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Application of Title VI in Indian Country: The Key is Tribal Sovereignty

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APPLICATION OF TITLE VI IN INDIAN COUNTRY: THE KEY IS TRIBAL SOVEREIGNTY

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INTRODUCTION

Title VI of the Civil Rights Act ("Title VI")[2] is an important tool in the tool belt of environmental justice advocates.[3] Environmental justice communities are increasingly turning to Title VI to protect them from the disproportionate impacts of environmental pollution.[4]

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1. J.D., University of Michigan School of Law; B.A. Cornell University. Assistant Professor of Law, University of Montana School of Law; Chief Judge, Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals. I would like to thank Professor Randall Abate for inviting me to attend Florida A&M University College of Law's Environmental Law & Justice Symposium in November 2010. Without the support and encouragement of Professor Abate, this article would not have been possible. I would also like to thank Quentin Pair for first asking the question that led me to write this article. I must thank my intelligent and talented research assistant, Melissa Fales, for her contributions to this piece. Finally, I would like to thank the editors of the Florida A&M Law Review for their assistance with this article.

2. James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L. J. 125, 152-53 (1994) ("On July 2, 1964, Congress enacted the most comprehensive civil rights legislation since the Reconstruction – the Civil Rights Act of 1964. In Title VI of the Act, Congress, using broad and forceful language, prohibits the federal government from financially supporting any program operated in a racially discriminatory manner . . . .").

3. 42 U.S.C. § 2000d (2006).

4. Colopy, *supra* note 2, at 128 ("Recipients determined to be in violation of Title VI or agency regulations can lose their funding. Since most environmental projects, including waste dumps, incinerators, and landfills, are heavily underwritten by federal funds, environmental justice plaintiffs are turning to Title VI to press for injunctive and remedial

Section 601 of Title VI states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[5] Environmental justice advocates can therefore use Title VI to combat the disproportionate impacts of pollution by arguing that federal funding should not be given, or even rescinded, where there is evidence that environmental justice communities are unfairly bearing the burden of increased pollution.[6]

Environmental justice has its origins in several social justice movements, including the Civil Rights Movements, the Anti-Toxics Movement, American Indian struggles,[7] the Labor Movement, and the

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relief under the Act."). The increasing focus on environmental justice and potential legal "tools" to address environmental justice concerns is further promoted by the Obama Administration's focus on environmental justice generally. As evidence of this focus, "[f]ive Cabinet Secretaries and senior officials from a wide range of Federal agencies and offices participated in the first White House Forum on Environmental Justice Wednesday, December 15, 2010." U.S. Department of the Interior, *Obama Administration Convenes Environmental Leaders at Historic White House Environmental Justice Forum Featuring Five Cabinet Secretaries* (Dec. 16, 2010), available at http://www.doi.gov/news/pressreleases/Obama-Administration-Convenes-Environmental-Leaders-at-Historic-White-House-Environmental-Justice-Forum-Featuring-Five-Cabinet-Secretaries.cfm. (alteration in orignal). At this historic Forum, the Environmental Protection Agency ("EPA") Administrator Lisa Jackson was quoted as saying, "[t]he administration has taken unprecedented steps to ensure that environmental protection reaches every community. We want to put an end to the days when public health and economic potential are harmed by disproportionate exposure to pollution." *Id.* (alternation in original).

5. 42 U.S.C. § 2000d (2006) (alteration in original). .

6. Richard Monette, *Environmental Justice and Indian Tribes: The Double-Edged Tomahawk of Applying Civil Rights Laws in Indian Country*, 76 U. DET. MERCY L. REV. 721, 722 (1999) ("'Title VI itself prohibits intentional discrimination. However, the United States Supreme Court has ruled that section 602 of Title VI allows federal agencies, including EPA, to adopt implementing regulations that prohibit unintentional discriminatory effects . . . . Courts have interpreted Title VI to prohibit a broad range of discriminatory activities including denial of services; differences in quality, quantity, or manner of services; different standards for participation; discrimination in any activity conducted in a facility built even in part with federal funds; and discriminatory employment practices, if the primary purpose of the program is to provide employment . . . . It is important to note that, under amendments to Title VI made by the Civil Rights Restoration Act of 1987, Title VI applies to all of a recipient's programs and activities . . . .'") (citing Dear Honorable Tribal Leader Letter (on file at University of Detroit Mercy Law Review)).

7. Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1629-1630 (2007) ("Proponents of the environmental justice movement during the 1980s and 1990s generally considered Native Americans to be victims of 'environmental racism,' similar to other racial minorities, based on their similar history of exclusion, stereotyping, and economic and political disenfranchisement. Indeed, ample factual support exists for the perspective that Native peoples live in vulnerable communities, beset by a multitude of hazardous conditions.").

traditional environmental movement.[8] Regarded as catalytic events in the formation of the environmental justice movement, some activists point to the 1982 protests against a PCB dump in Warren County, North Carolina and the publication of the United Church of Christ Commission for Racial Justice's 1987 study, *Toxic Wastes and Race*.[9] Both of these events and subsequent efforts during the "first generation of environmental justice claims" were focused on ensuring that people of color and lower socioeconomic communities did not bear a disproportionate negative impact from environmental burdens and had equal access to decision making.[10] "Environmental racism", the term originally coined to refer to situations that now correlate to the environmental justice movement, was understood to be

> [a]n extension of racism. It refers to those institutional rules, regulations, and policies of government or corporate decisions that deliberately target certain communities for least desirable land uses, resulting in the disproportionate exposure of toxic and hazardous waste on communities based upon certain prescribed biological characteristics. Environmental racism is the unequal protection against toxic and hazardous waste exposure and the systematic exclusion of people of color from environmental decisions affecting their communities.[11]

As the field of environmental justice has grown, it has become inclusive of several different concepts of "justice". "Environmental justice, as a field, asks how environmental law fails to further values of distributive justice, procedural justice, corrective justice, and social justice."[12] Although the disproportionate impacts of environmental decision making remain an important issue for many environmental justice advocates, what constitutes an environmental justice issue has expanded throughout the ensuing decades. David Getches and David Pellow considered what constitutes an environmental justice issue in light of newly emerging environmental considerations and challenges.[13] As they explain, "the ambit of environmental justice issues

8. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP, 19-30 (New York University Press 2000).

9. *Id.* at 20-21.

10. Tsosie, *supra* note 7.

11. ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 5 (Bunyan Bryant, ed., Island Press, 1995).

12. Lesley K. McAllister, *On Environmental Enforcement and Compliance: A Reply to Professor Crawford's Review of Making Law Matter: Environmental Protection and Legal Institutions in Brazil*, 40 GEO. WASH. INT'L L. REV. 649, 673 (2009) (alternation in original).

