MEMORANDUM

State of Alaska
Department of Law

TO:	Mark O'Brien Chief Contracts Officer DOT&PF	DATE:	July 23, 2003
		FILE NO:	665-02-0113
		TEL. NO.:	451-2811
FROM:	Paul R. Lyle Assistant Attorney General	SUBJECT:	Metlakatla Ferry Terminal TERO

Facts

The Annette Island Reserve is an Indian reservation set aside for the Metlakatla Indian Community (MIC), the members of which immigrated to Alaska from British Columbia in 1891. 25 U.S.C. § 495. The Metlakatlans are a recognized List Act Tribe (65 Fed. Reg. 13298, 13302) and are organized under the Indian Reorganization Act, 25 U.S.C. § 476. *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977). The tribe is governed by a council, which has promulgated a Tribal Employment Rights Ordinance (TERO). The tribe seeks to apply the terms of the TERO to an upcoming construction contract to improve the ferry terminal located within the reservation. The TERO requires construction contractors operating within the reservation to grant Native hiring preferences to MIC members and other Indians and to pay a three percent tax, the proceeds of which support MIC's TERO program.

The ferry terminal is located within a perpetual easement granted to the state in 1985 by the BIA and re-issued with identical terms in January 2002. The reasons for the re-issuance of the perpetual right-of-way are unexplained. The easements were issued under 25 U.S.C. §§ 323 -- 328. Attached to the 1985 grant is the necessary tribal approval and a statement that compensation to the tribe under 25 U.S.C. § 325 was waived. Stipulation (m) of both easements provides:

> The Council of Annette Islands Reserve will continue to have the right to enforce Law and Order within the bounds of the right-of-way and nothing unlawful or any business against the ordinances of the Council of Annette Islands Reserve shall be allowed within said right-of-way.

All construction for this project will take place within the right-of-way.

Questions Presented

1. May the Metlakatla Indian Community enforce its TERO against a non-Indian state contractor within a 25 U.S.C. § 323 right-of-way located in the Annette Island Reserve?

2. May DOT&PF lawfully require a state contractor to give hiring preferences to Alaska Natives?

Summary of Advice

Under the specific terms of the ferry terminal easement, we conclude that the land within the easement is "Indian land" within which the tribe may enforce its TERO tax and hiring preferences. State action requiring a state contractor to pay the tribal tax would be constitutional. However, if DOT&PF were to require a state contractor to comply with the TERO Native hiring preference, there is a significant risk that the preference would be declared unconstitutional as a violation of the Equal Protection Clause of the Alaska Constitution. In the absence of evidence demonstrating a pattern of past discrimination against Alaska Natives in their individual employment on state construction projects, a state-enforced Native hiring preference may also violate the Equal Protection Clause of the U.S. Constitution. Therefore, the state may lawfully require a state contractor to pay the TERO tax (and may lawfully reimburse the contractor for payment of the tax), but the state may not require a state contractor to comply with the TERO Native hiring preferences.

Our opinion is limited to the application of MIC's TERO within the ferry terminal easement. MIC might not have jurisdiction to enforce its TERO within other easements in the Annette Island Reserve (if they exist) depending upon the specific terms of those easements. In addition, except for MIC, other Alaska tribes do not reside within reservations and generally do not inhabit Indian country. Consequently, other Alaska tribes would probably not have the authority to enforce TEROs on state projects located near or within their villages, although any question concerning other tribal TEROs will have to be answered on a case-by-case basis.

Our February 4, 1985 memorandum of advice regarding the applicability of the Metlakatla Indian hire ordinance to state projects, 1985 *Inf. Op. Att'y Gen.* (366-287-85; Feb. 4), is hereby abrogated to the extent it conflicts with this opinion.

Legal Analysis

1. Does the Metlakatla Indian Community have jurisdiction to apply its TERO within the ferry terminal right-of-way granted to the state?

This question concerns the extent of tribal authority to regulate the activities of non-

tribal members on land located within a tribe's reservation. Land ownership within Indian reservations often resembles a checkerboard pattern: Some land within reservations is owned by the federal government in trust for the tribes. Some land is owned by individual Indians but is encumbered by conveyance restrictions. Other land, such as the right-of-way for the ferry terminal, has been conveyed by the BIA to non-Indians with the tribe's consent.

The contours of tribal jurisdiction over non-Indian activity on non-Indian land within reservation boundaries have been drawn by the U.S. Supreme Court in two cases; *Montana v. U.S.*, 101 S.Ct. 1245 (1981) and *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997). The Supreme Court has described its *Montana* decision as "the pathmarking case concerning tribal civil authority over nonmembers" of a tribe. *Strate*, 117 S.Ct. at 1409.

