

# TRIBAL ENFORCEMENT AND ADJUDICATORY JURISDICTION OVER COMMERCIAL MOTOR VEHICLES OPERATING ON ROADWAYS AND RIGHTS-OF-WAY IN INDIAN COUNTRY

Hon. Jan W. Morris (Ret.)\*

## EXECUTIVE SUMMARY<sup>1</sup>

There are more than 164,000 miles of roadways within Indian country, including rights-of-way for rural state and interstate highways. Annually more than 500,000 crashes involve a large truck or bus. The majority of nearly 4,500 fatal crashes involving large trucks occur in rural areas. The threat posed by unsafe commercial vehicles and non-Indian operators to the health and welfare of the tribe as well as the safety of all motorists supports the authority of Indian tribes to enact, enforce, and adjudicate commercial motor vehicle and commercial driver's license civil regulations over all roadways and rights-of-way within tribal lands where it is not uncommon for tribal law enforcement officers to have the primary patrol responsibility.

As sovereign governments, the 574 federally-recognized Indian tribes historically have possessed plenary authority over their territory except as may be limited by federal law or explicit treaty cession. A litany of federal caselaw acknowledges the retained civil regulatory authority of Indian tribes over Indians and non-members on tribal land, including a tribe's retained inherent power to exercise civil authority over the conduct of non-Indians within its reservation when that conduct threatens the health or welfare of the tribe. Tribal organic documents asserting retained authority over rights-of-way within tribal land have been approved by the federal government and supported by statute ("Indian country . . . include[s] rights-of-way"),<sup>2</sup> and contrary to certain language in the Supreme Court's opinion in *Strate v A-1 Contractors*,<sup>3</sup> federal regulations governing rights-of way over Indian lands now clarify that the grant of a right-of-way "does not diminish to any extent"<sup>4</sup> the Indian tribe's jurisdiction over the land and any person or activity within the right-of-way or the tribe's authority to enforce tribal law within the right-of-way. Tribal laws regarding CMV regulation, enforcement and adjudication will apply to all drivers.

---

\* Jan Morris is the Director of the National Tribal Judicial Center at the National Judicial College, the Nevada Department of Public Safety Office of Traffic Safety-designated Nevada Tribal Judicial Outreach Director, a Distinguished Faculty at the NJC, and a retired tribal court judge with over 2 years of judicial service.

<sup>1</sup> This material is based upon work supported by the Federal Motor Carrier Safety Administration (FMCSA) under Grant No. FM-CDL-0322-18-01-00. The FMCSA is a component of the United States Department of Transportation. Any opinions, findings, and conclusions or recommendations expressed in this publication are those of the author and do not necessarily reflect the view of the FMCSA and/or the U.S. Department of Transportation.

<sup>2</sup> 18 U.S.C. § 1153.

<sup>3</sup> 520 U.S. 438 (1997).

<sup>4</sup> 25 C.F.R. §169.9.

In the interests of the health and safety of the motoring public, states should recognize this tribal authority, and the Federal Motor Carrier Safety Administration should implement policies affirming tribal sovereignty and promulgate regulations requiring states to recognize Indian tribes' CMV enforcement and adjudicatory powers on all highways within tribal lands.

## PREFACE

There are more than 164,000 miles of roadways across the United States within Indian Country.<sup>5</sup> In 2009, motorists logged more than 2 billion vehicle miles on Indian reservation roads.<sup>6</sup> Roadways within Indian Country are used for a variety of reasons, from local, intrastate, and interstate transportation of goods and passengers to agricultural and mining transportation and other natural resource harvesting (e.g., timber). Beyond the commercial uses of these roadways are uses by the tribes to provide transportation and services to their citizens and other residents on tribal lands such as medical transportation, school busing, tourism, and patron transportation to tribal businesses. Almost 60,000 miles of roadways on tribal lands are paved with all but about 1,000 miles being maintained by federal, state and local governments.<sup>7</sup>

Particularly in the western United States, tribal lands can encompass vast tracks of land up to 1-3 million acres per tribe across which these roadways traverse. In the often-remote stretches of roadways, state and local law enforcement agencies do not always have an abundance of manpower to provide traffic enforcement and swift vehicle crash response. For example, the Montana Highway Patrol maintains only 225 uniformed officers<sup>8</sup> to patrol the state's 73,567 miles of highways,<sup>9</sup> in addition to conducting 4,288 school bus inspections.<sup>10</sup> Statistics from 2019 show that commercial trucks accounted for more than 3 billion miles of travel throughout Montana, representing almost 70% of daily vehicle miles of travel (DVMT) on rural roadways, predominantly interstate highways.<sup>11</sup> It is not uncommon to see tribal law enforcement officers patrolling the rural roadways that cross tribal lands (both paved and unpaved) to supplement often meager staffing of state, county, and local officers.

---

<sup>5</sup> Federal Highway Administration, Tribal Transportation Program, FY 2017 Data Report to the Secretary of Transportation and the Secretary of the Interior, Publication Number FHWA-181293-004. Retrieved 8/24/2020 from <https://highways.dot.gov/sites/fhwa.dot.gov/files/docs/federal-lands/programs-tribal/annual-report/28586/fy17-ttp-data-report.pdf>.

(Publication No. GAO-17-423). Retrieved from <https://www.gao.gov/products/GAO-17-423>.

<sup>6</sup> Sullivan IV, John J., and Martin, Clark, *The Role of TTAPs in Tribal Transportation*, Federal Highway Administration, Publication Number FHWA-HRT-10-001, Vol. 73 No. 3, Nov/Dec 2009. Retrieved 8/24/2020 from <https://www.fhwa.dot.gov/publications/publicroads/09novdec/03.cfm>.

<sup>7</sup> U.S. Government Accountability Office (May, 2017). *Tribal Transportation: Better Data Could Improve Road Management and Inform Indian Student Attendance Strategies*. (Publication No. GAO-17-423). Retrieved from <https://www.gao.gov/products/GAO-17-423>.

<sup>8</sup> Montana Highway Patrol 2019 Annual Report. Retrieved 8/28/2020 from [https://dojmt.gov/wp-content/uploads/MHP-Annual-Report\\_2019.pdf](https://dojmt.gov/wp-content/uploads/MHP-Annual-Report_2019.pdf)

<sup>9</sup> Montana Department of Transportation 2018 Fact Book. Retrieved 8/28/2020 from <https://www.mdt.mt.gov/publications/docs/brochures/factbook.pdf>

<sup>10</sup> *Ibid.*

<sup>11</sup> Montana Department of Transportation, Montana's 2019 Traffic Statistics. <https://mdt.maps.arcgis.com/apps/MapSeries/index.html?appid=71c3f510d09540688b437f38290532ff>.

Public safety is paramount in the enforcement of federal commercial motor vehicle (CMV) and commercial driver's license (CDL) regulations. With the heavy level of CMV traffic nationwide, and especially in rural areas and particularly in the western states, Indian tribes, as sovereign nations, want to ensure that all motorists and passengers within their tribal lands are safe on the highway, that CMVs have been properly inspected, and that the operators are properly trained and licensed. From a policy standpoint, training and utilizing tribal law enforcement officers in CMV/CDL enforcement is both prudent and cost-efficient given state and local law enforcement resource limitations, and comports generally with the authority of Native American tribal governments. This article demonstrates that tribal regulation of CMVs on tribal land is a vital and appropriate exercise of tribal sovereignty that promotes public safety, can build or enhance collaborative working relationships between tribes and states, and encourages formal federal recognition of tribal authority so that unsafe CMV operators can be reported to all licensing jurisdictions. Originally intended for an audience of tribal judges to support enhancement and expansion of judicial services in their jurisdictions, it may also serve to inform state and federal transportation officials as well as the legal community at large.

## **BACKGROUND**

### **“Indian Country”**

In his original 1941 text on Indian law, Felix Cohen opined that Indian country<sup>12</sup> “may perhaps be most usefully defined as country within which Indian laws and federal laws relating to Indians are generally applicable.”<sup>13</sup> However, a more modern-day and generally-accepted practical definition is now found in the United States Code. For purposes of this discussion, the term “Indian country” has the same meaning and description as in 18 U.S.C. §1151:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

### **Rights-of-way for Roads and Highways**

---

<sup>12</sup> “Indian Country” with an upper case “C” and “Indian country” may be used interchangeably herein, although the federal statutory designation is “Indian country.”

