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STANDARD CLAUSES IN STATE-TRIBAL AGREEMENTS: THE NAVAJO NATION EXPERIENCE

Paul Spruhan*

INTRODUCTION

This article discusses the attempts by the Navajo Nation (Nation) and the surrounding states to create standard contract clauses. The Nation has numerous agreements with state governments and their political subdivisions. Sovereignty issues complicate the contracting process, as the Nation and the states have legislatively-mandated contract clauses that they each must include in their agreements. Further, dispute resolution issues have caused friction, as the parties each possess sovereign immunity unless properly waived. Until recently, the Navajo Department of Justice and the respective attorney general offices have negotiated solutions to these problems on a contract-by-contract basis, resulting in varied approaches depending on the type of agreement and attorneys involved.

In an attempt to resolve these issues, the Nation and the states of Arizona and New Mexico recently have approved standard contract clauses for certain types of agreements. Though all issues have not been resolved by these clauses, and it remains to be seen how such clauses will be implemented, the standard contract clause model can be useful to other tribes and states who seek efficient and consistent methods of contracting without sacrificing core principles of tribal and state sovereignty.

THE CURRENT NAVAJO NATION-STATE RELATIONSHIP

Despite the historical depiction of states as the “deadliest enemies” of tribes,¹ the

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1. *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.”). Sam Deloria has been particularly influential, being among the first advocates, and remaining one of the strongest continuing advocates for a more cooperative vision of the tribal-state relationship. *See, e.g.*, P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365, 382 (1994) (stating that “there is room-abundant room for tribal negotiations with the states in areas where local concerns control and where federal law does not specifically forbid local attempts to solve the problem.”). The continuation of the “deadliest enemies” conception of tribal-state relations has been strongly criticized, with commentators encouraging a different view of tribal-state relations through cooperative agreements. *See, e.g.*, Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of State-Tribal Relations*, 43 TULSA L. REV. 73, 74 (2007).

modern relationship between the Navajo Nation and the states is much more complex. Three states lie within the boundaries of the Navajo Nation: Arizona, New Mexico, and Utah. Within those states, the Nation's territory overlaps with ten counties.² Citizens of the Navajo Nation have state-issued driver's licenses, birth certificates, and license plates. The Nation pays into state unemployment programs for its governmental employees. Its citizens receive state-issued Medicaid and other benefits. Roads through the Nation were built and continue to be maintained by state or county governments through the Nation's consent to rights-of-way issued by the United States.³ School districts organized under state law operate schools under leases from the Nation. The Nation's citizens vote in county and states elections, sit on county commissions, and serve in state legislatures. Two Navajos currently serve as county sheriffs in counties overlapping the Nation's territory.⁴ Most importantly for purposes of this article, the Nation and the states have numerous agreements related to funding as well as a broad spectrum of other areas, including health and social services, law enforcement, education, and public transit.

Though there are many areas of cooperation, there are also areas of conflict, involving competing claims of sovereignty and jurisdiction. The Nation strongly asserts its territorial sovereignty and the necessity of state actors to adhere to the Nation's laws while operating within the Nation. The Nation resists state and county law enforcement presence within the Nation absent approved cross-commission or mutual aid agreements.⁵ The Nation continues to apply its employment laws to state schools, even in the face of federal challenges by those school districts that such laws cannot apply to state entities.⁶ The Nation insists on provisions in leases and rights-of-way acknowledging and consenting to tribal jurisdiction, even in the face of objections by state or county officials.

The Nation's main question in contract negotiation between itself and the states, is how to balance cooperation and access to state resources while maintaining a respect for the Nation's sovereignty. That question has driven the desire for standard clauses in the myriad of agreements between the signatory governments. By "standard clauses," I mean uniform clauses in agreements across subject matter that can be applied without

2. The Navajo Nation's main reservation, tribal trust and allotted lands, and its satellite reservations for the Ramah, Alamo, and To'hajiilee bands, collectively lie within the boundaries of the Counties of Apache, Coconino, and Navajo in Arizona, the Counties of Bernalillo, Cibola, McKinley, Sandoval, San Juan, and Socorro in New Mexico, and San Juan County in Utah.

3. *E.g.*, Highways 160 and 264 are on the Arizona side of the Nation and Highway 491 is on the New Mexico side. DISCOVER NAVAJO, <http://discovernavajo.com/images/Navajomap.jpg> (last visited February 17, 2012).