13. David H. Getches & David N. Pellow, *Beyond "Traditional" Environmental Justice in* JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 3-30 (Kathryn M. Mutz, Gary C. Bryner, and Douglas S. Kenney eds., Island Press 2001).

has stretched well beyond attacking the classically urban problem of undesirable facility siting and unequal pollution impacts."[14]

Given "the ambit of environmental justice issues has stretched," there is a question of what now constitutes an environmental justice claim. Ultimately, Getches and Pellow conclude that environmental justice claims only extend to the claims of disadvantaged communities.[15] "The definition of the term *community* connotes some commonality in interests, backgrounds, occupations, or legal treatment among people as well as the existence of ties to a particular place."[16] In addition to focusing on community concerns, modern environmental justice concerns are those where the inequality faced by the community intensifies the disadvantages facing the community.[17] Accordingly, modern environmental justice concerns are those facing communities of color and poor communities where the inequality faced by these communities intensifies environmental disadvantages.[18]

Notably, environmental justice extends to the environmental inequity faced by those living in Indian country.[19] Native communities are environmental justice communities.[20] Land contained within In-

14. *Id.* at 5-6.

15. *Id.* at 25.

16. *Id.* at 24.

17. *Id.* at 26.

18. Any "modern" definition of environmental justice must also include consideration of tribal sovereignty. Sarah Krakoff, *Tribal Sovereignty and Environmental Justice in* JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 178 (Kathryn M. Mutz, Gary C. Bryner, and Douglas S. Kenney eds., Island Press 2002) ("Because justice for tribal peoples requires support for tribes as distinct political entities, any definition of environmental justice must include the norm of tribal sovereignty. This is particularly important because of the paradoxical nature of tribal sovereignty: on the one hand, tribal sovereignty predates that of the federal or state governments and therefore requires no validation; on the other hand, as a practical matter the contours of tribal sovereignty are constantly being negotiated in this country's courts and legislatures. In other words, tribal sovereignty is sacrosanct yet entirely vulnerable. Its vulnerability calls for vigilant defense.").

19. 18 U.S.C. §1151 (2006) (Defining "Indian Country," which states that "[e]xcept 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.") (alteration in original).

20. Krakoff, *supra* note 18, at 162. ("First, virtually all Indian tribes clearly fit into Getches and Pellow's definition of groups who come to the table with 'palpable and endemic disadvantage,' stemming from a long history of discrimination, exclusion, and deliberate attempts to destroy their cultural and political communities. Second, the obvious

dian country, however, has a unique legal character. Additionally, Indian tribes possess inherent sovereignty.[21] Despite tribal sovereignty, the federal government, and in some instances, individual state governments, exert a great deal of authority within Indian country.[22] In fact, Congress and the U.S. Supreme Court have taken steps to limit American Indian tribal authority.[23] Today, the majority of matters

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disproportionate environmental harms borne by Native peoples have meant that they are *already* a part of the discussion – to let them continue to be so without a conscious articulation of the role of tribal sovereignty would be counterproductive to determining appropriate remedial strategies.").

21. American Indian tribes exist as entities separate from state and federal governments. A myriad of historical legal developments led to this separateness. American Indian tribes are extra-constitutional, meaning that tribes exist apart from the American Constitution. Scholars have noted that "tribal sovereignty is both pre-constitutional and extra-constitutional." Ann Tweedy, *Connecting the Dots Between the Constitution, The Marshall Trilogy, and the United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J. L. REFORM 651, 656 (2009) (citing Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 417 (2003)). In the early 19th century, the U.S. Supreme Court affirmed the separateness of American Indian tribal nations. In *Cherokee Nation v. Georgia.*, the U.S. Supreme Court held that American Indian tribes were "domestic dependent nations," highlighting their separateness from both state and federal governments. 30 U.S. 1 (1831). In *Worcester v. Georgia.*, the U.S. Supreme Court further clarified the separateness of American Indian tribes, finding that the laws of the states shall have "no force or effect" within the exterior boundaries of American Indian tribal territory. 31 U.S. 515 (1832).

22. In the late nineteenth century, the relationship between tribal governments and the federal government changed, as the absolute authority of Congress over American Indian tribal nations was articulated by the U.S. Supreme Court in *United States v. Kagama*, which held that Congress has plenary authority over American Indian tribal nations. 118 U.S. 375 (1886). As an expression of its plenary authority over Indian country, on June 18, 1934, Congress passed the Indian Reorganization Act (IRA), Pub. L. No. 73-383, 48 Stat. 984 (1934), with the partial purpose of increasing local tribal self-government. Mescalero Apache v. Jones, 411 U.S. 145, 152 (1973) ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R. Rep. No. 73-1804, at 6 (1934); Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801, fn. 40 (2008) ("Congress enacted the Indian Reorganization Act of 1934, 25 U.S.C. § 461 (2000), which had as its purpose the need to craft measures "whereby Indian tribes would be able to assume a greater degree of self-government.") (citing *Morton v. Mancari*, 417 U.S. 535, 542 (1974)); Honorable Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 1 (1998), available at http://www.icctc.org/CC%20manual/Lessons%20From%20the%20Third%20Sovereign.pdf. ("Passage of the Indian Reorganization Act allowed the tribes to organize their governments, by drafting their own constitutions, adopting their own laws through tribal councils, and setting up their own court systems.").

23. For example, see the Indian Civil Rights Act of 1968, which applied many of the protections of the U.S. Constitution to Indian country as well as limiting American Indian tribal court punishment authority to $5,000 and/or one year in prison. 25 U.S.C. §§ 1301-03 (2006). *See also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that American Indian tribal courts do not have authority over non-Indians in criminal matters).

handled by American Indian tribal courts include largely intra-tribal matters,[24] especially issues of property and family law raised by members of the tribe.[25] This is consistent with the general policy of the American federal government to leave issues related to American Indian tribal members solely within the inherent tribal sovereignty of tribal governments.[26] Furthermore, "[i]n the modern era, as tribes have increasingly assumed governmental functions formerly performed by the Bureau of Indian Affairs and Indian Health Service, the relationship between the federal government and the tribes is often described as a government-to-government relationship."[27]

As a result of the unique legal history very briefly explained above, environmental justice claims arising from within Indian country include not only racial considerations, but also political considerations, as American Indian tribes have a special government-to-government relationship with the federal government.[28] The additional consideration of tribal sovereignty is crucial to any discussion of environmental justice claims arising in Indian country, and the application of Title VI, as explained below.

The preceding discussion leads to a natural question: given the increasing use of Title VI to address concerns related to environmental justice and the unique contours of Indian country, does Title VI apply

24. *See Oliphant*, 435 U.S. 191 (1978); Plains Commerce Bank v. Long Family Land & Cattle, 554 U.S. 316 (2008) (holding that although American Indian tribal courts have jurisdiction to regulate conduct on tribal lands, that power is lost once the land is transferred to non-Indians); *see also* Montana v. United States, 450 U.S. 544 (1981) (holding that American Indian tribal courts possess civil jurisdiction over non-Indians on non-Indian land when the non-Indians either enter into a consensual relationship with the plaintiff allowing for tribal court jurisdiction or when the non-Indians' activities threaten the health, welfare, economic security or political integrity of the tribe).

25. Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 308 (1998).

26. *See generally* Worcester v. Georgia, 31 U.S. 515 (1932) (holding that the laws of Georgia did not have any effect within the Cherokee Nation's territory); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (holding that tribes have the power to determine tribal membership).

27. Daniel Cordalis and Dean B. Suagee, *The Effects of Climate Change on American Indian and Alaska Native Tribes*, 22 NAT. RESOURCES & ENV'T 45 (2008) (citing Exec. Order No. 13,175, 2, 65 Fed. Reg. 67,249 (Nov. 6, 2000)). *See also* 25 U.S.C. § 3601 (2006) ("there is a government-to-government relationship between the United States and each Indian tribe . . . .") (alteration in original).