<sup>13</sup> Cohen, Felix. (1942) *Handbook of Federal Indian Law*, 3d printing, William S. Hein Co.

From the beginning of its national history, the United States, while recognizing the sovereign nature of tribal lands and reserving the same for tribal ownership and control through treaties, negotiated the creation, maintenance, and safe passage of travelers on roadways within the recognized tribal lands of individual tribal nations.<sup>14</sup> After the end of United States treaty-making with Indian tribes in 1871, roads through Indian lands were provided for by miscellaneous acts of Congress who, the Supreme Court ruled, had the authority to grant rights-of-way across Indian lands for roads, railroads, and utility lines.<sup>15</sup> Subsequently in 1901, Congress enacted 25 U.S.C §311 (“Opening highways”) which authorized the Secretary of the Interior to grant permission for the establishment of public highways through any Indian reservation.<sup>16</sup> After a major governmental policy shift culminating in the comprehensive Indian Reorganization Act of 1934 that promoted tribal sovereignty and self-government, Congress enacted 25 U.S.C. §323 (“Rights-of-way for all purposes across any Indian lands”) in 1948 which authorized the Secretary of the Interior to grant rights-of-way over tribal lands for any purpose.<sup>17</sup> Importantly, 25 U.S.C §324, a companion to §323, required the consent of the affected tribe(s) to effectuate any grant of right-of-way.

Following the enactment of 25 U.S.C. §323, regulations were created for the Secretary of the Interior to follow regarding applications for and approval of rights-of-way on Indian Lands. Previously found at 25 C.F.R. Part 256, the regulations are now at 25 C.F.R. Part 169. Recent updates will be discussed later.

## **Tribal Sovereignty**

---

<sup>14</sup> For example: the Treaty of November 11, 1794 with the Six Nations, Article 5: “The Seneca [sic] nation, all others of the Six Nations concurring, cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie . . . and the people of the United States shall have free and undisturbed use of this road, for the purposes of travelling and transportation.”; the Treaty of September 29, 1917 with the Wyandots and others, Article XIV: “The United States reserve to the proper authority, the right to make roads through any part of the land granted or reserved by this treaty . . . .”

<sup>15</sup> *Nadeau v. Union Pacific RR Co.*, 253 U.S. 442 (1920).

<sup>16</sup> Act of March 3, 1901, 31 Stat. 1084.

<sup>17</sup> For clarification, “Indian lands” includes fee lands and restricted lands. The term “fee land” refers to real property where the owner of the land holds an absolute title in the land. Early 19<sup>th</sup> century Supreme Court decisions applied the Doctrine of Discovery which conferred upon “discovering” European sovereigns fee title to lands in America occupied by Indian tribes. This title was good against all other European governments. The United States succeeded to that title to the extent it was held by the British, reserving to the Indians a “right of occupancy,” sometimes referred to as “original Indian title.” By law, that title can only be compromised by the federal government. The legal title to nearly all modern-day remaining communal tribal lands, generally identified as “reservations,” is held “in trust” by the federal government with the tribes enjoying a beneficial interest in the land. This is what is considered “trust land.” Under the federal General Allotment Act of 1887 (25 U.S.C. § 331 *et seq.*) and subsequent legislation, some communal tribal lands were divided up into farm-sized parcels to be held by individual Indians. These allotted lands (“allotments”) typically still were restricted from alienation by the Indian landholder except as provided by law or with the approval of the federal government. This is what is considered “restricted land.” The Bureau of Indian Affairs regulations controlling rights-of-way over Indian lands (25 C.F.R. Part 169) applies to both trust and restricted lands.

Indian tribes can be viewed as independent sovereign communities that have lost some aspects of sovereignty.<sup>18</sup> A tribe retains its sovereignty until Congress acts to divest that sovereignty. The powers of Indian tribal governments are “inherent powers of a limited sovereignty which has [sic] never been extinguished.”<sup>19</sup> The specific governmental powers of any particular tribe are usually defined in tribal constitutions or other organic documents. Boilerplate tribal constitutions favored by the Bureau of Indian Affairs (BIA) within the Department of the Interior after the enactment of the Indian Reorganization Act of 1934 (IRA)<sup>20</sup> typically contained provisions regarding the power of tribal government to “promulgate and enforce ordinances . . . providing for the maintenance of law and order and the administration of justice” and to “safeguard and promote the peace, safety, morals, and general welfare” of the reservation.<sup>21</sup> Subsequent revisions and amendments to tribal constitutions vary, but may include the exercise of police powers by enacting ordinances to “establish a court system,” “establish law enforcement agencies,” “protect the public health,” and “provide for the public welfare.”<sup>22</sup> Tribal constitutions must be approved by the Secretary of the Interior whose approval signifies that the tribal constitution is not contrary to applicable federal laws.<sup>23</sup> While there is no federal statutory requirement for Secretarial approval of laws and enactments of tribal governing bodies<sup>24</sup>, it is not an uncommon feature of BIA-recommended “boiler-plate” tribal constitutions in the 1930s to also include a provision for BIA review and approval of a tribal ordinance which signifies that such ordinance is not contrary to law.<sup>25</sup>

### **Tribal Traffic Codes and Enforcement**

Pursuant to federal law and tribal constitutional authority, many tribal legislative bodies have enacted ordinances and codes regulating vehicle traffic within the tribes’ lands. For example, a tribe may include within its traffic ordinance (as the Gila River Indian Community did), or in an accompanying tribal council resolution adopting the ordinance, language indicating that the enactment of civil traffic regulation is consistent with the tribe’s inherent authority because “the operation of motor vehicles on the Reservation has a direct effect on the health and welfare of the Community and its members”<sup>26</sup> and that the tribe will invoke its constitutional as well as its inherent sovereign power “to exercise civil authority over the conduct of any person operating a motor vehicle within the exterior boundaries of the . . . Reservation,”<sup>27</sup> including

---

<sup>18</sup> *Dolgenercorp Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3rd 167 (5th Cir. 2014); *aff’d* 579 U.S. \_\_\_\_\_, 136 S. Ct. 2159 (2016), citing *United States v. Wheeler*, 435 U.S. 313 (1978).

<sup>19</sup> *United States v. Wheeler*, 435 US 313, 322-23 (1978) *quoting* F. Cohen, Handbook of Federal Indian Law.

<sup>20</sup> 25 U.S. § 5101 *et seq.*

<sup>21</sup> Constitution and Bylaws of the Puyallup Tribe of the State of Washington, approved May 1, 1936, Art. VI (Powers of the Tribal Council).

<sup>22</sup> Constitution of the Salt River Pima-Maricopa Indian Community, approved August 15, 2005, Art. VII, Section 1 (Powers of the Tribal Council).

<sup>23</sup> 25 U.S.C. §5123 (a) and (d).

<sup>24</sup> *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198 (1985)

<sup>25</sup> E.g., Constitution of the Salt River Pima-Maricopa Indian Community, approved August 15, 2005, Art. VII, Section 2 (Review of Secretary of the Interior).

<sup>26</sup> Gila River Indian Community Code, Title 6 Traffic Code, Section 6.101(B).

<sup>27</sup> *Ibid.*

the conduct of non-members whose conduct threatens the health or welfare of the Community.<sup>28</sup> The Supreme Court has recognized the authority of Indian tribes to regulate the activities of nonmembers,<sup>29</sup> and the Court has consistently acknowledged that tribal authority over the activities of non-Indians on reservation lands is an important part of sovereignty.<sup>30</sup> While it is clear from *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) that Indian tribes lack criminal jurisdiction to try and punish non-Indian offenders for criminal offenses within tribal lands, tribal court civil jurisdiction is very broad under the principle that tribal sovereignty is retained where not ceded to or restricted by federal authority.<sup>31</sup>

Federal commercial motor vehicle safety laws exist “to ensure that the Secretary [of Transportation], States, and other political jurisdictions work in partnership . . . to improve motor carrier, commercial motor vehicle, and driver safety” in order to support a safe transportation system.<sup>32</sup> In particular, federal Department of Transportation regulations found at 49 C.F.R. Part 383 (regarding commercial driver’s license (CDL) standards) and 49 C.F.R. Parts 391-396 (regarding federal motor carrier safety regulations) set national standards for those topics which would most likely be the focus of tribal enforcement. The purpose of the Part 383 regulations is “to help reduce or prevent truck and bus accidents, fatalities, and injuries by requiring drivers to have a single commercial motor vehicle driver’s license and by disqualifying drivers who operate commercial motor vehicles in an unsafe manner.”<sup>33</sup> Part 393 establishes minimum standards for parts and accessories necessary for the safe operation of commercial motor vehicles (CMVs) and Part 396 establishes a requirement for and standards for the systematic inspection, repair and maintenance of all motor vehicles of motor carriers covered by the law and regulations.

