

NOTE

Increasing Telephone Penetration Rates and Promoting Economic Development on Tribal Lands: A Proposal to Solve the Tribal and State Jurisdictional Problems

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I. INTRODUCTION

The Telecommunications Act of 1996¹ (“1996 Act”) instructed the Federal Communications Commission (“FCC” or “Commission”) to ensure that all Americans have access to affordable telecommunications services.² Consistent with that mandate, the Commission now seeks to secure affordable telecommunications services for those in rural, insular, and high-cost areas.³ More importantly, the FCC held a series of public hearings to discuss with Tribes⁴ the issues they face concerning low telephone penetration rates.⁵ The FCC recommended investigation of universal

1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

2. *Id.* § 151.

3. *Id.* § 254(b)(3).

4. The FCC uses the terms “Indians” and “Indian tribes” according to the Federally Recognized Indian Tribe List. *See* The Federally Recognized Indian Tribe List Act of 1994, §§101-04, 25 U.S.C. § 479a (1994) [hereinafter Indian Tribe Act]. The term “Indian” describes:

all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood . . . Eskimos and other aboriginal peoples of Alaska shall be considered Indians.

Id. § 479. The term “Indian tribe” means “any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledged to exist as an Indian tribe.” *Id.* § 479a(2). An annual list of all Indian tribes that the Secretary of the Interior recognizes as eligible for special services and programs provided by the United States appears in the Federal Register. *Id.* § 479a-1(a).

5. *See* FCC Will Hold a Series of Pub. Hearings on Telephone Serv. for Indians on Reservations and Seeks Comments from the General Public on all Testimony and Other Evidence Presented Therein, *Public Notice*, 14 F.C.C.R. 3331 (1999); FCC to Hold Second Public Hearing in Series on Telephone Serv. for Indians on Reservations, *Public Notice*, 14 F.C.C.R. 3522 (1999).

service in unserved and underserved areas because telephone penetration rates among low-income consumers on tribal lands lagged behind rates in the rest of the country.⁶ Approximately 94.2% of all U.S. households have telephone service,⁷ while subscribership on tribal lands is 46.6%.⁸

After meeting with Indian leaders and telecommunications service providers at two formal field hearings held in New Mexico and Arizona, the FCC tentatively implemented several policies to address low telephone penetration rates on tribal lands.⁹ In response to the many requests made by tribal leaders for a statement of policy that recognizes tribal sovereignty and the government's fiduciary duty to Tribes, the FCC validated its commitment to promoting a government-to-government relationship between the FCC and all federally recognized Tribes. Specifically, the FCC reaffirmed its commitment to: (1) "work with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance;" (2) "consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources;" and (3) "identify innovative mechanisms to facilitate Tribal consultation in agency regulatory processes that uniquely affect telecommunications compliance activities . . . and other telecommunications service-related issues on Tribal lands."¹⁰ Despite the FCC's positive policy statements, however, it also established that such statements do not "create any right enforceable in any cause of action" against the FCC, the United States, or any other party.¹¹

Furthermore, in its effort to understand the reasons for low penetration rates on tribal lands, the FCC requested comments concerning its proposed rules on tribal jurisdiction.¹² Specifically, the FCC sought comments regarding the extent of state and tribal regulation of tribally owned or nontribally owned telecommunications carriers providing service

6. National Telecommunications and Information Administration (NTIA), *Falling Through the Net: Defining the Digital Divide*, (July, 8 1999) at <http://www.ntia.doc.gov/ntiahome/press/fttn070899.htm>.

7. In the Matter of Fed.-State Joint Bd. on Universal Serv.: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, *Further Notice of Proposed Rulemaking*, 14 F.C.C.R. 21,177 (1999) [hereinafter *Unserved and Underserved*, *Further Notice*].

8. *Id.*

9. In the Matter of Statement of Policy Establishing a Government-to-Government Relationship with Tribes, *Policy Statement*, FCC 00-207 (June 23, 2000), 2000 WL 800896 (FCC).

10. *Id.*

11. *Id.*

12. See *Unserved and Underserved*, *Further Notice*, *supra* note 7.

to tribal lands.¹³ This includes jurisdiction questions with respect to: (1) tribally owned or operated carriers providing service within reservations to tribal members, nontribal members, and nontribal members living on nonnative fee lands (within the reservation);¹⁴ (2) nontribally owned or operated carriers offering service both inside and outside of the reservation; and (3) tribally owned or operated carriers offering service outside the reservation.¹⁵ The parameters of federal, state, and tribal authority are not always clear. As the United States Supreme Court acknowledged in dicta, “[g]eneralizations on this subject [of Federal Indian policy] have become particularly treacherous.”¹⁶

Despite the complexities of determining tribal and state jurisdiction, the FCC tentatively established a framework to answer the jurisdictional questions posed in previous proceedings.¹⁷ First, under 47 U.S.C. § 214(e)(6),¹⁸ the Commission may designate tribally owned and nontribally owned carriers serving tribal lands as eligible carriers.¹⁹ The threshold question in these situations is whether the state lacks jurisdiction to designate and regulate carriers wishing to serve tribal lands.²⁰ The FCC must consider “whether state regulation is preempted by federal regulation, whether state regulation is consistent with tribal sovereignty and self-determination, and whether the Tribe has consented to state jurisdiction.”²¹ Second, when tribally owned and nontribally owned carriers seek to serve nontribal lands, even if those lands are included within the reservation’s boundaries, the state commission must determine whether it has

13. *Id.* para. 41.

14. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds., 1982) (discussing the General Allotment (Dawes) Act of 1887, under which each head of the household was allotted 160 acres and minors were allotted forty acres.) Congress amended the Dawes Act in 1891 to provide to each Indian allotments of either eighty acres of agricultural land or 160 acres of grazing land. After twenty-five years passed, the land would become free land, meaning individual Indians would have all rights of ownership and alienability, unlike trust land in which Indians have only a possessory interest in the land. *See also* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

15. *See* Unserved and Underserved, *Further Notice*, *supra* note 7, para. 41.

16. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

17. *See* In the Matters of Fed.-State Joint Bd. on Universal Serv.; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, *Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, FCC 00-208 (June 30, 2000), 2000 WL 870831 (F.C.C.) [hereinafter Promoting Universal Serv., *Report and Order*].

18. 47 U.S.C. § 214(e)(6) (Supp. IV 1998).

