NATURAL RESOURCES JOURNAL

Volume 18
Issue 3 *Summer 1978*

Summer 1978

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INDIAN LANDS ENVIRONMENT— WHO SHOULD PROTECT IT*

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INTRODUCTION

There has been a recent flourish of interest on the part of Indian tribes in programs for environmental protection as they relate to Indian land. No doubt a quiver full of individual reasons could account for this interest, but it is the author's perception that tribal interests in energy development and self-determination have played no small part.[1]

Until recently, there has been an almost complete absence of formal environmental regulation by Indian tribes.[2] The need for environmental regulation in a rural setting was not always as pressing as urban needs, but it is also true that existing environmental problems were sometimes not recognized or acted upon. Tribal councils deemed other social problems to be of greater need.

The 1970's brought the passage of intensive federal environmental legislation,[3] and the federal grant programs under this legislation have spawned the growth of state environmental programs that are now beginning to affect Indian reservations. Both states and Indian tribes are being cautious about environmental regulation, not wishing to give up jurisdiction, but also not yet sure what is really at stake.

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*This article was written by the author in his private capacity. No official support or endorsement by the Environmental Protection Agency or any other agency of the federal government is intended or should be inferred.

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1. *See* THE ROCKY MOUNTAIN MINERAL LAW FOUNDATION, INSTITUTE ON INDIAN LAND DEVELOPMENT: OIL, GAS, COAL AND OTHER MINERALS (1976); McGee, *Indian Lands: Coal Development: Environmental/Economic Dilemma for the Modern Indian*, 4 AM. INDIAN L. REV. 279 (1976); and Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450 (Supp. V 1975).

2. The Navajo Nation has enacted an ordinance which established an Environmental Protection Commission with authority to adopt and enforce environmental regulations. The Commission has been very active. It recently adopted a regulation which established a tax on excess sulphur emissions from power plants within the reservation. The Crow Tribe, by Resolution No. 76-22 B, adopted a comprehensive Environmental Health and Sanitation Ordinance (Jan. 31, 1976). On June 6, 1977, the Secretary of the Interior approved the environmental regulations of the Cheyenne River Sioux Tribe enacted by the tribe to govern mineral development and oil and gas leasing activities on tribal and allotted land within the reservation. This was the first time a tribe's environmental regulations had been accepted in place of the Department's general regulations.

3. *See* notes 12-18 *infra*.

Of course, programs to control pollution on reservations have been provided by federal agencies even before the enactment of federal environmental legislation. Since 1954, the Surgeon General, and later the Indian Health Service, has been tasked with the provisions of health, drinking water, and sanitation facilities for Indian reservations.[4] The Bureau of Indian Affairs, in cooperation with the Soil Conservation Service, has provided training programs in the areas of conservation, pesticide use, and management of solid waste.[5] The Department of Housing and Urban Development has provided septic tank facilities for HUD-funded housing on Indian lands.[6] A few tribes have enacted environmental controls, although not in a comprehensive manner.

Federal agencies are also required by the National Environmental Policy Act of 1969 (NEPA)[7] to prepare environmental impact statements for activities on Indian lands which involve major federal action. Although there was initially uncertainty over whether NEPA applied to federal activities involving Indian tribes, the case of *Davis v. Morton*[8] held, in 1972, that federal agency lease approval constituted a major federal action and thus must comply with the requirements of NEPA.[9]

The centralization of federal environmental effort in the Environmental Protection Agency (EPA)[10] in 1970 did not really affect Indian reservations as it did states and localities. The states benefited from an infusion of funds under the grant programs of the new environmental legislation, which also provided EPA with an assortment of "sticks" to prod the states when necessary. EPA has provided some of its services to Indian tribes, but normally only in response to a Tribal request.[11] Initially, there was little EPA policy recognition of the unique jurisdiction of Indian tribes.

Against this backdrop, it is not surprising that considerable confu-

4. 42 U.S.C. §2004a (1970) and 25 U.S.C.A. §§1601-61 (Supp. 1978).

5. 25 U.S.C. chs. 8-14 (1970).

6. 12 U.S.C. §1701 *et seq.* (1970).

7. 42 U.S.C. §§4321-47 (1970).

8. 469 F.2d 593 (10th Cir. 1972).

9. *See also* Cady v. Morton, 527 F.2d 786 (9th Cir. 1975). Salt River Pima-Maricopa Indian Community v. Kleppe, No. CIV-76-601 PHX-WPC (D. Ariz. Aug. 30, 1976). *See also* listings under Environmental Regulation: National Environmental Policy Act, in National Indian Law Library, Catalogue–An Index to Indian Legal Materials and Resources (1976 Cumulative Ed.).

10. The Environmental Protection Agency was established by Reorganization Plan No. 3, 35 Fed. Reg. 15,623 (1970), 5 U.S.C. Reorg. Plan of 1970 No. 3 (1970).

11. For example, a few Indian wastewater treatment plants are being constructed with funding from EPA grants; EPA has assisted Tribes with solid waste management; water discharge permits have been issued by EPA to facilities on Indian reservations, usually municipal or school wastewater treatment plants or irrigation water discharges.

sion exists regarding respective authorities and responsibilities of Indian tribes, federal agencies, and states for environmental protection of Indian lands. This article will undertake the ambitious goal of meshing the complexities of environmental law with the complexities of Indian law in an attempt to present a conceptual scheme of respective responsibilities.

THE FEDERAL ENVIRONMENTAL FRAMEWORK

In the last few years, the United States Congress has passed aggressive legislation in the environmental field containing a complex set of programs for protecting nearly every aspect of the environment. These statutes unavoidably have become a framework for the consideration of environmental issues. Without diminishing the importance of independent tribal authorities, to which we will return, we will first address the effect of this federal framework on the environment of Indian lands. This seminal question must be split into two issues: whether the federal statutes apply at all to Indian or Indian lands; and, whether these statutes confer upon states environmental jurisdiction over Indian lands.

One must read carefully the EPA statutes to find any mention of Indians or Indian tribes, and until recent amendments in 1977, even the legislative history of the acts was completely devoid of mention of Indian tribes. The first major environmental statute enacted—the Clean Air Act of 1970—contained no mention of Indians.[12] The Solid Waste Disposal Act, as amended in 1970,[13] did include Indian tribes within the definition of the term "municipality" but contained no other mention of Indians or Indian tribes. The Federal Water Pollution Control Act, as amended in 1972, contained the same mention of Indians only in the definition of the term "municipality."[14] However, the Noise Control Act of 1972[15] and the Federal Insecticide, Fungicide and Rodenticide Act, as amended in 1975,[16] again made no mention of Indians. The Safe Drinking Water Act of 1975 returned to the inclusion of Indians in the "municipality" definition.[17] The Toxic Substances Control Act of 1976 again made no

12. 42 U.S.C. §§1857-58a (1970).

13. 42 U.S.C. §§3251-59 (1970), now recodified as amended by the Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. §§6901-87 (1977). "The term 'municipality' . . . means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe. . . ." *Id.* §6903.

14. 33 U.S.C. §§1251-1376 (Supp. V 1975).

15. 42 U.S.C. §§4901-18 (Supp. V 1975).

16. 7 U.S.C. §136-136y (Supp. V 1975).

17. 42 U.S.C. §300f(10) (Supp. V 1975).

mention of Indians.[18] It wasn't until amendments to the Clean Air Act, the Federal Water Pollution Control Act, and the Safe Drinking Water Act in 1977 that Congress finally ventured beyond the definitional sections to mention Indians in any substantive provisions, and then only cautiously.[19]

Given this lack of clear Congressional expression of applicability to Indian tribes, some tribes have argued that the provisions of the EPA statutes should not apply to Indians at all, and further, that it would be inconsistent for the federal government as trustee or guardian of Indian lands to be placing environmental restrictions on Indian land or tribes.[20]

In spite of these tribal objections, it appears well settled in case law that federal statutes of a general nature such as the environmental statutes should apply to Indians and Indian tribes just as any other persons. In the first place, it is an oft-repeated axiom that Congress has plenary power over the activities of Indian tribes.[21] Congress has the right and responsibility to assure protection of tribal lands environmentally just as in any other manner. Secondly, the case of *Federal Power Commission v. Tuscarora Indian Nation* is now routinely quoted for the general proposition:

> The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See §4(e). It neither overlooks nor excludes Indians or lands owned or occupied by them. . . . The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians.[22]

The general proposition can be rescinded, however, where a tribe raises a specific right under a treaty or statute which is in conflict with the general law to be applied.[23] It is possible that a treaty

18. 15 U.S.C.A. § §2601-29 (Supp. 1978).

19. *See* notes 99-113 *infra* and accompanying text.

20. Final Report to the American Indian Policy Review Commission, Task Force Four: Federal, State, and Tribal Jurisdiction 34-35 (1976); P. MAXFIELD, M. DIETRICH & F. TRELEASE, NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 47 (1977); Seminole Nation v. United States, 316 U.S. 286, 296 (1942); *see also* M. PRICE, LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES 276-93 (1973).

21. U.S. DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 501 (1958); Final Report to the American Indian Policy Review Commission, *supra* note 20, at 2.

22. 362 U.S. 99, 118 (1960); *accord,* Navajo Tribe v. NLRB, 288 F.2d 162 (D.C. Cir. 1961), *cert. denied,* 366 U.S. 928 (1961).

23. Morton v. Mancari, 417 U.S. 535 (1974); United States v. White, 508 F.2d 453 (8th Cir. 1974).

between the United States and an Indian tribe could contain language which would be broad enough to exempt a tribe from coverage of all or specific provisions of federal environmental acts.