Data from 2017 reflects that nationally there were an estimated 507,000 non-fatal crashes involving at least one large truck or bus,<sup>34</sup> and large trucks and buses accounted for 13% of all traffic fatalities, which saw 5,005 lives lost in 4,455 crashes involving large trucks or buses.<sup>35</sup> Statistics further show that 61% of fatal crashes involving a large truck occurred in rural areas.<sup>36</sup> These statistics do not reflect data regarding crashes involving motor carriers other than large trucks and buses. While the available data showing how many of these fatal and non-fatal crashes occurred on the 164,000 miles of roadways traversing tribal lands is admittedly

---

<sup>28</sup> Gila River Indian Community Code, Title 6 Traffic Code, Section 6.101(A).

<sup>29</sup> *Montana v. United States*, 450 U.S. 544 (1981).

<sup>30</sup> *Iowa Mutual Ins. Co. v LaPlante*, 480 U.S. 9, 18 (1987).

<sup>31</sup> *United States v. Wheeler*, 435 U.S. 313 (1978).

<sup>32</sup> 49 U.S.C. §31100.

<sup>33</sup> 49 C.F.R. 383.1(a).

<sup>34</sup> U.S. Department of Transportation, Federal Motor Carrier Pocket Guide to Large Truck and Bus Statistics (2019).

<sup>35</sup> U.S. Department of Transportation, Federal Motor Carrier Safety Administration 2018 Factsheet. Retrieved from <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/safety/data-and-statistics/473411/cmvtrafficsafetyfactsheet2018.pdf>.

<sup>36</sup> *Ibid.*

inaccurate for multiple reasons,<sup>37</sup> it is easy to envision how tribal enforcement of traffic laws (state or tribal), and particularly CMV/CDL regulations incorporated into state or tribal law, could lead to the prevention of fatal and non-fatal crashes in the rural areas of a state where tribal law enforcement may be more readily available than state law enforcement. How this vision can become reality will be discussed in the last section.

## **Support, Challenges, and Limitations for Tribal CMV Enforcement**

Tension sometimes arises between the governments of states and Indian tribes, a natural consequence of two disparate governmental entities occupying the same geographic space.

### Black-Letter Law

Federal statutes provide little guidance on the topic of a tribe's jurisdiction to enforce federal CDL/CMV regulations (either independently or via incorporation into tribal legislation) or to regulate commercial motor vehicle traffic by non-Indian operators on roadways within Indian country through tribal legislation. Similarly, neither federal transportation agencies' nor the Bureau of Indian Affairs' regulations (with one exception<sup>38</sup>) address those specific topics. There are some federal regulations that appear generally applicable to tribal authority on Indian country roadways as well as other federal agencies' regulations that lay out the process for Indian tribes' treatment as states which may be instructive regarding potential future collaborative state-tribal CDL/CMV enforcement.

### Historic Litigation

Exhaustive research has revealed no controlling federal caselaw or persuasive state caselaw that is directly on point regarding the authority of American Indian and Alaskan Native tribes to enact tribal civil regulatory legislation affecting commercial traffic on roadways within Indian country, to exercise tribal police power by enforcing such regulations, or to exercise adjudicatory authority over alleged violations of such regulations. Federal caselaw tends to treat each of these three topics using a collective approach that appears applicable to all Indian and Alaska Native tribes in spite of the federal government's espoused policy of a "government-to-government" relationship with each of the 574 federally recognized Indian and Alaskan Native tribes, the constitutional supremacy of the nearly 400 congressionally ratified treaties with individual or collective tribes, the governmental organizational circumstances of each tribe, whether governed by an IRA tribal constitution (which by law must be reviewed and approved by the Secretary of the Interior on behalf of the United States government as being in compliance with all applicable federal law) or some other non-IRA organic document, and the application of

---

<sup>37</sup> See, Hon. J. Matthew Martin (Fall, 2018). Groping for the Boundaries of Indian Country, *Highway to Justice*, p 1-2. Retrieved from

[https://www.americanbar.org/content/dam/aba/publications/judicial\\_division\\_record/2018fall\\_hwtj.pdf](https://www.americanbar.org/content/dam/aba/publications/judicial_division_record/2018fall_hwtj.pdf)

<sup>38</sup> Fn 81, *infra*.

various congressional enactments including PL 280, ANCSA, and the Oklahoma Indian Welfare Act, to name a few.

In colonial times, Indian tribes were considered sovereign and the territory inhabited and used by them was entirely the province of the tribes, and they had jurisdiction in fact and theory over all persons and subjects present there. By treating with the tribes as foreign nations, the colonial powers and later the federal government recognized the sovereign status of the tribes. As the relationship between the tribes and the nascent U.S. government evolved, this concept was somewhat diminished by the U.S. Supreme Court 30 years and many treaties after the founding of the United States in the case of *Johnson v. M'Intosh*.<sup>39</sup> There, in order to justify the taking of land necessary for the expansion of the country and to establish the natural inferiority of the “savage” indigenous population to the growing new civilized (i.e., Christian) dominant culture, Chief Justice John Marshall relied on the doctrine of discovery to conclude that “the rights of the original inhabitants were . . . necessarily impaired . . . [and] their rights to complete sovereignty, as independent nations, were necessarily diminished.”<sup>40</sup>

Ten years later, Marshall continued that diminution in *Cherokee Nation v. Georgia*<sup>41</sup> in which, while being careful to acknowledge that the Cherokee Nation was still considered a “state” (as the term was used at that time to describe a distinct political society), the tribe could no longer be considered a “foreign” nation within the meaning of Article III of the U.S. Constitution since it resides within the acknowledged boundaries of the United States and is, consequently, considered within the jurisdictional limits of the United States. Instead, (admitting that “the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else”<sup>42</sup>), Marshall, relying on a variation of international law existing at the time, established a new concept. Due to the Indians’ acceptance of various treaties with the United States which contained standard provisions whereby the U.S. agreed to protect the tribe from dominion or demise by European nations, the tribes’ acquiescence was equivalent to their *reliance* on the protection of the United States, thus establishing a dependency. As a result, Marshall postulated, the Indians “may, more correctly, perhaps, be denominated domestic dependent nations.”<sup>43</sup>

As domestic dependent nations, the Supreme Court clarified in *Worcester v. Georgia*<sup>44</sup> that the “settled doctrine of the law of nations is, that a weaker power does not surrender its independence -- its right to self-government -- by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.”<sup>45</sup> So, while tribes may be deemed dependent nations, they “do not thereby cease to be

---

<sup>39</sup> 21 U.S. (8 Wheat.) 543 (1823).

<sup>40</sup> *Id.* at 574.

<sup>41</sup> 30 U.S. (5 Pet.) 1 (1831).

<sup>42</sup> *Id.* at 16.

<sup>43</sup> *Id.* at 17, *emphasis added*.

<sup>44</sup> 31 U.S. (6 Pet.) 515 (1832).

<sup>45</sup> *Id.* at 520.



sovereign and independent states”<sup>46</sup> and must still retain the inherent authority to make their own laws and be governed by them within their own territory, to the exclusion of any state authority or law.

Fast forward 127 years to 1959 when the Supreme Court, in *Williams v. Lee*,<sup>47</sup> confirmed that state courts had no jurisdiction in a particular class of civil litigation, noting that “the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be governed by them.”<sup>48</sup> Regarding the litigation at issue in the case, the court said that permitting state court jurisdiction in that instance “would undermine the authority of the tribal courts over Reservation affairs . . . .”<sup>49</sup>

In *Iowa Mutual Insurance Co v. LaPlante*,<sup>50</sup> the Supreme Court declined to decide whether, under the facts of the case, a tribal court had power to entertain a civil case against a non-Indian defendant, but acknowledged that “[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty [and] civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.”<sup>51</sup> This appears to be an affirmation of general tribal court civil subject matter jurisdiction, personal jurisdiction over non-Indians, and territorial jurisdiction over all tribal lands.

