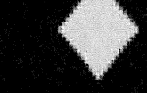
COHEN'S HANDBOOK OF

FEDERAL INDIAN LAW



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that the restored tribe exercises its inherent powers, not newly created, federally delegated powers.[249]

[9] State-Recognized Tribes

The term "state-recognized tribes" refers to tribes that are not federally recognized, but have been acknowledged by state law, and that sometimes reside on state-recognized reservations. Examples include the Haliwa Saponi of North Carolina,[250] and the Mattaponi and Pamunkey of Virginia.[251] State recognition has its roots in relationships that developed with English colonies and continued with the states after the American Revolution.[252] Some state-recognized tribes have sought and achieved federal recognition as well, either by congressional action[253] or by means of the Office of Federal Acknowledgment (OFA) process within the Bureau of Indian Affairs.[254]

State-recognized tribes are, by definition, not considered federally recognized tribes, and the legal status of their reservations and the scope of their governmental authority, if any, is a matter of state, not federal, law. Some states recognize considerable autonomy on the part of state-recognized tribes.[255]

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v. Menominee Nation Casino, 897 F. Supp. 389, 394 (E.D. Wis. 1995) (sovereign immunity).

[249] United States v. Long, 324 F.3d 475, 482 (7th Cir. 2003) (dual sovereignty exception to double jeopardy applied to permit subsequent prosecution of tribal member after conviction in tribal court by restored tribe); *cf.* United States v. Lara, 541 U.S. 193 (2004) (upholding constitutionality of federal congressional affirmation of criminal jurisdiction of tribes over nonmember Indians and applying dual sovereignty exception to double jeopardy). For a further discussion of *Lara*, see Ch. 4, § 4.03; for a further discussion of double jeopardy, see Ch. 9, § 9.05.

[250] N.C. Gen. Stat. § 71A-5.

[251] Virginia House Joint Resolution 54 of the General Assembly (1983). This resolution also recognizes the Chickahominy, the Eastern Chickahominy, the Rappahannock, the Pamunkey, and the Upper Mattaponi.

[252] *See* Treaty Between Virginia and the Indians, May 29, 1677, *reprinted in* 14 Va. Magazine of Hist. and Biography, 1906–1907, at 289–296 (William G. Stanard ed., 1968); and Treaty at Middle Plantation with Tributary Indians after Bacon's Rebellion (1677), *reprinted in* IV Early American Indian Documents: Treaties and Laws, Virginia Treaties 1607–1722, at 82 (Robinson ed., 1983) (declaring peace; guaranteeing Indian land security, and establishing relationship with colonial governor).

[253] *E.g.*, Maine Indian Claims Settlement Act, 25 U.S.C. § 1721 et seq. (granting federal recognition to three tribes in Maine formerly recognized by state government); Mashantucket Pequot Settlement Act, 25 U.S.C. § 1752 et seq.

[254] *See, e.g.*, Final Determination That the Mohegan Indian Tribe of Connecticut, Inc., Does Exist as an Indian Tribe; 59 Fed. Reg. 12,140 (March 7, 1994). For discussion of the Office of Federal Acknowledgment, see § 3.02[7].

[255] *See, e.g.*, Collins v. Shinnecock Tribe, 532 N.Y.S.2d 971 (Sup. Ct. 1988) (recognizing sovereign immunity); Op. of the Va. Attorney Gen., No. 03-018 (May 13, 2003) ("The activities of the Pamunkey and Mattaponi tribal members that take place on the Indian reservations are not subject to state and local tax. Therefore, it is my opinion that the consumption tax on electricity may not be collected from Pamunkey and Mattaponi tribal members who live on the respective Indian reservations for electricity consumed on those reservations"); Opinion of the Virginia Attorney

As a general proposition of federal Indian law, only tribes that have retained or established formal political relations with the federal government are entitled to exercise powers of self-governance over their members and activities occurring on tribal lands, and to participate in the range of federal programs and services provided to Indian people because of their status as Indians.[256] On the other hand, some federal statutes extend protection, services, and authorization for program management beyond federally recognized tribes and specifically include Indian groups that are formally recognized by state authorities. For example, the Native American Housing Assistance and Self-Determination Act specifically defines Indian tribe as a "federally recognized tribe or a State recognized tribe."[257] This federal statute is expressly limited to housing programs, and specifically provides that "nothing in this paragraph shall be construed to confer upon a State recognized tribe any rights, privileges, responsibilities, or obligations otherwise accorded groups recognized as Indian tribes by the United States for other purposes."[258] Similarly, the Indian Health Care Improvement Act[259] has been construed to reach members of state-recognized Indian tribes.[260] Members of state-recognized Indian tribes also receive some measure of federal protection and benefits for education,[261] for general economic development and social self-sufficiency,[262] and to secure interests in Indian-produced arts and crafts.[263] Members of non-federally recognized tribal groups are typically outside the purview of even these rules.