28. Additionally, individual American Indians have a political relationship with their tribal governments. Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L. J. 25, 27 (1997).

to environmental justice claims arising in Indian country?[29] The answer is likely yes and no. In addressing this question, this article considers potential Title VI claims brought against tribal governments.[30] Section I concludes that Title VI claims likely cannot be brought against federally-recognized tribal governments and entities controlled by tribal governments. In reaching this conclusion, Section I considers situations where the tribal government is acting under "Tribes-As-States" ("TAS") provisions of environmental statutes,[31] and where the matter at issue is not wholly intratribal in nature. In all instances, Section I concludes that it is unlikely a potential claimant would prevail on a Title VI claim against a federally-recognized tribe. Section II goes on to consider whether the same claimant would be successful in bringing a Title VI claim against a non-tribal entity operating within Indian country. Under these conditions, Section II concludes that a potential claimant may be able to bring a Title VI claim against a non-tribal governmental entity. The reason for the contrary result can be found in the underlying purpose of exempting tribal governments from the Civil Rights Act, of which Title VI is a part. In exempting tribal governments from the Civil Rights Act, it appears that Congress meant to remove any obstacle to tribal economic stability and success. In other words, the key factor in determining whether the Civil Rights Act, and Title VI in particular, applies is tribal sovereignty. Therefore, this article begins by considering

29. Notably, Title VI itself is silent as to whether or not it should be applied against tribes. 42 U.S.C. §§ 2000d- 2000d-1 (2006). Moreover, agency guidance, such as EPA regulations related to Title VI, does not provide any clarification. Colopy, *supra* note 2, at 174-75 ("'Recipients' [under Title VI regulations] are defined as any state government or political subdivision, any public or private entity, or any other person receiving the financial assistance . . . .") (citation omitted). In notable part, EPA's website says "[t]he issue of the applicability of Title VI to Federally-recognized tribes is currently under review at EPA." EPA, *Civil Rights: Policies and Guidance*, http://www.epa.gov/ocr/polguid.htm. (last visited March 10, 2011) (alteration in original).

30. This article uses the terms "complaint" and "claims" under Title VI to signal that individuals may bring complaints directly to federal agencies. Monette, *supra* note 6, at 722-23 ("The regulations allow any person to file a Title VI discrimination complaint with the EPA's Office of Civil Rights against a recipient of EPA assistance."); *see also e.g.* Colopy, *supra* note 2, at 178 ("If a complaintant does choose to take her case directly to the EPA, she must file her complaint within 180 calendar days of the discriminatory act, or obtain an OCR waiver of the time restriction for 'good cause.' The OCR must decide within twenty days whether to accept or reject the complaint, or refer it to another agency. If the complaint is accepted, the OCR allows the applicant or recipient an opportunity to respond and attempts to informally resolve the dispute by convincing the party to voluntarily comply with the agency's Title VI requirements.") (citations omitted).

31. *See* Clean Air Act, 42 U.S.C. § 7601(d)(1)(A) (2006), Clean Water Act, 33 U.S.C. § 1377(e) (2006), Safe Water Drinking Water Act, 42 U.S.C. § 300j-11 (2006), Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 (2006), and major portions of CERCLA, 42 U.S.C. §§ 9601-9657 (2006).

Congress's intent in exempting federally-recognized tribes from application of the Civil Rights Act.

I. TITLE VI CLAIMS AGAINST FEDERALLY-RECOGNIZED TRIBES ARE LIKELY BARRED

This Section considers whether Title VI claims may be brought against federally-recognized tribes and tribal enterprises largely controlled by tribal government. In reaching the conclusion that Title VI claims cannot be brought against federally-recognized tribal nations, this Section also considers whether the same is true if the tribe is acting under TAS authority and whether the same is true if the Title VI claim involves matters that are not wholly intra-tribal. However, before looking at these sub-issues it is helpful to first analyze the issue broadly by considering the legal justification for passage of the overall Civil Rights Act, as well as Congress's likely purpose in exempting tribes from application of the Civil Rights Act.

Professor Richard Monette has already published an excellent piece considering the legal foundations underlying the passage of the Civil Rights Act, and based on the underlying legal foundations, whether Title VI of the Civil Rights Act applies to Indian country.[32] Because Professor Monette has already conducted a thorough analysis of the relevant constitutional law likely applicable, including the Fourteenth Amendment, the Commerce Clause, and the Spending Clause, this article will not duplicate his work. Ultimately, Professor Monette concludes that "none of these constitutional provisions justify application of Title VI to Indian Tribes."[33]

In addition to an extensive discussion of whether these constitutional principles apply in Indian country, Professor Monette also

32. Monette, *supra* note 6, at 721.

33. *Id.* at 727. For example, in relevant part, Professor Monette explains that the Fourteenth Amendment to the U.S. Constitution does not apply to Indian country. *Id.* at 740 ("Indeed, as recently as 1978, the Supreme Court has indicated that the Fourteenth Amendment does not apply to tribes . . . . Simply, if the Fourteenth Amendment is the sole constitutional authority for Title VI, it cannot apply to tribes."). Similarly, Professor Monette points out that it is unclear whether the commerce clause is the legal foundation of Title VI, and there must be clarity to affect tribal sovereignty as invocation of Title VI would clearly affect the sovereignty of tribal nations. *Id.* at 742-43 ("If the Commerce Clause can be deemed to have been invoked in Title VI to apply the Civil Rights Act to tribes, questions remain regarding whether Congress did in fact invoke the Clause and whether Congress applied the Act to tribes. Such an abrogation of state sovereignty must be 'unmistakably clear. . . . At least one court summarily dismissed Title VI's application to tribes on these grounds, stating that tribes ' are subject to federal laws only when Congress expressly so declares.'").

buttresses his conclusions regarding the applicability of Title VI to tribes by turning to federal Indian law. Professor Monette explains that "[i]n general, the case law held that general federal laws would not apply to Tribes unless Congress made such intentions express. Further, if federal law would abrogate the sovereignty of the Tribes itself, such an intention would have to be 'unmistakably clear.'"[34] Moreover, Professor Monette pointed out that, "the Supreme Court ruled that the Federal Bill of Rights did not apply to tribes and thus did not prohibit discrimination by tribes."[35] Therefore, even if one were to argue that the protections of the federal Bill of Rights through application of the Indian Civil Rights Act applied in Indian country, it would not be possible to pursue a Title VI claim against a tribe unless the tribe had expressly waived its sovereign immunity to allow such suits.[36]

Beyond the fact that the constitutional law underlying Title VI is likely inapplicable to federally-recognized tribes, the conclusion that Title VI claims cannot be brought against federally-recognized tribes is buttressed by looking at EPA regulations related to Title VI and Title VII of the Civil Rights Act. Under EPA regulations related to Title VI, an individual may file a Title VI complaint against a recipient of EPA assistance.