19. *See* Promoting Universal Serv., *Report and Order*, *supra* note 17.

20. *See id.*

21. *Id.* para. 108.

jurisdiction considering the same factors listed above.²²

This Note argues that the FCC's proposed tribal and state jurisdiction policies deter eligible telecommunications companies ("telcos") from serving tribal and nontribal land, because the process of petitioning the state or federal commission to determine jurisdiction takes time and goes against the principles of tribal sovereignty. Prevailing FCC proposals impede Tribes' abilities to attract carriers because current provisions do not clearly define which sovereign—the Tribe or the state—maintains taxation and regulatory authority over eligible telecommunications carriers. Lastly, although the FCC initiated a sweeping policy affirming government-to-government relations with Tribes, this policy does not extend far enough to assure Tribes that states will not infringe on their ability to create economically viable infrastructures on tribal lands.

Part II of this Note provides an overarching history of the Federal Universal Service Plan ("Federal Plan"), and the considerable responsibilities given to states to further the goals of universal service. Parts III and IV examine the complex development of tribal and state jurisdictional analysis. Part V applies the elaborate jurisdictional analysis uncovered in Parts III and IV, using South Dakota regulations and case law to illustrate how state regulations affect telecommunications carriers serving tribal lands. Part VI proposes that Congress must expressly limit state jurisdiction in order for telephone penetration rates to increase on tribal lands. Without state taxation and regulation, Tribes may opt to impose their regulations on eligible carriers. Furthermore, eligible carriers would not suffer from dual taxation and regulation from Tribes and states under the current Supreme Court's jurisdictional framework if the FCC lobbied Congress for express federal preemption of state jurisdiction over carriers serving tribal lands and tribal members. Tribes should also have the opportunity to contract with states to waive jurisdiction if the states have historically assumed jurisdiction over carriers serving tribal lands. This Note concludes that Tribes are sovereigns and that the FCC must do more than negotiate with them on a government-to-government basis. Because recent Supreme Court precedent seems to divest Tribes of their territorial and regulatory authority, Congress must explicitly permit Tribes' exclusive tax and regulatory authority over eligible carriers serving their lands and people.

22. *Id.* para. 122.

II. GENERAL OVERVIEW OF UNIVERSAL SERVICE

In response to Congress's mandate to implement a new universal service plan, the FCC adopted the Federal Plan in the *Report and Order*, entitled *Federal-State Joint Board on Universal Service ("Universal Service Order")*, to execute the universal service provisions of the 1996 Act.²³ The Federal Plan aimed to extend telecommunications services "to as many members of society as possible," while providing the necessary funding to support the policy.²⁴ The Federal Plan evidenced Congress's intent for all consumers to receive telecommunications services at nondiscriminatory prices regardless of the additional costs involved in providing service to rural areas.²⁵ Specifically, the Federal Plan establishes several universal service principles:

(1) quality services should be available at just, reasonable, and affordable rates; (2) access to advanced telecommunications and information services should be provided in all regions of the Nation; (3) consumers in all regions of the Nation . . . should have access to telecommunications and information services, . . . that are reasonably comparable to those services provided in urban areas . . . ; (4) all providers of telecommunications services should make an equitable and non-discriminatory contribution to . . . universal service; (5) there should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.²⁶

In addition, the Federal Plan funds "single-party service; voice grade access to the public switched network; DTMF signaling or its functional equivalent; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; and toll limitation services for qualifying low-income consumers."²⁷

Only eligible telecommunications carriers may receive support from the Federal Plan, which uses federal subsidies to offset costs of telephone service to low-income individuals.²⁸ The Federal Plan defines an eligible telecommunications carrier as simply a common carrier that must provide universal support services by "using its own facilities or a combination of its own facilities," and that is required to "advertise the availability of such

23. Fed.-State Joint Bd. on Universal Serv., *Report and Order*, 12 F.C.C.R. 8776, 7 Comm. Reg. (P & F) 109 (1997) [hereinafter *Universal Serv., Order*].

24. Eli M. Noam, *Will Universal Service and Common Carriage Survive the Telecommunications Act of 1996?*, 97 COLUM. L. REV. 955, 957 (1997).

25. See 47 U.S.C. §§ 151-52, 251, 332 (Supp. IV 1998).

26. *Universal Serv., Order*, *supra* note 23, para. 21.

27. *Id.* para. 61.

28. See Rea Howarth, *Getting Connected: Bridging the Telecommunications Divide*, AM. INDIAN REP., March 2000, at 12, 13.

services and the charges . . . using media of general distribution.”²⁹

Since the 1996 Act seeks to increase competition in the telecommunications industry at the local service level and provide reasonable and affordable rates, Congress delegated to states the authority to designate and regulate telecommunications carriers eligible for universal service under the Federal Plan.³⁰ In essence, “state commissions [would be] on the front lines and [would] have a tremendous responsibility to act as the administrators of federal and state universal service programs.”³¹

A. State Obligations in Implementing Universal Service

Traditionally, states must ensure that universal service is available at just, reasonable, and affordable rates. Under the 1996 Act, states are given significant responsibility to maintain universal service in a competitive environment.³² Specifically, section 254(f) of the 1996 Act provides:

A State may adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.³³

State commissions have authority to determine which carriers are eligible to receive universal service support and which are subject to universal service obligations and to determine when a carrier may be relieved of its universal service obligations.³⁴ States may also adopt separate state universal service programs, provided that their rules are “not inconsistent with” the FCC’s universal service regulations and are supported by “specific, predictable, and sufficient mechanisms.”³⁵ Thus, section 254(f) creates a delicate balance between encouraging states to adopt intrastate universal service programs and ensuring that state programs do not interfere with the federal universal service support mechanisms.

29. 47 U.S.C. § 214(e)(1)(A).

30. Phillip Rosario & Mark F. Kohler, *The Telecommunications Act of 1996: A State Perspective*, 29 CONN. L. REV. 331, 339-41 (1996).

31. *Id.* at 341.

32. *Id.* at 339.

33. 47 U.S.C. § 254(f).

34. *See id.* § 214(e)(2)-(4).

35. *Id.* § 254(f).