There is little doubt that the environmental legislation, both as individual acts and in the aggregate, constitutes a complete and comprehensive plan for environmental protection of all lands. For example, under section 101 of the Clean Air Act, Congress notes that the primary purpose of the act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population. . . ."[24] The very first line of the Federal Water Pollution Control Act states: "The objectives of this act are to restore and maintain the chemical, physical, and biological integrity of the nation's waters."[25] The Administrator is empowered to ". . . prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and groundwaters and improving the sanitary condition of surface and underground waters."[26] The Noise Control Act of 1972 states: "The Congress declares that it is the policy of the United States to promote an environment for all Americans free from the noise that jeopardizes their health or welfare."[27]

The legislative history of each of the acts is replete with indications of the same comprehensiveness. For example, the Senate Report on the Clean Air Act of 1970 so noted:

> In sum, this bill would extend the Clean Air Act of 1963 as amended in 1965, 1966, and 1967 to provide a much more intensive and comprehensive attack on air pollution. It would establish that the air is a public resource, and that those who would use that resource must protect it from abuse, to assure the protection of the health of every American.[28]

Therefore, the comprehensiveness of the environmental legislation presents a strong argument that the rationale of the *Tuscarora* case would apply equally to the environmental legislation.[29] However, it

24. 42 U.S.C. §1857 (1970).
25. 33 U.S.C. §1251 (Supp. V 1975).
26. *Id.* §1252.
27. 42 U.S.C. §4901 (Supp. V 1975).
28. SEN. REP. NO. 91-1196, 91st Cong., 2d Sess. 4 (1970).
29. The NEPA cases noted *supra* note 9 provide additional support for the general application of federal environmental statutes to Indian lands. The courts have held that "NEPA is a very broad statute covering both substantive and procedural problems relating to the environment." Davis v. Morton, 469 F.2d 593, 598 (10th Cir. 1972). This case cited Federal Power Comm'n v. Tuscarora in holding that "[t]he fact Indian lands are held in trust does not take it out of NEPA's jurisdiction." *Id.* at 597. In the recent case of Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977), it is noted that NEPA is designed to address national environmental interests, and while tribal interests may not coincide with national interests, the court found "nothing in NEPA which exempts Indian lands from national

is necessary to carefully distinguish the general application of federal legislation to Indians from the conferral to states of jurisdiction over Indians–an issue that will be discussed in detail below.[30]

There are also sound policy reasons for Congress to include Indian tribes within the coverage of the environmental legislation. Pollution is ambient in nature and has no regard for jurisdictional boundaries. Prevailing winds blow air pollutants from one jurisdiction to another. Pollutants discharged into streams meander through many jurisdictions before spilling into the oceans. Toxicants from solid waste disposal sites can enter into the groundwater and contaminate drinking water sources many miles from the source of the pollutants. Lack of at least federal control over such sources on Indian lands could mean that an extensive and expensive effort by neighboring jurisdictions would be defeated.

From the above, the most reasonable conclusion is that Congress simply did not give a great deal of thought to the applicability of its comprehensive environmental legislation to Indian tribes. Indians are not specifically mentioned in several of the statutes, and there is almost no legislative history regarding Indian tribes. Consequently, the intentions of Congress are not clear. However, given the now-accepted maxim of the *Tuscarora* holding, and since the environmental enactments were intended to be comprehensive, the environmental statutes should apply to Indian tribes as a general matter.

STATE JURISDICTION OVER INDIAN LANDS

The most debated issue regarding environmental protection of Indian lands is the question of state jurisdiction. That there should be uncertainty over the respective authorities of states and Indian tribes is curious in itself in that one would presume that Congress long ago would have resolved such an important issue. But given the flip-flop history of Indian law, it is not surprising that jurisdiction endures as a crucial issue for Indian tribes.[31]

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environmental policy." *Id.* at 559. Of course, NEPA does not directly impose responsibilities on Indian tribes since NEPA only requires federal agencies to prepare environmental impact statements for major federal actions significantly affecting the environment. Since tribes are not federal agencies, they do not themselves have to prepare impact statements under NEPA. Will, *Environmental Protection of Indian Lands and Application of N.E.P.A.*, in THE ROCKY MOUNTAIN MINERAL LAW FOUNDATION, *supra* note 1, paper no. 8. The other environmental statutes would thus differ from NEPA to the extent that they impose environmental responsibilities on the tribes.

30. *See* note 31 *infra.*

31. *Cf.* Final Report to the American Indian Policy Review Commission, *supra* note 20, at 15-23.

With the current federal policy of Indian self-determination,[32] tribes are particularly concerned with the protection of their own sovereignty, and this concern is especially acute over anything to do with tribal lands, waters within a reservation, or a tribe's economic development. Tribes are jealous of their sovereignty against any encroachment by state jurisdiction which may interfere with tribal decisions regarding their land and development. The long history of the federal trustee/guardian relationship with Indian tribes and of federal economic support of tribal needs and activities no doubt has also fostered a preference among tribes to deal with federal rather than with state agencies.[33]

On the other hand, most states would like to have environmental jurisdiction over Indian lands, some states being more overt in expressing this desire.[34] The states find Indian lands an anomoly within the state, and they do not like the resultant gaps in their authority within the state's geographical boundaries. Given the ambient nature of pollution, states would like to have uniformity in their ability to control the sources of pollution.[35] In addition, the patchwork ownership pattern within the reservations, especially in the western states, frequently causes legal uncertainty, distrust, and ill-will between Indians and other citizens of the state when there is a disparity of control requirements. This is particularly so when the disparity can lead to a real or potential economic competitive advantage.

It is axiomatic that Indian tribes are a unique aggregation within a state, possessing attributes of sovereignty over both their members and their territory.[36] It is equally axiomatic that states generally do

32. Indian Self-Determination Act, 25 U.S.C. §450-450n (Supp. V 1975).

> The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of education as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

Id. §450a.

33. *Cf.* Final Report to the American Indian Policy Review Commission, Task Force Two: Tribal Government, ch. 1 (1976).

34. The State of Arizona asserts jurisdiction over all tribal lands within the state regarding air and water pollution, ARIZ. REV. STAT. §36-1801 (air) and §36-1865 (water). Arizona's assertion is questionable because Arizona did not remove its constitutional disclaimer (ARIZ. CONST. art. XX) but merely took "affirmative legislative action" by including Indians in the air and water statutes. *See* Kennerly v. District Court, 400 U.S. 423 (1971).

35. For an analogous argument in the land use area, *see* Reynolds, *Aqua Caliente Revisited: Recent Developments as to Zoning of Indian Reservations,* 4 AM. INDIAN L. REV. 257 (1976).

36. Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

not have jurisdiction over the tribes or their territory unless they are expressly given jurisdiction by an Act of Congress.[37] The question to be resolved, then, is whether any Act of Congress has given states jurisdiction over Indian lands for environmental purposes.

a. *Environmental Case Law Involving Indians*

There have been no definitive environmental cases involving Indians which have resolved this question. Several cases filed raised Indian environmental issues but were dismissed on procedural grounds and did not reach the merits.[38] In another case, several industrial petitioners challenged the applicability to Indian lands of EPA's regulations for the prevention of significant deterioration of air quality.[39] However, the court of appeals declined to rule on the issue on the grounds of ripeness.

> We pretermit this question as we find that the issue is not yet ripe for review. No federal or Indian land has yet been redesignated, and to that extent we cannot be certain how a conflict may evolve. If the Administrator were to approve, as replacements for these regulations, individual state plans which do not include the powers granted to federal land managers and Indian governing bodies, the problems foreseen by petitioners might never arise.[40]

The first land redesignation under these regulations was, in fact, Indian land, reclassified to a more protective air quality designation by the Northern Cheyenne Tribe in Montana.[41] It is likely that litigation will result from this action since the reclassification may restrict proposed expansion of power plant units to be constructed

37. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

38. Jicarilla Apache Tribe v. Ruckelshaus, Civil No. 125-73 (D.C.D.C. May 23, 1973) (dismissing suit to compel EPA to publish final regulations governing air quality for Arizona, Utah, and New Mexico). Oljato Chapter of the Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975) (dismissing suit challenging EPA refusal to revise standards for new coal-fired power plants because of improper court).

One water rights case reached the merits. In Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (also known as Akin v. United States) the Court found Indian water users to be subject to state court jurisdiction. Although the McCarron Amendment (43 U.S.C. §666 (1970)) did not mention Indians, the Court held that the "legislative history demonstrates that the McCarron Amendment is to be construed as reaching federal water rights reserved on behalf of Indians." 424 U.S. 800, 811 (1976). *See also id.* at 812-13 no. 20. Another case related to the environment was Sangre de Cristo Development Corp., Inc. v. City of Santa Fe, 84 N.M. 343, 503 P.2d 323 (1972). The court denied application of local planning and subdivision control authority to lessee of Indian land. *See also* Norvell v. Sangre de Cristo Development Corp., Inc., 372 F. Supp. 348 (D.N.M. 1974), *rev'd on other grounds*, 519 F.2d 370 (10th Cir. 1975).

39. Sierra Club v. Environmental Protection Agency, 540 F.2d 1114 (D.C. Cir. 1976).

40. *Id.* at 1139 (footnotes omitted).

41. 42 Fed. Reg. 40,695 (1977).

by Montana Power Compoany at the Colstrip mine near the reservation. Legal challenges to this action have been filed, but have not yet reached the merits.[42]

Although definitive environmental cases regarding Indians lands are lacking, other available authorities not specifically applicable to environmental issues do provide a basis for analyzing federal statutes to determine the degree of state jurisdiction, if any, over environmental matters on Indian lands.

b. *Recent Major Indian Law Cases*

The Supreme Court has outlined the general framework by which Indian jurisdiction cases are to be analyzed. In *McClanahan v. Arizona State Tax Commission,* the Court stated that:

> the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. See *Mescalero Apache Tribe v. Jones.* . . . [411 U.S. 145 (1973)]. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.[43]

Despite all the lip service paid to the doctrine of federal pre-emption in post-*McClanahan* cases[44] the *McClanahan* court itself deprecated the importance of the analysis in a footnote.

> The extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question. Cf. *Organized Village of Kake v. Egan,* 369 U.S. 60, 62 (1962); Federal Indian Law 846. The question is generally of little more than theoretical importance, however, since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.[45]

Pre-emption *as an analytical tool* may be somewhat of a misnomer since in practice the courts tend to posit pre-emption as a given and then employ the canons of construction as the analytical tool.[46] Nevertheless, analysis of the federal statutes is required.

42. Nance v. Environmental Protection Agency, Petition for Review, No. 77-3058 (9th Cir. 1977).

43. 411 U.S. 164, 172 (1973).

44. *See, e.g.,* Fisher v. District Court, 424 U.S. 382 (1976); Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (9th Cir. 1976); Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976).

45. 411 U.S. 164, 172 n.8 (1973).

46. "[S]tatutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7 (1976), cited in Bryan v. Itasca County, 426 U.S. 373, 392 (1976). The same canon was noted in McClanahan v. Arizona State Tax

The appropriate federal statutes to be analyzed, following *McClanahan,* are the EPA enabling statutes, Public Law 280, and any other federal statute that confers to states jurisdiction over Indian lands. If these statutes do not indicate a pre-emption of state jurisdiction, the state action need only satisfy the test laid down in *Williams v. Lee,* namely, that it not infringe on the rights of reservation Indians to make their own laws and be ruled by them.[47]

c. *EPA Enabling Statutes*

As noted above, the EPA enabling statutes contain little specific mention of Indian tribes nor do they specifically authorize states to exercise environmental jurisdiction over Indian lands,[48] and given the comprehensiveness of the environmental statutes,[49] it is not difficult to argue that these statutes do constitute a complete federal pre-emption of state authority. However, the somewhat unique federal/state cooperative effort laid out in the environmental statutes has led some to argue that states have been delegated authority over Indian lands for environmental purposes.[50] The argument is that the federal environmental legislation establishes an overlapping federal/state program that provides federal funding, research, coordination, and cooperation and state administration and enforcement of the program.

