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ENVIRONMENTAL COMPLIANCE CONSIDERATIONS FOR DEVELOPERS OF INDIAN LANDS

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I. INTRODUCTION

Tribal, state, and federal environmental regulatory jurisdiction over natural resources development and other business activities on Indian reservations and other Indian lands eludes precise definition. The unique attributes of tribal sovereignty and the relationships between tribes and states, the federal government, and private business, together with the lack of clear direction or standards of review from the courts give rise to jurisdictional uncertainties for those involved in undertakings with environmental impacts on Indian lands. Jurisdictional cross-currents can confound the expectations and understandings of developers on Indian lands. These uncertainties demand specialized attention by developers on tribal lands; developers must consider these unique issues in ascertaining environmental compliance obligations.

This article is intended to present a practice-oriented discussion covering the broad spectrum of environmental issues affecting natural resources development and other projects on Indian lands. The matters addressed here are applicable not only to natural resources development projects, but also to any type of development on Indian lands, including the waste treatment and disposal facilities that have received so much media attention in the recent past. This article serves to discuss the present day delineation of tribal, federal, and state environmental regulatory authority over activities on Indian lands. The interrelationship of these three jurisdictional spheres of influence present new and different challenges than those arising in transactions not involving Indian tribes, Indian lands, or Indian reservations. Of course, certain environmental compliance issues arise regardless of the location of the planned facility, and are common to Indian and non-Indian related projects. This article, however, does not present

a comprehensive analysis of such matters. Rather, the emphasis here is on environmental regulatory complications more unique to Indian lands.

Section I of this article examines the sources of, and limitations on, tribal power to impose environmental regulation on development activities. Section II examines specific permissible exercises of tribal regulatory jurisdiction over non-Indians, including zoning, health and safety regulation, environmental protection, and other matters addressed by the courts to date. This section also discusses the authority Congress has delegated to tribes under a number of significant federal environmental statutory and regulatory schemes. Section III discusses the potential exercise of state regulatory jurisdiction, raising the specter of concurrent and potentially conflicting jurisdiction. Section IV briefly addresses the role of federal regulation of natural resource leasing and development on Indian lands in environmental regulation. Section V touches on contractual obligations that may arise and affect environmental regulation. This discussion is designed to assist developers doing business on Indian lands in understanding some of the particularized complexities of transactions with Indian tribes and the concomitant environmental compliance considerations that result.

II. TRIBAL REGULATORY POWER: SOURCES AND LIMITATIONS

A. Sources of Tribal Authority

> The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. . . . [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.[1]

These words of Chief Justice John Marshall in 1831 continue to describe accurately the status of Indian tribes and Indian lands today. Indian tribes, long considered both sovereigns and wards subject to the supervision and protection of the federal government, derive powers from three principal sources: inherent tribal sovereignty, treaties with the United States, and delegation by the United States Congress through both general and specific legislative schemes.[2] Although not discussed here, tribes also may derive authority through cooperative agreements with states or federal land management agencies.

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1. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).
2. *See* Montana v. United States, 450 U.S. 544, 563-65 (1981); United States v. Wheeler, 435 U.S. 313, 323-24 (1978).

1. Inherent Tribal Sovereignty

In an early 1800's trilogy of still-influential cases, Chief Justice Marshall established that Indian tribes possessed powers of inherent sovereignty in one federal system that arose from tribes' status as independent nations before and at the time of the European colonization of North America.[3] "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ."[4] However, by virtue of Indian tribes' now dependent status within the federal system, their powers of inherent sovereignty are "necessarily diminished."[5] In general, however, most tribes retain certain inherent sovereign powers.[6] A tribe's governmental powers over its members are well established. Except as withdrawn, limited, or modified by treaty or statute, a tribe has inherent authority over tribal members within its territory.[7] However, a tribe's powers over Indians who are members of other tribes are similar to the narrower powers it enjoys over non-Indians.[8]

Inherent tribal powers to regulate non-Indian activities on the reservation are less clearly defined, but the existence of such powers is nonetheless well established.[9] Two propositions support Indian tribes' retaining power to regulate non-members: first, tribes possess the rights of a landowner; and second, tribes may exercise local self-government and regulate the relations between its members and other persons, consistent with federal law.[10]

Tribes retain certain inherent governmental powers that continue to be defined as they pertain to non-Indian activity on the reservation. In general, tribes may regulate "through taxation, licensing, or other means, the activities of nonmembers who enter consensual relation-

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3. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

4. *Wheeler*, 435 U.S. at 323 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).

5. Johnson v. McIntosh, 21 U.S. (8 Wheat.) at 574; *see also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) at 17 (tribes may be "denominated [as] domestic dependent nations.").

6. *See Wheeler*, 435 U.S. at 323 (Navajo tribal prosecution of tribal member does not bar federal prosecution for the same offense under the double jeopardy clause, since a tribe's source of power to try its members is derived not from federal government, but from inherent, unextinguished tribal sovereignty).

7. *See* Montana v. United States, 450 U.S. 544, 564-65 (1981); *Wheeler*, 435 U.S. at 323.

8. *See* Duro v. Reina, 495 U.S. 676 (1990).

9. *Compare Montana*, 450 U.S. 544 (1981) *with* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); *see also* Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985).

10. Powers of Indian Tribes, 55 Interior Dec. 14, 48-49 (1934) (citing 1 Op. Att'y Gen. 465, 466 (1821)); *see also* Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 478 (9th Cir. 1985). Land tenure within certain reservations may limit tribal power to exclude. For example, owners of land conveyed to non-Indians prior to the establishment of a reservation should not be subject to ouster, and may not be subject to regulation, by a tribe.

ships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[11] As indicated, tribes retain a fundamental attribute of sovereignty—the taxing power. A tribe also retains the "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[12] Justice Scalia recently described the "power reserved to tribes over the conduct of non-Indians within their reservations" as being "very narrow."[13] Despite its "narrow" applicability, tribal authority remains an important consideration for natural resources development on Indian lands. Attributes of inherent tribal sovereign power continue to be defined by the courts. Specific exercises of tribal powers will be discussed in Section II of this article.

2. Treaties with the United States

For many years, the chief instrument of federal power over Indians was the treaty, made by the President with the advice and consent of the Senate.[14] Consequently, many tribal rights in reservation lands are grounded in treaties between the United States and the tribe. While most treaties limit or preserve tribal powers derived from inherent sovereign status, treaties have been interpreted to supply, confirm, or define tribal authority over non-Indians.[15] "Implicit in . . . treaty terms . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."[16] Courts are disinclined to find that a

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11. *Montana*, 450 U.S. at 565; *see also* Morris v. Hitchcock, 194 U.S. 384, 389-92 (1904) (power to regulate commerce and raise revenue through licensing and permitting schemes). A well recognized attribute of tribal sovereignty is taxation. *See* Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 200-01 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982); *Colville*, 447 U.S. at 152; Powers of Indian Tribes, 55 Interior Dec. 14, 46 (1934) ("Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over non-members, so far as such non-members may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.").

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

13. County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 692 (1992).

14. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 33-46 (1942). The year 1871 marked the end of the treaty-making era between the United States and Indian tribes. However, the United States' obligations under Indian treaties remain unimpaired. *See* Act of March 3, 1871, 25 U.S.C. § 71 (1982); United States v. Berry, 4 F. 779 (D. Colo. 1880). Even treaty provisions that appear dated may have continued vitality. *See* Tsosie v. United States, 825 F.2d, 393, 403 (Fed. Cir. 1987) (enforcing a provision of the Treaty of June 1, 1868 with the Navajo Tribe which required the United States to reimburse Navajo Indians for injuries and loss resulting from the acts of white "bad men").

15. *See* Wisconsin v. Baker, 698 F.2d 1323, 1332 (7th Cir.), *cert. denied*, 463 U.S. 1207 (1983) ("1854 Treaty did not confer upon the [Lac Courte Oreilles] Band power to restrict public fishing and hunting in navigable lakes" on the reservation).

16. Williams v. Lee, 358 U.S. 217, 221-22 (1959); *see also Wheeler*, 435 U.S. at 324; Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965).

treaty divests tribal power where the treaty is susceptible of an interpretation preserving or establishing tribal authority over non-Indians.[17]

Treaties may create or secure important tribal powers over natural resources and business activities.[18] Treaties have been held to exclude State authority to regulate non-Indian tribal fishing and hunting on reservation lands, off-reservation fishing by tribal members,[19] and to support tribal authority to exclude regulation of work conditions in a tribal enterprise by the United States Department of Labor.[20] Treaties generally do not contain "boilerplate" provisions governing tribal jurisdiction over non-Indians or over natural resources development projects. In order to define a specific tribe's powers over particular activities, one should consider applicable treaties to determine whether their terms expand or limit tribal authority over non-Indian reservation activities.[21]

3. Executive Orders

Indian reservations were created by treaty, statute, and between 1855 and 1927,[22] by Executive Order. The particular organic action establishing a reservation may illuminate the scope of tribal authority over the lands involved. While potentially material in defining rights prior to 1927, the fact alone that a reservation had Executive Order origins rather than treaty or statute, generally is not held to diminish tribal powers. Tribal civil regulatory authority over Executive Order lands today appears comparable to authority over treaty or con-

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17. *See* Kerr-McGee Corp. v. Navajo Tribe of Indians, 731 F.2d 597, 600 (9th Cir. 1984), *aff'd*, 471 U.S. 195 (1985); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973).

18. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 67 (1982).

19. *See* Settler v. Lameer, 507 F.2d 231, 236 (9th Cir. 1974) (1855 Treaty with the Yakima Tribe provided tribe with regulatory authority, off-reservation, where the "right of taking fish at all usual and accustomed places" was granted by the Treaty).

20. Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709, 710 (10th Cir. 1982)

21. It is important to note, however, that Congress may override treaty rights through legislation. *See, e.g.*, Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968); Lone Wolf v. Hitchcock, 187 U.S. 553, 556 (1903) (treaty abrogation is a political question); United States v. Sohappy, 770 F.2d 816, 818 (9th Cir. 1985), *cert. denied*, 477 U.S. 906 (1986). Of course, Congressional power to abrogate treaties is not limited to Indian affairs. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979).

