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State v. Romero: The Legacy of Pueblo Land Grants and the Contours of Jurisdiction in Indian Country

Robert L. Lucero Jr.

STATE V. ROMERO: THE LEGACY OF PUEBLO LAND GRANTS AND THE CONTOURS OF JURISDICTION IN INDIAN COUNTRY

ROBERT L. LUCERO, JR.*

I. INTRODUCTION

The New Mexico Pueblos have always been unique among the native peoples of the Americas, particularly in the way that they relate to other sovereigns.[1] Currently, three sovereigns, the United States, New Mexico, and the Pueblo governments, hold jurisdiction to varying extents and over various matters in Pueblo Indian country within the boundaries of the State of New Mexico.[2] During the summers of 2001 and 2002, two separate incidents led to criminal charges against Pueblo Indians in northern New Mexico.[3] The resulting criminal cases worked their way through state, federal, and tribal courts as each court considered which had jurisdiction over these matters.[4] In the wake of the delayed prosecution caused by these jurisdictional deliberations, the alleged victims and others became dissatisfied with what appeared to be prosecution-free zones akin to the no-man's land of New Mexico's Old-West days.[5] Eventually, the U.S. Congress stepped in to ensure that crimes committed anywhere in New Mexico would not go without prosecution.[6] Nevertheless, the legislation passed in 2005 was not retroactive and therefore did not apply to the prosecution of these particular defendants.[7] As a result, the New Mexico state judiciary had to decide if it had jurisdiction to try these two cases.

This Note examines the opinion of the New Mexico Supreme Court in *State v. Romero*, in which the court held that the state has no jurisdiction to prosecute crimes committed by Indians within the external boundaries of Pueblo land grants.[8] Part II begins by providing a historical background of both the Pueblo land grants and the

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* University of New Mexico School of Law, J.D. candidate 2008. The author extends his sincere gratitude to Professor Gloria Valencia-Weber for her skilled advisement and to Professors Michael Browde, G. Emlen Hall, and Laura E. Gómez for their continuous encouragement. Deana Bennett, Nikko Harada, Kate Girard, and Tyler Atkins provided invaluable editorial guidance. As always, thank you to Tamarah L. Lucero for your constant support.

1. For a discussion of the unique historical, political, and cultural background of the Pueblos from the perspective of Pueblo authors, see generally EDWARD P. DOZIER, THE PUEBLO INDIANS OF NORTH AMERICA 31–37 (George & Louise Spindler eds., 1970); ALFONSO ORTIZ, THE PUEBLO (Frank W. Porter III ed., 1994); JOE S. SANDO, PUEBLO NATIONS: EIGHT CENTURIES OF PUEBLO INDIAN HISTORY (Ann Mason ed., 1992).

2. *See infra* notes 131–172 and accompanying text.

3. State v. Romero, 2006-NMSC-039, ¶¶ 2–3, 142 P.3d 887, 888–89, *cert. denied*, 127 S. Ct. 1494 (2007).

4. *Romero*, 2006-NMSC-039, 142 P.3d 887; State v. Romero, 2004-NMCA-012, 84 P.3d 670; State v. Gutierrez, No. 24,731 (N.M. Ct. App. May 20, 2004); *see also* Nicholas Riccardi, *A Matter of Jurisdiction, Justice*, L.A. TIMES, June 25, 2006, at A5.

5. *See* Riccardi, *supra* note 4.

6. Congress, led by New Mexico's delegation of representatives and senators, amended the Pueblo Lands Act by adding a provision that mandated the structure of criminal jurisdiction within the Pueblo land grants. Pursuant to this amendment, federal courts have jurisdiction over major crimes committed by or against Indians; the State of New Mexico has jurisdiction over any offense committed by a non-Indian, provided that the case does not fall under the jurisdiction of the United States; and the Pueblos have jurisdiction, "as an act of [their] inherent power as an Indian tribe, over any offense committed by a member of the Pueblo or an Indian," provided that Pueblo jurisdiction has not been preempted by the United States. S. 279, 109th Cong., 119 Stat. 2573, 2573–74 (2005).

7. *Romero*, 2006-NMSC-039, ¶ 1 n.1, 142 P.3d at 888 n.1.

8. *Id.* ¶ 26, 142 P.3d at 896.

legal issue of adjudicative jurisdiction in Indian country.[9] Part III continues by tracing the facts and procedural history of *Romero*.[10] Part IV examines the rationale of the New Mexico Supreme Court and discusses how it came to its conclusions.[11] Part V analyzes the court's rationale, focusing first on its application of the U.S. Supreme Court's analysis in *Alaska v. Native Village of Venetie*[12] and second on its analogy between Pueblos and reservations.[13] Finally, Part VI discusses the implications of *Romero* with respect to civil jurisdiction in Pueblo Indian country, as well as how the *Romero* court has positioned its opinion with regard to state and federal recognition of inherent Pueblo sovereignty.[14] Although the *Romero* court correctly decided the legal issue of whether the State of New Mexico may prosecute Pueblo members for alleged crimes committed within the exterior boundaries of Pueblo land grants, it leaves open possibilities that create more questions than answers for New Mexico practitioners in Pueblo Indian country.

II. BACKGROUND

To better appreciate the analysis and implications discussed below, it is necessary to understand the historical and legal background behind this controversy.[15] First, this Note summarizes the history of Pueblo sovereignty and the Pueblo land grants.[16] Subsequently, it examines the origin and evolution of the term of art "Indian country" as applicable to *Romero*.[17] Finally, the reader is provided with an assessment of the jurisdictional status of Indian country, including an evaluation of inherent tribal sovereignty as a source of tribal jurisdiction.[18] Because each of these topics is rich enough to provide material for a lifetime of scholarship, this Note presents only a thumbnail sketch to familiarize the reader with the historical and legal background relevant to this case.

A. Pueblo History and the Pueblo Land Grants

The history of the Pueblo people is a long one, as they are "an ancient people whose history goes back into the farthest reaches of time."[19] Archeological evidence shows that the ancestors of the Pueblo people occupied land that is now located within the borders of New Mexico and the other four-corners states as early as 10,000 B.C.[20] Indeed, the *Romero* court noted that "Taos Pueblo was settled in approximately 1000 A.D."[21] and that "[o]ur government has previously recognized

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9. *See infra* Part II.
10. *See infra* Part III.
11. *See infra* Part IV.
12. 522 U.S. 520 (1998).
13. *See infra* Part V.
14. *See infra* Part VI.
15. The New Mexico Supreme Court in *Romero* also found it necessary to present a paragraph on this historical and legal background. State v. Romero, 2006-NMSC-039, ¶ 4, 142 P.3d 887, 889, *cert. denied*, 127 S. Ct. 1494 (2007).
16. *See infra* Part II.A.
17. *See infra* Part II.B.
18. *See infra* Part II.C.
19. SANDO, *supra* note 1, at 21.
20. *See* DOZIER, *supra* note 1.
21. State v. Romero, 2006-NMSC-039, ¶ 4, 142 P.3d 887, 889, *cert. denied*, 124 S. Ct. 1494 (2007) (citing

that Pojoaque Pueblo has been inhabited since approximately 850–1100 A.D."[22] Since the beginning of their existence, the Pueblos exercised inherent sovereignty over their land and people, which they have maintained to some extent throughout their history, despite the arrival of other sovereigns: Spain, Mexico, and the United States.[23]

1. New Spain Comes to the Pueblos

The Rio Grande Pueblo people first encountered Europeans when the exploratory expedition of Francisco Vasquez de Coronado, commissioned in 1540, entered Pueblo country.[24] Coronado set up a center of operations at Tiguex Pueblo near present-day Bernalillo, from which he explored the surrounding area and encountered other Pueblos.[25] At that time, the estimated number of Pueblo settlements was between sixty and ninety-two.[26] Not until 1598 did Spanish settlement of New Mexico begin with the entrance of colonists under the organization and leadership of Don Juan de Oñate.[27] Decades of mistreatment and abuse at the hands of Spanish colonists and missionaries resulted in the Pueblo Revolt of 1680.[28]

The Spanish governor at the time of the Pueblo Revolt of 1680 was Antonio de Otermin.[29] The year after the Pueblos expelled the Spanish from New Mexico, Otermin traveled through Pueblo lands on an unsuccessful mission to investigate the causes of the revolt and the identities of the organizers.[30] The next Spanish Governor, Pedro Reneros de Posada, engaged in a comparable mission seven years later and, like Otermin, was unsuccessful.[31] The next year, yet another governor engaged in an expedition through Pueblo lands and, upon returning to El Paso, made grants of land to the Pueblos.[32] A Zia Pueblo man, Bartolomé de Ojeda, served as a witness to "[t]his strange spectacle, of 'conquerors' who had been evicted making

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RUBÉN SÁLAZ MÁRQUEZ, NEW MEXICO: A BRIEF MULTI-HISTORY 4 (1999)).

22. *Id.* (citing Department of the Interior, National Park Service, Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects from New Mexico in the Possession of the Museum of Indian Arts and Culture/Laboratory of Anthropology, Museum of New Mexico, Santa Fe, N.M., 63 Fed. Reg. 35,608 (June 30, 1998)). Interestingly, the *Romero* court, an institution of New Mexico state government, refers to a document produced by the federal government as support for its assertion of what "[o]ur government has previously recognized." *Id.*

23. *See infra* notes 24–95 and accompanying text.

24. *See* DOZIER, *supra* note 1, at 43.

25. *See id.*

26. FELIX S. COHEN ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[2][a], at 320 & n.924 (Nell Jessup Newton et al. eds., rev. ed. 2005).

27. *See* DOZIER, *supra* note 1, at 46–47.

28. SANDO, *supra* note 1, at 61–65. In the period between the beginning of Spanish settlement and the Pueblo Revolt of 1680, "the Pueblo peoples lost 62 percent of their settlements and about 78 percent of their population." ELINORE M. BARRETT, CONQUEST AND CATASTROPHE: CHANGING RIO GRANDE PUEBLO SETTLEMENT PATTERNS IN THE SIXTEENTH AND SEVENTEENTH CENTURIES 2 (2002). For a detailed examination of the Pueblo Revolt, including its causes and aftermath, see ANDREW L. KNAUT, THE PUEBLO REVOLT OF 1680: CONQUEST AND RESISTANCE IN SEVENTEENTH-CENTURY NEW MEXICO (1995).

29. SANDO, *supra* note 1, at 65.

30. *Id.* at 66–67; *see also* KNAUT, *supra* note 28, at 172–74.