> Of course, Tribes receive such assistance from the EPA under several other statutory authorizations. The regulations, however, do not expressly include Tribes in their definition of "recipients." One might surmise that this was not a mere oversight, but recognition of the Tribes' sovereignty and recognition that Title VI does not apply to them. The regulations do, however, expressly include American Indians in the definition of "Racial Classification.[37]

Notably, the EPA regulations seem to draw a distinction between the application of Title VI to tribes and its application to individual Indians. Here, the EPA regulations may be read to suggest that Title VI does not apply against tribes, but may be utilized by individual Indians. This distinction is consistent with this article's conclusion that Title VI does not apply against tribes and tribally-controlled entities, while individual Indians may bring Title VI claims against non-tribal entities on and off the reservation.

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34. *Id.* at 739 (citations omitted) (alternation in original).

35. *Id.* at 740 (citations omitted).

36. Garcia v. Akwesasne Housing Authority, 268 F.3d 76, 86 (2d Cir. 2001) (citing *Santa Clara Pueblo*, 436 U.S. at 59, ("[S]uits against the tribe under the ICRA are barred by its sovereign immunity from suit.")).

37. Monette, *supra* note 6, at 723 (citations omitted).

Moreover, guidance provided by EPA may be helpful in further beginning to understand whether Title VI applies to tribes.

> On February 5, 1998, the EPA issued an Interim Guidance Memorandum to guide the Office of Civil Rights in processing Title VI administrative complaints, without consulting Tribes. However, the Interim Guidance memorandum is largely silent regarding Tribes, except for one footnote that addresses the applicability of Title VI to Tribes, and it speaks volumes: "Title VI applies to Tribes as EPA recipients only when the statutory provision authorizing the Federal financial assistance is not exclusively for the benefit of Tribes. Otherwise, Tribes are exempt from Title VI."[38]

This Interim Guidance clearly supports the position that Title VI generally does not apply to tribes and may only apply in the very limited situation of when federal assistance is exclusively for the benefit of tribes. It is uncertain as to whether a situation would occur where the federal assistance at issue would be exclusively for the benefit of tribes or a single tribe.

Further, historical materials suggest that Title VI was not meant to be applied against tribes. On December 2, 1963, Nicholas Katzenbach, Deputy Attorney General for the U.S. Department of Justice, responded to what must have been a request from Congressman Emanuel Celler, Chairman of the House of Representatives Committee on the Judiciary, for a list of programs and activities that involve federal financial assistance within the scope of Title VI of the then proposed civil rights bill, H.R. 7152.[39] In response to this request, Katzenbach stated that "[p]rograms of assistance to Indians are also omitted. Indians have a special status under the Constitution and treaties. Nothing in title VI is intended to change that status or to preclude special assistance to Indians."[40] Interestingly, Katzenbach did not limit his conclusion to just tribes, but rather stated that Title VI was not intended to apply to Indians generally. This suggests that the inability to apply Title VI may be broader than just claims against tribes. However, given the EPA's regulations and guidance discussed above, it is more likely that it was Congress's intent to limit the application of Title VI as against tribes. To infer otherwise, would be to read a broad exception into Title VI, that Indians whether on or off the reservation are exempt from application of Title VI, and there is no

38. *Id.* (citing Tribal Guidance for Investigating Title VI Administrative Complaints Challenging Permits, n. 3 (last visited June 6, 1999); http://es.epa.gov/oeca/oej/titlevi/html).

39. Letter from Nicholas Katzenbach, U.S. Department of Justice Deputy Attorney General, to Congressman Emanuel Celler, Chairman of the House of Representatives Committee on the Judiciary, 110 Cong. Rec. 13380 (June 10, 1964).

40. *Id.*(alteration in original).

explicit congressional statement to support such an inference. Additionally, as discussed below, it seems more likely that Congress intended to exempt tribes from application of Title VI in order to protect essential governmental functions. Such essential tribal governmental functions would not come into play in regards to the actions of individual Indians.

In discussing whether Title VI applies to tribes, it is also helpful to look to Title VII of the Civil Rights Act for comparison. Although not an ideal comparison given Title VII explicitly exempts tribes,[41] such a comparison is helpful because both Title VI and Title VII are contained within the Civil Rights Act, and it may be suggested that Congress would have intended the same result through both Titles of the Act. Moreover, examining Title VII case law is helpful because several courts have considered whether Title VII applies against tribes, whereas little if any case law exists regarding the application of Title VI to tribes.

In *Garcia v. Akwesasne Housing Authority*, the U.S. Court of Appeals for the Second Circuit considered the application of Title VII to the actions of a tribal housing authority.[42] Although not a tribal government, "[t]he AHA [Akwesasne Housing Authority] was created pursuant to a resolution of the St. Regis Tribal Council. It provides public housing on the Akwesasne Reservation using federal funds disbursed by the United States Department of Housing and Urban Development." In relevant part, the court explained that "[a]s a matter of federal common law, an Indian tribe enjoys sovereign immunity from suit except where 'Congress has authorized the suit or the tribe has waived its immunity.'"[43] Furthermore, the court explained that the tribe itself may waive its sovereign immunity, but such a waiver must be explicit and must include an indication of where (i.e., in what venue) the tribe agrees to be sued.[44] The court ultimately determined that because the tribal housing agency functioned as a branch of the tribal government, the tribe's sovereign immunity applied to the activities of the tribal housing agency.[45] Therefore, because the tribal housing authority was cloaked in the tribe's sovereign immunity, there must have been either a clear congressional or tribal waiver of the tribe's sovereign immunity to allow the tribal housing agency to be

41. 42 U.S.C. § 2000e(b) (2006).

42. *Garcia*, 268 F.3d at 76.

43. *Id.* at 84 (citing *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754(1998); Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 356-57 (2d Cir. 2000)) (alteration in original).

44. *Id.* at 86 (citations omitted).

45. *Id.* at 87.

sued under Title VII. Finding no such waiver by either Congress or the Tribe, the court determined that the Title VII claim against the tribal housing agency could not move forward.[46] Given that the Second Circuit seemed to focus on the tribe's sovereign immunity in determining whether a Title VII claim could be brought against the tribal housing agency, it would seem that the same analysis would be equally applicable to claims brought against tribes under Title VI.

In *Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, the U.S. Court of Appeals for the Tenth Circuit considered a case very similar to the one considered by the Second Circuit in *Garcia v. Akwesasne Housing Authority*.[47] In *Duke*, an employee also brought a Title VII claim against the tribal housing authority. Unlike the tribal housing agency at issue in *Garcia*, however, the tribal housing authority at issue in *Duke* was created under state law.[48] The question before the Tenth Circuit then was whether the tribal housing authority was still a branch of the tribe, given it was created under state law, and therefore exempt from the application of Title VII. In determining whether the tribal housing authority should be exempt, the court considered the level of tribal control over the entity and whether the entity advanced the economic interests of the tribal government.[49] The court further explained that any ambiguities should be resolved in favor of advancing "Indian sovereignty."[50] In responding to the plaintiff's claim that the Tribe's decision to organize the tribal housing authority under state laws amounted to an affirmative choice by the Tribe to subject the tribal housing authority to state and federal laws, the court explained that "[i]n the absence of an express declaration to this effect, we are reluctant to impute such an intent to the tribe."[51] Taking the foregoing in totality, the court determined that the tribal housing authority did constitute a tribe and that there was no express statement by the Tribe of its willingness to be subjected to state and federal laws, despite the fact that the tribal housing authority was organized under state law.[52] Accordingly, the exemption for tribes under Title VII applied and the plaintiff's Title VII claim was therefore not applicable against the tribal housing authority.