> *Montana* … described a general rule that, absent a different congressional direction, **Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation**, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare.

Strate 117 S.Ct. at 1409-10 (emphasis added).[1] Thus, in applying the general rule of

[1] Under the *Montana* rule, the term "nonmember" means a person who is not of Indian descent. The term "non-Indian land" means land located within the exterior boundaries of a reservation that is owned in fee simple (or its equivalent) by non-Indian owners. *Montana*, 101 S.Ct. at 1249.

The two "*Montana* exceptions" mentioned above are narrowly construed. *Strate*, 117 S.Ct. at 1415-16. The first exception (consensual relationship with tribe) is limited to "commercial dealing, contracts, leases, or other arrangements" and requires "that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Atkinson Trading Co. v. Shirley*, 121 S.Ct. 1825, 1833 (2001)(citation and inner quotation marks omitted). The "consensual relationship" exception of *Montana* does not apply to intergovernmental agreements between states and tribes. *State of Montana, Dep't of Transp. v. King*, 191 F.3d 1108, 1113-14 (9th Cir. 1999); *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998). The "other arrangements" referred to in the first *Montana* exception "also must be of a commercial nature." *Boxx v. Long Warrior*, 265 F.3d 771, 776 (9th Cir. 2001). In addition, the issuance of an easement, like the one at issue in this case, does not constitute a "consensual relationship" with a tribe under the first *Montana* exception. *King*, 191 F.3d at 1113 ("[T]ransfers of property interests between governmental entities create property interests; they generally do not create continuing consensual relationships.")(citation

Montana, it is necessary to know whether the nonmember activity a tribe seeks to regulate occurs within land that is classified as non-Indian fee land or its equivalent. That consideration brings us to the Supreme Court's decision in *Strate*.

In *Strate*, the Supreme Court was asked to decide whether a tribal court had jurisdiction over litigation concerning an automobile accident involving nonmembers that occurred within a state highway traversing an Indian reservation. *Strate*, 117 S.Ct. at 1408. The right-of-way grant was issued under 25 U.S.C. § 323, the same statute under which the Metlakatla ferry terminal easement is issued. *Id.* at 1408, 1414. *Strate* held that the land within the right-of-way was equivalent to "alienated, non-Indian land" for the purpose of applying the general *Montana* rule. *Strate* 117 S.Ct. at 1413-14. The Court held that the tribe had no jurisdiction over the automobile accident: The accident occurred on non-Indian land and, under *Montana*'s main rule, tribes have no inherent power to regulate or adjudicate the activity of nonmembers on non-Indian land within a reservation.[2]

In order to determine whether the right-of-way in *Strate* was equivalent to "non-Indian land," the Court reviewed the specific terms of the right-of-way grant. The Court found that the tribe had not reserved any significant sovereign powers for itself when it consented to the grant of the easement to the state. The tribe retained no "gatekeeping" right or right to exercise "dominion or control" over the easement. *Strate*, 117 S.Ct. at 1414. The absence in the grant of a "landowner's right to occupy and exclude" others from the easement area, rendered the land within the easement equivalent to non-Indian fee-owned land over which the tribe lost jurisdiction. *Strate*, 117 S.Ct. 1413-14. It was the surrender of the tribe's gatekeeping rights in the terms of the easement (not the mere granting of the easement) that dispossessed the tribe of its jurisdiction over the right-of-way. Therefore, under *Strate*, the easement at issue must be examined to see if the tribe has retained the right to exercise some degree of dominion and control over the easement.

The centrality of the terms of the easement to the determination of whether a specific grant converts a right-of-way into "non-Indian" land under *Montana* and *Strate* is underscored by a pair of recent decisions in the Ninth Circuit, *State of Montana, Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999), and *McDonald v. Means*, 309 F.3d 530, 537-540 (9th Cir. 2002).

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omitted).

The second *Montana* exception (protecting tribal health, welfare and political structures) permits a tribe to regulate the activities of nonmembers on non-Indian land within a reservation only when it "is necessary to protect tribal self-government or to control internal [tribal] relations." *Strate*, 117 S.Ct. at 1416.

[2] *Strate* also held that neither *Montana* exception applied. 117 S.Ct. at 1415-16.

