



STATE REGULATION OF TRIBAL ECONOMIC ACTIVITY

BACKGROUND BRIEF

LPRO: LEGISLATIVE POLICY AND RESEARCH OFFICE

Laws addressing tribal economic activities involve a complex interaction between common law, constitutional law, statutory law, case law, and treaties. This complexity is underscored by competing interests of three sovereigns: the federal and state governments of the United States and tribal governments. While federal law controls nearly all aspects of Indian affairs, states have limited authority to regulate tribal economic activities in discrete areas that may impact the state's general welfare and economic interests. There are few bright lines delineating where state authority begins or ends regarding tribal economic activities.

CONTROLLING GOVERNMENT AUTHORITY

Federal Government

While the Supreme Court of the United States continues to recognize the sovereignty of tribes, it also upholds Congress' absolute authority to regulate any issue related to tribes under Article I, section 8 of the United States Constitution.¹

Constraints on tribal authority may be imposed either through federal statute or by consent of the tribe through treaty. Congress nonetheless reaffirmed tribal authority for independence, self-government, and economic development through the Indian Reorganization Act of 1934, under which Indian tribes may adopt constitutions, bylaws, and charters of incorporation that govern internal tribal matters and allow them to engage in economic activity.²

Tribal Government

A tribal government maintains authority over members of its own tribe, but this authority does not generally extend to nonmembers.³ Tribal government authority over

TABLE OF CONTENTS

CONTROLLING GOVERNMENT AUTHORITY	1
TRIBAL ECONOMIC ACTIVITY	2
TAXATION	3
GAMING	4

¹ See [U.S. v. Wheeler, 435 U.S. 313 \(1978\)](#).

² [25 U.S.C. 45 sect. 5101 et seq.](#)

³ See [Montana v. U.S., 450 U.S. 544 \(1981\)](#).

nonmembers only covers nonmember activities on Indian lands, including through taxation and licensure for commercial activities.⁴

State Government

Unless Congress explicitly provides otherwise, state law does not apply to tribal governments or members of tribes on Indian lands unless the state's interests outside the reservation are implicated. If a state's laws are either preempted by federal law or would infringe on the rights of tribal governments to govern their members, the state's laws are unlikely to be enforceable against a tribal member on Indian lands.

Whether a state law is preempted by federal law may require a court to balance the state, federal, and tribal interests involved. This balancing test has produced mixed results. However, the Supreme Court has consistently upheld a state's authority to regulate a nonmember's commercial activities on Indian lands, particularly through taxation. In some instances, a state law that affects tribal activity may be struck down even if the regulated conduct occurs outside Indian lands.

Although federal law generally prohibits state interference with tribal sovereignty, states are not prohibited from establishing cooperative agreements with tribes. The State of Oregon requires all state agencies to establish tribal relations policies, to provide annual training for agency officials and employees who have regular contact with tribes, and to designate tribal contacts for purposes of meeting on a regular basis to share information and discuss issues of mutual concern.⁵

TRIBAL ECONOMIC ACTIVITY

Under federal law, a person who is not "an Indian of the full blood" may not engage in trade with Indians without a license.⁶ The law preempts state law regulating trade with Indians, and states therefore may not impose additional burdens.⁷

Tribes themselves may engage in economic activities within and outside of Indian lands. They may do so 1) as a tribe, which may be incorporated under federal law, 2) through an unincorporated subdivision of the tribe, or 3) through a corporation that is formed under federal, tribal, or state law. With very few exceptions, these corporate forms will carry with them the tribe's sovereign immunity so long as the tribe maintains ownership and control over the corporation and a substantial portion of net revenues go to the tribe. If a tribe forms a corporation under state law, and the state law explicitly provides

⁴ See [Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.](#), 554 U.S. 316 (2008).

⁵ [O.R.S. 182.162, et seq.](#) For an overview of tribal governments in Oregon, as well as government-to-government relations between Oregon and tribal governments in the state, see *Background Brief: Tribal Governments in Oregon*, available at <https://www.oregonlegislature.gov/lpro/Publications/BB2016TribalGovernmentsinOregon.pdf>.

