

# American Indian Law Review

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Volume 26 | Number 1

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1-1-2001

## Uniform Laws and Tribal Legislation; One Tribe's Perspective

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### Recommended Citation

Truman Carter & Fred H. Miller, *Uniform Laws and Tribal Legislation; One Tribe's Perspective*, 26 AM. INDIAN L. REV. 89 (2001),  
<https://digitalcommons.law.ou.edu/ailr/vol26/iss1/4>

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# UNIFORM LAWS AND TRIBAL LEGISLATION; ONE TRIBE'S PERSPECTIVE

Truman Carter\* & Fred H. Miller\*\*

## I. Introduction

### A. *The National Conference of Commissioners on Uniform State Laws*

One hundred and ten years ago, what was to become the National Conference of Commissioners on Uniform State Laws (NCCUSL or Conference) held its first meeting in Saratoga Springs, New York. Today, NCCUSL has representatives from every state, the District of Columbia, the U.S. Virgin Islands, and Puerto Rico. It is responsible for hundreds of statutes that have been enacted by the jurisdictions that comprise it, including the Uniform Commercial Code and other equally important statutes in the areas of business law, family law, trust and estates law, civil procedure, and other legal areas.

NCCUSL is an organization peculiar to the federal system of government, and is unique in American law. "American law" of course actually consists of fifty separate, and potentially differing, bodies of state law, co-existing with, and overlaid by, federal law. The federal Constitution reserves to the states "powers not delegated to the United States by the Constitution, nor prohibited by it to the states." Because of this limitation, nearly all private law — contracts, negotiable instruments, business organizations, marriage and divorce, for example — and most areas of criminal law, are left for definition and regulation by the legislatures and courts of the several states.

As the United States developed a modern economy national in scope, the need for a common, predictable, nationwide legal system became crucial. There were at least two methods for unifying the legal systems of the states. First, state law could be preempted by the Federal Government through repeal of the Tenth Amendment, or by an expansive interpretation of the commerce clause and other express powers delegated to Congress (which, of course, was what ultimately happened to a degree). Alternatively, the states could create a forum and a vehicle by which they could voluntarily agree to develop, and then separately adopt, uniform legislation on important subjects of common concern. That was the path chosen in 1891 when NCCUSL was conceived;

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it remains a viable approach even today notwithstanding the expansion of federal authority because uniform acts, like Congressional acts, must fit into the overall body of American law, and that body of law for the most part is state law. Thus uniform state law is more easily adapted than uniform federal law.

### *B. Products of the Conference*

The products of the Conference for the most part are in the private law area, and are formulated by committees composed of Commissioners appointed by their state governments to prepare (research and draft) uniform acts for enactment by the legislatures in each state after approval by the National Conference as a whole. In that manner, a uniform law national in scope is created by the coordinated action of the individual states.

The range of subjects of uniform laws is quite broad, and includes the general areas of family law, civil procedure, commercial law, consumer law and business law. Because the focus is on commercial and consumer law in Indian country, set out below is a sampling of uniform acts in those areas. Oklahoma has enacted the vast majority of these acts.

#### **UNIFORM ARBITRATION ACT**

*Adoptions:* 49

*Purpose:* Permits enforceable agreements to submit disputes to arbitration. Provides for the selection of arbitrators, for an arbitration proceeding and for enforcement of an arbitration award.

#### **UNIFORM COMMERCIAL CODE ARTICLE 2A, LEASES**

*Adoptions:* 50

*Purpose:* Provides a legal framework for leases of personal property, similar to existing Article 2 which covers sales.

*Related Acts:* Other Articles of Commercial Code.

#### **UNIFORM COMMERCIAL CODE ARTICLES 3 AND 4, AND 4A, NEGOTIABLE INSTRUMENTS, BANK DEPOSITS AND COLLECTIONS AND FUNDS TRANSFERS**

*Adoptions:* 51, 53

*Purpose:* Updates provisions of the UCC dealing with payment by checks and other paper instruments to provide essential rules for the new technologies and practices in payment systems, and creates a legal structure for commercial wire transfers.

*Related Acts:* Other Articles of Commercial Code.

#### **UNIFORM COMMERCIAL CODE ARTICLE 6, BULK TRANSFERS**

*Repeal:* 42

*Revise:* 5

*Purpose:* Repeals this article of the UCC, originally adopted in every state except Louisiana, which many states have found to be obsolete. An optional amendment modernizes Article 6 for those states that wish to retain it.

*Related Acts:* Other Articles of Commercial Code; Fraudulent Transfer.

**UNIFORM COMMERCIAL CODE ARTICLE 8, INVESTMENT SECURITIES**

*Adoptions: 52*

*Purpose:* Updates UCC Article 8, originally adopted in every state, to provide a modern legal structure for the recently developed system of securities holding through intermediaries.