In *King*, the Ninth Circuit held that a tribe could not apply or enforce its TERO on state road maintenance projects within a right-of-way that traversed a reservation. Applying *Montana* and *Strate*, the court held that the tribe had no regulatory jurisdiction over the road because the tribe had not reserved a gatekeeping right within the easement. *King*, 191 F.3d at 1113. The court in *King* also examined the *Montana* exceptions and concluded that neither exception applied. The first exception (consensual relationship with the tribe) did not apply because that exception does not cover intergovernmental agreements between states and tribes. *Id.* at 1113-14, *citing*, *County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998). The second *Montana* exception (protecting tribal self-government) did not apply because enforcement of the TERO was not necessary to preserve "the internal functioning of the tribe and its sovereignty." *King*, 191 F.3d at 1114 (inner quotes omitted).

In *McDonald v. Means*, 309 F.3d 530, 537-540 (9th Cir. 2002), the Ninth Circuit held that BIA tribal roads built within a reservation – title to which are held in trust by the BIA for the benefit of the tribe – are roads over which tribes relinquish "some, but not all, of the sticks that form the landowner's traditional bundle of gatekeeping rights." *Id.* at 539. Because, under federal regulations, BIA tribal roads remain "subject to the authority of the tribe, both [for] rulemaking and enforcement" purposes, the court in *McDonald* held that the tribe retained full jurisdiction over the road and had authority to try a case concerning an automobile accident that occurred within the easement and that involved both members and nonmembers.

The lesson of *Strate*, *King*, and *McDonald* is that a tribe has regulatory jurisdiction over nonmember activity within rights-of-way traversing Indian reservations only if the granting document retains for the tribe some dominion and control over the easement or some gatekeeping right to occupy and exclude others from the easement. If no gatekeeping right is retained in the conveyance, *Strate* and *King* teach that the tribe has no jurisdiction to regulate or adjudicate activities undertaken within the easement. However, if the conveyance reserves in the tribe sufficient gatekeeping rights, then *McDonald* teaches that the tribe does have jurisdiction to regulate nonmember activities taking place within the right-of-way. Therefore, it is necessary to review the Metlakatla ferry terminal easement to see if MIC has retained sufficient gatekeeping rights.[3]

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[3] Other Ninth Circuit decisions have also been careful to review the specific provisions of easement grants to determine whether tribes have regulatory jurisdiction over certain lands located within their reservations. *Boxx v. Long Warrior*, 265 F.3d 771, 775 (9th Cir. 2001)(A tribe has no jurisdiction over a road crossing its reservation where the road was built by the National Park Service. The Court examined the grant and found it reserved to the tribe nothing more than grazing rights within portions of the right-of-way not developed for road use.); *Burlington Northern R. Co. v. Red Wolf*, 196 F.3d 1059, 1063 (9th Cir. 2000), *cert. denied*, 120 S.Ct. 1964 (2000)(A tribe has no jurisdiction over a railroad right-of-way

Stipulation (m) of the Metlakatla easement retains in the tribe "the right to enforce Law and Order" within the right-of-way, to prohibit any activity that is "unlawful" and to exclude "any business against the ordinances of the Council". Thus, the tribe has retained some gatekeeping rights, including the right to exclude any activity within the easement that violates tribal law. The prohibition of activity unlawful under tribal ordinances presumably includes the operation of any business activity that fails to comply with the tribe's TERO.

Stipulation (m) is not a model of drafting clarity. It may be susceptible to an interpretation that the tribe reserved only tribal powers designed to address general welfare issues, such as the exclusion of businesses against public decency and public order. In *Strate*, the tribe's retention of nothing more than the right to patrol the right-of-way was insufficient to establish the tribe's right to occupy and exclude. *Strate*, 117 S.Ct. at 1414 n. 11 ("[T]ribal power to stop and detain alleged offenders in no way confers an *unlimited* authority to regulate".)(citation omitted, italics in original). However, stipulation (m) seems to go beyond the tribal patrol and monitoring rights exercised by the tribe in *Strate*.

The Metlakatla easement falls somewhere between the *Strate* and *King*-type easements that retain virtually no gatekeeping rights and the *McDonald*-type easements that retain almost all gatekeeping rights. As stated above, the MIC easement reserves the right to exclude activities and businesses from the right-of-way that are unlawful under tribal law as well as the right to enforce tribal law and ordinances within the easement. While not entirely free from doubt, in our opinion, this provision in the Metlakatla easement distinguishes it from the easements construed in *Strate* and *King* and aligns it with the easement construed in *McDonald*.