⁶ See [25 U.S.C. 6 \(III\) sect. 264.](#)

⁷ See [Warren Trading Post Co. v. Arizona Tax Commission](#), 380 U.S. 685 (1965).

that the corporation is subject to being sued, the corporation generally will not have sovereign immunity.⁸

A tribe may also waive its sovereign immunity through a corporate charter. Because of the complex analysis that may be required to determine whether a tribe has waived sovereign immunity with regard to a corporate form, Congress passed the Indian Tribal Economic Development and Contract Encouragement Act of 2000.⁹ The changes Congress implemented under this Act have not had a significant or definitive impact on eliminating or diminishing these complexities.¹⁰

TAXATION

As governments, Indian tribes have a long-recognized power to impose taxes on commercial activities and property located on Indian lands.¹¹ This power extends even to those commercial activities that occur on Indian lands by nonmembers of the tribe.¹² A tribe may regulate (including through taxation) consensual economic relationships between nonmembers and the tribe as well as nonmember conduct within its reservation whenever that conduct impacts the economic interests of the tribe.¹³ The requirement for a consensual relationship must include some sort of commercial dealing, contract, or lease, but cannot merely involve the receipt of tribal services.¹⁴ With regard to the impact on the economic interests of the tribe, the impact must be so severe that it actually imperils the tribe's political integrity.¹⁵

Whether state taxation of commercial activities involving tribal members may be upheld is contextual, and case law is inconsistent. State taxes on commercial activities of members of a tribe on Indian lands are presumptively invalid, while state taxes on nonmembers for commercial activity on Indian lands or of either nonmembers or members of a tribe for commercial activities off Indian lands are generally valid. In any instance, if federal law or a treaty either prohibits or permits the tax, the federal law or treaty controls. Additionally, each of these general principles has myriad exceptions, and courts have either upheld or invalidated certain state taxes in contravention of the general principles.

⁸ See, e.g., [Somerrlott v. Cherokee Nation Distributors, Inc.](#), 686 F.3d 1144 (10th Cir. 2012).

⁹ Indian Tribal Economic Development and Contract Encouragement Act of 2000, [Public Law No. 106-179](#), 114 Stat. 46 (2000).

¹⁰ See [Contracting with Tribes Under 25 U.S.C. § 81](#), 20 Probate and Property 8, American Bar Association. (2006).

¹¹ See [Washington v. Confederated Tribes of Colville Indian Reservation](#), 447 U.S. 134 (1980).

¹² See [Merrion v. Jicarilla Apache Tribe](#), 455 U.S. 130 (1982).

¹³ See [Montana v. U.S.](#), 450 U.S. 544 (1981).

¹⁴ See [Atkinson Trading Co. Inc. v. Shirley](#), 532 U.S. 645 (2001).

¹⁵ *Ibid.*

GAMING

Until 1988, when Congress passed the Indian Gaming Regulatory Act (IGRA), regulation of gambling on Indian lands was done at both the federal and state levels. Since the enactment of IGRA, state law now only controls whether gambling is permitted on Indian lands to the extent that the state otherwise authorizes gambling in the rest of the state.

IGRA regulates gaming by classifying games into one of three classes.¹⁶ Class I gaming includes social games solely for prizes of minimal value or traditional forms of Indian gaming in connection with tribal ceremonies or celebrations.¹⁷ These games fall within the “exclusive jurisdiction of the Indian tribes” and are therefore free of either federal or state regulation. Class II gaming includes two basic forms of gaming: bingo and certain nonbanking card games.¹⁸ These games fall within the jurisdiction of the Indian tribes, subject to whether the state otherwise permits the particular form of gaming. Class III gaming includes all other forms of gaming that are not either class I or class II, along with more traditional casino-like gaming such as slot machines.¹⁹ These games require the state to have otherwise authorized the gaming in the rest of the state. Class III games are permitted at casinos located on Indian lands in Oregon because state law permits the playing of “casino-style games such as roulette, blackjack, various forms of poker and other card games, craps, wheel of fortune, and baccarat” by charitable, fraternal, and religious organizations.²⁰

STAFF CONTACT

Wenzel J. Cummings, LPRO Analyst
Legislative Policy and Research Office
(503) 986-1663
Wenzel.Cummings@oregonlegislature.gov

Please note that the Legislative Policy and Research Office provides centralized, nonpartisan research and issue analysis for Oregon’s legislative branch. The Legislative Policy and Research Office does not provide legal advice. Background Briefs contain general information that is current as of the date of publication. Subsequent action by the legislative, executive, or judicial branches may affect accuracy.

¹⁶ [25 U.S.C. 29 sect. 2701 et seq.](#)

¹⁷ [25 U.S.C. 29 sect. 2703\(6\).](#)

¹⁸ [25 U.S.C. 29 sect. 2703\(7\)\(A\).](#)

¹⁹ [25 U.S.C. 29 sect. 2703\(8\).](#)

²⁰ See [State ex rel. Dewberry v. Kitzhaber, 250 Or. App. 389 \(2013\).](#)