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## Protecting Tribal Skies: Why Indian Tribes Possess the Sovereign Authority to Regulate Tribal Airspace

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# PROTECTING TRIBAL SKIES: WHY INDIAN TRIBES POSSESS THE SOVEREIGN AUTHORITY TO REGULATE TRIBAL AIRSPACE

*William M. Haney*\*

## *Abstract*

*Since the advent of human flight, lawmakers in the United States have struggled to keep pace with advancements in aviation technology. Similarly, many doctrines of federal Indian law that govern the exercise of the sovereign powers of Indian tribes in the United States are based on outmoded conceptions of the capabilities and interests of Indian people and tribal governments. For decades, tribal governments have worked to protect their sovereign interests in tribal territory from the effects of aviation activities that occur within tribal airspace. There has been no exploration of tribal airspace issues in the academic community and limited examination of the subject in federal courts. As the Federal Aviation Administration creates a regulatory framework for the operation of unmanned aircraft systems in U.S. airspace, the question of tribal sovereignty in tribal airspace remains highly relevant to tribal governments, federal authorities, and aviation enthusiasts.*

*This Article argues Indian tribes possess the sovereign authority to regulate tribal airspace. It examines the real-world interests that motivate the exercise of tribal sovereignty in airspace and addresses potential concerns and objections to federal recognition of that power. It proposes political and regulatory solutions to the uncertain status of the ability of tribes to regulate tribal airspace and argues that a cooperative relationship between Indian tribes and the federal government is necessary to protect tribal interests and the integrity of domestic aviation activities.*

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### I. Introduction

A central maxim of international aviation law is that a nation state is entitled to “complete and exclusive sovereignty over the air space above its territory.”<sup>1</sup> For countries that exist in the international community as independent sovereigns,<sup>2</sup> the boundaries of each state’s sovereign airspace are more or less delineated through international agreements.<sup>3</sup> Even those nations that elect to assert sovereignty over national skies through domestic declarations and regulations, rather than participation in international airspace agreements, are generally acknowledged by the international community to possess exclusive sovereignty over their airspace.<sup>4</sup>

The unique sovereign status of Indian tribes in the United States complicates an analysis of this doctrine as it applies to sovereign control over tribal airspace. Although tribes exist as extraconstitutional, self-governing entities, they are also subject to the plenary power of the United States and are regarded as “domestic dependent nations” under federal law.<sup>5</sup> This political reality necessarily informs the question of whether the inherent sovereignty of Indian tribes extends into the airspace above tribal

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1. Paris Convention for the Regulation of Air Navigation, art. I, Belg.-Bol.-Braz.-Czech-Gr.Brit.-China-Cuba-Ecuador-Fr.-Greece-Guat.-Haiti-Hedjaz-Hond.-It.-Japan-Liber.-Nicar.-Pan.-Peru-Pol.-Port.-Rom.-Serb.-Siam-Uru.-U.S., Oct. 13, 1919, 11 L.N.T.S. 173 [hereinafter Paris Convention].

2. “Independent sovereign” in this instance means a nation state recognized by the international community as capable of entering into international treaties with other nation states.

3. See, e.g., Paris Convention, *supra* note 1 (designating the airspace above signatory countries to be the sovereign domain of each respective state). A country may also enter into an air services agreement in which it allows airlines from other countries to fly through its sovereign airspace, subject to certain limitations. For example, the International Air Services Transit Agreement of 1944 grants the airlines of the 121 signatory countries the “‘First and Second Freedoms’ of the air: that is, the right to fly across their respective territories without landing, and to land there for ‘non-traffic purposes’, such as refueling or repairs.” ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 321 (2d ed. 2010). Countries may also enter into bilateral or *ad hoc* agreements with each other to define the acceptable boundaries of the use of sovereign airspace by foreign aircraft. *Id.*

4. See Convention on International Civil Aviation, art. I, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention] (affirming the principle that “every State has complete and exclusive sovereignty over the airspace above its territory”).

5. The history of Indian tribes in America is a story characterized by continuous struggles over the boundaries of tribal sovereignty, tribal jurisdiction, and tribal property rights. These three issues have become inextricably linked in the canon of federal Indian law and are essential to figuring out the puzzle of whether tribes have the right to assert sovereign jurisdiction over tribal airspace. See *infra* Part III.

land. This question is becoming relevant for those tribes faced with an increasing use of tribal airspace.

The Hualapai Tribe (the “Tribe”) is a federally-recognized Indian tribe situated on a reservation that encompasses more than one million acres and includes much of the western rim of the Grand Canyon.<sup>6</sup> The Tribe earns revenue in part by selling hunting and fishing permits, leading guided tours of the Colorado River, conducting helicopter air tours over portions of the Grand Canyon, and offering other recreational activities in the area.<sup>7</sup> The Tribe’s reliance on tourism to provide revenue for the tribal government necessarily requires strict control over the use and exploitation of its resources by non-tribal members.<sup>8</sup> The extent and nature of the Hualapai’s control over their own resources was tested in January 2009, when a non-Indian freelance tour guide and photographer named Lionel de Antoni flew a fan-powered paraglider over the Hualapai reservation without the Tribe’s permission.<sup>9</sup>

As part of his freelance tourism business, Mr. de Antoni would regularly fly over scenic public lands with a paraglider and take photographs of the terrain below.<sup>10</sup> He would post the photos to his personal website and organize tours of the areas that attracted the most interest from visitors to his website.<sup>11</sup> Mr. de Antoni’s flight through Hualapai airspace began on

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6. *About Hualapai*, HUALAPAI TRIBE, <http://hualapai-nsn.gov/about-2/> (last visited Nov. 17, 2015).

7. *Id.* The Tribe also owns and operates a private airport and a public airport on its reservation. The Hualapai Tribe’s public airport is essential to its tourist economy as it is the departure and landing point for most of the air traffic moving through the reservation’s airspace. *See 3AZ5: Hualapai Airport*, AIRNAV.COM, <http://www.airnav.com/airport/3AZ5> (last visited Dec. 28, 2012) (providing information and flight guidelines regarding the tribally owned private airport on the Hualapai Reservation); *IG4: Grand Canyon West Airport*, AIRNAV.COM, <http://www.airnav.com/airport/IG4> (last visited Dec. 28, 2012) (providing information and flight guidelines regarding the tribally owned public airport on the Hualapai Reservation).

8. *See About Hualapai*, *supra* note 6 (“There is no casino gaming on the Hualapai Reservation. . . . The principal economic activities are tourism, cattle ranching, and arts and crafts.”).

9. Cyndy Cole, *Hualapai, Pilot at Stalemate*, ARIZ. DAILY SUN (Feb. 17, 2009), [http://azdailysun.com/news/hualapai-pilot-at-stalemate/article\\_f17b9b9c-9ceb-53e5-b6eb-aa5524193aea.html](http://azdailysun.com/news/hualapai-pilot-at-stalemate/article_f17b9b9c-9ceb-53e5-b6eb-aa5524193aea.html) [hereinafter Cole, *Stalemate*].

10. *Id.*

11. *Tribal Airspace Dispute Deserves Quick Resolution*, ARIZ. DAILY SUN (Feb. 19, 2009), [http://azdailysun.com/news/opinion/tribal-airspace-dispute-deserves-quick-resolution/article\\_f11717ed-5998-5e5f-a59a-a076890a57c6.html](http://azdailysun.com/news/opinion/tribal-airspace-dispute-deserves-quick-resolution/article_f11717ed-5998-5e5f-a59a-a076890a57c6.html).

federal land adjacent to the reservation, where he lived in a motorhome.<sup>12</sup> Hualapai officers met Mr. de Antoni near his landing site on the adjacent federal land and confiscated his motorhome, paraglider, and camera equipment.<sup>13</sup> The Tribe alleged Mr. de Antoni did not notify it of his intent to fly in Hualapai airspace prior to his flight.<sup>14</sup> He insisted he did not make physical contact with Hualapai land at any time during the flight and pointed out that he landed on federal—not tribal—land at the conclusion of the flight.<sup>15</sup>

The ensuing dispute between the Hualapai Tribe and Mr. de Antoni seemed certain to raise a set of interesting legal questions. A central point of discussion that quickly emerged was whether the Hualapai Tribe has jurisdictional authority to impose sanctions on pilots who enter reservation airspace without prior authorization from the Tribe. Paul Charlton, an attorney representing the Hualapai Tribe in the case, stated plainly that the Hualapai Tribe has “the right to determine who will or will not fly over Hualapai territory.”<sup>16</sup> A spokesman for the Federal Aviation Administration (“FAA”) initially told a reporter that “[a] tribe has no authority over airspace and cannot charge people for using it,” but did not elaborate on the legal basis for this claim other than to assert “[t]he federal government has sole jurisdiction over the nation's airspace.”<sup>17</sup> Mr. de Antoni echoed this sentiment and insisted his flight path complied with flight maps provided by the FAA.<sup>18</sup> The FAA declined to further comment on Mr. de Antoni’s case or intervene on his behalf.<sup>19</sup> Despite the early legal posturing by the parties, Mr. de Antoni declined to wage a costly legal battle to argue his theory of the case in tribal and federal courts.<sup>20</sup> He instead paid a fine to the

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12. *Id.*

13. *Id.*

14. Cole, *Stalemate*, *supra* note 9.

15. Cyndy Cole, *In Citing Pilot, Tribe Lays Claim to Airspace Over Its Lands*, ARIZ. DAILY SUN (Jan. 21, 2009), [http://azdailysun.com/news/in-citing-pilot-tribe-lays-claim-to-airspace-over-its/article\\_a259f1d0-4718-5b01-ab8e-48feae5f2d6.html](http://azdailysun.com/news/in-citing-pilot-tribe-lays-claim-to-airspace-over-its/article_a259f1d0-4718-5b01-ab8e-48feae5f2d6.html) [hereinafter Cole, *Citing Pilot*].

16. Cole, *Stalemate*, *supra* note 9.

17. Cole, *Citing Pilot*, *supra* note 15.

18. Cole, *Stalemate*, *supra* note 9; *Tribal Airspace Dispute Deserves Quick Resolution*, *supra* note 11.

19. Janice Wood, *Hualapai “Trespass” Pilot Reluctantly Enters Plea*, GEN. AVIATION NEWS (Mar. 16, 2009), <http://www.generalaviationnews.com/2009/03/16/hualapai-trespass-pilot-reluctantly-enters-plea/>.

20. *Id.*

Hualapai Tribe and the Tribe returned his property.<sup>21</sup> Thus, while the Tribe and Mr. de Antoni began to argue their cases in the court of public opinion, the question of tribal control of airspace ultimately escaped judicial analysis.<sup>22</sup>

This Article introduces the issues that might have been involved in that analysis and is intended to stimulate discussion about the legal basis for tribal regulation of airspace. It argues that Indian tribes have inherent sovereign jurisdiction over tribal airspace on the basis of established principles of inherent tribal sovereignty and federal Indian law.<sup>23</sup> It examines objections that tribes might encounter in attempting to exert increased regulatory control over tribal airspace and proposes a legislative solution to the more problematic obstacles that tribes face in this area of law.

Part I examines basic international, federal, state, and tribal regulatory airspace laws. It describes the legal basis for national control of airspace, the history and extent of federal regulation of airspace in the United States, the limited extent to which states in the U.S. may regulate state airspace, and the laws of several Indian tribes that assert tribal jurisdiction over their airspace.