22. In 1927, Congress enacted legislation limiting the authority of the Executive to change reservation boundaries or implicitly eliminate reservations without congressional approval. *See* 25 U.S.C. § 398d (1988). In an enactment peculiar to Arizona and New Mexico, Congress prohibited the creation of executive order reservations in those states in 1918. *See* 25 U.S.C. § 211 (1988). Prior to those dates, the nature of title held by tribes on Executive Order reservations, and perhaps the breadth of tribal authority over those lands was perhaps more ephemeral than treaty or congressionally-established reservations.

gressionally established reservations.[23] Nevertheless, the circumstances surrounding issuance of Executive Orders may impact the scope of tribal authority over the lands involved.

4. Congressionally Delegated Authority

The Supreme Court has confirmed congressional power to delegate regulatory authority to Indian tribes. In *United States v. Mazurie*,[24] for example, the Court upheld a broad congressional delegation to tribes of authority to regulate liquor sales on tribal and fee lands on the Wind River Reservation.

In recent years, Congress has authorized delegations of regulatory authority to tribes under a growing number of environmental regulatory statutes. One of the first such delegations appears in the Clean Air Act[25] where Congress initially delegated to Indian tribes the authority to exercise certain controls, comparable to powers granted also to States, over reservation air quality.[26] Under the Clean Air Act's "non-degradation" provisions, tribes may control the quality of their reservation airshed through designation of air quality standards acceptable on the reservation. Such designations may affect development both on and near the reservation.[27] Several other federal environmental statutes contemplate administrative delegations of a regulatory role for Indian tribes with demonstrated ability to administer such programs.[28]

In addition to specific congressionally delegated authority, courts have inferred delegations of regulatory authority or ousters of State authority from broad federal policies encouraging the exercise of tribal regulatory authority.[29] The Supreme Court has recognized that the

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23. *See* COHEN, *supra* note 18, at 127-28; Arizona v. California, 373 U.S. 546, 598-601 (1963). Few decisions directly address distinctions between tribal powers over Executive Order reservation and most were created by statute or treaty. However, when the Supreme Court affirmed the power of the Jicarilla Tribe to impose severance taxes on non-Indian lessees' oil and gas production within its Executive Order reservation, it based its decision on "the Tribe's general authority, as sovereign, to control economic activity within its jurisdiction . . . ." Merrion v. Jicarilla Apache Tribe, 455 U.S. at 137. Notably, the Court did not address the energy companies' arguments that the Executive Order origins of the reservation limited tribal authority. Nevertheless, any pertinent Executive Order and supporting administrative records should be reviewed to define tribal powers.

24. 419 U.S. 544, 556-57 (1975).

25. 42 U.S.C. §§ 7401-7626 (1988 & Supp. II 1990).

26. *See* 42 U.S.C. § 7474(c) (1988) (tribes may redesignate reservation air quality classifications). As discussed in Section II.D. *infra*, Congress broadened the delegation to tribes in the Clean Air Act Amendments of 1990.

27. *See* Nance v. EPA, 645 F.2d 701 (9th Cir. 1981), *cert. denied sub nom.* Crow Tribe of Indians v. EPA, 454 U.S. 1081 (1981).

28. *See* Section II.D., *infra*.

29. *Cf.* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) (applicable statutes evidence "a firm federal policy of promoting tribal self-sufficiency and economic development").

federal government is "firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes."[30]

Federal courts and tribal advocates have derived support for broad delegation of authority primarily from the Indian Reorganization Act of 1934 (IRA),[31] the Indian Financing Act of 1974,[32] the Indian Self-Determination and Education Assistance Act of 1975,[33] and the Indian Civil Rights Act of 1968 (ICRA).[34] While none of these statutes declare exclusive tribal jurisdiction or specifically oust state power, several decisions interpret them as establishing policies that support the preemption of state regulation or support federal or tribal jurisdiction.[35] However, recent Supreme Court decisions limit the extent to which such broad federal policies promoting tribal self-sufficiency may expand tribal powers or restrict state jurisdiction.[36] These recent decisions suggest that, in the absence of specific congressional enactments, traditional or historic tribal regulation of the specific activity may be more probative of the scope of inherent tribal powers than broad statutory proclamations of policy favoring tribal self-government.

Developers must consider these sources of regulatory power as part of the planning process. The study of these matters, focussing on the specific land, reservation, and/or tribe involved, will provide important insights into the opportunities and potential pitfalls of a

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30. New Mexico v. Mescalero Apache Tribe, 462 U.S. at 334-35. Of course, the present federal policy promoting tribal self-government was not always the guiding policy. Statutes still on the books may override such policy. *See, e.g.*, County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 691-92 (1992) (specific General Allotment Act of 1887 and Burke Act of 1906 provisions are not overridden by general Indian Reorganization Act policies adopted in 1934).

31. 25 U.S.C. §§ 461-79 (1988 & Supp. II 1990); the Supreme Court stated the "intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism. . . .'" Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (quoting H.R. REP. No. 1804, 73d Cong., 2d Sess. 6 (1934)).

32. 25 U.S.C. §§ 1451-1543 (1988 & Supp. II 1990). Section 1451 says "[i]t is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." *Id.* § 1451.

33. 25 U.S.C. §§ 450-450n (1988 & Supp. II 1990).

34. 25 U.S.C. §§ 1301-1303 (1988 & Supp. II 1990); *see also* Morton v. Mancari, 417 U.S. 535, 551 (1974) (the ICRA evidences a federal "policy of furthering Indian self-government"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978).

35. *See, e.g.*, Washington, Dep't of Ecology v. United States EPA, 752 F.2d 1465, 1471 (9th Cir. 1985) (in support of EPA delegation of RCRA program authority to a tribe relying on a federal "policy of encouraging tribal self-government in environmental matters.").

36. *See* Cotton Petroleum Co. v. New Mexico, 490 U.S. 163 (1989) (Court rejected contentions that general federal policies promoting tribal economic development and self-government should contribute to the ouster of state taxing jurisdiction); County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683 (1992).

project. Of course, such insights are not limited to environmental regulatory consideration. Rather, the information will be useful in all of the planning, negotiation, development, operational, and reclamation phases of the project. The specific research should also address the other matters discussed below.

B. Limitations on Tribal Sovereign Powers

Indian tribal sovereignty is not unfettered. "Tribal sovereignty is subject to limitation by specific treaty provisions, by statute at the will of Congress, by portions of the Constitution found explicitly binding on the tribes, or by implication due to the tribes' dependent status."[37] This section analyzes these and other limitations on the exercise of tribal powers, including federal preemption, geographical limitations, and the ICRA. No single factor is determinative of the possible extent of, or limitations on, tribal authority over non-Indian activities. Courts generally inquire into all of the facts and circumstances behind each assertion of tribal authority. This "totality of circumstances" approach counsels in favor of full examination of all potential limitations on tribal authority. The examination should include both generally and specifically applicable limitations.[38]

1. The Dependent Status of Indian Tribes

The Supreme Court has found implicit in Indian tribes' dependent status certain limitations upon the exercise of tribal authority. The extent of those limitations depends on the context in which the issue arises.[39] The Supreme Court has described the status of tribes as:

> "an anomalous one and of complex character," for despite their partial assimilation into American culture, the tribes have

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37. Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 591 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984); *see also* Montana v. United States, 450 U.S. 544, 565 (1981); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-66 (1978); United States v. Wheeler, 435 U.S. 313, 323 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978). This same type of analysis is used to determine the contours of state jurisdiction over non-Indian reservation activities. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); *see* Section III, *infra*.

38. Certain legislative schemes are applicable only to specific tribes or groups of tribes. *See, e.g.*, Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735 (1988). These specifically tailored enactments may affect the regulatory regime applicable to the reservation. *See, e.g.*, 25 U.S.C. § 1708 (1988) (subjecting lands purchased for Rhode Island Indians' benefit to state civil and criminal jurisdiction). Accordingly, in addition to general principles of federal Indian law, one must consider any statutes, treaties, judicial decisions, or executive actions that may be directed to a particular tribe or to a class of tribes.

39. *Compare* Montana v. United States, 450 U.S. 544 (1981) *with* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

> retained "a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."[40]

Because of Indian tribes' "anomalous" status as "not . . . possessed of the full attributes of sovereignty," courts struggle constantly with the extent to which inherent tribal powers remain, or alternatively, have been diminished as a result of Indian tribes' dependent status.

In *Montana v. United States*,[41] the Supreme Court considered inherent limitations on tribal power in determining the source and scope of the Crow Tribe's power to "regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians."[42] The Court found no treaty-based tribal power to regulate non-members' fishing and hunting. However, in evaluating other potential sources of tribal power, the Court enunciated a three-pronged "*Montana* test" for determining inherent tribal powers:

> [E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.
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> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.
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> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[43]

The Court held that the effect of the non-Indian hunting and fishing on the Crow Tribe's vital interests was insufficient to warrant tribal

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40. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (quoting McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973)); *see also* United States v. Kagama, 118 U.S. 375, 381-82 (1886).

41. 450 U.S. 544 (1981).

42. *Id.* at 547.

43. *Id.*

hunting and fishing regulation under the first prong of the "*Montana* test;" consequently, tribal regulation was inconsistent with dependent status. Despite the result, the *Montana* test remains the primary touchstone for consideration of tribal assertions of regulatory authority over non-Indian activity.[44]

Tribal dependent status played a significant role in the Court's decision in *Brendale v. Confederated Tribes of the Yakima Indian Nation*.[45] In *Brendale*, four members of the Court held that the tribes' exercise of zoning authority over nonmembers, predominately non-Indian, was inconsistent with the tribes' dependent status:

> [R]egulations of "the relations between an Indian tribe and nonmembers of the tribe" is necessarily inconsistent with the tribes, and therefore tribal sovereignty over such matters of "external relations" is divested.[46]

While the three opinions in *Brendale* resulted in ouster of tribal zoning power only as to non-Indian owned fee lands in the predominately non-Indian portion of the reservation, the decision suggests that the Rehnquist Court may view the dependent status of tribes as sharply limiting tribal powers over non-Indians on fee lands.[47]

2. Comprehensive Federal Regulatory Schemes: Preemption of Tribal Authority

Tribal regulatory authority may be preempted by comprehensive federal regulatory schemes, even without express congressional divestiture of tribal authority.[48] In some respects, the analysis is not unlike the inquiry as to whether tribes are divested of certain powers as the result of their dependent status.