In our opinion, a court would probably rule that the MIC easement retains gatekeeping rights in the tribe sufficient to authorize tribal enforcement of MIC's laws and ordinances against nonmembers who conduct business within the easement. Tribal law requires construction businesses to comply with the TERO and MIC has specifically retained the right

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crossing a reservation. The court examined the congressional grant of land to the railroad and found it conveyed "absolute" control over the easement to the railroad.); *Big Horn County Electric Coop v. Adams*, 219 F.3d 944, 949-50 (9th Cir. 2000)(A tribe has no regulatory jurisdiction to tax a utility's property. The court examined the grant and determined that the grant had reserved no dominion or control rights for the tribe.); *Wilson v. Marchington*, 127 F.3d 805, 814-15 (9th Cir. 1997)(A tribe has no jurisdiction over a highway right-of-way granted to a state where the road was constructed under a treaty provision allowing construction of roads and reserving no tribal right to "govern the conduct of nonmembers on the highway."); *Chiwewe v. Burlington Northern R. Co.*, 2002 WL 31922564 at *3 (D.N.M. Oct. 21, 2002)(In applying the holding in *Red Wolf* to a railroad right-of-way, the district court noted that *Strate* requires a detailed review of the right-of-way grant.)

to prohibit any business from conducting activity against the ordinances of the Council. Therefore, the tribe would likely be successful in convincing a court that it has retained sufficient jurisdiction within the easement to apply and enforce its TERO against a non-Indian state contractor.

You should be aware, however, of a recent case that indicates the U.S. Supreme Court may be moving away from reliance upon land status as a primary jurisdictional fact in cases addressing tribal jurisdiction over nonmember activity within an Indian reservation. In *Nevada v. Hicks*, 121 S.Ct. 2304 (2001), the Court was asked to decide whether a tribal court had jurisdiction to entertain a lawsuit by a member Indian against state officials who executed a search warrant on Indian-owned land located within a reservation. The search warrant was related to an alleged off-reservation crime. The Court clarified that

> the general rule of *Montana* [that tribes have no jurisdiction over nonmembers] applies to **both Indian and non-Indian land.** The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is necessary to protect tribal self-government or to control internal relations. It may sometimes be a dispositive factor. Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception [not relevant to Metlakatla], we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.… But **the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers.**

Hicks, 121 S.Ct. at 2310 (emphasis added)(citations omitted). The Court therefore presumed that the tribe had no jurisdiction over the nonmember state officials, even on Indian-owned land, unless one of the *Montana* exceptions applied. The first *Montana* exception did not apply because there was no qualifying consensual relationship between the tribe and the state officials. *Id.* at 2310 n. 5. Balancing the state's sovereign interest in enforcing off-reservation violations of state law within a reservation against the tribe's sovereign interests within its own land, the Court held that tribal jurisdiction over state officials was not necessary to protect tribal self-government or internal relations under the second *Montana* exception. *Id*. at 2313. Thus, the tribal court had no jurisdiction to entertain the lawsuit against the state officials.

Hicks clarifies that Indian ownership of land within a reservation, standing alone, is insufficient to confer tribal jurisdiction over the activities of nonmembers – even on Indian land – unless the tribe is able to establish one of the two *Montana* exceptions (consensual relationship or protection of tribal political integrity). Thus, the state could argue that, even if the ferry terminal easement is Indian trust land (as opposed to alienated non-Indian land), the trust status of the land itself would not be enough to support tribal authority to regulate

the hiring activities of a nonmember state contractor. If a court were to accept this premise, Metlakatla would have to demonstrate the existence of facts that would support the application of one of the two *Montana* exceptions. The tribe would have difficulty establishing either *Montana* exception given the Ninth Circuit's decisions in *King* and *County of Lewis* that *Montana*'s first exception (consensual relationship) does not apply to intergovernmental agreements or grants creating property rights, and *King's* conclusion that the enforcement of TEROs is not essential to preserve tribal self-government under the second *Montana* exception. *King*, 191 F.3d at 1113-14.

While it may be tempting to argue that the status of the ferry terminal land is not dispositive under *Hicks* and that, under *King*, neither *Montana* exception applies to confer jurisdiction on the tribe to enforce its TERO, we recommend against making this argument. Two concerns counsel restraint.

First, the Court in *Hicks* stated that its holding was **limited** to the issue of whether tribal courts have jurisdiction over state officials while those officials are enforcing state process on Indian land within a reservation for an off-reservation violation of state law. *Hicks*, 121 S.Ct. at 2309 n. 2. *Hicks* expressly left open the question of tribal court jurisdiction over nonmember defendants in general, which is akin to the question in the Metlakatla TERO case. *Id.* Alaska's sovereign interest in enforcing its process within the reservation is not an issue in this case. Given the different factual context of the Metlakatla case, the courts may draw a different balance between the tribal and state sovereign interests at stake.