Part II introduces the federal Indian law doctrines that limit the exercise of tribal sovereign powers and defines how Indian tribes exist and operate within and outside of the federal system. It provides an overview of the unique sovereign status of Indian tribes, civil and criminal jurisdiction on tribal lands, and tribal property rights.

Part III argues tribes have an inherent sovereign right to regulate tribal airspace. It explores the idea that this right arises from the federally-recognized inherent power of Indian tribes to exclude non-tribal members

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21. *Id.*

22. There has been very little litigation over issues of tribal airspace in tribal, federal, or state courts to date.

23. While the principles of inherent tribal sovereignty might be enough to explain the basis of an Indian tribe's essential jurisdiction over the airspace above its land, that jurisdiction should also be justified using the canon of federal Indian law that has developed over the past two centuries. This is because while jurisdictional issues can first be litigated in tribal courts, non-Indian citizens of the United States also have subsequent recourse in the federal courts under established constitutional and federal Indian law. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-57 (1985). The asserted plenary power of the United States over Indian affairs has been interpreted by the Supreme Court in such a way as to practically require that any expansions of tribal jurisdiction either be explicitly acknowledged by Congress or sanctioned by existing federal acknowledgments of tribal power over non-Indians and non-member Indians. *See infra* Parts IV-V.

from tribal lands, and that this power has not been relinquished by Indian tribes or abrogated by the United States government. It further proposes that the right of tribes to regulate airspace is supported by the tribal power to regulate non-members (including non-Indians) to protect its general health and welfare.

Part IV addresses objections to and arguments against the recognition of tribal sovereignty in airspace, including arguments that (1) tribal regulation of airspace is preempted by federal aviation laws and regulations, (2) the status of tribes as domestic dependent nations under federal law implicitly divests them of authority to regulate airspace, (3) allowing tribes to regulate airspace would be unsafe, and (4) tribes lack regulatory jurisdiction over non-Indian, non-member pilots.

Part V of this Article proposes a legislative solution to the legal issues involved in tribal jurisdiction in airspace. The proposed legislation would explicitly recognize the power of tribes to regulate certain reaches of tribal airspace as a cooperative effort with the FAA. It would also direct the FAA to enact regulations to protect tribal airspace, up to an altitude of ten thousand feet, from incursion by non-tribally operated aircraft without permission from the affected tribe. Part V also proposes general regulatory guidelines the FAA could adopt to carry out the congressional mandate.<sup>24</sup>

## *II. Airspace Regulation and Private Rights in Airspace*

### *A. International Airspace Law*

The first known aviation law was enacted by French authorities on April 23, 1784.<sup>25</sup> The ordinance prohibited any person from taking a manned balloon flight in the city of Paris without first obtaining permission from the city's police department.<sup>26</sup> Since that time, governments around the world have struggled to craft laws that keep pace with relatively rapid developments in aviation technology.<sup>27</sup> Though the use of airspace in the

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24. It is beyond the scope of this Article to propose an entire body of regulations that the FAA may adopt to carry out the goal of protecting tribal airspace. The agency oversees a complex regulatory process that requires the input of government officials, aviation professionals, and others who may be affected by a change in regulations. Thus, this Article seeks only to provide a starting point from which the FAA might begin the process of working with tribes to protect tribal airspace.

25. P.P.C. HAANAPPEL, *THE LAW AND POLICY OF AIR SPACE AND OUTER SPACE: A COMPARATIVE APPROACH* 4 (2003).

26. *Id.*

27. This tension can be seen clearly in the current debate in the United States over the use of unmanned aircraft systems (also known as "drones") within domestic airspace. *See*

United States is regulated primarily through domestic laws and regulations,<sup>28</sup> the global reach of air travel eventually led to the creation of international agreements governing flight across international boundaries.<sup>29</sup>

The use of aircraft in World War I resulted in the first international agreements governing the exercise of sovereignty in national airspace.<sup>30</sup> Nations affected by the war realized the reach of military aircraft created a need for clear rules governing the use of the airspace above their territories.<sup>31</sup> The primary issue was whether navigable airspace should be freely available to all, regardless of sovereign claims to the land below, or whether individual nations should retain some sovereign prerogative over national airspace.<sup>32</sup> Ultimately, signatories of the Versailles Peace Treaty agreed that all nation states—whether parties to the treaty or not—possess sovereign rights to the airspace above national lands and territorial waters.<sup>33</sup>

Although the default international rule is that nation states possess sovereign rights to national airspace, those rights can be modified through entrance into multi- or bilateral treaties.<sup>34</sup> There are limits, however, to the airspace any country can lay claim to or modify in these agreements. For example, the airspace above the “high seas”—the seas where all nations may freely travel—is considered free of any individual national sovereign control, and thus aircraft from all countries may freely pass through that

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Trent Gillies, *Drones Are Good, yet Safety Is ‘Paramount’: Former FAA Chief*, CNBC (Mar. 22, 2015, 9:00 AM), <http://www.cnbc.com/id/102522833> (describing concerns with the use of commercial drones in U.S. airspace); Ryan Mac & Frank Bi, *Senator Cory Booker to Introduce Commercial Drone Legislation Following FAA’s Amazon Ruling*, FORBES.COM (Mar. 23, 2015, 4:30 PM), <http://www.forbes.com/sites/ryanmac/2015/03/23/senator-cory-booker-to-introduce-commercial-drone-legislation-following-faa-amazon-ruling/> (describing a potential legislative effort to establish temporary rules governing the commercial use of drones in U.S. airspace); Brian Montopoli, *Lawmakers Move to Limit Domestic Drones*, CBS NEWS (May 16, 2013, 4:28 PM), [http://www.cbsnews.com/8301-201\\_162-57584695/lawmakers-move-to-limit-domestic-drones/](http://www.cbsnews.com/8301-201_162-57584695/lawmakers-move-to-limit-domestic-drones/) (describing state and federal legislation created in response to the plans of government and law enforcement agencies to begin using drones in domestic United States airspace).

28. *See, e.g.*, 49 U.S.C. §§ 40101-50105 (2015); 14 C.F.R. §§ 1-1399 (2015).

29. *See, e.g.*, Paris Convention, *supra* note 1; Chicago Convention, *supra* note 4.

30. HAANAPPEL, *supra* note 25, at 3.

31. *Id.*

32. *Id.*

33. *Id.* Haanappel’s definition of a sovereign nation will suffice for the purposes of this Article. He states that there are three primary characteristics of a modern sovereign state: “a territory, a population living on such territory, and a government that effectively exercises authority over the population living on the territory.” *Id.* at 3 n.13.

34. *Id.* at 15.

airspace.<sup>35</sup> The boundaries of outer space are also similarly free of any individual claims of national sovereign control.<sup>36</sup>

Indian tribes in the United States are unlikely to rely solely on international principles of aviation law when making the case for tribal sovereignty in airspace because international law principles do not generally apply in the context of federal Indian law.<sup>37</sup> Additionally, although tribes are considered sovereign governments, the Supreme Court and Congress have long regarded that sovereignty as being limited in many important ways by the plenary power of Congress.<sup>38</sup> Thus, any discussion of sovereignty in tribal airspace must necessarily acknowledge aspects of both domestic aviation law and federal Indian law.

### *B. Domestic Airspace Regulation in the United States*

Aviation law in the United States was largely developed in the twentieth century as a way to ensure a safe and efficient national air transit system.<sup>39</sup> The fundamental principle of domestic aviation law is that the federal government maintains sovereign control and supremacy over all airspace above land within the boundaries of the United States.<sup>40</sup> The United States was not a signatory to the Paris Convention for the Regulation of Air Navigation in 1919,<sup>41</sup> but instead declared its sovereignty over national airspace through the Air Commerce Act of 1926.<sup>42</sup> The Act was the result of a congressional debate about whether the federal government has the power to regulate the use of all airspace within the United States.<sup>43</sup>

Congress's primary concern at the time was that inconsistent state aviation regulations—which originally governed flights through domestic

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35. *Id.*

36. *Id.*

37. See Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751 (2003) (discussing the federal government's reluctance to apply principles of international law to Indian law issues, and arguing that it should).

38. See *infra* Part III.

39. See *A Brief History of the FAA*, FED. AVIATION ADMIN. (last modified Feb. 19, 2015, 4:23 PM), [https://www.faa.gov/about/history/brief\\_history/](https://www.faa.gov/about/history/brief_history/) (describing the history of aviation law in the United States).

40. See Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (codified as amended in scattered sections of 49 U.S.C.); 49 U.S.C. § 40103 (2012) (“The United States Government has exclusive sovereignty of airspace of the United States.”).

41. HAANAPPEL, *supra* note 25.

42. *Id.*; 49 U.S.C. § 40103.

43. STUART BANNER, *WHO OWNS THE SKY?: THE STRUGGLE TO CONTROL AIRSPACE FROM THE WRIGHT BROTHERS ON 150-67* (2008).

airspace—would lead to unsafe air travel conditions.<sup>44</sup> While some lawmakers initially argued that a declaration of federal supremacy over aviation regulations would require a Constitutional amendment,<sup>45</sup> Congress eventually concluded that the Constitution justified federal regulation of all aviation activities in the United States.<sup>46</sup>

Congress expanded federal regulation of aviation in the United States with the passage of the Federal Aviation Act of 1958 (“Aviation Act”). Created in response to a series of domestic airplane accidents,<sup>47</sup> the purpose of the Aviation Act is to “provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft.”<sup>48</sup> The Act created the precursor agency<sup>49</sup> to the FAA, the federal agency responsible for the promulgation and enforcement of aviation regulations in the United States.<sup>50</sup> The FAA’s mission is “to provide the safest, most efficient aerospace system in the world.”<sup>51</sup> It manages all air traffic and aviation activities within the United States through a regulatory regime that spans five volumes in the Code of Federal Regulations.<sup>52</sup>

Airspace in the United States is broadly divided into regulatory airspace and nonregulatory airspace.<sup>53</sup> Regulatory airspace includes controlled

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44. *Id.* at 161.

45. *Id.* at 155-58.

46. *Id.* at 157-61. While the conclusion that federal regulation of interstate flights was justified under the Commerce Clause was fairly straightforward, “[t]he question of *intrastate* air travel was much harder.” *Id.* at 158. Around the time of the debate, the Supreme Court decided two cases in which it concluded that federal regulation of railroads and stockyards—even when purely intrastate—was justified under the Commerce Clause. Thus, Congress concluded that federal regulation of intrastate aviation could be justified under the same rationale. *Id.* at 159-61.

47. *A Brief History of the FAA*, *supra* note 39.

48. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, 731.

49. The initial governmental body responsible for aviation safety was the Federal Aviation Agency, the Administrator of which was authorized to “develop plans for and formulate policy with respect to the use of the navigable airspace[,] and assign by rule, regulation, or order the use of the navigable airspace . . . in order to insure the safety of aircraft and the efficient utilization of such airspace.” *Id.* § 307(a), 72 Stat. at 749.

50. *See A Brief History of the FAA*, *supra* note 39.

51. *Mission*, FED. AVIATION ADMIN. (Apr. 23, 2010, 9:37 AM), <http://www.faa.gov/about/mission/>.

