

**A History and Description of the Model Tribal Secured Transactions Act Project**  
by  
William H. Henning\*

**A. A brief history and status report.**

There are over 500 federally recognized Indian tribes and nations<sup>1</sup> in the United States, and as a general matter they are sovereign entities subject to federal jurisdiction and law but not subject to state jurisdiction and law. They have the power to adopt legislation within their respective jurisdictions, and many tribes have developed extensive legislative codes.

Historically, tribes, Indian-owned businesses, and individual tribal members have encountered significant barriers when they have sought credit from lenders located outside Indian Country.<sup>2</sup> One reason cited for this phenomenon is the lack or insufficiency of commercial laws, especially laws governing secured transactions, which would protect the legitimate interests of lenders. The following statement accurately describes the dilemma:

Access to affordable credit is a fundamental component of sustainable economic development in all modern private market economies. When the rules governing lender/borrower relationships are uncertain or nonexistent, the risks to the lender increase. When the risk of a transaction increases, the lender may either refuse to lend or may increase the interest rate and other costs of the transaction to offset the risks. Therefore, to effectively enable access to credit by businesses and individuals at affordable rates and on competitive terms, rules are needed to govern lender/borrower or other creditor/debtor relationships.<sup>3</sup>

The past few decades have seen a dramatic increase in commerce in Indian Country, not just in the gaming industry but across a broad range of economic activity, and with this increased commercial activity has come an increase in the development of tribal law. As disparate laws have been developed, however, a situation has arisen not unlike that which prompted the development of the National Conference of Commissioners on Uniform State Laws (NCCUSL) 115 years ago. Laws that vary among tribes and that vary from the laws of the surrounding states invariably hamper the development of economic relationships, both between and among the tribes and between and among the tribes and the states.

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\* Distinguished Professor of Law at the University of Alabama School of Law and Executive Director of the National Conference of Commissioners on Uniform State Laws. The views expressed are those of the author and not necessarily those of the National Conference or any of its Commissioners. Part A of this article draws heavily on S. Woodrow and F. Miller, Lending in Indian Country, *Business Law Today*, Vol. 15, No. 2 (Nov./Dec. 2005).

<sup>1</sup> For convenience, “tribes” will be used throughout the paper rather than the more accurate but somewhat cumbersome “tribes and nations.”

<sup>2</sup> Indian Country is defined essentially in 18 U.S.C. § 115 as reservations, dependent Indian communities, and Indian allotments.

<sup>3</sup> Model Tribal Secured Transactions Act, Implementation Guide and Commentary, § I.

Several decades ago NCCUSL, recognizing the need for the development of somewhat uniform tribal laws, formed a Committee on Liaison with Native American Tribes.<sup>4</sup> Under the chairmanship of Commissioner Robert E. Sullivan of Montana, an effort was made to adapt uniform and model laws developed by NCCUSL to the needs of Indian tribes, but the effort may have been premature and little was accomplished. Several years ago, reacting to the increased economic activity in Indian Country, the committee was reconstituted under the chairmanship of Commissioner Timothy Berg of Arizona. The reconstituted committee's charge is to encourage the harmonization of state and Indian law on appropriate subjects by building relationships with Indian entities and by involving representatives of those entities in its drafting efforts.

The reconstituted committee, with the active participation of tribal representatives and other interested parties, determined that it should work to develop laws that would facilitate economic development. The study that led to this determination concluded in part as follows:

The Native American Lending Study prepared by the Community Development Financial Institutions Fund (November 2001) found that as Tribal economies expand and capital needs increase, Tribal governments need to cultivate an environment conducive to entrepreneurship, lending and investment. A key component of that type of environment is a legal infrastructure that supports contract enforcement and facilitates commercial activity.

