limited the scope of its investigation to seven specific transactions identified by the [Senior Financial Managers] as areas of concern and that could potentially impact [Le–Nature's] financial statements....
>
> The Committee is pleased to report that K & L [Gates] and P & W "found no evidence of fraud or malfeasance with respect to any of the transactions reviewed by it. Further[, K & L Gates] found no evidence which suggests that the transactions identified by the [Senior Financial Managers] as being of concern had not been properly reported on Le[-]Nature's financial statements." ...

Memorandum at 1. The Memorandum included the recommendations proposed by K & L Gates. *Id.* at 2. The Memorandum concluded with the following pronouncement:

> The [Special] Committee concurs strongly with all the recommendations outlined above.
>
> We look forward to talking with the full Board of Directors on these recommendations and other findings of fact as soon as possible and to work with the Company in addressing the issues raised herein.
>
> *Id.*

Throughout their investigation, the Defendants failed to uncover the massive fraud being perpetrated by Podlucky. Amended Complaint at ¶ 79. Podlucky and his senior managers continued to "loot" Le–Nature's, incurring further corporate debt and wasting corporate funds on avoidable transactions. *Id.* Podlucky and his senior management used the "no evidence of fraud" finding in the Report to retain their senior positions at Le–Nature's. *Id.*

However, between January 2004 and November 2006, Podlucky and his senior managers employed fraudulent schemes involving almost $200 million in equipment deposits. *Id.* at ¶ 80. Le–Nature's continued to add to its debt by, *inter alia*, building and commencing operations at unnecessary facilities. *Id.* at ¶ ¶ 81–83. In September 2006, Le–Nature's obtained a $285 million replacement line of credit through Wachovia. *Id.* at ¶ 83. Through 2005, Le–Nature's long-term secured debt increased to $275 million. *Id.* at ¶ 84. Le–Nature's continued borrowing funds, thereby substantially leveraging its assets and balance sheet. *Id.* at ¶ 84. By the end of 2005, Le–Nature's had production facilities in Latrobe, Pennsylvania and Phoenix, Arizona. *Id.* at ¶ 85. In late 2005, the Independent Directors learned that Podlucky intended to build a third facility in Florida. *Id.*

***6** In May 2006, the Minority Shareholders of Le–Nature's, who were represented on the Board by the Independent Directors, commenced in Delaware Chancery Court an injunctive action against Le–Nature's and its four inside directors.[FN2] *Id.* The Chancery Court granted a preliminary injunction enjoining Le–Nature's from certain actions, including making capital expenditures outside the ordinary

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course of business, *i.e.*, in excess of $1,000, without the approval of the Minority Shareholders. *Id.*

Subsequently, in September 2006, Podlucky requested the assistance of Ferguson in preparing an initial public offering ("IPO") of Le–Nature's stock. *Id.* at ¶ 86. Ferguson, with the assistance of K & L Gates's London, England, office, commenced work on the IPO. *Id.* However, prior to October 19, 2006, the Independent Directors learned of a new allegation of fraud involving Le–Nature's. *Id.* at ¶ 87. A financial institution alleged that Le–Nature's had forged American International Group ("AIG") letters relating to the purchase of equipment for the company. *Id.* At the request of the Minority Shareholders, the Chancery Court granted a Temporary Restraining Order enjoining Le–Nature's from (a) making or incurring expenditures exceeding $1,000 without Board authorization; (b) accessing, tampering with or destroying any Le–Nature's' property; (c) selling, leasing or disposing of Company assets; (d) making or committing the Company to make any loans, advancements or investments; or (e) causing or committing the Company to incur any debt. *Id.*

Because the Temporary Restraining Order precluded Podlucky from proceeding with Le–Nature's IPO, Podlucky placed Ferguson in charge of negotiating with the Minority Shareholders to vacate the Chancery Court's Order. *Id.* at ¶ 88. Unable to reach an agreement, the Minority Shareholders and Independent Directors filed an application for the appointment of a receiver for Le–Nature's. *Id.*

On October 27, 2006, the Delaware Chancery Court appointed Kroll Zolfo Cooper, Inc. ("Kroll"), as custodian of Le–Nature's, placing it in charge of management and operations. *Id.* at ¶ 89. Within several days, Kroll uncovered massive fraud at Le–Nature's. *Id.* On November 1, 2006, Steven G. Panagos, a Kroll managing director, filed an affidavit with the Delaware Chancery Court setting forth the evidence of the financial fraud he had discovered at Le–Nature's. *Id.* at ¶ 90.

On November 1, 2006, several of Le–Nature's creditors initiated involuntary bankruptcy proceedings against Le–Nature's under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et seq.* Amended Complaint at ¶ 91. Kroll converted the proceedings from Chapter 7 to Chapter 11. *Id.* On July 8, 2008, the Bankruptcy Court issued an Order confirming a liquidation plan for Le–Nature's. *Id.* at ¶ 23. In accordance with the liquidation plan and the Bankruptcy Court's confirmation Order, the Bankruptcy Court created the Le–Nature's Liquidation Trust ("Trust") and appointed Trustee. *Id.* Under the liquidation plan, all assets and property of Le–Nature's, including all claims and causes of action, were conveyed to and retained by the Trust. *Id.* Trustee also uncovered the massive fraud perpetrated by Podlucky and other insiders. *Id.* at ¶ 93.

***7** On September 9, 2009, Trustee filed, in the Court of Common Pleas of Allegheny County, a Civil Complaint against Defendants. Defendants filed Preliminary Objections demurring to all counts, after which Trustee filed an Amended Complaint. Again, Defendants filed Preliminary Objections demurring to the counts averred in the Amended Complaint. Trustee filed a response to Defendant's Preliminary Objections, and an objection to one of the Preliminary Objections filed by P & W. After oral argument, on December 28, 2010, the trial court entered an Order sustaining Defendants' Preliminary Objections and dismissing all counts of Trustee's Amended Complaint. Trial Court Order, 12/28/10. Thereafter, Trustee filed the instant timely appeal, followed by a court-ordered Concise Statement of matters complained of on appeal, in accordance with Pa.R.A.P. 1925(b).

On appeal, Trustee presents the following claims for our review:

> 1. Whether the Trial Court erred in dismissing [Trustee's] professional negligence claim against K & L Gates despite (a) the existence of an express or implied attorney-client relationship between [Le–Nature's] and K & L Gates and (b) [Trustee's] allegation that K & L Gates's wrongdoing directly and proximately caused cognizable and recoverable damages to [Le–Nature's] under Pennsylvania Law[?]
>
> 2. Whether the Trial Court erred in dismissing [Trustee's] breach of contract claim against K & L Gates despite [Trustee's] allegations of facts showing a contractual relationship between K & L Gates and [Le–Nature's] (either through the Special Committee or as a third-party beneficiary) and that the Company suffered damages resulting from the

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breach of contract[?]

3. Whether the Trial Court erred in dismissing [Trustee's] breach of fiduciary duty claim against K & L Gates where [Trustee] alleges facts establishing that K & L Gates owed a fiduciary duty to [Le–Nature's], which suffered damages as a result of the breach of that duty[?]

4. Whether the Trial Court erred in dismissing [Trustee's] negligent misrepresentation claim against [D]efendants despite [Trustee's] factual allegations that [D]efendants were professional firms in the business of supplying information, who provided false information concerning the absence of any evidence of fraud, and that [Le–Nature's], to its substantial financial harm, justifiably relied on their false information[?]

5. Whether the Trial Court erred in dismissing [Trustee's] vicarious liability claim against K & L Gates for the actions of P & W[,] despite [Trustee's] allegations of fact showing that a principal-agent or master-servant relationship was formed between K & L Gates and P & W[?]

6. Whether the Trial Court erred in dismissing [Trustee's] breach of contract claim against P & W despite allegations of fact showing that [Le–Nature's] was a third-party beneficiary of the K & L Gates–P & W agreement[?]

7. Whether [D]efendants' other preliminary objections, not addressed by the trial court's Opinion, are meritless or improper[?]

***8** Brief for Appellant at 3–4.

[1][2][3][4] As an initial matter, we are cognizant that "[a] preliminary objection in the nature of a demurrer is properly granted where the contested pleading is legally insufficient." *Cardenas v. Schober*, 783 A.2d 317, 321 (Pa.Super.2001) (citing Pa.R.C.P. 1028(a)(4)).

"Preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer." [*Cardenas*, 783 A.2d] at 321–22. (citation omitted). All material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true. *Id.* at 321.

In determining whether the trial court properly sustained preliminary objections, the appellate court must examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred. The impetus of our inquiry is to determine the legal sufficiency of the complaint and whether the pleading would permit recovery if ultimately proven. This Court will reverse the trial court's decision regarding preliminary objections only where there has been an error of law or abuse of discretion. When sustaining the trial court's ruling will result in the denial of claim or a dismissal of suit, preliminary objections will be sustained only where the case is free and clear of doubt.

Cooper v. Frankford Health Care Sys., 960 A.2d 134, 143–44 (Pa.Super.2008) (quoting *Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 805–06 (Pa.Super.2007), in turn quoting *Brosovic v. Nationwide Mut. Ins. Co.*, 841 A.2d 1071, 1073 (Pa.Super.2004)). This Court will not reverse a trial court's decision to sustain preliminary objections unless there has been an error of law or abuse of discretion. *Cornerstone Land Dev. Co. of Pittsburgh LLC v. Wadwell Group*, 959 A.2d 1264, 1266 (Pa.Super.2008).

[5] Trustee first claims that the trial court erred in dismissing his legal malpractice/professional negligence claim against K & L Gates. Brief for Appellant at 20. In dismissing that cause of action, the trial court concluded that Trustee cannot establish a professional negligence claim against K & L Gates because of (a) the absence of an express or implied attorney-client relationship between K & L Gates and Le–Nature's, and (b) the absence of any losses to Le–Nature's caused by K & L Gates's failure to detect mismanagement. Trial Court Opinion, 12/28/10, at 13–14 We first review whether the averments of the Amended Complaint, taken as true, establish the existence of an attorney-client relationship between K & L Gates and Le–Nature's.

"A cause of action for legal malpractice contains

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three elements: the plaintiff's employment of the attorney or other grounds for imposition of a duty; the attorney's neglect to exercise ordinary skill and knowledge; and the occurrence of damage to the plaintiff proximately caused by the attorney's misfeasance." *Epstein v. Saul Ewing LLP*, 7 A.3d 303, 313 (Pa.Super.2010). Whether a duty exists under a particular set of facts is a question of law. *Campisi v. Acme Mkts.*, 915 A.2d 117, 119 (Pa.Super.2006). On questions of law, our standard of review is *de novo* and our scope of review is plenary. *Epstein*, 7 A.3d at 313.

***9** While the trial court recognized the existence of an express contract between K & L Gates and the Special Committee, the trial court concluded that the K & L Gates was retained "solely to protect the interests of the remaining equity holders[,]" *i.e.*, the investors, and not Le–Nature's. Trial Court Opinion, 12/28/10, at 13. In so holding, the trial court stated the following:

> Since [K & L Gates] was instructed *by the investors* to determine whether the other equity holder [*i.e.*, Podlucky,] was looting the company, the investors would have reasonably believed that the law firm was representing their interests, and only these interests, in investigating whether there was merit to the concerns of mismanagement on the part of Podlucky.
>
> In summary, the Trustee is not bringing this lawsuit on behalf of the investors whom [K & L Gates] was retained to protect. It is these investors to whom [K & L Gates] owed a duty of care and it is these investors who have a cause of action for malpractice.

Id. at 13–14 (emphasis added). We disagree. Contrary to the trial court's determination, the Amended Complaint avers the existence of an attorney-client relationship between K & L Gates and Le–Nature's.

As set forth above, the Retention Letter identified an attorney-client relationship between K & L Gates and the Special Committee. Although Le–Nature's is not identified as a client in the Retention Letter, Pennsylvania courts have recognized that

> [a]bsent an express contract, an implied attorney-client relationship will be found if 1) the purported client sought advice or assistance from the attorney; 2) the advice sought was within the attorney's professional competence; 3) the attorney expressly or impliedly agreed to render such assistance; and 4) it is reasonable for the putative client to believe the attorney was representing him."

Cost v. Cost, 450 Pa.Super. 685, 677 A.2d 1250, 1254 (1996).

In reviewing Trustee's claim of an attorney-client relationship between K & L Gates and Le–Nature's, we are cognizant that Le–Nature's is a Delaware corporation. Delaware law provides that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation. 8 Del. C. § 141(a). In discharging this function, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del.1986). The Delaware Supreme Court has held that "[t]o the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable." *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 51 (Del.1994). In this context, we review the nature of the duty undertaken by K & L Gates.

The averments of the Amended Complaint, taken as true, establish that Le–Nature's, acting through its Board and the Board's Special Committee, sought the legal advice and assistance of K & L Gates. Specifically, Le–Nature's sought K & L Gates's legal advice and assistance in investigating allegations of fraud, and in preparing findings and recommendations for action to be taken by Le–Nature's.

***10** According to the Amended Complaint, the Board of Directors determined that it was in the best interests of Le–Nature's to create a special committee of the Board, which would investigate the allegations of fraud at Le–Nature's, and the resignations of the Senior Financial Managers. Amended Complaint at ¶ 38. Under Delaware law, a board of directors of a Delaware corporation may designate a committee, consisting of one or more directors of the corporation. 8 Del. C. § 141(c)(2). "Any such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the corporation, shall

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have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation....” *Id.*

As a committee of the Board, the Special Committee had the fiduciary duty to act in the best interests of not only the shareholders, but also the corporation.[FN3] *See* *Revlon,* 506 A.2d at 179 (holding that directors owe fiduciary duties of care and loyalty to the corporation and shareholders). The Special Committee was vested with the power and authority of the Board to manage this specific aspect of the company's business affairs. *See* 8 Del. C. § 141(c)(2); *see also* Amended Complaint at ¶ 38, Exhibit E. Thus, the Special Committee acted on behalf of the Board and Le–Nature's in its investigation.

By its Resolution, the Board authorized the Special Committee to retain counsel to conduct an investigation “on behalf of the company.” Amended Complaint at ¶ 38, Exhibit E (Resolution). K & L Gates was provided with a copy of the Board's Resolution. *See* Amended Complaint, Exhibit C (Report), at 4 (referencing the attached Resolution in the Report). Under Delaware law, the Board could not authorize the Special Committee to act solely on behalf of investors. Such authorization would violate the Board's fiduciary duty to Le–Nature's. *See* *Revlon,* 506 A.2d at 179 (holding that directors owe fiduciary duties of care and loyalty to the corporation *and* its shareholders and invalidating contracts that limit the exercise of such duties). Further, under Delaware law, the Special Committee only could act in the best interests of Le–Nature's *and* its shareholders. *See* 8 Del. C. § 141(c)(2) (providing that a committee of the board may exercise all of the powers of the board in the management and business affairs of the company); *Revlon,* 506 A.2d at 179.

According to the averments in the Amended Complaint, K & L Gates agreed to provide legal advice and assistance to Le–Nature's, through its Special Committee. K & L Gates's Retention Letter confirmed that (a) K & L Gates would provide legal assistance in investigating the fraud allegations; (b) K & L Gates would assist in preparing findings and recommendations; and (c) the findings and recommendations would be presented to the Board of Le–Nature's. Amended Complaint, Exhibit A (Retention Letter). In conformity with this undertaking, K & L Gates retained P & W to provide, *inter alia,* consulting, financial and investigative advice to K & L Gates “**to assist it in rendering legal advice to Le[-]Nature's.**” Amended Complaint, Exhibit B (P & W Retention Letter) (emphasis added). K & L Gates agreed to bill Le–Nature's for its fees and those of P & W. Amended Complaint, Exhibit B (P & W Retention Letter).

***11** Thus, the Amended Complaint avers that Le–Nature's, through a Special Committee of the Board of Directors, sought the legal advice and assistance of K & L Gates, and K & L Gates agreed to provide such advice and assistance. Specifically, Le–Nature's sought K & L Gates's legal advice and assistance in investigating allegations of fraud at Le–Nature's, and in preparing findings and recommendations in this regard. The parties do not dispute that the legal advice and assistance sought by Le–Nature's was within the professional competence of K & L Gates.

The averments of the Amended Complaint, taken as true, also establish that Le–Nature's reasonably believed that K & L Gates represented the *company's* interests. In addition to the foregoing, the Amended Complaint asserts that K & L Gates provided a draft of its Report not only to the Special Committee, but also to Podlucky. Amended Complaint at ¶ 75. Podlucky was not a member of the Special Committee. *See id.* at ¶ 39 (listing the directors appointed to the Special Committee).

After Ferguson signed and the Special Committee approved the final Report, the Special Committee forwarded it to the Board of Directors. *Id.* at ¶ 76. The cover memorandum attached to the final Report, which was reviewed by K & L Gates and directed to the Board of Directors, represented that K & L Gates found no evidence of fraud or malfeasance in the transactions reviewed. *Id.* at ¶ 78, Exhibit D. The cover memorandum further set forth K & L Gates's specific findings and recommendations for Le–Nature's. *Id.* By its actions, K & L Gates's confirmed that its duty extended beyond the Special Committee. Thus, these averments, in conjunction with the foregoing, establish the reasonableness of Le–Nature's belief that K & L represented the *company's* best interests, not just those of the Special Committee.

In summary, we conclude that the Trustee has averred the existence of an attorney-client relation-

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ship sufficient to impose a duty upon K & L Gates to Le–Nature's. The Amended Complaint and its exhibits establish that (1) Le–Nature's, through its Board and Special Committee, sought K & L Gates's legal advice and assistance in investigating alleged fraudulent transactions and preparing findings/recommendations for the Le–Nature's Board; (2) the investigation of financial fraud and the preparation of findings and recommendations was within the professional competence of K & L Gates; (3) K & L Gates agreed to render such assistance to Le–Nature's, through its Board and Special Committee; and (4) it was reasonable for Le–Nature's to believe that K & L Gates was representing it in the investigation of fraud and the preparation of findings/recommendations. *See* *Cost*, 677 A.2d at 1254.

[6] Trustee also challenges the trial court's conclusion that the Amended Complaint fails to aver cognizable and compensable damages to Le–Nature's. Brief for Appellant at 29–30. The trial court rejected Trustee's claim for damages because Le–Nature's was insolvent at the time K & L Gates prepared its Report in December 2003: [FN4]

> ***12** While [Trustee] contends that the increased insolvency is an actual corporate loss, [Trustee] does not offer any explanation as to how an already insolvent company was harmed because its insolvency increased by more than $500 million between December 2003 and October 2005....

Id. at 15. The trial court specifically observed that Le–Nature's *shareholders* were not harmed by the increased insolvency, as their interests had no value as of the date K & L Gates submitted its Report. *Id.* The trial court further rejected Trustee's claim for damages to the corporation, equating it to a claim for "deepening insolvency." *Id.* The trial court then rejected "deepening insolvency" as a legal basis for an award of tort damages:

> [The trial court] find[s] to be very persuasive—and believe[s] that the Pennsylvania appellate courts will also do so—the Opinion of the Court of Chancery of Delaware, New Castle County, in *Trenwick America Litigation Trust* [*v. Ernst & Young*, 906 A.2d 168 (Del.Ch.2006), *aff'd* 931 A.2d 438 (Del.2007)], that rejected the concept of deepening insolvency.

Trial Court Opinion, 12/28/10, at 24. Contrary to the trial court's analysis, our review of the Amended Complaint discloses that Trustee does not claim damages for "deepening insolvency." Further, the damages claimed by Trustee are cognizable and compensable.

[7][8] When it is alleged that an attorney has breached his professional obligations to his client, an essential element of the cause of action is proof of actual loss. *Sabella v. Milides*, 992 A.2d 180, 187 (Pa.Super.2010). Once the fact that damages occurred has been established, the jury is permitted to determine the extent of those damages. *Curran v. Stradley, Ronon, Stevens & Young*, 361 Pa.Super. 17, 521 A.2d 451, 455 (1987). Nevertheless, "the plaintiff has the burden of presenting sufficient evidence by which damages can be determined on some rational basis and other than by pure speculation or conjecture." *Id.*

Federal courts have coined the phrase "deepening insolvency" in describing the damages incurred by an already insolvent corporation. In *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340 (3d Cir.2001), [FN5] which arose out of the bankruptcy of two lease financing corporations that purportedly operated as a "Ponzi scheme," the Third Circuit Court of Appeals described "deepening insolvency" as a type of "injury to the Debtors' corporate property from the fraudulent expansion of corporate debt and prolongation of corporate life." *Id.* at 347. The concept presumes that, in taking on additional unpayable debt, a corporation might be harmed by operational limitations, strained corporate relationships, diminution of corporate assets, and the legal and administrative costs of bankruptcy. *Id.* at 349–50. The Third Circuit Court of Appeals predicted that where "deepening insolvency" causes damage to corporate property, the Pennsylvania Supreme Court would provide a remedy by recognizing a deepening insolvency cause of action. *Id.* at 351.

***13** Five years later, the Third Circuit Court of Appeals clarified its decision in *Lafferty:*

> In [*Lafferty*], we concluded that deepening insolvency was a valid Pennsylvania cause of action. Although we did describe deepening insolvency as a "type of injury," and a "theory of injury," we never held that it was a valid theory of *damages* for an independent cause of action. Those statements in *Lafferty* were in the context of a deepening in-

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> solvency *cause of action.* They should not be interpreted to create a novel theory of damages for an independent cause of action like malpractice.

Seitz v. Detweiler, Hershey and Assoc., P.C. (In re CitX Corp.), 448 F.3d 672, 676 (3d Cir.2006) (emphasis added) (citations omitted). However, the Court of Appeals observed that "[w]here an independent cause of action gives a firm a remedy for the increase in its liabilities, the decrease in fair asset value, or its lost profits, then the firm may recover, without reference to the incidental impact upon the solvency calculation." *Id.* at 678 (citation omitted).

In *CitX,* the federal appeals court (and the trial court herein) referred to an article frequently quoted on the subject of "deepening insolvency": Sabin Willet, *The Shallows of Deepening Insolvency,* 60 Bus. Lawyer 549 (2005). As this article explains,

> injury to solvency is an incident to the harm, not the harm itself. If the [corporation] lost asset value through defendant's conversion of property, the law measures damage; if through breach of contract, commission of tort, breach of fiduciary duty, or fraudulent transfer, the law already measures damage. The damages may include the insult to asset values ... or the accumulation of a liability.... Depending on the underlying law, the damage may or may not also include lost profits.... Solvency analysis will be incidental to all of these damage analyses. It may so happen that the diminished asset value, new liability, or lost profits that measures the damage also measures precisely the deepening of the firm's insolvency. *The point is that insolvency analysis adds nothing to the measure of damages the law already allows.*

Id. at 575 (emphasis added).

Since *CitX,* the Third Circuit continues to recognize the validity of traditional tort damages, even when those damages increase a corporation's insolvency. *See Thabault v. Chait,* 541 F.3d 512, 523 (3d Cir.2008) (recognizing as cognizable traditional tort damages even when the corporation is insolvent); *see also id.* at 525 (recognizing that an increase in liabilities is a harm to the company); *Fehribach v. Ernst & Young LLP,* 493 F.3d 905, 909 (7th Cir.2007) (recognizing that the defendant auditors owed a duty to the company, and that the duty does not "evaporate just because the client is bankrupt and any benefits from suing will accrue to its creditors.").

We find the rationale expressed by the federal appeals court in *CitX* and *Thabault* helpful to our determining the type of damages sought by Trustee. Our review of the Amended Complaint discloses that Trustee has not claimed "deepening insolvency," either as a separate cause of action or as a separate theory of damages. Trustee does not allege that Le–Nature's insolvency at the time of the alleged tortious conduct created additional damages or negated the harm caused by the allegedly tortious conduct. Rather, Trustee seeks tort damages for Le–Nature's increased liabilities, decreased asset values and losses proximately caused by the professional negligence of K & L Gates. Amended Complaint at ¶¶ 22, 79–84, 94, 107.

***14** Upon review, we conclude that Trustee seeks traditional tort damages. The fact of Le–Nature's insolvency does not negate the harm allegedly resulting from K & L Gates's professional negligence. *See* 37 Pennsylvania Law Encyclopedia, Torts § 4, at 120 (1961) (recognizing the basic legal principle in this Commonwealth that "for every legal wrong there must be a correlative legal right."). Accordingly, we conclude that Trustee has averred legally compensable and cognizable damages for the alleged professional negligence. [FN6]

[9] Trustee also argues that the averments of the Amended Complaint establish that K & L Gates's professional negligence proximately caused the harm alleged. Brief for Appellant at 38. Proximate cause must "be determined by the judge and it must be established before the question of actual cause is put to the jury." *Brown v. Philadelphia College of Osteopathic Med.,* 760 A.2d 863, 868 (Pa.Super.2000). "Proximate causation" in a legal malpractice action has been defined as "that which, in a natural and continuous sequence, unbroken by any sufficient intervening cause, produced injury, and without which the result would not have occurred." *Fiorentino v. Rapoport,* 693 A.2d 208, 217 (Pa.Super.1997) (citation omitted).

[10][11] To determine proximate cause, "the question is whether the defendant's conduct was a 'substantial factor' in producing the injury." *Brown,* 760 A.2d at 869. A defendant will not be found to

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have had a duty to prevent a harm that was not a reasonably foreseeable result of the prior negligent conduct. *Fiorentino*, 693 A.2d at 217 (citation omitted). Unless the evidence is such that reasonable people cannot disagree, the question of whether a defendant's conduct is the cause of the plaintiff's injury or loss is for the jury. *Curran*, 521 A.2d at 454.

The trial court concluded that Trustee had failed to establish proximate causation, because *the creditors* did not rely on K & L Gates's Report in making their decisions, as they were unaware of the Report. Trial Court Opinion, 12/28/10, at 31–32. The trial court concluded that "[c]onsequently, the losses of the new creditors were not caused by K & L [Gates's] malpractice." *Id.* at 32. However, as set forth above, Trustee brings this cause of action on behalf of Le–Nature's, not its creditors. Thus, we consider whether the Amended Complaint establishes that the professional negligence of K & L Gates proximately caused harm to Le–Nature's.

To determine whether any breach of duty proximately caused a plaintiff's damages, this Court looks to whether a reasonable person would infer that the injury was the natural and probable result of defendant's breach of duty. *Commerce Bank v. First Union Nat. Bank*, 911 A.2d 133, 142 (Pa.Super.2006). Regarding proximate causation, the Amended Complaint avers that if K & L Gates properly had performed its duty to Le–Nature's, *i.e.*, by conducting a proper investigation and issuing an appropriate report,

> ***15** Le–Nature's would have avoided Podlucky's massive looting of the Company and the several financings and leasing obligations misused by Podlucky and the other Insiders. Had they discharged their duties and obligations properly, Defendants would have informed the Independent Directors of the widespread fraud at the Company and the Independent Directors would have sought immediate judicial intervention and obtained in late 2003 or early 2004, the restraining and other orders secured in 2006. Such actions clearly would have prevented the unnecessary financings and closed down the Company, which would have liquidated a failed enterprise and preserved significant asset value.
>
> Amended Complaint at ¶ 94.

According to the Amended Complaint, Podlucky's fraud and looting were occurring during the investigation, and continued unimpeded as a result of K & L Gates's deficient investigation. *Id.* at ¶ 79. The Amended Complaint asserts that, as a direct result of K & L Gates's deficient investigation and misleading report, the Independent Directors were misled into a belief that the allegations of improper conduct were unfounded. *Id.* at ¶ 96. In addition, the Amended Complaint alleges that K & L Gates concealed the wrongdoing, causing the Independent Directors to relax their vigilance. *Id.* at ¶ 97. The Amended Complaint avers that

> [a]s a direct, proximate and foreseeable result of [K & L Gates's] wrongdoing, [Le–Nature's] has suffered substantial damages totaling more than $500 million that the Insiders looted from the Company or wasted on avoidable transactions after the issuance of the Report.

Id. at ¶ 107. According to the Amended Complaint, these damages were reasonably foreseeable and K & L Gates's malpractice enabled Podlucky and the interested directors to continue their fraudulent activity. *Id.* at ¶ 109.

K & L Gates was retained to investigate the exact type of injury being inflicted upon Le–Nature's. By negligently conducting its investigation, K & L Gates affirmatively caused harm to Le–Nature's, by concealing the looting of the Company and wrongdoing by Podlucky, and affirmatively representing that no evidence of fraud or misconduct existed. The foregoing allegations are sufficient to establish that K & L Gates's malpractice was a substantial factor in causing harm to Le–Nature's in the form of increased liabilities, decrease in the value of assets, additional looting of the company and corporate waste, all of which were permitted to continue because of the malpractice. Because the Amended Complaint alleges that the looting of the company and waste were ongoing, we cannot conclude as a matter of law that the alleged damages were too remote.

For these reasons, we conclude that the trial court erred in sustaining the Preliminary Objections of K & L Gates as to Count I—Professional Negligence. Trustee's Amended Complaint avers a *prima facie* cause of action for professional negligence against K & L Gates.[FN7]

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***16** [12] Trustee next claims that the trial court erred in dismissing Trustee's breach of contract claim against K & L Gates. Brief for Appellant at 44. In rejecting Trustee's breach of contract claim, the trial court concluded that K & L Gates's contract was with the Special Committee, and that "[t]here are no other interests that K & L [Gates] would have been reasonably expected to protect." Trial Court Opinion, 10/28/10, at 32. As a basis for its conclusion, the trial court incorrectly opined that the Special Committee represented the interests of the holders of Le–Nature's preferred stock, and that it would have been obvious to K & L Gates that its responsibilities were to protect the interests of the preferred shareholders. *Id.* The trial court also concluded that Le–Nature's was not a third-party beneficiary of K & L Gates's agreement with the Special Committee, and that the Amended Complaint fails to describe any harm to Le–Nature's caused by K & L Gates's breach of its duty of reasonable care. *Id.* at 33.

[13][14] A breach of contract action involves (1) the existence of a contract, (2) a breach of a duty imposed by the contract, and (3) damages. *Zokaites Contr., Inc. v. Trant Corp.*, 968 A.2d 1282, 1287 (Pa.Super.2009). A claim based on breach of an attorney-client agreement is a contract claim, and the attorney's liability must be assessed under the terms of the contract. *Fiorentino*, 693 A.2d at 213. "[A]n attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large." *Wachovia Bank, N.A. v. Ferretti*, 935 A.2d 565, 571 (Pa.Super.2007) (citation omitted).

As discussed above, the Amended Complaint avers the existence of an agreement between K & L Gates and Le–Nature's. Specifically, K & L Gates agreed to provide its professional services to Le–Nature's, in the form of an investigation of fraud and certain improper financial transactions. K & L Gates's Retention Letter confirmed that (a) K & L Gates would provide legal assistance in investigating the fraud allegations; (b) K & L Gates would assist in preparing findings and recommendations; and (c) the findings and recommendations would be presented to the Board of Le–Nature's. Amended Complaint, Exhibit A (Retention Letter). K & L Gates billed Le–Nature's for its services and Le–Nature's paid for those services. Amended Complaint at ¶ 42. Confirming the nature of K & L Gates's agreement with Le–Nature's, K & L Gates retained P & W to provide, *inter alia,* consulting, financial and investigative advice to K & L Gates "**to assist it in rendering legal advice to Le [-]Nature's.**" Amended Complaint, Exhibit B (P & W Retention Letter) (emphasis added).