*Related Acts:* Other Articles of Commercial Code; Securities; TOD Security Registration.

**UNIFORM COMMERCIAL CODE ARTICLE 9, SECURED TRANSACTIONS**

*Adoptions: 53*

*Purpose:* UCC Article 9, originally adopted in every state, provides a statutory framework that governs secured transactions—transactions which involve the granting of credit secured by personal property.

*Related Acts:* Other Articles of the Commercial Code.

**UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT**

*Adoptions: 2*

*Purpose:* This new act (1999) adopts the accepted and familiar principles of contract law, setting the rules for creating electronic contracts and the use of electronic signatures for contract adoption—thereby making computer information transactions as well-grounded in the law as traditional transactions.

*Related Acts:* Commercial Code; Electronic Transactions.

**MODEL CONSUMER CREDIT CODE**

*Adoptions: 11*

*Purpose:* Under this Act, which adopts a unitary approach to sales and loans, the total consumer credit process, from advertising through collection, is within the scope of regulation. Includes usury rules, limitations or practices, and disclosure requirements.

*Related Acts:* Commercial Code.

**UNIFORM DECEPTIVE TRADE PRACTICES ACT**

*Adoptions: 11*

*Purpose:* Removes undue restrictions on the common-law action for deceptive trade practices.

*Related Acts:* Commercial Code; Trade Secrets.

**UNIFORM ELECTRONIC TRANSACTIONS ACT**

*Adoptions: 38*

*Purpose:* This new act (1999) establishes the legal equivalence of electronic records and signatures with paper writings and manually-signed signatures, removing barriers to electronic commerce. A state that adopts the act does not have its laws preempted by a similar federal law.

*Related Acts:* Commercial Code; Computer Information Transactions.

**MODEL EXEMPTIONS ACT**

*Adoptions: 1*

*Purpose:* This comprehensive exemptions act provides a group of general categories for property and assets which are exempt from levy and creditors in bankruptcy proceedings. It achieves a fair balance between a debtor's needs and a creditor's rights.

*Related Acts:* Fraudulent Transfer.

#### UNIFORM FEDERAL LIEN REGISTRATION ACT

*Adoptions:* 36

*Purpose:* Provides for the registration of federal liens by procedures consistent as possible with normal recording of mortgages in local real property records and with the filing of security interests in personal property.

#### UNIFORM FOREIGN MONEY JUDGMENTS RECOGNITION ACT

*Adoptions:* 31

*Purpose:* Simplifies international business by recognizing money judgments obtained in other nations. International law provides for reciprocity, i.e., recognition by foreign countries of judgments obtained in the adopting state.

*Related Acts:* Enforcement of Foreign Judgments; Foreign Money Claims.

#### UNIFORM FRAUDULENT TRANSFER ACT

*Adoptions:* 40

*Purpose:* Provides a creditor with the means to reach assets a debtor has transferred to another person to keep them from being used to satisfy a debt.

*Related Acts:* Commercial Code; Exemptions.

#### UNIFORM LIMITED LIABILITY COMPANY ACT

*Adoptions:* 9

*Purpose:* Permits the formation of limited liability companies, which provide the owners with the advantages of both corporate-type limited liability and partnership tax treatment.

*Related Acts:* Limited Partnership; Partnership; Unincorporated Nonprofit Association.

#### UNIFORM LIMITED PARTNERSHIP ACT

*Adoptions:* 51

*Purpose:* Provides a more flexible and stable basis for the organization of limited partnerships, helping states stimulate new partnership business ventures.

*Related Acts:* Limited Liability Company; Partnership; Unincorporated Nonprofit Association.

#### UNIFORM MULTIPLE-PERSON ACCOUNTS ACT

*Adoptions:* 28

*Purpose:* Encourages banks and credit unions to offer POD (pay on death) and agency (convenience) account forms for use by persons desiring some, but not all, incidents of joint accounts, and encourages development of standard forms that will mean the same in all states.

*Related Acts:* Custodial Trust; Disposition of Community Property Rights at Death; Intestacy, Wills and Donative Transfers; Nonprobate Transfers on Death; Probate Code; Simultaneous Death; TOD Security Registration.

**UNIFORM NONPROBATE TRANSFERS ON DEATH ACT**

*Adoptions:* 10

*Purpose:* To provide not only for improved pay-on-death deposit accounts, but also for transfer-on-death investment securities. The transfers, like POD deposit accounts, are nontestamentary and do not fall into the probate estate of the deceased holder of these securities.

*Related Acts:* Disposition of Community Property Rights at Death; Multiple-Person Accounts; Probate Code; TOD Security Registration.