46. *Id.*
47. *Duke*, 199 F.3d 1123 (10th Cir. 1999).
48. *Id.* at 1124.
49. *Id.* at 1125.
50. *Id.*
51. *Id.* at 1125-26 (alteration in original).
52. *Id.* at 1126.

The Tenth Circuit's analysis in *Duke* is helpful in understanding whether Title VI applies against tribes for several reasons. First, the court suggested that the reason for the explicit exemption of tribes from application of Title VII is to advance the economic stability of tribal governments.[53] If this was Congress's purpose in exempting tribes from application of Title VII, it would seem that the same analysis would apply in considering the application of Title VI. Moreover, the Tenth Circuit seemed to agree with the Second Circuit in *Garcia* that any waiver of tribal sovereign immunity or tribal desire to have state and federal law applied against the tribe must be explicit and should not be imputed to the tribe, even where the tribe organizes a tribal entity under state law.[54] In the context of Title VI, it would therefore seem that there must be an explicit statement from either Congress or a tribe that Title VI applies before such an application may occur. Finally, the Tenth Circuit applied the general principle of federal Indian law that ambiguities should be resolved in favor of advancing tribal sovereignty in context of Title VII.[55] At best, it is ambiguous whether Title VI applies against tribes. Given this ambiguity, the question should be resolved in favor of advancing tribal sovereignty. Because Title VI would likely negatively impact the stability of tribal government, Title VI should therefore not apply against tribes.[56]

In *Pink v. Modoc Indian Health Project, Inc.*, the U.S. Court of Appeals for the Ninth Circuit also considered whether a Title VII claim could be brought against a non-profit corporation created by tribes.[57] "Modoc is a nonprofit corporation created and controlled by the Alturas and Cedarville Rancherias, both federally recognized tribes. Modoc was 'organized for charitable, educational, and scientific purposes and such other related purposes . . . relative to the delivery of certain services pursuant to [the Indian Self-Determination Act].'"[58] In

53. *Id.* at 1125.

54. *Id.* at 1125-26.

55. *Id.* at 1125.

56. Admittedly, an argument may be made that if a tribe is perceived as not enforcing civil rights within its jurisdiction this may negatively impact the tribe's sovereignty. This may be the case if outside entities refuse to conduct business within the tribe's jurisdiction because of perceived tribal civil rights abuses or perhaps if the tribal community becomes disgruntled as a result of failure to protect against civil rights abuses. Whether application of the Civil Rights Act in Indian country, specifically Title VI and Title VII, is ultimately a "good thing" or a "bad thing" for tribal sovereignty is therefore a question broader than the scope of this article. For purposes of this article, the logic advanced by the court decisions discussed, that imposition of Title VII would be "bad" for tribal sovereignty, is ultimately pursued.

57. Pink v. Modoc Indian Health Project, 157 F.3d 1185 (9th Cir. 1998).

58. *Id.* at 1187 (citations omitted) (alteration in original).

determining whether Modoc qualified as an "Indian tribe" for purposes of exempting it from application of Title VII, the court noted that "the purpose of the tribal exemption, like the purpose of sovereign immunity itself, was to promote the ability of Indian tribes to control their own enterprises."[59] Ultimately, the court concluded that Modoc served as "an arm of the sovereign tribes" and was therefore exempt from application of Title VII.[60]

Pink differed from the cases discussed above because the plaintiff argued that Modoc's actions extended beyond the reservation's boundaries and therefore Title VII should apply to the off-reservation activities. In relevant part, the court explained that "Congress did not limit the scope of tribal sovereign immunity, as such, the tribes retain the extraterritorial component of sovereign immunity."[61] This holding is important for purposes of considering whether Title VI applies against tribes. If the court had found that Title VII did apply against off-reservation impacts, such a holding would suggest that tribes were only exempt from application of Title VII as within their jurisdictional territory. In other words, a contrary holding would suggest that exemption from Title VII was directly connected to territorial sovereignty. In reaching the contrary holding, the court affirmed that tribes are exempted where their tribal sovereignty is impacted, regardless of whether such impacts occur within or outside of Indian country. This also affirms that the central question in determining whether a tribe is exempt from Title VI should be whether application of Title VI would negatively impact tribal sovereignty, and not the extent of the tribe's territorial sovereignty.

Finally, in *Dille v. Council of Energy Resource Tribes*, the Tenth Circuit also considered the application of Title VII against the Council of Energy Resource Tribes ("CERT"), which, at the time, was a council comprised of 39 tribes.[62] In particular, the court considered whether Title VII's exemption for tribes applied to CERT. "CERT is a council comprised of thirty-nine Indian tribes that have joined together to manage collectively their energy resources . . . . The member tribes, then, have exclusive control over the operations of CERT."[63] In reaching its decision, the court also reaffirmed the general principle of federal Indian law that ambiguities are to be resolved "with doubtful

59. *Id.* at 1188 (citations omitted).
60. *Id.*
61. *Id.* at 1189.
62. *Dille,* 801 F.2d 373 (10th Cir. 1986).
63. *Id.* at 374.

expressions being resolved in favor of the Indians."[64] Notably, the court also cited legislative history, and in particular, statements from Senator Mundt, for an understanding of the underlying purpose in exempting tribes from application of Title VII. As Senator Mundt explained:

> This amendment would provide to American Indian tribes in their capacity as a political entity, the same privileges accorded to the U.S. Government and its political subdivisions, to conduct their own affairs and economic activities without consideration of the provisions of the bill. Let me emphasize that Indian tribes in an effort to decrease unemployment and it order to integrate their people into the affairs of the national community, operate many economic enterprises, which are more or less supervised by the Indian tribes, the employees serving as apprentices in many instances, and as supervisors and regularly employed and paid employees in others.[65]

"Senator Mundt's comments show that the purpose of this exemption was to promote the ability of sovereign Indian tribes to control their own economic enterprises."[66] Ultimately, the court concluded that the Title VII exemption applied to CERT, as it was engaged in essential economic functions on behalf of the member tribes and the member tribes maintained control over the council. Specifically, "[t]he creation of CERT to advance the economic conditions of its thirty-nine member tribes is precisely the type of activity that Congress sought to encourage by exempting Indian tribes from requirements of Title VII."[67]

The Tenth Circuit's holding in *Dille*, which is buttressed by the legislative history behind the exemption for tribes from Title VII,[68] makes clear that the purpose of exempting tribes from application of Title VII is to promote the economic interests of the tribes. This same analysis is equally applicable when considering whether Title VI applies against tribes. It seems logical that if Congress intended to exempt tribes from application of Title VII to promote the economic interests of tribes, so too would Congress intend the same regarding the application of Title VI, as to conclude otherwise would seem to directly contradict Congress's intent. If Congress exempted tribes from

64. *Id.* at 375 (citing *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 149 (1984)).

65. *Id.* at 375 (citing 110 CONG. REC. 13702 (1964)).