The Amended Complaint also avers that K & L Gates breached the duty imposed under the agreement when it failed to provide Le–Nature's with professional services consistent with those expected of the profession at large. In support, the Amended Complaint avers, *inter alia,* that

***17** (a) Ferguson misrepresented his investigation expertise, and he directed a librarian at his law firm to identify and obtain copies of articles discussing how a corporate investigation should be conducted, *see* Amended Complaint at ¶ 44;

(b) Despite the serious allegations and resignations of the Senior Financial Managers, and the widespread nature of the allegations, K & L Gates improperly limited the scope of its investigation to a number of discrete transactions; *see id.* at ¶ 49;

(c) Despite allegations that virtually all of the suspected improper activity implicated Podlucky, K & L Gates allowed Podlucky to play an integral role in the investigation, including allowing Podlucky to control the documents that would be produced in the investigation and the process for interviewing witnesses, *see id.* at ¶ 50;

(d) Despite allegations that virtually all of the suspected improper activity implicated Podlucky, K & L Gates channeled all document requests through Podlucky, and knew that he failed to produce all of the requested documents, *see id.* at 51;

(e) Despite allegations that virtually all of the suspected improper activity implicated Podlucky, K & L Gates deferred to Podlucky for his explanations and assistance in investigating the improper activities, and repeatedly relied upon those uncorroborated explanations, *see id.;*

(f) Despite allegations that virtually all of the sus-

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> pected improper activity implicated Podlucky, K & L Gates agreed to provide Podlucky or his attorney with a description of the topics that K & L Gates intended to address during employee interviews, "thus enabling Podlucky to coach those witnesses before their interviews[,]" *see id.* at ¶ 52; and
>
> (g) K & L Gates conducted only limited non-employee interviews, improperly accepting Podlucky's pretextual reasoning, and acceded to Podlucky's unreasonable demand prohibiting follow-up interviews regarding material matters in the investigation, *see id.*

The Amended Complaint also identifies specific suspicious and fraudulent activities and transactions that should have been discovered by K & L Gates, had it conducted the promised investigation. *Id.* at ¶¶ 53–73.

The Amended Complaint further avers that K & L Gates breached its duties and obligations under the contract by, *inter alia,* failing to fulfill the engagement they agreed to undertake pursuant to the contract; improperly limiting the scope of the investigation and accepting limitations on the investigation; improperly permitting the suspected wrongdoers to dictate and limit the manner in which the investigation was conducted; improperly failing to interview material third-party witnesses and obtain independent third-party documentation regarding the challenged transactions; improperly relying on corporate insiders' self-serving and uncorroborated presentations; improperly suspending the investigation before it was completed; issuing a false and misleading Report despite being provided with substantial evidence of improper conduct and indications of fraud, and despite being provided with forged and backdated documents. *Id.* at ¶ 116.

***18** Additionally, the Amended Complaint alleges that K & L Gates's breach caused Le–Nature's to suffer actual damages totaling more than $500 million, which the insiders looted from the Company or wasted on avoidable transactions. *Id.* at ¶ 118. According to the Amended Complaint, the damages were reasonably foreseeable and could not have been discovered by Le–Nature's with the exercise of due diligence until the Kroll investigation. *Id.* at ¶ 120.

Based upon the foregoing, we conclude that the trial court erred in sustaining K & L Gates's preliminary objection as to Count II–Breach of Contract. The Amended Complaint avers a legally sufficient breach of contract action against K & L Gates.

[15] Trustee next claims that the trial court improperly dismissed his claim that K & L Gates breached its fiduciary duty to Le–Nature's. Brief for Appellant at 48. According to Trustee, the Amended Complaint alleges the existence of a fiduciary relationship between K & L Gates and the Company, "and that K & L Gates's negligent failure to act in good faith and solely for the benefit of the Company was a real factor in [Le–Nature's] harm." *Id.* (citing Amended Complaint at ¶¶ 123–32). Trustee contends that the trial court erred in concluding that K & L Gates's fiduciary duty, if any, was owed only to the Special Committee and Minority Shareholders, not Le–Nature's. Brief for Appellant at 48. Thus, Trustee claims that the Amended Complaint establishes a fiduciary duty owed by K & L Gates to Le–Nature's. *Id.* We agree.

[16] "It is axiomatic that an attorney who undertakes representation of a client owes that client both a duty of competent representation and the highest duty of honesty, fidelity, and confidentiality." *Capital Care Corp. v. Hunt*, 847 A.2d 75, 84 (Pa.Super.2004). Such duty demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest, and breach of such duty is actionable. *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 602 A.2d 1277, 1283 (1992). In *Maritrans*, our Supreme Court drew support from the United States Supreme Court, which set forth the following observations in an early decision:

> There are few of the business relations of life involving a higher trust and confidence than those of attorney and client or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

Id. (quoting *Stockton v. Ford*, 52 U.S. (11 How.) 232, 247, 13 L.Ed. 676 (1850)).

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The Amended Complaint asserts the existence of a fiduciary duty owed by K & L Gates to Le–Nature's, based upon their attorney-client relationship. Amended Complaint at ¶ 124. As discussed *supra*, the allegations of the Amended Complaint and its exhibits establish the existence of an attorney-client relationship between Le–Nature's and K & L Gates. The Amended Complaint avers that (1) Le–Nature's (through its Board and Special Committee) sought K & L Gates's legal advice and assistance in investigating alleged fraudulent transactions and preparing findings/recommendations for the Le–Nature's Board and, ultimately, Le–Nature's; (2) the investigation of financial fraud and the preparation of findings and recommendations was within the professional competence of K & L Gates; (3) K & L Gates agreed to render such assistance to Le–Nature's, through its Board and Special Committee; and (4) it was reasonable for Le–Nature's to believe that K & L Gates was representing it in the investigation of fraud and the preparation of findings/recommendations. *See* *Cost*, 677 A.2d at 1254. Based upon the existence of an attorney-client relationship, we conclude that the trial court erred when it determined that no fiduciary relationship existed between Le–Nature's and K & L Gates.

***19** Further, the Amended Complaint avers that K & L Gates breached its fiduciary duty by failing to act in good faith in accordance with the standard of care ordinarily provided by professionals when providing legal representation. Amended Complaint at ¶ 124; *see* *Maritrans GP, Inc.*, 602 A.2d at 1283 (describing the fiduciary duty owed by attorneys to their clients and stating that "attorneys are bound ... to perform their fiduciary duties properly. Failure to so perform gives rise to a cause of action ... [and] ... such duty demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest, and breach of such duty is actionable."). The Amended Complaint asserts, *inter alia*, that K & L Gates breached its duty of care by not conducting a reasonable and competent investigation; by violating its duty of undivided loyalty by becoming beholden to the principal suspected wrongdoer, Podlucky; by allowing Podlucky and other insiders to become clients of the law firm; by allowing Podlucky to dictate the manner of conducting the investigation, including allowing Podlucky to control interviews and document requests; by providing a false and misleading report. Amended Complaint at ¶¶ 125–27.

Finally, the Amended Complaint avers that K & L Gates's breach of its fiduciary duty was a substantial factor in causing Le–Nature's to sustain more than $500 million in damages, such damages were proximately caused by K & L Gates's breach of its fiduciary duty, and the damages were foreseeable. *Id.* at ¶¶ 128, 129. Based upon the foregoing, we conclude that Count III of the Amended Complaint, alleging a breach of fiduciary duty, is legally sufficient. Accordingly, we conclude that the trial court erred in dismissing this count of the Amended Complaint.

[17] Trustee next claims that the trial court improperly dismissed his claim of negligent misrepresentation against Defendants. Brief for Appellant at 50. According to Trustee, the trial court premised its ruling on its findings that "the only persons who relied on the Report and its misrepresentations were the Minority Shareholders[.]" *Id.* (citing Trial Court Opinion, 12/28/10, at 35). Trustee challenges this conclusion, and further challenges the trial court's conclusion that a claim of negligent misrepresentation cannot be made in the absence of an attorney-client relationship. Brief for Appellant at 50.

As set forth above, we conclude that the Amended Complaint has averred the existence of an attorney-client relationship between Le–Nature's and K & L Gates. Further, the Amended Complaint avers a sufficient basis upon which to hold K & L Gates and P & W liable for negligent misrepresentation.

In *Bilt–Rite Contrs., Inc. v. Architectural Studio*, 581 Pa. 454, 866 A.2d 270 (2005), the Pennsylvania Supreme Court adopted Restatement (Second) of Torts Section 552 as the law in Pennsylvania "where information is negligently supplied by one in the business of supplying information[.]" *Bilt–Rite Contrs.*, 866 A.2d at 287. Section 552, entitled "Information Negligently Supplied for the Guidance of Others," provides, in relevant part, as follows:

> ***20** (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise

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> reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Restatement (Second) of Torts § 552. In adopting Section 552, our Supreme Court explained that

> Section 552 sets forth the parameters of a duty owed when one supplies information to others, for one's own pecuniary gain, where one intends or knows that the information will be used by others in the course of their own business activities. The tort is narrowly tailored, as it applies only to those businesses which provide services and/or information that they know will be relied upon by third parties in their business endeavors, and it includes a foreseeability requirement, thereby reasonably restricting the class of potential plaintiffs. The Section imposes a simple reasonable man standard upon the supplier of the information. As is demonstrated by the existing case law from Pennsylvania and other jurisdictions, and given the tenor of modern business practices with fewer generalists and more experts operating in the business world, business persons have found themselves in a position of increasing reliance upon the guidance of those possessing special expertise. Oftentimes, the party ultimately relying upon the specialized expertise has no direct contractual relationship with the expert supplier of information, and therefore, no contractual recourse if the supplier negligently misrepresents the information to another in privity. And yet, the supplier of the information is well aware that this third party exists (even if the supplier is unaware of his specific identity) and well knows that the information it has provided was to be relied upon by that party. Section 552 is not radical or revolutionary; reflecting modern business realities, it merely recognizes that it is reasonable to hold such professionals to a traditional duty of care for foreseeable harm.

Bilt–Rite, 866 A.2d at 285–86. Here, Trustee has asserted that Defendants negligently provided information that it know will be relied upon Le–Nature's in its business endeavors, and that said reliance was foreseeable.

According to the Amended Complaint, P & W acknowledged its understanding that "P & W is being retained to assist K & L as a financial expert related to the special investigation of certain transactions involving Le[-] Nature's, Inc. [ ] **P & W shall provide general consulting, financial accounting, and investigative or other advice as requested by K & L to assist in it rendering legal advice to Le[-]Nature's.**" Amended Complaint, Ex. B, at 1 (emphasis added). P & W further confirmed that its fees would be paid by Le–Nature's. Amended Complaint, Ex. B, at 1–2. Thus, P & W expressly confirmed its understanding that the information it provided would ultimately be used to give legal advice to Le–Nature's and Le–Nature's would pay for this information.

***21** The Amended Complaint alleges that K & L Gates and P & W drafted and edited the Report, which contained numerous misrepresentations. Amended Complaint at ¶¶ 135, 136. The Amended Complaint specifically identifies the alleged material misrepresentations made by Defendants in the Report. *Id.* at ¶¶ 136, 137. According to the Amended Complaint, Defendants knew/reasonably should have known that the alleged misrepresentations were false and misleading, and that Le–Nature's, through its Board and Special Committee, would rely on those misrepresentations. *Id.* at ¶¶ 138–40. The averments of the Amended Complaint claim that Le–Nature's justifiably relied upon the misrepresentations and that the negligent misrepresentations foreseeably and proximately caused more than $500 million in damages. *Id.* at ¶¶ 141–43.

Thus, the Amended Complaint avers a legally sufficient cause of action for negligent misrepresentation. On this basis, we reverse the trial court's dismissal of Count IV of the Amended Complaint, which claimed negligent misrepresentation against Defendants.

[18] Trustee next claims that the trial court erred in dismissing his vicarious liability claim against K &

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L Gates. Brief for Appellant at 53. Specifically, Trustee challenges the trial court's statement that "[i]t does not matter whether or not K & L [Gates] is responsible for the conduct of [P & W] because of [the trial court's] rulings that K & L [Gates] owed obligations only to the members of the Special Committee and the persons whose interests they represented." *Id.* (quoting Trial Court Opinion, 12/28/10, at 36).

Trustee claims that K & L Gates is vicariously liable for P & W's negligence based on a principal-agent or master-servant relationship. Brief for Appellant at 53. According to Trustee, the Amended Complaint alleges facts demonstrating the excessive control exercised over P & W by K & L Gates. *Id.* at 54. Of note, Trustee directs our attention to allegations that K & L Gates instructed P & W as to the tasks and its responsibilities; that K & L Gates could terminate the hourly employees of P & W; that P & W was required to seek advance approval from K & L Gates regarding its investigative methods; and that P & W funneled its requests for additional company documents through K & L Gates. *Id.; see also* Amended Complaint at ¶¶ 43, 167.

K & L Gates counters by directing our attention to the trial court's conclusion that it owed no duties to Le–Nature's and that Le–Nature's suffered no cognizable injury. Brief for Appellees (K & L Gates and Ferguson) at 53–54. K & L Gates further argues that it is not liable for P & W's actions as a matter of law. *Id.* at 54. In support, K & L Gates contends that "no legal basis exists for imposing vicarious liability on a lawyer if an independent expert he retains should fail to satisfy the standard of care applicable to *the expert's* profession." *Id.* (emphasis in original).

***22** In its Opinion, the trial court rejected Trustee's claim of vicarious liability against K & L Gates, and stated the following:

> It does not matter whether or not K & L is responsible for the conduct of [P & W] because of my rulings that K & L owed obligations only to the members of the Special Committee and the persons whose interests they represented.
>
> Also, for the reasons given in my discussion of Count I, the Amended Complaint does not describe any harm that the corporation suffered as a result of the breach by K & L [Gates] and its agents of a duty to exercise reasonable care.
>
> Trial Court Opinion, 12/28/10, at 36.

As set forth above, we conclude that the Amended Complaint avers a legally sufficient basis for concluding that K & L Gates owed a duty to Le–Nature's, and that K & L Gates's breach of that duty proximately caused harm to Le–Nature's. We further conclude that Le–Nature's has asserted a viable cause of action holding K & L Gates vicariously liable for the negligence of P & W.

Initially, we observe that

> not every relationship of principal and agent creates vicarious responsibility in the principal for acts of the agent. A principal and agent can be in the relationship of a master and servant, or simply in the status of two independent contractors. If a particular agent is not a servant, the principal is not considered a master who may be held vicariously liable for the negligent acts of the agent.... A servant, in law, is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control. It is not ... the fact of actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. It is the exclusive function of the jury to determine, from the evidence, the precise nature of the relationship, except where the facts are not in dispute, in which latter event the question becomes one for determination by the court.

Myszkowski v. Penn Stroud Hotel, 430 Pa.Super. 315, 634 A.2d 622, 625 (1993) (citations and quotation marks omitted). *Accord Valles v. Albert Einstein Med. Ctr.*, 758 A.2d 1238, 1244 (Pa.Super.2000).

Here, the allegations of the Amended Complaint, taken as true, establish the existence of a master-servant relationship between K & L Gates and P & W. The Amended Complaint avers that P & W was selected to assist K & L Gates as a financial expert in investigating certain transactions involving Le–Nature's; that K & L Gates dictated the parameters of P & W's work on a daily basis; that K & L Gates set the interview schedules, provided assignments and

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deadlines to P & W for the work; that K & L Gates approved the investigative methods employed by P & W; and that K & L Gates selectively communicated P & W's findings to Le–Nature's; and that K & L Gates would include P & W's charges as part of K & L Gates's monthly invoices to Le–Nature's. Amended Complaint a ¶ 143.

***23** The Amended Complaint further avers that K & L Gates controlled the tasks and responsibilities of P & W and its employees during the investigation; that K & L Gates could terminate P & W's hourly employees assigned to the investigation; that P & W funneled its requests for documents through K & L Gates; that K & L Gates dictated to P & W the schedule for the investigation including meetings, interview and deadlines for comments on draft reports; that K & L Gates dictated the scope of the transactions investigating, requiring status reports of P & W's findings; and that K & L Gates controlled P & W's use of outside resources. *Id.* at ¶ 167.

We conclude that the averments of the Amended Complaint establish that K & L Gates retained an extensive right to interfere with and control P & W's performance. *See* *Myszkowski*, 634 A.2d at 625. On this basis, we conclude that the Amended Complaint alleges a master-servant relationship sufficient to establish K & L Gates's vicarious liability for damages proximately caused by P & W's negligent performance.

[19] Trustee next claims that the trial court improperly dismissed his third-party beneficiary claim against P & W. Brief for Appellant at 55. According to Trustee, the trial court concluded that P & W's Retention Letter failed to establish that either P & W or K & L Gates intended to give the benefit of P & W's performance to anyone other than the Special Committee and Minority Shareholders. *Id.* (citing Trial Court Opinion, 12/28/10, at 37). Based upon our review of the Amended Complaint and the P & W Retention Letter, we conclude that the trial court erred.

[20] "In order for a third party beneficiary to have standing to recover on a contract, both contracting parties must have expressed an intention that the third party be a beneficiary, and that intention must have affirmatively appeared in the contract itself." *Scarpitti v. Weborg*, 530 Pa. 366, 609 A.2d 147, 149 (1992). Furthermore,

> to be a third party beneficiary entitled to recover on a contract it is not enough that it be intended by *one* of the parties to the contract and the *third person* that the latter should be a beneficiary, but *both parties to the contract* must so intend and must indicate that intention in the contract; in other words, a promisor cannot be held liable to an alleged beneficiary of a contract unless the latter was within his contemplation at the time the contract was entered into and such liability was intentionally assumed by him in his undertaking.

Spires v. Hanover Fire Ins. Co., 364 Pa. 52, 70 A.2d 828, 830–31 (1950) (emphasis in original). While *Spires* was overruled by *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744 (1983), it was only overruled "to the extent that it states the exclusive test for third party beneficiaries." *Id.* at 751; *accord* *Burks v. Fed. Ins. Co.*, 883 A.2d 1086, 1088 (Pa.Super.2005).

[21] In *Guy*, our Supreme Court established a "narrow class of third party beneficiaries." *Scarpitti*, 609 A.2d at 151. This narrow exception established a "restricted cause of action" for third party beneficiaries by adopting Section 302 of the Restatement (Second) of Contracts (1979). *Scarpitti*, 609 A.2d at 151. Section 302 involves a two-part test to determine whether one is a third party beneficiary to a contract, which requires that (1) the recognition of the beneficiary's right must be appropriate to effectuate the intention of the parties, and (2) the performance must satisfy an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. *Guy*, 459 A.2d at 751 (quotation marks omitted); *accord* *Burks v. Fed. Ins. Co.*, 883 A.2d 1086, 1088 (Pa.Super.2005). Thus, even when the contract does not expressly state that the third party is intended to be a beneficiary, the party may still be a third party beneficiary under the foregoing test. *Burks*, 883 A.2d at 1088. "But *Guy* did not alter the requirement that in order for one to achieve third party beneficiary status, that party must show that both parties to the contract so intended, and that such intent was within the parties' contemplation at the time the contract was formed." *Id.*

***24** Here, the recognition of Le–Nature's rights under P & W's Retention Letter and K & L Gates's

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Retention Letter are appropriate to effectuate the intention of the parties. Further, the circumstances indicate that K & L Gates and P & W intended to give Le–Nature's the benefit of the promised performance. P & W's Retention Letter expressly acknowledged P & W's understanding that it was retained to assist K & L Gates in investigating certain transactions involving Le–Nature's. P & W Retention Letter at 1. The P & W Retention letter stated that "P & W shall provide general consulting, financial accounting, and investigative or other advice as requested by K & L **to assist it in rendering legal advice to Le[-]Nature's.**" *Id.* (emphasis added). Thus, P & W confirmed its intention to assist in providing legal advice to Le–Nature's.

Further, through its own Retention Letter, K & L Gates expressed an intention to benefit Le–Nature's in performing its duties under that agreement. Through the K & L Gates Retention Letter, K & L Gates expressed an intention to provide legal advice and assistance to Le–Nature's, through its Special Committee. K & L Gates's Retention Letter confirmed that K & L Gates would provide legal assistance in investigating the allegations of fraud, and assist in preparing findings and recommendations that would be presented to Le–Nature's Board. Amended Complaint, Exhibit A (Retention Letter). Accordingly, the trial court improperly dismissed Trustee's third-party beneficiary claim against P & W. The Amended Complaint's averments are sufficient to establish Le–Nature's status an intended third-party beneficiary of that agreement.

[22] Finally, Trustee asks this Court to address whether, as a matter of law, the affirmative defense of *in pari delicto* bars his claims. The trial court did not address this issue. However, Trustee's claim involves a question of law in which our scope of review is plenary and our standard of review is *de novo*. In the interest of judicial economy, we will address his claim.

K & L Gates directs our attention to the Amended Complaint's allegation that "Le–Nature's top executive orchestrated a massive and intentional fraud." Brief for Appellees (K & L Gates & Ferguson) at 58–59. K & L Gates responds, stating that "[t]he law imputes those executives' acts to Le–Nature's and the doctrine of *in pari delicto* bars the Trustee's claims on behalf of the company for K & L's alleged failure to uncover the Company's fraud." *Id.* at 59; *see also* Brief for P & W at 36–38 (similarly asserting *in pari delicto*).

The doctrine of *in pari delicto* provides that a "plaintiff who has participated in wrongdoing may not recover damages from the wrongdoing." BLACK'S LAW DICTIONARY (7th ed.1999). *In pari delicto*, literally means "in equal fault," and is rooted in the common-law notion that a plaintiff's recovery may be barred by his own wrongful conduct. *Pinter v. Dahl*, 486 U.S. 622, 632, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988). "[I]n the *in pari delicto* arena, where corporate plaintiffs are involved, the subject of imputation is a key focus." *Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. PriceWaterhouseCoopers, LLP*, 605 Pa. 269, 989 A.2d 313, 330 n. 12 (2010) (*Allegheny II*).

***25** In *Allegheny II*, the defendant auditor grossly misstated the principal corporation's finances, despite knowing that certain of the corporation's agents, including its financial officer, had misstated those finances thereby hiding substantial operating losses. *Id.* at 315. The auditor gave a false impression to the board of directors that the company was in good financial condition. *Id.* The board had no knowledge of the operating losses and the company went bankrupt. *Id.*

During extensive federal litigation, the Third Circuit Court of Appeals found it necessary to petition for certification of the following question for resolution by the Pennsylvania Supreme Court: "What is the proper test under Pennsylvania law for determining whether an agent's fraud should be imputed to the principal when it is an allegedly non-innocent third-party that seeks to invoke the law of imputation in order to shield itself from liability?" *Official Comm. of Unsecured Creditors of Allegheny Health Educ. & Research Found. v. PricewaterhouseCoopers, LLP*, 607 F.3d 346, 351 (3d Cir.2010) (*Allegheny I*). Our Supreme Court answered the question as follows:

> The proper test to determine the availability of defensive imputation in scenarios involving non-innocents depends on whether or not the defendant dealt with the principal in good faith. While one of the primary justifications for imputation lies in the

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> protection of innocents, in Pennsylvania ... it may extend to scenarios involving auditor negligence, subject to an adverse-interest exception, as well as other limits arising out of the underlying justifications supporting imputation. Imputation does not apply, however, where the defendant materially has not dealt in good faith with the principal.

Allegheny II, 989 A.2d at 339. As the Supreme Court noted, imputation "recognizes that principals generally are responsible for the acts of agents committed within the scope of their authority." *Id.* at 333.

> This is, in part, because it is the principal who has selected and delegated responsibility to those agents; accordingly, the doctrine creates incentives for the principal to do so carefully and responsibly. Imputation also serves to protect those who transact business with a corporation through its agents believing the agent's conduct is with the authority of his principal.
>
> The first exception ... is that involving adverse interest—where an agent acts in his own interest, and to the corporation's detriment, imputation generally will not apply. The primary controversy surrounding the appropriate application of the adverse-interest exception here concerns the degree of self-interest required, or, conversely, the quantum of benefit to the corporation necessary to avoid the exception's application (where self-interest is evident).

Id. at 333–34 (citations and footnotes omitted). "[I]mputation is not justified in scenarios involving secretive, collusive activity on the part of an auditor to misstate (and/or sanction management's misstatement of) corporate financial information." *Id.* at 337.

***26** Our Supreme Court "dr[e]w a sharp distinction between those who deal in good faith with the principal-corporation in material matters and those who do not." *Id.* at 335. Regarding those who deal in good faith with the principal corporation, the Supreme Court generally would impute an agent's bad acts to the principal corporation *if they benefit the corporation*, although the Supreme Court did not specify the extent of benefit necessary. *Id.* at 333. The Supreme Court maintained the "traditional, liberal test for corporate benefit." *Id.* at 336. For those who do not deal in good faith with the principal corporation, a third party would not be able to impute an agent's bad acts to the principal corporation if those bad acts were only in the agent's self-interest and conferred benefits only to the agent, not the corporation. *Id.* at 333–34.

Applying the Supreme Court's statement of the law in *Allegheny II*, we conclude that the averments of Trustee's Amended Complaint negate the defense of imputation. Certainly, Le–Nature's allegations aver that Defendants did not act in good faith in conducting the investigation. *See, e.g.,* Amended Complaint ¶¶ 13–15, 34–35, 50–52; 53–73, 116. Further, we cannot conclude that a material misstatement of corporate financial information, so as to hide Podlucky's looting of the company, provided any benefit to Le–Nature's. Thus, the dismissal of Trustee's Amended Complaint is not appropriate under these circumstances.

For the reasons set forth above, we conclude that trial court erred in sustaining the preliminary objections of Defendants as to all causes of action asserted in the Amended Complaint. On this basis, we reverse the Order of the trial court and remand for further proceedings.

Application for Post–Submission Communication granted; Order reversed; case remanded for further proceedings; Superior Court jurisdiction relinquished.

> FN1. A bankruptcy trustee is the representative of the bankrupt estate, and has the capacity to sue and be sued. 11 U.S.C.A. § 323. Among the trustee's duties is the obligation to "collect and reduce to money the property of the estate." *Id.* § 704(1). The "property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case," *id.* § 541(a)(1), including the debtor's "causes of action." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n. 9, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983) (internal quotation marks and citation omitted). Contrary to the trial court's determination, Trustee does not represent the creditors of Le–Nature's.
>
> FN2. (*George K. Baum Capital Partners, L.P. v. Le–Nature's Inc.*, Civil Action No. 2158–N) (Del.Ch.2006).

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FN3. Contrary to the arguments of K & L Gates and Ferguson, no conflict of interest existed between Le–Nature's and the Special Committee as the Special Committee owed a fiduciary duty to act in the best interests of the company. *See* *Revlon*, 506 A.2d at 179.

FN4. Under federal bankruptcy law, a corporation is insolvent when the sum of the entity's debts is greater than all of the entity's property, at a fair valuation. 11 U.S.C.A. § 101(32)(A).

FN5. "Decisions of the federal district courts and courts of appeals, including those of the Third Circuit Court of Appeals, are not binding on Pennsylvania courts, even when a federal question is involved." *Chiropractic Nutritional Assocs. v. Empire Blue Cross & Blue Shield*, 447 Pa.Super. 436, 669 A.2d 975 (1995). However, Pennsylvania courts may look to the federal courts for guidance.

FN6. Despite the fact that other courts may have determined that similar complaints involving Le–Nature's have alleged deepening insolvency as damages, we conclude that the Complaint before this Court does not, under Pennsylvania law.

FN7. We acknowledge K & L Gates's arguments that corporate waste does not show harm to Le–Nature's, and that K & L Gates's investigation was too remote in time and fact from the alleged injuries. Such claims appear to raise issues of fact, which are better addressed in a motion for summary judgment or at trial.

Pa.Super.,2012.
Kirschner v. K & L Gates LLP
--- A.3d ----, 2012 WL 1662075 (Pa.Super.), 2012 PA Super 102

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H

United States Court of Appeals,
Eighth Circuit.
Brian F. LEONARD; Marshall Investments Corp.; Page State Bank; Mcville State Bank; Ramsey National Bank and Trust of Devils Lake; Security Bank of USA; Ultima Bank Minnesota; First National Bank and Trust Co.; Dacotah Bank; North Country Bank and Trust; First Federal Bank of the Midwest; First American Bank and Trust; Northstate LLC; Security State Bank of Sebeka; First National Bank of the North; First Independent Bank; Citizens State Bank of Roseau; Farmers State Bank; State Bank of Park Rapids; New Auburn Investment Inc.; Peoples State Bank of Madison Lake; Bank of Luxemburg; Lake Country State Bank; Community National Bank; United Community Bank of North Dakota; Choice Financial Group; Security State Bank; Campbell County Bank Inc.; Security First Bank of North Dakota; First State Bank of Bigfork; McIntosh County Bank; Oregon Community Bank and Trust; Bremer Business Finance Corporation, Plaintiffs–Appellees,
v.
DORSEY & WHITNEY LLP, a Minnesota Limited Liability Partnership, Defendant–Appellant.
Bremer Business Finance Corporation; Plaintiff–Appellee/Cross–Appellant,
and
Brian F. Leonard, Trustee, Plaintiff–Appellee,
v.
Dorsey & Whitney LLP, Defendant–Appellant/Cross–Appellee.

Nos. 07–2220, 07–2242, 07–2258, 07–2261, 07–2260.
Submitted: April 17, 2008.
Filed: Jan. 15, 2009.
Rehearing Denied March 9, 2009.

Background: Trustee of Chapter 7 estate of investment banking firm that had acted as lead lender in multimillion-dollar loan participation agreement, and participant in agreement, brought adversary complaints against attorneys retained by bankrupt firm, seeking to recover on theories of breach of fiduciary duty and malpractice. The United States Bankruptcy Court for the District of Minnesota, Dreher, J., 352 B.R. 103, entered judgment for trustee, and proposed findings and conclusions in favor of participant. The United States District Court for the District of Minnesota, Donovan W. Frank, J., 364 B.R. 1, affirmed in part and reversed in part. Attorneys appealed, and participant cross-appealed.

Holdings: The Court of Appeals, Shepherd, Circuit Judge, held that:
(1) Court of Appeals had jurisdiction over trustee's claim for indemnity and contribution that was part of participant's adversary complaint;
(2) participant was bound by marketplace standards of vigilance and independent inspection;
(3) attorneys did not owe duty to participant; and
(4) attorneys did not owe fiduciary duty to lead lender to disclose possible malpractice claim.

Reversed in part and dismissed in part.

Colloton, Circuit Judge, filed dissenting opinion.

See also 745 N.W.2d 538.

West Headnotes

[1] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases

District court's dismissal of bankruptcy trustee's claim for indemnity and contribution, which trustee asserted in creditor's adversary complaint alleging malpractice against debtor's attorneys, constituted final and appealable decision; district court's dismissal followed bankruptcy court's recommended dismissal, to which no objections had been filed, creditor's motion to alter or amend requesting district

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court to address indemnity/contribution claim was untimely, and district court had ended its handling of trustee's claim. 28 U.S.C.A. §§ 636, 1291; Fed.Rule Civ.Proc.Rules 59(e), 72(b), 28 U.S.C.A.; Fed.Rules Bankr.Proc.Rule 9033(d), 11 U.S.C.A.

[2] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases

District court's order is final and appealable decision if it ends litigation on the merits and leaves nothing more for district court to do but execute judgment. 28 U.S.C.A. § 1291.

[3] Attorney and Client 45 26

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Duties and Liabilities to Adverse Parties and to Third Persons. Most Cited Cases

Under Minnesota law, lawyer can only be found to have duty to third party who is direct and intended beneficiary of lawyer's services.

[4] Attorney and Client 45 26

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Duties and Liabilities to Adverse Parties and to Third Persons. Most Cited Cases

In determining whether bank which participated in loan was intended beneficiary of work of attorney for investment bank which arranged loan, as required to support participating bank's malpractice claim, Minnesota law, as predicted by Court of Appeals, would hold participating bank to marketplace standards of vigilance and independent inspection, and not grant it any protection beyond express terms of participation agreement.

[5] Attorney and Client 45 26

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k26 k. Duties and Liabilities to Adverse Parties and to Third Persons. Most Cited Cases

Law firm hired to close loan for lead lender in loan participation agreement did not owe duty to participant in agreement, so as to confer upon participant right of action for malpractice against firm arising from firm's alleged misrepresentation as to enforceability of loan documents; there was no third-party beneficiary relationship between law firm and participant under Minnesota law, participant's only relationship was with lead lender and was that of seller and purchaser of property interest, and lead lender rather than participant was firm's client in litigation that followed borrower's default.

[6] Bankruptcy 51 3782

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3782 k. Conclusions of Law; De Novo Review. Most Cited Cases

Bankruptcy 51 3786

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3785 Findings of Fact
51k3786 k. Clear Error. Most Cited Cases

In bankruptcy matters Court of Appeals is second court of review, and applies same standards as district court, reviewing bankruptcy court's factual findings for clear error and its legal conclusions de novo.