**REVISED UNIFORM PARTNERSHIP ACT**

*Adoptions:* 33

*Purpose:* Modernizes the Uniform Partnership Act of 1914, adopted in every state except Louisiana. Establishes a partnership as a separate legal entity, and not merely as an aggregate of partners.

*Related Acts:* Limited Liability Company; Limited Partnership; Unincorporated Nonprofit Association.

**UNIFORM TOD SECURITY REGISTRATION ACT**

*Adoptions:* 47

*Purpose:* Provides non-probate transfer of specifically registered investment securities from owner to named beneficiaries at owner's death.

*Related Acts:* Commercial Code, Article 8; Disposition of Community Property Rights at Death; Multiple-Person Accounts; Nonprobate Transfers on Death; Probate Code; Securities.

**UNIFORM TRADE SECRETS ACT**

*Adoptions:* 44

*Purpose:* Provides a legal framework for improved trade secret protection for industry.

**MODEL TRANSBOUNDARY POLLUTION RECIPROCAL ACCESS ACT**

*Adoptions:* 7

*Purpose:* To overcome procedural obstacles that prevent a pollution victim in one state or province from seeking enforceable remedies in the state or province where the pollution originated.

**UNIFORM TRANSFERS TO MINORS ACT**

*Adoptions:* 50

*Purpose:* Updates and expands the usefulness of the Uniform Gifts to Minors Act.

*Related Acts:* Custodial Trust; Guardianship and Protective Proceedings.

**UNIFORM UNCLAIMED PROPERTY ACT**

*Adoptions:* 32

*Purpose:* Provides a system for transferring intangible personal property and personal property in safety deposit accounts, held by an entity other than the rightful owner, to the state when it is deemed abandoned by the rightful owner. The state holds the property for the rightful owner in perpetuity.

## UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT

*Adoptions:* 11

*Purpose:* Allows an unincorporated nonprofit association to receive, hold, and transfer real and personal property in its own name. Limits liability of members for liability of the association, while allowing association to incur liabilities in its own name.

*Related Acts:* Limited Liability Company; Limited Partnership; Management of Institutional Funds; Partnership.

### C. Tribal Sovereignty

Today the need for uniform legislation other than at the federal level has a new dimension. Non-uniformity among the states has been addressed, but because states to a large degree cannot act for Native American tribes, as those tribes begin to engage in economic development, there is a greater need for developed tribal law and for similarity of law among the states and Native American tribes. This is because:

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States, and in substance, terminates the external powers of the sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.<sup>1</sup>

Clearly a tribe has jurisdiction over its members.<sup>2</sup> However, more importantly for this discussion, like a state, a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.<sup>3</sup> For many years this power lay dormant for the most part as most tribes had few occasions to deal with

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1. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 123 (Five Rings 1986) (photo. reprint of Univ. of N.M. photo. reprint 1971) (1942).

2. *Montana v. United States*, 450 U.S. 544 (1981); *United States v. Wheeler*, 435 U.S. 313 (1978).

3. *Williams v. Lee*, 358 U.S. 217 (1959); *Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). For a more extensive discussion of tribal jurisdiction, see Thomas P. Schlosser, *Tribal Civil Jurisdiction Over Nonmembers*, in SOVEREIGNTY SYMPOSIUM XIV 2001 — A TRIBAL ODYSSEY (2001).

non-tribal members, except for the occasional Indian trader on the reservation.<sup>4</sup> This is no longer true. Tribes have been working hard to increase employment and bring prosperity to their tribal members. One endeavor that involves nonmembers and that has been spectacularly successful is gaming.<sup>5</sup> Even though gaming and other similar type activities have produced substantial funds, tribes more and more are looking at commercial endeavors as they develop their long range tribal goals. There is a growing interest in creating or enhancing commercial activities in order to advance self governance and tribal development through increased tribal income and more and better employment opportunities for tribal members. An example from a recent case involves the Kiowa Tribe and an agreement to buy stock from a non-tribal corporation and the execution of a promissory note to evidence the unpaid part of the purchase price. The agreement was not entered into on tribal land and had no governing law clause. When the deal turned sour, the Tribe refused to pay and suit was brought. The Tribe had carefully followed the law and the court determined the Tribe was immune from suit because Congress had not authorized the suit nor had the Tribe waived its sovereign immunity.<sup>6</sup> In a related action,<sup>7</sup> it was reiterated that state courts have no jurisdiction over contracts when one party is a tribe unless the tribe has waived immunity or unless Congress specifically has authorized the suit. In the more recent *C & L* case, however, the Tribe lost when they had not adequately followed the law and waived immunity by an arbitration clause.<sup>8</sup>

As a general rule, state civil laws do not apply to transactions arising in Indian country to which Indian tribes, tribal entities or tribal members are parties, except to the extent authorized by Congress.<sup>9</sup> The result as a general

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4. See, e.g., *Williams v. Lee*, 358 U.S. 217 (1959).