31. SANDO, *supra* note 1, at 67.

32. *Id.* Sando notes that each of these governors were acting "in absentia" during their various expeditions. *Id.*

gifts of parcels of land belonging to their victims."[33] Nevertheless, it is to these grants that "all claimants to private lands in [New Mexico]...trace their titles to the original owner, the [Spanish] Crown."[34] Indeed, "[t]he rights of conquest, the law of nations, and even the Pope...agreed that the land of New Mexico belonged to [Spanish monarchs] Ferdinand and Isabella by virtue of their underwriting Columbus's voyages of discovery."[35]

An often-overlooked aspect of New Mexico's legal history during this period is the effort "on the part of the officials of the Spanish government, not only to control the relationship of Spaniard and Indian, but to provide legal protection for the latter."[36] The Spanish governors of New Mexico appointed an official entitled *El Protector de Indios*, who was charged with representing the Pueblos in any litigation before Spanish tribunals or officials.[37] In addition, the Spanish colonial legal system provided protection for the property rights of the Pueblos, as evidenced by a royal *cédula*[38] published in 1687 that describes an ordinance issued in 1567 ordering:

> "[E]ach of the Indian Pueblos as might need land upon which to live and sow, should have given to them five hundred varas, and more should it be necessary; and that from that time forward there should not be granted to anyone lands or grounds unless they should be located a thousand varas, cloth or silk measure, away from and separate from the pueblos and houses of the Indians...."[39]

This royal *cédula* eventually became the basis of the New Mexico governors' authority to make land grants to the Pueblos.[40] Although the *cédula* later speaks of granting land measured up to six hundred *varas* to the north, south, east, and west of the Pueblo center, "constant revision of both the law and general practice increased the size of the pueblo lands to a league, 5,000 varas, in each direction."[41]

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33. *Id.*

34. G. Emlen Hall, *The Pueblo Grant Labyrinth*, *in* LAND, WATER, AND CULTURE: NEW PERSPECTIVES ON HISPANIC LAND GRANTS 67, 72 (Charles L. Briggs & John R. Van Ness eds., 1987). Professor Hall points out the historical irony that "the Pueblos never produced one of these so-called Cruzate grants until very late in the eighteenth century" and furthermore that "late in the nineteenth century, a United States handwriting expert for the Court of Private Land Claims would show these 1689 grants to be clumsy and relatively modern forgeries." *Id.* at 77.

35. *Id.* at 72. The U.S. Supreme Court incorporated the doctrine of property acquisition by conquest and discovery into the law of the United States in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). *See also infra* note 175 and accompanying text.

36. HERBERT O. BRAYER, PUEBLO INDIAN LAND GRANTS OF THE "RIO ABAJO," NEW MEXICO 8 (Arno Press 1979) (1938).

37. CHARLES R. CUTTER, THE PROTECTOR DE INDIOS IN COLONIAL NEW MEXICO, 1659–1821, at 2–3, 106–07 (1986). Despite having an appointed legal representative, Pueblo Indians were also successful in litigation before the Spanish judiciary without the advocate's assistance, often going directly to the governor or even to higher-ranking officials. *Id.* at 69–72; CHARLES R. CUTTER, THE LEGAL CULTURE OF NORTHERN NEW SPAIN, 1700–1810, at 145 (1995) [hereinafter CUTTER, LEGAL CULTURE]; *see also* WOODROW BORAH, JUSTICE BY INSURANCE: THE GENERAL INDIAN COURT OF COLONIAL MEXICO AND THE LEGAL AIDES OF THE HALF-REAL 377 (1983).

38. A *cédula* is "a decree of the Spanish Crown; esp., a royal enactment issued by the Council of Castile or of the Indies." BLACK'S LAW DICTIONARY 237 (8th ed. 2004).

39. BRAYER, *supra* note 36, at 11–12 (quoting a royal *cédula* from June 1687). For a discussion of Spanish standards of measurement, see *infra* notes 41–42 and accompanying text.

40. SANDO, *supra* note 1, at 108.

41. BRAYER, *supra* note 36, at 13. To put Spanish land measurements in modern perspective, a *vara* is a measure of distance roughly equivalent to 33.3 inches, whereas a Spanish league consists of 5,000 *varas*, approximately 2.63 miles. *See id.*; G. EMLEN HALL, FOUR LEAGUES OF PECOS: A LEGAL HISTORY OF THE PECOS

As a result, the accepted size of the Pueblo land grants became standardized during the Spanish period to a measurement of four square leagues, which is equivalent to 17,712 acres.[42]

An important component of the legal protections extended by the Spanish government to the Pueblos consisted of measures to protect their property from fraudulent dispositions and encroachment.[43] Because the Spanish crown viewed Indians as both wards and vassals, "[a]s vassals they could own real property; but the crown tried to protect them, as its official wards, from disposing of it."[44] The Spanish dictated narrow means through which Pueblos and Pueblo members could sell their lands to colonists, requiring a public auction that could only take place after notice was given and thirty days had passed.[45] Another legal mechanism prohibited non-Indians from encroaching on Pueblo lands by requiring a corridor of isolation around the Pueblo land grants within which non-Indians could not graze livestock or engage in agriculture.[46] The problem with this geographic system was that some of the Pueblos, such as Pojoaque and Nambé, were located so closely together that the four leagues of one Pueblo overlapped with those of a neighboring Pueblo.[47] On the other hand, more isolated Pueblos, such as Taos, "had sufficient vacant space between Pueblos to fully enforce government-imposed restrictions on the proximity of new grants from the Crown's public domain."[48] Despite these protective measures, Pueblo lands were sold and encroached upon, resulting in litigation that was resolved inconsistently by Spanish authorities.[49] As unpredictable as Spanish resolutions of land disputes had become, the Pueblos were only beginning their battles to protect their lands.

2. The Mexican Republic and the Pueblos

Although Mexican governance of New Mexico lasted only twenty-five years, from 1821 to 1846, its impact on the Pueblo people was profound.[50] The newly independent Mexican government implemented the *Plan de Ayala*, which did away with distinctions based on race and created one class of citizenship for all Mexican subjects.[51] The *Plan* had many important effects on the Pueblo people:

> Church books, census records, and tax rolls no longer designated entries by Indian and non-Indian status. All now belonged to what one New Mexico official called *la gran familia mejicana,* in which no distinctions were supposedly allowed....Pueblos operated their own municipal governments, paid

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GRANT, 1800–1933, at 84–85 (John R. Van Ness ed., 1984).

42. *See* BRAYER, *supra* note 36, at 13; *see also* CUTTER, LEGAL CULTURE, *supra* note 37, at 38–39.

43. *See* HALL, *supra* note 41, at 12.

44. *Id.*

45. *Id.*

46. *Id.* at 12–13.

47. *See* Hall, *supra* note 34, at 76.

48. *Id.*

49. *See id.* at 78–84.

50. *See infra* notes 51–56 and accompanying text. Although at first some Pueblos swore their allegiance to the Mexican republic, a group of Pueblo Indians and Hispanos united in an unsuccessful rebellion in 1837. DAVID J. WEBER, THE MEXICAN FRONTIER, 1821–1846: THE AMERICAN SOUTHWEST UNDER MEXICO 5, 261–65 (Ray Allen Billington & Howard R. Lamar eds., 1982).

51. BRAYER, *supra* note 36, at 17.

> taxes, and served in the militia along with non-Indians. The Pueblos were full citizens for the first time.[52]

Unfortunately, this citizenship came with a price: the loss of land through sales to non-Indians. Unlike under Spanish rule, with its protections of Indian land against non-Indian acquisition and encroachment, Mexican rule offered no special protections to the Pueblo people.[53] As a result, "the number of real property transfers from Pueblo Indians to non-Indians increased markedly during the period of Mexican rule."[54] Notably, by the end of the Mexican period there were more non-Indians than Indians living within the Pueblo land grants of Pojoaque, Tesuque, Nambé, and San Ildefonso.[55] Although the Pueblos maintained their one-league corridors of isolation surrounding their land grants, "no Pueblo challenged the presence of the large number of non-Indians living within its borders....who claimed a right to be inside the Pueblo boundaries by virtue of a common source—the Pueblo grants now conveyed in part to them."[56] Due to the increasing encroachment on Pueblo lands and the significant changes in the legal status of Pueblo people, the legacy of the Mexican period would have unexpected implications on Pueblo land grants under a new sovereign: the United States.[57]

3. United States Occupation and the Territorial Period

When the United States took possession of the Territory of New Mexico in 1846, it inherited a muddled set of claims and complaints concerning the ownership of property within the Pueblo land grants.[58] Much of this confusion was fueled by various interpretations of the Treaty of Guadalupe Hidalgo,[59] which ended the war between the United States and Mexico in 1848.[60] This treaty provided that Mexican citizens living within the borders of the newly ceded lands could either choose to retain their Mexican citizenship or be considered to have elected to become U.S. citizens by default.[61] In any event, the United States would honor the existing property rights of New Mexicans.[62] Because Mexican law had considered the Pueblo people as full citizens entitled to no more or less than any other citizen, unlike the Spanish legal notion of the Pueblo people as wards/vassals, the United States was faced with a question concerning whether it would consider the Pueblo people as citizens rather than wards.[63]

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52. Hall, *supra* note 34, at 86. Mexican Governor of New Mexico Facundo Melgares instructed that Pueblo Indians were to be considered equal citizens with Hispanos, particularly concerning their right to vote and hold public office. *See* WEBER, *supra* note 50, at 17.

53. Hall, *supra* note 34, at 86.

54. *Id.* at 87.

55. *Id.* at 91.

56. *Id.* at 91–92.

57. *See infra* notes 58–95 and accompanying text.

58. *See* Hall, *supra* note 34, at 91–92; BRAYER, *supra* note 36, at 20–21.

59. Treaty of Peace, Friendship, Limits and Settlement, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

60. *Id.*; BRAYER, *supra* note 36, at 20–21.

61. MYRA ELLEN JENKINS & ALBERT H. SCHROEDER, A BRIEF HISTORY OF NEW MEXICO 49–50 (9th ed. 1993).

62. *Id.*

63. HALL, *supra* note 41, at 69.

Recognizing Indian people as full citizens was at odds with federal Indian law and U.S. policy toward Indians at the time. Such policy viewed native people as wards to be relocated and supervised as the federal government saw fit.[64] As early as 1831, the U.S. Supreme Court recognized that the federal government had an obligation to safeguard the welfare of tribes.[65] This relationship between the tribes and the federal government was characterized as "that of a ward to his guardian."[66]

In contrast to its previous paternalistic relations with other tribes, the Pueblos challenged the United States with "an Indian problem for which it had no precedents" because the Pueblo people were "a sedentary people with permanent villages, and with large areas of land" that they held in fee simple.[67] A glaring question emerged from this problem: what form would the protection provided by the Treaty of Guadalupe Hidalgo take? If the treaty was self-executing,[68] then the United States would face many difficulties in discerning privately held land from public lands,[69] particularly in light of the contested nature of land claims described above.[70] To avoid these complications, the United States deemed that it held all of the formerly Mexican lands as a sovereign power.[71] The new sovereign then established a process for claimants to assert their property rights.[72] Pueblo people were quick to point out that their property rights had been vested in fee simple since the time of the grants from the Spanish crown.[73] In 1858, the U.S. Congress confirmed and patented the Pueblo land grants.[74] Nevertheless, non-Indian encroachment on Pueblo lands continued, and although New Mexico Territorial Governor James S. Calhoun communicated the Pueblos' land grant problems to Washington D.C., the federal government did little to address his concerns.[75]

The territorial and federal courts affirmatively addressed, however, the question of the legal status of the Pueblo Indians and their lands. In an 1869 case, *United States v. Lucero*,[76] the New Mexico Territorial Supreme Court addressed the legal

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64. BRAYER, *supra* note 36, at 20.

65. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16–17 (1831); *see also infra* note 180 and accompanying text.

66. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

67. BRAYER, *supra* note 36, at 20. For a discussion of the impact of the Treaty of Guadalupe Hidalgo on the Pueblos, see Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 215–17 (1996).

68. "[T]reaties are self-executing under the Supremacy Clause of the U.S. Constitution (art. VI, § 2) if textually capable of judicial enforcement and intended to be enforced in that manner." BLACK'S LAW DICTIONARY, *supra* note 38, at 1391.

69. *See* HALL, *supra* note 41, at 70.

70. *See supra* notes 32–69.

71. *See* HALL, *supra* note 41, at 70.