[7] Attorney and Client 45 109

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k109 k. Acts and Omissions of Attorney in General. Most Cited Cases

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Under Minnesota law as predicted by federal appellate court, law firm hired to close loan for lead lender in loan participation agreement for construction of tribal gaming casino did not owe fiduciary duty to lead lender to disclose possible malpractice claim arising from firm's closing loan without National Indian Gaming Commission (NIGC) approval; failure to obtain NIGC approval before closing loan did not create conflict of interest that would disqualify firm from representing lead lender.

[8] Attorney and Client 45 109

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k109 k. Acts and Omissions of Attorney in General. Most Cited Cases

Under Minnesota law, negligent legal advice does not give rise to claim for legal malpractice until client suffers damages as result.

***611** Richard Gary Mark, argued, Mark G. Schroeder, Jason R. Asmus, on the brief, Minneapolis, MN, for appellant.

Edward W. Gale, argued, Thomas C. Atmore, on the brief, Minneapolis, MN, for Leonard, et. al.

Paul Laurin Ratelle, argued, Minneapolis, MN, for Bremer Business.

Before MURPHY, COLLOTON, and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

One of Minnesota's largest law firms is before us, requesting that we overturn judgments that it committed legal malpractice and breached fiduciary duties owed to a client. On its side it has a recent decision of the Minnesota Supreme Court and our duty to conscientiously ascertain and apply state law. We predict that the Minnesota Supreme Court would reverse the judgments against Dorsey & Whitney LLP with instructions to dismiss. We must therefore do the same.

I.

This case is in federal court because the Plaintiffs' claims are related to the Chapter 7 bankruptcy case filed by SRC Holding Corporation, also known as Miller & Schroeder, Inc. (M & S). *See* 28 U.S.C. § 1334(b). Trustee Brian F. Leonard, on behalf of M & S's bankruptcy estate, brought an adversary complaint against the law firm Dorsey & Whitney LLP (Dorsey), alleging that the firm breached fiduciary duties that it owed to its client M & S. Bankruptcy estate claimant Bremer Business Finance Corporation (Bremer) brought a separate adversary complaint against Dorsey, alleging three claims premised on the theory that Bremer was Dorsey's client. The Trustee joined Bremer's complaint, [FN1] bringing a claim for indemnity and contribution against Dorsey to offset any monies that Bremer might recover in its claims against the estate.

FN1. Although the Trustee is a party to both of the adversary proceedings discussed in this case, for convenience we will refer to the first action as the "Trustee's," and to the second action as "Bremer's."

Dorsey consented to the entry of a judgment by the bankruptcy judge on the Trustee's complaint under 28 U.S.C. § 157(c)(2). Dorsey did not consent to the ***612** entry of a judgment on Bremer's complaint, so the bankruptcy judge submitted proposed findings of fact and conclusions of law to the district court. 28 U.S.C. § 157(c)(1). The district court reviewed the bankruptcy judge's decision on the Trustee's complaint as an appeal, 28 U.S.C. § 158(a)(1). It considered the bankruptcy judge's proposed findings and conclusions on Bremer's complaint after reviewing de novo the matters to which the parties objected. 28 U.S.C. § 157(c)(1). We have appellate jurisdiction over the final decisions of both courts under 28 U.S.C. § 158(d)(1) and 28 U.S.C. § 1291. *See In re M & S Grading, Inc.*, 526 F.3d 363, 368 (8th Cir.2008).

While the Trustee's and Bremer's claims went forward in the federal courts, parallel litigation involving the same claims and transactions proceeded in the Minnesota state courts. The state-court plaintiffs were 28 banks that had been dismissed from the Trustee's action for lack of subject-matter jurisdiction, and three banks from whose claims the bankruptcy court abstained "in the interest of justice, or in the interest of comity with State courts or respect for State law" under 28 U.S.C. § 1334(c)(1). The claims of the 31 banks were the same as those alleged in Bremer's complaint. As a result of limited federal

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court jurisdiction, the two actions would decide the same questions of law on a nearly identical set of facts.

Minnesota law supplies the rules of decision for this case. Just as in an action brought under diversity jurisdiction, the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), governs our application of state law. *See FDIC v. Wabick*, 335 F.3d 620, 625 (7th Cir.2003). Under the Erie doctrine, a federal court is bound by the decisions of the state's highest court. *HOK Sport, Inc. v. FC Des Moines, L.C.*, 495 F.3d 927, 934–35 (8th Cir.2007). If the state's highest court has not clearly spoken, we may rely on the decisions of intermediate state courts, unless we are convinced by persuasive data that the highest state court would decide the issue differently. *United Fire & Cas. Ins. Co. v. Garvey*, 328 F.3d 411, 413 (8th Cir.2003) (*citing Comm'r v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967)). In attempting to predict state law, a federal court may "consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data...." *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 663 (3d Cir.1980). Our duty is to conscientiously ascertain and apply state law, not to formulate new law based on our own notions of what is the better rule. *See David v. Tanksley*, 218 F.3d 928, 930 (8th Cir.2000); *McKenna*, 622 F.2d at 663.

As the parallel actions rounded their turns through the courts, Bremer's federal action ran a few lengths behind the 31 banks' state court litigation. The state trial court granted summary judgment in Dorsey's favor, whereas the bankruptcy court denied summary judgment and held a seven-day trial. The bankruptcy court was aware of the state court's decision but unwilling to give it preclusive or persuasive effect. By the time the district court considered Bremer's objections to the bankruptcy court's proposed decision, the Minnesota Court of Appeals had partially reversed the trial court's decision, but the Minnesota Supreme Court had granted further review. *McIntosh County Bank v. Dorsey & Whitney, LLP (McIntosh I)*, 726 N.W.2d 108 (Minn.Ct.App.2007), *rev'd in part*, 745 N.W.2d 538 (Minn.2008). The district court did not rely on either of the state courts' opinions in its consideration of the bankruptcy court's recommendations.

***613** The Minnesota Supreme Court issued its opinion in *McIntosh County Bank v. Dorsey & Whitney, LLP (McIntosh II)* while this appeal was pending. 745 N.W.2d 538 (Minn.2008). Unlike the bankruptcy and district courts, we have the advantage of knowing the Minnesota Supreme Court's precise view on some of the questions of law controlling Bremer's claims. Consequently, we must reverse Bremer's case as contrary to the *McIntosh II* decision, even if we might have thought the district court's predictions of Minnesota law correct when they were made. *Vandenbark v. Owens–Ill. Glass Co.*, 311 U.S. 538, 543, 61 S.Ct. 347, 85 L.Ed. 327 (1941). Not only does *McIntosh II* tell us how to decide the Bremer case, it also sheds light on the legal relationships among the parties. Because the bankruptcy court's decision is inconsistent with how we predict the Minnesota Supreme Court would characterize those relationships, we must also reverse the Trustee's case.

II.

In a bankruptcy adversary proceeding tried on the merits without a jury, "the court must find the facts specially and state its conclusions of law separately." Fed.R.Civ.P. 52(a)(1); Fed. R. Bankr.P. 7052. The rule only requires that the trial court set forth its reasoning with enough clarity that the appellate court may understand the basis of the decision. *Century Marine Inc. v. United States*, 153 F.3d 225, 231 (5th Cir.1998); *Sierra Fria Corp. v. Donald J. Evans, P.C.*, 127 F.3d 175, 180 (1st Cir.1997). Witness-by-witness particularity and expansive dissertations of law are unnecessary. *Century Marine*, 153 F.3d at 231; *Sierra Fria*, 127 F.3d at 180. "Ideally, findings of fact should be clear, specific, and complete, without unrealistic and uninformative generality on the one hand, and without an unnecessary and unhelpful recital of nonessential details of evidence on the other." 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2579 at 330 (3d ed.2008). We will not set aside a factual finding unless it is clearly erroneous and we will "give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed.R.Civ.P. 52(a)(6).

Rule 52(a) does not, however, "inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a

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misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). We will overturn a factual finding that is based on the application of an erroneous legal standard. *Shull v. Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 155 (8th Cir.1977). So long as we give proper deference to the trial court's credibility determinations, we may independently review the entire record to the degree necessary to correct legal error. *See Bose Corp.*, 466 U.S. at 499–501, 104 S.Ct. 1949.

With this standard in mind, we must restate the trial courts' factual findings [FN2] in a manner consistent with our duty to correctly apply Minnesota law. We set aside factual findings derived from erroneous legal assumptions, *see id.* at 501 n. 17, 104 S.Ct. 1949, and we consult the record for undisputed facts omitted from the trial courts' Rule 52(a) findings but material to the outcome of this case. We do not disturb the trial courts' credibility determinations, *see* ***614***Anderson v. City of Bessemer City*, 470 U.S. 564, 575, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), except that we disregard immaterial factual findings.

FN2. We review the bankruptcy court's findings as to the Trustee action and the district court's findings as to the Bremer action.

III.

M & S was a Minneapolis-based investment banking firm. One of its key lines of business was to arrange loans for Indian tribes. M & S would serve as the lead lender; after closing the loan it would sell participation interests in the loan to other lenders, mostly small local banks. Because it normally sold 100% of the loans to participants, M & S's revenue came from the placement fee paid by the Tribe and servicing fees the participants paid M & S to administer the loans.

In February of 1999, M & S closed the "St. Regis II" loan to President R.C.-St. Regis Management Company (President) in the amount of $3,492,000.[FN3] President was a New York general partnership formed to manage a casino on the reservation of the St. Regis Mohawk Tribe (the Tribe) in Hogansburg, New York. President would construct the facilities, arrange for funding, and manage the casino operations. The Tribe would pay President 25% of the net revenue from the casino as a management fee and committed to repay President for the construction and development costs out of the remaining 75%. The St. Regis II loan was secured by President's interest in the Tribe's payments from casino revenue.

FN3. The St. Regis I loan was for $8,624,000 and for our purposes structured identically to the St. Regis II loan. The claims in this case deal principally with the St. Regis II loan.

M & S retained Dorsey to assist in documenting the loan. Dorsey had assisted M & S in dozens of transactions and was familiar with M & S's business methods; there was no written agreement as to Dorsey's representation. Before closing the loan, Dorsey internally questioned whether some of the documents required approval by the National Indian Gaming Commission (NIGC) to be enforceable. Dorsey did not disclose the internal debate to M & S. The bankruptcy court found that Dorsey lawyers believed that, due to the risk of the documents being voided, the loan should not be closed until the NIGC approved of the loans or determined that approval was not required.

On February 16, 1999, the NIGC informed President and the Tribe that it would probably not approve the documents before the planned closing date. Dorsey advised M & S that approval of the loans was not needed. Although one lawyer testified that she orally advised M & S of the risks involved in closing without NIGC approval, the bankruptcy court found her not credible. The court credited the testimony of M & S personnel who stated that if M & S had known of the risk, it would not have closed the loans. M & S closed the loans on February 24, 1999.

Prior to closing, M & S had received commitments from participating banks to fund 100% of the two loans, including a $2,000,000 (approximately 57%) participation from Bremer. M & S sent a memorandum to the participants recommending that the loans be closed without NIGC approval, while also expressing its opinion that NIGC approval was imminent. The district court found no evidence that Bremer received the memorandum.

Bremer executed a Participation Agreement with M & S in May of 1999, although the text of the Agreement says it was effective on March 1, 1999.

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The Agreement defines the parties' relationship as "that of a seller and purchaser of a property interest," and authorized M & S "to be named as the nominal payee of the Note and ... to generally act as agent for all ***615** the Participants...." Paragraph 3.1 of the Agreement set forth Bremer's acceptance of the risk it was taking by participating in the St. Regis II loan:

> Participant has received and made a complete examination of copies of all Loan Documents it requires to be examined and approves of the form and content of the same. Participant acknowledges that Participant has been provided with or granted access to all of the financial and other information that Participant has requested or believes to be necessary to enable Participant to make an independent and informed judgment with respect to the Collateral, Borrower and any Obligor and their credit and the desirability of purchasing an undivided interest in the Loan. Participant has, without reliance on Lender and based upon such documents and information as the Participant has deemed appropriate, made its own credit analysis and decision to purchase its participation interest in the Loan.

The same paragraph went on to specify that Bremer was not relying on any statements made by M & S during the course of the marketing, offering, or negotiation of the Participation Agreement:

> Participant is participating with Lender based upon Participant's own independent examination and evaluation of the Loan transaction and the information furnished with respect to Borrower and without any representations or warranties from Lender as to the Borrower's financial suitability, the appropriateness of the investment and the value and security of the Collateral.... PARTICIPANT ACKNOWLEDGES THAT LENDER MAKES NO WARRANTY OR REPRESENTATION AND SHALL NOT BE RESPONSIBLE FOR ANY STATEMENT, WARRANTY OR REPRESENTATION MADE IN CONNECTION WITH THE COLLATERAL OR ANY DOCUMENT IN CONNECTION WITH THE LOAN. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, PARTICIPANT ACKNOWLEDGES THAT LENDER HAS MADE NO GUARANTY OF REPAYMENT, IT BEING UNDERSTOOD PARTICIPANT SHALL LOOK ONLY TO BORROWER, ANY OBLIGOR AND TO THE COLLATERAL FOR REPAYMENT OF THE LOAN.

M & S's duty under the Agreement was to administer the loan for Bremer's benefit "in accordance with the customary policies and procedures under which it administers loans for its own account." The Agreement obligated M & S to "enforce any remedies under the Loan Documents ... and in furtherance thereof may select counsel and other professionals of its choice...." Bremer was required to pay its portion of any litigation expenses, including attorneys' fees. The Agreement provided that M & S "shall not be responsible for any negligence or misconduct on the part of any accountant, attorney, ... or other expert or be bound to supervise the proceedings of any such appointee provided that Lender shall use reasonable care in the selection of such person or firm." The Participation Agreement was a standard form agreement originally drafted by M & S's in-house counsel. Bremer advanced its $2,000,000 participation on April 6, 1999.

The casino opened in April of 1999, but had difficulty making money. By February of 2000, President defaulted on its payment obligations. Two months later, the Tribe revoked President's management rights. On October 3, 2000, a Dorsey lawyer and representatives from M & S and Bremer met with the Tribal Council to discuss a possible resolution of the unpaid***616** loans. At the meeting, the Tribe's Chief suggested for the first time that the loan documents were unenforceable against the Tribe because they had not been approved by the NIGC. Three days later, M & S sent a letter to the participants repeating Dorsey's opinion that the Tribe's position as to the need for NIGC approval was incorrect.

The same day as the meeting, Dorsey filed a lawsuit on M & S's behalf in the United States District Court for the District of Minnesota against President for the collection of unpaid loan amounts and against the Tribe for an accounting of casino revenue. The Tribe was later dismissed from the lawsuit. In April of 2002, the court in that action entered a judgment against President in the amount of $4,505,043.75 on the St. Regis II loan. Three years later, Bremer and the other participants entered into a settlement with the Tribe in which the Tribe paid Bremer $650,000 for an assignment of its interest in the President judgment.

Soon after the President lawsuit was filed, Dor-

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sey began to prepare for possible claims of the participants against M & S. On December 7, 2000, Bremer showed Dorsey a draft complaint against M & S, alleging that M & S defrauded it by fraudulently misrepresenting that the loan had received NIGC approval when it had not. Some of the allegations suggested that Dorsey's advice as to the need for NIGC approval had been erroneous. Around the same time, M & S voluntarily dismissed the claim against the Tribe in the President litigation. The bankruptcy court concluded that the decision to drop the claims against the Tribe was made by Dorsey to conceal its "potential malpractice" as "a pattern of avoiding a situation where it would have to actually prove up the validity" of the St. Regis II loan documents.

Dorsey's lead counsel in the President litigation sent a memorandum to Dorsey's internal ethics counselor and loss management partner requesting an opinion on whether Dorsey was disqualified from representing M & S against Bremer because one of its lawyers might be a fact witness as to the closing of the St. Regis II loan. In the memorandum, the lead counsel mentioned that another firm was lobbying M & S to represent them on the issue, "but I would obviously prefer to keep all of this within the firm to the extent we can." The ethics and loss management lawyers advised that the firm could continue to represent M & S.

Through its counsel at Dorsey, M & S responded to Bremer's draft complaint. The lawyer wrote that M & S "concluded with the concurrence of my firm that NIGC approval was not required with respect to the loan documents...." The letter also referred to the memorandum M & S had sent to the participants recommending that the loans be closed without NIGC approval. After modifying its draft complaint to remove references to the Dorsey firm, Bremer filed a lawsuit against M & S in a Minnesota state court on December 21, 2000. Bremer alleged claims for fraud in the inducement, negligent misrepresentation, and breach of contract; it asked for rescission of the Participation Agreement and damages. Bremer's state court lawsuit was stayed when M & S filed for Chapter 7 bankruptcy protection.

IV.

Brian Leonard was appointed Trustee to administer M & S's bankruptcy estate. Bremer filed a timely proof of claim against the estate. It later filed an adversary complaint against Dorsey, alleging legal malpractice, negligent misrepresentation, and breach of contract. At the heart of Bremer's complaint was the theory that ***617** Bremer was Dorsey's client or a third-party beneficiary of Dorsey's services. The Trustee joined the complaint, claiming that the estate was entitled to indemnity or contribution from Dorsey to the extent that Bremer failed to recover directly.

Along with M & S's successor in interest, Marshall Investments Corporation (Marshall), the Trustee had previously brought his own complaint against Dorsey on behalf of the estate. Marshall and the Trustee claimed that Dorsey breached its fiduciary duty to M & S by failing to disclose: (1) it had a conflict of interest in representing M & S in a lawsuit against a participant; and (2) M & S had a third-party claim against Dorsey that it could assert in the suit brought by a participant. At least some of the Trustee's allegations were based on the assumption that the loan participants were Dorsey's clients or third-party beneficiaries of Dorsey's services.

The bankruptcy court held a seven-day trial on both complaints. Six months later, it issued a 146–page decision, which contained findings of fact and conclusions of law. According to the bankruptcy court, Bremer and Dorsey had a direct attorney-client relationship at the time of the St. Regis loan closings. Alternatively, the court found that Bremer had standing to sue Dorsey for legal malpractice as a third-party beneficiary of the attorney-client contract between M & S and Dorsey. It then concluded that Dorsey committed malpractice by closing the St. Regis II loan without first obtaining NIGC approval. The bankruptcy court recommended that the district court enter a judgment of $1,759,000 on Bremer's malpractice and breach of contract claims, and dismiss the negligent misrepresentation claim. It reached that figure by adding the original $2,000,000 participation and the $409,000 in fees and expenses for pursuing the state-court action against M & S, then subtracting the $650,000 settlement with the Tribe. The court recommended that the Trustee's claim for indemnity and contribution be dismissed as moot.

On the Trustee's action, the bankruptcy court found that Dorsey breached its fiduciary duties of loyalty and full disclosure to M & S. Based on its conclusion that Dorsey represented Bremer in both

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the drafting of the St. Regis II documents and the President litigation, the court found that Dorsey's representation of M & S in Bremer's state-court lawsuit was directly adverse to a current client without that client's consent. It also found that Dorsey failed to disclose that it may have committed malpractice by closing the St. Regis II loan without NIGC approval. According to the bankruptcy court, Dorsey's ongoing representation of M & S was materially conflicted by Dorsey's interest in avoiding malpractice liability. It further found that the breach was "a blatant conflict of interest constituting a lack of good faith," and that Dorsey's attorneys acted with "fraudulent or ill-intent." The bankruptcy court ordered disgorgement of all attorneys' fees and expenses paid in the Bremer and President litigations, entering a total judgment of $836,344.32 for the Trustee and $51,099.88 for Marshall.

Dorsey objected to the bankruptcy court's proposed findings and conclusions of law in Bremer's action and appealed its judgment in the Trustee's action. On de novo review of Bremer's action, the district court determined that Bremer did not become Dorsey's client until Dorsey began work on the President litigation in June of 2000. It found that Dorsey committed malpractice representing Bremer in the President litigation without disclosing that it had been negligent in the closing of the St. Regis loans. According to the court, "but for Dorsey's negligence, Bremer ***618** would have obtained a more favorable result, as it would have sued Dorsey instead of pursuing collection of the loan from President, who was judgment proof anyway." The court awarded Bremer $409,000 for the costs incurred in the state-court litigation against M & S; it declined to award Bremer a return on its $2,000,000 stake in the St. Regis II loan. The district court dismissed the negligent misrepresentation claim and the Trustee's claim for indemnity and contribution.

Reviewing the judgment in the Trustee's action under a clear-error standard, the district court affirmed the decision of the bankruptcy court. The district court diverged slightly from the bankruptcy court's view of the standard of care, holding that Dorsey was required to delay the closing until the NIGC finished its review of the documents related to the St. Regis II loans. In other words, it believed that a reasonable lawyer would have known that the validity of the documents without NIGC advice was uncertain and advised the client to await the NIGC's determination. The district court agreed that failure to disclose the malpractice claim was a breach of fiduciary duty and affirmed the bankruptcy court's remedy of full fee disgorgement.

Dorsey appeals the district court's judgment for Bremer and the bankruptcy court's judgment in favor of the Trustee and Marshall. Bremer cross-appeals, requesting that we adopt the bankruptcy court's view and increase the judgment against Dorsey to $1,759,000.

V.

[1] Considering *sua sponte* our jurisdiction over this appeal, the dissent concludes that this case must be dismissed. We disagree. According to the dissent, we lack jurisdiction over this matter pursuant to 28 U.S.C. § 1291, the jurisdictional basis asserted by Dorsey, because the district court did not resolve the Trustee's claim for indemnity and contribution against Dorsey.[FN4] However, the standard for finality under section 1291 has been met because the district court dismissed the Trustee's indemnity and contribution claim.

> FN4. The Trustee's claim against Dorsey for indemnity and contribution is not what we have referred to as the "Trustee's action." Rather, it is a claim asserted by the Trustee in what we have termed "Bremer's action." None of the parties have appealed the district court's dismissal of the Trustee's claim for indemnity and contribution.

[2] "Under § 1291, the courts of appeal have jurisdiction over 'all final decisions of the district courts of the United States.' " *Alpine Glass, Inc. v. Ill. Farmers Ins. Co.*, 531 F.3d 679, 681 (8th Cir.2008). "A district court's order is a 'final decision' for the purposes of § 1291 if it 'ends the litigation on the merits and leaves nothing more for the [district] court to do but execute the judgment.' " *Id.* (*quoting Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)).

In its report and recommendations, the bankruptcy court concluded that an attorney-client relationship existed between Bremer and Dorsey at the time of the "St. Regis II" loan closing and that Dor-

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sey committed malpractice, entitling Bremer to an award of damages directly from Dorsey and "probably resulting in the elimination of Bremer's claim against the estate." *In re SRC Holding Corp.*, 352 B.R. 103, 182 (Bankr.D.Minn.2006). In light of this decision, the bankruptcy court recommended the dismissal of the Trustee's indemnity and contribution claim. *Id.*

Only Dorsey filed objections to the bankruptcy court's report and recommendations,***619** and its objections did not encompass the recommended dismissal of the Trustee's indemnity and contribution claim. In reviewing non-core proceedings, like the Trustee's indemnity and contribution claim, "[t]he district court shall make a de novo review upon the record ... *of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made*," Fed. R. Bankr.P. 9033(d) (emphasis added), "[w]ithin 10 days of being served with a copy of the proposed findings of fact and conclusions of law," Fed. R. Bankr.P. 9033(b). The district court's April 6, 2007, order resolved Dorsey's objections, affirming in part and reversing in part the bankruptcy court's report and recommendations. As relevant here, the district court determined that Bremer's direct attorney-client relationship with Dorsey was established after the closing of the "St. Regis II" loan, rather than at the time of Dorsey's retention as the bankruptcy court found. Because no party objected to the bankruptcy court's recommendation that the Trustee's indemnity and contribution claim be dismissed, the dismissal became final and effective. *See In re Ragar*, 3 F.3d 1174, 1177–78 (8th Cir.1993) (recognizing that where a bankruptcy court makes proposed findings of fact and conclusions of law in a non-core proceeding "[i]ts action would ... become final and effective if [a party] [did] not file[ ] timely objections") (*citing* Fed. R. Bankr.P. 9033(d)); *Hagan v. Okony*, No. 1:08–cv–732, 2008 WL 4722747, at *1 (W.D.Mich. Oct.22, 2008) (stating that where no party files objections to the bankruptcy court's report and recommendation, it "stand[s] without objection"). This conclusion is further strengthened by caselaw applying the Federal Magistrates Act's [FN5] ten-day written-objection provision mirroring Rule 9033(d), 28 U.S.C. § 636(b)(1).[FN6]

FN5. 28 U.S.C. §§ 631–639.

FN6. Section 631(b)(1), in pertinent part, provides that:

> Within ten days of being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.
>
> 28 U.S.C. § 636(b)(1).

"The language of Bankruptcy Rule 9033(b) is nearly identical to that of Federal Rule of Civil Procedure 72(b) [which implements section 636(b)(1)]. Indeed, the drafters of Rule 9033(b) indicated that the rule 'is derived from [Rule 72(b)], which governs objections to a recommended disposition by a magistrate.' " *In re Nantahala Village, Inc.*, 976 F.2d 876, 879–80 (4th Cir.1992) (*quoting* Fed. R. Bankr.P. 9033(b) advisory committee notes). Thus, the Fourth Circuit determined that "a bankruptcy court's proposed resolution should be given the same effect as a magistrate's proposed resolution as far as an adversely affected party's responsibilities are concerned." *Id.* at 880. This court takes the same view. *See Ragar*, 3 F.3d at 1177–78 (stating that, where a bankruptcy court "viewed itself ... as making proposed findings of fact and conclusions of law in a non-core proceeding," it "acted much as a magistrate judge would have on a matter lawfully assigned to him or her for a report and recommendation under 28 U.S.C. § 636").

It follows that the Supreme Court's observation that section 636(b)(1) "provide[s] for de novo review *only* when a party ***620** objected to the magistrate's findings or recommendations," *Peretz v. United States*, 501 U.S. 923, 939, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991) (emphasis added), applies equally here, as does the Court's determination that the failure to file objections eliminates not only the need for de novo review, but *any* review by the district court. *See Thomas v. Arn*, 474 U.S. 140, 150, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985) ("We are

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therefore not persuaded that [section 636(b)(1)] requires some lesser review by the district court when no objections are filed."). In this vein, the First Circuit observed:

> Plaintiff also objects to the award of statutory costs to defendant DiMeo. Unfortunately, his objection comes too late. After the magistrate-judge issued his report, plaintiff had ten days to file written objections to the Report and Recommendation. We find no evidence in the record that plaintiff objected to the magistrate-judge's findings and recommended disposition. Failure to raise objections to the Report and Recommendation waives the party's right to review in the district court....

Davet v. Maccarone, 973 F.2d 22, 30–31 (1st Cir.1992) (citations omitted); *see Henley Drilling Co. v. McGee*, 36 F.3d 143, 150–151 (1st Cir.1994) (holding that objections are required to challenge magistrate judge's findings, as well as magistrate's failure to make additional findings); *Lewry v. Town of Standish*, 984 F.2d 25, 27 (1st Cir.1993) (stating that "[o]bjection to a magistrate's report preserves only those objections that are specified"); *Templeman v. Chris Craft Corp.*, 770 F.2d 245, 247 (1st Cir.1985) ("Absent objection by the plaintiffs, the district court had a right to assume that plaintiffs agreed to the magistrate's recommendation."). Thus, the failure of both the Trustee and Bremer to object to the bankruptcy court's recommended dismissal waived their right to *any* review by the district court.

Bremer then filed a motion to alter or amend the district court's judgment pursuant to Federal Rule of Civil Procedure 59(e), requesting that the district court address the Trustee's indemnity and contribution claim. However, as the district court recognized, Bremer was too late. *See United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 934–35 (8th Cir.2006) ("This court has consistently held that Rule 59(e) motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to the entry of judgment."). "Federal Rule of Civil Procedure 59(e) provides a means 'to support reconsideration [by the court] of matters properly encompassed in a decision on the merits.' Under rule 59(e), the court may reconsider issues previously before it, and generally may examine the correctness of the judgment itself [.]" *Ray E. Friedman & Co. v. Jenkins*, 824 F.2d 657, 660 (8th Cir.1987) (*quoting White v. N.H. Dep't of Employment Sec.*, 455 U.S. 445, 451, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982) (citations omitted)). Because Bremer did not raise the issue prior to the district court's April 6th order, it could not "use rule 59(e) to expand the judgment to encompass new issues." *See Friedman*, 824 F.2d at 660.

In denying Bremer's Rule 59(e) motion, the district court noted that, as a result of its conclusions in the April 6th order, the Trustee's indemnity and contribution claim was not moot and that it had "not 'adopt[ed]' the bankruptcy court's recommendation to dismiss the claim *as moot.*" *In re SRC Holding Corp.*, No. 06–3962, 2007 WL 1464385, at *4 (D.Minn. May 15, 2007) (unpublished) (emphasis added). However, the district court did *not* state that it had *not* dismissed the indemnity ***621** and contribution claim for a different reason. *Id.* Rather, the district court explained that it had dismissed the claim because Bremer and the Trustee had waived their right to review of the dismissal by failing to object to the bankruptcy court's recommendation pursuant to Rule 9033(b) and (d). *Id.* The district court also observed that, even if it had analyzed the indemnity and contribution claim in the April 6th order, as opposed to simply adopting the dismissal recommendation, it would have dismissed the claim as premature. *Id.* at *1; *see Henning v. Amsted Indus., Inc.*, 56 F.3d 29, 31 (7th Cir.1995) (stating that the "petition for indemnity was premature" because "[d]eclaratory relief as to indemnity is unavailable if liability in the underlying action has not been established" such that "[u]ntil there was a determination that [the claimant] had suffered any loss or incurred any liability, [it] could not enforce the indemnity against [the appellee]" (quotation omitted)); *Helena Marine Serv., Inc. v. Sioux City & New Orleans Barge Lines, Inc.*, 564 F.2d 15, 17 (8th Cir.1977) ("[T]he Court does not perceive that claimant has a cause of action against Helena Marine Service under its claim of indemnity unless and until it has completed the proceedings in the state court, resulting in judgment against claimant, which claimant has paid. Until these matters have been finally determined, a cause of action for indemnity would be premature."). Thus, the district court's dismissal of the Trustee's indemnity and contribution claim was not undermined by the fact that the claim was not moot.

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First, pursuant to Rule 9033(d), Bremer and the Trustee waived their right to contest the bankruptcy court's dismissal recommendation by failing to object.[FN7] Though the dissent states that we have incorrectly interpreted the district court's orders in determining that waiver was a basis for the dismissal of the indemnity and contribution claim, the district court expressly stated, in its denial of the Rule 59(e) motion, that "[b]ecause neither Bremer nor the Trustee objected or raised an issue as to the bankruptcy court's conclusions regarding the Trustee's indemnity and/or contribution claims, they waived their right to contest those conclusion, or at a minimum, any issue as to the conclusions [was] not properly in front of the [District] Court." *In re SRC Holding Corp.*, 2007 WL 1464385, at *4. The district court went on to state that "even if there is some evidence in the record to support Dorsey's liability to [M & S], any theory or argument as to the Trustee's indemnity and/or contribution claims have been waived here, or in any event were not properly raised before the [District] Court." *Id.*

> FN7. The district court also noted that, "[e]ven after briefing was complete," it had provided the Trustee and Bremer with another opportunity to raise the indemnity and contribution claim, but both parties failed to do so. *In re SRC Holding Corp.*, No. 06–3962, 2007 WL 1464385, at *3–4 (D.Minn. May 15, 2007) (unpublished). The district court explained that it "sent a letter to the parties asking them to be prepared to address certain issues at oral argument," including: "If the Court finds that a direct attorney-client relationship was formed when paragraph 4.8 of the [Participation] Agreement was invoked, what effect would that have on the issue of damages, and the proper measure of damages." *Id.* (*quoting* January 23, 2007 letter). However, "[a]t the February 7, 2007 oral argument, neither Bremer nor the Trustee objected or raised the issue that if the [District] Court made such a finding the issues of indemnity and/or contribution would need to be addressed." *Id.* at *4.