Based on its study, the committee concluded that the most appropriate initial drafting project for it to undertake was the development of a model secured transactions law adapted from Article 9 of the Uniform Commercial Code.<sup>5</sup>

In early 2002, with Professor Maylinn E. Smith, Director of the University of Montana's Indian Law Clinic<sup>6</sup> serving as the initial reporter, the committee began work on what eventually came to be known as the Model Tribal Secured Transactions Act (MTSTA). All NCCUSL drafting projects are conducted in public and great efforts are made to bring into the process representatives of entities that will be affected by the act under development. In the case of the MTSTA, numerous tribes appointed

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<sup>4</sup> The committee's name was amended in 2004 after NCCUSL received significant input from tribal representatives involved in the drafting process. It is now called the Committee on Liaison with American Indian Tribes and Nations.

<sup>5</sup> With its partner, the American Law Institute, NCCUSL developed the original Uniform Commercial Code, including Article 9, and in 1998 the two organizations promulgated a wholesale set of revisions. The committee that drafted the MTSTA noted in its study that while some tribes had adopted a version of secured transactions law based on former Article 9 few had amended their acts to incorporate the 1998 revisions, and the vast majority had no secured transactions laws whatsoever.

<sup>6</sup> Among her many professional accomplishments, Professor Smith has served as Chief Judge of the Southern Ute Tribal Court, Appellate Judge for the Southwest Intertribal Court of Appeals, and legal counsel for the Salish & Kootenai Tribal Court. The drafting project could not have succeeded without her extraordinary knowledge and efforts, and when she had to leave the project due to the press of other responsibilities the committee was fortunate to find an able successor in Carl Bjerre, a Commissioner from Oregon and a professor of law at the University of Oregon.

representatives to assist the committee, and many were able to attend one or more of the drafting committee meetings.<sup>7</sup> In addition, the project was generously supported by the Federal Reserve Bank of Minneapolis, which made available the services of Susan M. Woodrow, Community Affairs Managing Project Director for the Bank's Helena, Montana Branch. Ms. Woodrow served as a valued advisor to the committee throughout the drafting project, and she chaired a task force composed of members of the drafting committee and tribal representatives that developed an Implementation Guide and Commentary. The stated purposes of this document are: "(1) to assist tribal legislatures in their review, adaptation and enactment of the Act; (2) to facilitate the use and understanding of the Act by tribal judges, legal counsel and individuals promoting business development in Indian Country; and (3) to assist non-tribal lenders and businesses in understanding the similarities and differences between the Act and corresponding provisions of the Uniform Commercial Code ("UCC")."<sup>8</sup>

Drafting work on the MTSTA and the Implementation Guide and Commentary was completed in 2005, and the focus shifted to obtaining enactment by as many tribes as possible. While not involved in the drafting work, the Department of the Interior's Bureau of Indian Affairs has lent considerable support to the enactment process. Specifically, the BIA has committed up to \$30,000 per tribe -- \$10,000 to study the act, \$10,000 to introduce it in its legislature, and \$10,000 to enact it. In addition, the BIA has committed significant funds to assist NCCUSL in developing a pilot training program for tribal judges and lawyers.<sup>9</sup>

As of mid-November 2006, only the Crow Nations in Montana had enacted the MTSTA, but a number of other tribes were considering enactment<sup>10</sup> and still others were seeking Department of the Interior funding with a view towards ultimate enactment.<sup>11</sup> Many others have expressed interest in the act but have not yet initiated formal action. The ultimate success of the act lies not in the drafting, nor even in the implementation, but rather in the ability of the act, perhaps coupled with other commercial legislation, to attract capital and thereby improve the economies of, and opportunities available to, the various tribes and their members.

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<sup>7</sup> Among those attending at various times were representatives of the Sac & Fox, the Cherokee, the Chitimacha, the Oneida, the Crow, the Confederated Tribes of Warm Springs, the Chickasaw, the Little Traverse Bay Bands of Odawa Indians, and several California rancherias.

<sup>8</sup> Model Tribal Secured Transactions Act, Implementation Guide and Commentary, Introduction.

<sup>9</sup> Technically, the grant must go to a federally approved Indian entity, and thus the funds will flow to the United Sioux Tribal Development Corporation, which will then disburse them to NCCUSL as needed for the development of the training program.