72. *Id.*

73. *Id.* at 71. In fact, "General Kearney had been in Santa Fe for less than two days when a delegation of Pueblo Indians met with him and demanded that the [United States] government do something to restore the lands stolen from them by Spanish and Mexican settlers." *Id.*

74. Act of Dec. 22, 1858, ch. 5, 11 Stat. 374.

75. HALL, *supra* note 41, at 73.

76. 1 N.M. 422 (1869). For engaging accounts of the preceding events and the aftermath of the *Lucero* decision, see HALL, *supra* note 41, at 116–20, and Laura E. Gómez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 CHICANO-LATINO L. REV. 9, 33–38 (2005).

question of whether the Trade and Intercourse Act of 1834,[77] which prohibited U.S. citizens from encroaching on tribal lands, applied to the Pueblos.[78] In a racially charged opinion that revealed the institutional prejudice of the United States against Native Americans at the time, the court held that the Act did not apply to the Pueblos because the Pueblo people were not "a wild, savage, and barbarous race," but instead, they were citizens of the United States due to the operation of the Treaty of Guadalupe Hidalgo.[79] This holding implied that the Pueblo people were not entitled to the trusteeship that the United States provided other tribes. Ten years later, the U.S. Supreme Court decided the case of *United States v. Joseph*,[80] echoing the *Lucero* court's holding that the 1834 Act did not apply to the Pueblos.[81] Although the U.S. Supreme Court acknowledged that the Pueblos "hold their lands by a right superior to that of the United States....[dating] back to grants made by the government of Spain,"[82] this acknowledgement did little to prevent the loss of Pueblo lands due to encroachment by non-Indians.[83] As a result of the *Lucero* and *Joseph* decisions, the Pueblos were left without governmental protection of their lands and with little respect for their inherent tribal sovereignty.[84] This situation would continue into the early twentieth century.

4. New Mexico Statehood

It was not until the New Mexico Territory achieved statehood in the early twentieth century that the alienation of Pueblo lands received serious reconsideration from the Federal government. The U.S. Congress passed the Enabling Act for New Mexico,[85] which stated that "all lands...owned or held by any Indian or Indian tribes...acquired through or from the United States or any prior sovereignty...shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress."[86] Shortly thereafter, the U.S. Supreme Court decided the

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77. Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729; *see also infra* note 102 and accompanying text.

78. *Lucero*, 1 N.M. at 427.

79. *Id.* at 425. Notwithstanding this statement, the citizenship of Pueblo people was illusory, and they did not acquire "the primary right of citizenship," i.e., the right to vote, until 1948. *See* SANDO, *supra* note 1, at 90–91.

80. 94 U.S. 614 (1876).

81. *Id.* at 617. The U.S. Supreme Court refrained from going as far as the New Mexico Supreme Court in *Lucero* and did not declare the Pueblo people to be United States citizens; instead the Court limited itself to "decide nothing beyond what is necessary to the judgment we are to render, [and left] that question until it shall be made in some case where the rights of citizenship are necessarily involved." *Id.* at 618.

82. *Id.*

83. *See* HALL, *supra* note 41, at 138. For an engaging account of the preceding events and the aftermath of the *Joseph* decision, see *id.* at 128–38.

84. *See* SANDO, *supra* note 1, at 88–90.

85. Act of June 20, 1910, ch. 310, 36 Stat. 557.

86. *Id.* § 2. This provision was later adopted into the New Mexico Constitution as follows:

> The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States....

N.M. CONST. art. XXI, § 2.

case of *United States v. Sandoval*,[87] in which it held that the Pueblos fell under federal superintendence,[88] departing from the Court's previous decision in *Joseph*.[89] The implication of this case was that the Pueblos, like other tribes, could not alienate their land without federal approval.[90] The unanswered question, however, concerned what should happen to the disputed lands held by non-Indians within the Pueblo land grant boundaries.[91]

The U.S. Congress answered that question by passing the Pueblo Lands Act in 1924.[92] The Act created the Pueblo Lands Board, composed of executive appointees, which examined all property claims within the Pueblo land grants.[93] The attorney general then brought actions to quiet title in federal district court to resolve claims in which the Pueblo Lands Board found no extinguishment of Pueblo title.[94] Through this process the Pueblo land grants were finally adjudicated in terms of title,[95] but the jurisdictional complications that resulted were only beginning.

B. A Brief Legal History of Indian Country

Before examining the modern legal configuration of jurisdiction in Indian country, which is based largely on federal statutes and subsequent judicial interpretations,[96] a brief examination of the history of the term of art "Indian country" serves to illuminate this Note's subsequent analysis of *State v. Romero* and its implications. Terms such as "Indian country" have never had "a single, all-purpose federal definition that [has] operated consistently across time....Nevertheless, these terms have served to delineate jurisdictional authority, legal responsibilities, and property rights through much of federal Indian law."[97]

1. Origins and Development of "Indian Country" Before 1948

The term "Indian country" in America dates back to 1763, when King George of England issued a royal proclamation to create a border between Indian land and land

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87. 231 U.S. 28 (1913).

88. *Id.* at 48–49.

89. United States v. Joseph, 94 U.S. 614 (1876). *Sandoval* did not involve a dispute over title to land within the Pueblo grants, but instead dealt with the status of the Pueblos for determination of the legal question of whether Congress could regulate the importation of intoxicating liquors onto Pueblo lands. *Sandoval*, 231 U.S. at 36–38. The *Joseph* decision was more explicitly overturned by *United States v. Candelaria*, a case involving a quiet title action on Pueblo land, in which the Court decided that "[t]he Indians of the [P]ueblo are wards of the United States, and hold their lands subject to the restriction that the same cannot be alienated in any wise without its consent." 271 U.S. 432, 443 (1926).

90. BRAYER, *supra* note 36, at 25.

91. *See id.*; SANDO, *supra* note 1, at 114.

92. Pueblo Lands Act of 1924, ch. 331, 43 Stat. 636 (repealed 2000).

93. *See id.* § 2; BRAYER, *supra* note 36, at 28.

94. BRAYER, *supra* note 36, at 28.

95. *Id.* The fallout of the Pueblo Lands Act did not favor the Pueblos, as is evidenced by lost Pueblo property rights and charges of neglect of duty and misconduct against Pueblo Lands Board commissioners. *See* SANDO, *supra* note 1, at 114.

96. *See generally* Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973 (2000) (describing the contours of civil and criminal jurisdiction in Indian country); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 715–17 (2006) (providing a "Legal Description of the Indian Country Regime" with regard to criminal jurisdiction).

97. COHEN ET AL., *supra* note 26, § 3.01, at 134 (citation omitted).

belonging to the British colonists.[98] This frontier, set out for the maintenance of peace and the protection of the colonists, stemmed from the recognition of "the reality that areas beyond this border, though claimed by Britain, were effectively beyond its control," and were instead under the control of Indian sovereigns.[99] Within decades of the American Revolution, the U.S. Congress passed the first statutory definition of Indian country, contained in the Indian Intercourse Act of 1796,[100] which was similar to the 1793 Proclamation and stated that all lands beyond the western frontier were Indian country.[101] Subsequently, Congress passed the Trade and Intercourse Act of 1834,[102] which moved the frontier of Indian Country further west and regulated the conduct of individuals in Indian country.[103]

Federal Indian policy changed in the mid-nineteenth century—Indians were removed, often forcibly, onto reservations and granted individual allotments of land in an effort to achieve assimilation.[104] These policies rendered the definition of Indian country unworkable, and in 1874 the Indian country definition was deleted from the revised statutes, leaving courts to arbitrate the meaning of the term.[105] The most important case during this period, *Bates v. Clark*,[106] dealt with the issue of the Indian country status of lands ceded by Indians under the 1834 Act. In *Bates*, the U.S. Supreme Court held that

> all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress.[107]

As applied to the Pueblos, this holding was clarified by the Court in *United States v. Sandoval*,[108] which affirmed that Indian country can exist within the boundaries of a state and found that the Pueblo lands in New Mexico are Indian country based upon the Pueblos' status as "dependent Indian communities."[109] A subsequent case, *United States v. McGowan*,[110] further interpreted the term "dependent Indian community" as applied to lands that, unlike the lands in *Sandoval*, were not held in fee simple by the tribe.[111] Instead, at issue in *McGowan* were lands in the state of Nevada that were bought by the federal government to be held in trust for a tribe for

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98. Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283, 289 (1997). Matal interprets Indian country history in a way that is at odds with several prominent Indian law scholars; however, this is not true concerning his analysis of the intent and content of the 1763 Proclamation. *Id.*

99. *Id.* at 290.

100. Indian Intercourse Act, Act of May 19, 1796, ch. 30, 1 Stat. 469; *see also* COHEN ET AL., *supra* note 26, § 3.04[2][b], at 184.

101. Indian Intercourse Act, Act of May 19, 1796, ch. 30, 1 Stat. 469.

102. Trade and Intercourse Act, Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729.

103. *See* COHEN ET AL., *supra* note 26, § 3.04[2][b], at 185.

104. *See id.*

105. *See id.*

106. 95 U.S. 204 (1877).

107. *Id.* at 209.

108. 231 U.S. 28 (1913); *see* COHEN ET AL., *supra* note 26, § 3.04[2][b], at 187–88 (describing the development of *Sandoval* and other cases as the origins of the modern Indian country statute).

109. *Sandoval*, 231 U.S. at 45–46.

110. 302 U.S. 535 (1938).

111. *Id.*

the purposes of the tribe establishing a "colony."[112] The Court held that the colony in question was Indian country, as it was set aside for the use of Indians.[113] The slow incremental adjudication and definition of Indian country by the courts would not go unnoticed by the U.S. Congress, which soon legislated yet another definition of Indian country.[114]

2. Indian Country Statute

In 1948, Congress enacted the Indian Country Statute[115] to "consolidate[] numerous conflicting and inconsistent provisions of law into a concise statement of the applicable law."[116] The statute set out three categories of Indian country: (a) land located within reservations, (b) dependent Indian communities, and (c) Indian allotments with Indian title.[117]

With regard to reservation lands, prior to the passage of the Indian Country Statute, any non-Indian fee lands within reservations were not considered Indian country because Indian country status was tied to Indian title.[118] The first subsection of the Indian Country Statute changed the status of non-Indian-held lands within reservations. It provided that Indian country included "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."[119] The Court in *Seymour v. Superintendent*[120] affirmed the constitutionality of that subsection and pronounced the federal policy against creating checkerboard jurisdiction.

Congress codified the holdings of *Sandoval* and *McGowan*[121] into section 1151(b), which states that Indian country shall include "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state."[122] In *Alaska v. Native Village of Venetie*,[123] the Court interpreted section 1151(b) as establishing a two-prong test for whether the land in question is a dependent Indian community, and thus Indian country.[124] This test requires that (1) the land be set aside for the use of Indians and (2) the federal government have superintendence of the land.[125] The Court noted that these two prongs are rooted in the text "dependent Indian community" found in section 1151(b).[126]

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112. *Id.* at 538–39.
113. *Id.* at 539.
114. *See infra* Part II.B.2.
115. 18 U.S.C. § 1151 (1948).
116. *Id.* § 1151 (2000) (Historical and Revision Notes).
117. *Id.*
118. *See supra* Part II.B.1.
119. 18 U.S.C. § 1151.
120. 368 U.S. 351, 358 (1962).
121. *See supra* notes 108–113 and accompanying text.
122. 18 U.S.C. § 1151(b).
123. 522 U.S. 520 (1998).
124. *Id.* at 530.
125. *Id.*
126. *Id.* at 530–31.