The district court also explained why, though a shift in the legal basis for the dismissal of the Trustee's indemnity and contribution claim had occurred, the district***622** court did not address this in its April 6th order. The district court stated that neither the Trustee nor Bremer "raise[d] a contingent objection asserting that if the [District] Court disagreed with the bankruptcy court's recommendation, the indemnification and/or contribution claims would need to be addressed." *Id.* at *3. Thus, the district court did not discuss its reasoning for its dismissal of the Trustee's indemnity and contribution claim in its April 6th order because there was no need for it to do so. *See* Fed. R. Bankr.P. 9033(b), (d); *Peretz*, 501 U.S. at 939, 111 S.Ct. 2661; *Thomas*, 474 U.S. at 150, 106 S.Ct. 466; *In re Ragar*, 3 F.3d at 1177–78; *Davet*, 973 F.2d at 30–31; *Hagan*, 2008 WL 4722747, at *1.

Second, the Trustee's indemnity and contribution claim has not accrued and thus was premature because "[t]he Trustee has no basis to recover contribution or indemnity from Dorsey until [M & S's liability to Bremer] has been proven." *In re SRC Holding Corp.*, 2007 WL 1464385, at *1; *see E.S.P., Inc. v. Midway Nat'l Bank of St. Paul*, 447 N.W.2d 882, 885 (Minn.1989) ("Although under the Uniform Commercial Code Midway is entitled to be indemnified for any loss it sustains, its claim for indemnification does not ripen until it has sustained a loss—here, when it is compelled to pay E. S.P., Inc. The contingency giving rise to the indemnity claim does not occur until loss is experienced by the indemnitee."); *Calder v. City of Crystal*, 318 N.W.2d 838, 841 (Minn.1982) (providing that a claim for contribution or indemnity generally does not arise until payment is made); *Bunce v. A.P.I., Inc.*, 696 N.W.2d 852, 857 (Minn.App.2005) ("It is settled law that a claim for contribution does not accrue or mature until the person entitled to the contribution has sustained damage by paying more than his fair share of the joint obligation."). The district court explained that, while Bremer had filed claims in the M & S Chapter 11 bankruptcy case, "[n]o court has tried the issues of [M & S's] liability to Bremer and Dorsey's liability for contribution and indemnity to the Trustee." *In re SRC Holding Corp.*, 2007 WL 1464385, at * 1. Further, with respect to Bremer's claim against M & S, the precursor for liability on Dorsey's part to M & S, the district court observed that "[M & S's] liability was not fixed by the filing of the proofs of claims" because "[t]he Trustee has not waived any right to object on any basis to Bremer's proofs of claims and deny liability. In fact, the Trustee can still object to Bremer's proofs of claims, which may result in litigation over the substantiation of [M & S's] underlying liability." *Id.* at *3.

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Therefore, contrary to the dissent's suggestion that, if this appeal were dismissed for lack of jurisdiction, the district court would take some further action with respect to the Trustee's indemnity and contribution claim, the district court has ended its handling of the claim:

> The Court notes that Bremer's initial action against [M & S's] filed in bankruptcy court is currently stayed. It is the belief of this Court that the bankruptcy court may choose to lift the stay and litigate [M & S's] liability to Bremer in that case, litigate the issue based on any objection filed contesting Bremer's proofs of claims, or consolidate the two matters and litigate the issue. Either way, [M & S's] liability is not properly before this Court at this time, and therefore, the Court refrains from making any findings as to such liability.

Id. at *3 n. 4.

In sum, the district court accepted the bankruptcy court's recommendation that the indemnity and contribution claim be dismissed, without discussion, because none of the parties objected to the recommendation.***623** In denying Bremer's Rule 59(e) motion, the district court further explained that, even if Bremer and the Trustee had not waived their right to review of the indemnity and contribution claim, the claim was properly dismissed because it was premature in that the Trustee had no basis to recover contribution or indemnity from Dorsey where M & S's liability to Bremer had not been proven. Accordingly, if we were to dismiss this appeal for lack of jurisdiction, the district court would do nothing with regard to the Trustee's indemnity and contribution claim because it has nothing left to do. It has dismissed the claim, and the federal courts await the possible future filing of an action by the Trustee against Dorsey for contribution and indemnity once that cause of action accrues, if ever, by the legal recognition of the liability of the bankruptcy estate to Bremer. Therefore, because the district court's judgment in this matter is a final order in that it ended the Bremer litigation on the merits and leaves nothing more for the district court to do but execute the judgment, we possess jurisdiction over this appeal. *See* *Alpine Glass*, 531 F.3d at 681.

VI.

Between the time of the district court's decision and oral argument in this case, the Minnesota Supreme Court decided *McIntosh II*. 745 N.W.2d 538. The plaintiffs in *McIntosh II* were 31 banks that bought participation interests in the St. Regis loans from M & S. *Id.* at 542. After the bankruptcy court dismissed their cases for jurisdictional reasons, they filed an action against Dorsey in the Hennepin County, Minnesota district court. *Id.* at 544. They alleged claims of legal malpractice, negligent misrepresentation, breach of contract, and breach of fiduciary duty. *Id.* The banks voluntarily dismissed the breach of fiduciary duty claim. *Id.*

The trial court granted Dorsey's motion for summary judgment as to the remaining three claims. *Id.* On appeal, the Minnesota Court of Appeals affirmed the decision on the negligent misrepresentation claim and part of the legal malpractice claim. *McIntosh I*, 726 N.W.2d 108, 118–20 (Minn.App.2007). The Court of Appeals reversed summary judgment on the malpractice and breach of contract claims on the theories that the banks were third-party beneficiaries of Dorsey's representation of M & S and that the banks had an implied contract with M & S. *Id.* at 114–19. The Minnesota Supreme Court agreed to review the *McIntosh I* decision. *See* *McIntosh II*, 745 N.W.2d at 538.

[3] The Minnesota Supreme Court reversed the Court of Appeals in part, holding that the trial court appropriately granted summary judgment in Dorsey's favor on the third-party beneficiary and implied contract theories. *Id.* at 545–49. The Court began by reiterating the general rule that, absent fraud or another improper motive, "an attorney is liable for professional negligence only to a person with whom he has an attorney-client relationship. If an attorney were to owe a duty to a nonclient, it could result in potential ethical conflicts for the attorney...." *Id.* at 545 (citation omitted). In Minnesota, a lawyer can only be found to have a duty to a third party who is a direct and intended beneficiary of the lawyer's services. *Id.* at 547.

Elaborating on the meaning of "direct and intended beneficiary," the Court held that the transaction must have "as a central purpose an effect on the third party and the effect [must be] intended as a purpose of the transaction." *Id.* at 547. Further, the lawyer must be aware of the client's intent to benefit the

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third party. *McIntosh II*, 745 N.W.2d at 548. The Court said that this requirement reduced ***624** the risk of lawyers "dampening their zealous advocacy on behalf of clients, for fear of harming a third party to whom a duty might later be found to be owed." *Id.*

Finding the situation of the bank participants "far from the will-drafting context in which the third-party beneficiary theory was first developed," the Court concluded that the banks "were not direct and intended beneficiaries of the attorney-client relationship between M & S and Dorsey." *Id.* In the Court's opinion, the purpose of Dorsey's legal work was not to benefit the banks, but to close the St. Regis loans. *Id.* Even if Dorsey was aware of M & S's participation model and M & S expected Dorsey's work to benefit the banks, the Court held, to incur liability Dorsey would need to be aware that the banks were the intended beneficiaries of its services. *Id.*

The Court concluded that the record before it did not indicate that Dorsey was aware of that intent. *McIntosh II*, 745 N.W.2d at 548. Although M & S asked Dorsey for some advice in revising the Participation Agreement, the Court found:

> [T]here is no indication that this advice was more than an incidental part of Dorsey's representation. The names of the Bank Participants were not included in any of the instruments Dorsey drafted. No Bank Participant met with Dorsey attorneys prior to or at closing. There was no communication between the Bank Participants and Dorsey before or at closing.

Id. Having quoted significant portions of the Participation Agreement, the Court noted that the banks had acknowledged that they bought the participations based on their own independent evaluations of the loans. *Id.* at 542, 548.

Rather than considering them third-party beneficiaries of Dorsey's legal work in the St. Regis transactions, the Court suggested that the banks' "only relationship to the proposed transaction was that of parties with whom [Dorsey's] clients might negotiate a bargain at arm's length." *Id.* at 548 (*quoting Goodman v. Kennedy*, 18 Cal.3d 335, 134 Cal.Rptr. 375, 556 P.2d 737, 743 (1976)). It held that the record was "not sufficiently probative of a third-party beneficiary relationship to allow reasonable persons to draw different conclusions." *Id.* at 548–49.

Both Dorsey and Bremer have advised us of the *McIntosh II* decision. See Fed. R.App. P. 28(j). Dorsey argues that it supports reversal of Bremer's judgment against it; Bremer contends that the record before us is different from the one before the Minnesota Supreme Court in *McIntosh II*.

VII.

[4] Both the Minnesota Supreme Court's core holding and its suggestion that the relationship between M & S and the participating banks was an "arm's length" dealing contrast mightily with the analyses of the bankruptcy and district courts. In a footnote, the district court asserted that "Miller & Schroeder had loyalties to both President and to the bank lender/participants, whose interests were not necessarily aligned. And through Miller & Schroeder's acquiescence with President's push for closing, Miller & Schroeder evidenced that its loyalties to President prevailed." This statement by the district court implies that M & S owed a duty of care and loyalty to the bank participants even before they advanced funds to participate in the loans.

In *McIntosh II*, the Minnesota Supreme Court quoted key parts of the Participation Agreement and emphasized the participants' independent evaluation of the loans without reliance on M & S. *Id.* at 542, 548. But when the district court ***625** quoted the language of the Participation Agreement, it expressed its doubt as to the language's efficacy:

> While the disclaimers in the Participation Agreement play no part in the Court's determination as to Bremer's standing, the Court notes that it would have no difficulty finding that these disclaimers do not protect Miller & Schroeder from the bank lender/participants' claims, as the Court seriously questions whether Miller & Schroeder, acting as a dual agent with conflicting loyalties, acted in good faith or exercised reasonable judgment.

The Minnesota Supreme Court took the disclaimers as evidence that the banks were not intended beneficiaries of Dorsey's work.

Whereas the Minnesota Supreme Court was unwilling to hold Dorsey liable to the loan participants, the bankruptcy court concluded as a matter of public

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policy that Dorsey should be held liable:

> [I]f Dorsey can escape liability for activities that constitute malpractice in this situation on a standing defense, the integrity of these types of commercial transactions are at risk.... It cannot be sued for malpractice by the loan participants because they do not have standing; it cannot be sued by Miller & Schroeder because Miller & Schroeder has no damages.

There was obviously a broad discrepancy between how the courts below characterized the loan participation relationship between M & S and Bremer and how the Minnesota Supreme Court viewed the matter. As we seek to decide this case in the same manner as would the latter Court, we must investigate this relationship further.

Loan participations are "ostensibly simple devices that in fact are highly complex." Patrick J. Ledwidge, *Loan Participation Among Commercial Banks*, 51 Tenn. L.Rev. 519, 519 (1984). Commentators have cited several problems with participation agreements, in that they create an unbalanced power relationship in which the loan participant is at the mercy of the lead lender. *See* W.H. Knight, Jr., *Loan Participation Agreements: Catching Up With Contract Law*, 1987 Colum. Bus. L.Rev. 587, 629–30; Ledwidge, *supra*, at 526–27 (noting that there is no fiduciary relationship between lead lender and participant). "[T]he hidden dangers in participation agreements ... usually come to light after lead lender failure." Lori Laughlin Dalton, Comment, *Lead Lender Failure and the Pitfalls for the Unwitting Participant*, 42 Sw. L.J. 1071, 1071–72 (1989). Based on a belief that financial institutions have the resources to adequately protect their own interests, courts have typically dismissed bank requests for judicial protection in participated loan transactions. Knight, *supra*, at 587–88.

We have taken part in the trend against granting protection to participating banks. In *Union National Bank of Little Rock v. Farmers Bank*, we held that a loan participation is not a security under the Securities Exchange Act of 1934. 786 F.2d 881, 884–85 (8th Cir.1986). Even though the lead bank sold a 100% interest in the loan to the participating bank, under Arkansas law we decided that the lead bank had "no affirmative duty to disclose material information about the participation." *Id.* at 887. We characterized the participation as "an arms-length transaction." *Union Nat'l Bank*, 786 F.2d at 887. Our decision was an illustration of the principle that "participants are held to marketplace standards of vigilance and independent inspections. Therefore, banks should conduct independent and prudent evaluations of loans offered for participation." ***626***Bank of Chicago v. Park Nat'l Bank*, 266 Ill.App.3d 890, 203 Ill.Dec. 915, 640 N.E.2d 1288, 1297 (1994) (citations omitted).

A leading case on the nature of loan participation agreements is *First Bank of WaKeeney v. Peoples State Bank*, 12 Kan.App.2d 788, 758 P.2d 236 (1988). The court there held that "[t]he rights of the participant bank flow not from the participation relationship itself but from the express terms of the specific agreement." *Id.* at 238. The agreement does not give rise to a fiduciary relationship, but rather is an "arms-length contract." *See id.* at 240 (*quoting In re Colocotronis Tanker Sec. Litig.*, 449 F.Supp. 828, 833 (S.D.N.Y.1978)); *see also Hibernia Nat'l Bank v. FDIC*, 733 F.2d 1403, 1408 (10th Cir.1984); *N. Trust Co. v. FDIC*, 619 F.Supp. 1340, 1344–45 (W.D.Okla.1985). The Minnesota Court of Appeals cited the *First Bank* decision with approval when addressing the construction of a participation agreement. *See Olson v. Citizens State Bank of Montgomery*, No. C6–93–455, 1993 WL 366699, *1, *2 n. 1, 1993 Minn.App. LEXIS 949, *4, *7 n. 1 (Minn.Ct.App. Sept.21, 1993) (unpublished). An unpublished decision of the Minnesota Court of Appeals, however, is not precedential. Minn.Stat. Ann. § 480A.08, subd. 3(c) (West 2002).

Although the Minnesota Supreme Court has not directly addressed the nature of a participating bank's rights under a participation agreement, in *McIntosh II* it described the participation as an "arm's length" dealing and emphasized the participants' duty to rely on their own independent evaluation of the loans. *Id.* at 548. The Court's emphasis on the terms of the Participation Agreement convinces us that its view of these transactions is consistent with the commonly accepted understanding. As such, we predict that Minnesota law would hold Bremer to the marketplace standards of vigilance and independent inspection, and not grant it any protection beyond the express terms of the Participation Agreement.

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VIII.

[5] Turning to the district court's decision in the Bremer action, we review its factual findings for clear error and its conclusions of law de novo. *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314 (8th Cir.1991); *see* Part II, *supra*. As discussed in Part II, above, we may set aside factual findings that are derived from erroneous legal assumptions. *See id.* The district court found that Bremer had standing to sue Dorsey for malpractice based on a direct attorney-client relationship formed in June of 2000 when Dorsey began work on the President litigation. Bremer argues that it had standing to sue for malpractice that occurred when the loan was closed; Dorsey argues that Bremer never had standing.

McIntosh II controls the question of Bremer's standing to sue for malpractice committed during the closing of the loan. When Bremer bought a participation interest in the St. Regis II loan, it did so "in reliance not on M & S but on [its] own independent evaluation of the loan[ ]." *McIntosh II*, 745 N.W.2d at 548. It did not advance the funds to purchase the loan until more than a month after it closed; it did not execute the Participation Agreement until more than two months later. Bremer has not shown how the record before us is different than the record that led the Minnesota Supreme Court to hold that no reasonable person could conclude that there was a third-party beneficiary relationship. *Id.* at 548–49.

We now turn to whether Bremer had standing to sue Dorsey for legal malpractice or breach of contract as of June 2000 when Dorsey began work on the President litigation. The district court found that Dorsey represented the participants' interests***627** in the President litigation, not the interests of M & S, which had drafted the Participation Agreement to limit its own liability. It inferred that M & S was Dorsey's client only in its capacity as agent for the participants, lending further support for its conclusion that M & S retained Dorsey on the participants' behalf. We think the district court erred in discounting the import of the Participation Agreement between M & S and Bremer.

Based on our understanding of the relationships created by the Participation Agreement, we do not believe that Bremer's relationship with M & S at any time granted it standing to sue Dorsey for legal malpractice or breach of contract. A participating bank's only relationship is with the lead bank; the participant cannot look to the borrower for satisfaction of the debt. *In re AutoStyle Plastics, Inc.*, 269 F.3d 726, 736 (6th Cir.2001); *Hibernia Nat'l Bank*, 733 F.2d at 1407; *FDIC v. Adams*, 187 Ariz. 585, 931 P.2d 1095, 1104 (Ct.App.1996); *First Nat'l Bank of Belleville v. Clay–Hensley Comm'n Co. (Belleville)*, 170 Ill.App.3d 898, 121 Ill.Dec. 411, 525 N.E.2d 217, 222 (1988); *First Bank*, 758 P.2d at 238. As a matter of law, none of the loan participants had standing to be a party in the President litigation; only M & S could sue President on the promissory note. It follows that only M & S was Dorsey's client in the President litigation.

As defined by the Participation Agreement, the relationship between M & S and Bremer was that of "a seller and purchaser of a property interest." This relationship was not so close that Dorsey's representation of M & S could be imputed to Bremer. The Agreement obligated Bremer to pay M & S's attorneys' fees in proportion to its participation in the loan. M & S could only be liable to Bremer for breach of the Participation Agreement if it failed to use good faith or reasonable care in selection of litigation counsel or breached its overall duty to protect Bremer's interests "in accordance with the customary policies and procedures under which it administers loans for its own account." This standard of care is lower than what is ordinarily imposed on fiduciaries and may only expose the lead lender to liability for bad faith or possibly gross neglect. *See First Citizens Fed. Sav. & Loan Ass'n v. Worthen Bank & Trust Co.*, 919 F.2d 510, 514 (9th Cir.1990); *Belleville*, 121 Ill.Dec. 411, 525 N.E.2d at 222. Due to the arm's-length nature of the contractual relationship between M & S and Bremer, M & S could administer the loan with its own interests at heart.

Dorsey's client in the President litigation was M & S. It owed M & S, not the loan participants, the duties of confidentiality, loyalty, and care that attend the attorney-client relationship. Keeping in mind "the potential ethical conflicts" that might result "[i]f an attorney were to owe a duty to a nonclient," *McIntosh II*, 745 N.W.2d at 545, we believe that Dorsey did not owe Bremer a duty to disclose potential problems with the St. Regis loan closings. Dorsey was bound to protect the interests of its client M & S, to the derogation of the participants if necessary. Bremer's claim

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for legal malpractice should have been dismissed.

Furthermore, the district court's theory as to causation strikes us as illogical. The court's finding was that Bremer wasted its money funding the President litigation rather than pursuing a malpractice claim against Dorsey. The district court found, however, Bremer had no standing to pursue a malpractice action for the alleged negligence in the closing of the St. Regis II loans. To prove damages in a legal malpractice case, a client must prove that but for the lawyer's conduct, the client would have obtained a more favorable result.***628** *Jerry's Enterprises, Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 819 (Minn.2006). Supposing it had standing to sue Dorsey for malpractice in June of 2000, Bremer could not collect damages for negligence that allegedly occurred prior to the attorney-client relationship. Consequently, Bremer could not have satisfied the causation element even if it was Dorsey's client in June of 2000.

IX.

[6] Our decision in the Bremer action foreshadows our decision in the Trustee action. In bankruptcy matters we are a second court of review; we apply the same standards as the district court, reviewing the bankruptcy court's factual findings for clear error and its legal conclusions de novo. *In re M & S Grading, Inc.*, 526 F.3d at 367. Once again, we may overturn any factual findings that are the result of the application of an erroneous legal standard. *Shull*, 561 F.2d at 155; *see* Part II, *supra.*

The bankruptcy court found that Dorsey breached its fiduciary duty of loyalty by representing M & S in Bremer's state-court lawsuit when Bremer was a current client. It also found that Dorsey breached its fiduciary duties of loyalty and full disclosure by failing to disclose that it may have committed malpractice by closing the St. Regis II loan without NIGC approval. In the bankruptcy court's opinion, Dorsey's representation of M & S in the President litigation and in Bremer's state-court lawsuit was materially limited by Dorsey's own interest in avoiding liability for malpractice in closing the St. Regis loans. It further found that the conflicts of interest were blatant, in bad faith, and with fraudulent or ill intent.

[7] We have already determined that Bremer was at no time Dorsey's client or a third-party beneficiary of Dorsey's services. Hence there were no conflicting loyalties. The bankruptcy court erred as a matter of law in finding that Dorsey breached its fiduciary duty to M & S by representing it in Bremer's state-court lawsuit. We therefore reverse that aspect of its decision and turn to whether Dorsey breached its fiduciary duty by failing to inform M & S that it may have committed malpractice in the St. Regis closings.

Relying in part on the testimony of the Trustee's expert, Professor Neil Hamilton, the bankruptcy court found that Dorsey's duty to disclose a potential malpractice claim arose from its ethical and professional obligations. First, it discussed the duty to avoid conflicts of interest. *See* Minn. R. Prof. Conduct 1.7(b). Second, it discussed the duty to keep the client sufficiently informed to permit the client to make informed decisions. *See* Minn. R. Prof. Conduct 1.4. The court then observed that the Rules of Professional Conduct "do not require a client to prove that a conflict actually affects the eventual representation; but in this case, it surely did."

We believe the bankruptcy court erred by relying too heavily on the Minnesota Rules of Professional Conduct. Demonstrating that an ethics rule has been violated, by itself, does not give rise to a cause of action against the lawyer and does not give rise to a presumption that a legal duty has been breached. Minn. R. Prof. Conduct, Scope; *Carlson v. Fredrikson & Byron, P.A.*, 475 N.W.2d 882, 889 (Minn.Ct.App.1991), *overruled on other grounds by Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 410 (Minn.1994). The Rules may, however, "be evidence of breach of the applicable standard of conduct." Minn. R. Prof. Conduct, Scope. "There is a distinction between a disclosure of an ethical concern and the existence of a cause of action." 3 Ronald E. Mallen & ***629** Jeffrey M. Smith, *Legal Malpractice* § 24:5 at 543 (2008 ed.).

Unlike in the ethics context, there is "relatively little case law directly on point—and none in Minnesota" that addresses the lawyer's common-law duty to confess a potential malpractice claim to his client. *See* Charles E. Lundberg, [FN8] *Self–Reporting Malpractice or Ethics Problems*, 60 Bench & B. Minn. 24, 24 (Sept.2003). A lawyer's common-law duty to disclose a possible malpractice claim that his client may have against him is a "corollary of the fiduciary

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obligations of undivided loyalty and confidentiality" the lawyer owes to his client. 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 15:22 at 783 (2008 ed.). Just as the bankruptcy court discussed in the context of a lawyer's ethical standards, there are two aspects of this legal duty. First, the client is entitled to know of any fact that may limit the lawyer's ability to comply with the fiduciary obligations. *Id.* Second, the client is entitled to be informed of any acts or events over which it has control. *Id.* By definition, only the first aspect of this duty implicates the lawyer's fiduciary obligations to his client; the second arises from the lawyer's professional standards.

> FN8. Mr. Lundberg was Dorsey's expert witness in this case. The bankruptcy court agreed that there were no Minnesota decisions directly on point.

A classic example of a duty to advise a client of potential malpractice is a lawyer who fails to file a lawsuit for a client within the limitations period. *See* Restatement (Third) of The Law Governing Lawyers § 20, cmt. c (2000). The Restatement classifies this duty as part of the duty to keep the client reasonably informed, but mentions "the resulting conflict of interest that *may require* the lawyer to withdraw." *Id.* (emphasis added). Withdrawal is only called for if there is a conflict of interest such that "there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's" own interests. *Id.* §§ 121, 125. "Disclosure should be made if the failure to do so could reasonably be expected to prejudice the client's continued representation." 3 Mallen & Smith, *supra*, § 24:5 at 545.

We predict that the Minnesota Supreme Court would not hold a lawyer liable for failure to disclose a possible malpractice claim unless the potential claim creates a conflict of interest that would disqualify the lawyer from representing the client. *See Carlson*, 475 N.W.2d at 889–90 (proposing a similar standard for a lawyer's failure to disclose a conflict related to representation of another client). "When the lawyer's interest in nondisclosure conflicts with the client's interest in the representation, then a fiduciary duty of disclosure is implicated." 3 Mallen & Smith, *supra*, § 24:5 at 543 ("[T]here is no civil cause of action for a lawyer's failure to confess legal malpractice, which consists simply of nondisclosure of prior negligent conduct, unless there was an independent tort or risk of additional injury."). Thus, the lawyer must know that there is a non-frivolous malpractice claim against him such that "there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by" his own interest in avoiding malpractice liability. *See* Restatement (Third) of the Law Governing Lawyers §§ 121, 125.

[8] Negligent legal advice does not give rise to a claim for legal malpractice until the client suffers damages as a result. *See Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 116 (Minn.1992) ("There may be errors made by attorneys which do not constitute malpractice as a matter of law but are errors in judgment."); ***630***Vesely, Otto, Miller & Keefe v. Blake*, 311 N.W.2d 3, 5 (Minn.1981). It follows that a lawyer's duty to disclose his own errors must somehow be connected to a possibility that the client might be harmed by the error. For a fiduciary duty to be implicated, the lawyer's own interests in avoiding liability must conflict with those of the client. A lawyer may act in the client's interests to prevent the error from harming the client without breaching a fiduciary duty.

We do not believe that Dorsey's representation of M & S in the President litigation was a breach of fiduciary duty. According to the bankruptcy court, Dorsey breached the standard of care by closing the St. Regis loans without first obtaining NIGC approval. The court found that if M & S had known of the risks that the loans could be voided, it would not have closed the loans. But M & S could only be damaged if President defaulted on the loans and the documents proved to be unenforceable. Dorsey's work on the President litigation was part of its legitimate efforts to prevent its possible error in judgment from harming M & S; there was not a substantial risk that Dorsey's interests were adverse to those of M & S.

Neither do we believe that Dorsey's representation of M & S in Bremer's state-court action was a breach of fiduciary duty. In that action, Bremer accused M & S of fraud, negligent misrepresentation, and breach of contract based on allegations that M & S misrepresented the enforceability of the Pledge Agreement. Reasonable or justifiable reliance is an element of both fraud and negligent misrepresenta-

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tion. *See* *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 747 (Minn.2000) (fraud); *McIntosh I*, 726 N.W.2d at 120 (negligent misrepresentation); *Flynn v. Am. Home Prods. Corp.*, 627 N.W.2d 342, 350–51 (Minn.Ct.App.2001) (negligent misrepresentation). The still-binding portion of the Minnesota Court of Appeals's decision in *McIntosh I*, however, demonstrates that the language of the Participation Agreement effectively negates the justifiability of Bremer's reliance on M & S's or Dorsey's representations:

> Because the participation agreement specifically required [the participants] to affirm that they had made "an independent and informed judgment with respect to the Collateral, Borrower and Obligor and their credit and the desirability of purchasing an undivided interest in the Loan" and to acknowledge that [M & S] made no warranty or representation regarding the enforceability of any loan documents, [the participants'] reliance on Dorsey's advice, as communicated through [M & S], was not justifiable.

726 N.W.2d at 120. Once again, due to the arm's-length nature of the participation relationship between M & S and Bremer, there was not a substantial risk that Dorsey's representation of M & S in Bremer's state-court action was materially and adversely limited by Dorsey's own interests.

There were advantages and disadvantages to Dorsey representing M & S through both the closing of the St. Regis transactions and the litigation that arose from those transactions. On one hand, Dorsey was intimately aware of all the facts related to the litigation, and the law that controlled the enforceability of the loan documents. On the other hand, there was the potential that Dorsey's lawyers could be called as fact witnesses, and the hazard that "[i]t is far too easy to make the legal advisor a scapegoat for a variety of business misjudgments...." *See* *Viner v. Sweet*, 30 Cal.4th 1232, 135 Cal.Rptr.2d 629, 70 P.3d 1046, 1052 (2003). Despite the troubles that accompanied the St. Regis loans, the Participation Agreement assigned the risk of those troubles ***631** to Bremer, not M & S or its lawyer. Our independent review of the record in light of the controlling *McIntosh* decisions leads us to conclude that Dorsey is not liable under Minnesota law.

X.

In summary, we reverse the decisions of the bankruptcy court in the Trustee's case and the district court in Bremer's case. The decision of the Minnesota Supreme Court persuades us that it would hold loan participants such as Bremer to the marketplace standards of vigilance and independent inspection, such that its relationship with the lead lender is limited to the express terms of the participation agreement. Due to the arm's-length nature of that relationship, Bremer's relationship with the lead lender M & S did not grant it standing to sue M & S's lawyer Dorsey for legal malpractice or breach of contract. Furthermore, even if Bremer had standing to sue Dorsey, it could not collect damages for negligence that allegedly occurred before it obtained standing.

Because Bremer was not Dorsey's client, Dorsey did not breach its fiduciary duty to M & S by representing it in Bremer's state-court lawsuit. We also predict that the Minnesota Supreme Court would not hold a lawyer liable for failure to disclose a possible malpractice claim unless the potential claim creates a conflict of interest that would disqualify the lawyer from representing the client. The lawyer may act in the client's interests to prevent an error in judgment from harming the client without breaching a fiduciary duty. We conclude, based on the language of the participation agreement, that there was not a substantial risk that Dorsey's representation of M & S in Bremer's state-court action was materially and adversely limited by Dorsey's own interests. Hence there was no breach of fiduciary duty.

Our decisions are a result of controlling law from the opinions by the Minnesota Supreme Court and Court of Appeals, the inferences we have drawn from the Minnesota opinions, and our duty to correctly ascertain and apply Minnesota law.

XI.

The judgments against Dorsey & Whitney LLP are reversed. The cross-appeal of Bremer Business Finance Corporation is dismissed as moot. We instruct the district court to enter a judgment in Dorsey's favor in the actions of both Bremer and the Trustee.

COLLOTON, Circuit Judge, dissenting.

The appellant, Dorsey & Whitney, LLP, invokes our jurisdiction under 28 U.S.C. § 1291, which au-

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thorizes review of "final decisions" of the district courts, including those arising in bankruptcy. *See Conn. Nat. Bank v. Germain*, 503 U.S. 249, 252–53, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). We are obliged to consider jurisdictional issues *sua sponte*, even if they are conceded or unnoticed by the parties. *Thomas v. Basham*, 931 F.2d 521, 523 (8th Cir.1991). A party may not take an appeal under § 1291 until there has been a decision by the district court that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (internal quotations omitted). A decision that adjudicates fewer than all of the claims, or the rights and liabilities of fewer than all the parties, is not a final decision from which an appeal may be taken under § 1291. *In re Russell*, 957 F.2d 534, 535 (8th Cir.1992); *Bullock v. Baptist Mem. Hosp.*, 817 F.2d 58, 59 (8th Cir.1987); *see also* ***632**Fed.R.Civ.P. 54(b). [FN9] Having reviewed the complex history of this case, I conclude that the district court has not resolved all the claims in the consolidated adversary complaints, and that the appeal must therefore be dismissed for lack of jurisdiction.

FN9. Although we have said that a more flexible standard of finality applies to bankruptcy appeals under 28 U.S.C. § 158(d), *e.g.*, *In re Woods Farmers Coop. Elevator Co.*, 983 F.2d 125, 127 (8th Cir.1993), the appellant here invokes only 28 U.S.C. § 1291, and we have suggested that finality principles under § 1291 do not vary between the bankruptcy context and other civil appeals. *See In re Flight Transp. Corp. Sec. Litig.*, 874 F.2d 576, 580 (8th Cir.1989) (citing *In re Haw. Corp.*, 796 F.2d 1139, 1141 (9th Cir.1986)). Portions of the district court's decision on each of the adversary complaints arose through a report and recommendation from the bankruptcy court under 28 U.S.C. § 157(c)(1), rather than as an appeal pursuant to § 158(a), so § 158(d) cannot supply appellate jurisdiction over the entire case. *See Flight Transp. Corp.*, 874 F.2d at 580. And even where more flexible finality standards are applied under § 158(d), an order that disposes of fewer than all of the claims or parties in an adversary bankruptcy proceeding is not a final decision that may be appealed. *See In re Boca Arena, Inc.*, 184 F.3d 1285, 1286–87 (11th Cir.1999); Fed. R. Bankr.P. 7054(a).