4. The current McKinley County, New Mexico sheriff, Felix Begay, and the current Apache County, Arizona sheriff, Joseph Dedman, are both Navajo.

5. *See* State v. Harrison, 2010-NMSC-038, 148 N.M. 500, 238 P.3d 869 (New Mexico Supreme Court case in which Navajo Nation unsuccessfully argued that county deputy lacked jurisdiction to search Navajo member after stop within Navajo Nation for alleged crime committed outside Nation); Navajo Nation Cross-Commission Agreements Act of 2010, 17 N.N.C. § 1820, as amended by Navajo Nation Council Legislation No. CD-56-10 (2010) (a provision passed in response to *Harrison* that requires state, county, and municipal law enforcement to have duly-approved cross-commission agreement in order to validly search or arrest an Indian within the Navajo Nation).

6. *See* Red Mesa Unified Sch. Dist. v. Yellowhair, No. CV-09-8071-PCT-PGR, 2010 WL 3855183 (D. Ariz. Sep. 28, 2010) (holding that the Navajo Nation lacks jurisdiction to apply the Navajo Preference in Employment Act to Arizona state-organized school districts).

negotiation in individual situations. The Nation and the states have sought such clauses for years, and recently have agreed to some standard clauses for funding and cross-commission agreements. The Nation and the states continue to work on standard clauses for other types of agreements, including for future rights-of-way. The following is a review of the most problematic clauses in funding and cross-commission agreements, and the recent attempts to resolve them.

FUNDING AGREEMENTS

Funding agreements span many different types of programs, and involve many different departments within both the Nation and the states. Most agreements involve state funding of tribal programs, though the Nation provides funding such as Johnson-O'Malley educational funding, to some state entities.⁷ Though the legal language in such agreements is negotiated primarily by the state attorney general's office and the Navajo Nation Department of Justice, the agreements themselves are initiated and implemented by different state and tribal programs, involving numerous officials from both governments. Some money comes from state legislative appropriations, while other money comes from pass-through funds originating from the federal government.⁸ Regardless, state funding comes with specific contractual responsibilities, including adherence to clauses mandated by the state legislature, the state's lawyers, or the state risk management department.⁹ Equally so, the Nation's Council mandates certain contract clauses, as do the Nation's lawyers and risk management department.¹⁰ Potential conflict between the requirements of the state and the Navajo Nation arises in several key areas of any proposed agreement.

Dispute resolution is perhaps the most contentious subject of any funding agreement. For example, when the state provides money to the Nation, the state has an interest in making sure it can recoup money spent inconsistent with the agreement's requirements. This is especially so when federal funds pass through the state to the Nation, since the state continues to have fiscal responsibilities under its own funding agreement with the United States. Sovereign immunity is the main driver of the conflict, as both the state and the Nation have sovereign immunity from suit unless properly waived.¹¹ Under Navajo Nation law, the Nation cannot waive its sovereign immunity in contracts unless approved by a two-thirds vote of the Navajo Nation Council.¹² As a practical matter, seeking such waiver can take more time than allowable under funding

7. The Nation also has arrangements with several state public law schools, including the University of New Mexico and Arizona State University, to provide scholarships for citizens of the Navajo Nation.

8. *See, e.g.*, 49 U.S.C. § 5311(b)(2)(C)(i) (2011) (federal public transit grant program that require states to distribute money to Indian reservations).

9. One interesting clause in Arizona state contracts requires the contractor to acknowledge that it has no "scrutinized business operations" in Sudan and Iran. *See* ARIZ. REV. STAT. ANN. § 35-391.06 (West 2011) (Sudan), and ARIZ. REV. STAT. ANN. § 35-393.06 (West 2011) (Iran).

10. *See, e.g.*, 2 N.N.C. § 223(A) (requiring a clause in all Navajo Nation contracts that involve expending funds stating that the Nation's liability is "contingent upon the availability of appropriations by the Navajo Nation Council"); 15 N.N.C. § 609(A) (2005) (requiring a clause stating that the Navajo Preference in Employment Act applies to all agreements to be performed within a tribe's territory).

11. *See* U.S. CONST. amend. XI (recognizing state sovereign immunity); *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 760 (1998) (upholding tribal sovereign immunity).