52. *See* 14 C.F.R. §§ 1-1399 (2015).

53. FED. AVIATION ADMIN., AERONAUTICAL INFORMATION MANUAL: OFFICIAL GUIDE TO BASIC FLIGHT INFORMATION AND ATC PROCEDURES ch. 3-1-1(a) (2014), <http://www.faa.gov/aim/>.

airspace (Classes A, B, C, D & E) and restricted and prohibited areas.<sup>54</sup> Nonregulatory airspace includes military operations areas, warning areas, alert areas, and controlled firing areas.<sup>55</sup>

In placing airspace into a particular regulatory classification, the FAA considers factors such as the complexity or density of aircraft movements in the area, the nature of aviation operations conducted in the airspace, any safety concerns unique to the area, and how national and public interests might be affected by the classification.<sup>56</sup> There are three primary categories of regulatory airspace: (1) controlled airspace, (2) uncontrolled airspace, and (3) special use airspace.<sup>57</sup>

### *1. Controlled Airspace*

Airspace is “controlled” where pilots are required to communicate with nearby air traffic control systems as they move through the area.<sup>58</sup> FAA regulations separate controlled airspace into five classes: A, B, C, D & E.<sup>59</sup>

Class A is “airspace from 18,000 feet [mean sea level (“MSL”)] up to and including FL [flight level] 600, including the airspace overlying the waters within 12 nautical miles of the coast of the 48 contiguous States and Alaska.”<sup>60</sup> Class B is “airspace from the surface to 10,000 feet MSL surrounding the nation’s busiest airports in terms of [instrument flight rules (“IFR”)] operations or passenger enplanements,”<sup>61</sup> is specifically tailored to the area surrounding any particular airport, and requires a pilot obtain clearance from air traffic control before entering it.<sup>62</sup>

Class C airspace extends “from the surface to 4,000 feet above the airport elevation (charted in MSL) surrounding those airports that have an operational control tower, are serviced by a radar approach control, and that

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faa.gov/air\_traffic/publications/media/aim\_basic\_4-03-14.pdf [hereinafter FAA FLIGHT MANUAL].

54. *Id.*

55. *Id.*

56. *Id.* at ch. 3-1-1(c). These considerations include “[t]he complexity or density of aircraft movements, . . . [t]he nature of the operations conducted within the airspace, . . . [t]he level of safety required, and . . . [t]he national and public interest.” *Id.*

57. *See id.* (designating uncontrolled airspace as Class G airspace).

58. *Id.* at ch. 3-2-1.

59. *Id.*

60. *Id.* at ch. 3-2-2(a).

61. *Id.* at ch. 1-1-3, 3-2-3(a). Instrument flight rules are rules that apply to flights occurring under instrument meteorological conditions, which are “weather conditions below the minimums prescribed for flight under Visual Flight Rules (VFR).” 14. C.F.R. § 170.3.

62. *Id.*

have a certain number of IFR operations or passenger enplanements.”<sup>63</sup> Like Class B airspace, Class C is individually tailored to specific areas near airports but generally features a “radius core” of five nautical miles that extends up to four thousand feet above the surface elevation of the airport.<sup>64</sup> Pilots are required to establish two-way communications with air traffic control prior to entry into Class C airspace, and are subject to speed, distance, and other requirements while in Class C.<sup>65</sup>

Class D consists of airspace extending “from the surface to 2,500 feet above the airport elevation (charted in MSL) surrounding those airports that have an operational control tower.”<sup>66</sup> Flight restrictions in this class mirror that of Class C and pilots are expected to adhere to air traffic control directives while in this class of airspace.<sup>67</sup> Class E airspace consists of any other controlled airspace that does not fall in Classes A through D.<sup>68</sup> While there are no unique requirements applicable to pilots operating in Class E airspace, they are still expected to abide by FAA regulations governing communications with air traffic control.<sup>69</sup>

## 2. *Uncontrolled Airspace*

All airspace not categorized as Class A, B, C, D, or E is regarded as uncontrolled airspace and designated as Class G airspace.<sup>70</sup> While pilots flying through uncontrolled airspace are not required to maintain communication with air traffic control,<sup>71</sup> they must comply with FAA rules and regulations applicable to uncontrolled airspace.<sup>72</sup> For example, pilots in uncontrolled airspace must remain “at least 1,000 feet (2,000 feet in designated mountainous terrain) above the highest obstacle within a horizontal distance of 4 nautical miles from the course to be flown.”<sup>73</sup>

## 3. *Special Use Airspace*

FAA regulations define special use airspace as “airspace of defined dimensions identified by an area on the surface of the earth wherein

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63. *Id.* at ch. 3-2-4.

64. *Id.*

65. *Id.*

66. *Id.* at ch. 3-2-5.

67. *Id.*

68. *Id.* at ch. 3-2-6(a).

69. *Id.*

70. *Id.* at ch. 3-3-1.

71. *Id.* at ch. 3-3-3.

72. *Id.*

73. *Id.* at ch. 3-3-3(a).

activities must be confined because of their nature, or wherein limitations are imposed upon aircraft operations that are not a part of those activities, or both.”

There are several classifications of special use airspace:<sup>74</sup>

1) *Prohibited Areas*: Unauthorized aircraft may not fly through prohibited areas at any time.<sup>75</sup> Areas designated as prohibited are generally associated in some way with national security.<sup>76</sup> Examples include the White House, the National Mall, and Camp David.<sup>77</sup>

2) *Restricted Areas*: Airspace in which flight is not completely prohibited but is subject to certain restrictions.<sup>78</sup> The nature of restricted areas is such that outside aircraft may face unique hazards that necessitate clearance from air traffic control before entering the airspace.<sup>79</sup>

3) *Warning Areas*: Airspace in which hazards may exist but over which the United States does not have sole jurisdiction.<sup>80</sup> Pilots are merely warned of potential hazards on flight maps and by air traffic control.<sup>81</sup>

4) *Military Operation Areas*: Airspace reserved for military training and operations.<sup>82</sup> Pilots must obtain clearance from air traffic control to enter such airspace during operational times and are otherwise prohibited from entering.<sup>83</sup>

5) *Alert Areas*: Airspace in which pilots should exert heightened caution due to increased flight training or other aviation activity.<sup>84</sup> No permission is generally required to enter such areas but pilots are responsible for adhering to all normal flight regulations.<sup>85</sup>

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74. FED. AVIATION ADMIN., PILOT’S HANDBOOK OF AERONAUTICAL KNOWLEDGE 14-3 to 14-4 (No. FAA-H-8083-25A, 2008), [http://www.faa.gov/regulations\\_policies/handbooks\\_manuals/aviation/pilot\\_handbook/media/FAA-H-8083-25A.pdf](http://www.faa.gov/regulations_policies/handbooks_manuals/aviation/pilot_handbook/media/FAA-H-8083-25A.pdf) [hereinafter PILOT’S HANDBOOK].

75. *Id.* at 14-3.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 14-3 to 14-4.

80. *Id.* at 14-4.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

6) *Controlled Firing Areas*: Airspace in which ground firing activities must be suspended when an aircraft is approaching the area.<sup>86</sup> This area is less of a restriction on pilots in the air than on parties conducting the exercises on the ground.<sup>87</sup>

#### 4. *Other Airspace*

The “Other Airspace” classification includes all airspace that has not been categorized as controlled, uncontrolled, or special use.<sup>88</sup> Areas classified as “Other Airspace” are generally subject to permanent or temporary flight restrictions<sup>89</sup> for the purpose of protecting military training routes, existing or imminent hazards, flight operations of disaster relief aircraft, or the airspace above an incident or event that might attract an unusually dense gathering of sightseeing aircraft.<sup>90</sup>

#### 5. *FAA Treatment of Tribal Airspace*

As noted above, the FAA publishes sectional maps featuring graphical representations of the various classes and categories of airspace that exist in particular geographic areas of the United States.<sup>91</sup> Although tribally owned airports are noted on sectional maps, tribal reservations generally are not<sup>92</sup> and there is no specific class or category of airspace that provides for specific rules of flight through tribal airspace. Although there are certain flight rules that apply to airspace over national monuments or other natural resources that happen to be located on tribal land,<sup>93</sup> FAA regulations do not currently provide for the treatment of tribal airspace as a distinct classification in which special flight rules apply. The FAA therefore

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86. *Id.*

87. *Id.*

88. *Id.* at 14-4.

89. *Id.* at 14-4 to 14-7.

90. *Id.*

91. *Sectional Aeronautical Chart*, FED. AVIATION ADMIN., [https://www.faa.gov/air\\_traffic/flight\\_info/aeronav/productcatalog/vfrcharts/sectional/](https://www.faa.gov/air_traffic/flight_info/aeronav/productcatalog/vfrcharts/sectional/) (last modified Sept. 3, 2015).

92. *See, e.g.*, Fed. Aviation Admin., Phoenix Sectional Aeronautical Chart (FAA Product ID SPHX, 94th ed., eff. Oct. 15, 2015 to Apr. 28, 2016), [http://aeronav.faa.gov/content/aeronav/sectional\\_files/Phoenix\\_94.zip](http://aeronav.faa.gov/content/aeronav/sectional_files/Phoenix_94.zip) (noting the location and elevation of the Hualapai airport, but not outlining the general boundaries of the reservation).

93. *See, e.g.*, Special Flight Rules in the Vicinity of the Grand Canyon National Park, AZ, 14 C.F.R. ch. 1, pt. 91 (SFAR No. 50-2, 2014) (establishing flight rules applicable to overflight of certain areas of the Grand Canyon).

regulates tribal airspace only incidentally, and to the extent that the airspace above tribal land falls within regulatory or non-regulatory classifications.

*C. The Airspace Rights of Landowners in the United States*

Where Congress and the FAA are concerned with the safe and efficient management of aviation in the nation's airspace, litigation involving aviation issues often involves the question of private property rights in airspace above land and how those rights conflict with—and may be preempted by—larger public or governmental rights to the use of national airspace.

Courts at common law considered the property rights of landowners in airspace to extend from the earth “to the periphery of the universe.”<sup>94</sup> In 1946, however, the United States Supreme Court rejected that doctrine in *United States v. Causby*.<sup>95</sup> It concluded that an unlimited private property right in the airspace above land “has no place in the modern world” and that “[t]he air is a public highway,” the development of which would be seriously hampered by recognition of private claims to all airspace above private land.<sup>96</sup>

The *Causby* court did not foreclose all private airspace rights. It concluded that “[t]he landowner owns at least as much of the space above the ground as the [sic] can occupy or use in connection with the land.”<sup>97</sup> Thus, although airspace belongs primarily in the public domain, the Court held that a taking occurs where flights over private land are “so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.”<sup>98</sup> Although the Supreme Court further affirmed the principle that travel in navigable airspace is a public right in cases like *Griggs v. Allegheny County*<sup>99</sup> and *Aaron v. United States*,<sup>100</sup> the law of private ownership of airspace above land has not changed much since *Causby*.

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94. *United States v. Causby*, 328 U.S. 256, 260 (1946).

95. *Id.*

96. *Id.* at 261.

97. *Id.* at 264.

98. *Id.* at 266.

99. 369 U.S. 84 (1962) (holding that county governments are not immune from the *Causby* air easement taking standard and explaining that the government should take into account the necessity of providing for a safe approach area when acquiring public property near an airport).