The basic scheme of the statutes is for the state to take the lead in environmental protection with the federal government providing the funding and supportive prodding. The Clean Air Act is a good example. In discussing the relative authority of the federal and state governments, the Supreme Court in *Train v. Natural Resources Defense Council, Inc.* noted:

> [The Clean Air Act Amendments of 1970] sharply increased federal authority and responsibility in the continuing effort to combat air pollution. Nonetheless, the Amendments explicitly preserved the principle: "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such

Comm'n, 411 U.S. 164, 174 (1973). More relevant to this analysis is the canon which requires any grant of state jurisdiction to be clearly expressed by Congress, Bryan v. Itasca County, 426 U.S. 373, 376-77 (1976). "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170 (1973), quoting U.S. DEPARTMENT OF THE INTERIOR, *supra* note 21, at 845.

47. 358 U.S. 217 (1959).

48. *See* notes 12-18 *supra.*

49. *See* notes 22-27 *supra.*

50. Note, *The Applicability of the Federal Pollution Acts to Indian Reservations: A Case for Tribal Self-Government,* 48 U. COLO. L. REV. 63 (1976).

> State. . . ." §107(a) of the Clean Air Act, as added, 84 Stat. 1678, 42 U.S.C. §1857c-2(a). The difference under the Amendments was that the States were no longer given any choice as to whether they would meet this responsibility. For the first time they were required to attain air quality of specified standards, and to do so within a specified period of time.[51]

This state lead role has been even further strengthened in the recent Clean Air Act Amendments. The Senate report noted:

> The authority of States and localities to implement air pollution control programs within the framework of a national policy must be encouraged. The framework proposed in this bill is flexible in terms of the discretion in choosing methods for attaining firm national goals. States and localities are given broad discretion to make decisions, while maintaining the minimum national air quality baselines designed to protect health and welfare, prevent discrimination among States, protect national resources within States, and provide guidance on the technical and the economic implications of various national policies.[52]

Adding support to the delegation argument are indications, in the language of the statutes, of state responsibility over all lands in the state. In addition to the "entire geographic area" language in section 107 of the Clean Air Act noted in the *Train v. Natural Resources Defense Council* case, section 303(e) of the Federal Water Pollution Control Act requires the state to develop water quality implementation plans "for all navigable waters *within such state*" [emphasis added].[53] The Safe Drinking Water Act authorizes states to assume primary enforcement of the safe drinking water regulations over "public water systems within its jurisdiction."[54] The bottom line of the states' argument is that EPA statutes were intended to give states jurisdiction over any source on any land within the state including Indian lands.

Returning to our *McClanahan* analysis, it is difficult to describe this language as clear and express Congressional consent of state jurisdiction. Certainly, expressness would require that Indian tribes be mentioned in conjunction with the grant of jurisdiction. The statute's mere definitional mention of Indians should not suffice.

An idea of the degree of expressness required can be gleaned from the federal facilities section included in several of the acts. These

51. 421 U.S. 60, 64-65 (1975).
52. S. REP. NO. 95-127, 95th Cong., 1st Sess. 10 (1977).
53. 33 U.S.C. §1313(e)(3) (Supp. V 1975).
54. 42 U.S.C. §300g-4(1)(a) (Supp. V 1975).

sections indicate that Congress well knew how to legislative for historically protected lands such as federal lands, and Indian lands are due an even greater degree of protection because of the federal trust responsibility. The federal facility sections were recently the subject of Supreme Court decisions that rule against the assumption of state jurisdiction over the federal lands.

In the cases of *Hancock v. Train*[55] and *EPA v. California ex rel. State Water Resources Control Board*,[56] the states had argued respectively that section 118 of the Clean Air Act[57] and section 313[58] of the Federal Water Pollution Control Act require federal agencies to comply with both substantive and procedural requirements of the state environmental laws. Both sections had employed the term "requirements respecting control and abatement" of pollution, and it was not clear whether this term referred to procedural requirements in addition to substantive requirements. The Supreme Court noted the ambiguity and held that a clear expression of Congressional consent would be required.

> In view of the undoubted congressional awareness of the requirement of clear language to bind the United States, our conclusion is that with respect to subjecting federal installations to state permit requirements, the Clean Air Act does not satisfy the traditional requirement that such intention be evinced with satisfactory clarity. Should this nevertheless be the desire of Congress, it need only amend the Act to make its intention manifest.[59]

Congress has subsequently expressed its intention that federal agencies comply with all federal, state, and local environmental requirements both substantive and procedural.[60] Congress also has clarified its intentions regarding Indian lands in recent legislative amendments noted below.[61]

d. *EPA Implementing Regulations*

In spite of the ambiguities in the statutes, the question of

55. 426 U.S. 167 (1976).

56. 426 U.S. 200 (1976).

57. Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. 42 U.S.C. §1857f (1970).

58. 33 U.S.C. §1323 (Supp. V 1975). The language is almost identical to that of §118 of the Clean Air Act.

59. Hancock v. Train, 426 U.S. 167, 198 (1976) (footnotes omitted).

60. *See* note 106 *infra*.

61. *See* note 99 *infra*.

jurisdiction over Indian lands has been addressed in implementing regulations of several major EPA programs.[62] The treatment of the tribal/state jurisdiction issue in the regulations indicates that EPA does not consider its statutes to give states jurisdiction over Indian lands.

The earliest mention of any EPA regulations of Indian tribes appeared in the promulgation of 40 CFR Part 125, the National Pollutant Discharge Elimination System.[63] These regulations provided the federal procedures for the issuance of permits to discharge pollutants under the Federal Water Pollution Control Act. Proposed rules for this program did not mention Indian tribes in the regulations themselves except in the definitions taken directly from the Water Act.[64] However, in the preamble to the proposed rulemaking, it was noted that the states would not issue permits "with respect to Federal agencies and instrumentalities, for which the Administrator will continue to process permit applications in accordance with these regulations and will be the exclusive source of permits."[65]

It appears from this passage that the EPA was considering Indian facilities as federal instrumentalities or at least that Indian facilities should be treated similarly to federal facilities. In the interim between proposal and promulgation of the water permit regulations, two cases were decided by the Supreme Court which basically eliminated the doctrine that Indian tribes are federal instrumentalities.[66]

Discussing the doctrine in terms of taxing of Indian enterprises, *Mescalero* stated:

> The theory was that a federal instrumentality was involved and that the tax would interfere with the Government's realizing the maximum return for its wards. This approach did not survive; its rise and decline in Indian affairs is described and reflected in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938); ... where the court cut to the bone the proposition that restricted Indian lands

62. Early drafts of regulations for programs under the Resource Conservation and Recovery Act of 1976 have also included a discussion of the authority of Indian tribes, but these regulations have yet to be proposed.

63. 38 Fed. Reg. 13,528 (1973). The Federal Water Pollution Control Act requires any person who intends to discharge any "pollutant" into navigable waters (broadly construed) must obtain from EPA, or the state if delegated authority, a permit to discharge. The permit will contain effluent limitations (that is, limits on the amount of pollutant to be discharged) for each relevant pollutant. It will also normally require periodic self-monitoring. The person discharging selects his own means to meet the effluent limitations.

64. Proposed Reg. §125.1(k), 38 Fed. Reg. 1362 (1973).

65. *Id.*

66. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

> and the proceeds from them were—as a matter of constitutional law—automatically exempt from state taxation.[67]

The proper basis for protection of the tribes from the state permit granting authority is not that they are federal instrumentalities, but rather that, as *McClanahan* identified, namely the "backdrop of tribal sovereignty" and that state jurisdiction had been pre-empted by the applicable treaties and federal legislation.[68] This distinction was clarified in section 125.2—Scope and Purpose—of the promulgated regulations.

> The regulations in this part also prescribe the policy and procedures to be followed in connection with permits authorizing discharges into the navigable waters, the waters of the contiguous zone, and the oceans from any agency or instrumentality of the Federal Government *and from any Indian activity on Indian lands.* (emphasis added)[69]

The regulations further stated that "[s]uch state [water permit] programs do not cover agencies and instrumentalities of the Federal Government and Indian activities on Indian lands under the jurisdiction of the United States."[70]

The nature of state jurisdiction over Indian lands was addressed more thoroughly one year later in the development of regulations for the Prevention of Significant Air Quality Deterioration.[71] In the first EPA proposal of these regulations, a proposal that presented four alternative regulatory schemes and that requested comments on these alternatives, no mention of any sort was made of Indian tribes or Indian lands in either the preamble or the text of the proposal.[72] The extensive public comments received on the alternatives necessitated a reproposal of the regulations.[73] In the reproposal, Indian tribes were discussed with regard to area designations and with regard to review of new sources of air pollution.

The proposed regulations authorized "the appropriate Indian governing body [to] . . . submit to the Administrator a proposal to

67. *Id.* at 150.

68. An analogous rationale was used by the Supreme Court in Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976).

69. 38 Fed. Reg. 13,528, 13,530 (1973).

70. *Id.*

71. These regulations were published in response to an order of the District Court for the District of Columbia, Sierra Club v. Ruckelshaus, 344 F.Supp. 253 (D.C.D.C. 1972), *aff'd per curiam by an equally divided Court sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973).

72. Proposed Reg. §52.21, 38 Fed. Reg. 18,986 (1973).

73. 39 Fed. Reg. 31,000 (1974).

redesignate areas Class I, Class II, or Class III. . . ."[74] The preamble commented that the regulations did not intend to convey authority to states over Indian lands where such authority was not already conferred by other federal statutes.[75] The rulemaking was recognizing that there is a distinction in authorities between the state, federal, and Indian governing bodies.

In the final promulgation of the regulations for the Prevention of Significant Deterioration of Air Quality, the language was modified somewhat from the proposal.