Second, in *McDonald*, the Ninth Circuit – relying on the Supreme Court's statement that its holding in *Hicks* was limited – refused to apply *Hicks* to bar tribal jurisdiction over nonmember conduct on tribally-owned land and, instead, applied a traditional *Strate* analysis giving land status a primary jurisdictional role. *McDonald*, 309 F.3d at 540 & n. 9. Thus, without some intervening decision from the Supreme Court, it would be difficult to convince the Ninth Circuit that the ownership status of land and the retention of gatekeeping rights by MIC in the ferry terminal easement are no longer primary jurisdictional facts under *Montana*, *Strate* and *King*.

Therefore, we conclude that, under the particular terms of the ferry terminal easement, a court would probably hold that the Metlakatla ferry terminal easement is Indian land over which MIC has retained the right to impose and enforce its TERO.

We strongly caution that our opinion that MIC may enforce its TERO in this case applies **only** to the ferry terminal easement. MIC's TERO may not be enforceable within other easements (if they exist) where MIC has not retained a gatekeeping right.

Moreover, you should not construe this opinion to mean that TEROs are generally

enforceable by tribes on state projects. MIC enjoys a unique status among Alaska's tribes. Except for MIC, tribes in Alaska are not resident within Indian reservations and generally do not otherwise inhabit Indian country. Tribes that do not inhabit Indian country have no authority to regulate the activities of nonmembers in or near their villages and have no authority to enforce hiring preferences or assess taxes against nonmember state contractors. *Alaska v. Native Village of Venetie Tribal Government*, 118 S.Ct. 948 (1998).

2. May DOT&PF lawfully require a state contractor to give hiring preferences to Alaska Natives?

Our conclusion that MIC may apply and enforce its TERO against a nonmember state contractor operating within the ferry terminal easement requires us to examine whether the state may require a state contractor to comply with the tribe's TERO. In our opinion, the Equal Protection Clause of the Alaska Constitution likely prohibits the state from requiring a state contractor to comply with Native hiring preferences required under a TERO. We conclude that a court would likely declare unconstitutional – on equal protection grounds – any provision in a state contract requiring hiring preferences to be given to a certain class of Alaska residents at the expense of other citizens of the state.

Equal protection issues are not easily analyzed under Alaska's Constitution. Therefore, a brief explanation of the analytical framework adopted by the Alaska Supreme Court to address equal protection claims is a necessary prerequisite to understanding our conclusion.

The Equal Protection Clause of the Alaska Constitution provides greater protection to individual rights than does its counterpart in the U.S. Constitution. *Lampkin v. Fairbanks North Star Borough*, 956 P.2d 422, 429 (Alaska 1998). The Alaska Supreme Court applies a "sliding scale approach" in assessing equal protection claims brought under the Alaska Constitution. *Id.* at 429-30. Under this approach, the court balances the importance of the individual interest impaired by the state's action against the governmental interest underlying the state's action. Depending upon the importance of the individual interest at stake, the purpose underlying the state's action must be somewhere between "legitimate" and "compelling."

If the state's interest is at least legitimate, then there must be a nexus between the state's interest and the means the state chooses to achieve or protect that interest. Again, depending on the importance of the individual interest at stake, the nexus between a state interest and the means chosen to achieve it must fall on a continuum between a "substantial relationship" (the minimal level of scrutiny) and the "least restrictive means." *Lampkin*, 956 P.2d at 429-30.

The Alaska Supreme Court has already applied its sliding scale balancing test to strike

down regional residency hiring preferences in state construction contracts. *State v. Enserch Alaska Construction*, 787 P.2d 624 (Alaska 1989). In *Enserch*, the court held that an individual's right to engage in economic activity was an "important" one, subjecting the hiring preference in that case to close scrutiny under the court's sliding scale analysis. *Enserch*, 787 P.2d at 633. The state's "objective of economically assisting one class [of citizens] over another" was held to be "illegitimate." *Id*. at 634. Because the state's interest was illegitimate, the Court ended its constitutional inquiry and declared the regional hiring preference unconstitutional. *Id.*

Based on *Enserch*, Alaska courts would probably regard as unconstitutional any employment preference required on state projects whose objective was to economically assist Alaska Natives or Indians over other citizens. There can be little doubt that Metlakatla's TERO is promulgated to give an employment advantage to Alaska Natives and other Indians within the reservation. While the tribe may have the legal authority to promulgate the ordinance,[4] the state can not require contractor compliance with preferences designed to economically assist one class of citizens over another. *Enserch*, *id*.; *See also Lynden Transport v. State*, 532 P.2d 700, 710 (Alaska 1975)("[D]iscrimination between residents and non-residents based solely on the object of assisting the one class over the other economically cannot be upheld under … the … equal protection clause[].") A Native hiring preference would probably subject the state's action to the highest "least restrictive means" level of scrutiny under Alaska's Constitution. A hiring preference designed to economically assist an ethnic class over other citizens would probably not withstand the rigorous scrutiny of Alaska's sliding scale equal protection analysis, absent evidence of a past pattern of racial discrimination in public contract employment. *See* footnote 6, *infra.*