100. 311 F.2d 798 (1963) (holding that a taking occurs where air traffic is consistently below 500 feet and that the public has a right to unimpeded travel in the airspace above that height).

It is now well-settled that landowners have no claim to airspace beyond that which is necessary to achieve a productive purpose on the land itself.<sup>101</sup> Although the Supreme Court has not yet considered the question of whether this principle applies to the airspace above tribal land, at least one federal circuit has attempted to address the issue of whether tribal ownership of land has any bearing on a legal analysis of property rights in airspace.

In *Pueblo of Sandia v. Smith*,<sup>102</sup> the Tenth Circuit Court of Appeals heard an appeal involving an Indian tribe that sued the owner of a private airport. The airport was situated at the boundary line between the airport owner's land and tribal land, and featured two runways, which extended to the Tribe's boundary line.<sup>103</sup> Consequently, the majority of aircraft landing and departing at the airport flew within the Tribe's airspace at heights as low as 150 feet from the ground.<sup>104</sup>

In assessing whether the Tribe was harmed by these incursions, the Court adopted the theory of aerial trespass described in the Restatement (Second) of Torts.<sup>105</sup> Under this theory, flight into the airspace of a private landowner is considered trespass only if two conditions are met: (1) the plane "enters into the immediate reaches of the airspace next to the land," and (2) it "interferes substantially with the other's use and enjoyment of his land."<sup>106</sup>

The Court concluded the appellant Indian Tribe had neither shown nor even argued that there was substantial interference with actual use of the land.<sup>107</sup> Further, the Court was unwilling to presume nominal damages for aerial trespass, holding instead the Tribe had the burden of alleging and proving actual damages.<sup>108</sup> The lowered commercial value of the tribal land adjoining the airport runway was instead considered to be "speculative" and a "mere possibility."<sup>109</sup>

While *Pueblo of Sandia v. Smith* is notable for its application of the tort of trespass to private airspace, it is worth emphasizing that the Court did not consider whether the sovereign status of the Tribe rendered the action

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101. *United States v. Causby*, 328 U.S. 256, 264 (1946).

102. *Pueblo of Sandia v. Smith*, 497 F.2d 1043 (10th Cir. 1974).

103. *Id.* at 1044.

104. *Id.*

105. *Id.* at 1045.

106. *Id.* at 1045 n.3.

107. *Id.* at 1045. The Appellant contended that the constant low-altitude air traffic in the Tribe's airspace rendered the tribal land below unmarketable for commercial development. *Id.* at 1044.

108. *Id.* at 1045.

109. *Id.* at 1046.

something more than a simple private trespass action.<sup>110</sup> The *Sandia* court also failed to address the Tribe's claim that the commercial value of the land was significantly reduced due to the extremely low flight paths.<sup>111</sup> Thus, while the Tenth Circuit had the opportunity to analyze the tribal airspace issue through the lens of federal Indian law, it failed to do so.

#### *D. State Regulation of State Airspace*

The federal government's declaration of supremacy over the regulation of U.S. airspace was intended to prevent inconsistent state regulations from creating an unsafe air travel environment throughout the country.<sup>112</sup> While federal regulation of United States airspace remains supreme, state and local governments possess a limited ability to enact aviation regulations that do not conflict with federal aviation laws. This raises the question of whether Indian tribes are entitled to, at the very least, a similarly limited regulatory power over aviation activities.

In *Gustafson v. City of Lake Angelus*, the Sixth Circuit Court of Appeals concluded that federal preemption of airspace regulation does not prevent a city from prohibiting seaplanes from landing or operating on a city lake.<sup>113</sup> In doing so, the court distinguished federal preemption of regulation of navigable airspace, from the limited right of state and local governments to regulate surface areas used for takeoff and landing of aircraft.<sup>114</sup> Thus, common law draws a clear distinction between regulation of aviation activities in airspace and regulation of aviation-related activities on the ground, which are not exclusively controlled by the federal government. State and local governments ultimately may not regulate any portion of aviation law that is already exclusively occupied by the federal government.<sup>115</sup>

While the federal government maintains supremacy in regulating the use and classification of navigable airspace, state and local governments do have some ability to regulate certain uses of local airspace. In *Center for Bio-Ethical Reform v. City of Honolulu*, the U.S. District Court of Hawaii

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110. It is unclear whether the Tribe ever raised this argument at trial. While failure to do so would have precluded them from raising the argument on appeal even if they wanted to, there are no indications in the appellate court's opinion that the tribe made the arguments at trial, or attempted to on appeal.

111. *Pueblo of Sandia*, 497 F.2d at 1046.

112. BANNER, *supra* note 43, at 161.

113. 76 F.3d 778, 790 (6th Cir. 1996).

114. *Id.* at 783.

115. *Id.* at 789.

held a city ordinance banning aerial advertising was not preempted by a federal scheme of issuing waivers for planes to tow advertising banners in the sky.<sup>116</sup> The court drew a distinction between the federal rules, which regulated the flow of air traffic, and the city ordinance, which was enacted to prevent congestion of airspace by airplane advertisements.<sup>117</sup>

On balance, federal courts have largely limited state and local regulation of aviation to those laws that do not significantly interfere with the federal government's ability to regulate the use of navigable airspace.<sup>118</sup> It remains an open question whether federal courts would acknowledge that tribal governments possess at least the same regulatory power over aviation activities that state and local governments possess. However, several Indian tribes have not allowed this uncertainty to keep them from pursuing their own efforts to regulate the use of tribal airspace.

#### *E. Tribal Regulation of Tribal Airspace*

Tribes such as the Hualapai<sup>119</sup> and Eastern Band of Cherokee Indians,<sup>120</sup> whose reservations contain natural landscapes that serve as popular tourist destinations, are increasingly aware of the threat unimpeded air traffic can pose to the safety and well-being of those living on the reservations.<sup>121</sup> Helicopter, small airplane, and glider air tours are not uncommon in such

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116. 345 F. Supp. 2d 1123, 1130 (D. Haw. 2004).

117. *Id.*

118. *See, e.g., Lockheed Air Terminal v. City of Burbank*, 318 F. Supp. 914 (C.D. Cal. 1970) (holding that a city ordinance which sought to prevent the takeoff of aircraft during certain hours was preempted by federal law), *aff'd*, 457 F.2d 667 (9th Cir. 1972), *aff'd*, 411 U.S. 624 (1973); *United States v. City of Blue Ash*, 487 F. Supp. 135 (S.D. Ohio 1978) (holding that federal aviation law preempted a city ordinance which would have required aircraft to make a specific turn after takeoff to control noise over a residential area), *aff'd*, 621 F.2d 227 (6th Cir. 1980).

119. *See, e.g., ABOUT HUALAPAI*, *supra* note 6 (“An outdoorsman’s paradise, the [Hualapai] reservation is rich in hunting, fishing, and river rafting opportunities. The tribe sells guided big-game hunting permits for desert bighorn sheep, trophy elk, antelope, and mountain lion.”).

120. *See, e.g., Cherokee Attractions*, CHEROKEE NORTH CAROLINA (2014), <http://visitcherokeenc.com/attractions-in-chokeee-nc/> (describing the range of outdoor attractions offered to tourists on the tribal lands of the Eastern Band of Cherokee Indians).

121. *See IAN FRAZIER, ON THE REZ* 88 (2000) (“Military overflight has become such a reservation commonplace that some tribes have considered the possibility of restricting their air space.”).

areas,<sup>122</sup> and tribes are increasingly justified in asserting their right to control the use of tribal airspace for recreational or commercial purposes.<sup>123</sup>

The Hualapai Tribe, for example, owns and operates two airports on its lands: the private-use Hualapai Airport, and the public-use Grand Canyon West Airport.<sup>124</sup> The Grand Canyon West Airport is essential to the Hualapai tourism industry, as it is the primary hub for the Hualapai-authorized air tours that provide tourists with birds-eye views of the western rim of the Grand Canyon, which is located within the Hualapai reservation and owned by the Tribe.<sup>125</sup> Though wholly owned by the Tribe, the airports are subject to FAA regulation and are required to operate in accordance with federal guidelines.<sup>126</sup> The Hualapai's successful management of its airports and its proactive efforts to maintain a safe flying environment are convincing evidence that modern Indian tribes are fully capable of embracing modern aviation standards and responsibly managing the use of tribal airspace.

While the federal government has not yet acknowledged that Indian tribes possess sovereign authority in tribal airspace, several tribes have asserted such a right in their respective constitutions and tribal codes. The Constitution of the Citizen Potawatomi Nation, for example, declares sovereign jurisdiction over "all waters and air space within the Indian Country . . . over which the Citizen Potawatomi Nation has authority."<sup>127</sup> Several other tribes have included similar language in their constitutions,<sup>128</sup>

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122. See IAN FRAZIER, ON THE REZ 88 (2000).

123. See Victoria L. Gerberich, *An Evaluation of Sustainable American Indian Tourism*, in *INDIGENOUS TOURISM: THE COMMODIFICATION AND MANAGEMENT OF CULTURE* 77 (Chris Ryan & Michelle Aicken eds., 2005) ("With the increased adoption of tourism on reservations and the increased interest in visiting reservations, there is a need to ensure that policies are in place that will mitigate the negative impacts that tourism development could have on reservations.").

124. See *Airport Master Records & Reports: Grand Canyon West Airport*, AIRPORTIQ 5010, <http://www.gcr1.com/5010web/airport.cfm?Site=1G4&AptSecNum=0> (last modified Aug. 20, 2015) [hereinafter *Grand Canyon West Airport*]; *Airport Master Records & Reports: Hualapai Airport*, AIRPORTIQ 5010, <http://www.gcr1.com/5010web/airport.cfm?Site=3AZ5&AptSecNum=0> (last modified Aug. 20, 2015) [hereinafter *Hualapai Airport*].

125. See *Hualapai Tourism – Information*, HUALAPAI TRIBE (2010), <http://www.hualapai-tourism.com/questions.php#3> ("Originally, there was just a small dirt air strip, now there is an airport that accommodates nearly 30 tour companies with a 5,000-foot paved runway and 10 helipads.").

126. *Hualapai Airport*, *supra* note 124; *Grand Canyon West Airport*, *supra* note 124.

127. CITIZEN POTAWATOMI NATION CONST. art. IV, § 1.

128. See COQUILLE INDIAN TRIBE CONST. art. I, § 1 ("The jurisdiction of the Coquille Indian Tribe shall extend, to the fullest extent possible . . . over all lands, waters, property,

while others have passed civil ordinances acknowledging sovereignty in airspace and implementing airspace management plans.<sup>129</sup>

Such assertions of sovereignty in tribal laws are evidence that tribes increasingly recognize the importance of asserting regulatory authority in airspace. Nevertheless, such assertions may not be enough on their own to counter various federal doctrines that opponents of tribal sovereignty in airspace may raise in arguing that Indian tribes do not possess inherent authority to regulate tribal airspace.