B. Extent of Federal Support for Universal Service

As stated above, section 254 requires that universal service support mechanisms may be “specific, predictable, and sufficient.”³⁶ Congress never presupposed what “reasonable” or “affordability” would entail in terms of a particular number of dollars, nor did Congress establish a particular formula identifying how states and the federal government would share in funding universal service programs.³⁷ The 1996 Act, however, conferred upon the FCC a responsibility to ensure that the federal universal service mechanism adheres to all of the principles specified in the statute, including the requirement that the mechanism be specific and predictable.³⁸

The FCC established two high-cost support mechanisms to promote availability of telephone service at reasonable rates. The first approach applies to rural incumbent local exchange carriers (“ILECs”).³⁹ Generally, rural ILECs face higher-than-average local loop costs of telephone service.⁴⁰ To enable state jurisdictions to establish lower local exchange rates to rural study areas,⁴¹ the FCC developed the high-cost loop fund.⁴² The high-cost loop fund provides rural ILECs with the ability to allocate the higher loop costs to interstate jurisdictions to be recovered from interstate revenues.⁴³ Under this scheme, the federal mechanism provides support for the carrier’s loop costs exceeding 115% of the national average cost per loop.⁴⁴

For nonrural carriers, the FCC “concluded that the federal share of the difference between a carrier’s forward looking economic cost of providing supported services and the national benchmark will be 25 percent.”⁴⁵

36. *Id.*

37. Noam, *supra* note 24, at 961-62.

38. Rosario & Kohler, *supra* note 30, at 340.

39. An ILEC is defined in the Act as a LEC that, with respect to an area: (1) provided telephone exchange service in such area on February 8, 1996, the date of enactment of the 1996 Act; and (2) was a member of NECA on February 8, 1996, or became such member’s successor or assign. 47 U.S.C. § 251(h).

40. Universal Serv. Task Force, Common Carrier Bureau, Federal Communications Commission, *Preparation for Addressing Universal Service Issues: A Review of Current Interstate Support Mechanisms* 50-65 (Feb. 23, 1996), available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/univserv.txt (rural LECs have higher loop costs because of subscriber density, terrain, and size of local exchanges in rural areas).

41. *See* 47 C.F.R. § 36 (1999) (defining study area as an area for purposes of determining universal obligations and support).

42. *Id.* § 36.611.

43. *Id.*

44. *See id.* § 36.63(c), (d).

45. Universal Serv., *Order*, *supra* note 23, para. 269. Forward-looking costs are determined by costs of providing service per line and then subtracting a national benchmark representing average revenues per line. The costs that the nonrural carrier cannot recover

Therefore, the states are responsible for supporting the remaining 75% of high-cost support for carriers within their boundaries.⁴⁶ Nonrural carriers transitioned from the high-cost loop fund approach to the forward-looking cost model on January 1, 1999.⁴⁷

The debate continues concerning the 25/75 split.⁴⁸ “If only 25 percent of the universal service support mechanism is to be funded through the federal jurisdiction, the states will be on their own to decide how to pay for the remaining 75 percent.”⁴⁹ Ideally, states would reconsider their intrastate access regimes and reduce the access charges. The amount in reduction of access charges would be used to fund explicit universal service mechanisms.⁵⁰ Realistically, though, states would pass the savings in access charges to the consumers.⁵¹ This practice may leave small telephone companies serving rural telephone customers with increased local service rates, because the small telephone companies would have to search for new ways to cover the costs.⁵²

The picture is not quite as grim as it appears. FCC Chairman William E. Kennard indicated in his February 1998 speech before the National Association of State Utility Consumer Advocates⁵³ that there should be some flexibility on the possibility of an additional federal contribution toward universal service beyond existing levels and beyond the 25% share outlined in the *Universal Service Order*.⁵⁴ Of course, the state would still have to exhaust its ability to make funds available for universal service support.

Because the 1996 Act permits states to regulate and provide funding for universal service programs, the question remains whether telecommunications carriers serving reservations should be subject to state regulation and taxation. To understand which sovereign may assert jurisdiction, a detailed history of tribal sovereignty and jurisdictional

commercially will be the amount that the carrier is eligible for from universal service support.

46. Kathleen Wallman, *The Telecommunications Act of 1996: Congress' New Vision for Universal Service for Rural America*, 544 PLL/PAT 483, 505-06 (1998).

47. In the Matter of Fed.-State Joint Bd. on Universal Serv., Access Charge Reform, *Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket 96-45 Fourth Report and Order in CC Docket No. 96-262 and Further Notice of Proposed Rulemaking*, 14 F.C.C.R. 8078, para. 19, 16 Comm. Reg. (P & F) 92 (1999).

48. Wallman, *supra* note 46, at 505-06.

49. *Id.* at 506.

50. *Id.*

51. *See id.*

52. *Id.*

53. *Id.* at 506-07.

54. *See Universal Serv., Order, supra* note 23.

analysis is pertinent to the issue of improving telephone penetration rates on tribal lands.

III. DEFINING TRIBAL SOVEREIGNTY AND JURISDICTION

When Chief Justice Marshall wrote the opinion in *Worcester v. Georgia*,⁵⁵ he defined tribal sovereignty with a straightforward approach. The Court held that the Cherokee Nation was a separate political entity, within which state authority could not apply, absent the express consent of Congress.⁵⁶ In essence, no one could usurp tribal sovereignty without express authorization by Congress. Due in part to a legacy of broken treaties, ill-conceived congressional acts, and judicial decisions limiting the exercise of tribal sovereignty, however, numerous exceptions have arisen since *Worcester*, as explained below.

“Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.”⁵⁷ Congress never delegated sovereignty to Tribes; their sovereignty is inherent. Inherent sovereignty exists by virtue of the federal government’s historical recognition of Indian tribes as independent political entities.⁵⁸ Each Tribe’s existence predates this nation’s existence.⁵⁹ Tribes no longer maintain absolute sovereignty over their members, however. Tribal sovereignty is now described as having “a unique and limited character.”⁶⁰ “As a general rule, Indian tribes today still possess those aspects of their inherent tribal sovereignty which are not expressly withdrawn by treaty or statute, or by ‘implication’ as a necessary result of their so-called dependent status.”⁶¹

Examples of express limitations upon tribal sovereignty are those imposed by treaties⁶² and by congressional acts.⁶³ Despite these two possible means to limit tribal sovereignty, however, Congress has refused to expressly limit the exercise of tribal sovereignty. Surprisingly, in the last

55. 31 U.S. (6 Pet) 515 (1832).

56. *Id.* at 556-57.