12. 2 N.N.C. § 223(C) (2005).

deadlines,¹³ and, as a philosophical matter, may be difficult to obtain. The Navajo Nation Council has revised the Navajo Sovereign Immunity Act to allow the Nation to agree to arbitration and waive immunity for actions to compel arbitration or enforce an arbitration award.¹⁴ However, such suits must be brought in a Navajo Nation court in order for the waiver to be effective.¹⁵ Therefore, absent a direct waiver of immunity, the states have to come to the Nation's court system to compel arbitration or enforce an award against the Nation. Because the Nation requires any attorney appearing before its courts to be licensed by the Navajo Nation Bar Association,¹⁶ the states must have on staff, or hire on contract, a Navajo-licensed attorney to file any action against the Nation.

Indemnification clauses are a related problem. As a standard clause matter, the state governments require any contractor to indemnify the state for any claim made against it arising from the contract. These clauses vary in the scope of the indemnification, but uniformly require some promise by the contractor to reimburse the state for legal costs for the defense of the claim and damages if a judgment is rendered, if the claim arose from actions of the contractor.¹⁷ This means that the Nation would agree by contract to potentially pay the state for claims made by a third-party in an Arizona court. The Navajo Department of Justice generally takes the position that the Nation cannot indemnify outside entities, because indemnification is inconsistent with the Navajo Sovereign Immunity Act.¹⁸ That act defines the scope of the Nation's waiver of immunity and the procedure to invoke that waiver, and requires the Nation's liability be established by a Navajo Nation court or an arbitration panel appointed consistent with the Nation's Arbitration Act.¹⁹ Therefore, according to the nation, a contractual promise to be liable to the state outside of those limitations is inconsistent with the Navajo Nation Council's mandate.

Another area of conflict is the application of state anti-discrimination provisions. Arizona and New Mexico both require contractors to promise not to discriminate based on, among other classifications, race or national origin, as required by state laws and executive orders modeled after Title VI and VII of the federal Civil Rights Act of 1964.²⁰ Further, some pass-through funding agreements include federally-mandated

13. The Navajo legislative process takes time because each proposed piece of legislation first must be reviewed and voted on by at least two Council committees before it is presented to the full Council. *See* 2 N.N.C. § 164(A)(9), as amended by Navajo Nation Council Resolution No. CAP-10-11, § 3 (enacted Apr. 21, 2011, to be codified at § 164(A)(9)) (requiring that legislation must be approved by the full Council and must be heard by at least one standing committee and the Naa'biik'iyáti' Committee).

14. *See* 1 N.N.C. §§ 554(J), (K), as amended by Navajo Nation Legislation No. CJA-05-07 (January 24, 2007).

15. 1 N.N.C. § 554(K), as amended by Navajo Nation Legislation No. CJA-05-07 (January 24, 2007).

16. *See* 7 N.N.C. § 606(A) (2005) (civil provision requiring Navajo Nation Bar Association licensure); 17 N.N.C. § 377 (criminal offense for unauthorized practice of law) (2005).

17. The following is one example: "The Navajo Nation hereby agrees to save and hold harmless and indemnify from loss the State, any of its departments, agencies, officer or employees from any and all cost and/or damage incurred by any of the above and from other damage to any person or property whatsoever." Intergovernmental Agreement between the State of Arizona and the Navajo Nation, Att'y Gen. Contract # P00120090011848, § III(1) (an agreement for pass-through of federal American Recovery and Reinvestment Act funds for public transit) (on file with author) [hereinafter *Att'y Gen. Contract*].

18. *See* NAVAJO NATION DEPARTMENT OF JUSTICE, ADVISORY MEMORANDUM NO. AM/HSGU 01-2010 (2010) (on file with author) (discussing the Navajo DOJ's position on indemnification clauses).

19. *See* 1 N.N.C. §§ 551; 554(C), (K) (2005).

20. *See, e.g.,* New Mexico Human Rights Act, N.M. STAT ANN. § 28-1-7 (2004) (prohibiting employment

clauses promising non-discrimination consistent with Title VI and Title VII.²¹ The Nation has a Navajo Preference in Employment Act (NPEA) and a Navajo Business Opportunity Act, which mandate Navajo preference in employment and contract procurement.²² The NPEA explicitly requires a provision mandating application of the act in all contracts.²³ Though Title VII exempts tribes as employers from federal anti-discrimination law,²⁴ state law does not necessarily follow.²⁵ Finally, in the case of Arizona, an additional provision mandated by state law requires government contractors to use the federal “E-Verify” employment system to confirm the U.S. citizenship of all its employees.²⁶ As an Indian tribe predating the arrival of U.S. sovereignty over its territory, the Nation objects to confirming the citizenship of its employees, almost all of whom are citizens of the Navajo Nation. The Nation then seeks to excise such clauses from its agreements.