<sup>10</sup> Tribes or nations considering enactment include the Cheyenne River Sioux (South Dakota), the Rosebud Sioux (South Dakota), the Sisseton-Wahpeton Sioux (South Dakota), the Mille Lacs Band of Ojibwe (Minnesota), the Fond du Lac Band of Lake Superior Chippewa (Minnesota), the Leech Band of Ojibwe (Minnesota), the Salish & Kootenai (Flathead, Montana), and the Osage (Oklahoma).

<sup>11</sup> Tribes or nations seeking funding include the Chippewa Cree Rocky Boys, Montana), the Blackfeet (Montana), the Oglala Sioux (Pine Ridge, South Dakota), the Eastern Shoshone/Northern Arapahoe (Wind River, Wyoming), the Confederated Tribes of Warm Springs (Oregon), the Nez Perce (Idaho), the Yakima (Washington), the Umatilla (Washington), the Seminole (Oklahoma), the Sac & Fox (Oklahoma), and the Creek (Oklahoma).

## **B. The process of adapting U.C.C. Article 9 use by Indian tribes.**

Disentangling Article 9 from the rest of the Uniform Commercial Code and adapting it for use in jurisdictions without a common-law heritage was a daunting task. The various articles of the U.C.C. are interwoven to a significant extent, and extracting an article leaves dangling ends. An important aspect of the committee's work involved determining which provisions from other articles should be included in order for the MTSTA to function as a stand-alone act. The committee also wrestled with a number of other concerns: simplifying the act; appropriately reflecting tribal law, customs, and traditions; integrating the act into whatever body of commercial law might exist within a particular tribe; protecting the sovereign immunity of a tribe; and preserving the core concepts of Article 9 so that tribal and state law can be harmonized to the extent practicable.

Article 9, particularly as revised in 1998, is a remarkably long and dense piece of legislation, and the committee and its advisors were concerned that these features might work against its eventual implementation. Thus, concepts that were deemed to be of no applicability to current needs were omitted entirely from the MTSTA,<sup>12</sup> and concepts that were deemed to be of limited applicability were simplified, sometimes drastically. It was understood that any tribe that wishes to do so can add back omitted bells and whistles. To facilitate simplification while keeping the numbering system at least reasonably consistent with that of revised Article 9, some sections of the MTSTA are marked "Reserved."

The committee's handiwork in addressing each of the concerns expressed above can be seen by examining Part 1 of the act. Regarding the concern over including key provisions from other parts of the U.C.C., Section 9-106 imports definitions from the most recent official texts of Articles 1, 2, and 8.<sup>13</sup> It also imports from revised Article 1 provisions on notice and knowledge,<sup>14</sup> value,<sup>15</sup> leases distinguished from security interests,<sup>16</sup> good faith,<sup>17</sup> and course of performance, course of dealing, and usage of trade.<sup>18</sup> The choice-of-law rules are imported from original Article 1.<sup>19</sup>

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<sup>12</sup> E.g., the concept of agricultural liens was omitted entirely from the MTSTA.

<sup>13</sup> Imported from revised Article 1 § 1-203(b), are definitions of agreement, buyer in ordinary course of business, consumer, contract, organization, person, purchase, purchaser, and security interest. The definition of "sign" is derived from revised Article 2 § 2-103(1) (after using the term "authenticate" to include both manual and electronic signatures in Article 9, NCCUSL and the ALI determined that the word "sign" should be expanded to cover the same concepts in other articles as they were being revised). Imported from Article 8 § 8-102(a) is certificated security and from § 8-106 is control.

<sup>14</sup> Revised Article 1 § 1-202, MTSTA § 9-107.

<sup>15</sup> Revised Article 1 § 1-204, MTSTA § 9-108.

<sup>16</sup> Revised Article 1 § 1-203, MTSTA § 9-109. In furtherance of the goal of simplification the MTSTA section is limited to subsections (a) through (c) of the revised Article 1 provision.

<sup>17</sup> Revised Article 1 § 1-304, MTSTA § 9-113.