66. *Id.*

67. *Id.*

68. *See* D. Michael McBride and H. Leonard Court, *Labor Regulation, Union Avoidance and Organized Labor Relations Strategies on Tribal Lands: New Indian Gaming Strategies in the Wake of* San Manuel Band of Indians v. National Labor Relations Board, 40 J. MARSHALL L. REV. 1259, 1267 n. 41 (2007).

application of Title VII but then meant for Title VI to apply against tribes, the economic interests of tribes would be threatened by application of Title VI. This is exactly what Congress meant to avoid by exempting tribes from application of Title VII.

The conclusion that Congress did not intend Title VI to apply against tribes because it would potentially disrupt essential tribal government functions in consistent with general principles of federal Indian law. Generally, state and federal law will not apply in Indian country if such an imposition would negatively affect tribal self-governance.[69] Therefore, having concluded that Title VI is generally inapplicable to federally-recognized tribes, this article considers whether the analysis changes when tribes are acting under TAS provisions or where the matter as issue is not wholly intra-tribal in nature.

a. Application of Title VI to Tribes Acting Under TAS Status

Much of modern day American environmental law is premised on the idea of cooperative federalism, where the states are responsible for ensuring compliance with federal regulations. Several of the major environmental statutes, such as the Clean Air Act and Clean Water Act, have TAS provisions that allow for federally-recognized tribes to act as a state in implementing federal environmental statutes in Indian country.[70] Many environmental justice claims are brought against states and state agencies.[71] The natural question then becomes: if tribes are acting as states under the TAS provisions of some environmental statutes, must they submit to Title VI when acting in that capacity? The answer is likely no.

Moreover, there may be some suggestion that tribes are acting through a delegation of federal law when acting under the TAS provisions of certain environmental statutes. In *Arizona Public Service Company v. Environmental Protection Agency*, the court was asked to consider in part whether Congress expressly delegated to tribes authority to regulate air quality on all land, including land held in fee by

69. Williams v. Lee, 358 U.S. 217, 220 (1959); Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960).

70. *See* Clean Air Act, 42 U.S.C. § 7601(d)(1)(A) (2006), Clean Water Act, 33 U.S.C. § 1377(e) (2006), Safe Water Drinking Water Act, 42 U.S.C. § 300j-11 (2006), Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 (2006), and major portions of CERCLA, 42 U.S.C. §§ 9601-9657 (2006).

71. Colopy, *supra* note 2, at 156 ("Most environmental justice suits under Title VI are likely to be against a state agency. State, county, and local agencies that receive federal funds are often responsible for the siting of landfills. These agencies also enforce state environmental laws and regulations with the aid of federal funds.").

non-members of the tribe, under the TAS provisions of the Clean Air Act.[72] In arguing that tribes had the authority to so regulate under the TAS provisions of the Clean Air Act, the EPA apparently argued that the TAS provisions contained within the 1990 Amendments to the Clean Air Act constituted a delegation of federal authority to tribes.[73] Furthermore, the legislative history of the Clean Air Act Amendments of 1990, when the Clean Air Act TAS provisions were added to the statute, indicates a congressional belief that TAS status constituted an express delegation of federal authority to tribes.[74] If tribes acting under TAS status are therefore able to regulate because the TAS status constitutes a delegation of federal authority to the individual tribe, one may wonder whether this changes the analysis above. Accordingly, when tribes are acting under TAS status and assuming such status constitutes a delegation of federal authority to the tribes, does Title VI apply against tribes acting in such a capacity?

Even when tribes are acting under TAS status, it is likely that Title VI still is not applicable. Notably, there was a belief that Title VI was not meant to apply to activities wholly carried out by the United States with federal funds.[75] Accordingly, even assuming TAS status amounts to a delegation of federal authority to tribes, it would seem logical that if the United States is not included within the ambit of Title VI when it carries out activities using its own funds, then so too would Title VI be inapplicable to tribes carrying on the same activities under a delegation of federal authority. This conclusion is buttressed by the analysis above that Title VI generally does not apply against tribes and entities controlled by tribal governments, because Congress did not want to interfere with the governmental functions of said

72. Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000).

73. *Id.*

74. Report of the Committee on Environment and Public Works, A Legislative History of the Clean Air Act Amendments of 1990, 5 ENV'T AND NATURAL RES. POL'Y DIV. 8338, 8419 (1998) ("Thus, new section 328(a) of the Act constitutes an express delegation of power to Indian tribes to administer and enforce the Clean Air Act in Indian lands, as Indian tribes were delegated the power to administer and enforce the Safe Drinking Water Act and Clean Water Act.") (citing *Brendale v. Confederated Yakima Indian Nation, U.S.*, 492 U.S. 408, 426-30 (1989)).

75. Letter from Nicholas Katzenbach, U.S. Department of Justice Deputy Attorney General, to Congressman Emanuel Celler, Chairman of the House of Representatives Committee on the Judiciary, 110 CONG. REC. 13380 (June 10, 1964) ("Activities wholly carried out by the United States with Federal funds . . . are not included in the list. Such activities, being wholly owned by, and operated by or for, the United States, cannot fairly be described as receiving Federal 'assistance.' While they may result in general economic benefit to neighboring communities, such benefit is not considered to be financial assistance to a program or activity within the meaning of title VI.") (citation omitted).

tribes.[76] Moreover, as previously explained, tribes generally enjoy immunity from suit unless either the tribe or Congress has explicitly waived tribal sovereign immunity.[77]

b. Application of Title VI Against Tribes Where the Matter at Issue is an Intra-tribal Matter

As can be inferred from the analysis above, the argument that Title VI does not apply against a tribe or an entity that is controlled by and promotes the sovereign interests of the tribe is perhaps its strongest when the matter at issue involves an intra-tribal issue. The question therefore arises whether the foregoing analysis applies equally to environmental justice concerns related to tribal governments when such concerns are not wholly intra-tribal. More simply stated, would tribes still be exempted from Title VI when their actions have implications beyond their jurisdictions or if a non-member where to bring a Title VI claim against the tribe?

The answer is likely yes. As described in detail above, EPA regulations and historical guidance seem to suggest that the federal government did not intend for Title VI to apply against tribes. Neither the regulations nor guidance suggest that such a conclusion is limited to actions taken by tribes that are wholly intra-tribal in nature. Moreover, the case law regarding application of Title VII against tribes is particularly instructive on this point. For example, in *Dille v. Council of Energy Resource Tribes*, the Tenth Circuit concluded that Title VII did not apply to the actions of CERT, even when those actions were

76. At least in regard to the Clean Air Act, the TAS provisions were explicitly adopted to promote tribal self-government. Report of the Committee on Environment and Public Works, A Legislative History of the Clean Air Act Amendments of 1990, 5 ENV'T AND NATURAL RES. POL'Y DIV. 8338, 8419 (1998) ("The purpose of new section 238 of the Act is to improve the environmental quality of the air within Indian country in a manner consistent with the EPA Indian Policy and "the overall Federal position in support of Tribal self-government and the government-to-government relations between Federal and Tribal Governments," as stated in the document *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, Nov. 8, 1984."). Although this legislative history is specific to the Clean Air Act Amendments of 1990, the Report indicates that another purpose of the amendment is to grant tribes the same powers they already possessed under the Safe Drinking Water Act and Clean Water Act. *Id.* It may therefore be asserted that the justification for TAS provisions under the Clean Air Act, Clean Water Act and the Safe Water Drinking Act is the same.