> Nothing in this section is intended to convey authority to the states over Indian reservations where States have not assumed such authority under other laws nor is it intended to deny jurisdiction which states have assumed under other laws. Where a state has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III, provided that:
>
> (a) The Indian Governing Body follows procedures equivalent to those required of States under paragraphs (c)(3)(ii) and,
>
> (b) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located or which border the Indian Reservation and, for those lands held in trust, with the approval of the Secretary of the Interior.[76]

The preamble to the promulgation carefully noted that:

> These regulations were not intended to alter the present legal relationships between the States and Indian Reservations within the States. As these relationships vary from State to State, EPA has not attempted to define such relationships but has modified the proposed regulations to clarify that there is no intent to alter these relationships.[77]

Without mentioning it, the state assumption of jurisdiction language in the regulations was obviously referring to Public Law 280, which is the statutory means by which states may assume jurisdiction over Indian reservations.[78] However, the regulation, consistent with case law of 1974, stopped short of taking sides on the issue of whether Public Law 280 did in fact confer jurisdiction to a state for environmental purposes. The regulation instead took the

74. *Id.* at 31,007, §52.21(c)(3)(vii).
75. *Id.* at 31,004.
76. 40 C.F.R. §52.21(c)(3)(v) (1977), 39 Fed. Reg. 42,515 (1974).
77. 39 Fed. Reg. 42,513 (1974).
78. *See* note 114 *infra.*

moderate position of not attempting to alter the existing legal relationships between the states and Indian reservations. EPA was leaving resolution of that issue to the courts.[79]

The preamble also noted the independent status of Indian lands not subject to state laws. Nevertheless, a semblance of big brotherhood remained in that the regulations required the Indian tribe, prior to redesignation of reservation lands, to consult with the state in which the reservation is located and to obtain the approval of the Secretary of the Interior.[80] Furthermore, the regulation on its face did not authorize Indian tribes to perform the new source review for new or modified sources located on Indian reservations. Rather, the regulation provided that "[s]uch procedures shall be administered by the Administrator in cooperation with the Secretary of the Interior with respect to lands over which the State has not assumed jurisdiction under other laws."[81]

Shortly after the regulations for the Prevention of Significant Deterioration of Air Quality was promulgated, regulations were proposed providing for the certification of pesticide applicators.[82] The preamble to the proposed regulations noted:

> The problem of certifying applicators on Indian Reservations arose during the development of the proposed regulations for submission and approval of State plans. While States have primary responsibility for conducting certification within their own political boundaries, they do not always have jurisdiction over Indian Reservations within those boundaries.[83]

Therefore, the proposed regulation provided that the appropriate Indian governing body could choose to utilize a state certification program or to develop its own plan for certifying Indian applicators.

The preamble had noted that "[t]he certification plan to be followed may depend upon the extent of State jurisdiction over Indian Reservations within a State's political boundaries."[84] The text of the regulation addressed some of these circumstances.[85] It provided that where Indian land was subject to the jurisdiction of a

79. Congress would follow suit in 1977 Amendments to the Clean Air Act. *Cf. infra* note 101.

80. 40 C.F.R. §52.21(c)(3)(v) (1977).

81. *Id.* §52.21(d)(4)(ii).

82. An additional set of regulations establishing a federal certification program for Indian lands and states lacking approved plans was proposed recently. The regulations will set authority for EPA to carry out certification and enforcement functions in lieu of the tribe or state where necessary. Proposed Reg. §171.11, 42 Fed. Reg. 61,873 (1977).

83. 40 Fed. Reg. 2528, 2530 (1975).

84. *Id.*

85. Proposed Reg. §171.10, 40 Fed. Reg. 2532 (1975).

state, the applicators would be certified under the state's certification plan. It also provided that Indian applicators using pesticides outside the reservation would have to be certified under the state plan. This provision was consistent with the established line of case law holding that Indians outside the reservation boundaries would be subject to state jurisdiction.[86] This provision was later deleted from the promulgation of the regulations because the agency felt that "certifications issued pursuant to Indian plans necessarily are valid only within the limits of the territorial jurisdiction of the Indian Governing Body, just as in the case with certifications issued by States."[87]

Another provision of the proposed regulations significantly stated that "*[n]on-Indian employees* contracted to apply restricted use pesticides on Indian Reservation lands not subject to State jurisdiction shall be certified either under a State certification plan accepted by the Indian Governing Body or under the Indian Reservation certification plan" (emphasis added).[88] This provision was a bold recognition by EPA that an Indian tribe could have jurisdiction over non-Indians within a reservation, a position that was subject to considerable legal debate at the time of the proposal and not wholly consistent with the then official federal position.[89]

Except as noted, the proposed regulation was substantially retained in the final promulgation. However, the promulgated regulation required an Indian Governing Body that decided to utilize the state certification program to enter into a cooperative agreement with the state regarding funding and proper authority for enforcement of the certification program.[90] The preamble noted that this was inserted because

> [a] State with a large number of Indian Reservations objected to the wording of this section and the preamble discussion on the basis that it implies that an Indian Governing Body can make a unilteral decision as to whether or not it will utilize a particular State's certification program or develop its own plan and program. It was pointed out that the State involved should have a voice in the matters since it would have to expend funds for the certification

86. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) and U.S. DEPARTMENT OF THE INTERIOR, *supra* note 21, at 510-11.

87. 40 Fed. Reg. 11,698, 11,702 (1975).

88. Proposed Reg. §171.10(d), 40 Fed. Reg. 2532 (1975).

89. In 1970, the Solicitor of the Department of the Interior held that tribes do not have criminal jurisdiction over non-Indians on reservation lands, Opinion of the Solicitor of the Department of the Interior N-36810, 77 I.D. 113 (1970). *See infra* note 197.

90. *But see* note 172 *infra.*

> program and would also need the proper authority for enforcement purposes.[91]

The preamble of the promulgation also noted that some state officials had objected to tribal certification of non-Indian employees who apply restricted-use pesticides on Indian reservations. The preamble rejected the objection.

> While some aspects of the legal relationships between States and Indian Reservations remain to be resolved, it is the Agency's position that in those instances where a State has not assumed jurisdiction over a reservation under other Federal laws, that the Indian Governing Body should have the opportunity to choose a certification plan covering all applicators on the reservation. This procedure should provide adequate coverage of all restricted use pesticide applicators on such Indian Reservations pending final resolution of any outstanding legal questions.[92]

Finally, consistent with the "let the courts do it" position of the agency in earlier regulations, the pesticide regulations provide that "[n]othing in this section is intended either to confer or deny jurisdiction to the States over Indian Reservations not already conferred or denied under other laws or treaties."[93]

EPA also has addressed jurisdiction over Indian lands in Regulations for the Implementation of Drinking Water Standards. The proposal of these regulations included no mention of Indian tribes.[94] However, the final promulgation, section 142.3, provided that, in order to obtain enforcement responsibility for the drinking water program, a state does not have to show authority over "public water systems on Indian land with respect to which the State does not have the necessary jurisdiction or its jurisdiction is in question. . . ."[95] The preamble merely noted that these systems would be regulated by EPA.

The most recent inclusion of Indian Tribes in EPA regulations occurred in the May 16, 1977 promulgation of regulations for the identification and designation of regions and agencies for solid waste planning and management.[96] The Resource Conservation and Recovery Act requires a statewide plan for solid waste management and directs the governor to designate regions and agencies to conduct regional planning where appropriate.[97] The regulations provide that

91. 40 Fed. Reg. 11,702 (1975).
92. *Id.*
93. §171.10(d), 40 Fed. Reg. 11,704 (1975).
94. 40 Fed. Reg. 33,228 (1975).
95. 41 Fed. Reg. 2916, 2919 (1976).
96. 42 Fed. Reg. 24,926 (1977).
97. 42 U.S.C.A. §6946 (Supp. 1978).

"[m]ajor Federal facilities and Native American Reservations should be treated for the purposes of these guidelines as though they are incorporated municipalities, and the facility director or administrator should be considered the same as a locally elected official."[98]

This provision is mostly non-regulatory, directed primarily toward assuring local consultation and coordination. However, funding flows to those designated. As usual, the statute does not provide an alternative means for the designation and funding of Indian Tribes. The appropriateness of designation of Tribes by a governor is questionable in light of the states' lack of jurisdiction over Indian lands.

e. *1977/1978 Amendments to EPA Statutes*

Tribal expressions of concern about Indian sovereignty began to have an effect on Congressional action during 1977 and 1978. For the first time, Congress enacted amendments to the Clean Air Act and the Safe Drinking Water Act which included substantive provisions regarding Indian lands in other than the definitional sections. Congress also expressed concern about tribal sovereignty in floor debates on proposed amendments to the Federal Water Pollution Control Act. In each case, Congress followed the agency's prior buck-passing regarding state jurisdiction over Indian lands. But Congress also rejected the notion that EPA statutes could serve as a basis for state jurisdiction over Indian lands.

Amendments to the Federal Water Pollution Control Act have not included any further mention of Indian tribes. However, a colloquy during the Senate floor debate did confirm EPA's understanding of state/tribal relations, namely, that the Federal Water Pollution Control Act does not provide state jurisdiction over Indian lands.

> Mr. ABOUREZK. On the Clean Water Act, I wanted to ask the manager if there is anything in this act which in any way alters the jurisdictional situation on the Indian reservations of the United States.
>
> Mr. ANDERSON. No.
>
> Mr. ABOUREZK. It neither adds nor takes away jurisdiction, whatever the situation might be?
>
> Mr. ANDERSON. That is correct.[99]

The potpourri amendments to the Clean Air Act signed into law on August 7, 1977, included provision for air quality classification of reservation lands by Indian tribes. Basically, this provision was a

98. §255.33, 42 Fed. Reg. 24,926, 24,930 (1977).
99. 123 CONG. REC. S13,605 (daily ed. Aug. 4, 1977).

legislative enactment of a portion of the EPA regulation for Prevention of Significant Air Quality Deterioration which the EPA had promulgated in 1976 in response to a federal court order.[100]

The Prevention of Significant Deterioration section addressed the need to protect good quality air from deterioration due to construction of new pollutant emitting facilities. The EPA regulations had developed a scheme whereby lands with good air quality would be classified under three classes.[101] All lands were initially classified as Class II lands, which would have meant that only a small amount of air quality deterioration from 1975 base levels would have been permitted. The governing jurisdiction in the area could then opt to take steps to redesignate that area as either Class I (pristine air quality) or Class III (allowing air quality deterioration to the national standard). Section 164 of the Clean Air Act Amendments preserved the EPA regulatory provision that authorized Indian governing bodies to so redesignate reservation lands. Subsection (c) authorized Indian tribes to follow the same redesignation procedures provided to the states. "Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body."[102]

Such redesignation, however, was subjected to the review of the EPA Administrator whenever any bordering state affected by the redesignation of the Indian lands objects to the redesignation. Subsection 165(e) requires the Administrator to resolve the dispute.[103] In the House debate concerning adoption of the conference report of the Clean Air Act Amendments, the manager of the House bill, Representative Paul G. Rogers, noted and qualified the Administrator's review powers.

> [I]t is intended that the Administrator's review of such determinations by tribal governments be exercised with utmost caution to avoid unnecessarily substituting his judgment for that of the tribe. The concept of Indian sovereignty over reservation lands is a critical one, not only to native Americans, but to the government of the

100. Sierra Club v. Environmental Protection Agency, 540 F.2d 1114 (D.C. Cir. 1976).

101. 39 Fed. Reg. 31,007 (1974), 40 C.F.R. §52.21(c)(3)(vii) (1977). *See supra* note 74.