This case began with the filing of two adversary complaints in the bankruptcy court. One complaint was filed by the Trustee, Brian F. Leonard, on behalf of Miller & Schroeder's bankruptcy estate, against Dorsey. It has been labeled the Trustee complaint. The second complaint was filed by Bremer Business Finance Corporation, joined by the Trustee, also against Dorsey. It has been called the Bremer complaint. As the majority explains, the Bremer complaint included a claim by the Trustee "for indemnity and contribution against Dorsey to offset any monies that Bremer might recover in its claims against the estate." *Ante*, at 611; Dorsey App. A–99. This claim has not been adjudicated by the district court.

The bankruptcy court first addressed the Trustee's claim for indemnity and contribution in its decision of August 28, 2006. *In re SRC Holding Corp.*, 352 B.R. 103 (Bankr.D.Minn.2006). After concluding earlier in its opinion that Bremer could recover directly from Dorsey for legal malpractice based on Dorsey's conduct prior to the closing of the St. Regis II loan, the bankruptcy court declared that the Trustee's claim for indemnity and contribution from Dorsey was moot: "[H]aving decided that Bremer may recover directly from Dorsey, probably resulting in the elimination of Bremer's claim against the estate, the Trustee does not require contribution or indemnity from Dorsey making the Trustee's claim moot." 352 B.R. at 182.

When Dorsey objected to the bankruptcy court's report and recommendation, however, the district court concluded that Bremer did not establish a direct attorney-client relationship with Dorsey until after the closing of the loan, and that Bremer could not recover directly from Dorsey based on pre-closing negligence. The district court's order of April 6, 2007, which resolved the objections to the report and recommendation, did not analyze the Trustee's claim for indemnity and contribution. *See In re SRC Holding Corp.*, 364 B.R. 1 (D.Minn.2007). In response to Bremer's motion to alter or amend judgment, however, the district court clarified that "the Trustee's claim for indemnification and/or contribution is no longer moot." *In re SRC Holding Corp.*, No. 06–3962, 2007 WL 1464385, at *1 (D.Minn. May 15, 2007). The district court explained:

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> Although there is no analysis as to the bankruptcy court's recommendation regarding the Trustee's indemnification and/or contribution claim in the Court's opinion, *the Court did not "adopt" the* ****633*** *bankruptcy court's recommendation to dismiss the claim as moot.* The bankruptcy court's conclusions were adopted only "to the extent they [were] not inconsistent" with the Court's Opinion. *Here, the bankruptcy[ ] court's conclusion to dismiss the claim as moot was inconsistent with the Court's Opinion.* The Court found that Bremer was not entitled to recover its investment loss directly from Dorsey, which is contrary to the very basis for the bankruptcy court's recommendation to dismiss the Trustee's indemnity/contribution claim as moot. Therefore, because the Court found the way that it did, *it is implied in the April 6, 2007 Order that the indemnity/contribution claim is no longer moot.*
>
> *Id.* at *4 (emphases added).

The district court's order also made clear that the Trustee's claim for indemnity and contribution was not resolved. The court observed that "the record before the Court is not complete as to the Trustee's claims for indemnification and/or contribution," and that "[n]o court has tried the issues of Miller & Schroeder's liability to Bremer and Dorsey's liability for contribution or indemnity to the Trustee." *Id.* at *1. The court acknowledged that "dicta" in its April 6 order noted "some evidence that would have supported finding Dorsey's liability to Miller & Schroeder (or the Trustee)," but explained that "such liability was not before this Court and this Court did not conclusively decide it." *Id.* The court said that it "simply *did not address the claim* [for indemnity and contribution] because the claim was not properly presented to the Court and the Court *could not address the claim* because the record is not complete to determine the claim." *Id.* at *4 (emphases added). The court thus "decline[d] to address the merits of the Trustee's contribution/indemnification claims." *Id.* at *5.

In summary, the bankruptcy court recommended that the claim for indemnification and contribution be dismissed as moot. The district court's order of April 6, 2007, did not adopt the recommendation to dismiss the claim as moot, but did not otherwise address the claim on the merits. The district court's order of May 15, 2007, denied a motion to alter or amend judgment, and thus left the April 6 order intact. As a result, the Trustee's claim for indemnification and contribution was not dismissed; it is still unresolved and pending in the district court.

The majority acknowledges that the district court did not adopt the bankruptcy court's recommendation to dismiss the claim as moot. Given that Federal Bankruptcy Rule 9033(d) mirrors 28 U.S.C. § 636(b)(1), *ante*, at 619–20, it is clear that the district court had authority to reject the bankruptcy court's recommendation, whether or not Bremer or the Trustee filed a contingent objection. *See Thomas v. Arn*, 474 U.S. 140, 154, 106 S.Ct. 466, 88 L.Ed.2d 435 (1986) ("[W]hile [28 U.S.C. § 636(b)] does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard."); *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir.1991) ("In the absence of timely objection, the district court may review a magistrate's report under any standard it deems appropriate."); *Delgado v. Bowen*, 782 F.2d 79, 81–82 (7th Cir.1986) (per curiam) ("[Section 636(b)(1)] should be read as *permitting* modifications and *de novo* determinations by the district judge at all times but *mandating de novo* determinations when objections are raised."). No amendment or alteration of the district court's April 6 order and judgment was necessary to revive the ***634** claim for indemnity and contribution, because it was "implied in the April 6, 2007 Order that the indemnity/contribution claim is no longer moot." 2007 WL 1464385, at *4.

Although the district court rejected the only basis on which the bankruptcy court recommended dismissal of the indemnity/contribution claim, the majority asserts that the district court nonetheless dismissed the claim "without discussion." *Ante*, at 623. The majority theorizes that the district court "accepted the bankruptcy court's recommendation that the indemnity and contribution claim be dismissed, without discussion, because none of the parties objected to the recommendation." *Id.* The flaw in this analysis is that the bankruptcy court's recommendation to dismiss the claim cannot be separated from the court's rationale for recommending dismissal. The bankruptcy court recommended that the claim be dismissed as moot; the district court declined to adopt

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that recommendation, because it was inconsistent with the district court's opinion. The bankruptcy court did not recommend alternatively that the indemnity/contribution claim be dismissed "without discussion," on the merits, or for any other reason. Once the district court rejected the bankruptcy court's recommendation to dismiss the claim as moot, there was no remaining recommendation of dismissal to be adopted. The district court's adoption of those portions of the bankruptcy court's recommendation that were not inconsistent with the district court's opinion did not silently dismiss the indemnity/contribution claim on grounds never recommended by the bankruptcy court or stated by the district court. *Cf. Lorin Corp. v. Goto & Co.*, 700 F.2d 1202, 1206 (8th Cir.1983) ("It does not follow ... that the absence of objection relieves the district court of its obligation to act judicially, to decide for itself whether the Magistrate's report is correct.").

In its order of May 15, the district court cited the absence of a "contingent objection" by Bremer or the Trustee, and the doctrine of "waiver," to explain why it refused to address the merits of the unresolved claim for indemnity and contribution for the first time on a motion to alter or amend judgment. But this discussion does not establish that the district court *dismissed* the indemnity/contribution claim on April 6, and the May 15 order never states that the claim was dismissed. The court denied Bremer's motion to alter or amend judgment "to the extent Bremer [was] asking [the] Court *to make findings* as to that claim," 2007 WL 1464385, at *1 (emphasis added), citing the fact that neither Bremer nor the Trustee had raised "a contingent objection" asserting that "the indemnification and/or contribution claims would need to be addressed," that is, on the merits. *Id.* at *3. The district court's refusal to address the merits of the claim in that posture, however, does not constitute a dismissal of a claim that the court declared was no longer moot. The court simply denied a motion to alter or amend judgment, and that denial did not function to dismiss a claim that was not previously dismissed by the court's judgment of April 6, 2007.

The majority also contends that the district court "explained that, even if Bremer and the Trustee had not waived their right to review of the indemnity and contribution claim, the claim was properly dismissed because it was premature." *Ante*, at 623. The district court, however, never stated that the indemnity/contribution claim was "dismissed" because it was premature. The court merely referenced the fact that the record was not complete with respect to the indemnity/contribution claim as part of its explanation for declining to ***635** address the merits of the claim at that time. Whether the court *could have* dismissed the claim as premature (or, more likely, certified the April 6 order for immediate appeal under Federal Rule of Civil Procedure 54(b) despite the outstanding claim) is irrelevant to whether the actual decision before us constitutes a final decision for purposes of 28 U.S.C. § 1291.

When a district court adjudicates fewer than all claims in an action, there is no final decision that may be appealed, subject to the exceptions set forth in 28 U.S.C. § 1292, Rule 54(b), and the collateral order doctrine. *Hope v. Klabal*, 457 F.3d 784, 788 (8th Cir.2006). None of these exceptions applies in this case. The appeal does not involve a collateral order or one of the interlocutory orders enumerated in § 1292(a), and the district court has not certified the adjudicated claims for appeal pursuant to § 1292(b) or Rule 54(b). Accordingly, at least Dorsey's appeal with respect to the Bremer complaint must be dismissed for lack of jurisdiction.[FN10]

FN10. Even if there were a final decision, I would respectfully disagree with the majority's conclusion—based on excerpts from two footnotes in the district court's 94–page opinion (one of which expressly states that disclaimers in the Participation Agreement "play no part" in the court's decision about Bremer's standing)—that the holding and analysis in *McIntosh County Bank v. Dorsey & Whitney, LLP (McIntosh II)*, 745 N.W.2d 538 (Minn.2008), "contrast mightily" with the analysis of the district court on the Bremer complaint. *Ante*, at 624. *McIntosh II* held that Dorsey did not represent various bank participants in connection with the loan closing, citing the facts that "there were no communications between the Bank Participants and Dorsey before closing," that "there was no notice to Dorsey that it was expected to represent the Bank Participants," and that "Dorsey was unable to identify the Bank Participants before closing." 745 N.W.2d at 549. In short, "[t]he simple fact that [the banks] would benefit from Dorsey's

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services does not impose contractual liability." *Id.* Consistent with *McIntosh II*, the district court held that Dorsey did not represent Bremer prior to the loan closing, because "the fact that Bremer would benefit from Dorsey's work while Dorsey represented Miller & Schroeder does not, by itself, establish that Bremer was Dorsey's client." 364 B.R. at 28.

> The district court's finding that there was a direct attorney-client relationship between Bremer and Dorsey after June 2000 was based on specific underlying facts, such as a cover letter from Dorsey stating that the firm had been "retained to represent the Loan Participants," a memorandum from a Dorsey attorney addressed to the "loan participants" and stamped "subject to attorney-client privilege," and section 4.8 of the Participation Agreement (not discussed in *McIntosh II*), which authorized Miller & Schroeder to retain counsel to represent Bremer and other loan participants. 364 B.R. at 30–32. The district court did not simply conclude that "Dorsey's representation of M & S could be imputed to Bremer," *ante*, at 627, and *McIntosh II* does not call for reversal of the district court's ruling in favor of Bremer. I express no view on Dorsey's several challenges to this ruling, *see* Appellant's Br. 67–75, which are not addressed by the majority.

Our jurisdiction over Dorsey's appeal with respect to the Trustee complaint depends on whether the two consolidated cases filed in the bankruptcy court became one action for purposes of 28 U.S.C. § 1291 and appellate jurisdiction. On May 11, 2005, the bankruptcy court ordered that the two adversary proceedings involving the Bremer complaint and the Trustee complaint were "consolidated for pretrial and trial purposes only." The circuits vary in their treatment of consolidated cases and appellate jurisdiction. As the D.C. Circuit has summarized: (1) "Some circuits hold that consolidated cases remain separate actions and no Rule 54(b) certification is needed to appeal the dismissal of any one of them;" (2) "Others treat consolidated cases as a single action, or presume that they are, allowing the presumption to be overcome in highly unusual circumstances;" and (3) "Still other ***636** circuits apply no hard and fast rule, but focus on the reasons for the consolidation to determine whether the actions are one or separate." *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216 (D.C.Cir.2003) (internal quotations and citations omitted). If the consolidated cases are treated as one action, then lack of finality with respect to a claim in one of the underlying cases means that there is no appellate jurisdiction over the entire action.

Our circuit falls in the third category of circuits that have no "hard and fast rule" about the treatment of consolidated cases. *Id.* We have said that where cases are consolidated "for the purposes of convenience only," such as where a district court said that consolidation was to "accommodate the convenience of the parties," continued to refer to future filings "in these two suits," and stated that after one complaint was dismissed that there was "still other *related* litigation pending with this same case number," then the presence of an open question in one of the formerly separate suits did not preclude appeal of a final decision in the other suit. *Tri–State Hotels, Inc. v. FDIC*, 79 F.3d 707, 711–12 (8th Cir.1996) (internal quotations omitted); *see also Grain Land Coop v. Kar Kim Farms, Inc.*, 199 F.3d 983, 990 n. 4 (8th Cir.1999) (asserting jurisdiction over final judgment in one of two cases where "it appear[ed] the cases were merged for convenience and efficiency only"). But where two actions are "really consolidated and merged into one," *Mendel v. Prod. Credit Ass'n of the Midlands*, 862 F.2d 180, 182 (8th Cir.1988), or "formally merged for all purposes," *Tri–State Hotels*, 79 F.3d at 711, then all claims in both of the formerly separate cases must be resolved before there is a final decision for purposes of § 1291.

Under the case-by-case approach used by this and several other circuits, I would consider the two underlying adversary actions as one consolidated action for purposes of determining appellate jurisdiction. Although the bankruptcy court implied that the consolidation was somehow limited when it consolidated the cases for "pretrial and trial purposes *only*," the court offered no explanation of what other purpose might exist. Other circuits following the case-by-case approach have held that when two cases are consolidated for discovery and trial, then all claims in both cases must be resolved before the district court's

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decision is final and appealable. *See Alinsky v. United States*, 415 F.3d 639, 642–43 (7th Cir.2005) ("Because the district court consolidated these cases for discovery and trial, we conclude that the sixty-day time period for filing a notice of appeal did not begin to run until a final judgment was entered for all four cases."); *Bergman v. City of Atlantic City*, 860 F.2d 560, 566 (3d Cir.1988) (where cases were consolidated "for all purposes of discovery and trial," an order concluding one of the consolidated cases "should not be considered final and appealable"); *Ivanov–McPhee v. Wash. Nat'l Ins. Co.*, 719 F.2d 927, 929–30 (7th Cir.1983) (dismissing appeal of a district court order that resolved all claims in only one of two consolidated actions, where the district court did not state that cases were consolidated "for all purposes," but the cases were consolidated for both trial and discovery purposes, and the court of appeals could not "discern any purposes of substance for which they retain separate identities"). Unlike *Tri–State Hotels*, where the district court continued to refer to "two suits" after consolidation, the district court here stated, without any suggestion of limitation, that the Bremer case was "consolidated with" the Trustee case, 364 B.R. at 24, and referred to the consolidated matter as "this case" in ***637** the singular. *Id.* at 51. Although the district court maintained separate docket sheets for the two complaints, the judgments entered in the cases were identical, with each setting forth the court's orders regarding both the Bremer complaint and the Trustee complaint. *See Ivanov–McPhee*, 719 F.2d at 929 ("Apart from the maintenance of these separate docket entries, however, we can perceive no purpose for which these actions have not been treated as one."). Under these circumstances, the consolidated cases are best viewed as a single action, and the lack of finality with respect to the Bremer complaint precludes appellate jurisdiction over an appeal with respect to the Trustee complaint as well.

Upholding the finality requirement in this case furthers the congressional policy against premature appeals and piecemeal reviews in at least one specific respect. Dorsey's lead argument in its appeal of the district court's decision on the Trustee complaint is that Dorsey did not commit legal malpractice. (Appellant's Br. 31–44). Because the firm did not commit malpractice, Dorsey contends, the firm had no duty to disclose a potential malpractice claim to Miller & Schroeder, so the district court's finding of liability for failure to make such a disclosure must be reversed. As the district court explained in its discussion of the claim for indemnity and contribution, however, that court has not resolved whether Dorsey committed malpractice. The court emphasized that the record was not complete on this question, that Dorsey's liability for negligence was not before the court, and that the court "did not conclusively decide it." 2007 WL 1464385, at *1. As the issue whether Dorsey committed malpractice remains to be decided with respect to a claim that is still pending in the district court, it would be premature for this court to decide it now. After a final decision on all claims, this court will have the benefit of the district court's findings and conclusions as to whether Dorsey committed malpractice. If the district court were to conclude that Dorsey did not commit malpractice, moreover, then presumably that court could consider in the first instance the argument advanced by Dorsey in this appeal, and reconsider its previous decision, if appropriate.[FN11]

> FN11. I am not persuaded that the Trustee appeal could be resolved on the alternative ground that Dorsey had no duty to disclose a potential malpractice claim, even where such non-disclosure violates the Minnesota ethics rules, as long as the potential claim does not "create[ ] a conflict of interest that would disqualify the lawyer from representing the client." *Ante*, at 629. This argument was not raised by Dorsey in the district court or in this court. *See JCB, Inc. v. Union Planters Bank, NA*, 539 F.3d 862, 875 n. 8 (8th Cir.2008) ("To be reviewable, an issue must be presented in the brief with some specificity.") (internal quotation and citation omitted). That Dorsey did not criticize the bankruptcy court for "relying too heavily on the Minnesota Rules of Professional Conduct," *ante*, at 628, is not surprising, given that Dorsey's own expert, Charles Lundberg, testified that "*[t]he common law rule is the same as the ethics rule*," that "the cases from jurisdictions which have addressed the issue have uniformly held that an attorney has a professional duty to promptly notify a current client of a lawyer's failure to act and of a possible claim that the client may have against him," that a lawyer has a duty to advise a current client of a potential malpractice claim that is substantial and unknown to the client, and that a failure to do so would

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> violate the lawyer's "duty to advise the client about all pertinent matters to his matter." (T. Tr., Feb. 21, 2006, at 62, 107–08, 115–16) (emphasis added); *see* Charles E. Lundberg, *Self–Reporting Malpractice or Ethics Problems*, Bench & Bar of Minn., Sept. 2003, at 24; *see also* *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 212 (Minn.1984) ("The law treats a client's right to an attorney's loyalty as a kind of 'absolute' right in the sense that if the attorney breaches his or her fiduciary duty to the client, the client is deemed injured even if no actual loss results."). It is reasonable to predict that the Supreme Court of Minnesota would regard a client's right to be reasonably informed about a potential malpractice claim in accordance with Rule 1.4 of the Minnesota Rules of Professional Conduct as another "absolute" right of the sort discussed in *Perl*. *See* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 4.7 (3d ed.2001) (observing that the "core rules" of professional conduct, including Rule 1.4 regarding communication, "are all based on principles of fiduciary relationship and loyal service").

***638** For these reasons, I would dismiss the appeal for lack of jurisdiction.

C.A.8 (Minn.),2009.
Leonard v. Dorsey & Whitney LLP
553 F.3d 609, 51 Bankr.Ct.Dec. 13

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Chapter 6B

Ethics

Peter Shepherd
Harrang Long Gary Rudnick PC
Salem, Oregon

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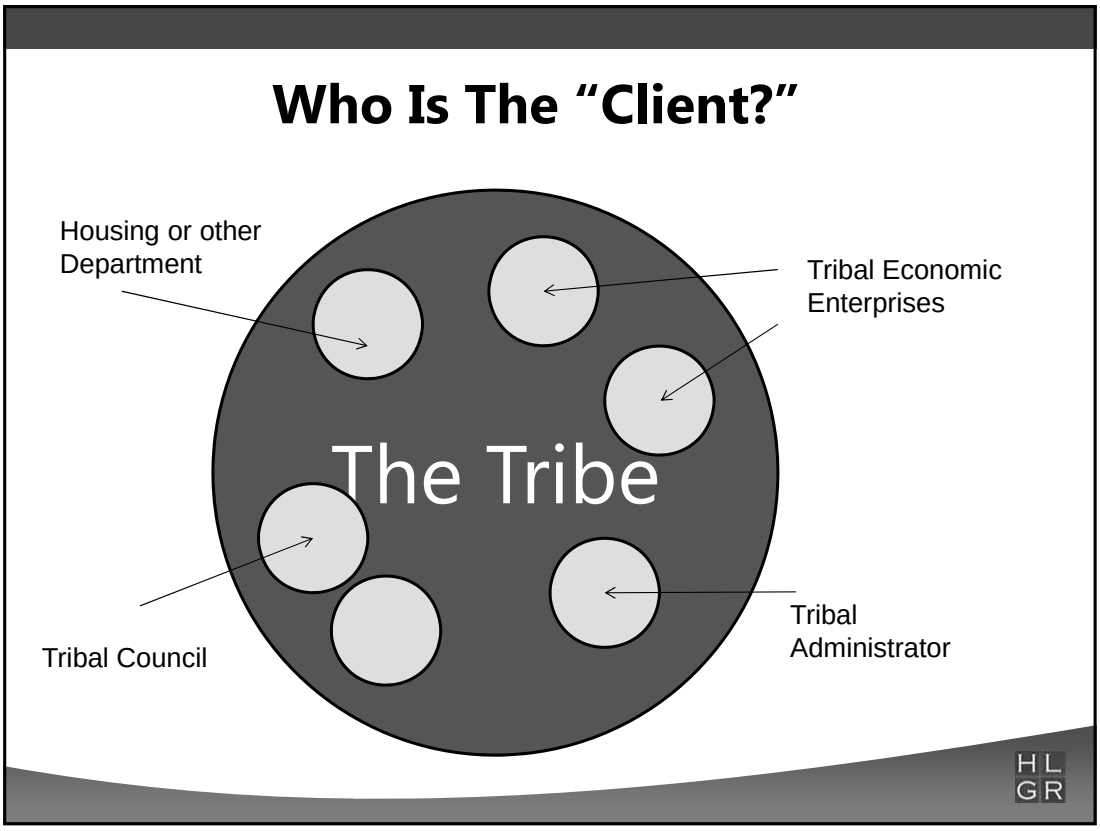
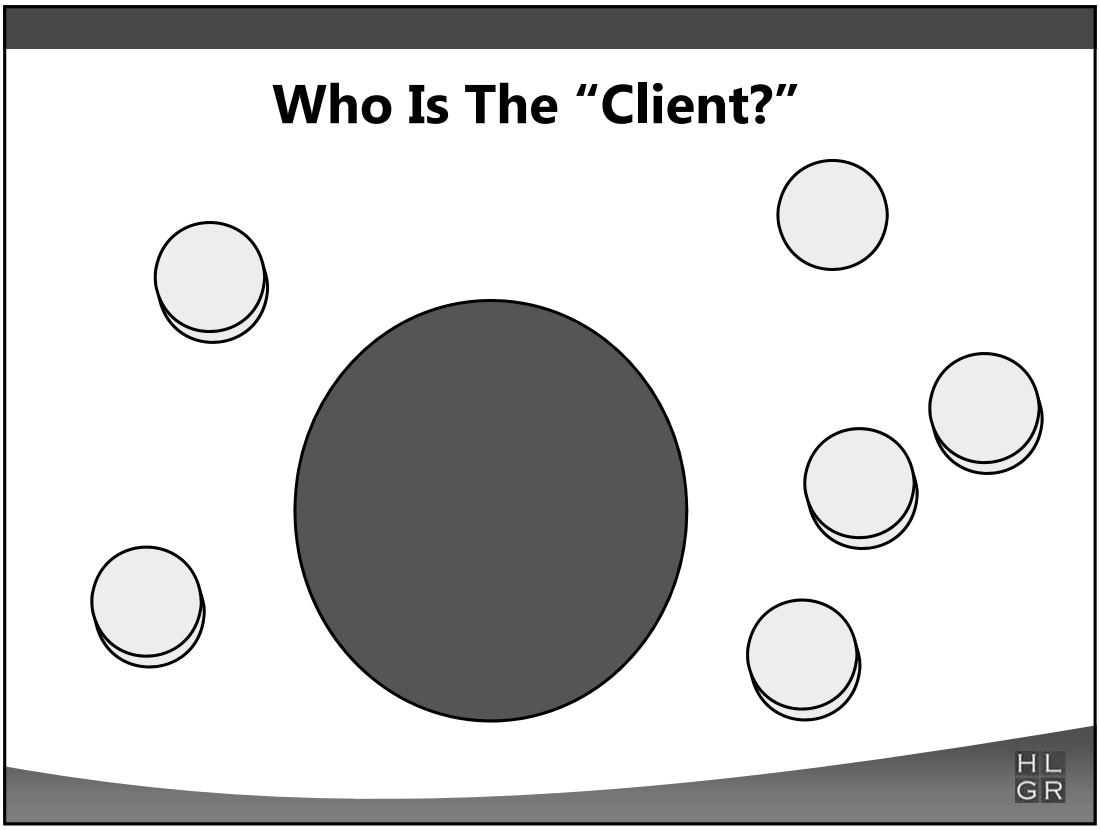
Who Is The "Client?"




Who Is The "Client?"
Housing or other Department
Tribal Economic Enterprises
The Tribe
Tribal Council
Tribal Administrator
HL GR


Who Is The "Client?"
HL GR

Who Is The "Client?"

- The Tribal Government as an organization
- The "general council."
- The "tribal council."
- The chairperson of the tribal council
- The "tribal chief."

Who Is the "Client"?

- The "Tribal Administrator."
- An employee of the Casino alleged in federal court to have committed a tort or to have violated Section 1983

Who Is the "Client"?

- Corporations or LLCs chartered under tribal law
- Federally-chartered corporations, such as those formed under Section 17 of the Indian Reorganization Act
- Partnerships or other joint ventures in which the Tribe is in business with a non-tribal entity or person
- Corporations or LLCs chartered under state law

HL GR

Who Is The "Client"?

- "Client" is a foundation for multiple ORPC.
  - Confidentiality. ORPC 1.6(a). See, ORS 40.255 (1)(a) (Lawyer-client privilege)
  - Current conflicts. ORPC 1.7(a); ORPC 1.8(a)
  - Former clients. ORPC 1.9(a)
  - Special conflict rules for former and current government officers and employees. ORPC 1.11(a)(2)

HL GR

Who Is The "Client"?

- "Client" is a foundation for multiple ORPC . . . continued:
  - Communication with a person represented by counsel. ORPC 4.2
  - Conditional duties imposed on lawyers for "organizations" to explain the "identity of the client" to officers and other "constituents" of the organization. ORPC 1.13(f).

HL GR

COMPETENCE

- ORPC 1.1: "A lawyer shall provide competent representation to a client."
  - "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

HL GR

COMPETENCE

- ORPC 1.16 (a)(1): A lawyer "shall not represent a client * * * if * * * the representation will result in a violation of the" ORPC.
- OSB Ethics Opinion 2011-187 Competency: Disclosure of Metadata ("Competency in relation to metadata requires a lawyer * * * to maintain at least a basic understanding of the technology * * * or to obtain and utilize adequate technology support.")

HL GR

COMPETENCE

- Proposed Amendment to ORPC 1.1:

  If a lawyer does not have sufficient learning and skill when the legal service is undertaken, the lawyer may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer or expert in the subject matter reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

- Bd. Of Bar Governors/House of Delegates, Resolution #4, Friday, November 2, 2012

HL GR

COMPETENCE

- ORS 97.745 (1): "[With exceptions] no person shall willfully remove, mutilate, deface, injure or destroy any cairn, burial, human remains, funerary object, sacred object or object of cultural patrimony of any native Indian."
- ORS 358.920 (1)(a): No one without a permit may "excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on public *or private lands* in Oregon * * * *."
  - Requires notice to Tribe
  - Failure to give notice is a Class B Misdemeanor
  - Corporations can be criminally culpable. *See,* ORS 161.170

HL GR

COMPETENCE

- Assume representation of a corporate housing developer operating on private land
- ORPC 1.13 Organization as Client
  - Lawyer who "knows" that a person "associated with" corporate client "is engaged in a violation of law which reasonably might be imputed to the organization" may have a duty to act, including referral to "the highest authority" within the organization.

HL GR

COMPETENCE

- "Tribunal" includes a legislative body acting in an "adjudicative capacity" under specified substantive and procedural circumstances. ORPC 1.0(p)
- Lawyer shall not knowingly, under specified circumstances, "fail to deliver to a tribunal legal authority * * * directly adverse to the position of the client * * * ." ORPC 3.3(a)(2).

HL GR

COMPETENCE

- See, 8-7-14 of the Tribal Code of the Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians (Review of Housing Department decisions).
- If the Housing Department denies a benefit to a member, and the member seeks Tribal Council review, is the Council a "tribunal"?

HL GR

COMPETENCE

- Cohen, *Federal Indian Law* (2012)
- Research guides from the National Indian Law Library (http://www.narf.org)
  - Basic Indian Law Research Tips – Tribal Law (Jan. 2012)
  - Basic Indian Law Research Tips – Part I: Federal Indian Law (Aug. 2008)
- Constitutions, codes, and rules of specific tribes.

HL GR

Who Is The "Client?"



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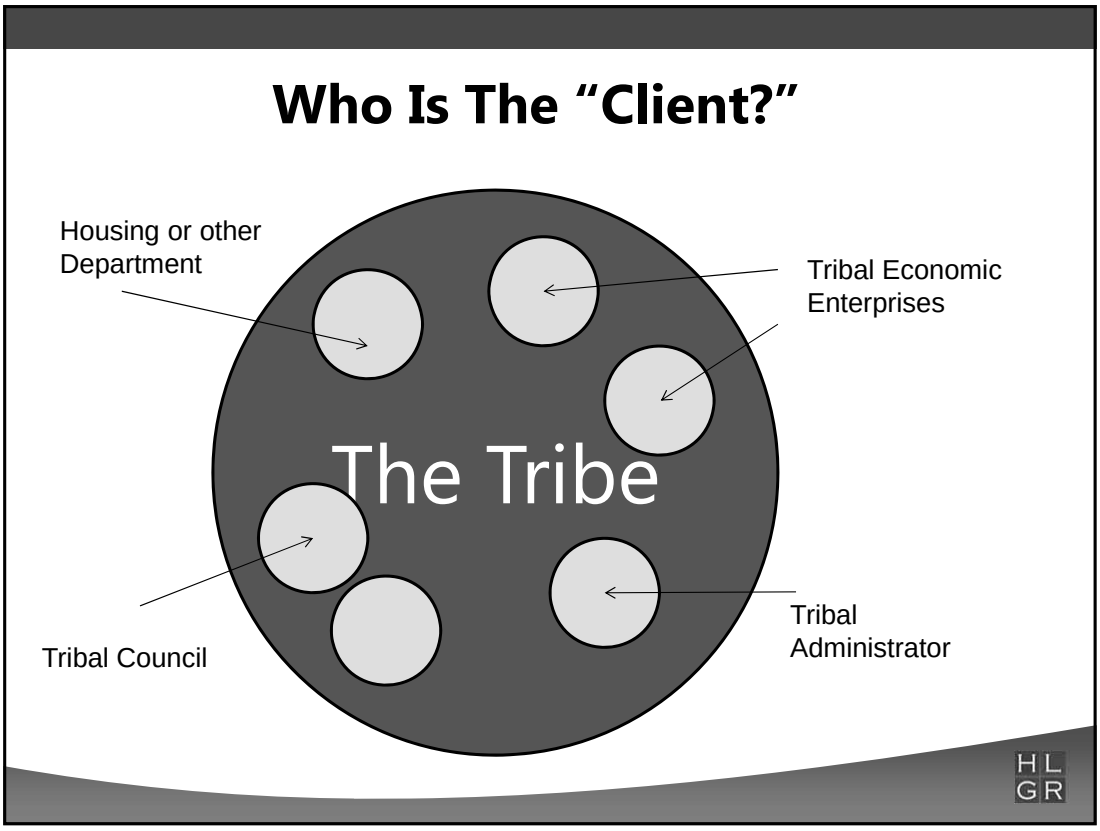
Who Is The "Client?"
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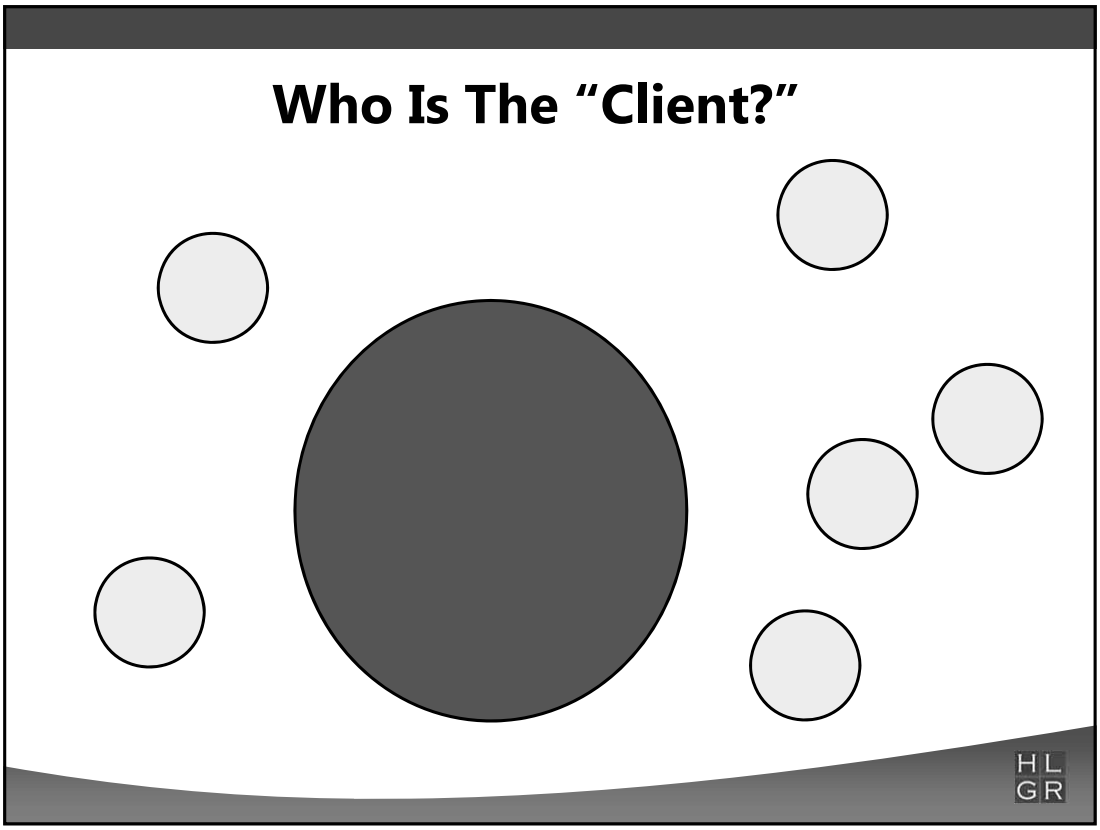
HL GR


Who Is The "Client?"
HL GR

Sovereignty & History Matter

- Columbus Day is not a holiday in Indian Country
- "Indian tribes are distinct, independent political communities, retaining their natural rights in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

HL GR

Sovereignty & History Matter

- Tribal sovereigns sometimes seek relief in the courts of an occupying power
- Suppose a lawyer in 1900 plead a claim that the federal government's exercise of authority to remove Indian children to distant boarding schools without a hearing violated the due process clause of the 14th Amendment

HL GR

Sovereignty & History Matter

- ORPC 3.1: "* * * a lawyer shall not knowingly bring ** * a proceeding * * * unless there is a basis in law and fact for doing so that is not frivolous * * * ."
- Modern times: Tribal members' conceptions of the current legal status of aboriginal fishing and hunting rights may exceed any treaty or statutory foundation in Federal or State law.