A number of cases have addressed the civil jurisdiction of tribes and tribal courts with regard to non-Indians. Keeping in mind that “jurisdiction” includes the three components identified in *Iowa Mutual* (subject matter, personal, territorial), various cases have addressed only one or two of the components, creating a hodgepodge of jurisdictional cases that must be navigated. Cases that address the specific issues of interest with regard to CDL/CMV regulation, enforcement, and adjudication must be reviewed.

Beginning with subject matter jurisdiction, the question arises whether tribes’ sovereignty includes the ability to regulate commercial motor vehicle traffic via legislation or tribal governmental agency rules promulgation. As noted above, tribal organic documents will typically provide for the authority of tribes to promulgate and enforce ordinances to safeguard and promote safety and the general welfare of the reservation. Tribal regulation of traffic on roadways within tribal lands is unquestionably a matter of safety and general welfare and is consistent with a tribe’s sovereignty. The federal government has long recognized that “Indian tribes possess a broad measure of civil [regulatory] jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest.”<sup>52</sup> Regulation of commercial traffic on the 164,000 miles of roadways traversing Indian lands to ensure the safe

---

<sup>46</sup> *Id.*

<sup>47</sup> 358 U.S. 217, 223 (1959).

<sup>48</sup> *Id.* at 220.

<sup>49</sup> *Id.* at 223.

<sup>50</sup> 430 U.S. 9 (1987)

<sup>51</sup> *Id.* at 18.

<sup>52</sup> *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980).

operation of thousands of CMVs so that tribal members and the motoring public are not injured or killed is, inarguably, a significant tribal interest.

The clear and obvious starting point for a discussion about the civil regulatory authority of Indian tribes over commercial vehicles operating in Indian Country is a recognition that the tribes, in fact, continue to possess the inherent sovereign power to do so. However, significant reliance by those who do not support tribal regulation will likely be placed on the case *Montana v. United States*.<sup>53</sup> In *Montana*, the Crow Tribe had, through various tribal laws, imposed hunting and fishing regulations throughout its reservation in Montana which prohibited non-Indians from hunting and fishing within the reservation, even on the non-Indians' own fee lands<sup>54</sup> located within the reservation. The Supreme Court agreed that the Tribe, as an expression of inherent sovereign power, "may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe" and that "if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits."<sup>55</sup> But, relying on language from *Wheeler*, the Court said that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes . . . . Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize" the Tribe's legislative prohibition.<sup>56</sup>

With particular regard to non-Indians on fee land within a reservation, the *Montana* Court recognized that "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."<sup>57</sup> However, the Court recognized only two exceptions when jurisdiction would be appropriate, which it articulated in what has become known as the "*Montana* Test": 1) A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements; and 2) a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.<sup>58</sup> The distinction between tribal regulation of non-Indians on fee land within a reservation espoused in *Montana* and the regulation of traffic on roadways and rights-of-ways within a reservation will be addressed later.

---

<sup>53</sup> 450 U.S. 544 (1981).

<sup>54</sup> Fn 17, *supra*.

<sup>55</sup> *Id.* at 557.

<sup>56</sup> *Id.* at 546-565 (citations omitted).

<sup>57</sup> *Id.* at 565.

<sup>58</sup> *Id.* at 565-566.

In *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*,<sup>59</sup> the Supreme Court applied the second prong of the *Montana* test and found that a non-member's proposed use of a small portion of fee land within the Yakima reservation would "negatively affect the general health and welfare"<sup>60</sup> of the tribe and its members and upheld the tribe's regulation of land use through a zoning ordinance that applied equally to members and non-members, even on fee land.

As part of a flood control project, Congress enacted legislation in 1954 in which the Cheyenne River Sioux Tribe relinquished over 100,000 acres of treaty land for a dam and reservoir to be controlled by the U.S. Army Corps of Engineers. Citing treaty rights, the Tribe in 1988 sought to require non-Indians to obtain tribal hunting and fishing licenses on those lands, a similar scenario to that in *Montana*. The Supreme Court ruled that Congress clearly abrogated the Tribe's pre-existing regulatory control over non-Indian hunting and fishing as a result of the land cession.<sup>61</sup>

Drawing on its previous ruling in *Montana*, the Supreme Court declared in *Strate v. A-1 Contractors*<sup>62</sup> that the tribal court of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota lacked civil adjudicatory authority over a tort action filed by a non-Indian against another non-Indian resulting from a car crash that occurred on a state highway running through the reservation. The Court took pains to describe how it believed a state highway right-of-way is equivalent to alienated fee land, thereby implicating the *Montana* Test. Stating that "[n]either regulatory nor adjudicatory authority over *the state highway accident* at issue is needed to preserve the right of reservation Indians to make their own laws and be ruled by them"<sup>63</sup>, the Court surmised that the *Montana* Rule, and not its exceptions, applied.

To the contrary, in the aforementioned discussion about the civil regulatory authority of tribes over CMVs, *Strate* and *Montana* are easily distinguishable from the previously described starting premise that tribes inherently possess such authority, as will be shown below.

### Support for Tribal Enforcement

In *Confederated Tribes of the Colville Reservation v. Washington*,<sup>64</sup> the Ninth Circuit held that civil regulatory traffic laws promote the public safety and welfare on public highways and that traffic infractions not otherwise denominated as crimes, such as DWI, are not criminal offenses. The court further rejected the state's argument that uniformity in highway safety laws requires only state jurisdiction, at least where tribes have shown their own highway safety laws and institutions are adequate. The power to regulate is only meaningful when combined with the power to enforce. Obviously, tribal police must have such power.<sup>65</sup> Fundamental to enforcing

---

<sup>59</sup> 492 U.S. 408 (1989).

<sup>60</sup> *Id.* at 443.

<sup>61</sup> *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993).

<sup>62</sup> Fn 3 *supra*.

<sup>63</sup> *Id.* at 459, *internal quotations omitted, emphasis added*.

<sup>64</sup> 938 F.2d 146 (9<sup>th</sup> Cir 1991) *cert denied* \_\_\_ U.S. \_\_\_ (1992).

<sup>65</sup> *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9<sup>th</sup> Cir.1975).

any traffic code is the authority by tribal officers to stop vehicles violating that code on roads within a reservation.<sup>66</sup> The Supreme Court “do[es] not question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway.”<sup>67</sup> It would severely hamper a tribe's ability to protect the welfare of Indians as well as non-Indians on the Reservation, the Supreme Court acknowledged, if it were to hold that tribes do not have authority to stop and detain alleged offenders who present a clear threat to community members.<sup>68</sup> In *United States v. Cooley*,<sup>69</sup> the Supreme Court reiterated that it has repeatedly acknowledged the existence of the *Montana* exceptions and preserved the possibility that certain forms of nonmember behavior may sufficiently affect the tribe as to justify tribal oversight, noting that the Court was presented with no statutory or regulatory provisions to show that Congress sought to deny tribes such authority and, “[t]o the contrary, in our view, existing legislation and executive action appear to operate on the assumption that tribes have retained this authority.”<sup>70</sup> In fact, “no treaty or statute has explicitly divested tribes of the policing authority at issue.”<sup>71</sup> Tribal enforcement authority has also been recognized in the context of highway safety and enforcement roadblocks on state highways passing through tribal lands to check for impaired drivers in addition to operators’ licensing and vehicle registration compliance. In *Bressi v. Ford*<sup>72</sup> the 9<sup>th</sup> Circuit Court of Appeals held that a roadblock on a public right-of-way within Indian territory, established on tribal authority, is permissible.