The Nation and the states of Arizona and New Mexico have resolved some of these problematic issues through agreement on standard clauses. For New Mexico, the Nation and the states only have agreed to an arbitration dispute resolution provision. In that provision, the Nation and the state agree to a uniform procedure on how to invoke arbitration, how the arbitrators will be selected, and how and under what rules the arbitration will be conducted.²⁷ However, the provision does not provide for

discrimination by any employer based on, among other classifications, race and national origin); OFFICE OF JANICE BREWER, EXEC. ORDER NO. 2009-09: PROHIBITION OF DISCRIMINATION IN STATE CONTRACTS, NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS (2009), available at http://azmemory.azlibrary.gov/cdm4/item_viewer.php?CISOROOT=/execorders&CISOPTR=680&CISOBX=1&REC=3 [hereinafter EXEC. ORDER NO. 2009-09] (prohibiting discrimination by government contractors based on, among other things, race and national origin). There is an ongoing question whether tribal affiliation, as opposed to Indian status, is “national origin,” and therefore whether tribal preference mandates — such as the one included in the Navajo Preference in Employment Act — are illegal discrimination under Title VII and equivalent state provisions. See *infra* note 25 and accompanying text; *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998) (holding that tribal affiliation is “national origin” for purposes of Title VII). The holding in *Dawavendewa* was rendered unenforceable by a subsequent ruling, which dismissed the case under Rule 19 of the Federal Rules of Civil Procedure for failure to join the Navajo Nation. *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1163 (9th Cir. 2002). The Equal Employment Opportunity Commission subsequently filed an action against Peabody Coal alleging national origin discrimination for following Navajo preference, in which the Ninth Circuit allowed the Nation to be joined as a defendant in the suit for res judicata purposes. See *E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 783 (9th Cir. 2005); *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070 (9th Cir. 2010) (opinion on procedural issue in suit by Equal Employment Opportunity Commission against Peabody Coal alleging compliance with Navajo preference in leases with Nation constitutes “national origin” discrimination). Regardless, the Nation consistently takes the position that Navajo membership is not “national origin” for purposes of these provisions.

21. See, e.g., *Att’y Gen. Contract*, *supra* note 17, § III(15).

22. See 5 N.N.C. §§ 201, *et seq.*; 15 N.N.C. §§ 601, *et seq.* (2005).

23. 15 N.N.C. § 609(A) (2005).

24. 42 U.S.C. § 2000e(b) (1991).

25. Compare Arizona Civil Rights Act, ARIZ. REV. STAT. ANN. § 41-1461(6)(b)(i) (2010) (exempting tribal governments from anti-discrimination provisions), and EXEC. ORDER NO. 2009-09, *supra* note 20 (exempting tribes as employers from anti-discrimination provision for state contracts) with New Mexico Human Rights Act, N.M. STAT. ANN. §§ 28-1-2(A)-(B), 28-1-7 (2007) (prohibiting employment discrimination of “employers” without explicit exemption of Indian tribes).

26. See ARIZ. REV. STAT. ANN. § 41-4401 (2008). “E-Verify” is a federal internet-based system operated by the Department of Homeland Security for employers to confirm employees’ eligibility to work legally in the United States. *E-Verify*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/E-Verify> (last updated June 17, 2011).

27. See Standard Arbitration Clause with New Mexico (on file with author).

enforcement of an award in any court, but states that failure to abide by the award allows the other party to terminate its obligations under the contract.²⁸ The standard clause with Arizona sets out the procedures for arbitration, and, consistent with the Nation's Sovereign Immunity Act, waives immunity only for actions compelling arbitration or enforcing an award.²⁹ Importantly, that provision specifies what court has jurisdiction, as Arizona agrees it will file such actions against the Nation in the Nation's courts and the Nation agrees it will file such actions against the state in Arizona courts.³⁰