57. *United States v. Mazurie*, 419 U.S. 545, 557 (1975), *quoted in* *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

58. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978).

59. *See id.* at 56.

60. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

61. John Fredericks III, *America’s First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J.L. & POL’Y 347, 386 (1998).

62. Tribes ceded vast portions of their territory in exchange for certain concessions (like food rations) and reservations of small territory. *See COHEN, supra* note 14.

63. Congress enacted Public Law 280, which gave six states criminal and civil jurisdiction over acts arising within designated Indian reservations. *See* 18 U.S.C. § 1162 (1994); 25 U.S.C. § 1321-1326 (1994); 28 U.S.C. § 1360 (1994).

two decades, it is the Supreme Court that has failed to follow Congress's lead in this respect.⁶⁴ Instead, implied limitations are now judicially created and imposed by the Supreme Court. In fact, the Court creates these limitations by interpreting treaties and congressional statutes as "implicitly" diminishing tribal sovereignty.⁶⁵ These implicit limitations arise, quite frequently, when cases involve a Tribe's relations with non-Indians.

The Court has found that Tribes cannot freely alienate their lands to non-Indians, cannot enter directly into commercial or governmental relations with foreign nations, and cannot exercise criminal jurisdiction over non-Indians in tribal court.⁶⁶ Beginning in 1978, the Supreme Court began—and continues to this day—to expand the implicit limitations on tribal sovereignty.⁶⁷

Among those implicit limitations on tribal sovereignty is civil jurisdiction over tribal lands alienated to non-Indians within reservation boundaries. This judicially created limitation on Tribes' territorial sovereignty presents the biggest threat to Tribes. In *Montana v. United States*,⁶⁸ the Court held that Indians, as a consequence of alienating tribal land to non-Indians, do not have authority to regulate non-Indians on non-Indian fee land, even though conduct occurs within the boundaries of the Tribe's reservation.⁶⁹ "While recognizing that the Tribe's authority to regulate the conduct of non-Indians on Indian owned land remained very broad and exclusive, the Court declined to recognize the Tribe's general sovereignty over land within [its] reservation"⁷⁰ As a result, the Court equated tribal sovereignty with land ownership, thus creating a confusing checkerboard pattern of state/tribal jurisdiction on allotted reservations.

The Court announced two exceptions to the rule in *Montana* that recognized that even on non-Indian fee land, Tribes still retain jurisdiction when a nontribal member enters into "consensual relationships with the tribe or its members" or when the nonmember's conduct on reservation fee land directly affects the Tribe's "political integrity, the economic security, or the health or welfare of the tribe."⁷¹ Although the exceptions seem significant, the Supreme Court has enunciated no clear test to determine

64. See Fredericks, *supra* note 61, at 388.

65. *Id.*

66. See *Brendale v. Tribes of the Yakima Indian Nation*, 492 U.S. 408, 426 (1989).

67. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

68. 450 U.S. 544 (1981).

69. See *id.* at 565-66.

70. Fredericks, *supra* note 61, at 393.

71. *Montana*, 450 U.S. at 565-66.

whether a nonmember's conduct on fee lands comes within one of these exceptions.⁷²

In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,⁷³ the Court indicated that the impact on the Tribe's political integrity, economic security, or health or welfare must be "demonstrably serious" and must "imperil" these interests.⁷⁴ The *Brendale* decision confused tribal jurisdiction analysis even further by distinguishing between "open areas" of the reservation and "closed areas." The Confederated Tribes and Bands of the Yakima Indian reservations maintained an open area which had been "opened" to non-Indian settlement after allotment. As a result, nonmembers owned almost half of the land in the area in fee.⁷⁵ The "closed area" of the reservation consisted primarily of Indian trust land with a few non-Indian landowners.⁷⁶ The Court concluded that the Tribe implicitly divested its authority over non-Indian fee land in the open area, but not in the closed area where non-Indians on fee land also resided.⁷⁷

Recently, "in *Strate v. A-1 Contractors*, the Supreme Court . . . held that tribal courts cannot exercise civil jurisdiction over an action between non-Indians for actions arising on state highways crossing Indian trust land within reservations."⁷⁸ In so holding, the Court treated the state highway as an equivalent to fee land. An interesting and important string cite hidden within the majority opinion may suggest some "wiggle room" for Tribes to retain their sovereignty. The Court states that the following activities fit within *Montana's* first exception for consensual relationships:

Williams v. Lee, 358 U.S. 217, 223 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation); *Buster v. Wright*, 135 F. 947, 950 (CA8 1905) (upholding Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; court characterized as "inherent" the Tribe's "authority . . . to prescribe the terms upon which noncitizens may transact business within its borders"); *Colville*, 447 U.S., at 152-154 (tribal authority to tax on-reservation cigarette sales to nonmembers "is a fundamental attribute of sovereignty which the Tribes retain unless divested of it by federal law or necessary

72. Fredericks, *supra* note 61, at 393.

73. 492 U.S. 408 (1989).

74. *Id.* at 431.

75. *Id.* at 415-16.

76. *Id.* at 415.

77. *See id.* at 421-33.

78. Fredericks, *supra* note 61, at 395 (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 442, 459 (1997)).

implication of their dependent status”).⁷⁹

The Court may seem willing to permit Tribes to maintain their inherent sovereignty *anywhere* within reservation boundaries if non-Indians enter into consensual agreements with the Tribe. Since *Strate*, however, the Court has not entertained jurisdictional questions that advance this line of thought.

As a result of the Supreme Court’s liberal use of so-called “implicit limitations” upon tribal sovereignty, the Court has essentially taken on the role of Congress and assumed the authority to decide when to modify or abrogate a Tribe’s inherent or treaty-protected sovereignty. The Court has effectively reversed the presumption that reserved Indian Tribes’ sovereign authority over lands that constitute their reservations, unless Congress explicitly limits the exercise of that sovereignty by treaty or statute. In contrast, the Court in the *Montana* line of cases presumes that Tribes lack jurisdiction to regulate the lands or conduct of non-Indians on non-Indian fee land within reservation borders unless Congress has expressly conferred such authority by statute or treaty, or unless one of the two *Montana* exceptions applies.