C. *Jurisdictional Milieu of Pueblo Indian Country*

The previous discussion of the origins and evolution of Indian country[127] refers little to the current jurisdictional status of Indian country, yet such an understanding is essential to fully appreciate the New Mexico Supreme Court's holding in *State v. Romero*. To provide context for such an understanding, this Note continues by summarizing the legal regimes governing criminal[128] and civil[129] jurisdiction in Indian country, followed by a brief analysis of the legal discourse surrounding inherent tribal sovereignty as a source of tribal jurisdiction.[130]

1. Criminal Jurisdiction in Pueblo Indian Country

The legal regime governing criminal jurisdiction in Indian country consists primarily of congressional legislation and federal case law that parcels out the criminal jurisdiction of Indian country among three types of sovereigns: the federal government, state government, and tribal government.[131]

Three primary statutes set out the extent of federal jurisdiction over crimes involving Indians and Indian country. First, the Indian Country Statute[132] requires an examination of the land status of the location of the alleged crime. Second, the General Crimes Act,[133] also referred to as the Indian Country Crimes Act, states that "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States...shall extend to the Indian country."[134] The General Crimes Act does not, however, allow federal courts to exercise criminal jurisdiction over "offenses committed by one Indian against the person or property of another Indian, nor to any Indian...who has been punished by the local law of the tribe."[135] The General Crimes Act grants federal courts exclusive jurisdiction over crimes committed in Indian country by non-Indians against Indians.[136] Third, the Major Crimes Act[137] applies only to Indian defendants charged with committing certain enumerated felonies in Indian country, placing such defendants under the exclusive jurisdiction of the federal courts.[138]

States generally "lack jurisdiction in Indian country absent a special grant of jurisdiction."[139] Although Congress has granted some states criminal jurisdiction over Indian country for certain matters pursuant to Public Law 280, New Mexico is not one of the states that received such a jurisdictional grant.[140] Nevertheless, all

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127. *See supra* Part II.B.
128. *See infra* Part II.C.1.
129. *See infra* Part II.C.2.
130. *See infra* Part II.C.3.
131. *See* COHEN ET AL., *supra* note 26, ch. 9, at 731–71.
132. 18 U.S.C. § 1151 (2000); *see also supra* Part II.B.2.
133. 18 U.S.C. § 1152 (2000).
134. *Id.* Importantly, the Assimilative Crimes Act provides that, in the absence of any substantive federal criminal statute governing the offense in question, the substantive criminal law of the state in which the offense allegedly occurred shall be applied by the federal courts. *Id.* § 13.
135. *Id.* § 1152.
136. *Id.*
137. *Id.* § 1153.
138. *Id.*
139. COHEN ET AL., *supra* note 26, § 9.03[1], at 754.
140. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. § 1162(a) (2000); 28 U.S.C. § 1360(a)

states reserve jurisdiction over Indian country crimes committed by non-Indians against non-Indians.[141]

Tribal courts retain jurisdiction over Indian country crimes not precluded by exclusive federal jurisdiction.[142] For instance, tribal courts have jurisdiction over Indians charged with Indian country crimes not enumerated in the Major Crimes Act but are precluded from exercising jurisdiction over crimes enumerated in the Act.[143] In addition, tribal courts have concurrent jurisdiction with federal courts over non-enumerated crimes committed by Indians in Indian country, regardless of whether the offenses are against Indians or Non-Indians.[144] Finally, the U.S. Supreme Court established in *Oliphant v. Suquamish Indian Tribe*[145] that tribes have no criminal jurisdiction over non-Indians accused of crimes in Indian country.

2. Civil Jurisdiction in Pueblo Indian Country

Unlike tribal criminal jurisdiction, which has been significantly curtailed by Congress and courts, tribal civil jurisdiction in Indian country is "more broad and is subject to fewer of the federal limitations imposed on tribal courts' criminal jurisdiction."[146] As such, this Note will present a summary of civil jurisdiction in Indian country[147] by beginning with the tribal courts and then addressing state and federal courts in turn.

Tribal courts have exclusive jurisdiction over civil matters concerning an Indian plaintiff and an Indian defendant, and Congress has not limited this jurisdiction, which is "first and foremost a matter of internal tribal law."[148] Tribal court jurisdiction over non-Indians in civil matters, however, is not so clear-cut. The U.S. Supreme Court held that the tribes' adjudicatory jurisdiction over non-Indians can extend no further than their ability to regulate non-Indians.[149] Civil litigation involving non-Indians that arises on non-Indian fee land in Indian country presents more complications.[150] In *Montana v. United States*,[151] the Supreme Court held that

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(2000)). Initially, Public Law 280 granted jurisdiction to the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id.* Subsequently, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington have acquired criminal jurisdiction in Indian country by state constitutional amendment or statute pursuant to Public Law 280. COHEN ET AL., *supra* note 26, § 6.04[3][a], at 544 & nn.305–08.

141. United States v. McBratney, 104 U.S. 621, 624 (1882); *see also* COHEN ET AL., *supra* note 26, § 9.03[1], at 754–55.

142. *See* COHEN ET AL., *supra* note 26, § 9.04, at 756–57.

143. 18 U.S.C. § 1153.

144. *See id.* § 1152 (2000); *id.* § 1153.

145. 435 U.S. 191, 208 (1978). The *Oliphant* decision has been intensely criticized by proponents of tribal sovereignty. *See* COHEN ET AL., *supra* note 26, § 4.02[3][b], at 226–28 & nn.192–96.

146. Thorington, *supra* note 96, at 1001–02.

147. The definition of Indian country found in the Indian Country Statute, 18 U.S.C. § 1151, has been used to determine Indian country status of lands for purposes of civil jurisdiction. *See, e.g.*, Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 125–26, 128 (1993); Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 513 (1991); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221–22 (1987). *But see* Strate v. A-1 Contractors, 520 U.S. 438, 454 n.9 (1997) (looking also to 18 U.S.C. § 1154(c) (2000) and § 1156 (2000), dealing with "dispensation and possession of intoxicants" as a basis for delineating the boundaries of Indian country).

148. COHEN ET AL., *supra* note 26, § 7.02[1][a], at 599.

149. *Strate*, 520 U.S. at 422; Nevada v. Hicks, 533 U.S. 353, 358 (2001).

150. *See* COHEN ET AL., *supra* note 26, § 7.02[1][a], at 600–01.

151. 450 U.S. 544 (1981).

tribes generally lack civil adjudicatory jurisdiction over non-Indians with two specific exceptions: (1) when non-Indians "enter consensual relationships with the tribe or its members" or (2) when conduct by non-Indians "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[152] However, subsequent U.S. Supreme Court decisions have narrowed the scope of the *Montana* exceptions. In *Strate v. A-1 Contractors*,[153] the Court held that the tribe lacked civil jurisdiction over a personal injury claim brought by a non-Indian against another non-Indian for damages stemming from a highway accident on land within reservation boundaries.[154] Four years later, in *Nevada v. Hicks*,[155] the Court held that a tribe lacked jurisdiction to adjudicate a civil action brought by a tribal member against a state game warden for alleged property damage.[156] In *Hicks*, the Court extended the general rule of *Montana*, precluding tribal civil jurisdiction over non-Indians, to include claims arising on Indian-owned land.[157] As a result, these cases continued the federal judiciary's recent trend of curtailing tribal jurisdiction over non-Indians.[158]

Although state courts have jurisdiction over civil suits involving Indians that arise outside of Indian country,[159] state jurisdiction in Indian country is more limited. In *Williams v. Lee*,[160] the Supreme Court held that states lack civil jurisdiction over tribal members in suits arising in Indian country because "the exercise of state jurisdiction here would undermine the authority of tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves."[161] This "infringement" test from *Williams* has become the standard for determining whether a state exercise of adjudicatory civil jurisdiction is permissible.[162]

The U.S. Constitution and federal laws grant federal courts limited civil jurisdiction, both within and outside of Indian country.[163] The two primary areas of federal jurisdiction involve federal questions[164] and diversity actions.[165] Federal question jurisdiction includes claims that arise from and require the interpretation of the Constitution, federal statutes, treaties, or federal common law.[166] As a result, any suit arising in Indian country that involves the Constitution, federal statutes, treaties, or federal common law could invoke federal jurisdiction.[167] Diversity jurisdiction requires that the parties be citizens of different states or nations and that the amount in controversy exceed $75,000.[168] As of 1924, Indians became citizens

152. *Id.* at 565–66.
153. 520 U.S. 438 (1997).
154. *Id.* at 442–45.
155. 533 U.S. 353 (2001).
156. *Id.* at 364–65.
157. *Id.* at 359.
158. *See* COHEN ET AL., *supra* note 26, § 4.02[3][c], at 232–37.
159. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 149–50 (1973).
160. 358 U.S. 217 (1959).
161. *Id.* at 223.
162. *See* COHEN ET AL., *supra* note 26, § 4.02[3], at 224–37.
163. *See id.* § 7.04[1][a], at 610–11.
164. 28 U.S.C. § 1331 (2000).
165. *Id.* § 1332.
166. *See* COHEN ET AL., *supra* note 26, § 7.04[1][a], at 612.
167. *Id.* § 7.04[1][a], at 612–13.
168. 28 U.S.C. § 1332.

of the United States,[169] but federal courts have held that Indians are not state citizens for purposes of federal diversity jurisdiction.[170] In addition, federal courts often defer to tribal jurisdiction in recognition of possible interference with tribal governments' control over their own dealings.[171] Although federal courts can review tribal determinations of jurisdiction, the federal courts should generally defer to the tribal courts, out of respect for tribal sovereignty, until tribal remedies are exhausted.[172]

3. Inherent Tribal Sovereignty as a Source of Jurisdiction

Tribal jurisdiction is rooted in the inherent sovereignty that tribes possess and have possessed since time immemorial.[173] Nevertheless, the extent of tribal jurisdiction in Indian country has been litigated and legislated extensively, creating a wide body of law that is largely incoherent.[174] Early U.S. Supreme Court cases limited the extent of tribes' inherent sovereignty, beginning with *Johnson v. M'Intosh*,[175] in which the Court held that that the United States acquired absolute title to its lands in America by virtue of discovery and conquest.[176] In contrast, "the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others."[177] In *Cherokee Nation v. Georgia*,[178] the Court held that tribes are to be treated as "domestic dependent nations," distinct from states and foreign sovereigns.[179] The Court analogized the domestic dependent status of tribes as one of wardship under the protection and supervision of the United States, setting the legal foundation for the trust relationship between the United States and Indian tribes.[180]

Although *Johnson v. M'Intosh* and *Cherokee Nation v. Georgia* severely curtailed the sovereign powers of tribes, other early U.S. Supreme Court cases affirmed the tribes' inherent sovereignty. A year after *Cherokee Nation v. Georgia*, in *Worcester v. Georgia*,[181] the Court acknowledged that the tribes are sovereign powers, "retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."[182] Further, the Court limited the extent to which states may

169. Act of June 2, 1924, ch. 233, 43 Stat. 253.

170. *See* COHEN ET AL., *supra* note 26, § 7.04[1][c], at 618–19 & nn.166–67.

171. *Accord* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

172. *See id.* at 19; Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 855–56 (1985).

173. *See* COHEN ET AL., *supra* note 26, § 4.01[1][a], at 204–09.

174. *See generally* Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003) (analyzing the Court's disregard for long-standing principles of federal Indian law and contradiction of congressional and executive policies); Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive to Divest Tribal Sovereignty*, 27 CONN. L. REV. 1281 (1995) (describing state efforts to decrease the amount of land considered Indian country in order to move adjudicatory and regulatory authority to states).

175. 21 U.S. (8 Wheat.) 543 (1823).

176. *See supra* note 35 and accompanying text.

177. *M'Intosh*, 21 U.S. (8 Wheat.) at 591.

178. 30 U.S. (5 Pet.) 1 (1831).