### The Fallacy of *Strate* and *Montana*

The Supreme Court in *Strate* “likened the public right-of-way to non-Indian fee land because the Tribes lacked the power to assert a landowner's right to occupy and exclude.”<sup>73</sup> Once an Indian reservation has been created, only Congress can divest a reservation of its land.<sup>74</sup> Diminishment will not be lightly inferred.<sup>75</sup> If Congress wishes to disestablish reservation land and, thus, eliminate tribal authority over that land, Congress must clearly express its intent to do so.<sup>76</sup> As noted previously, rights-of-way for public highways on tribal land are governed by 25 U.S.C. §323. In order for a public highway right-of-way to be equivalent to alienated, non-Indian land over which the tribe has ceded its jurisdiction and rights as the beneficial owner of the land as asserted in *Strate*, the holding in *McGirt* would require that §323 expressly state that the granting of the right-of-way by the Secretary of the Interior would remove the land constituting the right-of-way from all tribal interests. Congress included no such language in §323. There is no explicit language in §323 that either temporarily (during the term of the right-of-way) or permanently divests a tribe of its authority over right-of-way land. At the termination of the

---

<sup>66</sup> *State v. Schmuck*, 850 P.2d 1332 (Wash. 1993).

<sup>67</sup> Fn 3 *supra*, 520 U.S. at 456, n. 11,

<sup>68</sup> Fn. 66, 850 P.2d at 1342.

<sup>69</sup> \_\_\_ U.S. \_\_\_, 141 S. Ct. 1638 (2021).

<sup>70</sup> *Id.* at 1646.

<sup>71</sup> *Id.* at 1643.

<sup>72</sup> 575 F.3d 891 (9th Cir 2009).

<sup>73</sup> *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 651 (2001), *internal quotation and citation omitted*.

<sup>74</sup> *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

<sup>75</sup> *Ibid.*

<sup>76</sup> *McGirt v. Oklahoma*, 591 U.S. \_\_\_, 140 S. Ct. 2452 (2020).

right-of-way term or upon abandonment of the right-of-way, complete authority over the land reverts to the tribe without diminishment. To the contrary, §323 expressly states that the right-of-way may be granted by the Secretary “subject to restrictions *against* alienation.”<sup>77</sup> Thus, “it is clear that it was not the purpose of Congress to extinguish the title of the Indians in the land comprised within the right of way.”<sup>78</sup>

When the Secretary of the Interior considers a proposed highway right-of-way, he or she must follow regulations as authorized by 25 U.S.C. §328. Pursuant to that authority, the Secretary of Interior, following Administrative Procedures Act notice-and-comment rulemaking protocols, promulgated rules governing the consideration of applications for rights-of-way over tribal lands. A right-of-way, according to 25 C.F.R. §169.2, is defined as “an easement or a legal right to go over or across tribal land . . . for a specific purpose, including but not limited to building and operating a line or road.”<sup>79</sup> There is no language in the statute or the rule that even hints that the grantee of the right-of-way has primary and exclusive regulatory authority over the land comprising the right-of-way or that tribal authority over the land is impaired to any degree. Rule 169.2 provides that “in all cases, title to the land remains vested in the landowner.”<sup>80</sup> Since the statute authorizing rights-of-way across Indian lands does not expressly divest the tribe of its ownership interests, those interests remain in place. In support of continuing tribal authority, 25 C.F.R. §169.10 makes clear that a right-of-way is a non-possessory interest in land, and

the Secretary’s grant of a right-of-way will clarify that it does not diminish to any extent:

(a) The Indian tribe’s jurisdiction over the land subject to, and any person or activity within the right-of-way;

\* \* \*

(c) The Indian tribe’s authority to enforce tribal law of general or particular application on the land subject to and within the right-of-way, as if there were no grant of right-of-way; [or]

(d) The Indian tribe’s inherent sovereign power to exercise civil jurisdiction over non-members on Indian land . . . .<sup>81</sup>

Applicable in this instance is the principle of *Chevron* deference, which provides that courts must yield to an agency’s interpretation of a statute that Congress has instructed the agency to administer, particularly subsequent to notice-and-comment rulemaking.<sup>82</sup> Clarifying the apparent conflict between *Strate* and the language of the final rule, the Department of Interior explained that:

---

<sup>77</sup> 25 U.S.C § 323, *emphasis added*.

<sup>78</sup> *United States v. Soldana*, 246 U.S. 530, 532-533 (1918).

<sup>79</sup> 25 C.F.R. §169.2.

<sup>80</sup> *Ibid*.

<sup>81</sup> 25 C.F.R. §169.10.

<sup>82</sup> See, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984); see also, *Christensen v. Harris County*, 529 U.S. 576 (2000).

The circumstances in *Strate* are limited to the facts presented in that case. In *Strate*, neither the Federal Government nor the tribe expressly reserved jurisdiction over the land in the grant of the right-of-way. This lack of reservation of a “gatekeeping right” led the Supreme Court to consider the right-of-way as aligned, for purposes of jurisdiction, with land alienated to non-Indians. In these regulations, as grantor, the United States is preserving the tribes' jurisdictions in all right-of-way grants issued under these regulations and is requiring that such grants expressly reserve tribal jurisdiction. Therefore, grants of rights-of-way under these regulations, consistent with the Court's reasoning in *Strate*, would not be equivalent to fee land, but would retain the jurisdictional status of the underlying land.<sup>83</sup>

The Interior Department further noted that “*Strate* does confirm, however, that where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.”<sup>84</sup> Additionally, the Interior Department acknowledges that “[t]ribal governments can regulate travel on roads under their jurisdiction and establish a permitting process to regulate the travel of oversize or overweight vehicles, under applicable Federal law.”<sup>85</sup>

As noted previously, many modern Indian tribal governments are governed by tribal constitutions approved by the federal government pursuant to the Indian Reorganization Act of 1934.<sup>86</sup> Typical language in many constitutions are references to the jurisdiction of the tribe that “shall extend over all persons, property, lands, water, air space, resources and all activities occurring within the boundaries of the reservation or on other lands within the jurisdiction of the Nation notwithstanding the issuance of any right-of-way.”<sup>87</sup> Even when not included in the tribal constitution, tribes will often provide in their statutes that tribal territory “shall be taken to include all territory within the reservation boundaries, including fee-patented lands, rights-of-way, roads, water, bridges and land used for schools, churches or agency purposes.”<sup>88</sup>

When tribes have specifically included a jurisdictional statement as including rights-of-way in Secretarial-approved tribal constitutions, and when tribal laws declaring that tribal jurisdiction includes rights-of-way are required by the tribal constitution to be reviewed and approved by the federal government to ensure they are not contrary to federal law, the existence of these organic and positive-law sources of tribal authority over rights-of-way establish that they are valid.<sup>89</sup> These federal rules governing rights-of-ways over tribal lands and tribal jurisdiction over those rights-of-way comport with the language already approved by the

---

<sup>83</sup> 80 Fed. Reg. 72491, 72494 (published 11/19/2015) <https://www.federalregister.gov/documents/2015/11/19/2015-28548/rights-of-way-on-indian-land>, *internal citations omitted*.

<sup>84</sup> 80 Fed. Reg. 72491, 72504, *brackets and internal quotation marks omitted*.

<sup>85</sup> 25 C.F.R. §170.933.

<sup>86</sup> Pub. L. 73-383.

<sup>87</sup> Article II, Constitution of the Fort McDowell Yavapai Nation.

<sup>88</sup> Chapter 4, Article I, Sec. 4-1(c)(3), Salt River Pima-Maricopa Indian Community Code of Ordinances.

<sup>89</sup> Fn 22 and fn 24, *supra*.

Secretary of Interior in tribal constitutions and laws. Notably, the term “Indian country” includes “rights-of-way running through the reservation.”<sup>90</sup> Tribal jurisdiction over rights-of-way is also consistent with the definition of “Indian country” in 18 U.S.C. §1151. Thus, rights-of-way running through a reservation remain part of the reservation and within the territorial jurisdiction of the tribal police.<sup>91</sup> It is clear that the rights-of-way for state-built and -maintained public roadways running through tribal lands does not divest the tribe of its authority over the land comprising the right-of-way.

The Supreme Court’s decision in *Strate* suffers from inaccuracies other than just its misinformed belief that a right-of-way is equivalent to a conversion to fee status of the land constituting the right-of-way. Because the unanimous Court wrongly equated a right-of-way to non-Indian fee land, it reasoned that tribal authority over non-Indians should follow the holding in its 1981 *Montana* decision. Therefore, the Court determined that the two-part *Montana* test would be the deciding factor. The Department of the Interior addressed the fallacy of this reasoning in finalizing the revised regulations governing rights-of-way over Indian land, noting in its response to comments during the rule-making comment phase that the revised rule made clear that the granting of a right-of-way does not change or diminish the nature of the land and does not convert tribal trust land to non-Indian fee land.

The *Montana* court recognized that a tribe may regulate nonmembers' activities “on land belonging to the [t]ribe or held by the United States in trust for the [t]ribe.” For this reason, the final rule . . . states simply that the regulations do not limit the tribe's inherent sovereign power to exercise civil jurisdiction over non-members on Indian land. This statement confirms that the grant of right-of-way preserves any pre-existing tribal authority.<sup>92</sup>

Consequently, the holding in *Strate* “does not apply to rights-of-way granted under these regulations because the regulations and grants establish continued tribal jurisdiction over the granted land.”<sup>93</sup>

Even if the *Montana* Rule and exceptions did apply, the Interior Department dispelled the concept that a tribe is not in a consensual relationship with a right-of-way grantee on tribal trust land under the first prong of the test.

Under *Montana*, an Indian tribe “may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” As explained above, and required by the 1948 Act, tribal

---

<sup>90</sup> 18 U.S.C. §1151(a).

<sup>91</sup> *Ortiz-Barraza*, *supra* at 1180.

<sup>92</sup> 80 Fed. Reg. 72491, 72504, *internal citations omitted*.

<sup>93</sup> *Ibid*.

consent is required for the right-of-way. Therefore, the consensual relationship exception applies.<sup>94</sup>

There are also claims that tribal traffic regulation would certainly meet the tribal safety interest of the second prong of the *Montana* Test: conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. Although the *Strate* court acknowledged that those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members, the justices opined that “if *Montana*’s second exception requires no more, the exception would severely shrink the rule.” The Court went on to discuss the case citations listed after the second exception in *Montana* which, upon review, bear little upon the topic of traffic regulation within a reservation, and in particular commercial vehicle traffic. The cases noted and relied upon in *Montana* related to civil adoption proceedings, commercial dealings, and taxation, not to public safety traffic regulation. And indeed, the actual issue in *Strate* was whether a tribal court could exercise civil tort jurisdiction over a car crash, and did not need to reach the issue of tribal traffic regulation and enforcement.

Annually more than 500,000 crashes involve a large truck or bus.<sup>95</sup> In 2018, fatal crashes occurring on the nation’s roadways that involved at least one large truck numbered 4,415.<sup>96</sup> Approximately 57 percent of all fatal crashes involving large trucks occurred in rural areas.<sup>97</sup> The sheer number of state, local and federal road miles traversing Indian country, most often in the most remote parts of a state’s highway system where state law enforcement is least prevalent, coupled with the potential number of commercial vehicles (including passenger buses, school buses, tourism buses, emergency response vehicles, roadwork heavy equipment, mining and timber produce haulers, agricultural transports, consumer delivery vans, cross-country tractor trailer rigs, to name but a few), plus the grim statistics regarding commercial vehicle-related crashes and deaths can scarcely be dismissed as “shrinking the rule” when discussing public safety.

Following the Supreme Court’s reasoning in *Strate*, concerns over public safety would also mean that tribes could not regulate food safety at non-Indian owned restaurants on tribal lands leased from the tribe by the restaurant owner. Yet the Division of Environmental Health Services Food Safety Program of the Indian Health Service informs tribes that “Tribes are the regulatory authority for [reservation-based] retail food service and food manufacturing establishments. Tribes are responsible for licensing/permitting, inspecting and enforcing codes and ordinances.”<sup>98</sup> Each year, the United States experiences 3,000 deaths from foodborne illnesses.<sup>99</sup> With larger numbers of deaths occurring from commercial vehicle crashes than bad food from restaurants, it defies logic to even suggest that it is permissible for tribes to regulate

---

<sup>94</sup> *Ibid.*

<sup>95</sup> FMCSA 2020 Pocket Guide to Large Truck and Bus Statistics, p. 34; <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-10/FMCSA%20Pocket%20Guide%202020-v8-FINAL-10-29-2020.pdf>.

<sup>96</sup> *Id* at 36.

<sup>97</sup> <https://www.fmcsa.dot.gov/safety/data-and-statistics/large-truck-and-bus-crash-facts-2018#A4>.

<sup>98</sup> IHS Portland Area Food Safety Program document: [https://www.ihs.gov/sites/portland/themes/responsive2017/display\\_objects/documents/dehs-resources/FoodSafetyProgram.pdf](https://www.ihs.gov/sites/portland/themes/responsive2017/display_objects/documents/dehs-resources/FoodSafetyProgram.pdf).

<sup>99</sup> *Ibid.*



food safety but not traffic safety. One should also bear in mind that federal case law supports the authority of Indian tribes to enforce building, health and safety, and zoning regulations, even against non-Indian fee land owners within reservations.<sup>100</sup>

### Treaty Rights and the Inherent Authority of Tribes to Exclude

From 1778 to 1871, Congress ratified nearly 400 treaties between the United States and various Indian tribes. Many of these treaties recognized and affirmed the exclusive authority of the Indian tribes to regulate commerce within their treaty-established or -recognized territories,<sup>101</sup> with some of the treaties acknowledging the tribe's authority to punish non-Indians in their territory. Many of these treaties also recognized and affirmed inherent authority of the Indian tribes to preserve peace and safety within their territories.

Treaty rights of tribes are unique to each tribe and each treaty. Many treaties contained similar language, but not identical language, so each treaty with a tribe would need to be reviewed individually to determine what inherent sovereign rights remain intact. Without detailing the plethora of similar provisions in the language of each separate treaty, suffice it to say that each tribe can look to the language of any prior treaties with the United States to determine what similar rights may still exist. As much as American courts would prefer, it would be improvident to claim there is a blanket affirmation of tribal inherent and retained authority contained in treaties, unless the general policy is one of affirmation of *all* sovereign aboriginal authority.

Many of the federal and Supreme Court decisions noted herein mention an inherent authority of tribes to exclude undesirable non-members and non-Indians. This authority to prescribe the terms upon which noncitizens of a tribe may enter and conduct themselves within the tribe's borders is "one of the inherent and essential attributes of [a tribe's] original sovereignty," a nature right of that people, indispensable to its autonomy as a distinct tribe or nation.<sup>102</sup> The United States Supreme Court put it more succinctly: "Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them."<sup>103</sup> The exclusion power was unpersuasive as a foundational basis for tribal jurisdiction in both *Montana* and *Strate*, but as has been revealed, *Montana* dealt with fee land and *Strate* dealt with a highway right-of-way that was improperly "aligned" with non-Indian fee land for tribal court tort jurisdiction purposes. As noted, the U.S. Department of Interior finds that, for the purposes of exercising its statutory authority to approve rights-of-way over Indian trust or restricted land and to promulgate regulations governing that authority, neither *Montana* nor *Strate* applies.

### Federal Authority to Treat Tribes as States

There are other parallels besides food safety to allowing tribes to regulate non-Indian activities on tribal lands. The U.S. Environmental Protection Agency's implementation of its

---

<sup>100</sup> Canby, William C., Jr. (1988). *American Indian Law in a Nutshell*, West Publishing Co., p 229.

<sup>101</sup> 1866 Treaty with the Choctaw and Chickasaw Nations, Art. 39: "No person shall expose goods or other articles for sale as a trader without a permit of the legislative authorities of the nation he may propose to trade in,"; 1866 Treaty with the Cherokee Nation, Art. 8: "No license to trade in goods, wares, or merchandise shall be granted . . . to trade in the Cherokee Nation, unless approved by the Cherokee national council . . ."

<sup>102</sup> *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905).

<sup>103</sup> *Merrion v. Jicarilla Apache*, 455 U.S. 130, 144 (1982).

various statutory authorities on Indian land is governed by the Agency's 1984 Indian Policy.<sup>104</sup> The thrust of the Policy is to encourage tribal self-determination and for EPA to work directly with Indian tribal governments consistent with the federally acknowledged government-to-government relationship. It also "recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace."<sup>105</sup> It commits EPA to "encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands."<sup>106</sup> To this end, the Clean Water Act,<sup>107</sup> the Safe Drinking Water Act,<sup>108</sup> and the Clean Air Act<sup>109</sup> all authorize the EPA to promulgate regulations specifying how EPA will treat tribes in the same manner in which it treats states. In addition, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>110</sup> authorized EPA to treat Indian tribes as states for certain specific purposes. The EPA regulations for each of these federal laws contain approval processes for treating Indian tribes as states that are relatively formal and virtually identical.<sup>111</sup> A tribe seeking treatment as a state must complete and submit an application, which EPA will review to ensure that the tribe meets the applicable requirements, including recognition, a functioning government, jurisdiction,<sup>112</sup> and capacity. A tribe that meets those requirements is then approved for treatment as a state.

While currently only states are eligible to receive Motor Carrier Safety Assistance Program (MCSAP) grant funding,<sup>113</sup> it is noteworthy that in February 2020, the Federal Motor Carrier Safety Administration (FMCSA) issued a High Priority Commercial Motor Vehicle (HP-CMV) program notice of funding opportunity (FM-MHP-20-001) which listed federally recognized Indian tribes as eligible applicants<sup>114</sup> for funding under the High Priority program.<sup>115</sup> Funding under this opportunity could possibly have been used by tribal law enforcement agencies to train a CMV enforcement officer and design and operate a CMV/CDL enforcement program. While there were no tribal applicants among those who received awards,<sup>116</sup> the NOFO demonstrates the FMCSA initiative to make tribes eligible for funding, at least under the High Priority program.

However, even if there had been a tribal awardee that implemented a CMV enforcement program, it is uncertain how that tribal agency would have compiled CMV violation dispositions

---

<sup>104</sup> Policy for the Administration of Environmental Programs on Indian Reservations, U.S. Environmental Protection Agency (Nov. 8, 1984); <https://www.epa.gov/tribal/epa-policy-administration-environmental-programs-indian-reservations-1984-indian-policy>.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387.

<sup>108</sup> 42 U.S.C. §§ 300f-300j-26.

<sup>109</sup> 42 U.S.C. §§ 7401-7671q.

<sup>110</sup> 42 U.S.C. §§ 9601-9675.

<sup>111</sup> 40 C.F.R. pts. 35, 124, and 141-46; 40 C.F.R. pts. 35 and 150.

<sup>112</sup> A tribe must submit various documents to establish its jurisdiction including: a map or legal description of the area over which the tribe has authority; a statement by a tribal legal official describing the basis, nature, and subject matter of the tribe's jurisdictional authority; a copy of all documents supporting the jurisdictional assertions (e.g., tribal constitutions, codes, bylaws, charters, etc.); and a description of the locations of the systems or sources the tribe proposes to regulate.

<sup>113</sup> See, 49 C.F.R. §350.205.

<sup>114</sup> For authority, see 49 C.F.R. §350.401.

<sup>115</sup> <https://www.grants.gov/web/grants/view-opportunity.html?oppId=323510>.

<sup>116</sup> <https://www.fmcsa.dot.gov/mission/fiscal-year-2020-high-priority-grant-program-awards>

and reported the same for inclusion in the CDLIS (Commercial Driver License Information System), the federal database to which all CDL/CMV violations are ultimately reported for state driver licensing agencies (SDLAs) licensing decisions. Established under the Commercial Motor Vehicle Safety Act of 1986, CDLIS is a national database which, by law, is required to be maintained by FMCSA, although the CDLIS is not a federal system of records. State agencies responsible for reporting convictions and withdrawals for CDL holders to other States can do so using CDLIS, a system operated by the American Association of Motor Vehicle Administrators (AAMVA) to share CDL information. Roadside enforcement officers can check a driver's info and status via the National Law Enforcement Telecommunication System (Nlets), though some have direct access to CDLIS as well. Currently, only the 50 states and the District of Columbia are required and permitted to access the CDLIS for reporting purposes. Tribal enforcement officers and criminal justice agencies that use the Bureau of Indian Affairs Tribal Access Program (TAP)<sup>117</sup> to access the National Law Enforcement Telecommunications System (Nlets) should be able to access CDLIS via Nlets to check the status of a CDL holder's status, but such access would not allow tribal officials to report CMV violations.

Additionally, there exists no federal statutory or regulatory authority that addresses how a tribe would report CMV/CDL violations adjudicated in tribal court to a SDLA where the SDLA statutorily cannot or, pursuant to state policy, will not accept CMV disposition abstracts from Indian tribes within the state. While there are no known state statutes or regulations that explicitly authorize the reporting of tribally adjudicated CMV/CDL violations or otherwise provide for full-faith and credit or comity recognition, there are anecdotal reports of a few tribes that do provide traffic case dispositions to local courts or state agencies, but such instances do not appear to be widespread or consistent.

Without a formal federal policy in place, the lack of explicit FMCSA or other federal recognition of tribal CMV enforcement or reporting authority may contribute to roadblocks hindering tribal enforcement activities and tribal reporting capabilities, to the detriment of public safety.

### **Tribal and State Enforcement – a Public Safety Collaborative**

The jurisdiction of sovereign Indian tribes to enact public safety laws pursuant to tribal constitutional authority and approved by the Secretary of the U.S. Department of Interior is undeniable. While several federal and U.S. Supreme Court cases have touched on tribal civil authority over non-Indians within tribal lands, no reported decision has been rendered specifically regarding the overarching issue of tribal legislative, enforcement, and adjudicative authority of traffic regulation of non-Indians, and particularly regulation of CMVs. As a result, a tremendous opportunity arises where tribes and states (and even the federal government) can work cooperatively and collaboratively to ensure that CMVs operating on highways within Indian country meet all federal safety regulations and help reverse the upward trend of CMV-involved crashes causing property damage, injuries and unnecessary deaths.

---

<sup>117</sup> TAP allows selected federally-recognized Tribes to more effectively serve and protect their nation's citizens by ensuring the exchange of critical data across the Criminal Justice Information Services (CJIS) systems and other national crime information systems. <https://www.justice.gov/tribal/tribal-access-program-tap>.

## Recognition of Tribal Sovereignty by States

The easiest and most convenient way for tribes and states to collaborate on highway safety and traffic regulation on highways running through reservations and other tribal lands is for states to recognize the authority of tribes to enforce civil traffic safety regulations over all drivers within tribal lands. Instances of state-tribal relations in support of this concept already exist. The Wisconsin Attorney General opined that “[b]ecause traffic offenses are matters that arguably have a direct effect on the health and welfare of the tribe, the Winnebago Tribe probably thus has the authority to enforce civil regulations over non-members” operating vehicles within tribal lands.<sup>118</sup> In addition, Wisconsin Statutes Chapter 343, § 343.12 currently recognizes the validity of tribal court traffic adjudication dispositions when considering the qualifications for school bus drivers to obtain state special authorization. Furthermore, Minnesota Statutes § 626.93 currently addresses that state’s recognition of tribal law enforcement agencies. This recognition would be, appropriately, based at a minimum on: (a) the tribe enacting appropriate traffic laws; (b) publishing the traffic laws and court procedures for access by the general public; (c) ensuring that tribal enforcement officers who may cite non-Natives into tribal court for violations of tribal CMV traffic laws have the same training and certification as state officers, and (d) ensuring that tribal judges have received training in handling CMV and CDL violations in tribal court. The tribal traffic laws should contain a specific chapter detailing commercial motor vehicles and commercial drivers licenses that are consistent with the federal CMV/CDL regulations.

The National Tribal Judicial Center at the National Judicial College will soon have available online a Model Tribal CMV Code and in 2021 will provide in-person and online training opportunities for tribal judges to learn more about CMV regulatory enforcement and will also provide bench skills and other resources to enhance their ability to competently and fairly adjudicate these cases. Additionally, state law enforcement agencies would gain a boost of manpower and both state and tribal citizens as well as the general public would benefit from safer highways with no additional cost to the states.

## Formal Policy Recognition by FMCSA

Additional support for tribal CMV and CDL regulation on tribal lands could come from FMCSA via promulgation of a policy and regulations, similar to how the EPA supports tribal environmental regulation and the Public Health Service supports tribal food safety regulation. If FMCSA were to adopt a similar Indian policy and supporting regulations, much like the EPA has done, FMCSA recognition of tribal CMV authority could be premised on a tribe’s CMV enforcement capacity that includes having tribal laws that adopt CMV/CDL requirements not less stringent than those contained in the federal regulations, and could also be based on a

---

<sup>118</sup> Wisconsin Attorney General Opinion, 78 Op. Att’y Gen. 122, 131 (1989).

requirement for state law enforcement certification and approved CMV inspection training for any tribal law enforcement officer who will enforce the tribe's CMV laws.

A more onerous (and, therefore, a more unlikely) initiative would be modifications of other regulations under 49 C.F.R. Subtitle B, Chapter III, Subchapter A, for example §384.209 (notification of traffic violations) and §384.225 (CDLIS driver recordkeeping), to require state SDLAs to accept tribal court CDL/CMV violation dispositions for inclusion in reporting since currently there exists no direct method for tribal court convictions to be included in CDLIS.

As will be discussed below, intergovernmental relationships between states and tribes are sometimes good, but other times are very strained. Given the federal government's overarching policy of promoting tribal self-governance<sup>119</sup>, another compelling reason emerges for FMCSA to implement policy and procedure that either encourages or mandates states to collaborate with tribes in the reporting of tribal court adjudications of tribal CMV violations in Indian Country. It has been demonstrated that tying state compliance with federal regulations to FMCSA or other federal transportation funding proves to be an effective incentive.

An additional positive benefit for tribes would be that these types of changes could make Indian tribes eligible to compete with states for MCSAP program grants to fund training of CDL/CMV enforcement officers and the operation of tribal CDL/CMV enforcement activities on tribal lands pursuant to tribal law that incorporate the federal standards.

#### Tribal-State Mutual Aid and Cross-Deputation Agreements

Many local governments have already entered into mutual aid or cross-deputation agreements between the local government and one or more Indian tribes. Presuming that tribal law enforcement officers possess the same level of training and certification as state officers, these arrangements greatly benefit both parties by increasing the presence of available law enforcement officials. As previously mentioned, the State of Minnesota leads the way.<sup>120</sup> But any such agreements do not necessarily have to be general in nature. Rather, they can be crafted to address specific issues, such as the regulation of non-Native vehicular traffic on highways within rights-of-ways on tribal lands, including commercial motor vehicles and their operators. Once again, it would be the responsibility of tribal officials to ensure that tribal CMV enforcement officers have received training and certification for CMV violations. The cost of such training and certification could be the responsibility of either party (possibly through grant funding) or could be split between the two. As is common in such agreements between state and local jurisdictions and Indian tribes, the agreement would require the tribe to assume liability for the official actions of a tribal enforcement officer.

---

<sup>119</sup> "As we noted in *New Mexico v. Mescalero Apache Tribe*, the Federal Government is firmly committed to the goal of promoting tribal self-government." *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 200-201 (1985) *internal citation and quotation omitted*.

<sup>120</sup> 2002 Minnesota Statutes § 626.93, Subd. 4. Cooperative agreements. In order to coordinate, define, and regulate the provision of law enforcement services and to provide for mutual aid and cooperation, governmental units and the tribe shall enter into agreements under section 471.59. For the purposes of entering into these agreements, the tribe shall be considered a "governmental unit" as that term is defined in section 471.59, subdivision 1.

An additional opportunity exists with regard to states and tribes working together to report tribal court CMV violation dispositions into the national database. An MOU, MOA or IGA could easily provide for the tribal court to report those dispositions either to a central state court location or directly to the SDLA. The benefit is obvious – tribal officers patrolling isolated rural highways will help keep all motorists safe while expanding traffic safety opportunities in rural areas without additional cost to state and local jurisdictions, and CMV/CDL violations occurring and adjudicated in Indian country are properly reported so that any necessary action on the driver’s record can be initiated by the SDLA to ensure public safety.

It would be helpful and beneficial if states, at the very least, would simply give comity to tribal judicial convictions of tribal CMV laws for the purpose of including those dispositions in each state’s CDLIS reporting. If that state, or another state, or an affected driver wishes to challenge the validity of the reported conviction, that would still go through the tribe’s established processes for challenging court orders, just as it does with states. The states would not be certifying the tribal conviction, merely reporting it.

In reality, though, state-tribal governmental relationships are neither ideal nor identical, varying from state to state. Whether based in policy considerations implicating the sovereign authority of each entity or incorporated in state statutes (purposely or inadvertently), roadblocks exist that create difficulty or impossibility for tribal courts to report CMV violations to SDLAs. There is no identified mechanism by which tribes can report these violations absent state laws, MOAs or IGAs that facilitate tribal reporting to SDLAs. Many tribes are now connected to federal databases via DOJ’s TAP program<sup>121</sup>, but even that, as a practical matter, does not appear to provide tribes access to SDLAs or provide an avenue for tribes to bypass states to allow tribal CMV violation information to be reported directly into CDLIS or through other links via Nlets.

## **SUMMARY**

Indian tribes remain sovereign governments as identified in the United States Constitution and by European nations prior to 1789. As sovereigns, tribes historically have possessed plenary authority over their territory and its inhabitants and continue that authority today except as may be limited by federal statutory law and explicit treaty cession. In the area of traffic on highways or portions of highways within tribal lands, Indian tribes have exclusive authority to regulate that traffic, including commercial motor vehicles and their operators, when the driver is Native American. This exclusive authority also extends to the enforcement of tribal traffic regulations and the adjudication of alleged violations in tribal courts. There exist many examples of tribal constitutions and tribal enactments that reference the tribe’s retention of jurisdiction over rights-of-way, all of which have been approved and acknowledged by the Secretary of the Interior on behalf of the federal government as not contrary to federal law. No federal statutes have divested Indian tribes of their inherent authority to regulate all traffic on rights-of-way within tribal lands, even involving non-Indian drivers. To the contrary, federal law

---

<sup>121</sup> <https://www.justice.gov/tribal/tribal-access-program-tap>

defines “Indian country” as including rights-of-way. Furthermore, the statute authorizing the Secretary of Interior to approve rights-of-way for highways over tribal land contains no language divesting the tribe of continued jurisdiction over the right-of-way, and the regulations of the Bureau of Indian Affairs explicitly recognize and affirm that the grant of a right-of-way does not diminish to any extent: 1) the Indian tribe’s jurisdiction over the land subject to, and any person or activity within, the right-of-way; 2) the Indian tribe’s authority to enforce tribal law of general or particular application on the land subject to and within the right-of-way, as if there were no grant of right-of-way; or 3) the Indian tribe’s inherent sovereign power to exercise civil jurisdiction over non-members on Indian land. In certain circumstances, federal regulations currently acknowledge that tribal governments can regulate travel on roads under their jurisdiction and establish a permitting process to regulate the travel of oversize or overweight vehicles, under applicable Federal law.

While there are several federal court cases that acknowledge the retained civil regulatory authority of Indian tribes, critics cite two cases (*Montana v. U.S.* and *Strate v. A-1 Contractors*) most frequently to support the proposition that tribes have not retained that authority over non-Indian drivers on highways located on fee land within an Indian reservation or on a right-of-way over trust land. However, these cases cannot be used to deny tribal civil regulatory jurisdiction over non-Indian CMV drivers because: 1) neither the main issue nor the holding in either case was regarding that specific authority (*Montana* addressed tribal hunting and fishing regulation on non-Indian-owned fee land and *Strate* addressed tribal court tort jurisdiction); 2) highway rights-of-way do not statutorily or otherwise convert trust land to fee land; and 3) under federal statutes and regulations, tribes retain regulatory authority over both on-reservation rights-of-way as well as fee lands. Additionally, individual tribes may have treaty rights that bolster their claim of authority. The regulatory authority of tribes regarding public safety and CMVs is also consistent with tribes’ public health and safety authority to regulate food safety and environmental safety.

Clearly, Indian tribes retain their inherent sovereign authority over tribal lands including highway rights-of-way. That authority includes a tribe’s interest in public health and safety manifested through civil traffic regulation as a matter of public health and safety in response to the potential threat posed by unsafe CMVs or operators. Tribal laws regarding CMV regulation, enforcement and adjudication apply to all drivers. In support of this reality, states should recognize a tribe’s authority and, ideally, enter into cooperative agreements for cross-jurisdictional enforcement and adjudication of applicable state and tribal laws based on federal CMV regulations, or at least to allow tribal courts to report CMV convictions to SDLAs. Finally, the interests of the health and safety of the motoring public would be greatly bolstered if the FMCSA would implement a policy affirming tribal sovereignty and promulgate regulations supporting states’ recognition of tribes’ CMV enforcement and adjudicatory powers on highways within tribal lands.

\* \* \*