5. Jess Green, *Indian Gaming 2000*, in *SOVEREIGNTY SYMPOSIUM 2000: A NEW JOURNEY IV-43* (2000). For example, in Minnesota, Indian gaming is the state's seventh largest employer, creating more than 10,000 new jobs. But efforts extend far beyond gaming. Tribes in Arizona own a national frozen yogurt distributorship. The Narragansett tribe in Rhode Island is considering a bottling plant for spring water. The Mississippi band of Choctaw Indians is one of the state's top ten employers, with ten manufacturing plants as well as a hotel and casino. Some of these endeavors are cutting edge as well; the Coeur d' Alene tribe has an international-on-line lottery. See Susan Johnson, *From Wounded Knee to Capitol Hill*, *ST. LEGISLATURES MAG.*, Oct./Nov. 1998, at 16, 17. Moreover, economic development is more than just that; it is a holistic way of enriching and supporting a people in their development. Federal Reserve Bank of Kansas City, *Community Reinvestment: Special Supplement on Lending in Indian Country 3* (Winter 1994).

6. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998). As to waiver, see *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957).

7. *Hoover v. Kiowa Tribe*, 986 P.2d 516 (Okla. 1999).

8. *C & L Enters. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001).

9. John S. Clifford, *Application of Article 9 to Secured Transactions in Indian Country*, 28 *UCC L.J.* 297, 298 (1996); see also *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123-24 (1993); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973). There are limited exceptions. One exception is where the state demonstrates an overriding interest and application



starting point is that a tribe has the sovereign power to enact and enforce civil laws regulating the conduct of their members and of non-Indians who come upon tribal land. This authority includes the power to enforce contracts, even though entered into outside reservation boundaries,<sup>10</sup> and even off-reservation non-Indian land may qualify as a "dependent Indian community and thus part of Indian Country."<sup>11</sup>

That being so, it is clear that in a transaction between a tribe or a tribal member and a non-Indian entity or individual, tribal law<sup>12</sup> may be applicable<sup>13</sup> in a broad spectrum of circumstances to govern the rights and obligations of the parties. Accordingly, to the extent tribal law is unclear, or different than the law under which the non-tribal party to the agreement normally operates<sup>14</sup>, the transaction may well be discouraged. This may be

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of state law will impose minimal burdens on tribal self government. Clifford, *supra*, at 298. With respect to some states, federal statutes purport to extend state civil laws and adjudicatory jurisdiction to areas of Indian country; a significant example is "Public Law 280." However, Public Law 280 basically only involves a limited number of jurisdictions. *Id.* at 299-300.

10. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983); *Montana v. United States*, 450 U.S. 544 (1981). See generally Clifford, *supra* note 9, at 299-302.

11. See *HRI, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000); *Ahboah v. Housing Auth. of the Kiowa Tribe of Indians*, 660 P.2d 625 (Okla. 1983). "Indian country" is defined in 18 U.S.C. § 1151. Land held in trust by the United States for Indian tribes is accorded Indian country status whether or not officially designated as "reservations." *Okla. Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505 (1991). Determining whether a "dependent Indian community" exists is factually dependent and four factors may be considered: (1) whether the U.S. has retained title to and authority over the land occupied by the Indians; (2) the relationship of the inhabitants to Indian tribes and the federal government, such as by federal funding or provision of services; (3) whether there is an element of cohesiveness manifested by economic pursuits, common interests, and the like; and (4) whether the lands have been set apart for the use, occupancy and protection of dependent Indian peoples. See *Housing Authority of the Seminole Nation v. Harjo*, 790 P.2d 1098 (Okla. 1990), and Mike McBride, *Oklahoma's Civil-Adjudicatory Jurisdiction over Indian Activities in Indian Country: A Critical Commentary on Lewis v. Sac and Fox Tribe Housing Authority*, 19 OKLA. CITY U. L. REV. 81, 121-37 (1994), particularly *id.* at 127 (asserting that "lower court and Supreme Court cases lend support to the conclusion that traditional, 'formal' reservations continue to exist in Oklahoma") (footnotes omitted), and *id.* at 134-37 (criticizing the *Lewis* (and *Eaves*) cases). See generally FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 27-46 (Rennard Strickland et al. eds., 1982) (chapter 1, section D); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993).

12. This might include not only tribal ordinances or statutes, but custom as tribal common law. See, for example, Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994).

13. See, e.g., *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985). It is unclear, absent ordinance or statute, to what extent a contractual choice of law clause would be given effect. However, in the recent *C & L* case, *supra* note 8, one was followed without comment.