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44. Before *Montana*, the Court had stated, in considering the validity of state taxation, a different test: inherent tribal authority is retained by Indian tribes "unless divested. . .by federal law or necessary implication of their dependent status." *Colville*, 447 U.S. at 152. Since *Montana*, the courts generally have followed the Court's test in that case.

45. 492 U.S. 408 (1989). *Brendale* involved a challenge to the tribe's zoning authority over non-Indian fee lands in developed and undeveloped portions of the reservation. In three separate opinions, the Court formed two different alliances to reach different results. The tribe's authority was upheld as to the primitive position of the reservation, while the tribe's authority was struck down as to the developed portion of the reservation.

46. 492 U.S. at 427.

47. *Brendale* is discussed in greater detail in Section II.A.

48. *See* United States v. Dion, 476 U.S. 734, 740-41 (1986) (treaty rights are abrogated by Eagle Protection Act); United States v. Fryberg, 622 F.2d 1010 (9th Cir.), *cert. denied*, 449 U.S. 1004 (1980) (Eagle Protection Act, 16 U.S.C. §§ 668(a)-(d) (1988 & Supp. II 1990), protects national conservation interests which outweigh tribal hunting rights preserved by treaty). *But see* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 151-52 (1982) (Court rejected argument that tribal taxation of oil and gas operations conflicted with national energy policy).

In *Rice v. Rehner*,[49] the Supreme Court held that the State of California, pursuant to a federal scheme, could require a federally licensed Indian trader who operated a general store on an Indian reservation to obtain a state liquor license. "[T]radition simply has not recognized [an] . . . inherent [tribal] authority in favor of liquor regulation by Indians."[50] To the contrary, "[t]here can be no doubt that Congress has divested the Indians of any inherent power to regulate in this area [liquor sales]. In the area of liquor regulation, we find no 'congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.'"[51] In effect, the Court found that federal legislation preempted tribal sovereign powers.

A district court held similarly in *UNC Resources, Inc. v. Benally*.[52] In *Benally*, a tribal court had attempted to exercise jurisdiction over a dispute concerning an accidental off-reservation discharge of radioactive by-product material. The district court stated that tribal jurisdiction "conflicts with the superior federal interest in regulating the production of nuclear power."[53] Although greater emphasis has been focused on federal preemption of state regulation on the reservation, these decisions reflect that federal regulatory schemes may also preempt the exercise of tribal regulatory and adjudicatory jurisdiction.[54]

3. The Geographical Component of Sovereignty: Another Limitation

Reservation boundaries and land titles may also play a role in delineating or limiting tribal powers. The Supreme Court has repeatedly emphasized that there is "a significant geographical component to tribal sovereignty . . . ."[55] Inherent tribal sovereign powers,

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49. 463 U.S. 713 (1983).

50. Rice v. Rehner, 463 U.S. 713, 722 (1983).

51. *Id.* at 724 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980)); *see also* United States v. Mazurie, 419 U.S. 544, 545 (1975). In *Rice*, the Court reaffirmed that the tribal liquor regulation upheld in *Mazurie* was based on a specific delegation of congressional authority, not an independent tribal sovereign regulatory authority over liquor. *Rice*, 463 U.S. at 721-22.

52. 518 F. Supp. 1046 (D. Ariz. 1981).

53. *Id.* at 1052.

54. *See also* Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 786 (1984) (section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), divested tribal authority to grant or deny rights-of-way for hydroelectric project facilities).

55. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980); *see also* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 166 (Brennan, J. dissenting) ("[T]here is a significant territorial component to tribal power. Thus, state taxes on the off-reservation activities of Indians are permissible, and tribal laws will often govern the on-reservation conduct of non-Indians." (citations omitted)); Brendale v. Yakima Indian Nation, 492 U.S. 408, 457 (1989) (Blackmun, J., dissenting) ("The Court has affirmed and reaffirmed that tribal sovereignty is in large part geographically determined.").

therefore, generally extend to the limits of the reservation, and in certain circumstances may be exercised over non-Indians on fee lands within reservation boundaries.[56] In spite of this territorial aspect of tribal sovereignty, some tribes have successfully contended that treaties permit the assertion of tribal powers over tribal members beyond reservation boundaries, particularly where the off-reservation action could affect reservation lands or other tribal interests.[57]

Tribes recently have begun to assert jurisdiction over the off-reservation activities of non-Indians. For example, in 1988, the Navajo Tax Commission proposed a draft tax policy for the "Eastern Navajo Agency" area to the east and south of its recognized reservation. The policy sought to tax non-Indian business activities in that area, including lands undisputedly outside reservation boundaries. Because of pending litigation over whether certain of the Eastern Navajo Agency lands are included within its Reservation, the Navajo Nation has not acted to finalize the proposed policy.

To support extra-territorial assertions, tribes have relied on *dicta* in *DeCoteau v. District County Court*[58] and *California v. Cabazon Band of Mission Indians*,[59] stating that the federal "Indian Country" statute[60] applies to questions of both criminal and civil jurisdiction. However, those cases, and others citing them, involve on-reservation matters only.[61] To date no court has held that the "Indian Country" statute, which defines "Indian Country" for criminal jurisdiction purposes, authorizes or permits the assertion of tribal civil jurisdiction over off-reservation activities of non-Indians on fee lands. Tribal authority over off-reservation "Indian Country" will be unclear until the issue is resolved by the courts or Congress.[62]

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56. Montana v. United States, 450 U.S. 544, 566 (1981); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 142, 102 S. Ct. 894, 904 (1982); *cf.* Kleppe v. New Mexico, 426 U.S. 529, 538 (1976) (Congress' proprietary power over federal lands includes authority to regulate adjacent lands under the property clause of the Constitution where necessary to protect federal interests).

57. *See, e.g.*, Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974).

58. DeCoteau v. District County Court, 420 U.S. 425 (1975).

59. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

60. 18 U.S.C. § 1151 (1988) (defines "Indian country" to include all lands within the boundaries of Indian reservations, on and off-reservation Indian allotments, and dependent Indian communities outside reservations).

61. *See, e.g.*, Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988).

62. These matters are presented in Pittsburg & Midway Coal Mining Co. v. Watchman, U.S.D.C. Cause No. CIV 86-1442M (D.N.M.). The Ninth Circuit has rejected such off-reservation jurisdictional arguments in the context of state taxation assertions. *See* Yakima Indian Nation v. County of Yakima, 903 F.2d 1207, 1215 (9th Cir. 1990), *aff'd*, 112 S. Ct. 683 (1992). Resolution of such issues may be informed, in certain circumstances, by congressional action intended to open reservations to settlement or to terminate reservations. Surplus lands or allotment acts, prevalent from 1871 through 1928, when federal Indian policy sought to assimilate Indians into white society, resulted, in some circumstances, in a diminishment of tribal authority and termination of some reservations. The ultimate result of the allotment statutes is unsus-

4. The Indian Civil Rights Act

The Indian Civil Rights Act of 1968[63] (ICRA) represents an express congressional limitation upon the exercise of tribal powers. Prior to the enactment of ICRA, tribes "historically [had] been regarded as unconstrained by . . . constitutional provisions framed specifically as limitations on federal or state authority."[64] Through ICRA, Congress exercised its "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[65] The primary purpose of ICRA is to protect tribal members from abuses of tribal power, however, ICRA protects all "persons."[66] ICRA provides in part:

> No Indian tribe in exercising powers of self-government shall
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> * * *
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> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law . . . .[67]

This provision imposes restrictions upon tribal governments which are "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment."[68] Although rights guaranteed by this section are not coextensive with constitutional guarantees, courts interpret the section in light of federal constitutional law decisions.[69] However, tribal authority derived from congressional delegation ar-

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ceptible of generalized description: "The modern legacy of the surplus land Acts has been a spate of jurisdictional disputes between state and federal officials as to which sovereign has authority over lands that were opened by the Acts and have since passed out of Indian ownership." Solem v. Bartlett, 465 U.S. 463, 467 (1984). The Supreme Court recently found the extent to which land had passed into non-Indian fee ownership as a result of the allotment process to be critical to whether the Yakima Tribe retained zoning authority over fee lands within the reservation. *See* Brendale v. Yakima Indian Nation, 492 U.S. 408 (1989) (Stevens, J.). Accordingly, although perhaps not a principled distinction susceptible of even application, the character of land or community may be a factor in resolving jurisdictional disputes. *See also* Solem v. Bartlett, 465 U.S. 463 (1984).

63. 25 U.S.C. §§ 1301-1303 (1988 & Supp. II 1990).

64. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); *see, e.g.*, Talton v. Mayes, 163 U.S. 376, 384 (1896).

65. *Santa Clara Pueblo*, 436 U.S. at 56.

66. *Id.* at 61; *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. at 191 ("persons" includes Indians and non-Indians).

67. 25 U.S.C. § 1302 (1988).

68. *Santa Clara Pueblo*, 436 U.S. at 57.

69. Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 899 (9th Cir. 1988) (ICRA acts as a "conduit to transmit federal constitutional protections"); Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1047 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978); *see* UNC Resources, Inc. v. Benally, 514 F. Supp. 358, 361 (D.N.M. 1981); *but see* United States v. Strong, 778 F.2d 1393, 1397 (9th Cir. 1985) (limitations "are identical to those imposed by the fourth amendment").

guably may be subject to Fifth Amendment restrictions, in addition to ICRA limitations.[70]

5. Treaty Provisions: Limitations on Tribal Authority Over Non-Indians

Treaties may limit tribal authority over non-Indians. However, treaties generally are construed liberally in order to preserve tribal powers under the rule that ambiguities in treaty provisions are to be resolved in favor of the Indians.[71] Consequently, treaties seldom have been held to restrict tribal powers to any great degree.[72] Although treaties likely will be construed to preserve tribal rights and powers,[73] any investigation of tribal powers and limitations must consider applicable treaties.