### *III. A Review of Tribal Sovereignty Under Federal Law*

The question of whether Indian tribes possess inherent authority to regulate tribal airspace is informed by three key areas of federal Indian law: (1) the sovereign status of tribal governments, (2) the scope of tribal property rights under federal law, and (3) the extent of a tribe's criminal and civil jurisdiction in over members and non-members in Indian Country.<sup>130</sup>

#### *A. Tribal Sovereignty*

##### *1. The Marshall Trilogy*

A persistent misconception among the American public is that Indian tribes possess full sovereign rights and exist as completely foreign governments within the borders of the United States.<sup>131</sup> Although many

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airspace, minerals and other natural resources . . . owned by the Tribe or held in trust by the United States for the Tribe.”); *see also* SNOQUALMIE INDIAN TRIBE CONST. art. I, § 4(a) (“The jurisdiction and governmental power of the Snoqualmie Indian Tribe extends to all persons, property, lands, both running waters, and . . . airspace”); *see also* WHITE EARTH NATION CONST. ch. I (establishing jurisdiction over “airspace . . . located within the boundaries of the White Earth Reservation”).

129. *See, e.g.*, E. BAND CHEROKEE NATION CODE § 113A-22 (2010) (declaring sovereign control over tribal airspace); Air Tour Management Plan, E. BAND CHEROKEE NATION CODE § 113A-26 (2010) (tasking the tribe's Tribal Business Committee with “ensuring the safe and efficient use of the Eastern Band of Cherokee Nation's airspace and [protecting] the public health and welfare from aircraft noise and pollution”); NAVAJO NATION CODE tit. 16, § 2203(C) (2009) (describing tribal lands as including airspace); SNOQUALMIE TRIBAL CODE tit. 5.4, § 4.0 (2009) (describing tribal lands as including “all . . . airspace within the exterior boundaries of the Snoqualmie Indian Reservations”).

130. “Indian Country” is used here according to its statutory definition, which encompasses Indian reservations, dependent Indian communities, and Indian allotments. *See* 18 U.S.C. § 1151 (2012).

131. This most frequently manifests itself through the mistaken belief that Indians in the United States are not required to pay any external taxes, and that tribes are free to ignore

persuasively argue that the framers of the Constitution viewed Indian nations as wholly separate from the federal system,<sup>132</sup> over time the United States Supreme Court has interpreted the Indian Commerce Clause as granting Congress a plenary power over Indian nations.<sup>133</sup> The doctrine of plenary power has since been used to justify extensive federal control over Indian tribes and Indian people.<sup>134</sup> The turning point in the legal

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federal laws without consequence. See Jodi Rave, *Native Americans & Taxes*, POYNTER (Mar. 7, 2005, 11:44 AM), <http://www.poynter.org/how-tos/newsgathering-storytelling/diversity-at-work/34182/native-americans-taxes/> (describing and attacking the common misconception that Indians in the United States do not pay taxes).

132. There are only three references to Indian nations in the United States Constitution. The primary focus of Supreme Court analysis has been the text of the Indian Commerce Clause, which states that Congress shall have the power “[t]o regulate Commerce with . . . the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3. The Court has interpreted this language, which many would read to imply a grant of power to Congress to regulate commercial relations *between* the United States and Indian tribes, as conferring a plenary power to Congress over Indian tribes generally. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”). Many scholars argue that the federal plenary power is an unconstitutional fiction and that the federal government has no such control over Indian tribes. See, e.g., Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007) (arguing that the Founders intended that the Indian Commerce Clause would grant only a limited scope of federal power over trade with Indian tribes, and that Indians living within the boundaries of states were to be subject to state, not federal, police power). However, some scholars have come to a different conclusion. See, e.g., Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002) (arguing that the U.S. Constitution provides no basis for the Supreme Court’s doctrine of federal plenary power over Indian tribes). The other two references to Indians both deal with the apportionment of representatives and taxes, and mention them only to specify that the census taken to determine such apportionment “exclud[es] Indians not taxed.” U.S. CONST. art. I, § 2; U.S. CONST. amend. XIV, § 2.

133. See *United States v. Kagama*, 118 U.S. 375, 384 (1886) (holding that although the Commerce Clause does not explicitly grant Congress plenary power over Indians, that power can be inferred from the manner in which tribes are mentioned and that “[t]he power of the general government over [Indians] . . . is necessary to their protection, as well as to the safety of those among whom they dwell”); see also *Lone Wolf*, 187 U.S. 553 (holding that Congress’s plenary power over Indian affairs grants it the right to unilaterally abrogate treaties with Indian tribes).

134. Discussion of the constitutionality of the plenary power doctrine in the federal courts in the twentieth and twenty-first centuries has been limited. While federal courts now assume that Congress has plenary power over tribes, many Indian law scholars, practitioners, and tribal courts are not so convinced. See generally CLINTON, *supra* note 132 (arguing that the plenary power doctrine is unconstitutional).

relationship between tribes and the United States has its roots in a series of foundational Supreme Court cases known as the Marshall Trilogy.<sup>135</sup>

The Marshall Trilogy cases establish that Indian tribes are not domestic states or foreign nations under federal law,<sup>136</sup> but “domestic dependent nations”<sup>137</sup> which possess a fundamental right of occupancy to aboriginal or reserved tribal lands.<sup>138</sup> This right of occupancy, known as aboriginal title, can only be relinquished with the consent of the federal government.<sup>139</sup> The Marshall Trilogy further established that state laws are generally inapplicable against Indian tribes unless specifically authorized by Congress.<sup>140</sup> While tribes retain some inherent sovereign powers, the Court has held many rights otherwise available to independent sovereign nations are incompatible with the domestic dependent nation status of Indian tribes.<sup>141</sup>

## 2. Tribal Self Governance

The degradation of tribal sovereignty to fit into the judicially-created category of “domestic dependent nations” has not completely foreclosed all tribal sovereign powers. Over time, courts and Congress have consistently recognized the right of Indian tribes “to make their own laws and be ruled by them.”<sup>142</sup> Further, while Supreme Court opinions have narrowly construed the nature of tribal self-governance (especially where tribes attempt to assert civil or criminal jurisdiction over non-Indians),<sup>143</sup> it has also fundamentally affirmed the right of tribes to “punish tribal offenders, . . . determine tribal membership, [] regulate domestic relations among members, and [] prescribe rules of inheritance for members.”<sup>144</sup>

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135. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 (5 Pet.) U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

136. *Cherokee Nation*, 30 U.S. (5 Pet.) at 20.

137. *Worcester*, 31 U.S. (6 Pet.) at 583.

138. *Johnson*, 21 U.S. (8 Wheat.) at 588, 603.

139. *Id.* at 588.

140. *Worcester*, 31 U.S. (6 Pet.) at 593-94. For an example of the congressional application of state law in Indian Country, see Public Law 280, Pub. L. No. 280-505, 67 Stat. 588, 588-90 (1953) (applying general state criminal jurisdiction over Indian Country within seven states).

141. *See e.g.*, *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (describing the doctrine of implicit divestiture).

142. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

143. *See, e.g.*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (holding that Indian tribes do not have criminal jurisdiction over non-Indians).

144. *Montana v. United States*, 450 U.S. 544, 564 (1981).

The Court has also recognized the right of tribes to regulate economic activity occurring within tribal borders<sup>145</sup> and the jurisdiction of tribal courts over civil disputes between tribal members on tribal land.<sup>146</sup> Essentially, Indian tribes have a recognized sovereign right to “protect tribal self-government [and] control internal relations” as long as such rights are deemed consistent with tribes’ domestic dependent status.<sup>147</sup>

### *3. Reserved Rights and Implicit Divestiture*

Treaties between the United States and Indian tribes frequently served to define a range of basic rights that tribes wished to preserve, but also sometimes contained limitations on those rights or abrogated them altogether.<sup>148</sup> Known as the doctrine of reserved rights, this doctrine thus preserves any sovereign aboriginal rights that have not been expressly extinguished by treaty.<sup>149</sup>

While the doctrine of reserved rights can serve to protect tribal interests, it can also be defeated by a showing that the right asserted by the tribe is inconsistent with the tribe’s status as a domestic dependent nation.<sup>150</sup> This doctrine, known as implicit divestiture, has most frequently been used where tribes have attempted to assert some measure of authority over non-Indians.<sup>151</sup> Thus, one major objection to tribal sovereignty in airspace may

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145. *See* *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) (holding that tribes have the inherent sovereign power to impose taxes on non-Indians doing business with a tribe on a reservation).

146. *See* *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63-64 (1978) (affirming the right of tribes to determine tribal membership guidelines free of intervention by outside governments); *United States v. Wheeler*, 435 U.S. 313 (1978) (affirming the inherent sovereign right of tribes to punish Indians who violate tribal law within tribal territory).

147. *Montana*, 450 U.S. at 564.

148. *See, e.g.*, Treaty with the Delawares, U.S.-Delaware Nation, art. 6, Sept. 17, 1778, 7 Stat. 13 [hereinafter Treaty of Fort Pitt] (guaranteeing the Delaware Nation “all their territorial rights in the fullest and most ample manner”).

149. *See* *United States v. Winans*, 198 U.S. 371, 381 (1905) (holding that the tribal rights described in a treaty between the Yakima Nation and the United States “was not a grant of rights to the Indians, but a grant of right from them[:] a reservation of those not granted”); FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 67 (2009) (“In the reserved rights approach . . . the treaty reflects what a tribe has given up, with everything else not so surrendered as reserved.”).

150. *See Wheeler*, 435 U.S. 313 (1978).

151. *See id.*

[T]he sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving

be that tribes have been implicitly divested of the ability to control entry into tribal airspace because such power is inconsistent with the character of a domestic dependent nation.<sup>152</sup>

#### 4. Tribal Power to Exclude Non-Members

The Supreme Court has concluded that “a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands.”<sup>153</sup> In *Merrion v. Jicarilla Apache Tribe*, the Court acknowledged the inherent sovereign authority of tribes to completely exclude or condition the presence of non-members from tribal lands.<sup>154</sup> The majority noted that “[w]hen a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as [they comply] with the initial conditions of entry.”<sup>155</sup> It further clarified a tribe does not completely give up its sovereign right to exclude when it grants entry to a non-member, but can exclude a person even after granting them permission to enter tribal land.<sup>156</sup>

The Court later clarified the tribal power to exclude from tribal boundaries reaches not only non-Indians, but non-member Indians as well.<sup>157</sup> As discussed in Part IV *infra*, the tribal power to exclude non-members from the reservation may serve as an important legal basis for the assertion of tribal jurisdiction in airspace.

#### B. Tribal Property Rights

Given that tribal airspace exists in the space above tribal land, it is natural to ask what claims, if any, tribes may have to tribal airspace as sovereign owners of that property. This inquiry is complicated by doctrines of federal Indian law that regard Indian nations and their citizens as mere occupants of land held in trust by the United States government.

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the relations between an Indian tribe and nonmembers of the tribe.  
*Id.* at 326.

152. See *supra* Part I.D (discussing this particular objection).

153. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982).

154. *Id.* at 144 (“Nonmembers who lawfully enter tribal lands remain subject to the tribe’s power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct . . .”).

155. *Id.*

156. *Id.* at 145 (“A nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power.”).

157. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (“A tribe’s power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established.”).