HL GR

CHOICE OF LAW

- The Oregon Supreme Court and the State Legislature are not bound to conform their regulation of the practice of law to the laws and rules adopted by tribes
- Nor is any tribe bound to conform to any other tribe
- *E.g.,* A person admitted to practice in the Warm Springs tribal court "is responsible for meeting general ethical standards as established by the Chief Judge * * * ". Warm Springs Code 200.360(4)

HL GR

CHOICE OF LAW

- Warm Springs Code 200.360(1)(c) (non-lawyers may be admitted to practice in the Warm Springs tribal court).
- ORS 9.160 (Practitioner must be an "active member of the Oregon State Bar")
- ORPC 5.5(a) (Lawyer shall not assist another in practicing law in violation of a jurisdiction's requirements)

HL GR

CHOICE OF LAW

- ORPC 8.5(b):

  In the exercise of disciplinary authority by the Oregon Supreme Court, "the Rules of Professional Conduct to be applied shall be as follows;"

HL GR

CHOICE OF LAW

- Conduct "in connection with a matter pending before a tribunal“
  - Apply the ethical rules of that tribunal, including rules that refer to rules of professional conduct adopted by other jurisdictions.

HL GR

CHOICE OF LAW

- Everything *not* “in a tribunal.” Apply:
  - The rules where the conduct occurred, or,
  - The rules of the jurisdiction where the "predominant effect of the conduct” is manifest.

HL GR

CHOICE OF LAW

- "Predominant effect" undefined in text of ORPC 8.5
- Predominant effect informed by tribal sovereignty and federal Indian policy?
- "Reasonable belief" immunizes the lawyer who erroneously concludes that the predominant effect is in another jurisdiction.

HL GR

CHOICE OF LAW

- *Economics and Culture Both Put Their Stamp on Ethics Rules in Tribal Courts,* ABA Journal, March 1, 2011.
- State Bar of Arizona Ethics Opinion 99-13: *Paralegals, Nonlawyers; Unauthorized Practice of Law; Employees of Lawyers; Jurisdiction; Conflicts of Law (*December, 1999)

HL GR

Who Is The "Client"?

- Where does one look for the answer?
- Look to ORPC 1.13(a):
  "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."
- Then to law outside the ORPC.
  See, e.g., OSB Opinion 2005-122 Conflicts of Interest, Current Clients: Multiple Government Clients, Future Conflict Waivers

HL GR

Who Is The "Client"?

- Look to tribal law. Why?
  - ORPC 8.5(b) (Choice of Laws)
  - Tribal law determines who are the "duly authorized constituents" for purposes of ORPC 1.13(a)

HL GR

Who Is The "Client"?

- Look to tribal law. Why . . . continued
  Because the answer bears on aspects of the tribes' inherent sovereignty and reflects federal Indian policy:
  - *See,* 25 U.S.C. Section 476 (h)(1) (The Indian Reorganization Act does not deprive any tribe of its "inherent sovereign power to adopt governing documents under procedures other than those specified in [the Act]")
  - See, Sec. 16 of the original Indian Reorganization Act of 1934 (in tribal constitutions adopted pursuant to the Act, the "tribe or its tribal council" is vested with the power to "employ legal counsel")

HL GR

Who Is The "Client"?

- Article VI, Section 2 of the CTCLUSI Constitution: "tribal council shall * * * have the right and power to employ legal counsel * * *." Council "also has the right to delegate such authority * * * ."
- In context, Article VI, Section 2 is referring to the power to employ legal counsel *for the Tribal Government*

HL GR

Who Is The "Client?"

- Tribal Tort Claims Acts, particularly the exact language – if any – requiring the tribe to defend and indemnify tribal officers and employees
- The doctrine of tribal sovereign immunity as applied to various forms of tribal enterprises
- State and federal tax treatment of the enterprise

HL GR

Who Is The "Client"? Immunity Analysis

- Linkage between the Tribal government and the enterprise in terms of the governance structure of each.
  - Appointment/removal of board
  - Overlap of officers
  - Power of Tribal government to direct operations
  - Extent of supervision

HL GR

Who Is The "Client"? Immunity Analysis

- Whether the enterprise is legally separate from the Tribal Government.
  - Tribe itself vs. a state chartered corporation.

HL GR

Who Is The "Client"? Immunity Analysis

- For what purpose was the enterprise organized? Purely commercial? Purely governmental?
- To what extent would the answer further Indian self-determination – one of the foundations of Federal Indian policy?

HL GR

Who Is The "Client"? Immunity Analysis

- Functional managerial control
  - Enterprise status reports
  - Enterprise management treated as part of Tribal Government management
- Functional indicia of identity
  - Sharing of assets, co-location
  - Tribal Government takes title to assets acquired by enterprise

HL GR

Who Is The "Client"? Immunity Analysis

- Financial impact of decisions of each on the other
  - Could a judgment against the enterprise be satisfied from the Tribal Government's assets?
  - Can the enterprise compel the Tribal Government to commit things of value to support of the enterprise? Funds? Credit? Labor?

HL GR

Who Is The "Client"? Immunity Analysis

- **Tribe itself.** Tribe was the exclusive owner-operator of a casino authorized under the Indian Gaming Regulatory Act. *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir., 2006)(IGRA specifies that the tribe itself, through its governing body, is authorized to operate the casino)

- **A Department of the Tribe.** Tribal Housing Authority held immune where it was chartered by the tribal government, authorized by resolution to sue and be sued in its corporate name, and authorized to waive the Authority's immunity (but not to the extent of creating liability for the Tribe.) *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 582 – 583 (1998)

HL GR

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464 F.3d 1044
Mark S. ALLEN, Plaintiff-Appellant,
v.
GOLD COUNTRY CASINO; The Berry Creek Rancheria of Tyme Maidu Indians; Mattie Mayhew, Defendants-Appellees.
No. 05-15332.
United States Court of Appeals, Ninth Circuit.
Argued and Submitted August 14, 2006.
Filed September 29, 2006.
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Donald Earl Childress III, Jones Day, Washington, D.C., for the plaintiff-appellant.

Blaine I. Green, Pillsbury, Winthrop, Shaw, Pittman, LLP, San Francisco, CA, for the defendants-appellees.

Appeal from the United States District Court for the Eastern District of California; Lawrence K. Karlton, Senior Judge, Presiding. D.C. No. CV-04-00322-LKK.

Before CANBY, THOMPSON, and HAWKINS, Circuit Judges.

OPINION

CANBY, Circuit Judge.

Mark Allen is a former employee of the Gold Country Casino, which is owned and operated by the Tyme Maidu Tribe of the Berry Creek Rancheria in California. After the Casino fired Allen, he sued it and the Tribe. The district court dismissed the claims against the Tribe and the Casino on the ground of sovereign immunity. Allen concedes the Tribe's immunity, but argues that the district court erred in extending that immunity to the Casino without scrutinizing the relationship between the Tribe and the Casino. We find no error in the district court's dismissal of Allen's claims against the Casino because the record and the law establish sufficiently that it functions as an arm of the Tribe.

Allen also asserted various claims against Mattie Mayhew, a tribal member, and John Doe defendants. We reverse in part the district court's dismissal of these claims and remand for consideration of Allen's claims under 42 U.S.C. §§ 1981 and 1985, along with any state law claims over which the district court may exercise supplemental jurisdiction.

I. Facts

Allen was employed by Gold Country Casino as a surveillance supervisor. Gold Country Casino is a tribal entity formed by a compact between the federally recognized Tyme Maidu Tribe and the State of California. The Casino is wholly owned and operated by the Tribe. Allen contends he was discharged in retaliation for reporting rats in the Casino's restaurant and for applying to "the white man's court" for guardianship of three tribal children.

Allen obtained a right to sue letter from the Equal Employment Opportunity Commission and, proceeding pro se, filed this action in federal district court. Allen named as defendants the Casino, the Tribe, Mattie Mayhew, and John Does 1 thru 300, against whom he asserted various employment, civil rights, and conspiracy claims. The magistrate judge recommended that the claims against the Tribe be dismissed on the ground of sovereign immunity. The magistrate judge assumed without analysis that the Tribe's immunity extended to the Casino. The magistrate judge found that the only remaining claim was for false accusations against Mayhew. He recommended dismissal for lack of subject matter jurisdiction because this was a non-federal claim. The district court adopted these recommendations and dismissed all claims.

On appeal, Allen, who is now represented by counsel, concedes that the Tribe is immune from suit. But he contends that this immunity does not extend automatically to the Gold Country Casino. He urges that the district court be required to apply a three-part test to determine whether the Casino is "analogous to a governmental

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agency or operating in a governmental capacity as an arm of the tribe." Allen argues in the alternative that, if the Casino is immune, it waived its immunity by referring to federal law in its employment materials.

We review de novo the district court's dismissal under Federal Rule of Civil Procedure 12(b). *See, e.g., Decker v. Advantage Fund, Ltd.*, 362 F.3d 593, 595-96 (9th Cir.2004). We also review de novo questions of sovereign immunity and subject matter jurisdiction. *Orff v. United States*, 358 F.3d 1137, 1142 (9th Cir.2004).

II. Discussion

A. Sovereign Immunity of the Casino

Although the Supreme Court has expressed limited enthusiasm for tribal sovereign immunity, the doctrine is firmly ensconced in our law until Congress chooses to modify it. *See Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 757-60, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). This immunity extends to business activities of the tribe, not merely to governmental activities. *See id.* at 760, 118 S.Ct. 1700; *Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1100 (9th Cir. 2002). When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe. *See, e.g., Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978 (9th Cir. 2006) (holding that Blackfeet Tribe's sovereign immunity extends to Blackfeet Housing Authority); *Redding Rancheria v.Super. Ct.*, 88 Cal.App.4th 384, 388-89, 105 Cal.Rptr.2d 773 (2001) (holding that off-reservation casino owned and operated by tribe was arm of the tribe, and therefore was entitled to sovereign immunity); *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 642, 84 Cal.Rptr.2d 65 (1999) (recognizing sovereign immunity of for-profit corporation formed by a tribe to operate the tribe's casino). The question is not whether the activity may be characterized as a business, which is irrelevant under *Kiowa*, but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe.

Allen's contention that the district court erred in failing to scrutinize the nature of the relationship between the Tribe and the Casino fails to accord sufficient weight to the undisputed fact that the Casino is owned and operated by the Tribe. Allen recognized the reality of the Casino as an arm of the Tribe when he sued the Tribe "d.b.a." ("doing business as") the Casino. And this is no ordinary business. The Casino's creation was dependent upon government approval at numerous levels, in order for it to conduct gaming activities permitted only under the auspices of the Tribe. The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(d)(1), required the Tribe to authorize the Casino through a tribal ordinance and an interstate gaming compact. The Tribe and California entered into such a compact "on a government-to-government basis."

These extraordinary steps were necessary because the Casino is not a mere revenue-producing tribal business (although it is certainly that). The IGRA provides for the creation and operation of Indian casinos to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). One of the principal purposes of the IGRA is "to insure that the Indian tribe is the primary beneficiary of the gaming operation." *Id.*, § 2702(2). The compact that created the Gold Country Casino provides that the Casino will "enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government

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and governmental services and programs."

With the Tribe owning and operating the Casino, there is no question that these economic and other advantages inure to the benefit of the Tribe. Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general. *Cf. Alden v. Maine*, 527 U.S. 706, 750, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (noting that sovereign immunity protects the financial integrity of States, many of which "could have been forced into insolvency but for their immunity from private suits for money damages"). In light of the purposes for which the Tribe founded this Casino and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe. It accordingly enjoys the Tribe's immunity from suit. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir.2000) (stating that tribal housing authority "as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"); *Marceau*, 455 F.3d at 978 (recognizing that tribal sovereign immunity "extends to agencies and subdivisions of the tribe").

B. Waiver of Immunity

The Casino did not waive immunity when it provided in Allen's employment application that he could be terminated "for any reason consistent with applicable state or federal law," or when it stated in the Employee Orientation Booklet that it would "practice equal opportunity employment and promotion regardless of race, religion, color, creed, national origin ... and other categories protected by applicable federal laws." These statements are not a "clear" waiver of immunity. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001). At most they might imply a willingness to submit to federal lawsuits, but waivers of tribal sovereign immunity may not be implied. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (explaining that a waiver of immunity "must be unequivocally expressed").

This case is distinguishable from *C & L Enterprises* and *Marceau*. In *C & L Enterprises*, the Supreme Court held that the tribe waived its immunity by expressly agreeing to arbitration of disputes and to "enforcement of arbitral awards `in any court having jurisdiction thereof.'" 532 U.S. at 414, 121 S.Ct. 1589. In *Marceau*, the tribe established a housing authority by ordinance that gave the tribe's "irrevocable consent to allowing the Authority to sue and be sued in its corporate name," and further provided that any judgment against the Authority would not be a lien on the Authority's property but would be paid out of "its rents, fees or revenues." 455 F.3d at 981. The statements in Allen's employment documents did not approach these explicit waivers of immunity from suit; the statements' references to federal law did not mention court enforcement, suing or being sued, or any other phrase clearly contemplating suits against the Casino. These documents did not amount to an unequivocal waiver of the Casino's sovereign immunity.

Allen further argues that we should analogize the purported waiver of tribal immunity to waivers of immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605. That Act specifies exceptions to the immunity of foreign states, *see* § 1605(a), which the Tribe is not. As we pointed out in *Richardson v. Mt. Adams Furniture (In re*

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Greene), 980 F.2d 590 (9th Cir.1992), the fact that Congress limited the immunity of foreign sovereigns simply underscores the breadth of sovereign immunity in the absence of congressional action; because Congress has not limited the immunity of Indian tribes, it retains its full force. *See id.* at 594; *see also Kiowa*, 523 U.S. 751, 759-60, 118 S.Ct. 1700, 140 L.Ed.2d 981. There is simply no room to apply the FSIA by analogy, as Allen would have us do. The FSIA precludes immunity of a foreign state when that state engages in commercial activities

in the United States. 28 U.S.C. § 1605(a)(2). To apply that provision to the Tribe would contravene the Supreme Court's decision in *Kiowa*, holding that tribal immunity extended to commercial activities of the tribe. *Kiowa*, 523 U.S. at 760, 118 S.Ct. 1700. FSIA also permits a waiver of immunity to be implied, *see* 28 U.S.C. § 1605(a)(1), while the Supreme Court permits no such implied waiver in the case of Indian tribes. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670. We accordingly decline Allen's invitation to apply FSIA by analogy to tribal sovereign immunity.

C. Allen's Remaining Claims

Although the issue is not free from doubt, we conclude that the district court erred in its dismissal of the remainder of the complaint on the ground that it presented no federal claims against Mayhew and the unnamed defendants. Allen's pro se pleadings are unquestionably difficult to decipher, but they must be liberally construed. *See Ortez v. Washington County*, 88 F.3d 804, 807 (9th Cir.1996). In his response to the defendants' motion to dismiss, Allen explained that he was asserting against all defendants a claim under 42 U.S.C. § 1985. He also accused all defendants except Mayhew of violating 42 U.S.C. § 1981. Giving Allen the benefit of doubt, we conclude that he should be given the opportunity to amend his complaint to assert these two claims intelligibly. We express no opinion, of course, on the procedural or substantive merits of the claims beyond permitting Allen to assert them.

If Allen proceeds in district court with these federal claims, the district court may have supplemental jurisdiction over Allen's state-law claims under 28 U.S.C. § 1367. We therefore vacate the dismissal of Allen's state-law claims for lack of supplemental jurisdiction, so that the district court may consider anew its jurisdiction over those claims.

We affirm the dismissal of Allen's claims under 18 U.S.C. §§ 241 and 242 because these are criminal statutes that do not give rise to civil liability. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Similarly, we affirm the dismissal of his claim under 28 U.S.C. § 1343 because this jurisdictional statute does not provide a cause of action. *See Ellis v. Cassidy*, 625 F.2d 227, 229 (9th Cir.1980). The district court also properly dismissed Allen's claim under 42 U.S.C. § 1983 because there is no allegation that any defendant was acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 45-46, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

III. Conclusion

We affirm the district court's judgment dismissing Allen's claims against the Tribe and Casino on the ground of sovereign immunity. We also affirm the dismissal of claims against the individual defendants under 18 U.S.C. §§ 241 and 242, as well as claims under 28 U.S.C. §§ 1343 and 1983. We vacate and remand the judgment of dismissal without prejudice in favor of Mayhew and the Doe defendants because Allen asserted federal claims against those defendants under 42 U.S.C. § 1985. Allen also asserted claims against the Doe defendants

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under 42 U.S.C. § 1981. Finally, we vacate the dismissal of state-law claims for lack of supplemental jurisdiction, and remand for any appropriate exercise of supplemental jurisdiction over those claims.

The parties will bear their own costs on appeal.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

STATE BAR OF ARIZONA ETHICS OPINION 99-13: PARALEGALS; NONLAWYERS; UNAUTHORIZED PRACTICE OF LAW; EMPLOYEES OF LAWYERS; JURISDICTION; CONFLICTS OF LAW

12/1999

An Arizona attorney may permit his non-lawyer paralegal, who is a licensed tribal advocate, to represent clients in tribal court if that court's rules so permit, because that court's rules govern the conduct. Such representations will not run afoul of the Arizona lawyer's duty to not assist unauthorized practice of law as long as the paralegal representation is limited to tribal court. [ER 5.3, 5.4, 5.5, 8.5]

Facts[1]

Attorney is licensed to practice law in Arizona and in the Salt River Pima-Maricopa Tribal Court ("SRPM Court"). In SRPM Court, attorneys and non-attorneys may be licensed as "tribal advocates." Attorneys may represent tribal members in the criminal division of SRPM Court, but are not permitted to represent plaintiffs in the civil division. Attorney's paralegal ("Paralegal") is a licensed tribal advocate, and because she is not an attorney, under the rules of SRPM Court she may represent plaintiffs in the civil division of SRPM Court.

Attorney's practice includes representation of lenders in collection matters in SRPM Court. Attorney's client is aware of the restriction on representation in the civil division of SRPM Court, and consents to representation by Paralegal, under Attorney's supervision.

Question Presented

Given the fact that non-attorneys may represent clients as licensed tribal advocates in the civil division of SRPM Court, may an Arizona attorney's paralegal, under the attorney's supervision, so represent clients in the civil division of SRPM, with informed consent of the arrangement by clients?

Applicable Ethical Rules

ER 5.3 Responsibilities Regarding Non-lawyer Assistants

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ER 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

[1]Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 1999.

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan in based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a non-lawyer is a corporate director or officer thereof; or

(3) a non-lawyer has the right to direct or control the professional judgment of a lawyer.

ER 5.5 Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

ER 8.5 Jurisdiction

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

Opinion

These facts raise two questions.[2] First, which ethical rules govern the situation? Second, if the representation is governed by the SRPM Court rules, may the Attorney ethically supervise the Paralegal without "assisting the unauthorized practice of law"?

The Committee previously has issued a formal opinion regarding the jurisdictional question in the context of tribal court. In Opinion 90-19, the inquiring attorney was a member of both the Arizona bar and the Navajo bar. The ethical rules of the two bars were in conflict on an issue concerning judicial appointments for indigent defendants. Under the Arizona rules, the attorney would have been obligated to decline an appointment due to conflict of interest. Under the Navajo rules, however, the attorney was obligated to accept the appointment.

[2]This Opinion assumes that the inquiring attorney has accurately portrayed the practice and rules in SRPM Court, and no independent analysis of the SRPM Court or its rules has been done. This Opinion assumes that under the ethical rules of SRPM Court, the supervision of the Paralegal by the Attorney is ethically permissible.

In answering the inquiring attorney's seeming dilemma, the Committee concluded:

> [A]n attorney who is a member of both the Arizona and Navajo Nation Bars, and who is appointed by a Navajo Nation court to represent an indigent Navajo citizen in a criminal proceeding before a Navajo court, is not subject to disciplinary action by the State Bar of Arizona if the attorney complies with the Navajo Nation's ethical rules and court directives.

In reaching that conclusion, the Committee considered the comment to ER 8.5, which provides that "[w]here the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation." This, the Committee reasoned, means that "there may be limitations on the binding force of the Arizona Rules on such a lawyer when the lawyer is licensed to practice in another jurisdiction whose ethical rules impose obligations which conflict with Arizona's rules." The Committee then analyzed the choice of law rules from the Restatement (Second) of Conflicts of Law, and concluded that the Navajo rules applied to the situation.

For the same reasons discussed in Opinion 90-19, in the instant case the SRPM Court rules should apply to this situation. This situation differs somewhat from that analyzed in 90-19, however, because the proposed behavior here (supervision of a paralegal who is representing clients) is an optional behavior, not one that is required by the court (as the appointment was required by the Navajo courts in Opinion 90-19). Non-lawyers are specifically authorized to represent clients in SRPM Court and non-lawyers clearly cannot represent clients in Arizona courts. This has the potential to create a conflict for an Arizona attorney who assists a non-lawyer in representing clients (in and outside of Court) on matters pending in SRPM Court. The conclusion that the tribal laws govern the representation in tribal court, however, remains the same.

Having concluded that the SRPM Court rules apply to the representation of clients in SRPM Court, even if they create a conflict with Arizona's Ethical Rules, the question remains whether the Attorney's supervision, which does not necessarily occur only in SRPM Court, is assisting the unauthorized practice of law in violation of ER 5.5. That rule provides that a lawyer shall not "assist a person who is not a member of the bar in performance of activity that constitutes the unauthorized practice of law." This Committee recently considered the meaning of that phrase in Opinion 99-07. That Opinion concerned activity by public adjusters that was specifically allowed by state statute. Nonetheless, the Committee found that the activity by the public adjusters constituted the unauthorized practice of law and that lawyers who negotiated with such public adjusters thereby were impermissibly assisting the unauthorized practice of law.

Under the reasoning of Opinion 99-07, it is clear that the activity in which the Paralegal is engaging (representing clients in court) constitutes the practice of law. See also Opinion 98-08 (paralegal may conduct interviews and meetings with clients under limited circumstances under attorney's supervision.) Under the same reasoning, it is equally clear that the Attorney's supervision of such activity is assisting the practice of law. The question is whether the practice is "unauthorized." This situation differs significantly from that in Opinion 99-07, because here we are dealing with the ethical rules of another jurisdiction (SRPM Court) that is outside the jurisdiction of the Arizona Supreme Court; we are not dealing with statutes that apply in our jurisdiction (as was the case in Opinion 99-07). For this reason, the Committee finds that Opinion 99-07 is not controlling of the instant situation. Rather, for the reasons discussed above, the Committee finds that because the SRPM Court rules allow the

representation by the Paralegal and the supervision by the Attorney, the Attorney will not be assisting the unauthorized practice of law in violation of ER 5.5.[3]

Conclusion

For all the reasons set forth above, the Committee concludes that when an Attorney and his non-attorney assistant represent clients in conformance with applicable rules of a Native American tribal court, the ethical rules of such court govern the conduct. If such rules conflict with Arizona rules, the Attorney will not be in violation of the Arizona rules if she follows the tribal court rules.

[3]The Committee cautions the Attorney and the Paralegal to limit the proposed arrangement to representation and supervision in the SRPM Court where it is permitted under the rules applicable thereto. In areas of Attorney's practice outside of SRPM Court, the arrangement would violate ER 5.5. See Opinion 98-08.

OREGON RULES OF PROFESSIONAL CONDUCT

(with amendments effective January 1, 2012)

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RULE 1.0 TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposes the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Electronic communication" includes but is not limited to messages sent to newsgroups, listservs and bulletin boards; messages sent via electronic mail; and real time interactive communications such as conversations in internet chat groups and conference areas and video conferencing.

(d) "Firm" or "law firm" denotes a lawyer or lawyers, including "Of Counsel" lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

(e) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(f) "Information relating to the representation of a client" denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

(h) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances.

(i) "Matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of a government agency.

(j) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(k)"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(l) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(m) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(n) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(o) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(p) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will

render a binding legal judgment directly affecting a party's interests in a particular matter.

(q) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostatting, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Adopted 01/01/05

Comparison to Oregon Code

This rule replaces DR 10-101 and is significantly more expansive. Some DR 10-101 definitions were retained, but others were not incorporated into this rule.

The definition of "firm member" was eliminated as not necessary, but a reference to "of counsel" was retained in the definition of "firm." The definition of "firm" also distinguishes office sharers and lawyers working in a firm on a limited basis.

The concept of "full disclosure" is replaced by "informed consent," which, in some cases, must be "confirmed in writing."

The definition of "professional legal corporation" was deleted, as the term does not appear in any of the rules and does not require explanation.

The definitions of "person" and "state" were also eliminated as being unnecessary.

Comparison to ABA Model Rule

The Oregon Code definition of "electronic communication" has been carried over to the ORPC because it was adopted relatively recently in response to a perceived need for clarification in that area. The Model Rules do not define "information relating to the representation of a client;" it was added here to make it clear that ORPC 1.6 continues to protection of the same information protected by DR 4-101 and the term is defined with the DR definitions of confidences and secrets. The MR definition of "firm" was revised to include a reference to "of counsel" lawyers. The MR definition of "knowingly, known or knows" was revised to include language from DR 5-105(B) regarding knowledge of the existence of a conflict of interest. The definition of "matter" was moved to this rule from MR 1.11 on the belief that it has a broader application than to only former government lawyer conflicts. The MR definition of "writing" has been expanded to include "facsimile" communications.

CLIENT-LAWYER RELATIONSHIP

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Defined Terms (see Rule 1.0):

"Reasonably"

Comparison to Oregon Code

This rule is identical to DR 6-101(A).

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Fraudulent"
"Informed consent"
"Knows"
"Matter"
"Reasonable"

Comparison to Oregon Code

This rule has no real counterpart in the Oregon Code. Subsection (a) is similar to DR 7-101(A) and (B), but expresses more clearly that lawyers must defer to the client's decisions about the objectives of the representation and whether to settle a matter. Subsection (b) is a clarification of the lawyer's right to limit the scope of a representation. Subsection (c) is similar to DR 7-102(A)(7), but recognizes that counseling a client about the meaning of a law or the consequences of proposed illegal or fraudulent conduct is not the same as assisting the client in such conduct.

Comparison to ABA Model Rule

ABA Model Rule 1.2(b) states that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." It was omitted because it is not a rule of discipline, but rather a statement intended to encourage lawyers to represent unpopular clients. Also, MR 1.2(c) refers to "criminal" rather than "illegal" conduct.

RULE 1.3 DILIGENCE

A lawyer shall not neglect a legal matter entrusted to the lawyer.

Adopted 01/01/05

Defined Terms (see Rule 1.0)

"*Matter*"

Comparison to Oregon Code

This rule is identical to DR 6-101(B).

Comparison to ABA Model Rule

The ABA Mode Rule requires a lawyer to "act with reasonable diligence and promptness in representing a client."

RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Knows*"
"*Reasonable*"
"*Reasonably*"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code, although the duty to communicate with a client may be inferred from other rules and from the law of agency.

Comparison to ABA Model Rule

This is the former ABA Model Rule. ABA MR 1.4 as amended in 2002 incorporates provisions previously found in MR 1.2; it also specifically identifies five aspects of the duty to communicate.

RULE 1.5 FEES

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(c) A lawyer shall not enter into an arrangement for, charge or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support or a property settlement;

(2) a contingent fee for representing a defendant in a criminal case; or

(3) a fee denominated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:

(i) the funds will not be deposited into the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

(d) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client gives informed consent to the fact that there will be a division of fees, and

(2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

(e) Paragraph (d) does not prohibit payments to a former firm member pursuant to a separation or retirement agreement, or payments to a selling lawyer for the sale of a law practice pursuant to Rule 1.17.

Adopted 01/01/05

Amended 12/01/10:

Paragraph(c)(3) added.

Defined Terms (see Rule 1.0):

"Firm"
"Informed Consent"
"Matter"
"Reasonable"

Comparison to Oregon Code

Paragraphs (a), (b) and (c)(1) and (2) are taken directly from DR 2-106, except that paragraph (a) is amended to include the Model Rule prohibition against charging a "clearly excessive amount for expenses." Paragraph (c)(3) had no counterpart in the Code. Paragraph (d) retains the substantive obligations of DR 2-107(A) but is rewritten to accommodate the new concepts of "informed consent" and "clearly excessive". Paragraph (e) is essentially identical to DR 2-107(B).

Comparison to ABA Model Rule

ABA Model Rule 1.5(b) requires that the scope of the representation and the basis or rate of the fees or expenses for which the client will be responsible be communicated to the client before or within a reasonable time after the representation commences, "preferably in writing." Model Rule 1.5(c) sets forth specific requirements for a contingent fee agreement, including an explanation of how the fee will be determined and the expenses for which the client will be responsible. It also requires a written statement showing distribution of all funds recovered. Paragraph (c)(3) has no counterpart in the Model Rule. Model Rule 1.5(e) permits a division of fees between lawyers only if it is proportional to the services performed by each lawyer or if the lawyers assume joint responsibility for the representation.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve information relating to the representation of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or

conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

Adopted 01/01/05

Amended 12/01/06:

Paragraph (b)(6) amended to substitute "information relating to the representation of a client" for "confidences and secrets."