77. *Garcia*, 268 F.3d at 84 (citing *Kiowa Tribe* , 523 U.S. at 754; *Bassett*, 204 F.3dat 356-57). Moreover, "[c]ongressional abrogation of tribal immunity, like congressional abrogation of other forms of sovereign immunity, 'cannot be implied but must be unequivocally expressed." *Id.* at 85 (citations omitted) (alteration in original).

occurring outside of Indian country.[78] As previously discussed, the court focused its analysis on whether the actions of CERT promoted the sovereignty, and, in particular, economic interests, of the tribes. Therefore, the ultimate factor in determining whether Title VI applies is not the land or membership status of potential plaintiffs, but rather whether the application of Title VI would negatively impact tribal sovereignty. The Second, Ninth, and Tenth Circuits have all concluded that application of Title VII against tribes would negatively impact tribal sovereignty, and it may be reasonably inferred that Title VI would have the same negative impact. Therefore, it is likely that tribes are exempt from Title VI, even when the environmental justice matter at issue is not wholly intra-tribal in nature.

II. TITLE VI CLAIMS ARISING IN INDIAN COUNTRY BUT NOT BROUGHT AGAINST TRIBES

Given the foregoing conclusion that the essential factor in determining whether Title VI applies to complaints against tribes is its potential impact on tribal sovereignty, is the same conclusion reached, when the complaints do not involve tribal sovereignty? In other words, can Title VI claims be brought against non-tribal governmental entities when the actions of such entities raise environmental justice concerns within Indian country?

Yet again, consideration of courts' application of Title VII to non-tribal entities conducting business within Indian country may be helpful in determining whether Title VI applies. In Title VII claims brought against non-tribal entities conducting business within Indian country, it appears that courts have generally applied Title VII against non-tribal entities. In fact, "[f]ederal courts . . . have consistently applied Title VII to non-Indian held entities within Indian country, despite the inherent sovereignty tribes retain within Indian country pursuant to the rule reaffirmed in *Montana v. United States*-that non-Indians who have entered into consensual relations with a tribe are subject to tribal jurisdiction."[79]

78. *Dille*, 801 F.2d at 376. It is unclear from the court's discussion whether the plaintiffs in *Dille* were members of the tribes composing CERT. From the court's silence, it may be inferred that the membership status of the plaintiffs is irrelevant to the ultimate question of whether Title VII applied.

79. Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor and Employment Law*, 2008 MICH. ST. L. REV. 435, 443 (2008); *see also* McBride, *supra* note 67 ("When non-Indian employers have engaged in commerce within Indian country, courts have found Title VII to apply.") (citations omitted) (alteration in original).

To understand why this is the case, it is helpful to look at the analysis underlying some of these court decisions. In *Tidwell v. Harrah's Kansas Casino Corporation*, the U.S. District Court for the District of Kansas considered a Title VII claim brought by a non-member against a casino, which was a non-Indian corporation but had entered into a gaming-related compact with a federally-recognized tribe, the Prairie Band Potawatomi Nation.[80] The majority of the Court's analysis focused on whether the tribal exhaustion doctrine applied to the matter,[81] meaning that the case should be first considered in tribal court before its consideration in federal court.[82] In reaching its decision, the Court provided helpful analysis on the issue of whether Title VII claims, such as the one at issue in this case, impact tribal sovereignty. In response to the casino's arguments that tribal sovereignty concerns were implicated in the case, the Court explained that it is "difficult to discern what sovereignty concerns are threatened by [P]laintiff's suit. Her suit is between two non-Indian entities and plainly involves issues of federal law. The only connection with the tribe is the casino's location on the reservation."[83] Furthermore, the court explained that "[t]his case does not present a classic 'reservation affair,' it is a dispute between two non-tribal members arising under federal law, which took place in a casino owned by a nonmember. The mere fact that the casino is located on the reservation does not convert this dispute to into 'reservation affair.'"[84] Therefore, it logically follows from the court's reasoning that tribal sovereignty is not impacted by the existence of a non-tribal entity conducting business within its jurisdiction. In fact, the court confirmed this conclusion by continuing on to say that "Plaintiff's case does not touch upon tribal self government; it

80. Tidwell v. Harrah's Kan. Casino Corp., 322 F. Supp. 2d 1200, 1202 (D. Kan. 2004) ("Harrah's is a non-Indian entity that is located entirely on the Potawatomi reservation. Plaintiff, who is not a tribal member, is a United States citizen residing in Hoyt, Kansas, which is outside of the Potawatomi reservation. Harrah's operates the casino pursuant to an Operating Agreement it entered into with the Potawatomi Indian Nation, and the operation of the casino is conducted under the terms of the Indian Gaming Regulatory Act and the Prairie Band Potawatomi Nation-Kansas Gaming Compact (Compact).").

81. *Id.* at 1203 (explaining the tribal exhaustion doctrine) ("[T]he Court (in *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians* held that the question of whether tribal courts have jurisdiction over a matter involving non-Indians in civil cases should first be addressed in tribal courts. In *Iowa Mutual Insurance Co. v. LaPlante*, the Supreme Court further explained that '[t]ribal sovereignty over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.' Thus, civil jurisdiction over actions on reservation lands lies in the tribal courts unless affirmatively limited by a specific treaty or provision or federal statute.") (citations omitted).

82. *Id.*

83. *Id.* at 1204 (alteration in original).

84. *Id.* at 1206 (alteration in original).

does not involve injury to tribal members, a challenge to a tribal policy, the regulation of reservation lands, or even implicate tribal law."[85]

Although the court in *Tidwell* was specifically addressing the question of whether the tribal exhaustion doctrine applied, its analysis regarding the impacts of a Title VII claim brought against a non-tribal entity, here a casino operating within the reservation, is helpful because the court concluded that such claims do not implicate tribal sovereignty. Given tribal sovereignty appears to be the central determining issue as to whether the Civil Rights Act, and specifically Titles VI and VII, applies the *Tidwell* court's analysis supports the conclusion that Title VI claims may be brought against non-tribal entities operating within Indian country, assuming tribal sovereignty is not implicated by such claims.

In *Vance v. Boyd Mississippi Inc.*, the U.S. District Court for the Southern District of Mississippi considered a similar case to the matter at issue in *Tidwell*.[86] In *Vance*, the plaintiff was a non-member working for the company, Boyd, which managed a casino owned by a federally-recognized tribe and located on the tribe's reservation.[87] As in *Tidwell*, the defendant in *Vance* argued that the tribal exhaustion doctrine applied and therefore the matter should have first been decided by tribal court before being heard in federal court. The *Vance* court provided ample analysis as to why the tribal exhaustion doctrine did not apply. The Court neither discussed, nor concluded, that the Plaintiff's claim would implicate tribal sovereignty. Like the *Tidwell* court, the *Vance* court ultimately determined that federal court was the proper forum because "this is an action for Title VII discrimination between non-Indians involving only issues of federal law . . . ."[88]

Finally, in *Myrick v. Devils Lake Sioux Manufacturing Corporation*, the U.S. District Court for the District of North Dakota considered a claim which encompassed a Title VII claim brought by an Indian against a corporation that was 51 % owned by a federally-recognized tribe, Devils Lake Sioux Tribe.[89] *Myrick* differs from *Tidwell* and *Vance* in two notable respects. First, the Plaintiff was an Indian. Sec-

85. *Id.*

86. Vance v. Boyd Miss., Inc., 923 F. Supp. 905 (S.D. Miss. 1996).

87. *Id.* at 907.