<sup>18</sup> Revised Article 1 § 1-303, MTSTA § 9-114.

<sup>19</sup> MTSTA § 9-117 is adapted from § 1-105 of original U.C.C. Article 1 rather than § 1-301 of revised Article 1. This is consistent with developing state law in that the states in their adoptions of revised Article

Integrating the MTSTA into whatever body of commercial law might exist for a particular tribe proved challenging. Revised Article 9 uses over 30 terms found primarily in articles other than Article 1 and it imports the terms' definitions from those articles via Section 9-102(b). The MTSTA uses many of the same terms but cannot draw their meaning from the other articles. The solution was to provide in Section 9-106(b) that the meaning of a term not defined in the act must be drawn from the context in which the term is used "with due consideration for consistency in meaning with uniform principles of commercial and contract law operative in the United States." This opens the door to consideration of the U.C.C.'s standard definitions, which may be found in state law or in the law of tribes that have adopted parts of the U.C.C. It also opens the door to consideration of interpretive rulings issued by tribal, state, or federal judges.

A similar problem of integration arose with respect to the scope of the MTSTA. Under Section 9-109(5) and (6), revised Article 9 applies to security interests that arise pursuant to the provisions of other articles. Of course, the MTSTA does not have those other articles to draw upon, so it provides in Section 9-110(a)(4) that it applies to "any other commercial activities, including sales of goods, leases of goods, other transactions in goods, negotiable instruments, bank deposits and collections, funds transfers, letters of credit, documents of title, and investment securities, to the extent those commercial activities are implicated in" the act's basic scope provisions. Thus, if tribal law governing the sale of goods creates what amounts to a security interest, it will be drawn into the MTSTA to the same extent that a security interest arising under Article 2 of the U.C.C. is drawn into revised Article 9.<sup>20</sup>

The committee was informed by its advisors that there is great sensitivity to the issue of sovereign immunity and that it was important to make clear that merely entering into a transaction under the MTSTA could not amount to a waiver of that immunity. The matter was dealt with in the act's first substantive provision, Section 9-102, which provides sovereign immunity is not waived without a "recorded, properly ratified, express waiver." In addition, Section 9-117 on choice of law provides that "[t]he fact that the law of another Indian tribe or nation, State, or country is applicable as provided in this section does not ... waive the sovereign immunity of this [Tribe] [Nation] or of any agency or instrumentality thereof."

As regards simplification, even a casual look at Section 9-106 of the MTSTA reveals that it contains far fewer definitions than does revised Article 9's Section 9-102 and, as we have seen, quite a few of the definitions that it does contain are derived from other articles. In addition, there are some new and simplified terms that are derived from Article 8's treatment of securities and securities accounts and Article 9's parallel

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I have to date uniformly substituted for § 1-301 a nonuniform provision based on original § 1-105. Only the United States Virgin Islands has adopted the uniform version of §1-301.

<sup>20</sup> MTSTA § 9-110(a)(4) must be read in light of subsection (b) to the same section, which provides that application of the act to one of the listed types of transactions must be derived from the context involved "with due consideration for consistency in application with uniform principles of commercial and contract law operative in the United States." This parallels MTSTA § 9-106(b), discussed above.

treatment of commodity contracts and commodity accounts. For example, the term “investment intermediary” is new and is used to refer to a securities intermediary under applicable law or a commodities intermediary under applicable law, and an investment account,<sup>21</sup> also a new term, means “a financial account maintained by an investment intermediary to which securities or commodity contracts are or may be credited by agreement.” The use of this terminology and the references to “applicable law” permit the MTSTA to avoid some of the complexities that stem from revised Article 9’s more complex definition of “investment property.”<sup>21</sup>