179. *Id.* at 17.

180. *Id.*; *see also supra* note 65 and accompanying text. For a description of the development of the trust doctrine in federal Indian law, see COHEN ET AL., *supra* note 26, § 15.03, at 967–69.

181. 31 U.S. (6 Pet.) 515 (1832).

182. *Id.* at 559.

regulate tribes, noting that the federal government maintains "exclusive regulation of intercourse with the Indians; and, so long as this power shall be exercised, it cannot be obstructed by the state."[183] Subsequently, in *Talton v. Mayes*,[184] the Court held that because the tribes' inherent sovereignty predates the Constitution, tribal courts are not bound by due process requirements of the Fifth Amendment.[185]

Developing within the parameters established by these early U.S. Supreme Court cases, the legal doctrine surrounding inherent tribal sovereignty continues to evolve in modern times. In 1990, the U.S. Supreme Court held in *Duro v. Reina*[186] that non-member Indians do not fall under the criminal jurisdiction of tribal courts.[187] This holding had a severe impact on the ability of tribes to govern themselves due to the large number of non-member Indians that live in lands subject to tribal jurisdiction.[188] In response to this ruling, Congress passed the "*Duro*-fix" by amending the definitions section of the Indian Civil Rights Act (ICRA)[189] to read, in part:

> (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians[.][190]

Congress enacted the *Duro*-fix by amending the ICRA, rather than by enacting a new substantive law, at the end of a debate over the distinction between congressional delegation of federal judicial power to the tribes on one hand, and recognition of inherent tribal sovereignty on the other.[191] As evidenced by the language of the *Duro*-fix, Congress confirmed that tribes may exercise criminal jurisdiction over non-member Indians in Indian country by virtue of their pre-existing sovereign powers.[192]

A few years later, in *United States v. Lara*,[193] the U.S. Supreme Court examined the legitimacy of Congress's undertaking in the *Duro*-fix. A five-justice majority of the Court upheld the validity of the *Duro*-fix as a constitutional exercise of congressional power to adjust the status of dependent sovereign tribes.[194] Furthermore, the *Lara* majority upheld the congressional affirmation that the source of tribal

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183. *Id.* at 594.

184. 163 U.S. 376 (1896).

185. *Id.* at 384. Concern regarding a lack of due process and equal protection in tribal courts led to the passage of the Indian Civil Rights Act (ICRA) in 1968. 25 U.S.C. §§ 1301–03 (2000).

186. 495 U.S. 676 (1990).

187. *Id.* at 682 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).

188. Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109, 109–10 & nn.7–8 (1992). For an analysis of *Duro* in light of the U.S. Supreme Court's "implicit divestiture" of tribal sovereignty, departing from congressional and executive reaffirmations of inherent tribal sovereignty, see John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the* Cohen's Handbook *Cutting-Room Floor*, 38 CONN. L. REV. 731, 740–41 (2006).

189. 25 U.S.C. §§ 1301–03.

190. *Id.* § 1301.

191. *See* Jessup Newton, *supra* note 188, at 110–17 (describing the legislative history of the *Duro*-fix).

192. *See id.*

193. 541 U.S. 193 (2004).

194. *Id.* at 200.

jurisdiction over non-member Indians was their inherent sovereignty.[195] Nonetheless, the narrow majority and differences of opinion of the justices in *Lara* highlight the fact that this remains a volatile area of law.[196]

III. STATEMENT OF THE CASE

Having explored the legal history of the Pueblos, the term of art "Indian country," and the contours of adjudicatory jurisdiction within Indian country, this Note turns to a discussion of the facts and procedural history that led to the New Mexico Supreme Court's decision in *State v. Romero*.[197]

A. Facts

On June 19, 2001, a Taos County grand jury indicted Del E. Romero, an enrolled Taos Pueblo member, for aggravated battery against another enrolled Taos Pueblo member.[198] Mr. Romero moved to dismiss the charge for lack of jurisdiction, asserting that the alleged criminal acts occurred within the exterior boundaries of Taos Pueblo.[199] The State of New Mexico argued that the incident occurred outside the exterior boundaries of Taos Pueblo on privately owned fee land located within the boundaries of the Town of Taos.[200] The parties eventually stipulated that the incident occurred at the Pueblo Alegre Mall, which is located on private property within the Town of Taos *and* within the exterior boundaries of Taos Pueblo Land Grant.[201] The district court dismissed the charges, concluding that the state did not have jurisdiction to prosecute.[202]

More than a year later, on August 29, 2002, Matthew A. Gutierrez, an enrolled member of Pojoaque Pueblo, was arraigned in Pojoaque Tribal Court for assault, battery, carrying a concealed weapon, criminal negligence, and disorderly conduct.[203] The alleged victims were non-Indians and the alleged crime occurred on non-Indian fee land located within the exterior boundaries of Pojoaque Pueblo.[204] After tribal prosecution began, the State indicted Mr. Gutierrez for the same incident on charges of aggravated battery with a deadly weapon, child abuse, and battery against a household member.[205] On October 7, 2002, the Chief Judge of Pojoaque Pueblo announced a "Memorandum Opinion and Declaratory Judgment" holding

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195. *Id.* at 199.

196. *See* Gregory A. Smith, *Pueblo Lands Act Amendment Signed into Law*, 16 NATIVE AM. L. DIG. 2, 2–3 (2006). For an analysis of the constitutionality of the *Duro*-fix under equal protection and due process, see Will Trachman, Comment, *Tribal Criminal Jurisdiction After* U.S. v. Lara*: Answering Constitutional Challenges to the* Duro *Fix*, 93 CAL. L. REV. 847 (2005); Eric Wolpin, Comment, *Answering* Lara*'s Call: May Congress Place Nonmember Indians Within Tribal Jurisdiction Without Running Afoul of Equal Protection or Due Process Requirements?*, 8 U. PA. J. CONST. L. 1071 (2006).

197. State v. Romero, 2006-NMSC-039, 142 P.3d 887, *cert. denied*, 124 S. Ct. 1494 (2007).

198. *Id.* ¶ 2, 142 P.3d at 888.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* ¶ 2, 142 P.3d at 888–89.

203. *Id.* ¶ 3, 142 P.3d at 889.

204. *Id.*

205. *Id.*

that the Pojoaque Tribal Court had jurisdiction.[206] Mr. Gutierrez then moved to dismiss the state indictment, arguing that the state court lacked jurisdiction.[207] As with Mr. Romero, the district court dismissed the case due to lack of jurisdiction.[208]

B. New Mexico Court of Appeals

In both cases, the New Mexico Court of Appeals reversed the district court decisions, holding that the state courts had jurisdiction over the matters in controversy.[209] The court of appeals held that the State had jurisdiction to prosecute Romero because the site of the incident was not classified as Indian country.[210] The court of appeals focused its analysis on whether the "extinguishment of the Pueblo title to the lands underlying the town of Taos pursuant to the PLA [Pueblo Lands Act] permanently change[d] the jurisdictional status of this land[.]"[211] The court concluded "that in enacting the PLA, Congress clearly understood that it was altering the jurisdictional status of those lands as to which title was quieted in favor of a non-Indian, and that unless Congress subsequently acted to restore the Indian country status of these lands they remain outside Indian country."[212] Similarly, with respect to the *Gutierrez* case, the court of appeals reversed the district court and remanded the case for further proceedings.[213]

C. New Mexico Supreme Court

The New Mexico Supreme Court granted writs of certiorari for each case and consolidated them "to determine whether the State has jurisdiction to prosecute alleged crimes committed by Defendant Indians on private fee land within the exterior boundaries of Defendants' respective pueblos."[214] The court noted that, "[i]f the land in question is Indian country, the State prosecution must be dismissed."[215] Justice Serna, writing for the court, held that the lands in question "within the exterior boundaries of both Taos and Pojoaque Pueblos are Indian country within the meaning of § 1151(b) and Congress has not extinguished Indian country status."[216] Therefore, the State lacked jurisdiction to prosecute either defendant for incidents that happened on those lands.[217] As a result, the New Mexico Supreme Court reversed the decisions of the court of appeals.[218]

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206. *Id.*
207. *Id.*
208. *Id.*
209. State v. Romero, 2004-NMCA-012, 84 P.3d 670; State v. Gutierrez, No. 24,731 (N.M. Ct. App. May 20, 2004).
210. *Romero*, 2004-NMCA-012, ¶ 8, 84 P.3d at 672.
211. *Id.* ¶ 8, 84 P.3d at 672.
212. *Id.* ¶ 17, 84 P.3d at 675. Significantly, whereas the New Mexico Court of Appeals issued its opinion without the benefit of Congress's subsequent amendment to the Pueblo Lands Act, the New Mexico Supreme Court drafted its opinion with the amendment as a backdrop that "helps clarify congressional intent regarding jurisdiction." *Romero*, 2006-NMSC-039, ¶ 1 n.1, 142 P.3d at 888 n.1.
213. State v. Gutierrez, No. 24,731 (N.M. Ct. App. May 20, 2004).
214. *Romero*, 2006-NMSC-039, ¶ 7, 142 P.3d at 890.
215. *Id.*
216. *Id.* ¶ 26, 142 P.3d at 896; *see supra* note 147 (discussing 18 U.S.C. § 1151 (2000)).
217. *Id.*
218. *Id.*

IV. RATIONALE OF THE NEW MEXICO SUPREME COURT

The court confronted two main issues in *Romero*. First, the court analyzed whether the land where the alleged crimes occurred should be considered Indian country.[219] Second, the court examined whether the federal government had extinguished Indian country status of the lands in question.[220] The court applied a de novo standard of review to the question of whether the state possessed jurisdiction to prosecute Pueblo members for alleged crimes occurring within the exterior boundaries of the Pueblos,[221] but accepted the district court's findings of fact as supported by substantial evidence.[222] Throughout the opinion, the court applied the canon of construction requiring that "any ambiguity in [federal statutes] is to be resolved in favor of the Defendant Indians."[223]

A. Indian Country Status of Pueblo Land Grants

The court began its analysis of the Indian country status of the lands in question by citing Congress's codification of the definition of Indian country in the U.S. Code.[224] Both of the defendants and the State agreed that section 1151(c), discussing Indian allotments, was not applicable to the case of either defendant in the consolidated matter.[225] Both defendants argued that the definition of Indian country outlined in section 1151(b) as part of a "dependent Indian communit[y]"[226] encompassed the parcels of land in question. Mr. Romero alone contended that the land in question was Indian country under section 1151(a), arguing that a pueblo is a reservation.[227] The court addressed these arguments in turn.[228]

1. Pueblos Are Dependent Indian Communities

In concluding that Pueblos are dependent Indian communities as used in section 1151(b), the court looked first to the U.S. Supreme Court case of *United States v. Sandoval*.[229] In *Sandoval*, the Court recognized that,

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219. *Id.* ¶¶ 3–22, 142 P.3d at 890–95.
220. *Id.* ¶¶ 23–25, 142 P.3d at 895–96.
221. *Id.* ¶ 6, 142 P.3d at 890.
222. *Id.*
223. *Id.* ¶ 8, 142 P.3d at 890 (citing Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)). In *Montana*, the U.S. Supreme Court stated that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana*, 471 U.S. at 766.
224. *Romero*, 2006-NMSC-039, ¶ 7, 142 P.3d at 890. The New Mexico Supreme Court quoted this section verbatim:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter..., means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Id. (quoting 18 U.S.C. § 1151 (2000)).
225. *Id.* ¶ 9, 142 P.3d at 890.
226. *Id.*
227. *Id.*
228. *See infra* notes 229–272.
229. 231 U.S. 28 (1913).