In concluding that it is likely unconstitutional for the state to require a state contractor's compliance with a TERO's Native hiring preference, we have considered whether 23 U.S.C. § 140(d) delegates to the states the federal trust responsibility toward Indians to provide Native employment on federal-aid highway projects. This statute provides:

Consistent with section 703(i) of the Civil Rights Act of 1964

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[4] Tribes are not bound by the Alaska Constitution. Nor are tribes bound by the provisions of the U.S. Constitution "framed specifically as limitations on federal or state authority. *Santa Clara Pueblo v. Martinez*, 98 S.Ct. 1670, 1676 & n. 7 (1978). The Indian Civil Rights Act requires tribes to provide equal protection of tribal laws to all persons, but does not subject tribes to the Equal Protection Clause of the U.S. Constitution. 25 U.S.C. § 1302(8). A writ of habeas corpus filed in U.S. District Court is the only federal remedy against a tribe for an alleged violation of the Indian Civil Rights Act. 25 U.S.C. § 1303. Civil actions cannot be filed against tribes in federal court for alleged violations of the act. *Martinez*, 98 S.Ct. at 1677, 1683-84.

> (42 U.S.C. 2000e-2(i)), nothing in [section 140] shall preclude the preferential employment of Indians living on or near a reservation on projects and contracts on Indian reservation roads. **States may implement a preference for employment of Indians on projects carried out under this title near Indian reservations.** The Secretary [of Transportation] shall cooperate with Indian tribal governments and the States to implement this subsection.

(emphasis added).[5] The significance of a federal statute that delegates federal trust obligations toward Indians to the states is that state action undertaken pursuant to that delegation is subjected to a lower level of judicial scrutiny when analyzing state action under the Equal Protection Clause of the U.S. Constitution.

Under federal equal protection analysis, classifications on the basis of race are "suspect classifications" subject to strict judicial scrutiny. Discrimination based upon "invidious racial discrimination" is unconstitutional. *Morton v. Mancari*, 94 S.Ct. 2474, 2483 (1974). However, when Congress passes legislation favoring Indians it does so on the basis of the Indian Commerce Clause, treaties with tribes and its unique guardianship-ward relationship with Native Americans. *Mancari*, 94 S.Ct. at 2483. Federal legislation favoring Native Americans is based on this special **political** status of Indians rather than on constitutionally impermissible racial classifications. Therefore, the "rational basis" test for determining whether legislation violates federal equal protection is applied, at least where the federal legislation is related to "uniquely Indian interests." *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997); *Mancari*, 94 S.Ct. 2474 (Indian hiring preference for positions within the BIA upheld under the rational basis test of the Equal Protection Clause of the U.S. Constitution); *Alaska Chapter, Associated General Contractors v. Pierce*, 694 F.2d 1162, 1166-70 (9th Cir. 1982)(Indian hiring preference for federally-funded Indian housing projects upheld as rationally related to trust obligation of federal government under the Equal Protection Clause of the U.S. Constitution).

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[5] Section 140 of the Highway Act requires the states to assure that "employment in connection with proposed projects will be provided without regard to race, color, creed, national origin, or sex." Section 703(i) of the Civil Rights Act exempts from a charge of discrimination any employer conducting business on or near an Indian reservation who publicly announces an intention to grant preferential hiring treatment to Indians living on or near a reservation. The sentence highlighted above was added to the statute in 1991 and was intended to clarify that Indian hiring preferences on any Title 23 project near a reservation would not violate the Civil Rights Act. 3 *U.S. Code Cong. and Admin. News* 1609 (1991); 137 *Cong. Rec.* E-3566 (Oct. 28, 1991).

States do not enjoy the unique relationship that the federal government has with tribes. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 99 S.Ct. 740, 761 (1979). Therefore, if a state requires a Native hiring preference, the state's action will most likely be treated as a racial classification subject to strict scrutiny under the federal Equal Protection Clause and might be struck down as unconstitutional.[6] *Malabed v. North Slope Borough*, 42 F.Supp.2d 927, 937-42 (D.Alaska 1999)(striking down as violating federal equal protection a borough ordinance giving an employment preference to Indians for job openings in borough government because the hiring preference did not affect uniquely Indian interests and the borough has no trust obligation toward Indians); *Tafoya v. City of Albuquerque*, 751 F.Supp. 1527 (1990)(declaring an Indian preference for business licenses to sell wares in a downtown area unconstitutional as a racial classification prohibited under federal equal protection because the city had no trust responsibility toward Indians and failed to make a particularized showing of past discrimination against Indians in the granting of licenses).