III. SCOPE OF TRIBAL POWER: PERMISSIBLE EXERCISES OF TRIBAL REGULATORY JURISDICTION OVER NON-INDIANS

Tribal assertions of regulatory jurisdiction over non-Indians have extended into many spheres involving environmental protection, including zoning,[74] health and safety regulation,[75] taxation,[76] and land use planning.[77] Many other matters remain unexamined by the courts.[78] This section analyzes the scope of tribal authority in areas of interest or concern to natural resources developers and other businesses. While

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70. *See* United States v. Mazurie, 419 U.S. 544, 558 n.12 (1975) (fifth amendment may be available to remedy arbitrary tribal exercise of federally delegated authority); United States v. Morgan, 614 F.2d 166, 171 (8th Cir. 1980).

71. *See, e.g.*, Jones v. Meehan, 175 U.S. 1, 10-11 (1899) (disparity between federal and tribal sophistication in negotiation and expertise in written communication). A similar rule of construction applies to federal statutes. *See* County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683 (1992).

72. *See, e.g.*, Kerr-McGee Corp. v. Navajo Tribe, 731 F.2d 597 (9th Cir. 1984), *aff'd*, 471 U.S. 195 (1985); United States v. Wheeler, 435 U.S. 313 (1978); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965); Williams v. Lee, 358 U.S. 217, 222 (1959); Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984); UNC Resources, Inc. v. Benally, 518 F. Supp. 1046 (D. Ariz. 1981).

73. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); Rice v. Rehner, 463 U.S. 713 (1983); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); *but see* Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985) (applying rule of statutory construction that statutes must be read to give effect to every provision).

74. Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982).

75. Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982).

76. Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

77. Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982).

78. However, courts have considered other matters of limited importance. *See, e.g.*, Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 593-94, 599 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984) (Navajo Tribe has authority consistent with federal policy to regulate automobile repossession procedures where a tribal member's vehicle is threatened).

most cases uphold tribal assertions of traditional police power authority, recent Supreme Court decisions suggest higher hurdles may confront tribal regulation in the future.

A. Zoning Authority

The Supreme Court's 1989 decision in *Brendale v. Confederated Tribes of Yakima Indian Nation*[79] portends a narrower scope for tribal zoning powers than earlier lower court decisions had suggested. *Brendale* considered the Yakima Tribe's power to zone two discrete parcels in two markedly different portions of the reservation. Although members of the Court wrote three separate opinions, a majority affirmed tribal zoning power in a "closed" area of the reservation, where population and land ownership were overwhelmingly Indian, and overturned tribal zoning in an "open" area of the reservation, where land ownership and population were predominately non-Indian.

Writing for a four justice plurality, Justice White first rejected the Yakima Indian Nation's treaty-based jurisdictional assertions. He then examined the Court's *Montana* decision and determined that the Nation had no authority to zone lands held in fee by non-Indians.[80] Justice White reaffirmed prior decisions which held that tribal sovereignty is divested to the extent tribal powers are asserted over nonmembers of the Tribe.[81] "[U]nder the general principle enunciated in *Montana*, the Yakima Nation has no authority to impose its zoning ordinance on the fee lands [at issue]."[82] Thereafter, Justice White rejected application of the exceptions discussed in *Montana*. While tribes "may" retain authority over some types of non-Indian activities or fee lands under *Montana*, Justice White concluded, "[t]he governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in tribal courts, to regulate the use of fee land."[83]

The clarity of Justice White's plurality is muddied by the two other opinions filed in *Brendale*. Justice Stevens, joined by Justice O'Connor, represented the swing opinion in *Brendale* which resulted in the different results between the "open" and "closed" portions of the Yakima Reservation. Justice Stevens began his analysis by noting that "[z]oning is the process whereby a community defines its

79. 492 U.S. 408 (1989). The pivotal opinion of Justice Stevens in *Brendale* suggested that tribal zoning power may be determined by the extent to which it is necessary to preserve traditional tribal communities—and may be diverted to the extent immigration of non-Indians has had effect.

80. *Id.* at 422-31.

81. *Id.* at 425-26 (citing United States v. Wheeler, 435 U.S. 313, 326 (1978)).

82. *Id.* at 428.

83. *Id.* at 430.

essential character."[84] In the "open" part of the reservation, because of the high percentage of non-Indian fee lands, Justice Stevens opined that the Yakima Nation had lost the ability to "determine the essential character of the region" since the Tribe could not condition non-Indian entry on fee lands.[85] Thus, Justices White and Stevens combined forces to hold that the tribe had no jurisdiction to zone non-Indian fee lands where such lands represent a substantial percentage of the lands in a given area.

The "closed" reservation, however, remained an area over which, according to Justice Stevens, the Tribe retained the power to zone."[86] Justices Blackmun, Brennan, and Marshall joined Stevens and O'Connor to hold the tribe retained zoning authority in the "closed" reservation.

The lesson to be derived from *Brendale*, although subsequent changes on the Court could modify the analysis, is that tribal zoning and regulatory authority arising from inherent tribal sovereignty may depend on the existing Indian or non-Indian character of the area involved. This "rule" presents complications and uncertainties for tribes, states, and project proponents. No "bright line" exists regarding the geographic scope of tribal authority.

Brendale may narrow earlier opinions unqualifiedly affirming tribal zoning powers. In *Knight v. Shoshone and Arapahoe Indian Tribes*,[87] the Tenth Circuit affirmed application of a tribal zoning ordinance, adopted by the Shoshone and Arapahoe Tribes, to non-Indian owned fee lands on the Wind River Reservation.[88] The Knights argued the tribes had no authority to control the use of non-Indian fee lands, absent a congressional delegation of authority.[89] In rejecting the Knights' contention that "congressional delegation of authority to zone was required, the Tenth Circuit rested its affirmance on inherent tribal power under the third prong of the "*Montana* test," finding that uncontrolled land development would "directly affect" tribal and allotted lands and, hence, vital tribal interests.

> One proper form of the exercise of [inherent sovereign] power may be in response to "conduct [which] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."
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> The absence of any land use control over lands within the

84. *Id.* at 433.
85. *Id.* at 437.
86. *Id.* at 438-444.
87. Knight v. Shoshone & Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982).
88. *Id.* at 902-03.
89. *Id.* at 902.

> Reservation and the interests of the Tribes in preserving and protecting their homeland from exploitation justifies the zoning code. The fact that the code applies to and affects non-Indians who cannot participate in tribal government is immaterial. The activities of the developers directly affect Tribal and allotted lands.[90]

A Ninth Circuit court also applied the third prong of the *Montana* test to uphold a tribal zoning code as applied to non-Indian landowners on the reservation.[91]

The analyses of *Knight* and *Sechrist* now must be considered in light of *Brendale*. *Brendale* clearly will modify and focus the inquiry necessary to determine tribal zoning powers. Although land use planning decisions seem to directly affect a community, under *Brendale*, that effect alone will not sustain tribal zoning.

B. Health and Safety Regulation

Tribal health and safety regulation over activities of non-Indians may also fall squarely within the inherent tribal authority recognized by the Supreme Court in *Montana*.[92] In *Cardin v. De LaCruz*,[93] a non-Indian purchased a store on fee land within the boundaries of the Quinault Reservation. There were certain allegedly dangerous and unsanitary conditions in the store that violated tribal building, health, and safety regulations and the tribe closed the store. Thereafter, Cardin filed suit in federal court seeking to enjoin imposition of the tribal ordinances.

The Ninth Circuit determined that the principles enunciated in *Montana* controlled. The court concluded that the tribe's regulation was a permissible exercise of authority:

> First, the Tribe is regulating the activities of a non-member . . . who has "enter[ed] consensual relationships with the [T]ribe . . . through commercial dealing." Second, the conduct that the Tribe is regulating "threatens or has some direct

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90. *Id.* at 902-03 (citations omitted); *see also* Sechrist v. Quinault Indian Nation, 9 Ind. L. Rep. 3064 (W.D. Wash. 1982) (a tribal decision refusing to rezone non-Indian owned property from a "forestry" zone in part and a "wilderness" zone in part to a zoning classification which would permit the construction and operation of a recreational vehicle park and campground was upheld). The exercise of such regulatory authority, however, is not without limitation. *See* 25 U.S.C. § 1302 (1988); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 542 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982) ("The confiscation of property" is a "forbidden power.")

91. Sechrist v. Quinault Indian Nation, 9 Ind. L. Rep. 3064, 3065 (W.D. Wash. 1982).

92. 450 U.S. 544 (1981). Again, *Brendale* may temper the proper inquiry today.

93. 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982).

> effect on . . . the health or welfare of the [T]ribe." Thus, the Tribe retains inherent sovereign power to impose its building, health, and safety regulations on appellee's business, notwithstanding appellee's ownership in fee of the land on which the store stands.[94]

The Ninth Circuit also upheld a shoreline protection ordinance promulgated by the Confederated Salish and Kootenai Tribes as applied to non-Indian lands within the Flathead Reservation.[95] The court acknowledged the distinctions between *Montana* (powers not needed for tribal self-government or to control internal affairs have been divested) and *Colville* (only powers which are inimical to overriding federal interests have been divested), and held that the tribe's shoreline protection ordinance was valid as applied to non-Indian lands under either test. The court stated that:

> If the *Colville* rule . . . is applied . . . the Tribes must prevail on the regulatory issue, because no significant federal interests would be impaired by tribal regulation of the riparian rights of non Indian landowners . . .
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> Even if the *Montana* rule . . . is applied . . . the Tribes should prevail . . . . First, . . . the Tribes are in effect seeking to regulate non-Indians' use of tribal trust land . . . . Second, . . . the conduct that the Tribes seek to regulate [use of the bed and banks of a lake] . . . has the potential for significantly affecting the economy, welfare and health of the Tribes. Such conduct, if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources.[96]

These cases suggest that tribes retain authority to implement health and safety regulation where they can show effects on vital tribal interests under the *Montana* test. However, landholding and demographic patterns almost certainly will affect tribal powers under

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94. 671 F.2d at 366.