14. Of course, if there is no tribal law to the contrary, a court could apply the rules of state law by analogy or fashion the applicable rule along the same lines, as is often done outside the context under discussion. See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). But this hardly is a certain or predictable process; and what is needed here is a measure of certainty. It also often is hard to determine what laws a tribe may have adopted. See Clifford,

to the detriment of the tribe and its members.<sup>15</sup> It certainly is to the nontribal side of the transaction.<sup>16</sup> It, therefore, seems accurate to say, as was said years ago about the circumstances that led to the creation of NCCUSL, that a need for a common and predictable legal system is critical, or is rapidly becoming so.

The need for a common and predictable legal system is not news to many tribes. For example, in 1986, the Navajo Tribe adopted Phase I of a tribal UCC, modeled on the U.S. system, and the Oglala Sioux Tribe has adopted a collection code for the purpose of enforcing judgments obtained through the tribal courts.<sup>17</sup> The Indian Law Clinic at the School of Law, University of Montana, developed a Model Tribal Code for Secured Transactions for possible use in Indian Country<sup>18</sup> and it is known to your authors that the Sac and Fox Tribe in Oklahoma has adopted a version of UCC Article 9 for its use.<sup>19</sup>

This approach is not the only one that may be taken. A number of states and tribes have developed intergovernmental agreements addressing a variety of issues, such as tax agreements, and other states have established Indian affairs commissions or programs in state agencies that cooperate with tribes to address state-tribal issues.<sup>20</sup> Such an approach establishes certainty of law

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*supra* note 9, at 304 n.26.

15. *See, e.g.,* Federal Reserve Bank of Kansas City, *supra* note 5, at 17.

The complexities of Indian law and the implications of tribal sovereignty create legal and political uncertainties for lenders and investors.

. . . these continuing uncertainties may represent the greatest barrier to . . . economic and business development.

. . . Commercial transactions in non-Indian communities are governed by the Uniform Commercial Code . . . .

Tribes had not developed a comparable legal code . . . .

Such codes should quell a certain amount of . . . uncertainty.

*Id.* Some tribes have recognized this. *See supra* notes 17-21.

16. A transaction that does not occur can be a detriment to those who deal with tribes; Wisconsin businesses, for example, do \$150 million in business a year providing goods and services to Indian activities. The St. Croix Chippewa tribe shares revenue with Wisconsin of \$2.2 million a year until 2003. Different tribal rules, if more lenient than state regulations, also could entice industries to tribal lands, causing a loss of state revenue. *See Johnson, supra* note 5, at 16, 18. Moreover, there can be legal consequences. *See United States v. Blackpipe State Bank, Civ. No. 93-5115 (D.S.D. consent decree filed Jan. 21, 1994), Clearinghouse No. 49, 995 A&B (bank discrimination against Native Americans by refusing to make secured loans where collateral located on reservation; for placing credit requirements on Native Americans that were not required of whites). There may be Community Reinvestment Act consequences as well.*

17. Federal Reserve Bank of Kansas City, *supra* note 5, at 17.

18. A draft of this statute and accompanying materials are on file with the authors. The effort was funded by several tribes and several banks, as well as a tribal court.

19. Gary S. Pitchlynn, Unpublished Paper Presented at the 1998 Annual Meeting of the Oklahoma Bar Association 4 (on file with author). The law is Title 27, Secured Transactions.

20. *See Johnson, supra* note 5, at 19.

well enough, but is mainly adoptable to governmental issues rather than private law matters.

Another approach is represented by Ordinance No. 95-720-1 of the Mohegan Tribe of Connecticut.<sup>21</sup> Article III, Section 301 of that law adopts as substantive law for the subject of the ordinance: (a) law as set forth in any Mohegan tribal ordinances or regulations, and (b) the general statutes of Connecticut and cases interpreting such statutes except those that conflict with Mohegan tribal law, but not unwritten Mohegan Tribe traditional law and customs. This approach is efficient and provides for uniformity of law between a state and a tribe (and among tribes if other tribes do the same).<sup>22</sup> But it also may impose inappropriate legal rules on the tribe due to its all inclusive incorporation of other law, at least until the tribe acts through specific legislation to modify or reject the adopted law.<sup>23</sup>

Accordingly, the first approach, where the tribe itself considers the specifics of the proposed law as it will effect the tribe and its members before tribal enactment, often is superior, and also best effectuates the exercise of tribal sovereignty. Moreover, a state employs this exact process when considering a uniform law before enactment by the legislature of the state.<sup>24</sup>

## *II. Illustrative Example: Adoption of UCC Article 9 by a Tribe*

### *A. NCCUSL Committee on Liaison with Native American Tribes*

In recognition of the sovereignty of Native American tribes and the increasing legislative activities of some of those tribes, and also recognizing the difficulty faced by a tribe in properly formulating tribal legislation from a uniform act, the Executive Committee of NCCUSL created the Committee on Liaison with Native American Tribes. The purpose of this Committee is to encourage uniformity of laws among tribal nations and the states on appropriate subjects by first building relationships with tribal nations and associations of tribal governments that ultimately may facilitate the adoption and use by the tribes of uniform and model acts drafted by NCCUSL modified, as necessary, to suit tribal needs.