However, a state action favoring Indians will be accorded the same constitutional treatment received by federal legislation if the state is acting pursuant to a congressional delegation to the state of the federal trust obligation to Indians. *Confederated Bands and Tribes*, 99 S.Ct. at 761. Thus, if Congress delegated to Alaska the power to legislate Native hiring preferences on highway projects, then, under the U.S. Constitution, the state's enactment of a preference may only be required to be "rationally related" to the delegated duty toward Indians. Furthermore, if the state were acting in furtherance of a congressional delegation over Indian affairs, state action granting Native hiring preferences in state contracts may be viewed under the Alaska Constitution as a "legitimate" goal for the purpose of applying the state's equal protection sliding scale balancing test. Because state jurisdiction over tribal affairs

> erodes tribal self-government and federal protection … the Supreme Court has held that the congressional purpose to delegate Indian country jurisdiction to a state must be **clearly and specifically expressed.**

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[6] Statutes granting preferences in federal contracts based on race or other suspect classifications are subject to strict scrutiny under the federal constitution. *Adarand Constructors v. Pena*, 115 S.Ct. 2097 (1995). Under the strict scrutiny standard, the government must demonstrate an identifiable pattern of past discrimination against the preferred group, must demonstrate a compelling interest in granting the preference, and must show how the preference is "narrowly tailored" to cure the past discrimination. *City of Richmond v. J.A. Croson Co.*, 9109 S.Ct. 706, 727-28 (1989). This standard is very difficult to meet, especially where there is no statistical evidence demonstrating past discrimination.

F. Cohen, *Handbook of Federal Indian Law*, p.361 (1982 ed.)(emphasis added). We have examined cases where the courts have determined that Congress clearly and expressly delegated to the states the federal trust responsibility toward tribes and conclude that § 140(d) is not a delegation of the federal trust obligation.

In *Washington v. Confederated Bands and Tribes*, 99 S.Ct. 740, the Court considered whether Public Law 280 (P.L. 280) was an express congressional delegation to the states of civil and criminal jurisdiction over Indians residing in Indian country. Section 4 of P.L. 280 provided that certain states "**shall have jurisdiction**" over criminal and civil actions concerning Indians residing in Indian country. (emphasis added) Section 7 of P.L. 280 provided that states not listed in § 4 could assume jurisdiction over Indian country if they chose to do so. Section 7 provided: "The **consent of the United States is hereby given** to any other State … **to assume jurisdiction**" over Indian country. (emphasis added) The Court held that this language constituted an express delegation of the federal trust responsibility to the states and, because the State of Washington was acting pursuant to that delegated power when it passed a statute assuming P.L. 280 jurisdiction under section 7, that statute was evaluated and upheld against a federal equal protection challenge under the rational basis test. *Confederated Tribes and Bands*, 99 S.Ct. at 761-62.

In *Rice v. Rehner*, 103 S.Ct. 3291, 3301-02 (1983), the Supreme Court considered whether 18 U.S.C. § 1161 was a delegation to the states and Indian tribes of congressional authority over liquor transactions within Indian country. That statute provided that federal laws did not apply to liquor transactions in Indian country if the

> transaction is **in conformity both with the laws of the State** … and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country … .

18 U.S.C. § 1161 (emphasis added). The Supreme Court held the congressional intent to delegate to the states authority over liquor transactions within Indian country was clear from the face of this statute and its legislative history. *Rice*, 103 S.Ct. at 3303 & n. 17.

In *Alabama-Coushatta Indian Tribe of Texas v. Mattox*, 650 F.Supp. 282 (W.D.Tex. 1986) the federal statute terminating the United States' trust relationship with a tribe provided that all Indian lands conveyed to Texas "**shall be held in trust** for the benefit of the [tribes]" and further provided that the "**laws of the several States shall apply** to the tribe in the same manner as they apply to the citizens or persons within their jurisdiction." 25 U.S.C. §§ 721, 726 (emphasis added). The court held that the federal statute passed all federal trust responsibilities to the State of Texas. *Mattox*, 650 F.Supp. at 288-89. As in the other cases, a state statute accepting the delegated federal power passed constitutional muster under the rational basis test.