102. 42 U.S.C.A. §7474(c) (Supp. 1977). The Northern Cheyenne Tribe had completed redesignation to Class I for the Northern Cheyenne Reservation prior to enactment of the Clean Air Act Amendments. The EPA Administrator's approval of the redesignation was legislatively ratified in §168(b) of the amendments. 42 U.S.C.A. §7478 (Supp. 1978). The Northern Cheyenne redesignation had been the subject of considerable congressional debate because the redesignation to Class I potentially would have an adverse impact on proposed construction of additional units at the Colstrip Power Plant, approximately 15 miles from the Northern Cheyenne Reservation.

103. 42 U.S.C.A. §7474(e) (Supp. 1977).

> United States. A fundamental incident of that sovereignty is control over the use of their air resources. . . . [T]he Administrator should reverse the determination made by an Indian governing body to reclassify its land, only under the most serious circumstances.[104]

Thus, federal supervision remains over tribal reclassification. The Administrator has authority to modify or veto the tribe's decision to reclassify. This is unlike the Administrator's review authority over state reclassifications, where the Administrator may disapprove a reclassification only if procedural requirements of the section have not been met.[105]

Amendments to the Safe Drinking Water Act were particularly interesting regarding Indian tribes. In an enigmatic little amendment, Congress made clear its intentions concerning application of the Safe Drinking Water Act to federal facilities, clarified the issue of state jurisdiction over Indian lands, and completely exempted the Bureau of Indian Affairs from the provisions of the act. The amendment is also consistent with the Congressional tradition of ad hoc, patchwork legislation for Indian affairs which only further contributes to the difficulty of clearly understanding Indian law.[106]

> (c)(1) Nothing in the Safe Drinking Water Amendments of 1977 shall be construed to alter or affect the status of American Indian lands or water rights nor to waive any sovereignty over Indian lands guaranteed by treaty or statute.
>
> (2) For the purposes of this chapter, the term "Federal agency" shall not be construed to refer to or include any American Indian tribe, nor to the Secretary of the Interior in his capacity as trustee of Indian lands.[107]

Taking the second paragraph first, subparagraph (c)(2) simply says that Indian tribes and the Secretary of Interior, in his capacity as trustee of Indian lands, will not be defined as federal agencies for the purposes of the Safe Drinking Water Act. On first reading subparagraph 2, it might appear that both Indian tribes and the Bureau of Indian Affairs are completely exempted from the Safe Drinking

104. 123 CONG. REC. H8665 (daily ed. Aug. 4, 1977).

105. 42 U.S.C.A. §7474(b)(1)(C)(2) (Supp. 1977).

106. This issue has arisen because some tribes and the Bureau of Indian Affairs had become concerned that §8 of the Amendments–regarding federal facilities–would have disastrous effects on the water flood injection and disposal wells employed in oil and gas operations on Indian lands. They were concerned that they would be subject to state and local enforcement. Their argument was that the BIA regulations governing mining (25 C.F.R. §§171-84 (1977)) are stringent enough to prevent pollution from such operations. 123 CONG. REC. H6862 (daily ed. July 12, 1977).

107. Safe Drinking Water Act Amendments of 1977, 42 U.S.C.A. §300j-6(c) (Supp. 1977).

Water Act. A more careful reading reveals that the Secretary of Interior, when acting as trustee, indeed is exempt from the Safe Drinking Water Act. Because the term "federal agency" falls within the term "person," wherever the act regulates persons, the Secretary would be exempted from coverage. However, wherever the statute regulates "public drinking water supplies," a literal reading of the act would still cover the Secretary if the Secretary's activity falls under the definition of "public drinking water supply." This is probably not what Congress really intended, but the statute is so constructed.[108]

Exemption of Indian tribes also was not achieved. It would have been easy for Congress to say that no provision of the Safe Drinking Water Act would apply to Indian tribes. They did not do this. Rather, they said that Indian tribes are not "federal agencies" thus precluding any argument that Indian tribes could be subject to state substantive and procedural laws through the federal agency section.

In subparagraph (a), Congress bent over backwards to completely avoid the whole complex subject of tribal/state jurisdiction.

> The committee does not intend that this section alter or amend laws, regulations, or treaties pertaining to the tribal water rights of American Indian tribes or the established relationship between the American Indian tribes and the United States in its special relationship as trustee to those tribes. Furthermore, the committee does not intend that this provision alter or amend any Federal or State statute, regulation, State enabling statute or treaty pertaining to American Indian tribal water systems and tribal water resource management activities. Sovereignty over Indian lands guaranteed by treaty or statute is in no way waived by this provision.[109]

Congress, well aware of the delicacies of tribal self-determination and of disputes over state jurisdiction over Indian lands, is clearly leaving any sovereignty issues for judicial rather than legislative resolution. In sum, Congress did not want the Safe Drinking Water Act to be interpreted as conferring to a state jurisdiction over Indian lands.

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108. It may be appropriate for the Secretary of Interior, as trustee, to be exempt from the requirements of §8. Without this exemption, the BIA, as a federal agency, would have to comply with both the procedural and substantive requirements of state and local environmental law, providing in effect a backdoor application of state law to Indians.

109. H.R. REP. NO. 95-338, 95th Cong., 1st Sess. 13, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3648, 3660. The use of the phrase "alter or affect the status of American Indian lands" in subparagraph a is somewhat ambiguous. "Status" is not exactly a term of art and could be interpreted liberally to mean that the Safe Drinking Water Act should not apply to Indians. However, the legislative history indicates that the phrase was meant to be read as the pre-existing legal status of Indian land and water rights.

Other recent examples of Congress' sensitivity to the sovereignty issues are the Federal Land Policy and Management Act of 1976 (commonly known as the BLM Organic Act),[110] which requires the Secretaries of Interior and Agriculture to coordinate land use plans with land use and management programs of adjacent Indian lands, and the Surface Control and Mining Reclamation Act of 1977,[111] which directs the Secretary of Interior

> to study the question of the regulation of surface mining on Indian lands which will achieve the purpose of this chapter and recognize the special jurisdictional status of these lands. In carrying out this study the Secretary shall consult with Indian tribes. The study report shall include proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands.[112]

The conference report on the strip mining act noted:

> One reason that the Conferees agreed to the House version of the Indian lands provision was that they did not want to change the status quo with respect to jurisdiction over Indian lands both within reservations and outside reservation boundaries. Nothing in the study provision or any other part of H.R. 2 is intended to make any such change.[113]

From the above analysis, it is clear that the present language of the EPA statutes, the intentions of Congress, and the EPA's own regulatory interpretation of its statutes do not confer to states' environmental regulatory jurisdiction over Indian lands.

f. *Public Law 280*

Consistent with the then federal policy promoting termination of separate Indian lands, Congress, in 1953, enacted PL 83-280.[114] By this act, six states were directly given, with some restrictions, civil and criminal jurisdiction over Indian land. Thirty-six states were empowered to assume jurisdiction over reservations by positive enactment of state legislation. Eight states were empowered to assume jurisdiction by amending their state constitutions to remove

110. 43 U.S.C.A. §§1701-82 (Supp. 1978).
111. 30 U.S.C.A. §§1201-1328 (Supp. 1978).
112. *Id.* §1300.
113. H.R. REP. NO. 95-493, 95th Cong., 1st Sess. 114, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 728, 746.
114. The pertinent portions are now codified in 28 U.S.C. §1360 (1970) (civil jurisdiction) and 18 U.S.C. §1162 (1970) (criminal jurisdiction).

disclaimers of jurisdiction over Indian lands within their borders.[115] The less than clear guidelines of PL 83-280 have generated much debate and litigation, and it is, therefore, not surprising that it should be at the heart of the discussion of state and tribal jurisdiction over environmental protection of Indian lands.

Earlier decisions did not agree on the extent of state jurisdiction over Indian lands granted by the provisions of PL 83-280.[116] The case holdings and the relative positions of the federal government and of the states whose jurisdictional claims are subject to PL 83-280 have been discussed in numerous other articles, and will not be repeated here.[117] However, recent federal cases now indicate a trend toward restricting the breadth of state jurisdiction under PL 83-280. These cases are *Bryan v. Itasca County*,[118] *Santa Rosa Band of Indians v. Kings County*,[119] and *United States v. Humboldt*.[120]

In *Bryan v. Itasca County*, the question presented to the Supreme Court was whether or not PL 83-280 constituted Congressional consent for a state to tax personal property (a mobile home) of an Indian on reservation trust land.[121]

Mr. Justice Brennan, writing for a unanimous court, indicated that PL 280 does not grant states the authority to impose taxes on reservation Indians. Reaffirming the judicial rule of construction that

115. Council of State Governments, State Environmental Issues Series: Indian Rights and Claims 6 (1977).

116. *Compare* People v. Rhoades, 12 Cal.App.3d 720, 90 Cal.Rptr. 794 (3d Dist. 1970); Rincon Band of Mission Indians v. County of San Diego, 324 F.Supp. 371 (S.D.Cal. 1971), *rev'd on other grounds*, 495 F.2d 1 (9th Cir. 1974); Agua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs, 347 F.Supp. 42 (C.D.Cal. 1972); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

117. *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. REV. 535 (1975); Comment, *State Jurisdiction over Indian Land Use: An Interpretation of the "Encumbrance" Savings Clause of Public Law 280*, 9 LAND & WATER L. REV. 421 (1974); Dolan, *State Jurisdiction Over Non-Indian Mineral Activities on Indian Reservations*, 21 ROCKY MTN. MIN. L. INST. 475 (1975); Chambers, *Federal Environmental Regulation of Mineral Resources Development with Particular Emphasis on Indian Lands* in ROCKY MOUNTAIN MINERAL LAW FOUNDATION, INSTITUTE ON WESTERN COAL DEVELOPMENT 35 (1973); NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, LEGAL ISSUES IN INDIAN JURISDICTION 33-37 (1974).

118. 426 U.S. 373 (1976).

119. 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

120. Civil No. C-74-2526-RFP (Sept. 10, 1976). The Humboldt case was a federal district court ruling that Humboldt County, California did not have authority under Public Law 280 to impose its land use laws on tribal lands within the Hoopa Valley Indian Reservation. The court held that neither the state nor the county could enforce zoning ordinances, building permit ordinances, or the state Environmental Quality Act on tribal trust lands.

121. 426 U.S. 373 (1976). The State of Minnesota had pursued this case out of concern not only for the state's taxing authority, but also a range of other state civil regulatory authorities, such as land use planning and health regulation. COUNCIL OF STATE GOVERNMENTS, STATE ENVIRONMENTAL ISSUE SERIES: INDIAN RIGHTS AND CLAIMS 10 (1977).

ambiguous statutes should be construed favorably toward the Indians, the Court found that neither PL 280 on its face nor its legislative history indicated any Congressional intention to confer taxing authority upon the states over personal property of Indians on a reservation.[122]

Ample application of the *Bryan* decision to environmental issues regarding Indian lands can be found both in the Court's rationale and in the strong dicta. First of all, the Court culls from the legislative history an important distinction between private causes of action and general state regulatory authority, finding that section 4(a) of PL 280 granted those states jurisdiction only over the former.