Historically, the property rights of Indian tribes were defined internally, through tribal law and custom, and through the use of treaties with other nations.<sup>158</sup> The United States ratified its first treaty with an Indian tribe during the Revolutionary War<sup>159</sup> and entered into more than four hundred treaties with Indian nations before ending the practice of treating with tribes in 1871.<sup>160</sup> Such treaties typically included a provision defining the boundaries of tribal territory along with a statement that the non-tribal sovereign would respect those boundaries.<sup>161</sup> Further, while many U.S. treaties specifically recognized a tribe's right to exclude non-members from their lands, they also frequently contained exceptions for the safe passage of United States citizens and officials.<sup>162</sup>

The doctrine of discovery and the restrictions on alienation it placed on Indian land represented a major change in the federal posture toward Indian land rights.<sup>163</sup> In the decade following *Johnson v. M'Intosh*, the federal government began removing Indian tribes westward in an effort to free up valuable land for American settlement.<sup>164</sup> It accomplished this largely through forced removal of tribes with the passage of the Removal Act of 1830.<sup>165</sup>

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158. See, e.g., Treaty of Fort Pitt, *supra* note 148.

159. *Id.*

160. *Indian Affairs FAQs*, U.S. BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/FAQs/> (last visited Dec. 14, 2015) ("Congress ended treaty-making with Indian tribes in 1871. Since then, relations with Indian groups have been formalized and/or codified by Congressional acts, Executive Orders, and Executive Agreements.").

161. See, e.g., Treaty with the Creeks, U.S.-Creek Nation, art. 4, Aug. 7, 1790, 7 Stat. 35 (describing the boundaries of the Creek Nation).

162. See, e.g., Treaty with the Apaches, U.S.-Apache Tribe, art. 7, July 1, 1852, 10 Stat. 979 ("The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.").

163. The Nonintercourse Act of 1790 states that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." Act of July 22, 1790, § 4, 1 Stat. 137, 138 (codified as amended at 25 U.S.C. § 177 (2012)). The Court in *Johnson v. M'Intosh* went a step further by explicitly granting the United States ultimate fee simple title to Indian lands and the concurrent right to unilaterally extinguish Indian tribes' aboriginal occupancy rights, by treaty or otherwise. 21 U.S. (8 Wheat.) 543, 572-88, 595-97, 603-05 (1823).

164. See CAROLE GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 20-22 (6th ed. 2010).

165. *Id.*

In 1887, Congress passed the General Allotment Act (“Allotment Act”).<sup>166</sup> The Allotment Act effectively destroyed many reservations by allotting parcels of land formerly owned by a tribe to individual Indians and making those allottees subject to the general laws of the state in which the land was located.<sup>167</sup>

Scholars have noted the Allotment Act “all but ended the collective nature of tribal land tenure on affected reservations and . . . [f]or the first time, [permitted] non-Indians [] to live in Indian country in large numbers without being federally licensed traders.”<sup>168</sup> Patterns of problematic “checkerboard jurisdiction” were created as the presence of non-Indians increased within and around the reservations and Indian communities affected by allotment, especially those communities that maintained reservation status but also had several non-Indian owned parcels located within their boundaries.<sup>169</sup>

The Allotment Act represents a period in American history now at odds with modern congressional policy. Beginning with the Indian Reorganization Act (“IRA”) in 1934,<sup>170</sup> Congress began to reverse its policy of breaking up collective tribal land holdings and embraced a policy of encouraging Indian self-determination.<sup>171</sup> Consequently, this recognition of collective tribal land boundaries represented a renewal of Congress’s acknowledgment of collective tribal land rights and evinced an understanding of the difference between individual property ownership and tribal ownership.

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166. *See id.* at 25.

167. *See* General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. § 331) (repealed by Indian Land Consolidation Act, Pub. L. No. 106-462, 114 Stat. 1991 (2000)); Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 GONZ. L. REV. 609, 613-18 (2011) (describing the effect of allotment on Indian tribes).

168. GOLDBERG ET AL., *supra* note 164, at 25.

169. *See* *Brendale v. Confederated Tribes of Yakima Indian Nation*, 492 U.S. 408, 414-21, 457-59 (1989) (describing jurisdictional problems arising from checkerboard jurisdiction created by allotment of tribal land).

170. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2012)).

171. 25 U.S.C. § 461 (“On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.”).

### C. Tribal Civil Jurisdiction

Tribal regulation of airspace is primarily a jurisdictional issue. In imposing and enforcing rules governing the use of tribal airspace, the question necessarily arises as to whether the tribe has jurisdiction over the pilots in command of the aircraft that travel through tribal airspace. Although no court has addressed this question, established doctrines of tribal civil jurisdiction in federal Indian law provide a starting point for this inquiry.

The Supreme Court established limits on tribal civil jurisdiction over non-members in *Montana v. United States* in 1981 and *Strate v. A-1 Contractors* in 1997.<sup>172</sup> Under the doctrine espoused in these cases, there is a presumptive prohibition against Indian tribes exerting civil authority over non-Indians unless one or more exceptions are met.

Under *Montana* and *Strate*, tribes may have civil jurisdiction over non-member Indians and non-Indians where (1) there is a consensual relationship between the non-member/non-Indian and the tribe/tribal member, and the incident in question arose out of that relationship,<sup>173</sup> or (2) the activity of the non-member Indian or non-Indian on fee or tribal land within the reservation “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>174</sup> The Supreme Court and lower federal courts have construed the term “consensual relationship” narrowly, and given the political integrity, economic security, and health or welfare exception a similar treatment.<sup>175</sup> Thus, a tribe cannot simply claim civil jurisdiction by asserting that the activity of a non-member Indian or non-Indian somehow affects the welfare of the tribe—it must show interference with a core element of tribal governance in the absence of an incident arising out of a narrow and well-defined consensual relationship.<sup>176</sup>

Federal doctrines of tribal jurisdiction raise questions as to whether tribes possess the requisite jurisdiction over non-Indian or non-member Indian pilots who fly aircraft through tribal airspace. A federal court is unlikely to conclude that pilots whose flights originate and end outside of tribal

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172. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997); *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

173. *See Strate*, 520 U.S. at 456-57; *Montana*, 450 U.S. at 565.

174. *Montana*, 450 U.S. at 566.

175. *See id.*

176. *Id.*

airspace have established the kind of consensual relationship required by the *Montana* and *Strate* cases.

Tribes might be more successful in claiming low-altitude overflights through tribal airspace directly and negatively affect the health, welfare, or economic security of the tribe, in accordance with the second exception to the general rule. As Part VI argues, however, these jurisdictional questions could be rendered moot by congressional affirmation of tribal sovereignty in airspace and a cooperative partnership between Indian tribes and the FAA in the enforcement of tribal sovereignty in airspace.

#### *IV. Arguments for the Assertion of Jurisdiction in Airspace by Indian Tribes*

The Hualapai Tribe's assertion of jurisdiction in its airspace did not culminate in federal litigation.<sup>177</sup> Mr. de Antoni pled guilty to the trespass, paid a fine, and the Tribe returned his personal property.<sup>178</sup> Thus, the Tribe successfully asserted its sovereign authority to regulate the use of its airspace by non-members. Mr. de Antoni's guilty plea and payment of the fine also foreclosed the possibility that a tribal or federal court would be forced to address the questions that would be raised about the Tribe's ability to assert authority in airspace.

The legal arguments in such a proceeding would likely have involved all of the legal doctrines discussed in Parts II and III of this article. In determining the reach of the Tribe's regulatory jurisdiction, for example, a court would have considered whether federal aviation laws and regulations preempt tribal jurisdiction. It also would have critically examined any purported legal sources of authority for the tribal power to regulate airspace. In the author's view, the proposition that Indian tribes can regulate tribal airspace is most strongly supported by (1) inherent tribal sovereignty and (2) the tribal power to exclude non-members from tribal territory. This Part provides a broad outline of those justifications, while Part V examines the likely counterarguments that would be raised in response.

##### *A. Inherent Tribal Sovereignty*

As sovereign entities, tribal governments are endowed with the inherent authority to pass and enforce laws to protect the general welfare, health, and safety of their citizenry.<sup>179</sup> This right is recognized by Congress and the

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177. Wood, *supra* note 19.

178. *Id.*

179. *See Williams v. Lee*, 358 U.S. 217, 220 (1959) (recognizing the right of Indian tribes to "make their own laws and be ruled by them").

federal courts, and is the basis for a wide range of laws passed by Indian tribes for the benefit of their members.<sup>180</sup> As part of this inherent sovereign authority, tribes are necessarily endowed with a general police power which justifies the enforcement of tribal law as a means of protecting tribal citizens.<sup>181</sup> This tribal police power is part of the sovereign arsenal through which Indian tribes may maintain law and order within their respective territories.

The inherent sovereign authority of Indian tribes to enact laws designed to protect the general welfare, health, and security of tribal citizens is arguably the primary source of a tribe's power to regulate airspace. As the source of a tribe's legal authority, it allows a tribal governing body to enact tribal laws to address activities on a reservation that may pose a threat to safety if left unregulated. For example, in enacting ordinances that address automobile traffic, the governing body of a tribe may have concluded that such laws are necessary to ensure that tribal citizens and visitors to tribal territory are adequately protected against dangers arising from the use of automobiles. Some of those dangers could be unique to the geographic qualities of the reservation and, in the tribe's view, it is therefore necessary for tribal law to supplement or replace traffic laws that may govern the use of automobiles in surrounding non-Indian areas.

In the same way, a tribe could conclude that existing FAA regulations do not go far enough in protecting tribal interests on tribal land. Although the FAA is required to "[c]onsult with American Indian and Alaska Native Tribes before taking any actions that may significantly or uniquely affect them[,]"<sup>182</sup> it is not clear that such consultations have resulted in any significant federal protections in airspace for tribal interests. A tribe may conclude that it would prefer that noise from overflights of commercial or general aviation aircraft originating from non-Indian areas nearby be reduced much more than provided for by FAA regulations, or eliminated altogether by restricting flights over certain reservation areas. Although as a practical matter a tribe could attempt to petition the FAA for more restrictive rules, ultimately the question of whether or not tribal interests are served or harmed by aviation activities in tribal airspace should be left to tribal governments to determine, not the FAA.

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180. See *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997); *Montana v. United States*, 450 U.S. 544, 565 (1981); *Williams*, 358 U.S. at 220.

181. *Williams*, 358 U.S. at 220.

182. FED. AVIATION ADMIN., American Indian and Alaska Native Tribal Consultation Policy and Procedures, Order No. 1210.20 (Jan. 28, 2004), <http://www.faa.gov/documentLibrary/media/1210.pdf>.

Opponents of tribal authority in airspace might argue the tribal police power is in reality not an inherent sovereign power at all, but rather a delegated federal authority. If a power is delegated by the federal government, the source of that power is the sovereignty of the United States, not Indian tribes. This argument fails however, because the Supreme Court has recognized that such inherent sovereign powers are not delegations of federal power but rather preexisting tribal powers that have not been abrogated by the federal government.<sup>183</sup> Tribes are thus theoretically endowed with the ability to regulate tribal airspace to protect the general welfare, safety, and security of its members. However, it may be that this justification applies only where a tribe exerts its jurisdiction to regulate the behavior of tribal members. If a tribe's inherent authority to regulate activity on a reservation is primarily limited to members, its ability to regulate the behavior of non-member and non-Indian pilots must arise from another legal authority.