Amended 1/20/09:

Paragraph (b)(7) added.

Defined Terms (see Rule 1.0):

"Believes"
"Firm"
"Information relating to the representation of a client"
"Informed Consent"
"Reasonable"
"Reasonably"
"Substantial"

Comparison to Oregon Code

This rule replaces DR 4-101(A) through (C). The most significant difference is the substitution of "information relating to the representation of a client" for "confidences and secrets." Paragraph (a) includes the exceptions for client consent found in DR 4-101(C)(1) and allows disclosures "impliedly authorized" to carry out the representation, which is similar to the exception in DR 4-101(C)(2).

The exceptions to the duty of confidentiality set forth in paragraph (b) incorporate those found in DR 4-101(C)(2) through (C)(5). There are also two new exceptions not found in the Oregon Code: disclosures to prevent "reasonably certain death or substantial bodily harm" whether or not the action is a crime, and disclosures to obtain legal advice about compliance with the Rules of Professional Conduct.

Paragraph (b)(7) had no counterpart in the Oregon Code.

Comparison to ABA Model Rule

ABA Model Rule 1.6(b) allows disclosure "to prevent reasonably certain death or substantial bodily harm" regardless of whether a crime is involved. It also allows disclosure to prevent the client from committing a crime or fraud that will result in significant financial injury or to rectify such conduct in which the lawyer's services have been used. There is no counterpart in the Model Rule for information relating to the sale of a law practice or information relating to monitoring responsibilities.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Believes"
"Confirmed in writing"
"Informed consent"
"Knows"
"Matter"
"Reasonably believes"

Comparison to Oregon Code

The current conflicts of interest prohibited in paragraph (a) are the self-interest conflicts currently prohibited by DR 5-101(A) and current client conflicts prohibited by DR 5-105(E). Paragraph (a)(2) refers only to a "personal interest" of a lawyer, rather than the specific "financial, business, property or personal interests" enumerated in DR 5-101(A)(1). Paragraph (a)(3) incorporates the "family conflicts" from DR 5-101(A)(2).

Paragraph (b) parallels DR 5-101(A) and DR 5-105(F) in permitting a representation otherwise prohibited if the affected clients give informed consent, which must be confirmed in writing. Paragraph (b)(3) incorporates the "actual conflict" definition of DR 5-105(A)(1) to make it clear that that a lawyer cannot provide competent and diligent representation to clients in that situation.

Paragraph (b) also allows consent to simultaneous representation "not prohibited by law," which has no counterpart in the Oregon Code. According to the official Comment to MR 1.7 this would apply, for instance, in jurisdictions that prohibit a lawyer from representing more than one defendant in a capital case, to certain representations by former government lawyers, or when local law prohibits a government client from consenting to a conflict of interest.

Comparison to ABA Model Rule

This is essentially identical to the ABA Model Rule, except for the addition of paragraphs (a)(3) and (b)(3) discussed above; also, the Model Rule uses the term "concurrent" rather than "current." The Model Rule allows the clients to consent to a concurrent conflict if "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal."

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, confirmed in writing, except as permitted or required under these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the lawyer's client, except that a lawyer may advance or guarantee the expenses of litigation, provided the client remains ultimately liable for such expenses to the extent of the client's ability to pay.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information related to the representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement;

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith;

(3) enter into any agreement with a client regarding arbitration of malpractice claims without informed consent, in a writing signed by the client; or

(4) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or to pursue any complaint before the Oregon State Bar.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the client-lawyer relationship commenced; or have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation. For purposes of this rule:

(1) "sexual relations" means sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party; and

(2) "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Confirmed in writing"
"Information relating to the representation of a client"
"Informed consent"
"Firm"
"Knowingly"
"Matter"
"Reasonable"
"Reasonably"
"Substantial"
"Writing"

Comparison to Oregon Code

This rule has no exact counterpart in the Oregon Code, although it incorporates prohibitions found in several separate disciplinary rules.

Paragraph (a) replaces DR 5-104(A) and incorporates the Model Rule prohibition against business transactions with clients even with consent except where the transaction is "fair and reasonable" to the client. It also includes an express requirement to disclose the lawyer's role and whether the lawyer is representing the client in the transaction.

Paragraph (b) is virtually identical to DR 4-101(B).

Paragraph (c) is similar to DR 5-101(B), but broader because it prohibits soliciting a gift as well as preparing the instrument. It also has a more inclusive list of "related persons."

Paragraph (d) is identical to DR 5-104(B).

Paragraph (e) retains the prohibition in DR 5-103(B).

Paragraph (f) replaces DR 5-108(A) and (B) and is essentially the same as it relates to accepting payment from someone other than the client. This rule is somewhat narrower than DR 5-108(B), which prohibits allowing influence from someone who "recommends, employs or pays" the lawyer.

Paragraph (g) is virtually identical to DR 5-107(A).

Paragraph (h)(1) and (2) are similar to DR 6-102(A), but do not include the "unless permitted by law" language. Paragraph (h)(3) retains DR 6-102(B), but substitutes "informed consent, in a writing signed by the client" for "full disclosure." Paragraph (h)(4) is new and was taken from Illinois Rule of Professional Conduct 1.8(h).

Paragraph (i) is essentially the same as DR 5-103(A).

Paragraph (j) retains DR 5-110, reformatted to conform to the structure of the rule.

Paragraph (k) applies the same vicarious disqualification to these personal conflicts as provided in DR 5-105(G).

Comparison to ABA Model Rule

This rule is identical to ABA Model Rule 1.8 with the following exceptions. MR 1.8 (b) does not require that the client's informed consent be confirmed in writing as required in DR 4-101(B). MR 1.8(e) allows for contingent cost recovery and permits payment of costs for indigent clients. MR 1.8 (h) does not prohibit agreements to arbitrate malpractice claims. MR 1.8 (j) does not address sexual relations with representatives of corporate clients and does not contain definitions of terms.

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) For purposes of this rule, matters are "substantially related" if (1) the lawyer's representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client's position in the subsequent matter.

Adopted 01/01/05

Amended 12/01/06:

Paragraph (d) added.

Defined Terms (see Rule 1.0):

"Confirmed in writing"
"Informed consent"
"Firm"
"Knowingly"
"Known"
"Matter"
"Reasonable"
"Substantial"

Comparison to Oregon Code

This rule replaces DR 5-105(C), (D) and (H). Like Rule 1.7, this rule is a significant departure from the language and structure of the Oregon Code provisions on conflicts. Paragraph (a) replaces the sometimes confusing reference to "actual or likely conflict" between current and former client with the simpler "interests [that are] materially adverse." The prohibition applies to matters that are the same or "substantially related," which is virtually identical to the Oregon Code standard of "significantly related."

Paragraph (b) replaces the limitation of DR 5-105(H), but is an arguably clearer expression of the prohibition. The new language makes it clear that a lawyer who moves to a new firm is prohibited from being adverse to a client of the lawyer's former firm only if the lawyer has acquired confidential information material to the matter while at the former firm.

Paragraph (c) makes clear that the duty not to use confidential information to the client's disadvantage continues after the conclusion of the representation, except where the information "has become generally known."

Paragraph (d) defines "substantially related." The definition is taken in part from former DR 5-105(D) and in part from Comment [3] to ABA Model Rule 1.9.

Comparison to ABA Model Rule

ABA Model Rule 1.9(a) and (b) require consent only of the former client. The Model Rule also has no definition of "substantially related;" this definition was derived in part from the Comment to MR 1.9.

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST; SCREENING

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of

them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer or on Rule 1.7(a)(3) and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9, unless the personally disqualified lawyer is screened from any form of participation or representation in the matter. For purposes of this rule, screening requires that:

(1) the personally disqualified lawyer shall serve on the lawyer's former law firm an affidavit attesting that during the period of the lawyer's disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation and will not discuss the matter or the representation with any other firm member; and the personally disqualified lawyer shall serve, if requested by the former law firm, a further affidavit describing the lawyer's actual compliance with these undertakings promptly upon final disposition of the matter or representation;

(2) at least one firm member shall serve on the former law firm an affidavit attesting that all firm members are aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation and describing the procedures being followed to screen the personally disqualified lawyer; and at least one firm member shall serve, if requested by the former law firm, a further affidavit describing the actual compliance by the firm members with the procedures for screening the personally disqualified lawyer promptly upon final disposition of the matter or representation; and

(3) no violation of this Rule shall be deemed to have occurred if the personally disqualified lawyer does not know that the lawyer's firm members have accepted employment with respect to a matter which would require the making and service of such affidavits and if all firm members having knowledge of the accepted employment do not know of the disqualification.

(d) A disqualification prescribed by this rule may be waived by the affected clients under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Adopted 01/01/05

Amended 12/01/06:

Paragraph (a) amended to include reference to Rule 1.7(a)(3).

Defined Terms (see Rule 1.0):

"Firm"
"Know"
"Knowingly"
"Law firm"
"Matter"
"Screened"
"Substantial"

Comparison to Oregon Code

Paragraph (a) is similar to the vicarious disqualification provisions of DR 5-105(G), except that it does not apply when the disqualification is based only on a "personal interest" of the disqualified lawyer that will not limit the ability of the other lawyers in the firm to represent the client.

Paragraph (b) is substantially the same as DR 5-105(J).

Paragraph (c) retains the provisions of DR 5-105(H) and (I) allowing screening to avoid disqualification of a firm when a lawyer joining the firm is personally disqualified from a representation.

Paragraph (d) is similar to DR 5-105 in allowing clients to consent to what would otherwise be imputed conflicts.

Paragraph (e) has no counterpart in the Oregon Code because the Oregon Code does not have a special rule addressing government lawyer conflicts.

Comparison to ABA Model Rule

Paragraphs (a) is similar to the ABA Model Rule, but includes reference to "spouse/family" conflicts which are not separately addressed in the Model Rule. Paragraph

(b) is identical to the ABA Model Rule. Paragraph (c) has no equivalent in the Model Rule; screening is limited in the Model Rules to certain situations under Rules 1.11 and 1.12 and does not apply generally.

The title has been changed to include "Screening."

RULE 1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENTGOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as Rule 1.12 or law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9 (c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c).

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) use the lawyer's public position to obtain, or attempt to obtain, special advantage in legislative matters for the lawyer or for a client.

(ii) use the lawyer's public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client.

(iii) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

(iv) either while in office or after leaving office use information the lawyer knows is confidential government information obtained while a public official to represent a private client.

(v) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the lawyer's former client and the appropriate government agency give informed consent, confirmed in writing; or

(vi) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk or staff lawyer to or otherwise assisting in the official duties of a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) Notwithstanding any Rule of Professional Conduct, and consistent with the "debate" clause, Article IV, section 9, of the Oregon Constitution, or the "speech or debate" clause, Article I, section 6, of the United States Constitution, a lawyer-legislator shall not be subject to discipline for words uttered in debate in either house of the Oregon Legislative Assembly or for any speech or debate in either house of the United States Congress.

(f) A member of a lawyer-legislator's firm shall not be subject to discipline for representing a client in any claim against the State of Oregon provided:

(1) the lawyer-legislator is screened from participation or representation in the matter in accordance with the procedure set forth in Rule 1.10(c) (the required affidavits shall be served on the Attorney General); and

(2) the lawyer-legislator shall not directly or indirectly receive a fee for such representation.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Confirmed in writing"
"Informed consent"
"Firm"
"Knowingly"
"Knows"
"Matter"
"Screened"
"Substantial"
"Tribunal"
"Written"

Comparison to Oregon Code

This rule has no exact counterpart in the Oregon Code, under which the responsibilities of government lawyers are addressed in DR 5-109 and DR 8-101, as well as in the general conflict limitations of DR 5-105. This rule puts all the requirements for government lawyers in one place.

Paragraph (a) is essentially the same as DR 5-109(B).

Paragraph (b) imputes a former government lawyer's unconsented-to conflicts to the new firm unless the former government lawyer is screened from participation in the matter, as would be allowed under DR 5-105(I).

Paragraph (c) incorporates the prohibitions in DR 8-101(A)(1), (A)(4) and (B). It also allows screening of the disqualified lawyer to avoid disqualification of the entire firm.

Paragraph (d) applies concurrent and former client conflicts to lawyers currently serving as a public officer or employee; it also incorporates in (d)(2) (i) –(iv) the limitations in DR 8-101(A)(1)-(4), with the addition in (d)(2)(iv) of language from MR 1.11 that a lawyer is prohibited from using only that government information that the lawyer knows is confidential. Paragraph (d)(2)(v) is the converse of DR 5-109(B), and has no counterpart in the Oregon Code other than the general former client conflict provision of DR 5-105. Paragraph (d)(2)(vi) has no counterpart in the Oregon Code; it is an absolute bar to negotiating for private employment while a serving in a non-judicial government position for anyone other than a law clerk or staff lawyer assisting in the official duties of a judicial officer.

Paragraph (e) is taken from DR 8-101(C) to retain a relatively recent addition to the Oregon Code.

Paragraph (f) is taken from DR 8-101(D), also to retain a relatively recent addition to the Oregon Code.

Comparison to ABA Model Rule

Paragraph (a) is identical to the ABA Model Rule, with the addition of a cross-reference to Rule 1.12, to clarify the scope of the rule.

Paragraphs (b) and (c) are identical to the Model Rule, except that the limitation on apportionment of fees does not apply when a former government lawyer is disqualified and screened from participation in a matter. MR 1.10(c) does not prescribe the screening methods; MR 1.0 defines screening as "timely…procedures that are reasonably adequate."

Paragraphs (d)(2)(i)-(iv) are not found in the Model Rules; as discussed above, they are taken from DR 8-101(A). Paragraph (d)(2)(v) is modified to require consent of the lawyer's former client as well as the appropriate government agency, to continue the Oregon Code requirement of current and former client consent in such situations. Paragraph (d)(2)(vi) deviates from the Model Rule to clarify that the exception applies to staff lawyers who do not perform traditional "law clerk" functions.

Paragraph (e) has no counterpart in the Model Rules.

Paragraph (f) also has no counterpart in the Model Rules.

RULE 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in Rule 2.4(b) and in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk or staff lawyer to or otherwise assisting in the official duties of a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Confirmed in writing*"
"*Informed consent*"
"*Firm*"
"*Knowingly*"
"*Matter*"
"*Screened*"
"*Substantial*"
"*Tribunal*"
"*Written*"

Comparison to Oregon Code

Paragraph (a) is essentially the same as DR 5-109(A), with an exception created for lawyers serving as mediators under Rule 2.4(b).

Paragraph (b) has no equivalent rule in the Oregon Code; like Rule 1.11(d)(2)(vi) it address the conflict that arises when a person serving as, or as a clerk or staff lawyer to, a judge or other third party neutral, negotiates for employment with a party or a party's lawyer. This situation is covered under DR 5-101(A), but its application may not be as clear.

Paragraph (c) applies the vicarious disqualification that would be imposed under DR 5-105(G) to a DR 5-109 conflict; the screening provision is broader than DR 5-105(I), which is limited to lawyers moving between firms.

Paragraph (d) has no counterpart in the Oregon Code.

Comparison to ABA Model Rule

This is the ABA Model Rule, except that it requires screening substantially in accordance with the specific procedures in Rule 1.10(c). It deviates slightly to clarify that (b) applies to staff lawyers who do not perform traditional "law clerk" functions.

RULE 1.13 ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent may only be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Adopted 01/01/05

Amended 12/01/06:

Paragraph (b) amended to conform to ABA Model Rule 1.13(b).

Defined Terms (see Rule 1.0):

"*Believes*"
"*Information relating to the representation*"
"*Knows*"
"*Matter*"
"*Reasonable*"
"*Reasonably*"
"*Reasonably believes*"
"*Reasonably should know*"
"*Substantial*"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code.

Comparison to ABA Model Rule

This is the ABA Model Rule, as amended in August 2003, except that in paragraph (g), the words "may only" replace "shall" to make it clear that the rule does not require the organization to consent.

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Believes*"
"*Information relating to the representation of a client*"
"*Reasonably*"
"*Reasonably believes*"
"*Substantial*"

Comparison to Oregon Code

Paragraph (b) is similar to DR 7-101(C), but offers more guidance as to the circumstances when a lawyer can take protective action in regard to a client. Paragraph (a) and (c) have no counterparts in the Oregon Code, but provide helpful guidance for lawyers representing clients with diminished capacity.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 1.15-1 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other funds held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the jurisdiction where the lawyer's office is situated. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Lawyer trust accounts shall conform to the rules in the jurisdictions in which the accounts are maintained. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a lawyer trust account for the sole purposes of paying bank service charges or meeting minimum balance

requirements on that account, but only in amounts necessary for those purposes.

(c) A lawyer shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the fee is denominated as "earned on receipt," "nonrefundable" or similar terms and complies with Rule 1.5(c)(3).

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Adopted 01/01/05

Amended 11/30/05:

Paragraph (a) amended to eliminate permission to have trust account "elsewhere with the consent of the client" and to require accounts to conform to jurisdiction in which located.

Paragraph (b) amended to allow deposit of lawyer funds to meet minimum balance requirements.

Amended 12/01/10:

Paragraph (c) amended to create an exception for fees "earned on receipt" within the meaning of Rule 1.5(c)(3).

Defined Terms (see Rule 1.0):

"Law firm"
"Reasonable"

Comparison to Oregon Code

Paragraphs (a)-(e) contain all of the elements of DR 9-101(A)-(C) and (D)(1), albeit in slightly different order. The rule is broader than DR 9-101 in that it also applies to the property of prospective clients and third persons received by a lawyer. Paragraph (c) makes it clear that fees and costs paid in advance must be held in trust until earned unless the fee is denominated "earned on receipt" and complies with the requirements of Rule 1.5(c)(3).

Comparison to ABA Model Rule

Paragraph (a) has been modified slightly from the Model Rule, which applies only to property held "in connection with a representation," while Oregon's rule continues to apply to all property, regardless of the capacity in which it is held by the lawyer. The Model Rule allows trust accounts to be maintained "elsewhere with the consent of the client or third person." There is no requirement in the Model Rule that the account to be labeled a "Lawyer Trust Account" or that it be selected by the lawyer "in the exercise of reasonable care." The Model Rule also makes no provision for "earned on receipt fees."

RULE 1.15-2 IOLTA ACCOUNTS AND TRUST ACCOUNT OVERDRAFT NOTIFICATION

(a) A lawyer trust account for client funds that cannot earn interest in excess of the costs of generating such interest ("net interest") shall be referred to as an IOLTA (Interest on Lawyer Trust Accounts) account. IOLTA accounts shall be operated in accordance with this rule and with operating regulations and procedures as may be established by the Oregon State Bar with the approval of the Oregon Supreme Court.

(b) All client funds shall be deposited in the lawyer's or law firm's IOLTA account unless a particular client's funds can earn net interest. All interest earned by funds held in the IOLTA account shall be paid to the Oregon Law Foundation as provided in this rule.

(c) Client funds that can earn net interest shall be deposited in an interest bearing trust account for the client's benefit and the net interest earned by funds in such an account shall be held in trust as property of the client in the same manner as is provided in paragraphs (a) through (d) of Rule 1.15-1 for the principal funds of the client. The interest bearing account shall be either:

(1) a separate account for each particular client or client matter; or

(2) a pooled lawyer trust account with subaccounting which will provide for computation of interest earned by each client's funds and the payment thereof, net of any bank service charges, to each client.

(d) In determining whether client funds can or cannot earn net interest, the lawyer or law firm shall consider the following factors:

(1) the amount of the funds to be deposited;

(2) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(3) the rates of interest at financial institutions where the funds are to be deposited;

(4) the cost of establishing and administering a separate interest bearing lawyer trust account for the client's benefit, including service charges imposed by financial institutions, the cost of the lawyer or law firm's services, and the cost of preparing any tax-related documents to report or account for income accruing to the client's benefit;

(5) the capability of financial institutions, the lawyer or the law firm to calculate and pay income to individual clients; and

(6) any other circumstances that affect the ability of the client's funds to earn a net return for the client.

(e) The lawyer or law firm shall review the IOLTA account at reasonable intervals to determine whether circumstances have changed that require further action with respect to the funds of a particular client.

(f) If a lawyer or law firm determines that a particular client's funds in an IOLTA account either did or can earn net interest, the lawyer shall transfer the funds into an account specified in paragraph (c) of this rule and request a refund for any interest earned by the client's funds that may have been remitted to the Oregon Law Foundation.

(1) The request shall be made in writing to the Oregon Law Foundation within a reasonable period of time after the interest was remitted to the Foundation and shall be accompanied by written verification from the financial institution of the interest amount.

(2) The Oregon Law Foundation will not refund more than the amount of interest it received from the client's funds in question. The refund shall be remitted to the financial institution for transmittal to the lawyer or law firm, after appropriate accounting and reporting.

(g) No earnings from a lawyer trust account shall be made available to a lawyer or the lawyer's firm.

(h) A lawyer or law firm may maintain a lawyer trust account only at a financial institution that:

(1) is authorized by state or federal banking laws to transact banking business in the state where the account is maintained;

(2) is insured by the Federal Deposit Insurance Corporation or an analogous federal government agency;

(3) has entered into an agreement with the Oregon Law Foundation:

(i) to remit to the Oregon Law Foundation, at least quarterly, interest earned by the IOLTA account, computed in accordance with the institution's standard accounting practices, less reasonable service charges, if any; and

(ii) to deliver to the Oregon Law Foundation a report with each remittance showing the name of the lawyer or law firm for whom the remittance is sent, the number of the IOLTA account as assigned by the financial institution, the average daily collected account balance or the balance on which the interest remitted was otherwise computed for each month for which the remittance is made, the rate of interest applied, the period for which the remittance is made, and the amount and description of any service charges deducted during the remittance period; and

(4) has entered into an overdraft notification agreement with the Oregon State Bar requiring the financial institution to report to the Oregon State Bar Disciplinary Counsel when any properly payable instrument is presented against such account containing insufficient funds, whether or not the instrument is honored.

(i) Overdraft notification agreements with financial institutions shall require that the following information be provided in writing to Disciplinary Counsel within ten banking days of the date the item was returned unpaid:

(1) the identity of the financial institution;

(2) the identity of the lawyer or law firm;

(3) the account number; and

(4) either (i) the amount of the overdraft and the date it was created; or (ii) the amount of the returned instrument and the date it was returned.

(j) Agreements between financial institutions and the Oregon State Bar or the Oregon Law Foundation shall apply to all branches of the financial institution. Such agreements shall not be canceled except upon a thirty-day notice in writing to OSB Disciplinary Counsel in the case of a trust account overdraft notification agreement or to the Oregon Law Foundation in the case of an IOLTA agreement.

(k) Nothing in this rule shall preclude financial institutions which participate in any trust account overdraft notification program from charging lawyers or law firms for the reasonable costs incurred by the financial institutions in participating in such program.

(l) Every lawyer who receives notification from a financial institution that any instrument presented against his or her lawyer trust account was presented against insufficient funds, whether or not the instrument was honored, shall promptly notify Disciplinary Counsel in writing of the same information required by paragraph (i). The lawyer shall include a full explanation of the cause of the overdraft.

(m) For the purposes of paragraph (h)(3), "service charges" are limited to the institution's following customary check and deposit processing charges: monthly maintenance fees, per item check charges, items deposited charges and per deposit charges. Any other fees or transactions costs are not "service charges" for purposes of paragraph (h)(3) and must be paid by the lawyer or law firm.

Adopted 01/01/05

Amended 11/30/05:

Paragraph (a) amended to clarify scope of rule.

Paragraph (h) amended to allow remittance of interest to OLF in accordance with bank's standard accounting practice, and to report either the average daily collected account balance or the balance on which interest was otherwise computed.

Paragraph (j) amended to require notice to OLF of cancellation of IOLTA agreement.

Paragraph (m) and (n) added.

Amended 01/01/12:

Requirement for annual certification, formerly paragraph (m), deleted and obligation moved to ORS Chapter 9.

Defined Terms (see Rule 1.0)

"Firm"
"Law Firm"
"Matter"
"Reasonable"
"Writing"
"Written"

Comparison to Oregon Code

This rule is a significant revision of the IOLTA provisions of DR 9-101 and the trust account overdraft notification provisions of DR 9-102. The original changes were prompted by the US Supreme Court's decision in *Brown v. Washington Legal Foundation* that clients are entitled to "net interest" that can be earned on funds held in trust. Additional changes were made to conform the rule to banking practice and to clarify the requirement for annual certification.

Comparison to ABA Model Rule

The Model Rule has no equivalent provisions regarding IOLTA and the trust account overdraft notification programs. In most jurisdictions those are stand-alone Supreme Court orders.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Believes*"
"*Fraud*"
"*Fraudulent*"
"*Reasonable*"
"*Reasonably*"
"*Reasonably believes*"
"*Substantial*"
"*Tribunal*"

Comparison to Oregon Code

This rule is essentially the same as DR 2-110, except that it specifically applies to declining a representation as well as withdrawing from representation. Paragraph (a) parallels the circumstances in which DR 2-110(B) mandates withdrawal, and also includes when the client is acting "merely for the purpose of harassing or maliciously injuring" another person, which is prohibited in DR 2-109(A)(1) and DR 7-102(A)(1).

Paragraph (b) is similar to DR 2-110(C) regarding permissive withdrawal. It allows withdrawal for any reason if it can be accomplished without "material adverse effect" on the client. Withdrawal is also allowed if the lawyer considers the client's conduct repugnant or if the lawyer fundamentally disagrees with it.

Paragraph (c) is like DR 2-110(A)(1) in requiring compliance with applicable law requiring notice or permission from the tribunal; it also clarifies the lawyer's obligations if permission is denied.

Paragraph (d) incorporates DR 2-110(A)(2) and (3). The final sentence has no counterpart in the Oregon Code; it recognizes the right of a lawyer to retain client papers and other property to the extent permitted by other law. The "other law" includes statutory lien rights as well as court decisions determining lawyer ownership of certain papers created during a representation. A lawyer's right under other law to retain papers and other property remains subject to other obligations, such as the lawyer's general fiduciary duty to avoid prejudicing a former client, which might supersede the right to claim a lien.

Comparison with ABA Model Rule

This is essentially identical to the Model Rule except that MR 1.16(d) refers on to the retention of the client's "papers." The additional language in the Oregon rule was taken from ORS 86.460.

RULE 1.17 SALE OF LAW PRACTICE

(a) A lawyer or law firm may sell or purchase all or part of a law practice, including goodwill, in accordance with this rule.

(b) The selling lawyer, or the selling lawyer's legal representative, in the case of a deceased or disabled lawyer, shall provide written notice of the proposed sale to each current client whose legal work is subject to transfer, by certified mail, return receipt requested, to the client's last known address. The notice shall include the following information:

(1) that a sale is proposed;

(2) the identity of the purchasing lawyer or law firm, including the office address(es), and a brief description of the size and nature of the purchasing lawyer's or law firm's practice;

(3) that the client may object to the transfer of its legal work, may take possession of any client files and property, and may retain counsel other than the purchasing lawyer or law firm;

(4) that the client's legal work will be transferred to the purchasing lawyer or law firm, who will then take over the representation and act on the client's behalf, if the client does not object to the transfer within forty-five (45) days after the date the notice was mailed; and

(5) whether the selling lawyer will withdraw from the representation not less than forty-five (45) days after the date the notice was mailed, whether or not the client consents to the transfer of its legal work.

(c) The notice may describe the purchasing lawyer or law firm's qualifications, including the selling lawyer's opinion of the purchasing lawyer or law firm's suitability and competence to assume representation of the client, but only if the selling lawyer has made a reasonable effort to arrive at an informed opinion.

(d) If certified mail is not effective to give the client notice, the selling lawyer shall take such steps as may be reasonable under the circumstances to give the client actual notice of the proposed sale and the other information required in subsection (b).

(e) A client's consent to the transfer of its legal work to the purchasing lawyer or law firm will be presumed if no objection is received within forty-five (45) days after the date the notice was mailed.

(f) If substitution of counsel is required by the rules of a tribunal in which a matter is pending, the selling lawyer shall assure that substitution of counsel is made.

(g) The fees charged clients shall not be increased by reason of the sale except upon agreement of the client.

(h) The sale of a law practice may be conditioned on the selling lawyer's ceasing to engage in the private practice of law or some particular area of practice for a reasonable period within the geographic area in which the practice has been conducted.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Known*"
"*Law firm*"
"*Matter*"
"*Reasonable*"
"*Tribunal*"
"*Written*"

Comparison to Oregon Code

This rule continues DR 2-111which, when adopted in 1995, was derived in large part from Model Rule 1.17.

Comparison to ABA Model Rule

The Model Rule requires sale of the entire practice or practice area, and also requires that the selling lawyer cease to engage in the private practice of law, or the area of practice sold, within a certain geographic area. The Model Rule gives the client 90 days to object before it will be presumed the client has consented to the transfer of the client's files. The Model Rule requires notice to all clients, not only current clients, but does not require that it be sent by certified mail. The Model Rule does not address the selling lawyer's right to give an opinion of the purchasing lawyer's qualifications. The Model Rule does not allow for client consent to an increase in the fees to be charged as a result of the sale.

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to the prospective client

Adopted 01/01/05

Amended 12/11/09:

Paragraph (d) amended to conform to ABA Model Rule 1.18 except for prohibition against disqualified lawyer being apportioned a part of the fee.

Defined Terms (see Rule 1.0):

"*Confirmed in writing*"
"*Informed consent*"
"*Firm*"
"*Knowingly*"
"*Matter*"
"*Screened*"
"*Substantial*"

"*Written*"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code. It is consistent with the rule of lawyer-client privilege that defines a client to include a person "who consults a lawyer with a view to obtaining professional legal services." OEC 503(1)(a). The rule also codifies a significant body of case law and other authority that has interpreted the duty of confidentiality to apply to prospective clients.

Comparison to ABA Model Rule

This is similar to the ABA Model Rule, but does not include language limiting the application to situations where the lawyer has taken steps not to learn too much information. It also doesn't prohibit the screened lawyer from sharing in the fee.

COUNSELOR

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Adopted 01/01/05

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code, although it codifies the concept of exercising independent judgment that is fundamental to the role of the lawyer and which is mentioned specifically in DRs 2-103, 5-101, 5-104, 5-108 and 7-101.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 2.2 [RESERVED]

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Believes*"
"*Informed consent*"
"*Knows*"
"*Matter*"
"*Reasonably believes*"
"*Reasonably should know*"

Comparison to Oregon Code

This rule is similar to DR 7-101(D), which was adopted in 1997 based on *former* ABA Model Rule 2.3. Paragraph (b) is new in 2002 to require client consent only when the evaluation poses is a risk of material and adverse affect on the client. Under paragraph (a), when there is no such risk, the lawyer needs only to determine that the evaluation is compatible with other aspects of the relationship.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 2.4 LAWYER SERVING AS MEDIATOR

(a) A lawyer serving as a mediator:

(1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and

(2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.

(b) A lawyer serving as a mediator:

(1) may prepare documents that memorialize and implement the agreement reached in mediation;

(2) shall recommend that each party seek independent legal advice before executing the documents; and

(3) with the consent of all parties, may record or may file the documents in court.

(c) Notwithstanding Rule 1.10, when a lawyer is serving or has served as a mediator in a matter, a member of the lawyer's firm may accept or continue the representation of a party in the matter in mediation or in a related matter if all parties to the mediation give informed consent, confirmed in writing.

(d) The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Confirmed in writing*"
"*Informed consent*"
"*Firm*"
"*Matter*"
"*Writing*"

Comparison to Oregon Code

This rule retains DR 5-106, except that the requirement in (c) for consent after full disclosure has been changed to require informed consent, confirmed in writing.

Comparison to ABA Model Rule

ABA Model Rule 2.4 applies to a lawyer serving as a "third-party neutral," including arbitrator, mediator or in "such other capacity as will enable the lawyer to assist the parties to resolve the matter." It requires that the lawyer inform unrepresented parties that the lawyer is not representing them and, when necessary, explain the difference in the role of a third-party neutral. The Model Rule does not address the lawyer's drafting of documents to implement the parties' agreement, or the circumstances in which a member of the lawyer's firm can represent a party.

ADVOCATE

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

In representing a client or the lawyer's own interests, a lawyer shall not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless so defend the proceeding as to require that every element of the case be established.