The Committee is modeled in concept on the operation of the NCCUSL Committee on Cooperation between the Uniform Law Conference of Canada and NCCUSL. That committee exchanges information concerning legislation being formulated in the United States and that being formulated in Canada,

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21. MOHEGAN TRIBE OF CONN. ORDINANCES No. 95-720-1 (1995) (on file with authors). A similar approach was taken by the Cheyenne River Sioux tribe when it entered into an agreement with the South Dakota Secretary of State for the latter to serve as the central filing office for UCC Article 9 filings made under the adoption of UCC Article 9 as enacted in South Dakota by the tribe as tribal law. See S. Con. Res. 4 (S.D. Feb. 2001).

22. See Clifford, *supra* note 9, at 305-06.

23. *Id.*

24. *Id.*

with the goal of seeking harmonization of the laws of the two countries to facilitate commercial transactions between the two nations and the recognition of rights of citizens of each country as to wills, trusts, family matters, commercial matters, and the like by both nations.

The Committee is beginning its efforts by contacting tribal governments, associations of tribal governments or tribes and state liaison entities to introduce them to NCCUSL's work and inquire to what extent uniform or model acts might be useful to the tribes. The Committee recognizes that some tribes have used uniform and model acts, while others have found the acts to be unsuitable, at least in part. The Committee intends to determine both what aspects of what acts have been useful, and what aspects have been unsuitable, and to work with interested tribes in connection with both, using a procedure similar to that of a NCCUSL drafting committee, including inviting participation by tribal representatives and possibly utilizing a reporter to draft any appropriate modifications to uniform and model acts. The work of the Committee thus will facilitate and encourage consideration by interested tribes of uniform and model acts, or at least their basic principles, when the tribes are preparing their own legislation. This should enhance uniformity of law governing commercial transactions, the enforcement of judgments and other procedural matters, family law matters, and other appropriate subjects, between tribes and states, and among tribes, for the benefit of all in a manner similar to the work of NCCUSL among the states themselves.

*B. Adaption of Uniform Laws for Tribal Purposes: UCC Article 9*

An example may indicate how the Committee could work with tribes in providing expertise and drafting skills to formulate acceptable versions of uniform or model acts for tribal use. In 1997, the Indian Law Clinic at the University of Montana, which was preparing a model tribal Code for Secured Transactions (basically UCC Article 9) for the use of tribal governments when developing their own commercial codes, contacted NCCUSL requesting comments on the then draft. Had the Liaison with Native American Tribes Committee been in existence, it could have replied and worked with the clinic and representatives of the interested tribes as observers "in order that the final product will be beneficial both to tribal governments and entities wishing to do business in Indian Country."<sup>25</sup> As it was, a reply was formulated by one of the authors as Executive Director of NCCUSL, as follows:

As you are aware, Uniform Article 9 is under revision with completion expected in July/August 1998. I assume your project

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25. Letter from Maylenn Smith, Director Indian Law Clinic, School of Law, University of Montana, Missoula, Mont., to John M. McCabe, Legislative Director/Legal Counsel, NCCUSL (June 11, 1997) (on file with authors). Ms. Smith is now the reporter for the Liaison with Native American Tribes Committee, which is working on a version of UCC Article 9 and related laws for possible tribal enactments.

will be timed to coordinate. However, revision of Article 1 may not be completed until 1999 and that may impact on Parts 1-2 of the Model Code. Parts of Article 2A (2A-307 in particular) also may be moved into Article 9. Since Article 2A is scheduled also for completion in 1999, some further delay may be desirable. I see you already have moved 2A-307 into the Model Code, but without more of Article 2A (e.g., definition of a lessee in the ordinary course of business) is this enough? Also in reference to damages categorization, you seem to have borrowed from Article 2B. Again, this matter is in flux until 1998.

I notice the Model Code does not have comments. These will be extremely important. The Official Comments to revised Article 9 are copyrighted, but I will be happy to assist in working out a suitable arrangement if desired.

Other observations. Filing under new Article 9 is likely to be a combination of the statute and guidelines or regulations mutually adopted by filing offices. For that reason, to create a filing system is likely to require a fair amount of resources. Because of that, and for ease of search, it might be worth considering plugging into the state filing system. Of course, if filing ends up privatized that will not be a problem, but that is far from a sure thing.