#### *B. Tribal Power to Exclude Non-Members*

While the authority to physically exclude non-members from tribal territory arises out of a tribe's general police power,<sup>184</sup> it is regarded by federal courts as a fundamental sovereign right.<sup>185</sup> Further, it is not simply a right to make someone leave—it is a right to impose conditions of entry.<sup>186</sup>

A fundamental premise of tribal authority in airspace must be that a tribe has the ability to regulate pilots flying aircraft through tribal airspace, whether they are tribal members or not. Although a tribe might more readily regulate the behavior of tribal members operating aircraft in tribal airspace, it must also be able to extend its regulatory reach to non-member pilots who pass through the tribe's airspace. The power to exclude could serve as the legal basis for that authority. A tribe could theoretically use the power to completely exclude non-members from certain altitudes of airspace over the reservation. Additionally, the tribe could impose certain

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183. See, e.g., *United States v. Lara*, 541 U.S. 193 (2004) (holding that the power to punish a tribal offender for an assault on a federal officer which occurred on tribal land is an inherent sovereign right and not a delegation of federal authority).

184. See Jerry Gardner, *Tribal Efforts to Address Problems Presented by the Lack of Tribal Criminal Jurisdiction Over Non-Indians*, in *INTRODUCTION TO TRIBAL LEGAL STUDIES* 162 (Justin B. Richland & Sarah Deer eds., 2d ed. 2010) (“Indian Nations have inherent sovereign authority to exclude (or banish) persons (including non-Indians)”).

185. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (“A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established.”)

186. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

conditions on the use of its airspace given that the power to exclude non-members includes the power to require non-members to adhere to certain rules if they desire to remain in tribal territory. For example, a tribe might decide to restrict certain areas of tribal airspace completely while allowing for limited overflight around other areas at designated altitudes.

No federal court has addressed the issue of whether the right to exclude non-members extends to tribal airspace. Therefore, opponents of the idea may argue that tribes should not attempt to exert that kind of authority in airspace absent official federal acknowledgment of that right. A tribe might respond that the right to exclude non-members from tribal lands should extend to airspace because the fundamental principles are the same—conditioning the entry and presence of a non-member to protect the tribe, its citizens, and its resources. Further, a tribe might argue that the right to exclude in airspace has not been abrogated by federal action and is therefore a reserved right. It might also point to the necessity of protecting tribal citizens from aircraft noise, air pollution, aircraft accidents, and other effects of aviation in tribal airspace.

While established principles of federal Indian law may support the tribal right to claim sovereignty in tribal airspace, some may ask whether tribes are realistically justified in asserting such a right. After all, the federal aviation system in the United States is regarded as the safest and most efficient in the world, and global air travel is the safest it has been in years.<sup>187</sup> The standards enforced by that system are responsible for the safe commercial and recreational air travel in United States airspace.

The Hualapai incident involving Mr. de Antoni's unauthorized flight through the tribe's airspace is illustrative of the very real problems that modern Indian tribes face today. In that case, the Hualapai Tribe purported to exercise its sovereignty in tribal airspace for two reasons: (1) to protect the air traffic at its on-reservation airports from unauthorized incursion,<sup>188</sup>

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187. See Jad Mouawad & Christopher Drew, *Airline Industry at Its Safest Since the Dawn of the Jet Age*, N.Y. TIMES (Feb. 11, 2013), [http://www.nytimes.com/2013/02/12/business/2012-was-the-safest-year-for-airlines-globally-since-1945.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/02/12/business/2012-was-the-safest-year-for-airlines-globally-since-1945.html?pagewanted=all&_r=0) (describing an increase in safety in domestic and international aviation due to heightened federal guidelines and the FAA's adoption of a more proactive approach to ensuring aviation safety); see also Memorandum, Subcommittee Hearing on "Review of FAA's Progress in Implementing the FAA Modernization and Reform Act" (May 10, 2013), [http://transportation.house.gov/uploadedfiles/documents/2013-05-16-aviation\\_ssm.pdf](http://transportation.house.gov/uploadedfiles/documents/2013-05-16-aviation_ssm.pdf) (describing the United States aviation system as "the safest in the world" due to the combined efforts of legislative, administrative, and corporate partnerships).

188. Cole, *Stalemate*, *supra* note 9 ("The [Hualapai] tribe accuses the pilot of entering tribal land without permission to take photographs, and of causing potentially unsafe

and (2) to control the exploitation of its resources from unauthorized commercial gain.<sup>189</sup> Many Indian tribes today are similarly sufficiently modernized to be concerned with the effects that even federally regulated low-level air traffic can cause within a reservation.<sup>190</sup> This is especially true of tribes that own and operate airports within their reservations, and those whose location might attract excessive aviation activities such as airplane and helicopter tours.<sup>191</sup>

Even those tribes that do not operate private or public airports on reservation land may have genuine concerns about the threat unimpeded air traffic at low altitudes may pose to the safety and welfare of tribal residents.<sup>192</sup> The risks come not just from the direct effects of the airplanes to people on the ground, but from the accidents that can occur due to certain obstacles that exist in low-altitude airspace, for example, power lines, electrical and cell phone towers, trees, and other high-reaching impediments.<sup>193</sup> It is therefore vital tribes have the ability to determine who may or may not enter those classes of airspace in which errant, non-permitted flights might interfere with the health, safety, and general welfare of tribal citizens.

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conditions in an area where about 11,500 flights occurred from September through December.”).

189. *See id.* By regulating which air tour companies may operate in Hualapai airspace, the tribe maintains a degree of control over who may use its resources for commercial gain.

190. The Seminole Tribe of Florida, for example, owns and operates a private airport within its Big Cypress reservation. *See Big Cypress Airfield Airport (59FD) in Immokalee, Florida*, CITY-DATA.COM, <http://www.city-data.com/airports/Big-Cypress-Airfield-Airport-Immokalee-Florida.html> (last visited Dec. 14, 2015) (describing the Seminole Tribe of Florida's ownership of Big Cypress Airfield Airport in Immokalee, Florida).

191. While not all tribal reservations are situated in the midst of land that lends itself to outdoor tourism, even those tribes which are situated near airports, such as the Pueblo of Sandia may have to deal with low-flying aircraft on a regular basis. *See supra* Part II.C. The existence of tribal sovereignty in airspace should thus grant tribes, at the very least, an authoritative voice in the FAA's process of dealing with such disturbances.

192. *See* Bruce Landsberg, *Most Dangerous Game*, AIRCRAFT OWNERS & PILOTS ASS'N (Nov. 1, 1996), <http://www.aopa.org/asf/asfarticles/sp9611.html> (stating that aviation accidents occurring as a result of low-altitude flights have been “repeated enough times in real-life general aviation that the AOPA Air Safety Foundation decided to look more closely at maneuvering flight mishaps”).

193. *See* H. Dean Chamberlain, *The Hazards of Low Altitude and Off-Airport Flight Operations*, AVSTOP.COM, <http://avstop.com/stories/low.html> (last visited May 13, 2013) (describing the safety risks pilots flying in low-altitude airspace may encounter).

*V. Objections to Tribal Sovereignty in Airspace*

Although the prior section describes a legal basis for the assertion of tribal authority in airspace, opponents of the idea may raise several credible objections that tribes will likely be required to address should the issue ever reach a federal court.

*A. Objection 1: Tribal Sovereignty in Airspace Is Preempted by Federal Law*

Opponents of tribal authority in airspace may argue the United States' declared sovereign supremacy over all airspace within the country's borders<sup>194</sup> and the federal government's exclusive occupation aviation regulation preempts Indian tribes from exercising any regulatory control in tribal airspace. Although the Supreme Court has historically interpreted statutes that explicitly concern Indians in a way that favors tribal interests,<sup>195</sup> federal statutes of general applicability that do not expressly mention Indian tribes may not be interpreted so favorably.<sup>196</sup> Thus, opponents may argue that the Air Commerce Act of 1926—which does not mention Indians, Indian tribes, or tribal airspace—is a statute of general applicability that preempts tribal authority to regulate tribal airspace, which technically falls within the national airspace. Opponents might also argue the extensive federal aviation regulatory system forecloses tribal regulation in this area because it is evidence of congressional intent to exclusively occupy the field of aviation in the United States.

While these arguments are formidable, it is by no means certain that they cannot be successfully challenged by a tribe. Just as federal aviation law does not completely preempt state governments from exerting some measure of sovereign regulatory control over aviation activities in state airspace,<sup>197</sup> tribes could argue that, at the very least, they possess the same power to regulate some aspects of aviation activity. Tribes might also assert that, under existing principles of federal Indian law, Congress must explicitly state it intends to override the sovereignty of Indian tribes in

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194. *See* Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (codified as amended in scattered sections of 49 U.S.C.).

195. This approach, known as the Indian Canons of Construction, seems to be falling out of favor with the modern Supreme Court but has been used in many key Indian law cases in the past. *See* GOLDBERG ET AL., *supra* note 164, at 218-22 (discussing the Indian Canons of Construction).

196. *See id.* at 222-24 (discussing the inapplicability of the Indian Canons of Construction to general federal statutes).

197. *See supra* Part II.D.

tribal airspace.<sup>198</sup> While a federal court may be hostile to these responses, it is important that tribes prepare to directly address preemption arguments.

*B. Objection 2: Tribes Have Been Implicitly Divested of Sovereignty in Airspace*

Opponents of tribal authority in airspace may also argue Indian tribes have been divested of sovereignty in airspace and assertion of tribal jurisdiction in airspace—particularly over non-members—is inconsistent with the domestic dependent status of Indian tribes under federal law.

Tribes may respond that the shift in federal policy toward the encouragement and affirmation of tribal self-governance is evidence that tribes are no longer dependent upon the federal government to the extent that they may have been in the past.<sup>199</sup> Thus, traditional implicit divestiture analysis is increasingly becoming an anachronism as Indian tribes begin to outgrow antiquated federal perceptions about the ability of tribal governments to operate in a self-sustaining manner.

Another important component of the implicit divestiture inquiry is whether tribes have historically conceded such rights by treaty or other arrangement with the United States. As all treaties between tribes and the United States were negotiated and ratified prior to 1871,<sup>200</sup> the parties during that period had no way of knowing that aviation would later become a central form of travel. Thus, there were no standard treaty provisions that expressly guaranteed tribal sovereignty over the navigable airspace above tribal lands.

*C. Objection 3: Tribes Do Not Have Regulatory Jurisdiction Over Non-Member Pilots*

Opponents may finally argue that Indian tribes do not possess regulatory jurisdiction over non-member pilots and therefore cannot enforce tribal regulations in airspace. This is likely to be another significant legal hurdle should the issue ever be litigated in federal court.

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198. See GOLDBERG ET AL., *supra* note 164, at 223 (“Where a federal law would infringe or abrogate existing Indian rights, courts require a clear and specific Congressional intent to limit such rights in the general federal statute . . . In the absence of such an indication, courts hold the federal statute inapplicable to Indian tribes.”).

199. See, e.g., Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2012)) (ending the practice of allotment of tribal lands and restoring tribal control over local tribal affairs).

200. Congress officially ended the practice of entering into treaties with Indian nations in 1871. See, e.g., GOLDBERG ET AL., *supra* note 164, at 78.