Adopted 01/01/05

Amended 12/01/06:

Paragraph (a) amended to make applicable to a lawyer acting in the lawyer's own interests.

Defined Terms (see Rule 1.0):

"*Knowingly*"

Comparison to Oregon Code

This rule retains the essence of DR 2-109(A)(2) and DR 7-102(A)(2), although neither Oregon rule expressly confirms the right of a criminal defense lawyer to defend in a manner that requires establishment of every element of the case.

Comparison to ABA Model Rule

This is the ABA Model Rule, tailored slightly to track the language of DR 2-109(A)(2) and DR 7-102(A)(2).

RULE 3.2 [RESERVED]

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false;

(4) conceal or fail to disclose to a tribunal that which the lawyer is required by law to reveal; or

(5) engage in other illegal conduct or conduct contrary to these Rules.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, but in no event require disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that

will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Adopted 01/01/05
Amended 12/01/10:

Paragraphs (a)(3) and (b) amended to substitute "if permitted" for "if necessary;" paragraph (c) amended to make it clear that remedial measures do not require disclosure of information protected by Rule 1.6.

Defined Terms (see Rule 1.0):

"*Believes*"
"*Fraudulent*"
"*Knowingly*"
"*Known*"
"*Knows*"
"*Matter*"
"*Reasonable*"
"*Reasonably believes*"
"*Tribunal*"

Comparison to Oregon Code

Paragraph (a)(1) is similar to DR 7-102(A)(5), but also requires correction of a previously made statement that turns out to be false.

Paragraph (a)(2) is the same as DR 7-106(B)(1).

Paragraph (a)(3) combines the prohibition in DR 7-102(A)(4) against presenting perjured testimony or false evidence with the remedial measures required in DR 7-102(B). The rule clarifies that only materially false evidence requires remedial action. While the rule allows a criminal defense lawyer to refuse to offer evidence the lawyer reasonably believes is false, it recognizes that the lawyer must allow a criminal defendant to testify. Only if the lawyer know the criminal defendant's testimony is the lawyer precluded from offering it.

Paragraphs (a)(4) and (5) are the same as DR 7-102(A)(3) and (8), respectively.

Paragraph (b) is similar to and consistent with the interpretations of DR 7-102(B)(1).

Paragraph (c) continues the duty of candor to the end of the proceeding, but, notwithstanding the language in paragraphs (a)(3) and (b), does not require disclosure of confidential client information otherwise protected by Rule 1.6.

Paragraph (d) has no equivalent in the Oregon Code.

Comparison to ABA Model Rule

Subsections (4) and (5) of paragraph (a) do not exist in the Model Rule. Also, MR 3.3 (c) requires disclosure even if the information is protected by Rule 1.6

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) knowingly and unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence; counsel or assist a witness to testify falsely; offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case; except that a lawyer may advance, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for the witness's loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness.

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, knowingly make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

(f) advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for purposes of making the person unavailable as a witness therein; or

(g) threaten to present criminal charges to obtain an advantage in a civil matter unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Believes*"
"*Knowingly*"
"*Matter*"
"*Reasonable*"
"*Reasonably*"
"*Reasonably believes*"
"*Tribunal*"

Comparison to Oregon Code

Paragraph (a) is similar to DR 7-109(A).

Paragraph (b) includes the rules regarding witness contact from DR 7-109, and also the prohibition against falsifying evidence that is found in DR 7-102(A)(6).

Paragraph (c) is generally equivalent to DR 7-106(C)(7).

Paragraph (d) has no equivalent in the Oregon Code.

Paragraph (e) is the same as DR 7-106(C)(1), (3) and (4).

Paragraph (f) retains the language of DR 7-109(B).

Paragraph (g) retains DR 7-105.

Comparison to ABA Model Rule

Paragraphs (a), (c), (d) and (e) are the Model Code, with the addition of a "knowingly" standard in (a) and (d). Paragraph (b) has been amended to retain the specific rules regarding contact with witnesses from DR 7-109, beginning with "…or pay…." Paragraph (f) in the Model Rule prohibits requesting a person other than a client to refrain from volunteering information except when the person is a relative, employee or other agent of the client and the lawyer believes the person's interests will not be adversely affected. Paragraph (g) does not exist in the Model Rules.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte on the merits of a cause with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment;

(d) engage in conduct intended to disrupt a tribunal; or

(e) fail to reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge.

Adopted 01/01/05

Amended 12/01/06:

Paragraph (b) amended to add "on the merits of the cause."

Defined Terms (see Rule 1.0):

"*Known*"
"*Tribunal*"

Comparison to Oregon Code

Paragraph (a) has no counterpart in the Oregon Code.

Paragraph (b) replaces DR 7-110, making ex parte contact subject only to law and court order, without additional notice requirements.

Paragraph (c) is similar to DR 7-108(A)-(F).

Paragraph (d) is similar to DR 7-106(C)(6).

Paragraph (e) retains the DR 7-108(G).

Comparison to ABA Model Rule

This is essentially the ABA Model Rule, with the addition of paragraph (e), which has no counterpart in the Model Rule.

RULE 3.6 TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may:

(1) reply to charges of misconduct publicly made against the lawyer; or

(2) participate in the proceedings of legislative, administrative or other investigative bodies.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Firm"
"Knows"
"Matter"
"Reasonable"
"Reasonably should know"
"Substantial"

Comparison to Oregon Code

Paragraph (a) replaces DR 7-107(A).

Paragraph (b) has no counterpart in the Oregon Code.

Paragraphs (c)(1) and (2) retain the exceptions in DR 7-107(B) and (C).

Paragraph (d) applies the limitation of the rule to other members in the subject lawyer's firm or government agency.

Paragraph (e) retains the requirement of DR 7-107(C).

Comparison to ABA Model Rule

This is essentially the ABA Model Rule, although the Model Rule has an exception in (c) that allows a lawyer to make statements to protect the client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the client. Model Rule 3.6 has no counterpart to paragraphs (c)(1) and (2) or (e) .

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a witness on behalf of the lawyer's client unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) disqualification of the lawyer would work a substantial hardship on the client; or

(4) the lawyer is appearing pro se.

(b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness on behalf of the lawyer's client.

(c) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a member of the lawyer's firm may be called as a witness other than on behalf of the lawyer's client, the lawyer may continue the representation until it is apparent that the lawyer's or firm member's testimony is or may be prejudicial to the lawyer's client.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Firm"
"Substantial"

Comparison to Oregon Code

This rule retains DR 5-102 in its entirety.

Comparison to ABA Model Rule

This rule is similar to the ABA Model Rule. Paragraph (a) of the Model Rule applies only when the lawyer is likely to be a necessary witness. In the Model Rule, paragraph (b) does not apply if the witness lawyer will be required to disclose information protected by Rule 1.6 or 1.9. Paragraph (c) has no counterpart in the Model Rule.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; and

(b) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Known"
"Knows"
"Tribunal"

Comparison to Oregon Code

Paragraph (a) is essentially the same as DR 7-103(A).

Paragraph (d) is essentially the same as DR 7-103(B), with the addition of an exception for protective orders.

Comparison to ABA Model Rule

The ABA Model Rule contains four additional provisions: prosecutors are (1) required to make reasonable efforts to ensure that accused persons are advised of the right and afforded the opportunity to consult with counsel; (2) prohibited from seeking to obtain a waiver of important pretrial rights from an unrepresented person; (3) prohibited from subpoenaing a lawyer to present evidence about current or past clients except when the information is unprivileged, necessary to successful completion of an ongoing investigation or prosecution, and there is no other feasible means of obtaining the information; and (4) prohibited from making extrajudicial public statements that will heighten public condemnation of the accused. The Model Rule also requires prosecutors to exercise reasonable care that other people assisting or associated with the prosecutor do not make extrajudicial public statements that the prosecutor is prohibited from making by Rule .3.6.

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Adopted 01/01/05

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code.

Comparison to ABA Model Rule

This is the ABA Model Rule.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting an illegal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Fraudulent"
"Knowingly"

Comparison to Oregon Code

This rule has no direct counterpart in Oregon, but it expresses prohibitions found in DR 1-102(A)(3), DR 7-102(A)(5) and DR 1-102(A)(7).

Comparison to ABA Model Rule

This is the ABA Model Rule, except that MR 4.1(b) refers to "criminal" rather than "illegal" conduct.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

(a) the lawyer has the prior consent of a lawyer representing such other person;

(b) the lawyer is authorized by law or by court order to do so; or

(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Knows*"
"*Written*"

Comparison to Oregon Code

This rule retains the language of DR 7-104(A), except that the phrase "or on directly related subjects" has been deleted. The application of the rule to a lawyer acting in the lawyer's own interests has been moved to the beginning of the rule.

Comparison to ABA Model Rule

This rule is very similar to the ABA Model Rule, except that the Model Rule does not apply to a lawyer acting in the lawyer's own interest. The Model Rule also makes no exception for communication required by a written agreement.

RULE 4.3 DEALING WITH UNREPRESENTED PERSONS

In dealing on behalf of a client or the lawyer's own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client or the lawyer's own interests.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Knows*"
"*Matter*"
"*Reasonable*"
"*Reasonably should know*"

Comparison to Oregon Code

This rule replaces DR 7-104(B). It is expanded to parallel Rule 4.2 by applying to situations in which the lawyer is representing the lawyer's own interests. The rule is broader than DR 7-104(B) in that it specifically prohibits a lawyer from stating or implying that the lawyer is disinterested. It also imposes an affirmative requirement on the lawyer to correct any misunderstanding an unrepresented person may have about the lawyer's role. The rule continues the prohibition against giving legal advice to an unrepresented person.

Comparison to ABA Model Rule

This is essentially identical to the ABA Model Rule, with the addition "or the lawyers own interests" at the beginning and end to make it clear that the rule applies even when the lawyer is not acting on behalf of a client.

RULE 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS; INADVERTENTLY SENT DOCUMENTS

(a) In representing a client or the lawyer's own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Adopted 01/01/05

Amended 12/01/06:

Paragraph (a) amended to make applicable to a lawyer acting in the lawyer's own interests.

Defined Terms (see Rule 1.0):

"*Knowingly*"
"*Knows*"
"*Reasonably should know*"
"*Substantial*"

Comparison to Oregon Code

This rule had no equivalent in the Oregon Code, although paragraph (a) incorporates aspects of DR 7-102(A)(1).

Comparison to ABA Model Rule

This is essentially the ABA Model Rule. A prohibition against "harassment" has been added to the first part of (a) to retain the severity of the kind of conduct that is sanctionable; the modifier "knowingly" has been added to the last part of paragraph (a) to make it clear that a lawyer is not responsible for inadvertently violating the legal rights of another person in the course of obtaining evidence.

LAW FIRMS AND ASSOCIATIONS

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

A lawyer shall be responsible for another lawyer's violation of these Rules of Professional Conduct if:

(a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(b) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Knowledge*"
"*Knows*"
"*Law Firm*"
"*Partner*"
"*Reasonable*"

Comparison to Oregon Code

This rule is essentially the same as DR 1-102(B) although it specifically applies to partners or others with comparable managerial authority, as well as lawyers with supervisory authority.

Comparison to ABA Model Rule

ABA Model Rule 5.1 contains two additional provisions. The first requires partners and lawyers with comparable managerial authority to make reasonable efforts to ensure that the firm has in place measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. The second requires lawyers having direct supervisory authority over another lawyer to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Reasonable*"

Comparison to Oregon Code

Paragraph (a) is identical to DR 1-102(C).

Paragraph (b) has no equivalent in the Oregon Code.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Knowledge*"
"*Knows*"
"*Law firm*"
'*Partner*"
"*Reasonable*"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code. Paragraph (a) is somewhat similar to the requirement in DR 4-101(D), but broader because not limited to disclosure of confidential client information.

Paragraph (b) applies the requirements of DR 1-102(B) to nonlawyer personnel. An exception by cross-reference to Rule 8.4(b) is included to avoid conflict with the rule that was formerly DR 1-102(D).

Comparison to ABA Model Rule

This is similar to the ABA Model Rule, although the Model Rule also requires law firm partners and other lawyers with comparable managerial authority to make reasonable efforts to ensure that the firm has in place measures giving reasonable assurance that the conduct of nonlawyer assistants is compatible with the professional obligations of lawyers. Also, the Model Rule does not have the "except as provided in 8.4(b)"

language in paragraph (b), since the Model Rule has no counterpart to DR 1-102(D).

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation, except as authorized by law; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Firm"
"Law firm"
"Matter"
"Partner"
"Reasonable"

Comparison to Oregon Code

Paragraph (a)(1) is the same as DR 3-102(A)(1). Paragraph (a)(2) is similar to DR 3-102(A)(2), except that it addressees the purchase of a deceased, disabled or departed lawyer's practice and payment of an agreed price, rather than only authorizing reasonable compensation for services rendered by a deceased lawyer. Paragraph (a)(3) is identical to DR 3-102(A)(3). Paragraph (a)(4) has no counterpart in the Oregon Code.

Paragraph (b) is identical to DR 3-103.

Paragraph (c) is identical to DR 5-108(B).

Paragraph (d) is essentially identical to DR 5-108(D).

Paragraph (e) is the same as DR 2-105, approved by the Supreme Court in April 2003.

Comparison to ABA Model Rule

This is the ABA Model Rule with the addition of paragraph (e), which has no counterpart in the Model Rule.

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission;

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or

(5) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A lawyer who provides legal services in connection with a pending or potential arbitration proceeding to be held in this jurisdiction under paragraph (c)(3) of this rule must, upon engagement by the client, certify to the Oregon State Bar that:

(1) the lawyer is in good standing in every jurisdiction in which the lawyer is admitted to practice; and

(2) unless the lawyer is in-house counsel or an employee of a government client in the matter, that the lawyer

(i) carries professional liability insurance substantially equivalent to that required of Oregon lawyers, or

(ii) has notified the lawyer's client in writing that the lawyer does not have such insurance and that Oregon law requires Oregon lawyers to have such insurance.

The certificate must be accompanied by the administrative fee for the appearance established by the Oregon State Bar and proof of service on the arbitrator and other parties to the proceeding.

Adopted 01/01/05

Amended 01/01/12:

Paragraph (e) added.

Defined Terms (see Rule 1.0):

"Matter"
"Reasonably"
"Tribunal"

Comparison to Oregon Code

Paragraph (a) contains the same prohibitions as DR 3-101(A) and (B).

Paragraph (b), (c), (d) and (e) have no counterpart in the Oregon Code.

Comparison to ABA Model Rule

Paragraphs (a), (b) and (c)(1)-(4) are identical to the Model Rule. MR 5.5(d) includes what is (c)(5) in the Oregon rule. Paragraph (e) has no counterpart in the Model Rule.

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a direct or indirect restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Adopted 01/01/05

Comparison to Oregon Code

Paragraph (a) is similar to DR 2-108(A), but in addition to partnership or employment agreements, includes shareholders and operating "or other similar type of agreements," in recognition of the fact that lawyers associate together in organizations other than traditional law firm partnerships.

Paragraph (b) is similar to DR 2-108(B).

Comparison to ABA Model Rule

This is the ABA Model Rule with the addition of the words "direct or indirect" in paragraph (b) to address

agreements that are not strictly part of the "settlement agreement."

RULE 5.7 [RESERVED]

PUBLIC SERVICE

RULE 6.1 [RESERVED]

RULE 6.2 [RESERVED]

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knowingly"
"Law firm"

Comparison to Oregon Code

This rule is similar to DR 5-108(C)(10 and (2).

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interest of a client of the lawyer. When the lawyer knows that the interest of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"

Comparison to Oregon Code

This rule is similar to DR 5-108(C)(3).

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 6.5 NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rule 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"
"Law firm"
"Matter"

Comparison to Oregon Code

This rule has no equivalent in the Oregon Code. It was adopted by the ABA in 2002 to address concerns that strict application of conflict of interest rules might be deterring lawyers from volunteering in programs that provide short-term limited legal services to clients under the auspices of a non-profit or court-annexed program.

Comparison to ABA Model Rule

This is the ABA Model Rule.

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1 COMMUNICATION CONCERNING A LAWYER'S SERVICES

(a) A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer's firm, whether in person, in writing, electronically, by telephone or otherwise, if the communication:

(1) contains a material misrepresentation of fact or law, or omits a statement of fact or law necessary to make the communication considered as a whole not materially misleading;

(2) is intended or is reasonably likely to create a false or misleading expectation about results the lawyer or the lawyer's firm can achieve;

(3) except upon request of a client or potential client, compares the quality of the lawyer's or the lawyer's firm's services with the quality of the services of other lawyers or law firms;

(4) states or implies that the lawyer or the lawyer's firm specializes in, concentrates a practice in, limits a practice to, is experienced in, is presently handling or is qualified to handle matters or areas of law if the statement or implication is false or misleading;

(5) states or implies that the lawyer or the lawyer's firm is in a position to improperly influence any court or other public body or office;

(6) contains any endorsement or testimonial, unless the communication clearly and conspicuously states that any result that the endorsed lawyer or law firm may achieve on behalf of one client in one matter does not necessarily indicate that similar results can be obtained for other clients;

(7) states or implies that one or more persons depicted in the communication are lawyers who practice with the lawyer or the lawyer's firm if they are not;

(8) states or implies that one or more persons depicted in the communication are current clients or former clients of the lawyer or the lawyer's firm if they are not, unless the communication clearly and conspicuously discloses that the persons are actors or actresses;

(9) states or implies that one or more current or former clients of the lawyer or the lawyer's firm have made statements about the lawyer or the lawyer's firm, unless the making of such statements can be factually substantiated;

(10) contains any dramatization or recreation of events, such as an automobile accident, a courtroom speech or a negotiation session, unless the communication clearly and conspicuously discloses that a dramatization or recreation is being presented;

(11) is false or misleading in any manner not otherwise described above; or

(12) violates any other Rule of Professional Conduct or any statute or regulation applicable to solicitation, publicity or advertising by lawyers.

(b) An unsolicited communication about a lawyer or the lawyer's firm in which services are being offered must be clearly and conspicuously identified as an advertisement unless it is apparent from the context that it is an advertisement.

(c) An unsolicited communication about a lawyer or the lawyer's firm in which services are being offered must clearly identify the name and post office box or street address of the office of the lawyer or law firm whose services are being offered.

(d) A lawyer may pay others for disseminating or assisting in the dissemination of communications about the lawyer or the lawyer's firm only to the extent permitted by Rule 7.2.

(e) A lawyer may not engage in joint or group advertising involving more than one lawyer or law firm unless the advertising complies with Rules 7.1, 7.2, and 7.3 as to all involved lawyers or law firms. Notwithstanding this rule, a bona fide lawyer referral service need not identify the names and addresses of participating lawyers.

Adopted 01/01/05

Amended 12/01/06:

Paragraph (a)(5) reworded to conform to former DR 2-101(A)(5).

Defined Terms (see Rule 1.0):

"*Firm*"
"*Law firm*"
"*Matter*"
"*Reasonably*"
"*Writing*"

Comparison to Oregon Code

Paragraph (a) retains DR 2-101(A).

The requirement in DR 2-101(B) to retain records of communications for two years from dissemination has been eliminated.

Paragraph (b) retains DR 2-101(C).

Paragraph (c) retains DR 2-101(E).

Paragraph (d) retains DR 2-101(F).

Paragraph (e) retains DR 2-101(G).

Comparison to ABA Model Rule

ABA Model Rule 7.1 is much shorter and less specific. It prohibits a lawyer from making false or misleading communications about the lawyer or the lawyer's services and defines a false or misleading communication as one that contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement not materially misleading.

RULE 7.2 ADVERTISING

(a) A lawyer may pay the cost of advertisements permitted by these rules and may hire employees or independent contractors to assist as consultants or advisors in marketing a lawyer's or law firm's services. A lawyer shall not otherwise compensate or give anything of value to a person or organization to promote, recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except as permitted by paragraph (c) or Rule 1.17.

(b) A lawyer shall not request or knowingly permit a person or organization to promote, recommend or secure employment by a client through any means that involves false or misleading communications about the lawyer or the lawyer's firm. If a lawyer learns that employment by a client has resulted from false or misleading communications about the lawyer or the lawyer's firm, the lawyer shall so inform the client.

(c) A lawyer or law firm may be recommended, employed or paid by, or cooperate with, a prepaid legal services plan, lawyer referral service, legal service organization or other similar plan, service or organization so long as:

(1) the operation of such plan, service or organization does not result in the lawyer or the lawyer's firm violating Rule 5.4, Rule 5.5, ORS 9.160, or ORS 9.500 through 9.520;

(2) the recipient of legal services, and not the plan, service or organization, is recognized as the client;

(3) no condition or restriction on the exercise of any participating lawyer's professional judgment on behalf of a client is imposed by the plan, service or organization; and

(4) such plan, service or organization does not make communications that would violate Rule 7.3 if engaged in by the lawyer.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Firm"
"Knowingly"
"Law firm"

Comparison to Oregon Code

This rule retains DR 2-103 in its entirety, except that the references in (c)(4) are limited to Rule 7.3.

Comparison to ABA Model Rule

ABA Model Rule 7.2(a) permits advertising through written, recorded or electronic communication, including public media, subject to the requirements of Rule 7.1 and 7.3.

ABA Model Rule 7.2(b) is similar to DR 2-103(A). It prohibits a lawyer from compensating a person for recommending the lawyer's services, but allows a lawyer to pay the cost of advertisements allowed by the Rules, to pay the usual charges of a legal service or referral plan, or to purchase a practice under Rule 1.17. MR 7.2(b)(4) allows a lawyer to refer clients to a lawyer or nonlawyer professional under a reciprocal referral agreement if the agreement is not exclusive and the client is informed of the existence and nature of the reciprocal agreement.

ABA Model Rule 7.2(c) requires that communications under the rule include the name and office address of at least one lawyer or law firm responsible for its content.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the prospective client is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(3) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertisement" in noticeable and clearly readable fashion on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraph (a).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Electronic communication*"
"*Known*"
"*Knows*"
"*Matter*"
"*Reasonable*"
"*Reasonably should know*"
"*Written*"

Comparison to Oregon Code

Paragraph (a) is similar to and replaces DR 2-104(A)(1) and (2), although this rule prohibits personal solicitation of a client only when pecuniary gain is a significant motive of the lawyer.

Paragraph (b) is similar to DR 2-101(D).

Paragraph (c) is essentially the same as DR 2-101(H).

Paragraph (d) is the same as to DR 2-104(A)(3).

Comparison to ABA Model Rule

Paragraphs (a) and (d) are the Model Rule.

Paragraph (b) is the Model Rule with the addition of (b)(1) from DR 2-101(D).

Paragraph (c) is the Model Rule, with the addition of "in noticeable and clearly readable fashion" to incorporate Oregon's requirement that "Advertisement" be larger and darker than the type used for the text of the communication.

RULE 7.4 [RESERVED]

RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer may use professional announcement cards, office signs, letterheads, telephone and electronic directory listings, legal directory listings or other professional notices so long as the information contained therein complies with Rule 7.1 and other applicable Rules.

(b) A lawyer may be designated "Of Counsel" on a letterhead if the lawyer has a continuing professional relationship with a lawyer or law firm, other than as a partner or associate. A lawyer may be designated as "General Counsel" or by a similar professional reference on stationery of a client if the lawyer or the lawyer's firm devotes a substantial amount of professional time in the representation of the client.

(c) A lawyer in private practice:

(1) shall not practice under a name that is misleading as to the identity of the lawyer or lawyers practicing under such name or under a name that contains names other than those of lawyers in the firm;

(2) may use a trade name in private practice if the name does not state or imply a connection with a governmental agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1; and

(3) may use in a firm name the name or names of one or more of the retiring, deceased or retired members of the firm or a predecessor law firm in a continuing line of succession. The letterhead of a lawyer or law firm may give the names and dates of predecessor firms in a continuing line of succession and may designate the firm or a lawyer practicing in the firm as a professional corporation.

(d) Except as permitted by paragraph (c), a lawyer shall not permit his or her name to remain in the name of a law firm or to be used by the firm during the time the lawyer is not actively and regularly practicing law as a member of the firm. During such time, other members of the firm shall not use the name of the lawyer in the firm name or in professional notices of the firm. This rule does not apply to periods of one year or less during which the lawyer is not actively and regularly practicing law as a member of the firm if it was contemplated that the lawyer would return to active and regular practice with the firm within one year.

(e) Lawyers shall not hold themselves out as practicing in a law firm unless the lawyers are actually members of the firm.

(f) Subject to the requirements of paragraph (c), a law firm practicing in more than one jurisdiction may use the same name in each jurisdiction, but identification of the firm members in an office of the firm shall indicate the jurisdictional limitations of those not licensed to practice in the jurisdiction where the office is located.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Firm"
"Law firm"
"Partner"
"Substantial"

Comparison to Oregon Code

This rule retains DR 2-102 in its entirety.

Comparison to ABA Model Rule

Paragraph (a) of ABA Model Rule encompasses the same provisions as paragraphs (a) and (c)(2) of this rule. Paragraph (b) of the Model Rule is essentially the same as paragraph (f) of this rule. Paragraph (c) of the Model Rule is similar to paragraph (d) of this rule, but without the "one year" exception. Paragraph (d) of the Model Rule is essentially the same as paragraph (e) of this rule.

RULE 7.6 [RESERVED]

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

(a) An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(1) knowingly make a false statement of material fact; or

(2) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

(b) A lawyer admitted to practice in this state shall, within 30 days after receiving notice thereof, report in writing to the disciplinary counsel of the Oregon State Bar the commencement against the lawyer of any disciplinary proceeding in any other jurisdiction.

(c) A lawyer who is the subject of a complaint or referral to the State Lawyers Assistance Committee shall, subject to the exercise of any applicable right or privilege, cooperate with the committee and its designees, including:

(1) responding to the initial inquiry of the committee or its designees;

(2) furnishing any documents in the lawyer's possession relating to the matter under investigation by the committee or its designees;

(3) participating in interviews with the committee or its designees; and

(4) participating in and complying with a remedial program established by the committee or its designees.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knowingly"
"Known"
"Matter"
"Writing"

Comparison to Oregon Code

Paragraph (a) replaces DR 1-101, but is broader because the Oregon rule applies only to misconduct in connection with the lawyer's own or another person's application for admission and this rule applies to any "disciplinary matter." Paragraph (a)(2) replaces DR 1-103(C) but requires only that a lawyer respond rather than "cooperate."

Paragraph (b) is the same as DR 1-103(D). It is placed here because it pertains to the obligations of a lawyer regarding the lawyer's own professional conduct.

Paragraph (c) is the same as DR 1-103(F). It is placed here because it pertains to the obligations of a lawyer regarding the lawyer's own professional conduct.

Comparison to ABA Model Rule

Paragraph (a) is identical to Model Rule 8.1. Paragraphs (b) and (c) have no counterpart in the Model Rules and are taken from the Oregon Code.

RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard to its truth or falsity concerning the qualifications or integrity of a judge or adjudicatory officer , or of a candidate for election or appointment to a judicial or other adjudicatory office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"

Comparison to Oregon Code

Paragraph (a) is essentially the same as DR 8-102(A) and (B), although the Oregon rule prohibits "accusations" rather than "statements" and applies only to statements about the qualifications of the person.

Comparison to ABA Model Rule

This is the ABA Model Rule, except that the Model Rule also prohibits statements pertaining to "other legal officers."

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Oregon State Bar Client Assistance Office.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or ORS 9.460(3), or apply to lawyers who obtain such knowledge or evidence while:

(1) acting as a member, investigator, agent, employee or as a designee of the State Lawyers Assistance Committee;

(2) acting as a board member, employee, investigator, agent or lawyer for or on behalf of the Professional Liability Fund or as a Board of Governors liaison to the Professional Liability Fund; or

(3) participating in the loss prevention programs of the Professional Liability Fund, including the Oregon Attorney Assistance Program.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"
"Substantial"

Comparison to Oregon Code

This rule replaces DR 1-103(A) and (E). Paragraph (a) is essentially the same as DR 1-103(A), although the exception for confidential client information is found in paragraph (c). Also, the rule now requires that misconduct be reported to the OSB Client Assistance Office, to conform to changes in the Bar Rules of Procedure that were effective August 1, 2003.

Paragraph (b) has no counterpart in the Oregon Code, although the obligation might be inferred from DR 1-103(A).

Paragraph (c) incorporates the exception for information protected by rule and statute. It also incorporates the exception contained in DR 1-103(E).

Comparison to ABA Model Rule

This is essentially the ABA Model Rule, expanded slightly. Paragraph (c) includes a reference to ORS 9.460(3) to parallel the exceptions in DR 1-103(A). Paragraph (c) in the Model Rule refers only to "information gained…while participating in an approved lawyer assistance program."

RULE 8.4 MISCONDUCT

(a) It is professional misconduct for a lawyer to:

(1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;

(4) engage in conduct that is prejudicial to the administration of justice; or

(5) state or imply an ability to influence improperly a government agency or official or to achieve results by mans that violate these Rules or other law, or

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct.

"Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

Adopted 01/01/05

Amended 12/01/06:

Paragraph (a)(5) added.

Defined Terms (see Rule 1.0):

"Believes"
"Fraud"
"Knowingly"
"Reasonable"

Comparison to Oregon Code

This rule is essentially the same as DR 1-102(A).

Paragraph (b) retains DR 1-102(D).

Comparison to ABA Model Rule

Paragraphs (a)(1) through (6) are the same as Model Rule 8.4(a) through (f), except that MR 8.4(a) also prohibits attempts to violate the rules.

Paragraph (b) has no counterpart in the Model Rules.

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Believes"
"Matter"
"Reasonably believes"
"Tribunal"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code. A similar version based on *former* ABA Model Rule 8.5 was adopted by the Supreme Court in 1996 as Bar Rule of Procedure 1.4.

BR 1.4(a) specifically provides that the Supreme Court's jurisdiction over a lawyer's conduct continues whether or not the lawyer retains authority to practice law in Oregon and regardless of where the lawyer resides.

BR 1.4(b)(1) is essentially the same as 8.5(b)(1).

BR 1.4(b)(2) applies the Oregon Code if the lawyer is licensed only in Oregon. If the lawyer is licensed in Oregon and another jurisdiction, the rules of the jurisdiction in which the lawyer principally practices apply, or if the conduct has its predominant effect in another jurisdiction in which the lawyer is licensed, then the rules of that jurisdiction will apply.

Comparison to ABA Model Rule

This is the ABA Model Rule, as amended in 2002 in conjunction with the adoption of the amendments to Rule 5.5 regarding multijurisdictional practice. As amended, the rule applies to lawyers not licensed in the jurisdiction if they render or offer to render any legal services in the jurisdiction.

RULE 8.6 WRITTEN ADVISORY OPINIONS ON PROFESSIONAL CONDUCT; CONSIDERATION GIVEN IN DISCIPLINARY PROCEEDINGS

(a) The Oregon State Bar Board of Governors may issue formal written advisory opinions on questions under these Rules. The Oregon State Bar Legal Ethics Committee and General Counsel's Office may also issue informal written advisory opinions on questions under these Rules. The General Counsel's Office of the Oregon State Bar shall maintain records of both OSB formal and informal written advisory opinions and copies of each shall be available to the Oregon Supreme Court, Disciplinary Board, State Professional Responsibility

Board, and Disciplinary Counsel. The General Counsel's Office may also disseminate the bar's advisory opinions as it deems appropriate to its role in educating lawyers about these Rules.

(b) In considering alleged violations of these Rules, the Disciplinary Board and Oregon Supreme Court may consider any lawyer's good faith effort to comply with an opinion issued under paragraph (a) of this rule as:

(1) a showing of the lawyer's good faith effort to comply with these Rules; and

(2) a basis for mitigation of any sanction that may be imposed if the lawyer is found to be in violation of these Rules.

(c) This rule is not intended to, and does not, preclude the Disciplinary Board or the Oregon Supreme Court from considering any other evidence of either good faith or basis for mitigation in a bar disciplinary proceeding.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"*Written*"

Comparison to Oregon Code

This rule is identical to DR 1-105, amended only to refer to "General Counsel's Office" in the second sentence of paragraph (a), rather than only to "General Counsel," to make it clear that opinions of assistant general counsel are covered by the rule.

Comparison to ABA Model Rule

This rule has no counterpart in the Model Rules.