An observation or question is how will the Model Code relate to other law? I suppose federal bankruptcy takes care of itself, but is there reasonably developed tribal law on consumer protection law, agency law, repair shop law, accessions law, and so on? This is a problem that needs attention, even though not an obvious one. A number of relationships even within the scope of the Uniform Code also are necessary; e.g., the Model Code speaks of a holder in due course of a "negotiable instrument" — where is the latter defined; it speaks of a letter of credit — what is the relation to §5-114 in the Uniform UCC, and so on.<sup>26</sup>

In the future, the work of the Committee may extend to acting as a liaison between interested tribes and NCCUSL drafting and study committees as they are created, so that appropriate provisions can be placed in uniform laws under development to accommodate tribes,<sup>27</sup> and so that adaption to concerns

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26. Letter from Fred Miller, Executive Director of NCCUSL, to Maylinn Smith, Director Indian Law Clinic, School of Law, University of Montana, Missoula, Mont. (Aug. 20, 1997) (on file with authors); *see also* Clifford, *supra* note 9, at 306-08.

27. An example where this occurred even without the assistance of the Liaison with Native American Tribes Committee is the Uniform Certification of Questions of Law Act. This act, when enacted by a state, will allow state courts to accept certifications from tribal courts of questions of law requesting an opinion by the state court. However, for state courts to be able

of tribal governments may also occur as new uniform or model acts are being formulated by those committees. This will enable Native American communities to promptly act contemporaneously with the states with respect to proposed uniform and model acts.

### *III. Uniform Laws: Legislative Activity by the Sac and Fox Tribe*

Most of the research and work in the area of the development and implementation of private law, including commercial transactions and business organizations, has been left to the individual states. Very little emphasis has been placed upon encouraging those tribal governmental entities, who possess primary jurisdiction, in developing and implementing such legislation for activities that occur within the federally defined Indian country and which is beyond the regulatory authority of the states, especially Oklahoma.<sup>28</sup>

Arguably, the conduct of persons and entities, and the activities occurring in the Indian country (including business or commercial activities) involving an Indian or an Indian tribe are beyond the states' authority. In the absence of the applicability of state commercial laws in Indian country, Indian tribes may exercise their governmental prerogatives to fill the void.

The federal legislative, executive, and judicial treatment of Indian country in Oklahoma has been the subject of public debate by federal, tribal, and state officials, in the last two decades. It appears clear now that all of the Indian tribes in Oklahoma possess the usual accouterments of tribal self-government consistent with the Indian sovereignty principles first enunciated in *Worcester v. Georgia*.<sup>29</sup>

The exercise of tribal sovereignty in Indian country in Oklahoma in the last twenty years has generated the greatest economic growth of tribes as well as generated perhaps the greatest body of federal statutory law and Indian case law for those interested in the industrial, business, commercial, and retail development of Indian country.

One of the first Indian tribes in Oklahoma to begin exercising its legitimate governmental authority over persons and business activities in Indian country subject to the tribal jurisdiction was the Sac and Fox Nation. Before 1982, these tribal governmental powers basically lay in a state of dormancy since Oklahoma statehood in 1907.

Led by then Principal Chief John R. (Jack) Thorpe (the youngest son of Sac and Fox Olympic athlete Jim Thorpe), Sac and Fox leaders forged a new era of tribal government development and Indian country economic

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to certify questions to tribal courts, tribal legislative adoption of the act would have to occur.

28. See, e.g., *Kiowa Tribe v. Mfg. Techs, Inc.*, 523 U.S. 751 (1998); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993); *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988).

29. 31 U.S. (6 Pet.) 515 (1832).

development in Oklahoma which is unparalleled in Oklahoma history and continues forward to this date. The Sac and Fox people's courage and determination to take its rightful place among the panorama of governments in Oklahoma and across the nation has given other tribes hope and strength to pursue their own prerogatives in business and economic development.

In 1982, the Sac and Fox Business Committee, acting as the tribal legislature, enacted the most comprehensive code of laws of any tribe in Oklahoma, and most tribes across America. This code of laws has been reproduced and adopted by many Indian tribes in Oklahoma and other states. The stated purpose of the Code of Laws was for the purpose of strengthening tribal self-government, providing for the judicial needs of Indian country subject to the jurisdiction of the Sac and Fox Nation, and thereby assuring the adequate maintenance of law and order within Indian country.<sup>30</sup>

The Sac and Fox Code of Laws established a judicial branch of tribal government with statutory provisions for civil procedure, evidence, criminal procedure, juvenile procedure, appellate procedure, elections, criminal offenses, and minerals. Additional statutory provisions dealt with the creation and conduct of corporations, industrial banking, general revenue and taxation, and secured transactions.