The effort to adapt the MTSTA to the specific circumstances of the tribes suffuses Part 1. For example, Section 9-104 acknowledges that some property that might otherwise be subject to a security interest is inalienable under federal law. This is particularly important under the MTSTA for fixtures that are a part of trust land. The same result would no doubt be reached under the first clause of Section 9-401 of the act,<sup>22</sup> but the concept is of great importance in Indian Country and it was deemed appropriate to showcase it at the beginning of the act. Section 9-106 contains a definition of “tribal business day,” which means a day on which the governmental offices of the tribe are open for ordinary business. Based largely on input from the committee’s advisors, the MTSTA sometimes uses calendar days<sup>23</sup> and sometimes uses tribal business days.<sup>24</sup> The term “usage of trade” contains a bracketed phrase that, if adopted,<sup>25</sup> would include within the term a local custom or tradition of the enacting tribe. Finally, the act’s scope provision makes clear that it only applies to transactions that are within the tribe’s jurisdiction,<sup>26</sup> and it excludes from coverage a tribal lien<sup>27</sup> just as it excludes a landlord’s liens.

<sup>28</sup>

The last of the listed concerns was that the MTSTA exist in reasonable harmony with state law governing secured transactions, meaning revised Article 9. This is in part to gain the efficiencies that always come when the laws in different jurisdictions are similar with regard to their core principles. There is, however, another important reason where the MTSTA is concerned. As indicated above, one of the goals of the project is to create a legal foundation that will attract capital, and it is important that lenders outside Indian Country contemplating loans to tribes or to other entities or individuals inside Indian Country find a law governing secured transactions that is familiar and with which

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<sup>21</sup> See, e.g., MTSTA § 9-314, which states in its entirety that “[a] security interest in a security or an investment account may be perfected by control.” The definition of the term “security” is generally left to other law, but MTSTA § 9-106(a) does provide that the term includes mutual fund shares that are not held in an investment account. By doing so in conjunction with the broad definition of investment account, the MTSTA covers virtually all useful forms of what revised Article 9 refers to as investment property.

<sup>22</sup> MTSTA § 9-401 states in relevant part that “[w]hether a debtor’s rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this [act]. . . .”

<sup>23</sup> See, e.g., MTSTA § 9-612(b) (safe-harbor rules for notice of disposition).

<sup>24</sup> See, e.g., MTSTA § 9-616(a) (explanation required before commencing action for deficiency).

<sup>25</sup> The brackets signify that each implementing tribe or nation should determine whether to make the phrase part of its act.

<sup>26</sup> MTSTA § 9-110(a). It is often difficult to define the jurisdiction of a tribe or nation but the committee determined that it do no better than to leave the matter to other law.

<sup>27</sup> MTSTA § 9-111(c).

<sup>28</sup> The act excludes interests in land, MTSTA § 9-111(l), but governs fixtures. MTSTA § 9-110(a)(1).

they feel comfortable. A quick review of Part 1 of the MTSTA will reveal many familiar definitions and other provisions that are straight out of revised Article 9.<sup>29</sup>

### **C. Other important features of the MTSTA.**

It is not the primary purpose of this article to give a detailed description of the MTSTA but rather to describe the process by which it was developed. However, there are a few important features of the act that differ significantly from Article 9 and are therefore worthy of at least a brief mention:

► The MTSTA's rules on the law governing perfection, the effects of perfection or nonperfection, and priority differ significantly from those of revised Article 9. Whereas revised Article 9 generally looks outside the state of enactment to the state of the debtor's location for perfection issues and to the state where the collateral is located for priority issues,<sup>30</sup> the MTSTA provides generally that it, rather than the law of another tribe or state, governs from the time a transaction that is subject to its terms is entered into<sup>31</sup> or from the time a debtor or transferee of collateral becomes subject to it.<sup>32</sup>

► Subpart 3 of Part 3, which provides the rules governing priority, has been radically truncated in the MTSTA. Similar concepts have been combined in such a way that the priority rules can be presented in just six, rather than 23, sections.

► Part 4 of the MTSTA also reflects a radical truncation of the similar provisions of revised Article 9. The provisions of this part are elegantly drafted and in many respects are clearer than those in the U.C.C. itself.