> beginning as early as 1854 and continu[ing] up to the present time, the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and...this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling.[230]

The New Mexico Supreme Court then looked to the more recent U.S. Supreme Court case *Alaska v. Native Village of Venetie*[231] to further explore the term dependent Indian community as used in section 1151(b).[232] Noting that the New Mexico Supreme Court previously relied on *Venetie* in *State v. Frank*,[233] the *Romero* court laid out the two-pronged *Venetie* test, which states that the term

> "[dependent Indian community] refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence."[234]

In *Venetie*, Justice Thomas described dependent Indian communities as "a limited category of Indian lands that are neither reservations nor allotments," thereby defining mutually exclusive categories of reservations under section 1151(a) and dependent Indian communities under section 1151(b).[235] Nevertheless, the *Romero* majority stated that, although such a distinction "may be perfectly apt when construing the Alaska Native Claims Settlement Act as in *Venetie*," it is not as appropriate when "considering the unique circumstances of New Mexico's pueblos."[236] The court then proceeded with its *Venetie* analysis.

The first prong of *Venetie* requires that the land in question be "set aside by the Federal Government for the use of the Indians as Indian land."[237] The court first defined the unit of land to which it would apply the *Venetie* "set-aside" analysis.[238] Although the State argued that the court should have examined the individual parcels of private land in question, the court agreed with the defendants that all of the land within the boundaries of a Pueblo must be "considered as a whole" when determining whether the lands meet the federal "set-aside" standard.[239] The court then pointed out that even the individual parcels of land in question "have been

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230. *Id.* at 47.

231. 522 U.S. 520 (1998).

232. *Romero*, 2006-NMSC-039, ¶ 4, 142 P.3d at 339 (analyzing 18 U.S.C. § 1151(a) (2000)); *see also supra* notes 123–126 and accompanying text.

233. 2002-NMSC-026, ¶¶ 16–17, 52 P.3d 404, 408 (explaining that the two-pronged *Venetie* test is the appropriate analysis for New Mexico courts when examining whether lands constitute a dependent Indian community).

234. *Romero*, 2006-NMSC-039, ¶ 11, 142 P.3d at 891 (alteration in original) (quoting *Venetie*, 522 U.S. at 527).

235. *Venetie*, 522 U.S. at 527.

236. *Romero*, 2006-NMSC-039, ¶ 12, 142 P.3d at 891.

237. *Venetie*, 522 U.S. at 527.

238. *Romero*, 2006-NMSC-039, ¶ 13, 142 P.3d at 891–92.

239. *Id.* ¶ 13, 142 P.3d at 892.

previously recognized as set aside by the federal government for the use of the Indians as Indian land."[240]

In analyzing the land within the outer Pueblo boundaries as a whole, the court looked to the New Mexico Enabling Act[241] as evidence that Congress had established that the Pueblo lands were Indian country.[242] The court also acknowledged its deference to the findings of fact by the district courts and an "established historical record regarding governmental protection from the time of the Spanish conquistadores through the Pueblo Lands Act of 1924" when it held that the "set-aside" prong of its *Venetie* analysis was fulfilled.[243]

The court then moved on to hold that the second prong of *Venetie* was satisfied because the land in question was the Pueblo as a whole, and because the Pueblos have long been under federal superintendence.[244] Furthermore, the court pointed out that this holding promotes policy concerns against checkerboarding,[245] which is the same concern that formed part of the legislative intent behind section 1151.[246] The court acknowledged that Mr. Gutierrez established evidence at trial that led the district judge to adopt a finding of fact, given deference by the New Mexico Supreme Court, that the Pueblo of Pojoaque was under federal superintendence.[247] Although Mr. Romero did not establish a similar record at the trial level because he did not argue section 1151(b) until his appeal, the court refrained from remanding his case for fact-finding on this particular issue, stating that it found "no reason to question that Taos Pueblo is different than Pojoaque Pueblo in regard to federal superintendence."[248] Instead of remanding, the court determined that the second prong of the *Venetie* test was met in both cases.[249] Furthermore, the court stated that district courts may presume that Pueblos are always under federal superintendence, and that "[f]urther fact finding is only necessary in the event that the State makes a persuasive showing that circumstances regarding federal superintendence have changed in a significant way."[250]

2. Pueblos and Reservations Are Jurisdictionally Synonymous

Although the court pointed to the silence of section 1151(b) regarding the treatment of non-Indian fee land, it read subsections (a) and (b) together and concluded that "a pueblo satisfying § 1151(b) is sufficiently similar to a reservation in § 1151(a) to merit identical treatment for the purposes of criminal jurisdiction."[251]

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240. *Id.*

241. Act of June 20, 1910, ch. 310, 36 Stat. 557. "Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico...." *Id.* at 558.

242. *Romero*, 2006-NMSC-039, ¶ 14, 142 P.3d at 892.

243. *Id.* ¶ 15, 142 P.3d at 892.

244. *Id.* ¶ 16, 142 P.3d at 892.

245. *Id.* ¶ 16, 142 P.3d at 893. For a brief description of checkerboarding resulting from the allotment era, see COHEN ET AL., *supra* note 26, § 1.04, at 78.

246. *Romero*, 2006-NMSC-039, ¶ 16, 142 P.3d at 892–93 (citing Hilderbrand v. Taylor, 327 F.2d 205, 207 (10th Cir. 1964)).

247. *Id.* ¶ 17, 142 P.3d at 893.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* ¶ 19, 142 P.3d at 894.

First, the court looked to the wording in various congressional acts, citing specific instances when Congress conflated the terms "Pueblo" and "reservation" or used them interchangeably or in combination.[252] The court also pointed to several legislative enactments concerning Indian country that apply to the Pueblos despite not mentioning them explicitly.[253]

Next, the court cited precedent from both federal and New Mexico courts that construed the term "reservation" broadly.[254] Specifically, the court looked to *United States v. McGowan*,[255] in which the U.S. Supreme Court looked beyond the semantic differences between the terms "reservation" and "colony" to examine instead the "protections afforded by the Federal government."[256] The *Romero* court also cited *Blatchford v. Gonzales*,[257] in which the New Mexico Supreme Court stated that "'Indian reservations and dependent Indian communities are not two distinct definitions of place, but definitions which largely overlap.'"[258]

Finally, the court examined the New Mexico Court of Appeals case *State v. Ortiz*,[259] which is factually similar to *Romero* because it involved an alleged major crime occurring within a non-Indian town site that was also located within the boundaries of a Pueblo.[260] In *Ortiz*, the court of appeals held that the State lacked jurisdiction to prosecute the alleged crime because it occurred in Indian country.[261] The *Romero* court pointed to specific language in *Ortiz*, which stated that "'land within the exterior boundaries of a Pueblo is indistinguishable from land lying within the exterior boundaries of an Indian reservation.'"[262] Finding that the terms "Pueblo" and "reservation" and sections 1151(a) and 1151(b) are of an "overlapping nature," the *Romero* court held that "fee land within a § 1151(b) dependent Indian community is Indian country just like the fee land within a § 1151(a) reservation."[263]

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252. *Id.* The court cited a statute pre-dating New Mexico statehood that referred to land "within Pueblo reservations or lands," Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1069; a congressional ban on the "introduction into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico," Act of June 20, 1910, ch. 310, 36 Stat. 557, 558; and a congressional act allowing wine for religious use "within the Indian country or any Indian Reservation, including the Pueblo Reservations in New Mexico," 25 U.S.C. § 253 (2000). *Romero*, 2006-NMSC-039, ¶ 19, 142 P.3d at 894.

253. *Romero*, 2006-NMSC-039, ¶ 19, 142 P.3d at 894. The court cited the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1985(e)(1)(A)(i)(II) (2000); Professional Boxing Safety Act of 1996, 15 U.S.C. § 6312 (2000); Federal Highway Act, 23 U.S.C. § 101(a)(12) (2000); Indian Self-Determination and Education Assistance Act, *id.* § 450b (2000); Indian Financing Act, *id.* § 1452 (2000); Indian Child Welfare Act, *id.* § 1903 (2000); and the Clean Water Act, 33 U.S.C. § 1377(h)(1) (2000). Although the *Romero* court noted that neither the National Indian Forest Resources Management Act, 25 U.S.C. § 3103 (2000), nor the Indian Tribal Justice Act, 25 U.S.C. § 3653 (2000), refer explicitly to the Pueblos, both of these statutes include Pueblos within their definition of Indian tribes. *Romero*, 2006-NMSC-039, ¶ 19, 142 P.3d at 894; *see also* 25 U.S.C. § 3103(3); *id.* § 3653(3).

254. *Romero*, 2006-NMSC-039, ¶ 20, 142 P.3d at 894.

255. 302 U.S. 535 (1938).

256. *Romero*, 2006-NMSC-039, ¶ 20, 142 P.3d at 894 (citing *McGowan*, 302 U.S. at 538–39).

257. 100 N.M. 333, 670 P.2d 944 (1983).

258. *Romero*, 2006-NMSC-039, ¶ 20, 142 P.3d at 894 (quoting *Blatchford*, 100 N.M. at 335, 670 P.2d at 946 (1983)).

259. 105 N.M. 308, 731 P.2d 1352 (Ct. App. 1986).

260. *Romero*, 2006-NMSC-039, ¶¶ 20–21, 142 P.3d at 894–95 (citing *Ortiz*, 105 N.M. at 312, 731 P.2d at 1356).

261. *Id.*

262. *Id.* ¶ 20, 142 P.3d at 894 (quoting *Ortiz*, 105 N.M. at 312, 731 P.2d at 1356).

263. *Id.* ¶ 22, 142 P.3d at 894.

B. Congressional Intent to Extinguish Indian Country Status

Having found that the lands in question were Indian country for purposes of jurisdiction under section 1151, the court then analyzed whether the U.S. Congress had extinguished its Indian country status. The court began by analogizing the facts of the case before it to *Seymour v. Superintendent*,[264] a U.S. Supreme Court case holding that Washington State had no jurisdiction to prosecute an Indian charged with a crime occurring within Indian country on fee land in a town that was within reservation boundaries.[265] The *Romero* court followed the U.S. Supreme Court's analysis and rejected the State's arguments that Indian country status is extinguished by alienation of land to non-Indians or by the establishment of a non-Indian town within the reservation.[266]

The court in *Romero* then examined whether the Pueblo Lands Act[267] extinguished the Indian country status of the lands in question.[268] To begin, the court defined a standard requiring that the congressional action "'provide substantial and compelling evidence of congressional intention to diminish Indian lands'" and looked primarily to the explicit language of the Act.[269] Although it acknowledged that the Pueblo Lands Act allows for the extinguishment of Indian title to lands originally held by the Pueblos, the court found no explicit mention of a change in Indian country status or jurisdiction for the lands in question.[270] Finding no "substantial and compelling evidence," the court dispatched the "State's overly-broad interpretation that the Pueblo Lands Act extinguishes Indian country status merely by allowing non-Indians to have fee title to certain parcels."[271] Because the lands at issue were held to be Indian country and because Congress had not extinguished its status as such, the court concluded that the State lacked jurisdiction

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264. 368 U.S. 351 (1962).

265. *Romero*, 2006-NMSC-039, ¶ 24, 142 P.3d at 895 (citing *Seymour*, 368 U.S. at 357–58).

266. *Id.* (citing *Seymour*, 368 U.S. 351).