On April 16, 1982, the Sac and Fox legislature enacted the Sac and Fox Corporation Act.<sup>31</sup> This tribal legislation authorized businesses to organize private for profit corporations under tribal law. Foreign corporations organized under the laws of other states or tribes are permitted to register to conduct business in the Sac and Fox Indian country.<sup>32</sup> Nonprofit corporations are permitted under Sac and Fox law as well.<sup>33</sup>

The Sac and Fox Secured Transactions Code was adopted into law on November 2, 1984.<sup>34</sup> The Secured Transactions Code governs all security interests created by contract including pledge, assignment, chattel, mortgage, chattel trust, trust chattel deed, factor's lien, lien equipment trust, conditional sale, trust receipt, other lien or title retention contract, and lease or consignment intended as security.<sup>35</sup>

These security interests apply so far as concerns any personal property and fixtures within the jurisdiction of the Sac and Fox Nation to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including all goods, documents, and instruments.<sup>36</sup> A lender's interests in property are protected under tribal law

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30. SAC & FOX CODE OF LAWS pmbl. (1982).

31. See SAC & FOX CODE OF LAWS tit. 8.

32. *Id.* at ch. 7.

33. *Id.* at ch. 12.

34. See SAC & FOX CODE OF LAWS §§ 1-507 (1984).

35. *Id.* § 102(b).

36. *Id.* § 102(a).

when the provisions for perfecting a security interest in the property are followed, even in a multiple jurisdiction transaction.<sup>37</sup>

The tribal secured transactions code was in response to an exercise of tribal sovereignty by the Sac and Fox Nation. In September 1984, the Sac and Fox Nation became the first Indian tribe in Oklahoma to issue motor vehicle license plates and motor vehicle certificates of title. Residents of Sac and Fox Indian country were required to register their motor vehicles with, and pay taxes to, the Tribe. Absent such tribal laws, and because of the inapplicability of state vehicle laws, an Indian country resident would not be required to register a vehicle with any governmental authority.

Sac and Fox tribal officials were convinced that Oklahoma state officials, without lawful authority or Congressional permission, were extracting improper taxes upon the persons and property of residents of Indian country subject to the jurisdiction of the Sac and Fox Nation.<sup>38</sup> In order to provide for resident consumers needs and to protect lenders who sold motor vehicles to these residents outside Indian country but knowing the secured property would be garaged in Indian country beyond the state jurisdiction, a new tribal law would be needed to address these business activities and commercial transactions. Lenders may perfect their security interests by filing lien entries with the Sac and Fox Tax Commission. This tribal law and procedure has worked well in practice.

The sheer financial and economic power of the thirty-nine (39) Indian tribes in Oklahoma cannot be overstated. Indian tribal governments possess the authority to generate revenues and to stimulate the state's overall economy. The Sac and Fox bond issue of 1986 is a good example of an Indian tribe's ability to raise monies for public purposes. The Sac and Fox Industrial Development Commission, a political subdivision of the tribe, issued \$125 million in bonds for the purpose of acquiring proven oil and gas properties across the United States.

With the able assistance of the National Conference of Commissioners on Uniform State Laws, the Sac and Fox Nation recently enacted three new pieces of legislation in 2000 dealing with private business organizations conducting commercial and business activities within the Sac and Fox Indian country.

Sac and Fox officials recognized a need to enact tribal legislation authorizing the establishment of, and regulating the powers of, partnerships, associations or organizations formed to carry out business, commercial, or governmental activities in the Sac and Fox Indian country. On November 6, 2000, the Sac and Fox Uniform Partnership Act, the Sac and Fox Limited Liability Partnership Act, and the Sac and Fox Uniform Limited Liability Company Act were enacted and adopted into tribal law.

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37. *Id.* § 103.

38. *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993).



Individuals, groups, or business entities now have a greater range of choices for organizing or incorporating under the laws of the Sac and Fox Nation.

### *Conclusion*

NCCUSL has a history of the successful promulgation of uniform and model statutes that accomplish basic uniformity in suitable areas of private law among the states. Tribes increasingly are looking for legislation to develop their law and make their law more easily ascertainable and a uniform law can serve that purpose. Moreover, both the states and the tribes increasingly need laws that provide uniformity of law among them so that their citizens are not inconvenienced in their movements between jurisdictions, and transactions benefitting both tribal members and state businesses are facilitated. Uniform and model laws are one answer in this context. In short, using uniform and model laws is an efficient and cost effective approach for the tribes if those laws can be properly adapted, if necessary, for tribal use. A committee of NCCUSL exists to assist in that purpose. A cooperative effort between interested tribes and NCCUSL therefore appears to be an activity whose time has arrived.