In recent times, the Court has steered away from tribal sovereignty arguments and has relied upon federal preemption to burden a Tribe’s ability to regulate on-reservation transactions with Indians and non-Indians.⁸⁰ Specifically, the Court in *Cotton Petroleum Corporation v. New Mexico* emphasized the reasoning in *McClanahan* that the right of tribal sovereignty serves more as a “backdrop against which the applicable treaties and federal statutes must be read,” instead of a means of preemption.⁸¹

IV. DEFINING STATE JURISDICTION: *COTTON PETROLEUM CORP. V. NEW MEXICO*

When it issued the *Cotton* decision, the Supreme Court continued to chip away at traditional notions of tribal sovereignty, thus making it more difficult for Indians to develop tribal economic resources.⁸² The Court affirmed New Mexico’s right to impose a severance tax on gas and oil produced by Cotton Petroleum Corporation, a non-Indian lessee, on the Jicarilla Apache Reservation, despite the fact that the corporation was

79. *Strate*, 520 U.S. 438, 457 (1997).

80. *See McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 172 (1973).

81. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989) (citing *McClanahan*, 411 U.S. at 172).

82. *Id.* at 206, 208-09 (Blackmun J., dissenting).

subject to tribal severance taxes.⁸³ The Tribe filed an amicus brief, arguing that both tribal and state taxation of on-reservation production would reduce the desirability of the Tribe's leases and hinder the Tribe's economic development, because the leases represented the major source of tribal revenues.⁸⁴ Moreover, by allowing dual taxation, the Supreme Court set aside traditional notions of federal policy by limiting the Tribe's ability to profit from on-reservation activities. The Court found, however, that Congress never expressly or impliedly intended to preempt state taxation.⁸⁵ The Court relied on the fact that federal regulation of oil and gas production was not exclusive and that the state's taxes did not "substantially burden" the Tribe.⁸⁶

In holding that federal law does not preempt state taxes, the Supreme Court changed the analysis of Indian preemption to the detriment of the Tribes.⁸⁷ Indian tribes are distinct sovereign entities, which means state law should not penetrate reservation boundaries.⁸⁸ Tribal sovereignty was initially used to bar state jurisdiction;⁸⁹ since *Cotton*, however, tribal sovereignty is used primarily as a backdrop to preemption analysis. Therefore, in determining whether a federal law preempts state law, the Court considers: (1) tribal sovereignty as a "backdrop" to federal statutes or treaties; (2) the comprehensiveness of federal statutes granting tribal taxing authority; and (3) the balance of federal and tribal interest against the states' interests.⁹⁰ Accordingly, if extensive federal regulation exists, this leaves no room for the exercise of state authority. Likewise, if state authority infringes on the Tribe's right to "make [its] own laws and be ruled by them,"⁹¹ then states lack authority to regulate Tribes. The three-part analysis requires a balancing of tribal, federal, and state interests. For example, a state's regulatory interest will be greater and more compelling if the state can show off-reservation effects, like service to non-Indians from

83. *Id.* at 163.

84. *Id.* at 176 n.11, 208-09.

85. *Id.* at 183 n.14.

86. *Id.* at 186.

87. Indian preemption analysis starts with the principle that federal preemption exists unless the Court finds congressional intent to allow state intervention. The analysis begins with federal preemption because Congress has almost exclusive federal control of Indian policy. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 164-65 (1973); *Williams v. Lee*, 358 U.S. 217, 221 (1959). This analysis is contrary to general preemption, which assumes state intervention unless congressional intent to preempt is established.

88. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

89. *See McClanahan*, 411 U.S. at 172.

90. *See Cotton Petroleum Corp.*, 490 U.S. at 176.

91. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (quoting *Williams*, 358 U.S. at 220).

an on-reservation corporation.⁹² The state's interests are less if the state seeks to tax on-reservation transactions between Tribes and non-Indians just to raise state revenues.⁹³

In *Cotton*, the majority found that significant state interests offset federal and tribal interests, because New Mexico provided approximately three million dollars per year to both Cotton and the Tribe and regulated spacing and mechanical integrity of the gas and oil wells.⁹⁴ Furthermore, the Court indicated that the Tribe could increase its taxes without adversely affecting on-reservation oil and gas development because the state tax did not fall on the Tribe, but on Cotton Petroleum Corporation.⁹⁵

Therefore, the Court appeared to hold that if a state provides some services to the Tribes on a reservation, then justification for permitting state taxation on reservations exists.⁹⁶ In particular, if the economic burden (a state tax) does not fall directly on the Tribes, and identifiable state interests exist (any interest concerning possible gain or loss of revenue), there cannot be comprehensive federal regulation to preempt state law. In sum, the *Cotton* dissent correctly criticizes the majority's use of the "inexorable zero"⁹⁷ element to deny preemption "unless the States are *entirely* excluded from a sphere of activity and provide *no* services to the Indians or to the lessees they seek to tax."⁹⁸

Cotton may set "a precedent for the requirement of more comprehensive congressional 'occupation of the field' [of Indian law] before preemption is honored."⁹⁹ Because the Supreme Court appears indifferent to the Tribe's inability to conduct transactions on and off the reservations without suffering economic hardship because of dual taxation and regulation, the FCC must understand how tribal and state jurisdictional analysis principles apply to tribally owned and non-Indian-owned telcos

92. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983).

93. *See Ramah Navajo Sch. Bd., Inc., v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 845 (1982); *see also White Mountain Apache Tribe*, 448 U.S. at 150; *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965).

94. *See Cotton*, 490 U.S. at 207 n.11 (Blackmun J., dissenting). The dissent found that the oil- and gas-related revenues expended by the state for the Tribe over the five-year period contested were \$89,384, compared to \$1,206,800 in federal funds and \$736,358 in tribal funds. *Id.* at 207 n.11. (Blackmun, J. dissenting) (citing Brief for Jicarilla Apache Tribe as *Amicus Curiae* 10-11 n.8).

95. *Id.* at 185.

96. *Id.* at 190.

97. *Id.* at 204 (Blackmun J., dissenting) (quoting *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977)).

98. *Id.*

99. Daniel Gluck, Note, *A Tale of Two Taxes-Preemption on the Reservation: Cotton Petroleum Corp. v. New Mexico*, 43 TAX LAW. 359, 372 (1990).

serving reservations.

V. APPLYING INDIAN JURISDICTIONAL ANALYSIS TO TELCOS SERVING TRIBAL LANDS: A STUDY OF SOUTH DAKOTA

To promote tribal sovereignty, self-sufficiency, and economic development, the FCC must comprehend the complexities of applying state and tribal jurisdictions. Determining which sovereign has jurisdiction is not always easy. For example, Tribes and states may have exclusive or concurrent taxation and regulatory authority. The following applications of tribal and state jurisdiction will assist the FCC in conceptualizing jurisdictional analysis.