95. *See* Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982).

96. *Id.* at 963-64. Of similar effect is Lummi Indian Tribe v. Hallauer, 9 Indian L. Rep. 3025, 3026 (W.D. Wash. 1982), in which a federal district court found an Indian tribe to have civil jurisdiction to plan, construct, operate and maintain a sewer system to service non-Indian owned land within a reservation "and to require non-Indian fee simple property owners to hook up to the system and to pay assessment fees for the services received." *Id.* The court found no inconsistency between any overriding federal interests and the Quinault's plan to administer a comprehensive sewer system on the reservation. *Id.*

Brendale. *Colville* is also likely to remain an independent threshold when the tribal regulation will intrude upon important federal interests or regulatory schemes. *Montana*, *Brendale*, *Colville*, and their progeny will continue to inform (or plague) the determination of the scope of tribal regulatory authority. The lessons of these decisions should be analyzed carefully with the circumstances of any proposed project firmly in mind. Such an analysis is necessary to understand the tribal regulatory side of environmental compliance considerations.

C. Environmental Protection

Little precedent exists concerning inherent tribal authority to regulate clean air, clean water, hazardous waste, and other areas of environmental protection. However, *Montana*, *Colville*, and their progeny, together with federal statutes, supply several bases for Indian tribes to institute tribal environmental protection ordinances and to apply them to non-Indians. Recently, the EPA has announced a policy favoring tribal responsibility for protection of reservation environments[97] and Congress has authorized administrative delegations to tribes for the implementation of some federal environmental programs. These delegations are consistent with the November 8, 1984 EPA Policy for the Implementation of Environmental Programs on Indian Lands.[98] Such delegations, at present, give rise to more important compliance considerations than inherent sovereignty. However, as tribes develop reservation-based economies we can expect the development of tribal regulatory codes that are based on principles of inherent sovereignty and extend beyond the scope of congressional obligation. This subsection focusses on existing congressional delegations of authority.

1. Clean Air Act

The Clean Air Act Amendments of 1990 provide qualified, federally recognized tribes with sweeping new authority to regulate air quality matters on the reservation.[99] Under the 1990 Amendments, the EPA Administrator is authorized to treat tribes as states.[100] Such treatment is available to tribes which the EPA Administrator determines are "reasonably expected to be capable . . . of carrying out the functions to be exercised in a manner consistent with the terms

97. *See* Nance v. EPA, 645 F.2d 701 (9th Cir. 1981), *cert. denied sub nom.* Crow Tribe of Indians v. EPA, 454 U.S. 1081 (1981).

98. For an excellent discussion of EPA policy, see Eric D. Eberhard, A REVIEW OF THE ENVIRONMENTAL PROTECTION AGENCY INDIAN LANDS POLICY, ABA SONREEL Indian Lands Conference (April 1990).

99. *See, e.g.*, 42 U.S.C. § 7410 (1988 & Supp. II 1990).

100. 42 U.S.C. § 7601(d)(1)(A) (1988 & Supp. II 1990).

and purposes of [the Act] . . . ."[101] The EPA will promulgate regulations to specify the nature of tribal authority, but the amendments limit tribal authority to "the management and protection of air resources within the exterior boundaries of the reservation or *other areas within the tribe's jurisdiction* . . . ."[102] While the emphasized language is not defined in the statute, tribal authority to develop implementation plans to meet the goals of the Clean Air Act is limited to areas within reservation boundaries.[103]

Until the 1990 amendments to the Clean Air Act, tribal governments were not granted express regulatory or enforcement authority over Indian reservations by the Clean Air Act.[104] No mention of tribes appeared in the enforcement provisions of the Act.[105] Indirect tribal control over reservation airsheds, however, was provided by a delegation to tribes under the Clean Air Act's Prevention of Significant Deterioration (PSD) program.[106] The Act provides in pertinent part:

> (c) Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respects to the provisions of subsection (e) of this section.[107]

The authority to redesignate reservation airsheds allowed tribes to indirectly limit or promote industrial development both on and off the reservation.[108] The 1990 amendments, however, may limit any

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101. 42 U.S.C. § 7601(d)(2)(C) (1988 & Supp. II 1990).

102. *Id.* at § 7601(d)(2)(B) (1988 & Supp. II 1990) (emphasis added).

103. 42 U.S.C. § 7410(o) (1988 & Supp. II 1990). Implementation plans constitute the primary regulatory mechanism through which national ambient air quality standards are to be met. *See* J. GORDON ARBUCKLE ET AL, ENVIRONMENTAL LAW HANDBOOK 148-49 (7th ed. 1983).

104. *See* Patrick Smith & Jerry D. Guenther, Note, *Environmental Law Protecting Clean Air: The Authority of Indian Governments to Regulate Reservation Air-sheds*, 9 AM. INDIAN L. REV. 83, 92 (1981).

105. *See, e.g.*, 42 U.S.C. §§ 7411(c), 7412(d) (1988 & Supp. II 1990).

106. Clean Air Act, 42 U.S.C. § 7474 (1988 & Supp. II 1990). Under the PSD program, states and Indian tribes are authorized to designate air quality regions within the states or Indian reservations as falling into one of three classifications. Each designation permits different degrees of air quality deterioration. Class I areas are permitted the least amount of air quality degradation, while class III areas are permitted significantly greater deterioration. Class II is intermediate. The purpose of the PSD program, in part, is to allow states and tribes flexibility in determining whether the amount of development permitted is in conformity with state or tribal development plans.

107. Clean Air Act, 42 U.S.C. § 7474(c) (1988).

108. Should a tribe seek to discourage industrial development on or near the reservation, its authority to challenge such development is not limited necessarily to matters within reservation boundaries. *See* 42 U.S.C. § 7474(e) (1988). Under the Clean Air Act, a tribe could seek to limit development adjacent to the reservation which might have an affect on reservation air quality. *Id. See also* Nance v. EPA, 645 F.2d 701, 715 (9th Cir. 1981), *cert. denied sub nom.* Crow Tribe of Indians v. EPA, 454 U.S. 1081 (1981). For example, the Navajo Tribe,

tribal authority that impacts off-reservation development; the issue is open.

In *Nance v. EPA*,[109] the Crow Tribe and coal companies challenged EPA approval of the Northern Cheyenne Tribe's PSD redesignation of its reservation airshed from Class II to Class I. The Class I designation promotes near pristine air quality and severely limits the permissible air quality deterioration. Stating that the EPA promulgated specific procedures through which a tribal governing body could redesignate its reservation airshed under the Clean Air Act, the Ninth Circuit upheld the EPA's approval of the Northern Cheyenne Tribe's redesignation:

> The conclusion can be drawn . . . that within the present context of reciprocal impact of air quality standards on land use, the states and Indian tribes occupying federal reservations stand on substantially equal footing. The effect of the [PSD] regulations was to grant the Indian tribes the same degree of autonomy to determine the quality of their air as was granted to the states.[110]

As a result, although the 1990 Amendments may affect the analysis, tribes may have the ability to control off-reservation development affecting reservation air quality. "Just as a tribe has the authority to prevent the entrance of non-members onto the reservation, a tribe may exercise control, in conjunction with the EPA, over the entrance of pollutants onto the reservation."[111] The "equal footing" concept provides powerful agreements for tribes seeking to control development adjacent to the reservation.

2. Clean Water Act

The 1987 amendments to the Clean Water Act (CWA) authorize the EPA to delegate program responsibilities to tribes which are similar to those delegable to states. However, a tribe must be able to demonstrate the ability to fulfill the purposes of the CWA.[112] Under

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or at least a part of it, opposed the now abandoned coal-fired power plant planned for Kaiparowits, near the Navajo Reservation. *See* Lynne E. Petros, Comment, *The Applicability of the Federal Pollution Acts to Indian Reservations: A Case for Tribal Self-Government*, 48 U. COLO. L. REV. 63, 89 n.144 (1976).

109. 645 F.2d 701 (9th Cir. 1981).

110. *Nance*, 645 F.2d at 714.

111. *Id.* at 715 (citations omitted).

112. 33 U.S.C. § 1377(e)(3) (1988); *see also* 54 Fed. Reg. 14,354 (April 11, 1989) (interim final rule promulgated by the EPA defining procedures for tribes to qualify for treatment as states under the act). The Clean Water Act (CWA) refers to Indian tribes in the definitional section. *See* Clean Water Act, 33 U.S.C. § 1362(4) (1988) (defining a "municipality" to include "an Indian tribe or an authorized Indian tribal organization"). As a result, tribes may be regulated entities amenable to citizen suits for violations of the Act. *See* Blue Legs v. United States EPA, 668 F. Supp. 1329, 1338 (D.S.D. 1987), *aff'd sub nom.* Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989) (involving RCRA enforcement under a similar statutory scheme).

these provisions, the EPA may delegate responsibility to tribes for: National Pollutant Discharge Elimination System (NPDES) permitting; dredge and fill permitting; and water quality standard setting. The tribe also may obtain federal grants for pollution control programs.[113] The authority delegable to tribes, within the areas listed, is comparable to that of states. However, the "treatment as states" provisions of the Clean Water Act are not comprehensive. While tribes do not hold the same range of authority as do states under the Clean Water Act, tribes may soon obtain important permitting and water quality standard setting authority. Developers should bear in mind, however, that while tribes may possess regulatory authority over certain elements of a project, states may hold sway over other matters.