State recognition can take a variety of forms, and federal laws extending to state-recognized tribes defer to the states' characterizations.[264] Some states

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General, No. 00-076 (Sept. 28, 2001) ("The Indian Treaty of 1677 imposes some duty on the state to provide certain privileges or benefits to the Indians that may not be extended to others. While this special relationship may not be defined fully, it has been recognized consistently").

[256] *See* § 3.02[3].

[257] 25 U.S.C. § 4103(12)(A).

[258] 25 U.S.C. § 4103(12)(C)(ii)(II).

[259] 25 U.S.C. § 1651 et seq.

[260] *See, e.g.*, Schmasow v. Native Am. Ctr., 978 P.2d 304 (Mont. 1999); 25 U.S.C. § 1603(13).

[261] *See, e.g.*, 20 U.S.C. § 1401(10) (providing federal educational benefits to individuals with disabilities); 34 C.F.R. § 263.3 (affording Indian Fellowships and Professional Development programs); 42 C.F.R. §§ 136.302(h),136.303 (providing scholarships through Department of Health and Human Services as part of Indian Health Care Improvement Act).

[262] *See, e.g.*, 45 C.F.R. § 1336.33 (administration for Native Americans); 45 C.F.R. § 96.44 (community block grant service programs); 45 C.F.R. § 96.48 (low-income home energy assistance).

[263] *See* 25 U.S.C. § 305e, 18 U.S.C. § 1159 (making it illegal to falsely claim goods are Indian-produced).

[264] For example, 25 U.S.C. § 4103(12)(c) defines a state-recognized tribe as "any tribe, band, nation, pueblo, village, or community . . . that has been recognized as an Indian tribe by any State." States continue to recognize tribes. *See, e.g.*, 2006 Vt. Acts & Resolves 125 (Vermont recognition of Abenaki).

administer lands set aside for tribal groups that are not recognized by the federal government.[265] Other states provide political recognition through representation on state Indian commissions or councils,[266] or administer benefit programs for non-federally recognized tribes located within their boundaries.[267] At least one state has authorized a state-recognized tribe to create a police force, vested with most of the same powers as state or municipal officers.[268] Another form of state recognition may consist of merely acknowledging that a particular tribal group constitutes the indigenous people of a particular area in the state.[269]

State laws and regulations providing some measure of protection and services to Indians and Indian tribes because of their status as Indians have some legal foundation. The United States Supreme Court has held that the federal power to enact legislation in discharge of trust obligations to Indian tribes may be delegated to the states.[270] Thus, state laws addressed specially to Indians or Indian tribes may survive legal challenges if they rationally advance federal policy and authority as well as the purposes of the state law.[271] Although state law addressing state-recognized tribes may not conflict with any rules of federal Indian law,[272] state-recognized tribes are generally not the subject of federal legislation and concern. Hence, there would not appear to be any conflict with federal law when states administer their own programs of respect and protection. Furthermore, the fact that states maintain a political relationship with the tribes that they recognize may insulate state legislation directed at such tribes from legal challenge under principles of equal protection.[273]

§ 3.03 Definition of Indian

[1] Introduction

Who counts as an Indian for purposes of federal Indian law varies according to

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[265] *See, e.g.*, N.Y. Indian Law §§ 120–122.

[266] *See, e.g.*, Va. Code Ann. § 2.2-2628; N.C. Gen. Stat. § 143B-407.

[267] A joint project of the National Congress of American Indians and the National Conferences of State Legislatures provides useful information and important electronic links to the range of cooperative state-tribal arrangements. *See* Susan Johnson, Government to Government: Understanding State and Tribal Governments (Nat'l Conference of State Legislators, 2000).

[268] Ala. Code §§ 36-21-120 to 36-21-124.

[269] *See, e.g.*, J. Res. No. 96, ch. 146 (Cal. 1994) (Gabrieleno/Tongva Tribe acknowledged as aboriginal people of Los Angeles basin).

[270] *See* Ch. 6, § 6.04.

[271] *See, e.g.*, Washington v. Confederated Bands & Tribes of Yakima Nation, 439 U.S. 463, 500 (1979) (upholding state partial assertion of jurisdiction in accordance with federal law; discussed in Ch. 6, § 6.04[2]); Livingston v. Ewing, 601 F.2d 1110 (10th Cir. 1979) (state museum preference for Native American artists not violative of equal protection).

[272] *See* Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 Notre Dame L. Rev. 1461, 1476–1477 (1991).

[273] *See* Ch. 14, § 14.03[2][b].