> With this as the primary focus of §4(a), the wording that follows in §4(a)—"and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State"—authorizes application by the state courts of their rules of decision to decide such disputes. 10 Cf. 28 U.S.C. §1652. This construction finds support in the consistent and uncontradicted references in the legislative history to "permitting" "*State courts to adjudicate* civil controversies" arising on Indian reservations, H.R. Rep. No. 848, pp. 5, 6 (emphasis added), and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations.[123]

State environmental statutes fall into the latter category of general state civil regulatory authority[124] and thus are outside the ambit of the PL 280 grant of jurisdiction. By defining the limits of jurisdiction granted to PL 280 states, Congress continued to reserve to the federal government or the tribes jurisdiction not so granted.[125]

Secondly, in reviewing the legislative history of Title IV of the Civil Rights Act of 1968[126] as it related to section 4, the Court

122. Bryan v. Itasca County, 426 U.S. 373, 381 (1976).

123. *Id.* at 383-84. The internal footnote is interesting:

> [10] Cf. Israel & Smithson, *supra*, n. 8, at 296:
>
> "A fair reading of these two clauses suggests that Congress never intended 'civil laws' to mean the entire array of state noncriminal laws, but rather that Congress intended 'civil laws' to mean those laws which have to do with private rights and status. Therefore, 'civil laws . . . of general application to private persons or private property' would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchises, etc. These are not within the fair meaning of 'private' laws."

124. The EPA statutes authorize criminal as well as civil enforcement powers, although the major emphasis is civil regulation. *Cf.* United States v. Atlantic Richfield, 429 F.Supp. 830 (E.D. Pa. 1977).

125. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Kennerly v. District Court, 400 U.S. 423 (1971).

126. 25 U.S.C. §§1301-41 (1970).

notes the following passage quoting Senator Ervin, the principal sponsor of Title IV.

> Certain representatives of municipalities have charged that the repeal of [§7 of] Public Law 280 would hamper air and water pollution controls and provide a haven for undesirable, unrestricted business establishments within tribal land borders. Not only does this assertion show the lack of faith that certain cities have in the ability and desire of Indian tribes to better themselves and their environment, but, *most importantly, it is irrelevant, since Public Law 280 relates primarily to the application of state civil and criminal law in court proceedings,* and has no bearing on programs set up by the States to assist economic and environmental development in Indian territory." (Emphasis added.) Hearing Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, No. 90-23, 90th Cong., 2d Sess., 136 (1968).[127]

The *Bryan* Court cites this passage as supportive of its proposition that Section 4 jurisdiction acquired under Title IV cannot be construed as extending general state civil regulatory authority.

It is also of importance for environmental questions that the court in *Bryan* cited the *Santa Rosa* case three times.[128] The *Santa Rosa* case, a decision of the Ninth Circuit Court of Appeals, held that neither the state nor its political subdivisions would have jurisdiction under PL 280 or 25 C.F.R. § 1.4 to apply state or local land use controls to Indian property within an Indian reservation.[129] The argument of the Ninth Circuit was similar to the rationale of the Court in *Bryan,* namely, that states are without jurisdiction over Indian lands unless such jurisdiction is *expressly* granted by Congress.[130] However, the *Santa Rosa* court also placed great weight on the term "encumbrance," which appears in the savings clause of PL 280.[131] The court held that the term "encumbrance" should be broadly construed.[132]

127. Bryan v. Itasca County, 426 U.S. 373, 387 (1976).

128. *Id.* at 388 and 388-89 n.14.

129. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038 (1977).

130. *Id.* at 658.

131. 28 U.S.C. §1360(b) (1970) (the "savings clause" of Public Law 280):

> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States, or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

132. *See* note 117 *supra.*

> Relying on the canon of construction applied in favor of Indians, the Court has ruled in different contexts that the word "encumbrance" is to be broadly construed and is not limited to a burden which hinders alienation of the fee. . . . Following the Court's lead, and resolving, as we must, doubts in favor of the Indians, we think that the word as used here may reasonably be interpreted to deny the state the power to apply zoning regulations to trust property.
>
> . . . Consequently, a construction of the term "encumbrance" more consonant with present congressional policy is mandated.[133]

The Supreme Court subsequently denied *certiorari* on the *Santa Rosa* case.[134] Environmental regulation is certainly very akin to land use regulation,[135] and it is reasonable to infer that the broad interpretation of the savings clause in the land use cases would equally apply to environmental issues.

Therefore, the *Bryan* and *Santa Rosa* cases appear to recognize pre-emption of state environmental regulation of Indian reservations for two reasons: state civil regulation was not intended by Congress to be within the scope of PL 280, and the savings clause of PL 280 specifically prohibits encumbrance of Indian land and water resources.[136]

g. *Other Federal Statutes*

Other federal statutes have been suggested as possible bases for state civil jurisdiction over activities on Indian land.[137] In 1950 the State of New York was granted civil jurisdiction over Indian tribes.[138] This act, now codified at 25 U.S.C. § § 232 and 233, was among a series of termination oriented acts, and was envisioned as a forerunner of the grant of jurisdiction to states by PL 83-280 in 1953.[139] However, there are several differences in wording in sections 232 and 233, which, on their face, could be read to confer a slightly broader scope of jurisdiction than the language of PL 83-280.

133. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 667-68 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

134. *Id.*

135. *See* EPA Report, EPA Programs Related to State, Regional and Local Planning (1975); LaFrance, Zoning Authority Over Fee Lands Within Reservation Boundaries (paper presented at Indian Law Seminar, Boulder, Colo. 1977).

136. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 658-59 n.2 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

137. It may be that the State of Oklahoma has general civil jurisdiction over Indian lands within the state, but analysis of the numerous statutes regarding Oklahoma is beyond the scope of this article. *Cf.* American Indian Policy Review Commission, *supra* note 20, at 120.

138. Act of Sept. 13, 1950, 64 Stat. 845.

139. For a general discussion of the origins of Pub. L. No. 83-280, *see* COMM. ON INTERIOR AND INSULAR AFFAIRS, BACKGROUND REPORT ON PUBLIC LAW 280, 94th Cong., 1st Sess. (1975).

For example, the savings clause of section 233 covers about the same subject matter as does that of PL 280.[140] However, the key term "encumbrance" from the proviso of PL 280 does not appear in section 233, but much narrow encumbrance-type language does appear: *"Provided further,* that nothing herein contained shall be construed as subjecting the land within any Indian reservation in the State of New York to . . . execution on any judgment rendered in the state court. . . ."[141] This language would argue against a broadening of the savings clause to prohibit state environmental jurisdiction, as is done under PL 83-280.

The few federal cases reported under these sections do not help determine whether New York would have jurisdiction for environmental purposes. The District Court in *Seneca Nation of Indians v. State* found that section 233 did not authorize the state to apply the New York highway law to Indian lands.[142] However, the issue there was *alienation* of Indian land by state appropriation of Indian land in connection with construction of a highway.

> [T]his Act does not authorize New York to appropriate land belonging to the Indians under the Highway Law because it contains a proviso which explicitly prohibits New York from applying any law which will result in the alienation of Indian land. . . .
>
> * * *
>
> . . ."[u]nder the penultimate proviso [of the 1950 Act] the matter of alienating tribal reservation lands would appear to have been left precisely where it was prior to the act."[143]

The "encumbrance" issue apparently has not been litigated in the federal courts. The Solicitor's Office of the Department of Interior has recently reviewed section 233 in conjunction with an opinion regarding the applicability of the Federal Metal and Non-metallic Mine Safety Act to Indian lands. The Interior Department has taken the position that the state regulatory program for mining safety would not apply to federal Indian reservations within the State of New York.

> The Statute confers civil jurisdiction . . . in civil actions and proceedings between Indians or between one or more Indians and any other person or persons. . . . In general, the word person used in a statute

140. *See* note 131 *supra.*
141. *See* note 138 *supra.*
142. 397 F. Supp. 685 (W.D.N.Y. 1975).
143. *Id.* at 687, *quoting* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 680 (1974).

> will not be construed so as to include the United States or a state or an agency thereof. In addition, it is a long established rule of statutory construction that when the word "person" is used in a legislative act, natural persons are intended unless something appears in the context to show that the statute applies to artificial persons. Corporations are an exception to this rule. Accordingly, 25 U.S.C. 233 does not provide authority to state courts to hear and decide civil actions in which the United States of America, or the State of New York including the New York State Department of Labor, are parties.[144]

An analogous argument could be made for state environmental protection regulations since ultimately it will be the state which would be enforcing the environmental standards or regulations in a state court, and according to the Department of Interior, a state is not a "person" under 25 U.S.C. § 233. The Interior position denying the state regulatory jurisdiction is consistent with the *Bryan* case[145] and with the current federal policy of Indian self-determination.[146] Whether a court ruling on this issue would give greater weight to this argument or to the argument that the savings clause of section 233 is fundamentally different from the savings clause of PL 83-280, in that it lacks the "encumbrance" language, is unknown. However, from a policy viewpoint it is much easier for EPA to have a uniform position that neither PL 83-280 nor 25 U.S.C. § 233 would grant state environmental regulatory jurisdiction over Indian lands.

Title 25 U.S.C. § 231 authorizes states, under regulations of the Department of Interior, to apply state health and sanitation laws on Indian reservations.[147] However, a 1969 opinion of the Solicitor of the Department of Interior indicated that this statute was not self-executing and, in the absence of implementing regulations, could not serve as a source of authority to enforce state health and sanitation laws in Indian country.[148] Although prior to 1956 regulations implementing the health portion of this section were in force, they have been withdrawn, and currently no health regulation

144. Unpublished opinion.

145. Bryan v. Itasca County, 426 U.S. 373 (1976).

146. *See generally* Comment, *The New York Indians' Right to Self-Determination*, 22 BUFFALO L. REV. 985 (1973).

147. The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and education conditions and enforcing sanitation and quarantine regulations. . . .