3. Safe Drinking Water Act

Under the Safe Drinking Water Act (SDWA) amendments of 1986,[114] tribes are treated as states. Tribes are regulated entities or "persons" for enforcement purposes.[115] In addition, the EPA may delegate primary enforcement authority over drinking water standards to a tribe that demonstrates its ability to administer the program effectively.[116]

4. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

Under CERCLA,[117] tribes may be treated "substantially the same . . . as a state."[118] As under the Clean Water Act, however, tribal authority is not as broad as the authority Congress delegated to states. Tribes—specifically the governing body of the Indian tribe—are to be treated as states for purposes of: (a) receiving notification of hazardous substance releases; (b) consultation regarding remedial clean-up action; (c) accessing information regarding hazardous substances maintained by facilities operators; (d) participation in the registration of diseases and illnesses related to hazardous substance exposure, and of persons exposed to toxic materials; and (e) development of the National Contingency Plan.[119] Beyond these enumerated areas, Congress has not delegated CERCLA authority to tribes. For example, tribes are excluded from participation in the "initiation, development,

113. 33 U.S.C. § 1377(f) (1988).
114. 42 U.S.C. §§ 300f-300j-11 (1988).
115. 42 U.S.C. §§ 300f(10), 300f(12) (1988).
116. 42 U.S.C. § 300j-11 (1988).
117. 42 U.S.C. §§ 9601-9675 (1988 & Supp. II 1990).
118. 42 U.S.C. § 9626(a) (1988).
119. *Id.*

and selection of remedial actions to be undertaken" on the reservation, whereas states are involved in that process.[120]

5. Resource Conservation and Recovery Act

While federal delegations to tribes are increasingly prevalent in the environmental protection area, the Resource Conservation and Recovery Act (RCRA)[121] does not yet appear to contemplate a regulatory role for Indian tribes. In *Washington, Dep't of Ecology v. United States EPA*,[122] the Ninth Circuit Court of Appeals affirmed the EPA's refusal to certify the State of Washington's RCRA program as applied to regulation of reservation activities.[123] The court stated that "RCRA does not authorize the states to regulate Indians on Indian lands."[124] Unfortunately, "RCRA does not directly address the problem of how to implement a hazardous waste management program on Indian reservations."[125]

> In the case at bar, as in *Nance*, the tribal interest in managing the reservation environment and the federal policy of encouraging tribes to assume or at least share in management responsibility are controlling. We cannot say that RCRA clearly evinces a Congressional purpose to revise federal Indian policy or to diminish the independence of Indian tribes . . . .
>
> EPA, having retained regulatory authority over Indian lands in Washington under the interpretation of RCRA that we approve today, can promote the ability of the tribes to govern themselves by allowing them to participate in hazardous waste management. To do so, it need not delegate its full authority to the tribes. We therefore need not decide, and do not decide, the extent to which program authority under section 3006 of RCRA is delegable to Indian governments.[126]

The question whether Tribes have delegated authority under RCRA remains unanswered. Presumably, Congress will undertake this matter expressly when RCRA reauthorization is considered.

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120. 42 U.S.C. § 9621(f) (1988). However, if any remedial action developed by the federal government involves relocation of tribal members, such remedial action "must be concurred in by the affected tribal government." 42 U.S.C. § 9626(b) (1988).

121. 42 U.S.C. §§ 6901-6987 (1988 & Supp. II 1990).

122. 752 F.2d 1465 (9th Cir. 1985).

123. *Id.* at 1466. The court did not address whether the EPA could have certified a state program which extended onto Indian reservations only insofar as it sought to regulate non-Indian activities. *Id.* at 1468.

124. *Id.* at 1467-68.

125. *Id.* at 1469.

126. *Id.* at 1472. Section 3006 of RCRA authorizes states specifically to assume responsibility for hazardous waste management programs. 42 U.S.C. § 6926 (1988).

Although RCRA does not expressly authorize Indian tribes to undertake RCRA management programs, tribes are subject to suit for RCRA violations. In *Blue Legs v. United States EPA*,[127] tribal members sued the Oglala Sioux Tribe, the EPA, and others for RCRA violations. Finding that RCRA violations were widespread on the reservation, the district court concluded that the tribe was amenable to suit under RCRA's citizen suit provisions. The court found that the tribe's inherent sovereign status included responsibility to regulate and operate dumps on the reservation.[128] The Court of Appeals for the Eighth Circuit affirmed.[129] Accordingly, a developer that seeks to cloak itself with the immunity of a tribe will be laid bare insofar as RCRA liability is concerned.

6. Summary

Congressional delegations support tribal environmental jurisdiction in several contexts.[130] Unfortunately, the limited delegations under certain statutes complicate the jurisdictional picture for those seeking to obtain an understanding of one's environmental compliance obligations.

The propriety of tribal regulatory jurisdictional assertions in other environmental areas, where there has been no express federal delegation, may depend on whether tribal regulation is preempted by a comprehensive federal scheme. Alternatively, tribal regulatory authority may be supported by inherent tribal sovereignty given the EPA's efforts to "promote tribal self-government in environmental matters."[131] Developers must consider not only applicable federal regulatory schemes, but also tribal regulatory schemes that may be supported by inherent tribal sovereign power.

D. Occupational Safety And Health Regulation

Research has disclosed no precedent concerning the authority of Indian tribes to regulate occupational safety and health matters. However, given the standard of review in *Montana*,[132] tribal regulation of

127. 668 F. Supp. 1329 (D.S.D. 1987), *aff'd*, 867 F.2d 1094 (8th Cir. 1989).

128. 668 F. Supp. at 1337, 1339. The court also admonished the EPA to provide assistance to the Tribe to better administer the reservation RCRA program. *Id.* at 1339.

129. Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989).

130. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, 9626(a) (1988 & Supp. II 1990).

131. Washington, Dep't of Ecology v. United States EPA, 752 F.2d 1465, 1471 (9th Cir. 1985). *See also* Lummi Indian Tribe v. Hallauer, 9 Indian L. Rep. 3025, 3026 (W.D. Wash. 1982); EPA POLICY FOR THE IMPLEMENTATION OF ENVIRONMENTAL PROGRAMS ON INDIAN LANDS, November 8, 1984. In the 1984 EPA policy statement, the Agency undertook to provide assistance to tribes on a "government-to-government" basis in order to undertake environmental regulatory programs on the reservation.

132. Montana v. United States, 450 U.S. 544 (1981).

occupational safety and health may be upheld as applied to non-Indian commercial enterprises located within the exterior boundaries of an Indian reservation, particularly if that enterprise employs tribal members.

Federal courts are split over whether federal occupational safety and health regulations are applicable to tribal enterprises, and preclude application of tribal regulatory schemes to non-Indian enterprises on a reservation.[133] In *Donovan v. Navajo Forest Products Industries, Inc.*,[134] the Tenth Circuit rejected the Secretary of Labor's argument that *F.P.C. v. Tuscarora Indian Nation*,[135] supported the interpretation that OSHA's generally applicable provisions extended onto the reservation.[136] The Tenth Circuit stated that *Tuscarora* "does not apply to Indians if the application of the general statute would be in derogation of the Indians' treaty rights."[137] The court concluded that the Treaty of June 1, 1868 between the Navajo Tribe and the United States limited federal authority to regulate tribally owned businesses, and that application of OSHA to a tribally owned business "would dilute the principles of tribal sovereignty and self-government recognized in the treaty."[138] The opinion also intimates that Indian tribes may retain inherent authority to regulate all occupational safety and health matters on the reservation, and that the exercise of such tribal authority would not be inconsistent with overriding national interests.[139]

The effect of *Navajo Forest*, however, may be limited due to the treaty provisions peculiar to the Navajo Tribe in that case. In *Donovan v. Coeur d'Alene Tribal Farm*,[140] the Ninth Circuit declined to follow *Navajo Forest* and concluded that federal OSHA standards were applicable to tribal businesses, following *Tuscarora*.[141] Again, circumstances peculiar to a given tribe and business will impact the result. No bright lines may be drawn.

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133. *Compare* Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709, 710 (10th Cir. 1982) (Navajo Tribe's sovereignty bars application of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1988 & Supp. II 1990), to a tribally-owned business enterprise) *with* Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1117 (9th Cir. 1985) (distinguishing *Navajo Forest Products Industries* because the Tenth Circuit's decision rested on the 1868 Treaty provision expressly granting the power to exclude non-Indians, and holding OSHA applicable to tribal commercial activities).

134. 692 F.2d 709 (10th Cir. 1982).

135. 362 U.S. 99 (1960).

136. *Id.* at 116. The *Tuscarora* language relied upon by the Secretary provides: "[I]t is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *Id.*

137. *Navajo Forest*, 692 F.2d at 711.

138. *Id.* at 712.

139. *Id.* at 712-13.

140. 751 F.2d 1113 (9th Cir. 1985).

141. *Id.* at 1117.

E. Summary

The permissible scope of the exercise of tribal regulatory authority over non-Indians continues to develop, but at present is not capable of general definition. *Montana*, despite its holding that the tribe could not regulate non-Indian hunting, and its progeny suggest broad latitude for the exercise of tribal regulatory authority. However, *Brendale* strongly signals a regression on this development. Federal statutes, reflecting a variety of policies which range from encouragement of tribal self-determination to a desire to maintain national security and uniformity, may further inform the inquiry. As with many issues of Indian law, a particularized inquiry into present day and historical tribal, federal, state and private interests is required to determine the validity of tribal assertions of environmental regulatory authority.[142]

IV. POTENTIAL STATE REGULATORY AUTHORITY

Reservation resource developers also must consider the potential to which their activities may be subject to state control. State authority, however, does not foreclose tribal authority, and vice versa. Such concurrent jurisdictional regimes yield a host of considerations for the natural resource developer. Overlapping jurisdiction can yield inconsistent or conflicting regulatory obligations. For example, the tribe may not want a tall stack for aesthetic reasons, while the state requires a tall stack to better disburse the exhaust plume. These types of matters should be identified promptly and addressed through negotiation or otherwise.

Although the ultimate scope of state environmental regulatory jurisdiction over reservation-based activities remains to be determined, the recent decision of the United States Supreme Court in *Cotton Petroleum Co. v. New Mexico*[143] boldly announces the proposition that, under the circumstances and facts presented, states may tax the reservation-based oil and gas production of non-Indian lessees of Indian tribes, notwithstanding that the tribe already taxes the activity.[144] On the heels of *Cotton*, the Court also announced that states

142. *See* National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

143. 490 U.S. 163 (1989).