► Part 5 consists of only two sections, but here the simplicity is somewhat deceiving. Section 9-501(f) of the act provides tribes with regulatory authority to implement the filing provisions of the act, and the Implementation Guide and Commentary contains in Exhibit B a complete set of regulations, including acceptable forms, that were adapted by the committee from the Model Rules prepared for state governments by the International Association of Corporate Administrators.<sup>33</sup> The two sections of Part 5 of the MTSTA, as augmented by the Model Rules, provide virtually the same regime as that created by Part 5 of revised Article 9.

► The MTSTA does not provide for self-help repossession, although the Implementation Guide and Commentary suggests that a tribe might want to consider permitting it. Instead, the act provides that repossession must either be by judicial process or with the debtor's consent. It goes on to provide that "[s]uch consent is

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<sup>29</sup> See, e.g., MTSTA § 115 (purchase-money security interest).

<sup>30</sup> Revised Article 9 § 9-301.

<sup>31</sup> Recall that MTSTA § 9-110(a) provides that the act applies to secured transactions that are within the jurisdiction of the tribe.

<sup>32</sup> MTSTA § 9-301.

<sup>33</sup> Under revised Article 9 § 9-527, state filing offices must report to the governor or legislature on the extent to which their office rules are not in harmony with the most recent version of the Model Rules prepared by the International Association of Corporate Administrators.

effective only if expressed after default by means of a separate dated and signed personal statement in the debtor's handwriting, describing the powers to be exercised by the secured party and expressly acknowledging and waiving the debtor's right to require that such exercise be pursuant to judicial process.”

► Although not directly a part of the MTSTA, tribes considering implementation of the act must consider what filing office to use, and here the committee provided several choices. A tribe could choose to establish its own filing office or enter into a consortium with other tribes to establish a filing office. The Model Rules of IACA referred to above, as adapted by the committee and set forth in Exhibit B to the Implementation Guide and Commentary, will provide the necessary structure for operating the office. Alternatively, a tribe might choose to enter into a memorandum of understanding with a secretary of state's office so that its filings become part of the files maintained by that office. The Implementation Guide and Commentary contains in Exhibit A a sample memorandum of understanding.<sup>34</sup>

#### **D. Conclusion, and a peek into the future.**

The drafting of the MTSTA was a groundbreaking event for NCCUSL, and those involved in the process, as well as NCCUSL members generally, have been gratified by the extent to which it has received early support. As is true of NCCUSL drafting projects generally, whatever success the act ultimately has will be attributable in large measure to the knowledge, skill, and dedication of the committee's many advisors. NCCUSL is committed to continuing its efforts to spread the word about the act and to provide training to those who will be called upon to administer it.

NCCUSL has many acts that might be adapted for use by Indian tribes, but it can only make appropriate selections for projects if it is informed by the judgment of the community it seeks to serve. To that end, its executive committee has approved the formation of a Joint Editorial Board (JEB) for Tribal Code Development. NCCUSL participates in several JEBs,<sup>35</sup> which are essentially partnerships between and among NCCUSL and other entities with an interest in a particular area of the law. The JEBs function as independent think tanks and they provide invaluable advice to NCCUSL as it shapes its agenda. At its 2006 Annual Meeting, the National Congress of American Indians (NCAI) adopted a resolution authorizing it to participate as a founding member of the new JEB for Tribal Code Development, and as this article is being written NCCUSL and the NCAI are discussing the terms of the new JEBs charter and considering whether other entities should be invited to join the venture. There is little doubt but that the MTSTA project is the first of many such projects.

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<sup>34</sup> The memorandum of understanding is based on the Joint Powers Agreement between South Dakota Secretary of State and Cheyenne River Sioux Tribe. See [www.sdsos.gov/ucc/](http://www.sdsos.gov/ucc/).

<sup>35</sup> Currently, NCCUSL participates in Joint Editorial Boards for Uniform Family Law Acts, Uniform Trust and Estate Acts, Uniform Real Property Acts, and Uniform Unincorporated Organization Acts. It is currently exploring but has not yet approved participation in a Joint Editorial Board in the area of international law.