88. *Id.* at 914.

89. Myrick v. Devils Lake Sioux Mfg. Corp., 718 F. Supp. 753, 753 (Dist. N.D. 1989) ("Plaintiff Frank Myrick is a 64 year old American Indian male, who resides at St. Michael, North Dakota, on the Devils Lake Sioux Indian Reservation. Defendant Devils Lake Sioux Manufacturing Corporation (DLSMC) is incorporated under the laws of the State of North Dakota. The Devils Like Sioux Tribe owns 51% of DLSMC, and Brunswick Corporation, a Delaware corporation owns the other 49%.").

ond, the Defendant, Devils Lake Sioux Manufacturing Corporation, was majority owned by a federally-recognized tribe. Yet, the *Myrick* court applied largely the same analysis as the courts applied in *Tidwell* and *Vance*. First, the *Myrick* court summarily dismissed Defendant's argument that Title VII did not apply against it, arguing that given a tribe possessed the majority interest in the corporation the tribal exemption discussed above should apply.[90] Like the *Tidwell* and *Vance* courts, the *Myrick* court considered whether the tribal exhaustion doctrine applied, allowing the tribal court to consider the matter first. In discussing the potential application of the tribal exhaustion doctrine, the *Myrick* court distinguished the case before it from other cases where the tribal exhaustion doctrine was applied, finding that the other cases involved matters "intimately related to tribal self-government" and involving an "internal tribal controversy".[91] Conversely, in the matter at hand, the court apparently determined that tribal self-government was not at issue given the tribe was not a party and the case "predominantly present[ed] issues of federal law."[92]

Given the *Myrick* court's analysis, it may therefore be concluded that Title VII applies even in a case where the plaintiff is an Indian and a federally-recognized tribe owns a majority share of the defendant corporation. As discussed above, it appears that the only situation where Title VII will not apply in Indian country is when a tribe or tribally-controlled business directly affecting the economic stability of the tribe is a party. The justification for this exception is that Title VII should not be applied so as to threaten tribal sovereignty and economic development.

Notably, all three of the cases focused on whether the tribal exhaustion doctrine applied. In *Tidwell* and *Vance*, it appears that neither defendant argued Title VII did not apply.[93] In *Myrick*, the assertion that Title VII would not apply was dismissed by the court with practically no discussion.[94] Given the lack of argumentation and discussion on this point in all three cases, it can be inferred that there is a general consensus that Title VII should apply against non-tribal entities conducting business within Indian country. Therefore, the

90. *Id.* at 754 ("First, DLSMC argues that plaintiff's Title VII claim should be dismissed because it falls within the Indian Tribe exception as provided in 42 U.S.C. § 2000e(b) . . . . These arguments are without merit.") (citation omitted).

91. *Id.*

92. *Id.* at 755 (alteration in original).

93. *Tidwell*, 322 F. Supp. 2d at 1203 ("It is undisputed that this Court has federal question jurisdiction to adjudicate this case, which arises under Title VII.") (citation omitted); *Vance*, 923 F. Supp. at 907-08.

94. *Myrick*, 718 F. Supp. at 754.

outstanding issue is merely whether federal courts or tribal courts should be the first to adjudicate such claims. Furthermore, although both *Tidwell* and *Vance* involved Title VII claims brought by non-member Indians, the analysis utilized by both courts suggests that, even if the parties had been member-Indians, at best the Title VII claim would have first been heard by tribal court. There is nothing in the Courts' analyses from the three cases discussed above to suggest that Title VII would not apply to non-tribal entities conducting business in Indian country.

Again, one cannot make conclusions regarding the application of Title VI to non-tribal entities based solely on decisions where courts considered similar application of Title VII, because Title VII explicitly exempts tribes. However, the underlying analysis in *Tidwell*, *Vance*, and *Myrick* is persuasive on the point that Title VI claims may be brought by anyone (i.e., member, non-member or non-Indian) against an entity conducting business within Indian country as long as application of Title VI in such a context would not negatively impact tribal sovereignty. In *Tidwell* and *Vance*, no one raised an argument against general application of Title VII and in *Myrick*, the argument was summarily dismissed. In addressing the question of whether the tribal exhaustion doctrine applied, all three courts concluded that application of Title VII against the various entities conducting business within Indian country was appropriate because such application would not negatively impact tribal sovereignty. Thus, it appears that the lynchpin to the analysis of whether provisions of the Civil Rights Act apply in Indian country is whether tribal sovereignty is affected. Given most Title VI claims brought against non-tribal entities conducting business in Indian country would unlikely affect tribal sovereignty, individuals living within Indian country should most likely be able to bring Title VI claims against on-reservation entities.

III. CONCLUSION

Whether Title VI applies to environmental justice issues arising in Indian country ultimately turns on how such claims implicate tribal sovereignty. EPA regulations, guidance and related legislative history all seem to suggest that Congress did not intend for Title VI to apply against tribes. This conclusion is also strengthened by the fact that Title VII, another title of the Civil Rights Act, does not apply against tribes or tribally-controlled businesses, whose affairs impact tribal sovereignty. This would seem to be the case regardless of whether the tribe is acting under TAS provisions of the various federal statutes or

whether issues not wholly intra-tribal in nature are involved. Yet, the analysis seems somewhat less clear when considering whether Title VI may be applied against non-tribal entities conducting business within Indian country. However, Title VII case law can be used for guidance. Courts have consistently applied Title VII against non-tribal entities conducting business within Indian country. Under all circumstances, it appears that the central question is: What impact will application of Title VI have on tribal sovereignty? If tribal sovereignty will be negatively impacted by application of Title VI, it seems clear that such claims cannot proceed.

By way of caveat, this article should not be read to mean that individuals are incapable of protecting themselves against tribal governments and entities controlled by tribal governments when individual civil rights are infringed upon. To the contrary, such individuals have a cause of action against tribal governments in tribal court. Civil rights complaints may be brought against tribal governments and the entities they control under tribal law.[95] Moreover, the Indian Civil Rights Act applies the protections of the majority of the federal Bill of Rights to Indian country.[96]

Ultimately, when it comes to application of Title VI of the Civil Rights Act to environmental justice issues arising in Indian country, tribal sovereignty is the key.

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95. Monette, *supra* note 6, at 740 ("Relatively early in this Nation's history, the Supreme Court ruled that the Federal Bill of Rights did not apply to tribes and thus did not prohibit discrimination by tribes. In *Talton v. Mayes*, the Court used language and logic remarkably similar to that used in *Barron v. Mayor of Baltimore*, reasoning that Tribes had their own constitutions and that their citizens could seek protection there.") (citations omitted).

96. In language tracking the U.S. Bill of Rights, the Indian Civil Rights Act ("ICRA") grants individual Indians rights against tribal governments. 25 U.S.C. §§ 1301-1303 (2006). These rights include the free exercise of religion and many of the protections of the federal criminal process. *Id.* ICRA also grants individual Indians the right to equal protection and due process, as well as the writ of habeas corpus. *Id.*