25 U.S.C. § 231 (1970).

148. Opinion of the Solicitor of the Department of the Interior M-36768 (unpublished 1969).

exists that implements section 231.[149] No case has clearly ruled on this section, although it was discussed by Justices Douglas and White in a dissent to the denial of certiorari in *Snohomish County v. Seattle Disposal Company:*

> There may also be merit to the dissent's view that the immunity of Indian lands to a state "encumbrance" cannot frustrate state programs to check air and water pollution. The States should, perhaps, be able to prevent sewage dumped on Indians' lands from draining into streams which flow into water supplies outside Indian lands. The same is true of smoke from garbage burned on Indian lands that contributes to smog over nearby cities. State controls in this area may be permissible by virtue of 25 U.S.C. §231, whether or not they are achieved under the label "zoning" rather than "sanitation regulations."
>
> The Solicitor General, in a memorandum expressing the views of the United States, asserts that the decision below was correct because it accorded with an administrative regulation of the Department of the Interior. This regulation provides that no local zoning ordinance shall be applicable to land leased from an Indian tribe where, as here, the land is held in trust by or is subjected to a restriction against alienation by the United States. The Supreme Court of Washington did not rely on this regulation, and whether it is valid or unduly restricts the state authority conferred by Public Law 280 and 25 U.S.C. §231 is an important federal question this Court should decide. I would grant certiorari.[150]

The dissent of two justices to *denial of ceriorari* does not, of course, carry great precedential weight, and the interpretation by the Department of Interior of their statutory authority probably would be given some deference.[151]

h. *The Williams Test*

Even though the foregoing analysis would indicate that states are pre-empted from asserting environmental jurisdiction over Indians or Indian trust lands, the *Williams* case[152] is of interest to environmental regulation because frequently, the source of environmental pollution within an Indian reservation is non-Indian owned. *McClanahan* carefully distinguished this situation from the issue of

149. There is, however, a regulation implementing 25 U.S.C. §231 in the education area: 25 C.F.R. §273.52 (1977).

150. 389 U.S. 1016, 1019-20 (1967).

151. Udall v. Tallman, 380 U.S. 1 (1965).

152. Williams v. Lee, 358 U.S. 217 (1959). The case involved the attempt by a non-Indian store owner on the reservation to collect in state courts a debt for goods sold to an Indian.

state jurisdiction over Indian trust lands. The court in *McClanahan* summarized four situations where the state would have jurisdiction over Indians or non-Indians within the reservations: (1) Indians have left or never inhabited their reservation; (2) a tribe does not possess the usual accouterments of tribal self-government; (3) the activities undertaken by reservation Indians are on non-reservation lands; and, (4) the exertion of state's jurisdiction is over non-Indians who undertake activity on Indian reservations.[153] Regarding environmental issues, the first three of these situations should not present any obvious problems for conflicting jurisdiction. However, the fourth, state regulation of non-Indian activities on Indian lands, is not always so clear.

In *McClanahan,* the Supreme Court went out of its way to apply and limit the *Williams* test to this type of situation.

> It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. See also *Organized Village of Kake v. Egan,* 369 U.S., at 75-76. In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.[154]

The *Williams* standard has proven in practice to be somewhat nebulous. "Essentially, absent 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."[155] This language was restated in *Mescalero Apache Tribe v. Jones.* "The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law."[156]

There are no cases interpreting state environmental activities over non-Indians within a reservation, but when such a case does arise, no doubt the nexus of the regulated activiities to tribal government, the strength of the tribal government, the bearing of the federal environmental act, the history of state action on that particular reservation, and the degree of state interest will be determinative in any such ruling.

153. 411 U.S. 164 (1973).
154. *Id.* at 179.
155. 358 U.S. 217, 220 (1959).
156. 411 U.S. 145, 148 (1973).

If upheld on appeal, a recent Washington Federal District Court case could lend considerable guidance to determining relative state and Tribal authorities. In *Confederated Tribes of the Colville Indian Reservation v. Washington*[157] the Court considered another "cigarette tax" dispute involving the cigarette tax ordinances of several Washington tribes and the state's tax regulation. The court found the state regulation to be an infringement of tribal self-government under *Williams*. The court noted that *Williams* requires proof by the tribe, or concession by the state, that the state regulation causes actual interference with performance of tribal governmental obligations. "Merely theoretical conceptions of interference with the functions of . . . government" will not suffice to strike the state regulation.[158]

More important, however, was the court's extended analysis of tribal pre-emption of state regulation. The court posited a dual benchmark for determining the existence of tribal pre-emption: (a) is the tribal ordinance enacted under a valid delegation of power from Congress, and (b) does the ordinance establish a *comprehensive* program or scheme regulating the entire reservation.[159] If both tests are met, then the state regulation is pre-empted. If upheld, this could become a useful test in a very difficult area of Indian law.

Under either *Williams* or *Colville,* the factual circumstances are very important to the determination. A few environmental examples will illustrate the difficulty of determining "infringement."

Section 208 of the Federal Water Pollution Control Act requires states and regional planning entities to develop a water quality management plan.[160] Congress intended in section 208 that all parts of the state be subject to water quality planning although the act does not address the distinctive nature of Indian or federal lands.[161] The section further provides that it is the responsibility of the governor of state to designate areas of the state for more intensive planning.[162] Although no Indian reservations were so designated by governors, areas designated in some states included Indian lands.[163] Probably such designations of Indian land by a governor are beyond the authority of a state.

157. 446 F.Supp. 1339 (E.D. Wash. 1978).

158. *Id.* at 1363.

159. *Id.* at 1360-62.

160. 33 U.S.C. §1288 (Supp. V 1975).

161. Natural Resources Council, Inc. v. Train, 396 F. Supp. 1386 (D.C.D.C. 1975).

162. 33 U.S.C. §1288 (Supp. V 1975). The planning process is to include an assessment of water quality in the defined area, a classification of streams by levels of water quality, an analysis of point and non-point sources of water pollutants, the development of controls and regulatory programs for identified pollutants, and extensive public participation in the development of the plan.

163. All or portions of the following reservations were included in designated planning

However, the real question is who has authority to conduct the planning for the fee lands and non-Indian communities within the reservation boundaries. Certainly, given the flow of streams and pollutants across jurisdictional boundaries, the state could have a legitimate interest in such planning. But the interests of tribes in the waters flowing through the reservation have a preferred status dating back to the Indian treaties.[164] Therefore, any comprehensive tribal planning of the use or quality of their waters should serve to preempt any state activity within the reservation even if the state planning would be restricted to the waters of non-Indian lands. If a tribe takes no planning or regulatory action regarding water quality or only acts haphazardly, it would leave open the question of whether non-Indian communities within the reservation could participate in state directed water quality planning for their lands.

A second example involves major sources of air pollution. For certain categories of polluters, EPA has established new source performance standards that set air pollution emission limitations for the sources.[165] Normally, EPA delegates states the authority to review the ability of these sources to meet the new source performance standards.[166] Nothing in the Clean Air Act or the regulations indicates how sources constructed within an Indian reservation are to be reviewed. However, consistent with the water permit regulations,[167] it is unlikely that EPA would allow a state to perform the new source review of a facility to be located within a reservation. A fossil fuel power plant to be located at a coal mine within a reservation serves as a good example. If the plant were located on trust lands, it is unlikely that the state would be able to assert jurisdiction over the facility. This is because provisions in the lease of the land by the facility would probably include environmental restrictions,[168] and these restrictions would constitute tribal governmental action. Any

areas in Region VIII of EPA: Flathead, Crow and Northern Cheyenne in Montana; Uintah and Ouray in Utah; and Fort Berthold in North Dakota. Each of these reservations is receiving planning funds through the designated planning agency, normally a council of governments.

164. Pelcyger, *Indian Water Rights: Some Emerging Frontiers,* 21 ROCKY MTN. MIN. L. INST. 743 (1975).

165. 42 U.S.C. §1857c-6 (1970).

166. *Id.*

167. 40 C.F.R. §125.2 (1977).

168. Prior to approval of any lease or extension of an existing lease pursuant of (sic) this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; . . . the effect on the environment of the uses to which the leased lands will be subject.

25 U.S.C. §415 (1970).

state review of the same facility would constitute an infringement on this tribal action. If the tribe itself was participating in the construction or operation of the power plant, any action by the state would certainly constitute an infringement.

If the power plant is located on fee lands within the reservation, if there is no tribal interest or benefit deriving from the plant, and if the tribe has taken no regulatory action regarding air quality, then the legitimate state interest in the impact of the plant on nearby non-reservation lands may be a sufficient basis for state jurisdiction over the plant.

A third example is the regulation of persons applying pesticides. The Federal Insecticide, Fungicide and Rodenticide Act requires each state to develop a plan for the certification of pesticide applicators.[169] No person may use a "restricted" pesticide unless he has first participated in a training course or taken a test and received a certificate of his ability to use pesticides.[170] The implementing regulations for this program authorize Indian tribes to undertake a certification program themselves or to enter into a cooperative effort with a state.[171]

The enforcement question is a tough one in the certification program. Even if a tribe entered into a cooperative agreement with the state, the tribe could not authorize state enforcement because only an act of Congress can give a state jurisdiction over Indians on Indian lands.[172] However, the tribe could accept the certification of the state and perform its own enforcement functions. Independent of a cooperative agreement, the state probably would be unable to enforce its certification program against a non-Indian person using pesticides on leased trust lands because the state's exercise of jurisdiction would again interfere with a lease provision and thus constitute an "infringement." However, if the non-Indian were using pesticides on fee lands and if the tribe did not have a reservation-wide certification program, exercise of state jurisdiction should not infringe upon tribal self-government. The legitimate state interest here would be those of the health of state citizens and crop and livestock protection. Under *Colville*, the state enforcement in this latter case would not constitute an unconstitutional burden on tribal government.

As Indians become more aware of state and federal programs,

169. 7 U.S.C. §136b (Supp. V 1975).
170. *Id. See also* 40 C.F.R. §171 (1977).
171. *See* note 84 *supra.*
172. Kennerly v. District Court, 400 U.S. 423 (1971).

lawsuits over jurisdiction are certain to arise. It will be interesting to see how the courts sort out the complexities.

TRIBAL AUTHORITY TO REGULATE RESERVATION ENVIRONMENT

In the long run, the best approach for environmental protection of Indian lands will be development by the tribes of their own environmental programs and expertise. There is little question about their authority to do so.

It is fundamental that Indian tribes have inherent powers to govern themselves.[173] These powers may be limited by federal statute, treaty provisions, or provisions of the tribal constitution.[174] Tribal powers may also be augmented by specific federal statute or regulation.[175]

Although the authority of Indian tribes in the environmental area has yet to be extensively discussed in case, comment, or statutory provision, other analogous tribal powers have been well established by case law, and there are no present federal statutes that would limit tribal powers to protect reservation environments.[176]

Tribes have considerable latitude in regulating the use of the tribal property. Powers to regulate and tax commercial activities within the reservation are fairly well established,[177] although the provisions of sections 261-264 of Title 25 of the U.S. Code, authorizing the Bureau of Indian Affairs to regulate the activities of certain commercial traders on Indian reservations, raise questions about the division of authority in this area between the Bureau of Indian Affairs and tribes.[178]

Tribal powers in the land use area provide the most direct analogy to environmental regulation. Tribal land use authorities have been, from time to time, question, mainly in conjunction with the grant of state jurisdiction in PL 83-280.[179] After the enactment of PL 83-280, case law results were mixed with several federal California

173. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942).

174. Manual of Indian Law, ch. 1, A-2, A-4 (1976).

175. *Id.* at A-2.