144. Conceivably, *Cotton*'s impact will be limited to the tax arena, and its rationale will not be applied in other areas. That the majority chose not to address and harmonize the result in *Cotton* with California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), where California state regulation of bingo operations was ousted, supports a taxation-regulation distinction. However, *Cabazon Band* and other decisions intimate that taxation is the most intrusive jurisdictional assertion, suggesting that if state taxation were permissible so too would state regulation of the same activity. On the other hand, generalizations are dangerous and each jurisdictional assertion must be considered thoroughly. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

and local governments have authority, in certain circumstances, to regulate the use of fee lands inside reservation boundaries.[145] Accordingly, reservation status does not necessarily negate the authority of the states to tax or regulate non-Indian activities.[146]

At present, the extent of state authority over non-Indians is "riddled with inconsistencies and major questions that are still unresolved."[147] Developers should attempt to resolve these uncertainties on a project-specific basis. Fact-specific research may address the problem; other problems may need to be addressed by contract or other methods.

Congressional delegation to tribes, of course, may alter the equation when states assert environmental regulatory authority in an area governed by a federal scheme. Moreover, state authority may be ousted where there is yet to be a delegation to tribes. In *Washington, Dep't of Ecology v. United States EPA*,[148] the Ninth Circuit held that Washington lacked RCRA authority to regulate on Indian lands.[149] As Congressional delegations to tribes flourish, state regulatory jurisdiction will likely diminish under the analyses employed to determine the scope of state jurisdiction.

Two interrelated inquiries control questions of the validity of state jurisdiction. The first rule provides that states may not infringe upon tribal rights of self-government.[150] The second rule, the Indian preemption doctrine, is based upon federal policies promoting reservation economic development, tribal self-sufficiency, and self-determination, and limits state authority over Indian matters.[151] Factors considered in determining the extent of state jurisdiction include: reservation status, land status, whether jurisdiction is asserted over Indians or non-Indians, and the subject matter to be regulated.[152] In addition, treaties, federal statutes, state constitutions, and other en-

145. Brendale v. Yakima Indian Nation, 492 U.S. 408 (1989).

146. *See also* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 147 (1973) (federal government does not have exclusive jurisdiction over Indian tribes); United States v. Anderson, 736 F.2d 1358, 1365 (9th Cir. 1984) (state has authority to regulate use of waters by non-Indians on non-tribal fee land; tribe has no inherent authority under *Montana* to oust state regulatory authority); Sac and Fox Tribe v. Licklider, 576 F.2d 145, 150 (8th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978) ("A state has initial authority to regulate the taking of fish and game by reason of its police power"; however, a state may not enforce regulations "in conflict with treaties" or otherwise prevented by federal law); Industrial Uranium Co. v. State Tax Comm'n, 387 P.2d 1013 (1963) (non-Indian business activities on reservation are subject to state taxes).

147. COMMISSION ON STATE-TRIBAL RELATIONS, HANDBOOK: STATE-TRIBAL RELATIONS 17 (1984). While published in 1984, the quoted statement remains valid today.

148. 752 F.2d 1465 (9th Cir. 1985).

149. 752 F.2d at 1466-68. *See supra* note 119 and accompanying text.

150. Williams v. Lee, 358 U.S. 217, 220 (1959).

151. Rice v. Rehner, 463 U.S. 713 (1983); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

152. COMMISSION ON STATE-TRIBAL RELATIONS, *supra* note 147, at 16.

actments may limit the exercise of state jurisdiction. This section will briefly examine the potential limitations on state regulatory jurisdiction over reservation development activities. An understanding of these concepts is critical to understanding the potential range of state environmental regulation applicable to any development project.

A. Disclaimer Clauses

Under state constitutions and federal Enabling Acts,[153] most western states have "disclaimer clauses" in which the states generally agree to:

> forever disclaim all right and title to . . . lands lying within said boundaries [of the state] 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 Tribe 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 . . .[154]

Despite express language that tribal lands remain "under the absolute jurisdiction . . . of the United States," disclaimer clauses do not preclude exercise of state jurisdictional authority over reservation lands or tribal activities.[155]

In *Organized Village of Kake v. Egan*,[156] the Supreme Court stated "[t]he disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest."[157] Accordingly, states are not precluded from exercising regulatory jurisdiction over the off-reservation activities of Indians by virtue of State disclaimer clauses in federal enabling acts for states entering the Union.[158]

B. State Jurisdictional Authority on the Reservation

Historically, assertions of state jurisdiction over Indian lands were measured by two separate, but closely related, standards: (1) in-

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153. *See, e.g.*, N.M. CONST. art. XXI, § 2; New Mexico Enabling Act Pub. L. No. 61-219 § 310, 36 Stat. 558-59, 569 (1910); *see generally*, Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 561 (1983).

154. N.M. CONST. art. XXI, § 2.

155. *See, e.g.*, Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (New Mexico gross receipts tax valid as applied to Indian-operated ski resort located off-reservation); Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

156. 369 U.S. 60 (1962).

157. *Id.* at 69.

158. *See also* Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984); Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 570 n.20 (1983).

fringement and (2) preemption. Infringement analysis considers the impact of the proffered state regulation on tribal sovereignty, while the preemption test examines whether comprehensive federal regulation and federal Indian policies foreclose the state assertion of authority. While these two standards of review have competed for primacy over the years, the Supreme Court's most recent statements appear to incorporate infringement considerations into a preemption analysis.

1. The Infringement Test

Before the preemption test developed, infringement analysis prevailed in the review of state authority on the reservation. In *Williams v. Lee*,[159] a case involving a non-Indian's attempt to collect money due from a Navajo tribal member arising from on-reservation transactions, the Supreme Court stated the standard of review governing the exercise of state jurisdiction over Indian lands and tribes: "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[160] This test guided determination of state regulatory, taxing, and adjudicatory jurisdiction over reservation activities, until the preemption and infringement analyses coalesced. Infringement analysis must now be considered in light of preemption considerations.

2. Preemption of State Regulation

The Indian preemption doctrine now plays the key role in limiting state authority over non-Indian reservation activities.[161] The Indian preemption doctrine is not applied in the same fashion as traditional preemption analysis.[162] Rather, attributes of Indian tribal sovereignty

159. 358 U.S. 217 (1959).

160. *Id.* at 220.

161. *See* Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976); Crow Tribe v. Montana, 819 F.2d 895, 901-03 (9th Cir. 1987), *summarily aff'd*, 484 U.S. 997 (1988); Crow Tribe v. Montana, 650 F.2d 1104 (9th Cir. 1981), *modified*, 665 F.2d 1390, *cert. denied*, 459 U.S. 916 (1982) (elimination of state severance tax imposed on all coal mined and sold in state); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) (state regulation of water rights on reservation preempted by creation of reservation); *see generally*, Robert D. Wilson-Hoss, Comment, *Jurisdiction to Zone Indian Reservations*, 53 WASH. L. REV. 677, 691 (1978).

162. The traditional federal preemption test applied by the Supreme Court provides that application of state law is not foreclosed "in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963); *see also* DeCanas v. Bica, 424 U.S. 351 (1976). Perhaps Indian matters could be considered "subject matter [which] permits no other conclusion" in view of tribes' unique status in the federal system, however, the Supreme Court has not held consistently that state regulation of Indian matters is preempted by federal law. *See, e.g., Colville*, 447 U.S. at 161.

provide a backdrop for the application of preemption principles.[163] As a result, state authority over reservation lands is limited more stringently than would be expected under traditional preemption analysis. As with other areas pertaining to regulatory jurisdiction over reservation activities, "no rigid rule" is available through "which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members," or to non-Indian activities on the reservation.[164]

In *White Mountain Apache Tribe v. Bracker*,[165] Arizona sought to impose motor carrier license and use fuel taxes on a non-Indian owned logging company, which had contracted with the tribe to cut, load, and transport timber on the Fort Apache Indian Reservation. The Supreme Court stated in that "several basic principles with respect to the boundaries between state regulatory authority and tribal self-government" had been established.[166] Congress had announced a "firm federal policy of promoting tribal self-sufficiency and economic development."[167] In light of this policy, according to the Court, an express congressional intention to preempt the application of state law is not required.[168] "[S]tate authority over non-Indians acting on tribal reservations is preempted even though Congress has offered no explicit statement on the subject."[169] However, contemplating a balancing test, the Court considered the state's regulatory interest:

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry de-

163. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-43 (1980).
164. *White Mountain Apache*, 448 U.S. at 142.
165. 448 U.S. 136 (1980).
166. *Id.* at 141.
167. *Id.* at 143.
168. *Id.* at 144.
169. *Id.* at 151 (citing Kennerly v. District Court, 400 U.S. 423 (1971)); Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965); Williams v. Lee, 358 U.S. 217 (1959).

signed to determine whether, in the specific context, the exercise of state authority would violate federal law.[170]

In *White Mountain Apache*, the Court agreed with the Tribe that "the federal regulatory scheme [over timber resource use] is so pervasive as to preclude the additional burdens sought to be imposed [by the state] in this case."[171] The Court concluded that imposition of the state taxes would threaten overriding federal interests, including a reduction in tribal revenues, and that the economic burden of the state taxes would ultimately fall on the tribe.[172]

In *California v. Cabazon Band of Mission Indians*,[173] the Supreme Court rejected the state's effort to regulate tribal bingo operations on the reservation. In the face of important federal and tribal interests in promoting tribal self-sufficiency, the requirement of federal approval of tribal bingo regulations and management contracts, and that the bingo services were developed on the reservation, the Court found no legitimate state interests justifying state jurisdiction.[174] In 1988, by summary affirmance of the Ninth Circuit, the Supreme Court rejected Montana's coal severance tax on reservation coal mined by non-Indians.[175] Congress intended the Indian Mineral Leasing Act,[176] under which the subject coal leases were granted, to ensure the greatest return to tribes, the Ninth Circuit noted.[177] Where tribal resources are involved and because the state tax made tribal coal less competitive, the Ninth Circuit presumed that no legitimate state interest existed.[178] Because the state failed to overcome the presumption and demonstrate that the tax was tailored to support state interests, the tax was held inapplicable.