267. Pueblo Lands Act of 1924, ch. 331, 43 Stat. 636 (repealed 2000).

268. *Romero*, 2006-NMSC-039, ¶ 25, 142 P.3d at 896. The special concurrence in *Romero* also analyzed whether Congress ever intended to change criminal jurisdiction within Pueblo boundaries, pointing to a debate over the Pueblo Lands Act in the Subcommittee of the Senate Committee on Public Lands and Surveys concerning section 3 of the Act, which provided that the state would have jurisdiction over former tribal lands ceded to non-Indians. *Id.* ¶ 32, 142 P.3d at 898 (Chávez, J., specially concurring). Although the special concurrence is correct that section 3 of the Act was deleted by Congress, it is not clear from the legislative history that the intent in deleting the section was to prevent the states from having jurisdiction over such lands. On the contrary, the common understanding of the law at that time was that when Indian title was extinguished, so was Indian country status. This understanding is evidenced by the following exchange between Senator Lenroot and Commissioner Burke: Senator Lenroot, "Have you any doubt but what the State courts would have jurisdiction of non-Indian lands without this section at all?" Commissioner Burke, "I have not a bit of doubt." *Hearings on S. 3855 and S. 4223 Before the Subcomm. of the S. Comm. on Public Lands and Surveys*, 67th Cong. 90 (1923) (statements of Sen. Lenroot, Member, S. Comm. on Public Lands and Surveys & Hon. Charles H. Burke, Comm'r of Indian Affairs); *see also id.* at 88–90; *Hearings on H.R. 13452 and H.R. 13674 Before the H. Comm. on Indian Affairs*, 67th Cong. 330 (1923) (statement of Mr. A.B. Renehan, New Mexico attorney) ("I do not consider [section 3] necessary, for...when the Indian title has been extinguished, the State courts will have jurisdiction."); State v. Romero, 2004-NMCA-012, ¶¶ 15–17, 84 P.3d 670, 674–75.

269. *Romero*, 2006-NMSC-039, ¶ 25, 142 P.3d 887, 896 (quoting Solem v. Bartlett, 465 U.S. 463, 472 (1984)).

270. *Id.*

271. *Id.*

over the cases of Mr. Romero and Mr. Gutierrez.[272] The court disposed of the legal issues before it, but its analysis deserves further scrutiny.

V. ANALYSIS

The *Romero* court arrived at a decision that affirms the Pueblo's inherent sovereignty, yet has implications on civil jurisdiction in Pueblo Indian country. Before exploring these implications, however, it is helpful to examine the way in which the court arrived at its holding. First this Note examines the court's analysis under *Venetie*, concluding that such analysis may not be necessary and has problematic consequences.[273] Next, the Note continues by examining the court's use of the terms "Pueblo" and "reservation" in its analysis.[274]

A. Venetie *Analysis, Troublesome Dicta*

The *Romero* court dedicated a great deal of space in its opinion to the two-pronged *Venetie* analysis,[275] but, as argued by the special concurrence authored by Justice Chávez, the majority may not have needed to go so far to decide the case.[276] The majority opinion admits that in *Venetie*, "[t]o determine if the land was Indian country, the Court construed the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (1971), which has no bearing on the land ownership system for New Mexico pueblos."[277] Nevertheless, by applying its analysis under *Venetie*, the majority refused to distinguish the history and legal status of the Pueblo land grants[278] from those at issue in *Venetie*.[279]

The majority could have taken the more straightforward approach suggested by the special concurrence.[280] Under this analysis, the U.S. Supreme Court's recognition of the Pueblos' status as dependent Indian communities in *Sandoval*[281] is enough to establish that the land in question is Indian country.[282] Further analysis of the Indian country status of the land would then be unnecessary because in *Romero* the alleged crimes occurred within the original Pueblo boundaries, and "[P]ueblos

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272. *Id.* ¶ 26, 142 P.3d at 896.

273. *See infra* Part V.A.

274. *See infra* Part V.B.

275. *Romero*, 2006-NMSC-039, ¶¶ 11–17, 142 P.3d at 891–93.

276. *Id.* ¶¶ 29–30, 142 P.3d at 897 (Chávez, J., specially concurring). *But see* United States v. Arrieta, 436 F.3d 1246 (10th Cir. 2006), *cert denied*, 126 S. Ct. 2368 (2006). In *Arrieta*, the Tenth Circuit Court of Appeals engaged in a *Venetie* analysis and held that "all lands within the exterior boundaries of a Pueblo land grant, *to which the Pueblo hold title*, are Indian country within the meaning of 18 U.S.C. § 1151." *Id.* at 1250–51 (emphasis added). The *Arrieta* court, however, did *not* address lands within Pueblo land grants that are held in fee simple by non–Indians.

277. *Romero*, 2006-NMSC-039, ¶ 11, 142 P.3d at 891.

278. *See supra* Part II.A.

279. The lands at issue in *Venetie* comprised approximately 1.8 million acres located "[n]early 800 miles north of Alaska's capital—above the Arctic circle," which the Native Village of Venetie holds in fee simple, pursuant to their election to take title to their former reservation lands after their reservations were dissolved under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–28 (2000). *See* Kristen A. Carpenter, *Interpreting Indian Country in* State of Alaska v. Native Village of Venetie, 35 TULSA L.J. 73, 76–83 (1999).

280. *Romero*, 2006-NMSC-039, ¶¶ 28–30, 142 P.3d at 897 (Chávez, J., specially concurring).

281. United States v. Sandoval, 231 U.S. 28, 47 (1913).

282. *Romero*, 2006-NMSC-039, ¶ 28, 142 P.3d at 897 (Chávez, J., specially concurring).

have already been recognized as Indian country."[283] The two-pronged *Venetie* analysis should only apply if the alleged crimes in question were committed on land not previously recognized as Indian country, or land that presents a problematic classification as Indian country.[284] Indeed, the *Venetie* court itself recognized that the Pueblos are dependent Indian communities and that Congress "could exercise jurisdiction over the Pueblo lands, under its general power over 'all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired.'"[285]

Furthermore, the majority's analysis under *Venetie* results in problematic dicta because of its potential for causing procedural delays in criminal prosecution.[286] In holding that the "set-aside" prong of the *Venetie* test is satisfied in part by factual findings by the trial court, the majority implied that fact-finding may be necessary to find the existence of a dependent Indian community.[287] Although the majority later stated that "pueblos are subject to federal superintendence, and a district court may so presume,"[288] it goes on to suggest that "[f]urther fact finding is only necessary in the event that the State makes a persuasive showing that circumstances regarding federal superintendence have changed in a significant way."[289] These references to factual findings with regard to the status of Pueblo lands as Indian country are unnecessary, however, because the U.S. Supreme Court has explicitly held that the Pueblos are to be considered as dependent Indian communities.[290] Furthermore, fact-finding on such a jurisdictional matter would be conducted by a trial court at the outset of a proceeding, causing unneeded delay.[291]

Such a delay and a court's disregard of clear holdings by the U.S. Supreme Court could be avoided by refraining from applying the *Venetie* two-pronged analysis to the Pueblo land grants. Instead, a court would need only look at "a) whether the alleged crime was committed within the exterior boundaries of a pueblo, and b) whether the accused is an Indian within the meaning of the Major Crimes Act, 18 U.S.C. § 1153."[292] Because both of these elements were satisfied in *Romero*, it should have been clear that state courts have no criminal jurisdiction over the petitioners.

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283. *Id.* ¶ 29, 142 P.3d at 897. Nevertheless, the special concurrence continued:

> If an analysis were required under *Venetie* I would conclude that the "set-aside" of the pueblo lands by the federal government occurred at the time it confirmed the pueblo land grants. I would also conclude that "superintending control" of the pueblos has been shown through the Pueblo Lands Act....

Id. ¶ 30, 142 P.3d at 897 (citations omitted).

284. *See id.* ¶ 29, 142 P.3d at 897 (citing Alaska v. Native Village of Venetie, 522 U.S. 520, 530 (1998) ("[S]ection 1151 does not alter the definitions of Indian country as described in earlier cases, including *Sandoval*.")).

285. *Venetie*, 522 U.S. at 528 (quoting *Sandoval*, 231 U.S. at 46).

286. *See Romero*, 2006-NMSC-039, ¶ 30, 142 P.3d at 897 (Chávez, J., specially concurring).

287. *Id.* ¶ 15, 142 P.3d at 892 (majority opinion).

288. *Id.* ¶ 17, 142 P.3d at 892.

289. *Id.*

290. *See infra* Part III.B.2.

291. *See Romero*, 2006-NMSC-039, ¶ 30, 142 P.3d at 897 (Chávez, J., specially concurring). The special concurrence noted that, "'[i]f an extensive factual inquiry is necessary to make a jurisdictional determination...criminal trials will be delayed.'" *Id.* (alteration in original) (quoting State v. Ortiz, 105 N.M. 308, 312, 731 P.2d 1352, 1356 (Ct. App. 1986)).

292. *Id.*

B. Pueblo, Reservation, or Both?

The majority's analysis is also problematic because it gives insufficient consideration to the fact that the Pueblos hold their land grants in fee simple under federal superintendence as a dependent Indian community. Although Pueblos may also hold reservation lands, the Pueblo land grants are not reservations and are therefore not subject to unilateral or uncompensated diminishment or extinguishment by the United States.[293] The special concurrence points out that "[t]his is one of the unique, historical, and still significant differences between the pueblo lands and the reservations of other Indian tribes."[294] If Congress were to choose to reduce Pueblo fee land holdings, it would commit a taking of private fee simple property, subject to the Takings Clause of the Fifth Amendment to the U.S. Constitution.[295] In contrast, the United States can unilaterally extinguish Indian title to *reservation land* because the federal government holds fee title to such land in trust for the tribe.[296]

The court seemed persuaded by the argument of the brief of amici curiae submitted by the American Indian Law Center, Inc., and the University of New Mexico Native American Law Students Association[297] that "Pueblos Are Reservations for Purposes of Criminal Jurisdiction Under 18 U.S.C. § 1151(a)."[298] However, the court did not go as far as the amici curiae urged and state that Pueblos are equivalent to reservations, but instead stated in dicta that "a pueblo satisfying § 1151(b) is sufficiently similar to a reservation in § 1151(a) to merit identical treatment for the purposes of criminal jurisdiction."[299] This statement is in direct contradiction with Justice Thomas's opinion in *Venetie*, which was quoted by the majority, that "'[w]e now hold that [dependent Indian community] refers to a limited category of Indian lands that are neither reservations nor allotments.'"[300] Recognizing that Justice Thomas "seemed to indicate that a particular piece of Indian country could not be both a reservation...and a dependent Indian community,"[301] the majority nevertheless stated that such a distinction was not as helpful to New Mexico courts when analyzing the Indian country status of the Pueblos as it was to the U.S. Supreme Court when analyzing Alaskan native settlements.[302]

The *Romero* court's analysis under *Venetie* and its conflation of the terms "Pueblo" and "reservation" are two problematic aspects of its opinion. In addition,

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293. For a description of federal power to extinguish Indian title, see COHEN ET AL., *supra* note 26, § 15.09[1], at 1019–30.

294. *Romero*, 2006-NMSC-039, ¶ 31, 142 P.3d at 898 (Chávez, J., specially concurring).

295. U.S. CONST. amend. V.

296. *See* COHEN ET AL., *supra* note 26, at 1019–22.

297. Brief of the American Indian Law Center, Inc. & the University of New Mexico Native American Law Students Ass'n *Amicus Curiae* in Support of Defendant-Petitioner, *Romero*, 2006-NMSC-039, 142 P.3d 887 (No. 28,410).

298. *Id.* at 3.

299. *Romero*, 2006-NMSC-039, ¶ 19, 142 P.3d at 894; *see also supra* note 251 and accompanying text.