176. It could be argued, however, that the comprehensive federal environmental legislation pre-empts Indian tribes just as it does the states. *Cf.* Note, *Indian Coal Authorities: The Concept of Federal Preemption and Independent Tribal Coal Development on the Northern Great Plains*, 53 N.D. L. REV. 469 (1977).

177. Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947 (8th Cir. 1905); Barta v. Oglala Sioux Tribe of Pine Ridge Reservation, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959).

178. Manual of Indian Law, at A-6.

179. *Id. But see* LaFrance, *supra* note 135.

cases ruling in favor of state and local land use authorities over the tribe.[180] But the disparity has now been resolved by the *Santa Rosa* case, which has reaffirmed tribal authorities in land use regulation.[181]

No limitations on a tribe's powers of environmental regulation are apparent, and, in fact, a few tribes have taken legislative steps to protect reservation environment.[182] There are, however, practical difficulties facing tribes which will probably have the result, for the time being, of discouraging most tribes from regulating reservation environment. The first hurdle is the lack of motivation in the tribal infrastructure. Most tribes see immediate economic and social problems as a higher priority than environmental regulation. Some tribes probably do not have or do not perceive any environmental problems on their reservation as warranting environmental control. Other tribes that do have serious environmental problems may not recognize the problem or may not see any gain to the tribe from environmental regulation. The lack of manpower skills and technical experience in the environmental field is a prevailing but decreasing problem with Indian tribes.[183] This problem is coupled with a frequent lack of trust of outside expertise, including, in many cases, distrust of the environmental expertise of the federal government.[184]

Some tribes face internal roadblocks to tribal environmental action through pressure brought to bear on the tribal council by Indian entrepreneurs and lease holders who enjoy their relative lack of regulation and competitive advantage and who oppose any regulation, environmental or otherwise, which would complicate or increase the cost of their enterprise. Indian allottees are equally undesirous of impairing in any way the leasability of their portion of a grazing unit. All too often, the income from their leased land constitutes a major portion or even all of their total income.

A second hurdle is the common ambiguity in general federal statutes over eligibility of tribes for grant funds. The EPA statutes authorize grant funds under a variety of programs. With the exception of the Toxic Substances Control Act, each of the acts provide

180. *See* note 116 *supra.*

181. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 664 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038 (1977).

182. *See* note 2 *supra.*

183. FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION, TASK FORCE SEVEN: RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION 110 (1976); A. SORKIN, AMERICAN INDIANS AND FEDERAL AID 104-35 (1971).

184. FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION, *supra* note 183, at 91.

program management grants designed to enable the states to carry out their responsibilities under the act.[185] However, the authorization for most of these program management grants only provides for grants to states, and Indian tribes are not included in the definition of "state" under the acts. The Clean Air Act is slightly different, providing for program management grants to "air pollution control agencies," the definition of which could be interpreted to include an Indian tribe.[186]

Tribes are eligible and have received EPA grant funds under a variety of other grant programs. Many tribes have received monies for water quality planning on reservation lands.[187] Training grants and research/demonstration project funds have been received by tribes.[188] Tribes are also eligible for 75% federal funding of wastewater treatment plants construction under section 201 of the Federal Water Pollution Control Act,[189] although there is a major hurdle to tribes receiving this funding in that the tribal project must appear on a state priority list, which is an annual ranking in the order of need prepared by the state of all proposed projects desiring federal funding.[190] Tribes have objected to the application of these procedures to Indian projects on grounds of inequality of treatment and of inconsistency with Indian law. And even where a grant program clearly applies to Indian tribes, frequently the amount of funds available and the number of entities competing for the funds diminish the attractiveness of attempting to obtain the funds.[191]

185. *Cf.* 33 U.S.C. §1256 (Supp. V 1975) (water program grants); 42 U.S.C. §1857c (1970) (air program grants).

186. "The term 'air pollution control agency' means any of the following: . . . (3) A city, county, or other local government health authority, or, in the case of any city, county, or other local goverment in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency; . . . ." 42 U.S.C. §1857h(b) (1970). In January, 1978, the Navajo Tribe was notified by EPA that they would be eligible for grant funds under this section.

187. The Regional EPA Office in Denver, Colo., has made planning money available to all 25 reservations in its six state region.

188. The Northern Cheyenne tribe is conducting a hydrology study under EPA research funds. Other Indians have been trained in treatment plant operation and management of solid waste.

189. 33 U.S.C. §1281 (1970).

190. 33 U.S.C. §1284 (1970).

191. Proposed amendments to the Federal Insecticide, Fungicide and Rodenticide Act would significantly place Indian tribes on an equal footing with states:

> SEC. 23. STATE COOPERATION, AID, AND TRAINING
>
> (a) COOPERATIVE AGREEMENTS.–The Administrator is authorized to enter into cooperative agreements with States and Indian tribes–
>
> (1) to delegate to any State or Indian tribe the authority to cooperate in the enforcement of this Act through the use of its personnel or facilities, to train personnel of the State or Indian tribe to cooperate in

A third major hurdle is the present uncertainty regarding the extent of tribal civil jurisdiction over non-Indians within reservation boundaries. In the first place, tribal constitutions normally have not authorized tribal court jurisdiction over non-Indians.[192] The law and order codes that have been adopted by many tribes practically verbatim from 25 C.F.R. § 11.2, provide for jurisdiction only over Indian persons.[193] Even if a tribal constitution specifically authorizes jurisdiction over non-Indians, it is not yet certain that such jurisdiction is valid. The question is an important one because in many instances the enterprises within a reservation which would cause significant pollution are owned or operated by non-Indians.[194]

It is surprising that the civil and criminal authority of a tribe over non-Indians within a reservation has not been squarely addressed in Indian case law until quite recently. The civil jurisdiction of a tribe over non-Indians has been strongly implied by dicta in *Williams v. Lee*[195] and more recently in *United States v. Mazurie*,[196] where the Supreme Court upheld tribal authority to require a liquor license of a non-Indian owned tavern within the reservation.

As late as 1970 the Solicitor of the Department of Interior held that tribes do not have criminal jurisdiction over non-Indians on reservation lands.[197] However, when the case of *Oliphant v. Schlie* was affirmed by the Ninth Circuit, upholding tribal criminal jurisdiction over a non-Indian committing a criminal act on trust lands within the reservation,[198] the Interior Department withdrew the

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the enforcement of this Act, and to assist States and Indian tribes in implementing cooperative enforcement programs through grants-in-aid; and

(2) to assist State and Indian tribal agencies in developing and administering State or Indian tribal programs for training and certification of applicators consistent with the standards the Administrator prescribes.

(b) CONTRACTS FOR TRAINING.—In addition, the Administrator is authorized to enter into contracts with Federal, State, or Indian tribal agencies for the purpose of encouraging the training of certified applicators.

192. For example, the Tribal Constitution of the Three Affiliated Tribes of the Fort Berthold Reservation provides: "The Fort Berthold Indian Court shall have jurisdiction of all suits wherein the defendant is a member of the Three Affiliated Tribes or an Indian over whom the Court has jurisdiction, and of all other suits between members and non-members brought before the Court by stipulation of the parties." Ch. II, Judicial Procedure, Civil.

193. 25 C.F.R. §11.2 (1977). Jurisdiction provides: "A Court of Indian Offenses shall have jurisdiction over all offenses enumerated in §§11.38-11.87NH, when committed by any Indian, within the reservation or reservations for which the court is established. . . ." *Id.*

194. Non-Indian owned lands may be subject to state jurisdiction. *See* discussion accompanying note 153 *supra.*

195. 358 U.S. 217, 223 (1959).

196. 419 U.S. 544, 557 (1975).

197. Opinion of the Solicitor of the Department of the Interior N-36810, 77 I.D. 113 (1970).

198. 544 F.2d 1007 (9th Cir. 1976), *rev'd sub nom.* Oliphant v. Suquamish Indian Tribe, 98 S.Ct. 1011 (1978).

opinion.[199] The Supreme Court has now reversed the Ninth Circuit, holding that Indian tribal courts do not have criminal jurisdiction to try and punish non-Indians and that they may not assume such jurisdiction unless specifically authorized by Congress.[200]

The decision in *Oliphant* relied heavily on the long-standing presumption of the courts, Congress and the Executive Branch that tribal courts lack power to try non-Indians. The same presumption has not prevailed in civil matters and, therefore, it is unlikely that the same result would apply to a tribal civil jurisdiction over non-Indians, including environmental regulation. Indeed, the *Colville* case mentioned above (decided two weeks before *Oliphant*) strongly affirmed the tribe's civil tax regulation over non-Indians.[201]

The final report of the American Indian Policy Review Commission addressed this issue, finding:

> that the growth and development of tribal government into fully-functioning governments necessarily encompasses [sic] the exercise of some tribal jurisdiction over non-Indian people and property within reservation boundaries. The tribes must accept the fact and operate under the assumption that the jurisdiction they assert over non-Indians must bear a reasonable relationship to legitimate tribal interests such as protection of trust resources, maintenance of law and order, delivery of services and protection of tribal government generally.[202]

One final danger to tribal exercise of authority over environmental protection of reservation lands should be noted. It is generally agreed that a tribe's inherent powers are preserved even though it does not exercise them.[203] However, courts may be reluctant to defend unexercised powers in the face of a strong attack by other competing interests. When they want to, courts can find tangential means to strip or limit a power, especially when a significant national interest such as energy needs are at stake.

CONCLUSIONS

The best environmental protection of Indian lands will normally be achieved through environmental action by those most interested in the land, in this case, by the tribes themselves protecting their own land. Hopefully, where environmental problems exist or arise on a reservation, tribes will exercise their legitimate authorities.

199. Oliphant v. Suquamish Indian Tribe, 98 S.Ct. 1011, 1017 n.11 (1978).
200. Oliphant v. Suquamish Indian Tribe, 98 S.Ct. 1011 (1978).
201. *Supra* note 157.
202. FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION, *supra* note 183, at 143.
203. Fischer v. District Court, 424 U.S. 382 (1976).

Even if tribes do enact environmental programs, it is likely states will still try to exercise jurisdiction over non-Indian owned or operated sources if these sources constitute a major pollution source or a serious environmental problem. The current trend of analogous Indian law cases indicates that states' jurisdiction even over non-Indian activities within a reservation will be curtailed in environmental issues.

Although the EPA has authority to apply federal standards to pollution sources within a reservation, it is not likely that EPA will take a strong enforcement position except where serious environmental problems exist. To date, EPA has not shown an inclination to unilaterally impose economically burdensome controls on Indian activities. There is no reason to suspect that the pattern followed in EPA's dealings with states and localities will change when it comes to environmental issues on Indian lands. All environmental problems cannot be solved at the same time, so environmental problems on Indian lands must be addressed one at a time in order of highest priority.