Under the *Montana* and *Strate* cases, a tribe can assert civil jurisdiction over non-members only where (1) the non-member has a consensual relationship with the tribe and the tribe's regulation arises out of that relationship,<sup>201</sup> or (2) the activity of the non-member "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>202</sup>

Unless the non-member in question is the pilot of tribally owned aircraft that departs from and returns to an airport on tribal land, a court is unlikely to conclude that entry into tribal airspace alone constitutes the requisite consensual relationship required by *Montana* and *Strate*.

A tribe may be more successful in asserting that its jurisdictional authority over non-members in tribal airspace is necessary to protect the economic security or health and welfare of the tribe. However, such arguments would need to be supported by strong and direct evidence that non-member aviation activities adversely affect those tribal interests and that tribal airspace regulations are required to prevent those harms from occurring.

#### *VI. A Proposal for Federal Acknowledgment of Tribal Sovereignty in Airspace*

Although Indian tribes may legally possess the inherent sovereign right to regulate tribal airspace, as a practical matter the United States government actively regulates all airspace within its borders—including tribal airspace.<sup>203</sup> The regulatory aviation system created and maintained by the United States has proven to be highly successful and effective, and exists as the global safety standard against which other national aviation systems are measured.<sup>204</sup>

As discussed in Part V above, tribes would likely encounter strong opposition to the exercise of tribal authority in airspace. Litigation in federal court would almost certainly involve an examination of various doctrines of federal Indian law, the interpretation of which by a federal court could lead to an undesirable outcome for Indian tribes looking to protect tribal skies. As with many issues affecting Indian tribes, federal

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201. See *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Montana v. United States*, 450 U.S. 544 (1981).

202. *Montana*, 450 U.S. at 566.

203. See sources cited *supra* note 41.

204. See Mike Hall, *Report: U.S. Aviation System Safest in the World*, AFL-CIO Now (Oct. 14, 2011), <http://www.aflcio.org/Blog/Organizing-Bargaining/Report-U.S.-Aviation-System-Safest-in-the-World>.

legislation could be the key to bringing clarity to these issues by affirming the authority of tribes to regulate at least some aspects of tribal airspace. Given the pervasive and successful nature of federal regulation of United States airspace, tribes may be best situated to achieve such a political victory by emphasizing that any such regulation would occur as a close cooperative effort between tribal officials and the FAA, with the latter in charge of enforcing tribal air regulations.

*A. Proposed Congressional Affirmation of Tribal Sovereignty in Tribal Airspace*

In an ideal world, Congress would affirm the right of tribes to control entry into portions of tribal airspace in which air traffic poses a risk of any adverse effect to tribal citizens or the tribal government. In acknowledging the success of the federal regulatory regime, it could direct the FAA to work closely with Indian tribes to create, promulgate, and enforce rules and regulations designed to protect tribal airspace.

Congressional affirmation of inherent tribal power is not unthinkable. A significant example is the so-called “*Duro Fix*,” a legislative response to the Court’s holding in *Duro v. Reina* that Indian tribes had no criminal jurisdiction over non-member Indians who committed crimes on a reservation.<sup>205</sup> The Court’s holding created a jurisdictional void in which non-member Indians could theoretically commit crimes on the reservations of other tribes and escape prosecution. While the federal government still had jurisdiction over such crimes, the lack of federal criminal resources devoted to prosecuting on-reservation criminal actions by non-member Indians served as a practical barrier to prosecution.<sup>206</sup> Thus, Congress saw the need to affirm the right of tribes to prosecute such individuals. Its response was swift, and resulted in amendment of the Indian Civil Rights Act to include the following provision:

“[P]owers of self-government” means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby

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205. *Duro v. Reina*, 495 U.S. 676, 679 (1990).

206. See Samuel E. Ennis, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of Oliphant*, 57 UCLA L. REV. 553, 564-72 (2009) (describing the various reasons that federal prosecutors are disincentivized to prosecute crimes on Indian reservations over which they have jurisdiction).

recognized and affirmed, to exercise criminal jurisdiction over all Indians.<sup>207</sup>

As with the *Duro Fix*, Congress could affirm the inherent tribal right to sovereignty in airspace through amendment of the Indian Civil Rights Act.<sup>208</sup> The legislation would ideally define the tribal power to exclude non-members and affirm that such authority extends to both tribal land and airspace. The provision could read as follows:

For purposes of this subchapter, the term—

...

(5) “power to exclude” means the recognized inherent sovereign right of an Indian tribe to condition the presence of any non-member Indian or non-Indian on land over which that tribe has jurisdiction, and the right to physically exclude any non-member Indian or non-Indian from that jurisdictional territory entirely for any cause that the tribe deems necessary to protect the welfare of the tribe, its members, and its resources. This right to exclude includes the right to establish flight rules and other conditions of entry, and extends to all navigable tribal airspace up to ten thousand feet mean sea level (MSL).

The language in the above provision would accomplish several objectives. First, it would make clear that Indian tribes have an interest in the aviation activities occurring in tribal airspace. Second, it would affirm that the power to exclude may be exercised on tribal land and in the airspace above it. Third, it would extend the tribe’s authority to regulate aircraft up to a reasonable level (ten thousand feet) and preserve existing commercial, military, and private air routes at higher altitudes.<sup>209</sup> Fourth, it would acknowledge that tribal governments are the entities best situated to determine what kind of air traffic might be detrimental to the tribe.

#### *B. Proposed Federal Aviation Regulations*

Passage of legislation affirming tribal sovereignty in airspace would go far in empowering Indian tribes to pursue better protections for tribal

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207. Indian Civil Rights Act, 25 U.S.C. § 1301 (2012) (emphasis added).

208. 42 U.S.C. § 1983.

209. Actual jurisdictional altitude limit would ideally be determined through a cooperative process between Congress, the FAA, and Indian tribes. There could be additional language that would give flexibility to individual Indian tribes and the FAA to determine an appropriate altitude limit for the tribe’s jurisdictional reach.

airspace. However, more would be required in order to ensure a safe transition into the new legal paradigm. As part of the legislation, Congress would ideally direct the FAA to consult closely with Indian tribes to develop a new regulatory category to carry out the enforcement of tribal airspace laws.

In creating a new regulatory scheme, the FAA would need to strike a balance between honoring the ability of Indian tribes to exert control in tribal airspace and protecting the integrity of United States airspace. To accomplish this, it could create a new category of special use airspace<sup>210</sup> which classifies all tribal airspace below an altitude of ten thousand feet MSL as restricted airspace.

The rules would ideally direct pilots with a need to fly below ten thousand feet MSL in tribal airspace to obtain clearance from nearby air traffic control (whether tribal or non-tribal) prior to entering tribal airspace. Exceptions could be made for emergency landings and any unexpected disruption in air traffic patterns which might necessitate the temporary relaxing of tribal airspace flight restrictions.

To address commercial, private, or military air traffic traveling through existing air routes, the FAA could possibly retain the right to negotiate air easements over certain portions of tribal airspace where such airspace is part of an established route that requires flight under ten thousand feet MSL. The fundamental premise of the regulatory changes would be the recognition that tribal governments share authority with the FAA to determine what flight rules will best serve to protect tribal interests on the ground.

The FAA might best achieve the preceding objectives by designating airspace above tribal lands as Restricted Tribal Airspace. This new category would fall under the Special Use category of airspace, a classification in which special flight rules and restrictions apply. Though there are already several existing categories of Special Use airspace,<sup>211</sup> the creation of the new category will serve to put pilots on clear notice of the existence of special flight rules in tribal airspace. The Restricted Tribal Airspace designation and its flight rules could be communicated to pilots through the use of FAA sectional charts and other communications.<sup>212</sup>

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210. Special use airspace is airspace in which special flight rules or restrictions apply. See PILOT'S HANDBOOK, *supra* note 74, at 14-3 to 14-4.

211. *Id.* at 14-3 to 14-4.

212. The FAA uses sectional aeronautical charts, notices to airmen (NOTAMS), and other methods of communication to put pilots on notice of acceptable flight paths and the

The FAA would ideally work directly with tribal governments to determine precisely which rules should apply within each Restricted Tribal Airspace area. The United States currently holds “[a]pproximately 56.2 million acres” in trust for Indian tribes,<sup>213</sup> but the geographic and demographic features of tribal territory are unique to each tribe.<sup>214</sup> Therefore, it would likely be necessary to carefully create specific airspace boundaries on a tribe-by-tribe basis.

The proposed statutory requirement that tribal airspace includes only that land over which a tribe has jurisdiction would likely complicate this process, as tribal objectives in regulating airspace may be frustrated by reservation areas that were allotted and are therefore characterized by “checkerboard” tribal jurisdiction. Such issues would need to be carefully considered by tribes, Congress, and the FAA prior to the enactment of final federal regulations.

### *VII. Conclusion*

In 2009, the Hualapai Tribe successfully asserted regulatory jurisdiction in its airspace when it fined Lionel de Antoni, a non-Indian aviation enthusiast with no ties to the Tribe, for his unauthorized aerial trespass into the Tribe’s airspace. Although the jurisdictional issues seemed ripe for consideration by a federal court, the case was rendered moot when Mr. de Antoni pled guilty in tribal court and the Tribe returned his property.

This article has examined the legal issues that likely would have been litigated had the case moved out of tribal court and into a federal forum. It concludes that while Indian tribes have strong legal arguments for the assertion of tribal authority in airspace, opponents may also have a strong basis in federal Indian law to challenge some of the core assumptions underlying the theory of tribal sovereignty in airspace. The legislative and regulatory solutions proposed in Part VI are intended to inspire thinking about possible solutions to the jurisdictional and practical barriers that tribes may face in asserting regulatory authority in airspace.

Aviation activity in the United States will likely continue to impact tribal airspace as aviation technology evolves. As the FAA now races to catch up

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rules that apply in various sections and altitudes of airspace along any given flight route. *See id.* at 14-3 to 14-4.

213. *Indian Affairs FAQs*, *supra* note 160.

214. The largest tribal land base, for example, is the Navajo Nation, with a reservation encompassing sixteen million acres across Arizona, New Mexico, and Utah. *Id.* By contrast, there are many tribes with reservations as small as 1000 acres or less. *Id.*

to innovations in commercial and recreational drone technology,<sup>215</sup> state and local jurisdictions are actively testing the scope of their authority to impose their own regulations on drone use.<sup>216</sup> Some Indian tribes are likely already considering solutions under tribal law to deal with the issues that commercial and recreational drone use are certain to create in tribal airspace. While this article provides a foundation for such conversations, there are no clear and decided answers at this time. What is clear is that these issues are unlikely to be resolved in favor of tribal interests without active political and legal engagement by Indian tribes, tribal advocates, and policymakers.

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215. Scott Shane, *F.A.A. Rules Would Limit Commercial Drone Use*, N.Y. TIMES (Feb. 15, 2015), <http://www.nytimes.com/2015/02/16/us/faa-rules-would-limit-commercial-drone-use.html>.

216. Justin Peters, *Chicago Becomes the First Big City to Enact Drone Regulations, Nails Them*, SLATE.COM (Nov. 20, 2015), [http://www.slate.com/blogs/future\\_tense/2015/11/20/chicago\\_enacts\\_drone\\_regulations\\_that\\_are\\_really\\_good.html](http://www.slate.com/blogs/future_tense/2015/11/20/chicago_enacts_drone_regulations_that_are_really_good.html).