In our opinion, the language in § 140(d) of the Highway Act is not comparable to the language or structure of those federal statutes that have been held to delegate federal trust authority to the states. P.L. 280 explicitly authorized states to assert their civil jurisdiction within Indian country. *Confederated Tribes and Bands*, 99 S.Ct. at 761-62. In 18 U.S.C. § 1161, Congress explicitly made state and tribal laws applicable to liquor transactions within Indian country. *Rice*, 103 S.Ct. at 3303. In *Alabama-Coushatta*, 650 F.Supp at 284, 286, Congress expressly terminated supervision over a tribe and provided that the laws of the several states would thereafter be applied to the tribe and its members.

Neither the plain language of section 140(d) nor its legislative history evidence a "clear purpose" by Congress to "readjust the allocation of jurisdiction over Indians" between the states and the federal government with respect to Indian employment preferences on highway projects. *Confederated Bands and Tribes*, 99 S.Ct. at 761. Section 140(d) merely states that Indian employment preferences, if granted, do not violate federal equal employment opportunity laws. This statement is a far cry from delegating to states jurisdiction over Indians or Alaska Natives to legislate or enforce Native hiring preferences on federal-aid highway projects. Therefore, in our opinion, 23 U.S.C. § 140(d) is not a delegation to the states of the federal trust obligation to Indians regarding employment preferences on highway projects.

Because 23 U.S.C. § 140(d) is not a clear and express congressional delegation to the states of the federal trust responsibility over Indian employment issues on federal-aid highway projects, any contract requiring a state contractor to comply with a Native hiring preference would likely be classified as either an *Enserch*-prohibited regional hiring preference or an ethnic hiring preference designed to economically assist one class of state citizens over another. Disparate treatment of citizens based on these classifications might not withstand strict scrutiny under the U.S. Constitution or the sliding scale analysis used to evaluate denial of equal protection claims under the Alaska Constitution.[7]

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[7] If 23 U.S.C. § 140(d) is a delegated trust obligation, then the outcome of a challenge under the Alaska Constitution to a Native employment preference is more difficult to predict. The individual right of state residents to engage in economic activity will be deemed "important," subjecting the preference scheme to at least close scrutiny. *Enserch*, 787 P.2d at 633; *Lampkin*, 956 P.2d at 430.

If the court accepts that a Native employment preference is based on a political classification made in furtherance of a delegated federal trust obligation, then it will probably deem the state's interest to be at least "legitimate." However, although the state's interest may be legitimate, the court will probably require the state to establish a very close nexus between the trust obligation and the employment preference for two reasons.

CONCLUSION

In our opinion, MIC has retained sufficient gatekeeping rights within the ferry terminal easement to classify the land within the easement as "Indian land." Tribes have the power to tax the activities of nonmembers on Indian lands within their reservations. *Atkinson Trading Co. v. Shirley*, 121 S.Ct. 1825, 1831-32 (2001); *Merrion v Jicarilla Apache Tribe*, 102 S.Ct. 894, 901 (1982); *Washington v. Confederated Tribes of Colville Indian Reservation*, 100 S.Ct. 2069, 2080-81 (1980). Therefore, the tribe may impose its TERO tax on the state's contractor. Bidders on the ferry terminal project should be notified in the solicitation for bids of this tax and should be advised to factor the tax into their bids.

While the tribe may have the authority to impose its TERO employment preference on a contractor operating within the ferry terminal easement, there is a significant risk that a court would rule the state can not constitutionally require a contractor to provide Native hiring preferences.

Since the TERO tax could be validly imposed on the state contractor by the tribe, and the contractor could be validly reimbursed for paying this local tax,[8] we suggest that DOT&PF consider negotiating a solution with the tribe that would require the state contractor to pay the tax while exempting the contractor from the hiring preferences. If this solution can not be successfully negotiated, we recommend that DOT&PF forego construction of the project.

First, the court has often stated that the Alaska Constitution provides greater protection to individual rights than does the U.S. Constitution. *Enserch*, 787 P.2d at 631 and cases cited at n. 11; *Lampkin*, 956 P.2d at 429. Second, the court has not hesitated to examine the objectives behind the government's stated goals in analyzing alleged equal protection violations. *Enserch*, *id*. at 634; *Lynden Transport*, 532 P.2d at 710. Any stated goal of government that appears to include an underlying objective to economically favor one class of state residents over others will likely be subjected to heightened scrutiny by the Alaska Supreme Court. While it is difficult to predict whether a Native hiring preference granted under a congressionally delegated trust power would pass constitutional muster under Alaska's Equal Protection Clause, it is certain that any preference would face serious scrutiny in Alaska's courts. We need not resolve this difficult question, however, since we have determined that § 140(d) does not constitute a congressional delegation of the Indian trust obligation.

[8] FHWA treats TERO taxes as a participating expense on federal-aid projects if the tax rate for highway construction contracts is the same for all contracts to which the TERO tax applies. FHWA Notice N 4720.7.