300. *Id.* ¶ 11, 142 P.3d at 891 (alteration in original) (quoting Alaska v. Native Village of Venetie, 522 U.S. 520, 527 (1998)); *see also supra* notes 232–236.

301. *Romero*, 2006-NMSC-039, ¶ 12, 142 P.3d at 891.

302. *Id.*

there are other implications of the court's opinion that impact the Pueblos, surrounding communities, and legal practitioners in Pueblo Indian country.

VI. IMPLICATIONS

The *Romero* opinion has two important implications. While one implication adds a layer of complexity to an already multifaceted area of the law, the other reaffirms longstanding law and policy. The former is the impact of the *Romero* decision on civil jurisdiction in New Mexico Indian country; the latter is the affirmation of inherent Pueblo sovereignty expressed by the opinion. This Note discusses each in turn.

A. Civil Jurisdiction in Indian Country

Although Congress's recent amendment of the Pueblo Lands Act demystifies the jurisdictional status of lands in and around Pueblo Indian country for purposes of criminal jurisdiction, it does not address civil jurisdiction. In New Mexico, *Romero* will be the controlling precedent for determining which sovereign has jurisdiction to adjudicate civil matters that arise within Pueblo land grants. Now that the New Mexico Supreme Court has held that all land within the Pueblo land grants is Indian country, New Mexico courts are bound to that determination when deciding whether they have jurisdiction over a civil claim arising on that land.

Once litigants establish that the cause of action arose in Indian country, trial courts will still need to consider who the parties are and which, if any, are Indians.[303] If a court determines that the plaintiff and defendant are both Indians, then tribal courts have exclusive jurisdiction.[304] When both parties are non-Indians, jurisdiction will typically default to the state, but may fall under exclusive tribal jurisdiction if the subject matter has a direct impact on tribal concerns.[305] If the plaintiff is a non-Indian and the defendant is an Indian, then the tribe has exclusive jurisdiction.[306] If the plaintiff is an Indian and the defendant is a non-Indian, then the jurisdictional outcome depends on whether the action arises on Indian-held land or on non-Indian fee land.[307] If the action arose on Indian-held land, then the tribal court will have jurisdiction if their law so allows, with a possibility of concurrent jurisdiction with the State.[308] If the action arose on non-Indian fee land, then the State has jurisdiction, which is subject to the possibility of tribal jurisdiction if the case involves certain important interests of the tribe.[309] In addition, federal courts may have concurrent jurisdiction if there is diversity of citizenship or if the case involves a federal question.[310]

These jurisdictional considerations may also play out differently based on the substantive law of the cause of action at bar, such as whether the case involves the

303. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 224–26 (4th ed. 2004).
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *See supra* Part II.C.2.

law of contract or tort. Although many contracts may include a forum selection clause mandating the parties' choice of forum for resolution of disputes as well as a choice of which substantive law to apply, these provisions will be unenforceable if the forum chosen would not have jurisdiction without the clause.[311] As a result, a poorly drafted forum selection clause may prohibit jurisdiction in the only forum that would otherwise be available, leaving the parties with "no forum having jurisdiction to decide disputes under the contract."[312] Furthermore, although the Court of Appeals for the Seventh Circuit upheld a forum selection clause precluding tribal jurisdiction in *Altheimer & Gray v. Sioux Manufacturing Corp.*,[313] the tribal exhaustion principle may dictate that the first determination of tribal court jurisdiction take place in tribal court.[314]

Unlike contract actions, in which the parties may select ahead of time their forum for resolution of disputes, tort actions arise without planning for such eventualities.[315] *Romero* becomes important in tort actions occurring within the Pueblo land grant boundaries when one or both of the parties is Indian. For example, what would happen if a tort action were brought by a non-Indian New Mexico citizen against a Pueblo member for damages arising from an incident in the Town of Taos within the Taos Pueblo land grant? Federal jurisdiction is most likely precluded because there is no federal question involved with a common-law tort and diversity of citizenship is not satisfied.[316] State jurisdiction would likely be precluded by the U.S. Supreme Court case of *Williams v. Lee*,[317] which held that "the exercise of state jurisdiction [in cases such as this] would undermine the authority of the tribal courts over [Indian] affairs and hence would infringe the right of the Indians to govern themselves."[318] Therefore, exclusive jurisdiction would almost certainly reside in the tribal courts.[319]

This development will increase tribal court dockets and possibly provide them with jurisdiction over a greater variety of matters. Nevertheless, some non-Indians may not be optimistic about the prospect of having to take their claim to an unfamiliar tribal court.[320] Many tribal courts, however, are sophisticated judicial

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311. Mark A. Jarboe, *The Gaming Industry on American Indian Lands: Financing and Development Issues*, *in* PRACTICING LAW INST., THE GAMING INDUSTRY ON AMERICAN INDIAN LANDS 167, 182 (1994).

312. Mark A. Jarboe, *Fundamental Legal Principles Affecting Business Transactions in Indian Country*, 17 HAMLINE L. REV. 417, 442 (1994).

313. 983 F.2d 803, 815 (7th Cir. 1993) ("To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination.").

314. *See supra* notes 171–172 and accompanying text.

315. One area in which New Mexico state courts have concurrent jurisdiction with tribal courts over tort claims, pursuant to gaming compacts, is when non-Indians sue tribes for torts occurring at Indian gaming establishments. *See* Doe v. Santa Clara Pueblo, 2007-NMSC-008, ¶¶ 41–45, 154 P.3d 644, 655–56.

316. *See supra* notes 165–172 and accompanying text.

317. 358 U.S. 217 (1959).

318. *Id.* at 223; *see also supra* notes 160–161 and accompanying text.

319. *See Williams*, 358 U.S. at 223.

320. *See* Lynn H. Slade, *Structuring and Financing Natural Resource and Energy Development on Indian Lands*, NAT. RESOURCES & ENV'T, Spring 1993, at 7, 10 ("The developer also should consider seeking agreement to a forum other than tribal courts or administrative agencies to resolve disputes arising under the agreement. Generally, tribes fear off-reservation courts, and developers fear tribal courts."); Orlando Romero, *Court Case Poses Threat to Non-Indians*, SANTA FE NEW MEXICAN, Mar. 11, 2007, at F1.

institutions with formalized rules and procedures similar to state and federal courts.[321]

For example, the Pueblo of Pojoaque Tribal Court operates pursuant to a Tribal Constitution,[322] allows for appeals,[323] and offers alternative dispute resolution in the form of mediation, settlement facilitation, and traditional methods.[324] In addition, the tribal judges and prosecutors in the Pueblo of Pojoaque Tribal Court are attorneys licensed by the State Bar of New Mexico.[325] Both English and Spanish may be used in Pojoaque tribal court, and interpreters are available.[326] Tribal rules of civil procedure, criminal procedure, appellate procedure, and evidence have been compiled and published and are available to practitioners, as is the substantive law compiled in the tribal code, including provisions governing family law, juvenile justice, housing and land use, commercial transactions, torts, criminal law, and environmental law.[327] Jury trials are available and hearings are recorded and transcribed.[328] As a result, a non-Indian appearing in a tribal court such as that of the Pueblo of Pojoaque would have many of the same protections and opportunities as a citizen of one state being summoned by the court of another state.[329]

B. Affirmation of Inherent Pueblo Sovereignty

In *Romero*, the New Mexico Supreme Court echoed the U.S. Congress in recognizing the inherent sovereignty of the Pueblos. Congress included specific language in its amendment of the Pueblo Lands Act that reads, "The Pueblo has jurisdiction, as an act of the Pueblos' inherent power as an Indian tribe, over any offense committed by a member of the Pueblo or an Indian."[330] This congressional enactment confirms that tribal jurisdiction is not federal jurisdiction delegated to the tribes, but instead is an element of the intrinsic sovereign powers that tribes have possessed since their origins.

In light of the contentious nature of the inherent sovereignty/delegation debate, Pueblo leaders were understandably concerned by earlier versions of the congressional amendment to the Pueblo Lands Act that specifically addressed jurisdiction in Pueblo Indian country without any discussion of the source of such jurisdiction.[331] This concern was magnified by the recent discourse on inherent tribal sovereignty between the U.S. Supreme Court and the U.S. Congress:[332] the Court's

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321. *See infra* notes 322–329.

322. *See* NEW MEXICO TRIBAL COURT HANDBOOK 2006, Pojoaque Pueblo 2007, at 3, 6 TRIBAL L.J., *available at* http://tlj.unm.edu/handbook (follow "Pojoaque Pueblo" hyperlink").

323. *Id.* at 8.

324. *Id.* at 5.

325. *Id.* at 6.

326. *Id.* at 7.

327. *Id.* at 7, 12–14.

328. *Id.* at 8–9.

329. Although many tribal courts in New Mexico possess a level of sophistication and development similar to that of Pojoaque Pueblo, others do not. For a description of each tribal court system in New Mexico, see NEW MEXICO TRIBAL COURT HANDBOOK 2006, *supra* note 322.

330. S. 279, 109th Cong., 119 Stat. 2573 (2005).

331. *See* Smith, *supra* note 196, at 2–3.

332. *See supra* notes 186–196 and accompanying text.

decision in *Duro v. Reina*;[333] the congressional amendment of the Indian Civil Rights Act of 1968,[334] which essentially overturned the *Duro* decision; and the Court upholding Congress's power to enact the ICRA amendment in *United States v. Lara*.[335]

Putting at ease the concerns of Pueblo leaders, New Mexico's delegation to the U.S. Congress united in passing the Pueblo Lands Act amendment with language that specifically and unequivocally affirms the Pueblos' inherent sovereignty as the root of their jurisdictional powers.[336] The delegation was successful, and the finalized text of the amendment is a powerful confirmation that Congress recognizes and respects the inherent sovereignty of the Pueblos.[337]

Early in its opinion, the *Romero* court recognized the congressional intent behind the Pueblo Lands Act amendment.[338] This recognition undoubtedly aided the court in its resolution of this matter, and Justice Serna crafted an opinion that reaffirms New Mexico's recognition of the Pueblos' sovereign status.

VII. CONCLUSION

In *Romero*, the New Mexico Supreme Court rendered a decision that is consistent with the federal recognition of inherent tribal sovereignty expressed in the *Duro*-fix, *Lara*, and the Pueblo Lands Act amendment. Unfortunately, the majority's analysis opens troublesome doors to undermine this recognition of the sovereignty of the New Mexico Pueblos through its analysis of the Pueblos under *Venetie*. Furthermore, the court's blurred distinctions between Pueblos and reservations, although not material to the outcome of this case, could prove problematic in cases regarding rights to and arising from land, particularly when the status of the land is a pivotal issue.[339]

Future cases will define the contours of civil jurisdiction in Pueblo Indian country with *Romero* adding complexity to a legal landscape already difficult to navigate. The unanswered questions created by *Romero* will undoubtedly be litigated in cases that will be watched closely and cautiously by the communities that have existed in New Mexico for generations.

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333. 495 U.S. 676 (1990).

334. 25 U.S.C. § 1301 (2000).

335. 541 U.S. 193 (2004). For an analysis of the implications of *Lara* on tribal sovereignty, see MacKenzie T. Batzer, Note, *Trapped in a Tangled Web* United States v. Lara*: The Trouble with Tribes and the Sovereignty Debacle*, 8 CHAP. L. REV. 283 (2005); *supra* notes 186–196 and accompanying text.

336. Smith, *supra* note 196, at 3.

337. *Id.*

338. State v. Romero, 2006-NMSC-039, ¶ 1 n.1, 142 P.3d 887, 888 n.1, *cert. denied*, 127 S. Ct. 1494 (2007).

339. *See supra* Part V.A–B.