Arizona and the Nation have also agreed to a revised provision on discrimination. This resolution was aided by Governor Jan Brewer's revision of an executive order mandating such anti-discrimination language in state contracts.³¹ In Executive Order No. 2009-09, Governor Brewer exempted tribal governments as employers from the anti-discrimination provisions, in line with the federal exemption for tribes under Title VII.³² The revised provision tracks the executive order by stating that "the parties agree to comply with all *applicable* state and federal statutes and regulations concerning non-discrimination practices," but that "[t]his contract is governed by Arizona Executive Order No. 2009-09."³³

Further, Arizona has agreed not to apply the e-verify requirement, interpreting such requirement consistent with the statutory language to only apply to procurement contracts.³⁴ As funding agreements do not go through a bidding procurement process, the Nation and Arizona agreed that the provision was not applicable to intergovernmental funding agreements. While these issues have been resolved, other issues linger. There is no general agreement with either state on indemnification. Arizona acknowledges the Nation's position that it cannot indemnify, but does not agree to waive indemnification requirements, leaving the issue for resolution on a contract-by-contract basis.³⁵ Interestingly, New Mexico has agreed in certain contracts to forego an indemnification clause, and instead includes a provision stating that each government is liable for the acts and omissions of its employees and agents,³⁶ but has not agreed to a standard clause for all funding agreements. Further, as a compromise for agreements from the state to the Nation, the Nation agreed to Arizona law as the choice of law for such agreements.³⁷ While the Nation would prefer all of its agreements to be interpreted according to Navajo law, it nonetheless agreed to such provision.

28. *Id.*

29. Navajo Nation and State of Arizona Contract Provisions, Sovereign Immunity and Dispute Resolution Provisions, § 6 (on file with author) [hereinafter *Contract Provisions*].

30. *Id.*

31. See EXEC. ORDER NO. 2009-09, *supra* note 20.

32. *Id.* See also 42 U.S.C. § 2000e(b) (1991).

33. *Contract Provisions*, *supra* note 29, Addendum Provisions for Arizona States Agencies and Contracts with the Navajo Nation, § 2 (emphasis added). The addition of the word "applicable" is one of the standard contract drafting techniques in state and federal funding agreements used to avoid a clear resolution of what provisions actually will apply to a contract, leaving the issue to a later resolution when and if necessary. Such temporary resolution may delay the question, but I believe standard clauses that resolve the issue completely are preferable when the parties are willing and able to agree to them.

34. *Id.* at Overview, ¶ 1; ARIZ. REV. STAT. ANN. § 41-4401(D)(1) (2008).

35. *Contract Provisions*, *supra* note 29, at Overview, ¶ 1.

36. See, e.g., Memorandum of Agreement between the New Mexico Department of Transportation (NDOT) and Navajo Nation, § 32 (2009) (on file with author).

37. *Contract Provisions*, *supra* note 29, § 5.

With a standard clause agreement in place for Arizona, the Nation intends to seek similar agreements with New Mexico and Utah. Time will tell how successful these agreements will be in streamlining the sometimes tedious and contentious negotiation process for funding agreements, and whether future state and Nation administrations will continue to adhere to them.

CROSS-COMMISSION AGREEMENTS

Cross-commission agreements between Nation and state law enforcement present different challenges. The purpose of these agreements is to strengthen law enforcement both in state and Nation territory by eliminating jurisdictional impediments to lawful search and arrest.³⁸ According to federal law, states lack criminal jurisdiction over Indians within the Nation, while the Nation generally lacks criminal jurisdiction over non-Indians within the Nation, and over anyone outside its federally-defined “Indian country.”³⁹ As established by several cases in New Mexico, state and county law enforcement cannot legally arrest an Indian within the Nation’s territory, even after ‘hot pursuit’ from state territory into the Nation.⁴⁰ The Nation requires states to request extradition of Indian suspects present within the Nation,⁴¹ and the New Mexico courts and the Ninth Circuit have enforced that requirement.⁴² Further, on the New Mexico side of the Nation, lands are “checkerboarded” outside the formal boundary of the Navajo Reservation between state, tribal, and federal lands, creating doubt whenever a crime occurs as to whether it is committed in Navajo or state territory.⁴³ However, as crimes are committed across territorial boundaries, and can involve both Indians and non-Indians, on-the-ground law enforcement can be hampered significantly by these limitations.

