Indians and the Environment: An Examination of Jurisdictional Issues Relative to Environmental Management

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I. INTRODUCTION

Since the beginning of the nation, the states, the federal government and the Indian tribes have all vied for jurisdiction over Indian lands. In recent times, heightened concerns for environmental quality and natural resource management have accentuated the conflicting jurisdictional claims. The most troublesome issues are: the extent of permissible Indian initiative to define, regulate and monitor resource management on Indian lands; the interplay between federal regulatory programs and the state and tribal jurisdictional conflicts; and the role of state police power over Indian lands.

This article will consider first the tribal, federal and state jurisdictional claims over Indians and Indian land from a historical perspective. The next section examines state administration of environmental management programs on Indian lands. The final section proposes an intergovernmental mechanism to deal with the use, protection, preservation and enhancement of the finite resources on Indian lands.

II. JURISDICTIONAL ISSUES

A. *Tribal Authority*

An Indian tribe is a political body endowed with the power of self government. This principle was first enunciated by the Supreme Court in 1832 in *Worcester v. Georgia*.[1] In *Worcester*, Chief Justice Marshall declared that Indian tribes or nations "had always been considered as distinct, independent, political communities,

1. 31 U.S. 515 (1832).

retaining their original natural rights,"[2] and that "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right of self-government—by associating with a stronger, and taking its protection."[3] The governing power of tribes springs from their inherent original sovereignty and from their status as landowners.

Since *Worcester*, Congress and the courts have generally respected tribal self-government over Indian lands, with few exceptions.[4] However, in recent years, state government involvement in areas traditionally dominated by tribal governments[5] has created jurisdictional confusion[6] and civil protest among Indians.[7]

B. *Federal Authority*

1. Basic Theory

The federal authority over issues of Indian jurisdiction has two bases: the Constitution and the guardian theory.

Constitutional Basis

The United States Constitution grants to Congress the "power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . ."[8] This clause authorizes federal treaties and acts licensing trade with Indian tribes. It has been construed to "comprehend all that is required for the regulation of our intercourse with the Indians."[9] The Constitution also grants to the President "power, by and with the advice and consent of the Senate, to make treaties . . . ,"[10] including treaties with Indian nations.

2. *Id.* at 559.
3. *Id.* at 560-61.
4. *See* notes 8-23 and accompanying text *infra*.
5. *See generally* T.W. TAYLOR, THE STATES AND THEIR INDIAN CITIZENS (1972).
6. *See generally* France, *Recent Developments in Indian Litigation*, 13 LAND & NAT. RESOURCES DIV. J. 73 (1975).
7. The Indians, fearing further erosion of tribal sovereignty, often cite the United States Supreme Court decision of the late nineteenth century, United States v. Kagama, 118 U.S. 375 (1886), in which the Court stated "[b]ecause of the local ill feeling, the people of the States where they (the Indian tribes) are found are often their deadliest enemies." *Id.* at 384.
8. U.S. CONST., art. I, § 8, cl. 3.
9. Worcester v. Georgia, 31 U.S. 515, 517 (1832).
10. U.S. CONST., art. II, § 2, cl. 2.

Guardian Theory

The federal government has also asserted the weakness and helplessness of the Indian people as a basis for its occasional regulation of Indian land. Chief Justice Marshall stated in *Cherokee Nation v. Georgia*[11] that "the Indians are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian; they look to our government for protection . . . ."[12] This alleged guardianship relationship also makes federal power and jurisdiction over the Indians superior to that of the states.

In both *Cherokee Nation* and *Worcester*, Chief Justice Marshall defined the position of Indian tribes relative to the federal and state governments. In declaring the Cherokee Tribe was a "unique nation . . . occupying its own territory, . . . in which the laws of Georgia can have no force,"[13] he established that Indian reservations are physically and politically separate from the states in which they are located.[14]

2. Federal Action

Early federal policy respecting the Indians concentrated on isolating them; numerous reservations were established to separate the Indians from white settlers. In 1803, for example, the Cherokees were forcibly removed from their ancestral homes in Georgia and North Carolina to designated reservation land in Oklahoma.[15]

In the 1880's, in an effort to improve the Indian standard of living, federal policy changed from isolation to assimilation and acculturation. This change in policy resulted in the passage of the Allotment Act of 1887,[16] designed to "civilize" the Indians by providing for individual ownership of specified parcels of reservation land. In addition, in 1906 the Secretary of the Interior was empowered to issue patents in fee simple to qualified Indian allottees.[17] This "civilization" policy, however, failed to raise the living standard

11. Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
12. *Id.* at 17.
13. 31 U.S. at 561.
14. *Id.* at 559.
15. Interview with Earl Boyd Pierce, Esq., General Counsel to the Cherokee Nation, in Fort Gibson, