



Testimony

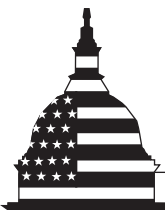
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INDIAN ISSUES

Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands

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Highlights of [GAO-11-543T](#), a statement before the Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, House of Representatives

Why GAO Did This Study

Indian tribes are among the most economically distressed groups in the United States. In 2008, the U.S. Census Bureau reported that the poverty rate among American Indian and Alaska Natives was almost twice as high as the population as a whole—27 percent compared with 15 percent. Residents of tribal lands often lack basic infrastructure, such as water and sewer systems, and sufficient technology infrastructure. Without such infrastructure, tribal communities often find it difficult to compete successfully in the economic mainstream.

This testimony statement summarizes GAO's observations on (1) five broad categories of unique issues that may create uncertainty and therefore affect economic activity in Indian country and (2) tribes' use of special gaming and small business contracting provisions. It is based on prior GAO reports.

This testimony statement contains no new recommendations.

View [GAO-11-543T](#) or key components. For more information, contact Anu K. Mittal at (202) 512-3841 or mittala@gao.gov.

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INDIAN ISSUES

Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands

What GAO Found

GAO's previous work has identified five broad categories of unique issues that may create uncertainty for tribes or, in some cases, private companies wishing to pursue economic activities on Indian reservations.

Accruing land in trust. Having a land base is essential for tribal economic development activities such as agriculture, energy development, and gaming. However, a February 2009 Supreme Court decision has raised uncertainty about the process for taking land in trust for tribes and their members.

Tribal environmental standards. The Clean Water Act, Safe Drinking Water Act, and Clean Air Act authorize the Environmental Protection Agency to treat Indian tribes in the same manner as states. In some cases, however, states are concerned that tribes with this authority may impose standards that are more stringent than the state standards, which could result in a patchwork of standards within the state and potentially hinder economic activity.

Indian tax provisions. Tribes face uncertainties regarding the types of activities that they can finance with tax-exempt bonds. Also, in 2008, GAO reported that there were insufficient data to (1) identify the users of a tax provision that allows for accelerated depreciation of certain property used by businesses on Indian reservations and (2) assess whether the provision had increased economic development on Indian reservations.

Obtaining rights-of-way. Securing rights-of-way across Indian land is important in providing Indian lands with the infrastructure needed to support economic activity. In 2006, GAO reported that obtaining rights-of-way through Indian lands was a time-consuming and expensive process.

Legal status of tribes. The unique legal status of tribes has resulted in a complex set of rules that may affect economic activities. For example, Indian tribes have sovereign immunity, which can influence a business's decision to contract with a tribe. Also, the limitations imposed by federal law on Indian tribes' civil jurisdiction over non-Indians on Indian reservations can create uncertainties over where lawsuits arising out of contracts with tribes can be brought.

In contrast to these unique issues that may pose challenges to economic activity in Indian country, some Indian tribes have taken advantage of special provisions for gaming and small business contracting. The National Indian Gaming Commission reports that tribal gaming operations generated \$26.5 billion in revenue for 2009. However, not all tribes have gaming operations and the majority of the revenue is generated by a fraction of the operations. Similarly, Alaska Native Corporations (ANC) have been granted special procurement advantages. In 2006, GAO reported that obligations to firms owned by ANCs that participated in the Small Business Administration's 8(a) program increased from \$265 million in fiscal year 2000 to \$1.1 billion in 2004. We have ongoing work looking at the use of these special procurement advantages.

Chairman Lankford, Ranking Member Connolly, and Members of the Subcommittee:

I am pleased to be here today to participate in your hearing on the challenges of trying to increase economic activity in Indian Country. Indian tribes are among the most economically distressed groups in the United States. For example, in 2008, the U.S. Census Bureau reported that American Indians and Alaska Natives were almost twice as likely to live in poverty as the rest of the population—27 percent compared with 15 percent. Residents of tribal lands also often lack basic infrastructure, such as water and sewer systems, and sufficient technology infrastructure, such as telecommunications lines that are commonly found in other American communities. Without such infrastructure, tribal communities often find it difficult to compete successfully in the economic mainstream.

Our testimony today will cover (1) five broad categories of unique issues that may create uncertainty and therefore affect economic activity in Indian Country—land issues, tribal environmental standards, Indian tax provisions, rights-of-way, and certain issues related to the legal status of tribes—and (2) tribes’ use of special gaming and small business contracting provisions. This statement is based on previously published work issued from December 2001 through March 2011. See the list of related GAO products at the end of this statement and other products cited for detailed descriptions of the scope and methodology used to conduct our work. We conducted our work in accordance with generally accepted government auditing standards or GAO’s Quality Assurance Framework, as appropriate to each engagement.

Background

Tribal lands vary dramatically in size, demographics, and location. They range in size from the Navajo Nation, which consists of about 24,000 square miles, to some tribal land areas in California comprising less than 1 square mile. Over 176,000 American Indians live on the Navajo reservation, while other tribal lands have fewer than 50 Indian residents. Some Indian reservations have a mixture of Indian and non-Indian residents. In addition, most tribal lands are rural or remote, although some are near metropolitan areas.

The federal government has consistently recognized Indian tribes as distinct, independent political communities with inherent powers of a limited sovereignty which has never been extinguished. To help manage tribal affairs, tribes have formed governments or subsidiaries of tribal governments including schools, housing, health, and other types of

corporations. The United States has a trust responsibility to recognized Indian tribes and maintains a government-to-government relationship with those tribes. As of October 2010, there were 565 federally recognized tribes—340 in the continental United States and 225 in Alaska.¹

According to tribal officials and government agencies, conditions on and around tribal lands—including the lack of technology infrastructure such as telecommunications lines—generally make successful economic development more difficult. In addition, a 1999 Economic Development Administration (EDA) study that assessed the state of infrastructure in American Indian communities found that these communities also had other disadvantages that made successful business development more difficult.² This study found that the high cost and small markets associated with investment in Indian communities continued to deter widespread private sector involvement.

To help address the needs of Indian tribes, various federal agencies provide assistance, including economic development assistance. The Bureau of Indian Affairs (BIA) in the Department of the Interior is charged with the responsibility of implementing federal Indian policy and administering the federal trust responsibility for about 2 million American Indians and Alaska Natives. BIA assists tribes in various ways, including providing for social services, developing and maintaining infrastructure, and providing education services. BIA also attempts to help tribes develop economically by, for example, providing resources to administer tribal revolving loan programs and guaranteed loan programs to improve access to capital in tribal communities. In addition to the support provided by BIA, other agencies with significant programs for tribes include the Department of Health and Human Services, which provides funding for the Head Start Program and the Indian Health Service; the Department of Housing and Urban Development, which provides support for community development and housing-related projects; and the Department of Agriculture, which provides support for services pertaining to food distribution, nutrition programs, and rural economic development.

¹75 Fed. Reg. 60810 (Oct. 1, 2010); 75 Fed. Reg. 66124 (Oct. 27, 2010).

²Linda A. Riley, B. Nassersharif, and J. Mullen, *Assessment of Technology Infrastructure in Native Communities*, a study based on a survey of 48 Native communities, New Mexico State University, (Las Cruces, N.Mex.: 1999), EDA project no. 99-07-13799.

Some Unique Issues that May Affect Economic Activity in Indian Country

Our prior work has highlighted five broad categories of unique issues that have the potential to create uncertainty for tribes or, in some cases, private companies wishing to pursue economic activities on Indian reservations. Some of the issues that we have identified during our past work include (1) accruing land in trust for tribes and individual tribal members, (2) tribal environmental standards, (3) Indian tax provisions, (4) obtaining rights-of-way, and (5) certain legal issues that arise from the unique legal status of tribes. In addition to these five issues there may be others, such as access to financing, which may also hinder economic activity on Indian reservations. The five broad categories should only be considered as illustrative of some of the unique circumstances that exist in Indian country, which tribes or other business entities will need to take into account when they consider undertaking economic activities on tribal lands.

Land in Trust Issues May Create Uncertainty

Having a land base is essential for many tribal economic development activities such as agriculture, grazing, timber, energy development, and gaming. Since the early days of colonization, Indian lands have diminished significantly, in large part because of federal policy. By 1886, Indian lands had been reduced to about 140 million acres, largely on reservations west of the Mississippi River. Federal policy encouraging assimilation in the late 1800s and early 1900s further reduced Indian lands by two-thirds, to about 49 million acres by 1934. In 1934, however, the enactment of the Indian Reorganization Act changed the government's Indian policy to encourage tribal self-governance.³ Section 5 of the act provided the Secretary of the Interior with discretionary authority to take land in trust on behalf of Indian tribes or their members. Trust status means that the federal government holds title to the land in trust for tribes or individual Indians. Once land is taken in trust it is no longer subject to state and local property taxes and zoning ordinances.⁴ In 1980, Interior established a regulatory process intended to provide a uniform approach for taking land in trust.⁵ Under the regulations, tribes or individual Indians who purchase or own property on which they pay property taxes can submit a written request to the Secretary of the Interior to have the land taken in trust; if

³Act of June 18, 1934 (Indian Reorganization Act), ch. 576, 48 Stat. 984-988 (1934), *codified as amended at* 25 U.S.C. §§ 461-479.

⁴Department of the Interior regulations provide that zoning ordinances do not apply to land in trust except as permitted by the Secretary. 25 C.F.R. § 1.4.

⁵25 C.F.R. pt. 151.

approved, the ownership status of the property would be converted from taxable status to nontaxable Indian trust status. Some state and local governments support the federal government's taking additional land in trust for tribes or individual Indians, while others strongly oppose it because of concerns about the impacts on their tax base and jurisdictional control. Since 1934, the total acreage held in trust by the federal government for the benefit of tribes and their members has increased from about 49 million to about 54 million acres.⁶

We reported in July 2006 that BIA generally followed its regulations for processing land in trust applications from tribes and individual Indians to take land into trust, but had no deadlines for making decisions on these applications.⁷ BIA generally responded to our recommendations to improve the processing of such applications, but this issue continues to create uncertainty in Indian country, in part, because of a February 24, 2009, Supreme Court decision and ongoing litigation. The Supreme Court held that the Indian Reorganization Act only authorizes the Secretary of the Interior to take land into trust for a tribe or its members if that tribe was under federal jurisdiction when the law was enacted in 1934.⁸ The court did not define what constituted being under federal jurisdiction but did find that a particular tribe, which was not federally recognized until 1983, was not under federal jurisdiction in 1934. It is not clear how many tribes or pending land in trust applications will be affected by this decision, but the decision raises a question about the Secretary's authority to take land in trust for the 50 tribes that have been newly recognized

⁶The 5-million acre difference between these two figures represents the net change of Indian land in trust from 1934. In addition to Indian applicants seeking to have land converted to trust status, Indian applicants can also seek to have land already in trust status converted to fee status (which is subject to property tax) and tribes and individual Indians can also lose trust lands through a variety of means, including probate and foreclosure. These two processes result in land "coming into trust" (referred to as acquisitions) and land "going out of trust" (referred to as disposals). The regulations governing taking land out of trust are in 25 C.F.R. pt. 152. For example, for the calendar year ending December 31, 1997, BIA reported acquiring about 360,000 acres and disposing of about 260,000 acres, for a net increase in tribal and individual Indian trust acreage of about 100,000 acres.

⁷GAO, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications*, [GAO-06-781](#) (Washington, D.C.: July 28, 2006).

⁸*Carcieri v. Salazar*, 555 U.S. 379 (2009).

since 1960 and their members.⁹ The Secretary’s decisions to take land in trust for two of these tribes—the Match-e-be-nash-she-wish Band of Potawatomi Indians of Michigan and the Cowlitz Indian tribe of Washington—have been challenged in court.¹⁰

Having or securing the land does not lead to economic development if that land sits idle. In the past we have reported on concerns about idle Indian lands and BIA’s process for leasing Indian lands,¹¹ but we have not done any recent work on these issues.

Tribal Environmental Standards May Create Uncertainty

The Clean Water Act, Safe Drinking Water Act, and Clean Air Act authorize the Environmental Protection Agency (EPA) to treat Indian tribes in the same manner as it does states,¹² referred to as TAS (treated as states),¹³ for the purposes of implementing these laws on tribal lands. On the one hand, tribes want to be treated as states and assume program responsibilities to protect their environmental resources because they are sovereign governments and have specific knowledge of their environmental needs. Tribes also generally believe that TAS status and program authority are important steps in addressing the potential impacts of economic

⁹For additional information on BIA’s administrative process for granting federal recognition and a list of newly recognized tribes see GAO, *Indian Issues: Improvements Needed in Tribal Recognition Process*, [GAO-02-49](#) (Washington, D.C.: Nov. 2, 2001). Also see enclosure II of GAO, *Indian Issues: BLM’s Program for Issuing Individual Allotments on Public Lands Is No Longer Viable*, [GAO-07-23R](#) (Washington, D.C.: Oct. 20, 2006) and appendix II of GAO, *Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act*, [GAO-10-768](#) (Washington, D.C.: July 28, 2010) for updated lists of new and restored tribes. The Shinnecock Indian Nation of New York, the newest federally recognized tribe, was recognized as of October 1, 2010. 75 Fed. Reg. 66124 (Oct. 27, 2010).

¹⁰*Patchak v. Salazar*, 646 F. Supp. 2d 72 (D.D.C. 2009), *rev’d*, 632 F.3d 702 (D.C. Cir. 2011) (remanding to district court for further proceedings); *Clark County v. Salazar*, No. 11-00278 (D.C. Cir. filed Jan. 31, 2011).

¹¹GAO, *Indian Programs: BIA’s Management of the Wapato Irrigation Project*, [GAO/RCED-97-124](#) (Washington, D.C.: May 28, 1997); GAO, *Indian Programs: BIA Should Streamline Its Processes for Estimating Land Rental Values*, [GAO/RCED-99-165](#) (Washington, D.C.: June 30, 1999).

¹²Under these laws, EPA may authorize states to establish their own standards and carry out a state program in lieu of the federal program. State standards must meet or exceed federal requirements.

¹³The acts generally use the term “treat as states.” EPA and most Indian tribes prefer to use the term “treatment in the same manner as a state.”

development affecting their land. On the other hand, in some cases, states are concerned that tribes with program authority may impose standards that are more stringent than the state's, resulting in a patchwork of standards within the state and potentially hindering the state's economic development plans.

In October 2005, we reported that since 1986, when Congress amended the first of the three environmental laws to allow TAS status for tribes, a number of disagreements between tribes, states, and municipalities had arisen, over land boundaries, environmental standards, and other issues.¹⁴ The disagreements had been addressed in various ways, including litigation, collaborative efforts, and changes to federal laws. For example, in *City of Albuquerque v. Browner*,¹⁵ the city challenged EPA's approval of the nearby Pueblo of Isleta tribe's water quality standards, which are more stringent than those of New Mexico. EPA's approval was upheld. In other disagreements, some tribes and states have addressed the issues more collaboratively. For example, the Navajo Nation and the Arizona Department of Environmental Quality entered into a cooperative agreement that, among other things, recognizes the jurisdiction of the Navajo Nation within its reservation and establishes a plan to share the cost of pilot projects. Regarding the use of federal legislation to address disagreements, a federal statute enacted in August 2005, requires Indian tribes in Oklahoma to enter into a cooperative agreement with the state before EPA can approve a tribe's TAS request.¹⁶ At the time of our October 2005 report, the Pawnee Nation was the only Oklahoma tribe that had been awarded TAS status to set its own water quality standards, and we have not conducted any more recent work on this issue.

Uncertainties Regarding the Use of Selected Indian Tax Provisions

The tax code has also been used to promote economic activity in Indian country. We have reported on tax provisions regarding (1) the uncertainties that tribes faced regarding the types of activities that they could finance with tax-exempt bonds and (2) the impact of accelerated depreciation provisions.

¹⁴GAO, *Indian Tribes: EPA Should Reduce the Review Time for Tribal Requests to Manage Environmental Programs*, GAO-06-95 (Washington, D.C.: Oct. 31, 2005).

¹⁵97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997).

¹⁶Pub. L. No. 109-59, § 10211, 119 Stat. 1144, 1937 (2005).

In September 2006, we reported on Indian tribal governments' use of tax-exempt bonds under section 7871(c) of the Internal Revenue Code.¹⁷ Section 7871(c), which was originally enacted in 1983, generally limits the use of tax-exempt bonds by Indian tribal governments to the financing of certain activities that constitute "essential government functions."¹⁸ In 1987, section 7871(e) was added to the code to limit the essential governmental functions standard further to provide that an essential governmental function does not include any function which is not customarily performed by state and local governments with general taxing powers. To date the Internal Revenue Service has not issued regulations defining essential government function.¹⁹ The lack of a definition has created uncertainty among tribes regarding the types of activities that they can finance using tax-exempt bonds. In addition, this custom-based essential governmental function standard has proven to be a difficult administrative standard and has led to audit disputes, based on difficulties in determining customs, the evolving nature of the functions customarily performed by state and local governments, and increasing involvement of state and local governments in quasi-commercial activities. In trying to determine what the customary practices were of state and local governments that tribes should be held accountable to, we reported that state and local governments had provided financial support for a variety of facilities, including rental housing, road transportation, parking facilities, park and recreation facilities, golf facilities, convention centers, hotels, and gaming support facilities.

Section 1402 of the American Recovery and Reinvestment Act of 2009 added a \$2 billion bond authorization for a new temporary category of tax-exempt bonds with lower borrowing costs for Indian tribal governments known as "Tribal Economic Development Bonds" under section 7871(f) of the Internal Revenue Code to promote economic development on Indian lands.²⁰ In general, this new authority provides tribal governments with greater flexibility to use tax-exempt bonds to finance economic

¹⁷GAO, *Federal Tax Policy: Information on Selected Capital Facilities Related to the Essential Governmental Function Test*, GAO-06-1082 (Washington, D.C.: Sept. 13, 2006).

¹⁸Indian Tribal Government Tax Status Act, Pub. L. No. 97-473, § 202, 96 Stat. 2605 (1983), *codified as amended at* 26 U.S.C. § 7871(c).

¹⁹On August 9, 2006, the Internal Revenue Service published an advanced notice of proposed rulemaking regarding the definition of essential government function and solicited comments on a definition. 71 Fed. Reg. 45474 (Aug. 9, 2006).

²⁰Pub. L. No. 111-5, § 1402, 123 Stat. 115, 351 (2009).

development projects than is allowable under the existing essential governmental function standard of section 7871(c). The Internal Revenue Service allocated the \$2 billion of bond issuance authority provided by section 1402 to 134 tribal governments in two rounds. Furthermore, the act required the Secretary of the Treasury to study the effect of section 1402 and report to Congress on the results of the study, including the Secretary's recommendation regarding the provision. According to the Treasury Department, the House Ways and Means Committee and the Senate Finance Committee indicated that, in particular, Treasury should study whether to repeal on a permanent basis the existing more restrictive essential governmental function standard for tax-exempt governmental bond financing by Indian tribal governments under section 7871(c).²¹ The act required that the study be completed no later than 1 year after enactment, which would have made the deadline February 17, 2010. The Treasury Department published a notice in the Federal Register in July 2010 seeking comments from tribal governments regarding the tribal economic development bond to assist the department in developing recommendations for the required study, but, to our knowledge, the department has not yet issued the report to Congress. There is continuing uncertainty in this area because it is unknown what the Treasury Department may recommend regarding changes to section 7871(c) and ultimately what changes, if any, Congress may adopt.

A second tax measure intended to promote economic activity in Indian country is the Indian reservation depreciation provision, enacted in 1993. The provision acts as an incentive for investment on Indian reservations because it permits taxpayers to accelerate their depreciation for certain property used by businesses on Indian reservations.²² The provision's special depreciation deduction schedule permits eligible taxpayers to take

²¹75 Fed. Reg. 39730 (July 12, 2010).

²²26 U.S.C. § 168(j). Indian reservation is defined as (1) Indian reservations; (2) public domain Indian allotments; (3) former Indian reservations in Oklahoma which are within the jurisdictional area of an Oklahoma Indian tribe as determined by the Secretary of the Interior and are recognized by the Secretary as eligible for trust land status under applicable regulations in effect on the day of the provision's enactment; (4) land held by incorporated Native groups, regional corporations, and village corporations; (5) all land within the limits of any Indian reservation under the jurisdiction of the United States Government; (6) all dependent Indian communities; (7) all Indian allotments, the Indian titles to which have not been extinguished; and (8) any lands not within the limits of an Indian reservation, part of a dependent Indian community, nor an allotment which is either held by the United States in trust or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

a larger and earlier deduction for depreciation from their business incomes than they otherwise would be allowed, thereby reducing any tax liability. Reducing tax liability earlier is an incentive for economic development because having a lower tax payment today is worth more to the taxpayer than having a lower tax payment in the future. However, in June 2008, we reported that there were insufficient data to identify users of the provision and assess whether the provision had increased economic development on Indian reservations.²³

Obtaining Rights-of-Way Across Indian Land Can Involve Uncertainty

Securing rights-of-way across Indian lands is an important component of providing Indian lands with the critical infrastructure needed to support economic activity. We have reported on the uncertainties that telecommunication service providers and a nonprofit rural electric cooperative have faced in trying to negotiate rights-of-way involving Indian lands.

In January 2006, we reported that according to several telecommunications service providers and tribal officials, obtaining a right-of-way through Indian lands is a time-consuming and expensive process that can impede service providers' deployment of telecommunications infrastructure.²⁴ The right-of-way process on Indian lands is more complex than the right-of-way process for non-Indian lands because BIA must approve the application for a right-of-way across Indian lands. BIA grants or approves actions affecting title on Indian lands, so all service providers installing telecommunications infrastructure on Indian lands must work with BIA or its contractor (a realty service provider) to obtain a right-of-way through Indian lands.²⁵ To fulfill the requirements of federal regulations for rights-of-way over Indian lands and obtain BIA

²³GAO, *Tax Expenditures: Available Data Are Insufficient to Determine the Use and Impact of Indian Reservation Depreciation*, [GAO-08-731](#) (Washington, D.C.: June 26, 2008).

²⁴GAO, *Telecommunications: Challenges to Assessing and Improving Telecommunications For Native Americans on Tribal Lands*, [GAO-06-189](#) (Washington, D.C.: Jan. 11, 2006).

²⁵The Indian Self-Determination and Education Assistance Act, as amended, directs Interior, at the request of a tribe, to contract with Indian tribes or tribal organizations to carry out the services and programs the federal government provides to Indians. Therefore, as authorized by the act, regional nonprofit corporations or tribal entities can assume management of the realty function from BIA to perform realty services for Indian lands. 25 U.S.C. § 450f.

approval, service providers are required to take multiple steps and coordinate with several entities during the application process. These steps must be taken to obtain a right-of-way over individual Indian allotments as well as tribal lands. Several of the steps involve the landowner, which could be an individual landowner, multiple landowners, or the tribe, depending on the status of the land. Specifically, the right-of-way process requires (1) written consent by the landowner to survey the land; (2) an appraisal of the land needed for the right-of-way; (3) negotiations with the landowner to discuss settlement terms; (4) written approval by the landowner for the right-of-way; and (5) BIA approval of the right-of-way application.²⁶ One telecommunication service provider told us that an individual Indian allotment of land can have over 200 owners, and federal regulations require the service provider to gain approval from a majority of them. The service provider stated that the time and cost of this process is compounded by the fact that a telecommunications service line often crosses multiple allotments. In addition, if the service provider cannot obtain consent for the right-of-way from the majority of landowners, the provider is forced to install lines that go around the allotment, which is also expensive.

Rights-of-way can also be necessary to deliver energy to consumers. In September 2004, we reported that the Copper Valley Electric Association, a nonprofit rural electric cooperative, had been unable to reach agreements with several individual Alaska Natives for rights-of-way across their land.²⁷ In 1906, the Alaska Native Allotment Act authorized the Secretary of the Interior to allot individual Alaska Natives a homestead of up to 160 acres.²⁸ We found 14 cases where conflict exists regarding Copper Valley's rights-of-way within Native allotments. Resolution to a number of these conflicts had been intermittently pursued since the mid-1990s, but at the time of our report, only a few cases had been resolved using existing remedies. Copper Valley had three remedies to resolve these conflicts: (1) negotiating rights-of-way with Native allottees in conjunction with BIA; (2) relocating its electric lines outside of the allotment; or (3) exercising the power of eminent domain, also known as condemnation,

²⁶25 C.F.R. § 169.3.

²⁷GAO, *Alaska Native Allotments: Conflicts with Utility Rights-of-way Have Not Been Resolved through Existing Remedies*, [GAO-04-923](#) (Washington, D.C.: Sept. 7, 2004).

²⁸Act of May 17, 1906 (Alaska Allotment Act), ch. 2469, 34 Stat. 197 (1906), *repealed by* Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 18(a), 85 Stat. 688, 710 (1971).

to acquire the land.²⁹ We reported that Copper Valley had ceased trying to resolve these conflicts because it maintains that the existing remedies are too costly, impractical, and/or potentially damaging to relationships with the community. More importantly, Copper Valley officials told us that on principle they should not have to bear the cost of resolving conflicts that they believe the federal government had caused.

Section 1813 of the Energy Policy Act of 2005 required the Secretaries of Energy and of the Interior to conduct a study of issues regarding energy rights-of-ways on tribal land and issue a report to Congress on the findings, including recommending appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for granting, expanding and renewing rights-of-way.³⁰ Issued in May 2007, the study focused on rights-of-way for electric transmission lines and natural gas and oil pipelines associated with interstate transit and local distribution. The study recommended that valuation of rights-of-way continue to be based on terms negotiated between the parties and that if negotiations failed to produce an agreement that has a significant regional or national effect on the supply, price, or reliability of energy resources, Congress should consider resolving such a situation through specific legislation rather than making broader changes that would affect tribal sovereignty or self-determination generally.

Certain Issues Related to the Legal Status of Tribes May Complicate the Resolution of Disputes

The unique legal status of tribes has resulted in a complex set of rules that may affect economic development efforts. As we reported earlier this year, as a general principle, the federal government recognizes Indian tribes as “distinct, independent political communities” with inherent powers of self-government.³¹ Therefore, Indian tribes have sovereign immunity as well as plenary and exclusive power over their members and territory subject only

²⁹Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where they are located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee (25 U.S.C. § 357). Under Alaska state law a public utility may exercise the power of eminent domain for public utility uses (Alaska Stat. § 42.05.631).

³⁰Pub. L. No. 109-58, § 1813, 119 Stat. 594, 1127 (2005). Tribal land is defined as any land or interests in land owned by any Indian tribe, title to which is held in trust by the United States, or is subject to a restriction against alienation under laws of the United States.

³¹GAO, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, [GAO-11-252](#) (Washington, D.C.: Feb. 14, 2011).

to the limitations imposed by federal law. However, sovereign immunity may influence a private company's decision to contract with an Indian tribe and the limitations imposed by federal law on Indian tribes' civil jurisdiction over non-Indians on Indian reservations may create uncertainties regarding where lawsuits arising out of those contracts can be brought.

Like the federal and state governments, Indian tribes are immune from lawsuits unless they have waived their sovereign immunity in a clear and unequivocal manner or a federal treaty or law has expressly abrogated or limited tribal sovereign immunity. For example, the Indian Tribal Economic Development and Contracts Encouragement Act of 2000 requires the Secretary of the Interior to approve any agreement or contract with an Indian tribe that encumbers Indian lands for 7 or more years; however, it prohibits the Secretary from approving the agreement or contract unless it provides remedies for breaching the agreement or contract, references a tribal law or court ruling disclosing the tribe's right to assert sovereign immunity, or includes an express waiver of sovereign immunity. If the tribe does not waive its sovereign immunity in the agreement or contract, private companies might be hesitant to undertake the work because they will not be able to sue the tribe if any disputes arise. In addition to waiving sovereign immunity in agreements or contracts on a case-by-case basis, some tribes have formed separate entities to conduct business that are not immune from lawsuits.

The Supreme Court has ruled that, as a general proposition, the inherent sovereign powers of an Indian tribe do not extend to the activities of non-tribal members.³² However, the Court has also recognized two exceptions to this general proposition: (1) tribes may regulate the activities of nonmembers who enter into consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements and (2) tribes may exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe. In 2008, the Supreme Court ruled that a tribal court did not have jurisdiction to adjudicate a discrimination claim against a non-Indian bank brought by a company

³²Montana v. United States, 450 U.S. 544 (1981).

owned by tribal members because neither of the exceptions applied.³³ The court's opinion focuses on the tribe's authority to regulate the bank's sale of fee land it owned within the reservation rather than addressing whether the tribal court had authority to hear the discriminatory lending claim under the consensual relationship exception. However, some private companies believe that this decision may not eliminate all of the uncertainty as to the nature and extent of tribal court jurisdiction that makes off-reservation businesses reluctant to trade on Indian reservations or with tribal members who live on reservations. For example, the brief filed by a railroad association asked the court to adopt a brightline rule that tribal courts may not exercise jurisdiction over claims against nonmembers absent clear and unequivocal consent to tribal court jurisdiction. The association argued that such a rule would ensure that litigation against nontribal members will be addressed by a forum that the nonmember has agreed affords acceptable law, procedure, and fundamental safeguards of process and fairness.

Special Provisions for Gaming and Small Business Contracting

In contrast to the unique issues that can cause uncertainty or pose challenges to economic activity in Indian country, tribes can take advantage of special provisions for gaming and small business contracting. Indian gaming, a relatively new phenomenon, started in the late 1970s when a number of Indian tribes began to establish bingo operations as a supplemental means of funding tribal operations. In 1987, the U. S. Supreme Court ruled that state regulation of tribal gaming would impermissibly infringe on tribal governments, thereby barring state regulation of tribal gaming in states which did not prohibit all forms of gaming.³⁴ In response, the Indian Gaming Regulatory Act of 1988 was enacted, which established a regulatory framework to govern Indian gaming operations.³⁵ In section 2(4) of the act, Congress found that a

³³Plains Commerce Bank v. Long Family Land and Cattle Company, 554 U.S. 316 (2008). The non-Indian bank made operating loans to the company owned by tribal members and accepted the deed to the company's fee land inside the reservation but leased the land back to the company, with an option to purchase it at the end of the lease. The company did not exercise its option and the bank subsequently sold the property to non-Indians. The company then sued the bank in tribal court on a variety of claims, including claiming that the bank discriminated against the company because it had sold the company's land to non-tribal members on terms more favorable than those offered to the company. The tribal court awarded the company an option to purchase some of the land at issue, which effectively nullified the bank's previous sale of that land to non-Indians.

³⁴California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

³⁵Pub. L. No. 100-497, 102 Stat. 2467 (1988), *codified at* 25 U.S.C. §§ 2701-2721.

principle goal of federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government. To that end, the act generally requires that the net revenues from tribal gaming operations be used to (1) fund tribal government operations or programs, (2) provide for the general welfare of the Indian tribe and its members, (3) promote tribal economic development, (4) donate to charitable organizations, or (5) help fund operations of local government agencies. A tribe may distribute its net revenues directly to tribal members, provided that the tribe has a revenue allocation plan approved by BIA and meets certain other conditions.

According to the final report of the National Gambling Impact Study Commission,³⁶ gambling revenues have proven to be a critical source of funding for many tribal governments, providing much needed improvements in the health, education, and welfare of Indians living on reservations across the United States. The National Indian Gaming Commission reports that for 2009

- 233 tribes operating 419 gaming operations generated \$26.5 billion in revenue (233 tribes represents about 40 percent of the 565 federally recognized tribes),
- the top 21 operations (or about 5 percent of all the operations) generated 38.7 percent of all the revenues, and
- the top 71 operations (or about 17 percent of all the operations) generated 69.5 percent of all the revenues.

In addition, in 1986, a law was enacted that allowed Alaska Native corporation (ANC)-owned businesses to participate in the Small Business Administration's (SBA) 8(a) program—one of the federal government's primary means for developing small businesses owned by socially and economically disadvantaged individuals. This program allows the government to award contracts to participating small businesses without competition below certain dollar thresholds. Since 1986, special procurement advantages have been extended to ANC firms beyond those afforded to other 8(a) businesses, such as the ability to win sole-source

³⁶The National Gambling Impact Study Commission, Final Report (Washington, D.C.: June 18, 1999). The National Gambling Impact Study Commission Act created the commission and required it to produce this report. Pub. L. No. 104-169, 110 Stat. 1482 (1996).

contracts for any dollar amount. In April 2006, we reported on the use of special procurement advantages by ANCs, and found that 8(a) obligations to firms owned by ANCs increased from \$265 million in fiscal year 2000 to \$1.1 billion in 2004.³⁷ In fiscal year 2004, obligations to ANC firms represented 13 percent of total 8(a) dollars. Sole-source awards represented about 77 percent of 8(a) ANC obligations for the six procuring agencies that accounted for the vast majority of total ANC obligations over the 5-year period.

ANCs use the 8(a) program to generate revenue with the goal of providing benefits to their shareholders, but the ANCs we reviewed did not track the benefits provided to their shareholders specifically generated from 8(a) activity. Thus, an explicit link between the revenues generated from the 8(a) program and benefits provided to shareholders is not documented. Benefits vary among corporations, but include dividend payments, scholarships, internships, burial assistance, land gifting or leasing, shareholder hire, cultural programs, and support of the subsistence lifestyle. The special procurement advantages for ANCs also generally apply to tribes and Native Hawaiian organizations (NHO). To obtain more information on the benefits these entities receive from participation in the 8(a) program, SBA recently promulgated regulations that require each 8(a) program participant owned by an ANC, tribe, or NHO to submit information showing how the ANC, tribe, or NHO has provided benefits to tribal or Native communities or tribal or Native members due to its participation in the 8(a) program.³⁸ The data submitted should include information relating to funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services provided by the ANC, tribe, or NHO to the affected community. We have ongoing work looking at the use of these special procurement advantages by ANCs, tribes, and NHOs.

³⁷GAO, *Contract Management: Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight*, GAO-06-399 (Washington, D.C.: Apr. 27, 2006).

³⁸76 Fed. Reg. 8222, 8264 (Feb. 11, 2011). Although the regulation, 13 C.F.R. § 124.604, requires reporting by each participant in the 8(a) program, the preamble to the regulation states that only parent corporations and not the individual subsidiary 8(a) participants will be required to submit this information. Generally, the new regulation became effective on March 14, 2011. However, SBA decided to delay the benefits reporting requirement to further study how the requirement could best be implemented without imposing an undue burden on ANCs, tribes, and NHOs. SBA has delayed the implementation for at least 6 months and noted that further delay may be necessary if the refinements to the requirement take longer than 6 months. 76 Fed. Reg. 8222, 8236 (Feb. 11, 2011).

Chairman Lankford, Ranking Member Connolly, and Members of the Subcommittee, this concludes my prepared statement. I would be pleased to answer any questions that you may have at this time.

GAO Contacts and Acknowledgments

For further information about this testimony, please contact Anu K. Mittal at (202) 512-3841 or mittala@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Jeffery D. Malcolm, Assistant Director; Jeanette Soares, and Joe Thompson also made key contributions to this statement.

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