Cross-commission or mutual aid agreements allow state and county officers to be commissioned as Nation officers and Nation officers to be commissioned as state or county officers.⁴⁴ When properly commissioned under such agreement, the location of the crime and the status of the offender are irrelevant; either law enforcement agency may search and arrest an offender, as an officer or deputy can act under both Navajo and

38. See, e.g., Cross-Commission Agreement between the Navajo Nation and the McKinley County Sheriff’s Office, § I (December 8, 2007) (on file with the Tulsa Law Review) [hereinafter *McKinley Cross-Commission Agreement*] (stating the purpose of the agreement).

39. See *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 526-527 (1998) (tribal civil and criminal jurisdiction is limited to lands considered “Indian Country” under 18 U.S.C. § 1151); *Solem v. Bartlett*, 465 U.S. 463, 465 (1984) (stating that states generally lack criminal jurisdiction over Indians within “Indian country”); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that there is no tribal criminal jurisdiction over non-Indians).

40. See *Benally v. Marcum*, 553 P.2d 1270, 1271 (N.M. 1976); *City of Farmington v. Benally*, 892 P.2d 629, 631 (N.M. Ct. App. 1995).

41. See 7 N.N.C. § 607; 17 N.N.C. § 1951 (2005).

42. See *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 685-686 (9th Cir. 1969); *Benally*, 553 P.2d at 1272-73; *Benally*, 892 P.2d at 632.

43. See *Hydro Res. Inc., v. EPA*, 608 F.3d 1131, 1135-36, 1139 (10th Cir. 2010) (discussing the “checkerboard” land status in Eastern Navajo Agency and holding that specific non-Indian owned fee parcel within the boundaries of the political subdivision of the Navajo Nation is not “dependent Indian community” under the “Indian country” statute, 18 U.S.C. § 1151).

44. See, e.g., *McKinley Cross-Commission Agreement*, *supra* note 38, § VII.

state law.⁴⁵ Though such agreements do not grant prosecutorial jurisdiction to the other government, they do solve on-the-ground search and arrest problems, by immunizing such actions from challenge by the offender that the search or arrest was done without legal authority.⁴⁶ However, as with funding agreements, the negotiation of such agreements involves several key areas of potential conflict.

Liability is a one major concern. Which government will pay claims when a law enforcement officer acts under the law of the other government? States and counties assert that the Nation should cover its officers when acting as commissioned Navajo officers, and the Nation believes the same should hold for its officers when acting as state or county officers.⁴⁷ Both governments have concerns that their insurers will not cover claims against officers acting under cross-commissions. Indemnification rears its head again in this context, as both governments seek indemnification for the acts of the other law enforcement agency.

Another key issue is hot pursuit and extradition. When state and county officers stop an Indian offender within the Nation after initially engaging the offender in state territory, they want to be able to immediately remove the offender back to the state. The Nation's extradition statute provides no hot pursuit exception, but requires state authorities to request extradition of any Indian located within the Nation.⁴⁸ Connected to this issue is what post-arrest procedures should be in place, including whether law enforcement should transport an Indian or non-Indian offender to a Nation or state jail after arrest. A related practical question is which agency should be responsible to transport that offender to the jail, which may be fifty miles or more from the site of the crime.

The Nation currently has cross-commission agreements with McKinley and Socorro Counties in New Mexico, a commission agreement with the Arizona Department of Public Safety, and a mutual aid agreement with Apache County in Arizona.⁴⁹ The Nation and the counties have attempted to resolve these issues through

45. *Id.*

46. *See, e.g.,* New Mexico v. Martinez, 112 P.3d 293, 295-96 (N.M. Ct. App. 2005) (upholding the arrest of a non-Indian outside of the Navajo Nation by a Navajo Nation officer cross-commissioned by McKinley County).

47. One alternative currently being explored by the counties is to receive Special Law Enforcement Commissions (SLECs) from the Bureau of Indian Affairs. *See* 25 C.F.R. § 12.21(a) (2012) (discussing commissions). Such commissions authorize outside law enforcement to enforce federal laws within Indian country pursuant to a deputation agreement. *See* 25 U.S.C. § 2804(a) (2010). The Nation must consent to such commission before an agreement may be executed. 25 U.S.C. § 2804(c) (2010). Importantly, if federally commissioned, county deputies enforcing federal law are covered by the Federal Tort Claims Act for any actions taken in the scope of their federal commissions. *See* 25 U.S.C. § 2804(f)(1)(A) (2010). Tribes can also receive SLECs and the Nation has entered into a deputation agreement with the Bureau of Indian Affairs to commission its officers and criminal investigators. *See* 25 C.F.R. § 12.21(a) (2012); Deputation Agreement between the Navajo and Bureau of Indian Affairs (July 9, 2010) (on file with author) [hereinafter *Deputation Agreement*]. Such commissions allow Navajo officers to arrest non-Indians for a federal offense. *See id.* §§ 3(A), 7(A).

48. *See* 17 N.N.C. § 1951 (2005).

49. Though termed "mutual aid," the agreement with Apache County is essentially a commission agreement. However, Navajo officers do not need to be commissioned by an agreement with the county to be empowered to enforce Arizona law, as long as they are certified by the Arizona Peace Officer Standards and Training Board's certification process. *See* ARIZ. REV. STAT. ANN. 13-3874(A) (1991). The Apache County agreement explicitly acknowledges this fact, and states that the county's commission of Nation officer is to "confirm" the pre-existing authority. *See*, Mutual Aid Agreement between the Navajo Nation and the Apache

the agreements. For the New Mexico counties, the Nation negotiated with then Governor Bill Richardson's office for standard language that will apply for any county wishing to enter into future agreements. The standard language states that each officer remains the employee of their respective agency, whether acting under Navajo law or state law.⁵⁰ Therefore, any liability for the actions of that officer remains the responsibility of his or her employer agency.⁵¹ There is no waiver of either government's sovereign immunity.⁵² However, there is a mutual indemnification clause, despite the Nation's general objection to such clauses.⁵³ Further, any Indian offender arrested for violations of Navajo law is to be transported by the agency making the arrest to a Nation jail.⁵⁴ Any non-Indian offender is to be transported to a state jail, unless the victim is Indian, and then the offender is transferred to federal custody.⁵⁵ Indians committing traffic offenses within the Nation are to be cited into the Nation's courts, while non-Indians are cited into state court, unless the officer or deputy concludes that the road is under the Nation's jurisdiction.⁵⁶ Importantly, the Nation agrees that an Indian arrested after hot pursuit from state territory will be transferred to state custody, essentially waiving the extradition requirement in that circumstance.⁵⁷ The Apache County mutual aid agreement resolves these issues in essentially the same way, except that there is no hot pursuit exception, and Indian offenders regardless of the location of the offense are first to be transported to a Nation jail and must be extradited according to the Nation's laws.⁵⁸

As with funding agreements, cross-commission or mutual agreements are not perfect from either government's perspective. In negotiation of such agreements, compromises on both sides were necessary. Negotiations with other counties, particularly in Arizona, have involved detailed discussion of these issues, especially liability, and have prevented finalization of agreements. However, once executed, they do provide practical and legal solutions to recurring problems. Importantly, they do so with respect for the sovereignty of the Nation and the states.

CONCLUSION

In perhaps no other area is the complexity of modern Indian law and policy more pronounced than in tribal-state relations, because of the dynamic of two sovereigns with different histories and sources of governmental power acting within the same territory. The modern relationship between the Navajo Nation and the state and county

County Sheriff's Office, at § VII(C) (February 6, 2004) (on file with author) [hereinafter *Apache County Mutual Aid Agreement*].

50. See *McKinley Cross-Commission Agreement*, *supra* note 38, § XI.

51. *Id.*

52. *Id.* § XIII.

53. *Id.* § XIV.

54. *Id.* § VIII(A).

55. *Id.* § VIII(B). Under the General Crimes Act, the United States has exclusive criminal jurisdiction over a crime by a non-Indian against an Indian. See 18 U.S.C. § 1152 (1948). An offender may be held by either law enforcement agency for up to twenty four hours pending a transfer of custody to the other agency. *McKinley Cross-Commission Agreement*, *supra* note 38, §§ VIII(H), (I).

56. *McKinley Cross-Commission Agreement*, *supra* note 38, §§ IX(A), (B).

57. *Id.* § VIII(K).

58. *Apache County Mutual Aid Agreement*, *supra* note 49, § XIII.

governments reflects a careful balance of cooperation and independence. In an under-resourced area like the “four corners” region of the Southwest, government-to-government cooperation is a necessary component of providing governmental services. No one government can carry the load, due to large distances, minimal infrastructure, and a limited tax base due to low population and high poverty. Consistent with this reality, the state, county, and Nation governments have compromised on many issues towards a common goal of benefitting tribal and non-tribal citizens. However, such compromises are made in the context of mutual respect for the sovereignty of each government.

Importantly, the relationship between the Nation and the states is ever-changing. Incidents not fully anticipated by either side arise that test the strength of the relationship. Administrations change, and the attitude of the officials in power at any given time can greatly alter the balance agreed upon by prior officials. In the case of the Navajo Nation, the standard contract clauses with Arizona were agreed to under Arizona Attorney General Terry Goddard in 2010.⁵⁹ With new Attorney General Tom Horne in office, it remains to be seen whether Arizona will continue to adhere to the agreement. The standard clauses for New Mexico cross-commission agreements were agreed to under the administration of Governor Bill Richardson. The new administration of Susanna Martinez may or may not follow them in future agreements. Further, a new, reduced Navajo Nation Council recently took office,⁶⁰ and it is unclear whether those officials will change the policies of the Nation affecting tribal-state relations.

What is the lesson for other tribal governments from the Navajo Nation’s experience? First, standard contract clauses are a worthwhile project, particularly if the Indian tribe receives substantial state funding through multiple funding agreements or has law enforcement issues that can be helped through cooperation. There is a lot of time saved by negotiating across-the-board clauses to be plugged into different contracts, allowing implementation of the programs to take precedence over piecemeal legal wrangling. Second, success with such clauses depends on a state or county government that respects the fundamental premise that tribes are sovereign governments existing independent of state authority, with legitimate power over their territories. Third, to enter into agreements with the states, tribes must accept the premise that state and county governments are part of the overall provision of governmental services to tribal members, and that working with such governments requires a compromise from a position of absolute tribal autonomy. A tribe that believes that those governments have

59. See Letter of Arizona Attorney General Terry Goddard to Navajo Nation Attorney General Louis Denetsosie (Aug. 5, 2010) (on file with author). Interestingly, Goddard, a democrat, ran unsuccessfully against Governor Jan Brewer, a republican and the issuer of the executive order exempting tribes from anti-discrimination contract requirements, the same year he approved the standard contract clauses. See EXEC. ORDER NO. 2009-09, *supra* note 20; Paul Davenport, *Arizona Election Results: Jan Brewer Defeats Terry Goddard In 2010 Governor’s Race*, HUFFINGTON POST, Nov. 3, 2010, http://www.huffingtonpost.com/2010/11/03/arizona-election-results-governor_n_773068.html.

60. The Navajo Nation Council was recently reduced from eighty-eight to twenty-four delegates by an initiative approved by the Navajo people. 2 N.N.C. § 102(A), as amended by Navajo Nation Council Legislation No. CAP-10-11, § 3 (enacted Apr. 21, 2011) (implementing the initiative by acknowledging the reduction of the Council to twenty-four members). See *Nelson v. Initiative Comm. to Reduce Navajo Nation Council*, 8 AM. TRIBAL LAW 407 (Nav. Sup. Ct. 2010) (upholding the initiative and ordering election for only twenty-four delegates).

no role to play within tribal territory simply should refuse to enter into any agreements.⁶¹ However, for tribes that do accept a role for such governments, their leaders need to think seriously about what contract clauses they will not waive, and what clauses they are willing to modify or omit from intergovernmental agreements.

Standard clauses are not the answer to all of the problems in provision of governmental services to Indian people. However, they can be part of the solution by facilitating cooperation instead of discord among tribal and state governments, while respecting the sovereignty tribes have fought so hard for throughout United States history.

61. Some commentators have expressed skepticism in the value of tribal-state agreements to tribes, suggesting state governments are not necessarily to be trusted based on the history of tribal-state relations. See Ezra Rosser, *Caution, Cooperative Agreements, and the Actual State of Things: A Reply to Professor Fletcher*, 42 TULSA L. REV. 57, 70-73 (2006) (disagreeing with the conception of tribal-state relations expressed by Professor Matthew Fletcher, *supra* note 1). The purpose of this article is not to support or reject cooperative agreements as a normative question. The reality on the ground for the Navajo Nation is that the Navajo Nation Council and President have decided as a matter of policy to enter into such agreements. This article is intended to assist tribes in deciding how to negotiate and implement such agreements once the decision to enter into such agreements is made.