A. Relationship Between South Dakota Public Utilities Commission and Telcos Serving Tribal Lands

The Cheyenne River Sioux Reservation in north central South Dakota encompasses 4,600 square miles, with approximately 11,000 Indians and non-Indians living on the reservation.¹⁰⁰ Since 1958, the Cheyenne River Sioux Tribe ("CRST") has owned and operated its Telephone Authority ("CRSTTA") in Eagle Butte, South Dakota.¹⁰¹ Although the current penetration rate is 75%,¹⁰² basic telephone service is available to 100% of tribal lands served by CRST.¹⁰³ Moreover, the CRSTTA extends 2,900 access lines into reservation households.¹⁰⁴

Although located off the reservation and not tribally owned, Golden West serves the Oglala Sioux Tribe on the Pine Ridge Indian Reservation in southwest South Dakota.¹⁰⁵ While telephone service is available to 100% of the reservations, only 86% of Pine Ridge customers subscribe to telephone service.¹⁰⁶

Both Tribes can provide affordable, basic telephone service through support from federal universal service funds. Section 254(f) of the 1996

100. See NATIONAL TELEPHONE COOPERATIVE ASSOCIATION, DIAL-TONE IS NOT ENOUGH: SERVING TRIBAL LANDS 18 (1999) available at http://www.ncta.org/leg_reg/white?4TRIBAL4.pdf [hereinafter DIAL-TONE].

101. *Id.* at 17-18.

102. See FCC Public Hearing, 33 (Mar. 23, 1999) (testimony of J.D. Williams, CRST general manager) at http://www.fcc.gov/Panel_Discussions/Teleservice_reservations/march23/32399fcc.txt [hereinafter FCC Public Hearing].

103. DIAL-TONE, *supra* note 100, at 18. The Telephone Authority serves 80% of the Cheyenne River Sioux Reservations. *Id.* at 18 n.44.

104. See FCC Public Hearing, *supra* note 102, at 38.

105. DIAL-TONE, *supra* note 100, at 18. Golden West is based in Wall, South Dakota. *Id.* at 18 n.46.

106. *Id.* at 18.

Act permits states to adopt regulations consistent with the FCC's rules to advance universal service.¹⁰⁷ To this end, South Dakota implemented statutes applicable to rural service carriers and service areas. South Dakota Codified Law section 49-31-73 states, in part:

[I]f the applicant proposes to provide any local exchange service in the service area of a rural telephone company, the applicant is required to satisfy the service obligations of an eligible telecommunications carrier as set forth in 47 U.S.C. § 214 (e)(1) . . . within a geographic area as determined by the [South Dakota] commission [sic].¹⁰⁸

Furthermore, the South Dakota Public Utilities Commission may "designate a common carrier as an eligible telecommunications carrier for a service area."¹⁰⁹ The South Dakota Commission may also designate service areas consistent with 47 U.S.C. § 214(e).¹¹⁰

Although certain FCC proposals appear to promote tribal sovereignty, in reality those proposals have no bite when it comes to providing Tribes the ability to designate and regulate their own telcos. In fact, Tribes still litigate the issue of whether they have regulatory jurisdiction over carriers serving tribal lands because current federal regulations provide state public utilities commissions with increasing authority to regulate their eligible carriers. *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*¹¹¹ provides a good example of why FCC proposals provide Tribes with little assurance of maintaining tribal sovereignty over their economic development.

B. Regulation of Telcos Serving Tribal Lands

In *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*,¹¹² CRSTTA appealed South Dakota's Public Utilities Commission's decision denying a proposed sale of three telephone exchanges from US West, on which CRSTTA had successfully bid several years prior to this case.¹¹³ The dispute involved whether South Dakota's Public Utilities Commission could assert jurisdiction over the sale of the

107. 47 U.S.C. § 254(f) (Supp. IV 1998).

108. S.D. CODIFIED LAWS § 49-31-73 (Michie 2000). South Dakota, however, does not have jurisdiction to designate common carriers owned by Tribes as eligible for state universal service funds. Recently, Congress amended the 1996 Act to state, "In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier." 47 U.S.C. § 214(e)(6).

109. S.D. CODIFIED LAWS § 49-31-78.

110. *Id.*

111. 595 N.W.2d 604 (1999).

112. *Id.*

113. *Id.* at 605.

on-reservation portion of exchange.¹¹⁴ CRSTTA asserted that the Public Utilities Commission lacked authority to regulate its business activities within the boundaries of the reservation because the Tribe had approved the transaction.¹¹⁵ By asserting jurisdiction, the Public Utilities Commission infringed the Tribe's exercise of tribal sovereignty by not allowing the Tribe to determine with whom it does business.¹¹⁶ Under *Montana*, the CRSTTA argued that a Tribe may regulate activities of nonmembers on tribal lands who enter consensual contracts with the Tribe or its members.¹¹⁷ Furthermore, CRSTTA argued that the Public Utilities Commission was preempted by the federal interest of "promoting economic development and self-sufficiency for Indian tribes."¹¹⁸

Despite the fact that congressional initiatives encourage and promote economic growth for Tribes, the Court rejected the argument by stating that the current FCC regulations allowed state Public Utilities Commissions to regulate "all consumers, whether they reside on or off an Indian reservation."¹¹⁹ Therefore, South Dakota's Public Utilities Commission's authority was not preempted by federal law, but rather, "is a significant, as well as authorized, part of the overall regulatory scheme"¹²⁰ to protect telecommunications consumers.

Current FCC proposals offer the same encouragement and promotion of economic growth on reservations. As indicated by the South Dakota case, however, the FCC proposals are easily defeated because they do not provide preemptive legislation needed to deny states' regulation over carriers serving tribal lands.

C. Taxation of Telcos Serving Tribal Lands

In addition to designating and regulating eligible carriers and service areas, South Dakota's Public Utilities Commission may examine and inspect telcos and their records, require annual reports, inquire into the telcos' management, require monetary deposits into the South Dakota Public Utilities Commission Regulatory Assessment Fee Fund, and tax telcos.¹²¹ Because states traditionally have regulated and taxed telcos under their jurisdictions, tribally owned and non-Indian-owned telcos may also be

114. *Id.* at 608.

115. *Id.* at 609.

116. *Id.*

117. *Montana v. United States*, 450 U.S. 544, 565 (1981).

118. *Cheyenne River Sioux Tribe Tel. Auth.*, 595 N.W.2d at 610 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)).

119. *Id.* at 611.

120. *Id.*

121. S.D. CODIFIED LAWS §§ 49-31-7.1, 12.6 (Michie 2000).

subject to states' authority.

South Dakota has no interest in taxing on-reservation transactions between a tribally owned telco and tribal members because Tribes have sole jurisdiction in regulating the "political integrity, the economic security,[and] the health [and] welfare" for their members.¹²² After opening up reservations for westward expansion, however, virtually no reservations are exclusively Indian. Therefore, tribally owned telcos provide basic telephone service to non-Indians, as well as their tribal members.

South Dakota's interests are reduced if it seeks to tax on-reservation transactions between Tribes and non-Indians on trust land and on nonfee land within the reservation just to raise state revenue.¹²³ Nonetheless, *Cotton* suggests that a state should not be excluded from taxing on-reservation businesses providing any services to the Tribe.¹²⁴ For example, South Dakota prescribes forms for eligible telecommunications carriers to keep records of their expenses and provides state officials to inspect and examine telcos.¹²⁵ Regardless of whether the state provides minimal funds to regulate eligible carriers in proportion to tribal expenditures on similar services, the state's taxation is justified.

Tribally owned telcos may concede that states have concurrent jurisdiction in taxation and regulation when the burden falls directly on the non-Indian company. The state's taxes would fall directly on the Tribe, however, via the tribally owned telco, and, therefore, would prevent states from asserting jurisdiction. Although this argument is appealing, the *Cotton* decision implies that if the state identifies any interest in regulation and taxation of on-reservation activities, then the state should not be barred from asserting jurisdiction.¹²⁶

Finally, jurisdiction is simple when activities occur off of the reservation. State law applies to telephone services provided by off-reservation companies, such as Golden West's telephone service to Pine Ridge Reservation, unless there is "express federal law to the contrary."¹²⁷

Jurisdictional analysis is important to discern which sovereign, the state or Tribe, acquires regulatory authority over telcos serving reservations. Emphasis should be placed, however, on finding solutions

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

123. See *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 845 (1982).

124. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 203 (1989) (Blackmun J., dissenting).

125. S.D. CODIFIED LAWS § 49-31-7.1.

126. See *Cotton*, 490 U.S. at 189-90.

127. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

that would prevent Tribes and states from litigating which sovereign has taxation and regulatory authority over eligible carriers.

VI. SOLVING JURISDICTIONAL ISSUES TO PROMOTE UNIVERSAL SERVICE PROGRAMS AND INCREASE TRIBAL TELEPHONE PENETRATION RATES

Tribal jurisdiction precedent and *Cotton Petroleum* emphasize the need for explicit congressional statements authorizing tribal jurisdiction over eligible telecommunications carriers serving their reservations, without concurrent state regulation. Controversies over jurisdictional issues impede the economic growth of reservations because reservations do not present commercially attractive service areas. Sparse population and low penetration rates deter larger companies from serving tribal lands because service is expensive and the return is lower on a per-subscriber level. Because the reservation is expensive to service, common carriers need universal support mechanisms to help defray the high costs of providing service. Therefore, the FCC must develop and present a plan to Congress that will facilitate the 1996 Act's goal of ensuring that all Americans have access to affordable telecommunications services.¹²⁸

A. Express Congressional Preemption of State Public Utilities Regulation

In deciding whether state jurisdiction applies, courts currently examine whether Congress enacted comprehensive federal statutes granting tribal taxing and regulatory authority.¹²⁹ Tribal sovereignty serves as a "backdrop" to the applicable federal statutes.¹³⁰ Therefore, Tribes must be given the authority to regulate tribally owned and non-Indian-owned telcos, located both on and off the reservation, without state interference. This forbearance would increase telephone penetration rates and promote economic growth. Tribal jurisdiction precedent and sovereignty support this view.

First, under *Montana*, Tribes may regulate non-Indians on non-Indian fee land within the reservation if the nontribal member enters into "consensual relationships with the tribe or its members" or "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."¹³¹ Non-Indians contract for basic telephone services provided by tribally owned telcos.

128. See 47 U.S.C. § 257(b) (Supp. IV 1998).

129. See *Cotton*, 490 U.S. at 175.

130. See *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 (1973).

131. *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

This transaction falls within the first *Montana* exception because both parties have entered a voluntary, contractual relationship.

Second, non-Indian-owned telcos advancing telephone services to non-Indians and Indians arguably fall under *Montana*'s second exception. The Supreme Court, in *Brendale*, announced that the impact on the Tribe's political integrity, economic security, or health or welfare must be "demonstrably serious" and must "imperil" these interests.¹³² Unemployment rates on Indian reservations are 43%, with the highest rate being 75%.¹³³ Advanced telecommunication infrastructures encourage growth. Specifically, Tribes are able to attract businesses to the area because technology is not an impediment to facilitating business transactions. Accordingly, tribal regulation of non-Indian telcos is important in maintaining economic security and growth on the reservation.

Lastly, states may regulate Indian and non-Indian telcos if their services are provided to Indians by off-reservation companies. State law applies, however, unless there is "express federal law to the contrary."¹³⁴ Again, the FCC must emphasize and propose to Congress a provision granting exclusive regulatory and taxing jurisdiction to Tribes; otherwise, any service, whether it be designating service areas or prescribing forms, will permit states to tax and regulate reservation telecommunication carriers.¹³⁵

B. Amend 1996 Act Provisions

Although Congress amended the 1996 Act to permit the FCC to designate eligible telecommunications carriers not subject to state jurisdiction,¹³⁶ this amendment is not enough to prevent states from asserting jurisdiction. Indeed, once the FCC designates eligible carriers, states still provide a percentage of universal service funds to the carriers,¹³⁷ especially for nonrural carriers. While the federal share of the difference between the carrier's costs for support services and the national benchmark is 25%,¹³⁸ the states provide the remaining 75% for nonrural carriers.¹³⁹

132. *Brendale v. Confederate Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989).

133. NATIONAL TELEPHONE COOPERATIVE ASSOCIATION, NTCA MEMBERS SERVING TRIBAL AREAS: SURVEY REPORT 4 (1999), available at <http://www.ntca.org/leg-reg/white/TR11299.pdf>. (Pine Ridge Reservation had the highest unemployment rate.)

134. *Mescalero Apache v. Jones*, 411 U.S. 145, 148 (1973).

135. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173 (1989).

136. 47 U.S.C. § 214(e)(6) (Supp. IV 1998).

137. *Id.* § 214(e)(2)-(4).

138. Universal Serv., *Order, supra* note 23, para. 269.

139. *Id.*

When dealing with tribally owned or non-Indian-owned telcos serving reservations, the FCC should contribute 100%. Congress's fiduciary duty mandates this proposal. Indeed, the United States, in dealing with Indians, "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, . . . should therefore be judged by the most exacting fiduciary standards."¹⁴⁰

Finally, the FCC must do more than place in writing a provision affirming that Tribes and federal agencies must communicate on a government-to-government basis, and not government-to-"dependent wards" negotiations.¹⁴¹ While this government-to-government relationship places Tribes back on the road to tribal sovereignty—a road that was long deserted because of the judiciary's role in divesting the Tribe's ability to retain authority over its "political integrity[—]the economic security,[and] health [and] welfare" of its people,¹⁴² only congressional legislation can preempt state regulation and taxation. Stated differently, "[d]iminishment by judicial, not legislative, fiat preempts legislative prerogative and makes it much harder for tribal advocates to guard the remaining vestiges of tribal sovereignty."¹⁴³

C. Encourage Cooperation and Provide Incentives for Tribes to Own Their Carriers

In 1987, Tohono O'odham Nation purchased facilities from US West

140. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), *rev'd*. 499 F.2d 1095 (D.C. Cir. 1975)).

141. On April 29, 1994, President Bill Clinton mandated that *all* federal agencies and departments establish meaningful government-to-government relationships with Indian Tribes. Exec. Mem. of April 29, 1994, 3 C.F.R. 1007 (1994). *See also* Exec. Order No. 13,084, 3 C.F.R. 150 (1999) (The President's recent order declares the Clinton Administration's commitment to tribal sovereignty, a commitment based upon a historic government-to-government relationship:

The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign power over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights.).

Id.

142. *Montana v. United States*, 450 U.S. 544, 566 (1981).

143. Robert Laurence, *The Unseemly Nature of Reservation Diminishment by Judicial, as Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act in Limiting Both*, 71 N.D. L. REV. 393, 394 (1985).

to serve 390 subscribers.¹⁴⁴ Today, the tribally owned carrier serves nearly eight times the number of subscribers served by US West (now Qwest).¹⁴⁵ Telephone penetration rates began at a low 20% and climbed to 70% once the Tribe improved the service.¹⁴⁶ Tohono O'odham Nation improved telephone services by borrowing from the Rural Utilities Service ("RUS").¹⁴⁷ RUS makes loans available to rural telecommunications carriers without charging construction costs. The FCC must encourage Congress to implement more programs similar to RUS in order to provide incentives for Tribes to construct their own telcos. Likewise, existing non-Indian telcos must communicate and cooperate with Tribes.

For example, on the Crow Reservation in southeastern Montana, Project Telephone Company employs predominantly Crow tribal members, many of whom are fluent in the Crow language.¹⁴⁸ Project also appointed a member of the Crow Tribe to be a full-voting member of the telco's board of directors.¹⁴⁹ Project staff members are required to attend cultural awareness sessions covering the history of the Crow Tribe, tribal governmental structure, and language.¹⁵⁰ This example provides evidence of a working relationship between a non-Indian-owned telco and a Tribe. Before Project Telephone Company began providing services to the reservation, it received approval from the Crow Tribe to operate. Although the Crow Tribe did not fund the telco, the Tribe remains an active participant in its operations.

D. Negotiate Contractual Agreements Between Tribes and States

Tribes should have the opportunity to negotiate cooperative agreements to waive state or tribal jurisdiction. Cooperative agreements are not new to Federal Indian law. For instance, businesses that otherwise might locate upon or contract to do work within reservations may be deterred by the lack of remedies for contractual breaches or torts because Tribes enjoy sovereign immunity, in much the same manner as the United States.¹⁵¹ Despite the fact that tribal sovereign immunity is protected both to sustain tribal self-determination and to encourage economic

144. DIAL-TONE, *supra* note 100, at 27.

145. *Id.*

146. *Id.* at 16-17.

147. *Id.* at 17. Rural Utilities Service is a rural development agency of the U.S. Department of Agriculture that assists in financing construction of telecommunications in rural America.

148. *Id.* at 27.

149. *Id.*

150. *Id.*

151. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

development,¹⁵² Tribes contractually agree to limit waivers of sovereign immunity. Similarly, Tribes and states should negotiate which sovereign will assert jurisdiction, either concurrently or exclusively. Contractual agreements will provide assurances to outside telecommunications carriers that their businesses will not be dually taxed or regulated. Thus, cooperative and contractual agreements encourage potential telcos to construct telecommunications infrastructure because the contractual agreements limit the telco's costs, in an otherwise high-cost support area.

VII. CONCLUSION

As this Note demonstrates, the Supreme Court is currently engaging in a campaign to divest Tribes of their sovereignty over transactions developing on and off tribal lands. Because tribal sovereignty is judicially limited, Congress must act according to its fiduciary duties and explicitly preempt states from asserting jurisdiction over telecommunications carriers and universal fund programs serving tribal lands. Tribes can neither be sovereign nor self-sufficient if their authority is limited to activities that involve their own members or tribally owned telecommunications carriers. Importantly, by issuing an express statement against state jurisdiction, Congress would assist Tribes in increasing telephone penetration rates (along with economic development) because eligible carriers would be assured that their companies would not be dually taxed and regulated by both sovereigns.

Finally, Tribes should be given incentives to invest in their own telcos. The FCC would further this goal by providing 100% support in universal service funding, instead of 25%. By contributing 100% support to eligible carriers serving tribal lands, the states no longer have taxation and regulatory authority since they are not providing any services to tribal lands. The 100% support would comply with Congress's fiduciary duty and moral obligation to Tribes. With these proposed changes, tribal and state jurisdictional problems would be less of an issue; therefore, the FCC would accomplish its goal of providing low-cost, affordable basic telephone rates on tribal lands.

152. See *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)).