More recently, and in contrast to these results, the Supreme Court affirmed New Mexico's authority to impose its severance taxes on the value of oil and gas that non-Indians produce from the Jicarilla Apache Reservation.[179] The decision, the Supreme Court's first recent opinion on the important "dual taxation" issue, complicates the analysis of state jurisdictional authority.

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170. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980) (citations omitted).

171. *Id.* at 145-49.

172. *Id.* at 149-150. Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 844 n.8 (1982), provides a comparable analysis, where the actual economic burden fell on the tribe by contract, notwithstanding that the "legal incidence" fell on the tribe's non-Indian contractor.

173. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221-22 (1987).

174. *Id.* at 221; *see also* Indian Country, U.S.A., Inc. v. Oklahoma Tax Commission, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988).

175. Crow Tribe v. Montana, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 484 U.S. 997 (1988).

176. Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1988).

177. *Crow Tribe*, 819 F.2d at 898.

178. *Id.* at 899-901.

179. Cotton Petroleum Co. v. New Mexico, 490 U.S. 163 (1989).

The Court not only rejected the contention that Cotton Petroleum Company made in state district court—that state severance taxes violated the Indian and Interstate Commerce Clauses—but also rejected in sweeping terms federal preemption and related infringement arguments.[180] The majority's review of the Indian Mineral Leasing Act of 1938,[181] discussed in *Crow Tribe*,[182] disclosed no express prohibition of state taxation. To the contrary, the Court found that, particularly with respect to Executive Order reservations, prior statutes suggested an intention to allow state taxation of non-Indians' oil and gas production from tribal lands.[183] The tribal sovereignty "backdrop" analysis described in *White Mountain Apache* was narrowed. In *Cotton Petroleum* the "backdrop" that the Court focused on was the narrow one of historical application of state taxes to mineral leasing on Indian lands,[184] whereas in prior decisions the Court considered the broader "backdrop" of promoting tribal self-sufficiency and fostering economic development on the reservation.[185]

The *Cotton Petroleum* Court distinguished its decisions in *White Mountain Apache Tribe v. Bracker*[186] and *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*,[187] which had found federal preemption of certain state taxes of federally regulated non-Indian business activity on Indian lands. The Court found that while the federal regulation of oil and gas development in *Cotton Petroleum* was "extensive," it was "not exclusive" like the federal regulation in *Bracker* and *Ramah*.[188] The Court concluded that a direct and substantial adverse impact on a tribe is required to support preemption of state taxing authority.[189]

Cotton Petroleum may be considered to limit the breadth of the Indian preemption doctrine. Statements that statutes "no more express a congressional intent to preempt state taxation of oil and gas lessees",[190] suggest a retreat from the broader rulings of the Court

180. Cotton Petroleum Company presented no factual record in the trial court material to, or designed to develop, a preemption claim. Its initial theory was a commerce clause analysis not requiring development of a factual record regarding tribal regulation and services in the area.

181. 25 U.S.C. §§ 396a-396g (1988).

182. *Crow Tribe*, 819 F.2d 895 (9th Cir. 1987).

183. However, the Court reaffirmed its ruling in Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985), that states may not tax a tribe's royalty interest in gas produced from reservation lands.

184. *Cotton Petroleum*, 490 U.S. at 176-83.

185. *See, e.g.*, Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 165-66 (1980).

186. 448 U.S. 136.

187. 458 U.S. 832.

188. *Cotton Petroleum*, 490 U.S. at 186.

189. *See id.* at 187.

190. *Id.* at 183 n.14.

in *White Mountain Apache* and *Central Machinery Co. v. Arizona State Tax Commission.*[191]

After *Cotton Petroleum*, the unanswered question is whether the Court might reach a different conclusion if presented with a record actually aimed at establishing a federal preemption claim, showing that state taxation interferes either with a tribe's ability to raise tax revenues or inhibits oil and gas development on tribal lands. *Cotton Petroleum* cannot be read as validating all state taxes; the *Cotton Petroleum* majority found "no occasion to reexamine our summary affirmance of the Court of Appeals for the Ninth Circuit's conclusion that Montana's unique severance and gross proceeds taxes may not be imposed on coal mined on Crow tribal property."[192]

Also unanswered by *Cotton Petroleum* is the question whether the Court would employ the same analysis in a state regulatory, as opposed to tax, matter. *Cotton Petroleum* and *County of Yakima* both suggest that state tax jurisdiction commands an analysis different than state regulation.[193] Illustrative of this point is that the majority opinion in *Cotton Petroleum* does not even cite the Court's 1987 *Cabazon Band* decision, which was a state regulation case. However, if the *Cotton Petroleum* analysis is applied in the context of state regulation, states may exercise greater regulatory control over activities on Indian lands.

These opinions must be considered by businesses seeking to develop or manage tribal resources. Whether state jurisdiction is ousted in the environmental regulatory area would involve factors such as: (a) federal delegation to tribes; (b) federal regulatory schemes generally; (c) nature of the regulated community; (d) state, federal, and tribal environmental protection interests; and (e) other factors described in the case law. While there may be no way to assure oneself about the potential applicability (or inapplicability) of state jurisdiction over a development project, one should develop an understanding of the possibilities in order to structure any contractual arrangement to the best advantage of the developer and tribe.

In summary, state regulation of non-Indian on-reservation activities is scrutinized under preemption analysis overlain with consideration of adverse impacts on tribal sovereignty. Without, and in certain cases even with, legitimate state interests at stake, state regulation will fail where tribal rights of self-government are directly and substantially affected and where federal policies and regulatory

191. 448 U.S. 160.

192. *Cotton Petroleum*, 490 U.S. at 186 n.17. *See* Montana v. Crow Tribe of Indians, 484 U.S. 997 (1988), *summarily aff'g*, 819 F.2d 895 (9th Cir. 1987).

193. *See*, County of Yakima v. Confederated Tribes of the Yakima Indian Nation, 112 S. Ct. 683, 693-94 (1992).

schemes comprehensively promote and regulate on-reservation conduct of Indians and non-Indians.[194] However, a particularized inquiry is required to determine the scope of state regulatory authority. Threshold state jurisdictional authority questions must be resolved in the planning or early stages of any proposed development.

V. FEDERAL NATURAL RESOURCES DEVELOPMENT STATUTES AFFECTING INDIAN LANDS

Federal laws governing natural resources development on Indian lands may present additional sources of environmental regulatory requirements with which developers must comply. Regulations governing leasing of tribal lands for mining[195] and governing development agreements under the Indian Mineral Development Act of 1982[196] were on the Department of the Interior, Bureau of Indian Affairs' drawing board when this article went to press.[197] These regulations, when ultimately promulgated, will likely include recognition of environmental controls and reclamation. At a minimum, the regulations will provide opportunities for tribes to control development through environmental protection and other regulatory means. Developers should be informed of these regulations and their impact on development.

VI. ENVIRONMENTAL COMPLIANCE REQUIREMENTS IMPOSED BY CONTRACT

Although not unique to reservation development, developers should pay careful attention to negotiating contractual obligations in the environmental protection arena. Because tribes retain both proprietary and governmental interests, contracts can define the scope of tribal environmental regulatory authority.

Business may seek certainty in applicability of regulatory schemes in negotiations with a tribe. Agreements should pin down regulatory obligations and the rights and duties of the parties when jurisdictional disputes arise. Cooperative agreements between states and Indian tribes also present an avenue for resolving jurisdictional disputes before they arise or affect on-reservation business. States and Indian tribes have

194. Preemption may also be found where a comprehensive tribe regulatory scheme has been developed to implement a federal policy. Generally for preemption to be found in those circumstances, authority should have been delegated by the federal government to the Tribe. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Fisher v. District Court, 424 U.S. 382 (1976).

195. *See* 25 C.F.R. pt. 211 (1992).

196. 25 U.S.C. §§ 2101-08 (1988).

197. A Notice of Proposed Rulemaking (NOPR) was published November 21, 1991 concerning revisions to regulations governing mining on tribal and allotted lands, presently codified at 25 C.F.R. Pts. 211 and 212 (1992), and concerning regulations to implement the Indian Mineral Development Act (IMDA).

been exploring these possibilities recently.[198] Such agreements could address regulatory, adjudicatory and taxing authority, perhaps providing sound expectations for business development and saving litigation expense for all concerned.

VII. CONCLUSION

While reservation-based resource development projects present a host of complicated environmental compliance considerations, those complications are not insurmountable. Although many lessons can hopefully be gleaned from the foregoing discussion, a single central theme arises: careful planning is a necessary prerequisite to any business project on Indian lands. In this area, there is no substitute for a particularized inquiry into tribal and reservation history, the details of the proposed development, the applicable (or potentially applicable) tribal, state, and federal laws, the prevailing political inclinations of state, local, tribal and federal governments and their respective enforcement priorities and regulatory initiatives. At the outset of any planning program, developers should:

(a) Contact tribal officials to ascertain potentially applicable tribal regulation and the existence of any cooperative regulatory agreements with other governments that may apply;

(b) Contact the U.S. Environmental Protection Agency to determine applicable federal regulations and policies, including the extent of any federal delegation to the tribe involved;

(c) Contact the local Bureau of Indian Affairs officials to discuss applicable environmental and land use regulation within their spheres of influence;

(d) Contact state and local environmental regulatory officials to determine the extent to which state environmental regulatory programs are asserted to apply to Indian lands activities; and

(e) Examine these matters in light of specific tribal, reservation and land status historical information: (i) to determine the validity of the jurisdiction assertions; (ii) to identify whether the proposed development is feasible; (iii) to ascertain where regulatory conflicts arise; and (iv) to determine whether regulatory authorities are willing to work together to develop a regulatory approach that protects the environment while permitting development of an economically viable and efficient project.

With careful planning, jurisdictional issues and related matters can be resolved. While the planning and negotiations may be more

198. *See* COMMISSION ON STATE-TRIBAL RELATIONS, *supra* note 147.

protracted at the outset than other projects, the efforts will pay dividends for all parties over the long-run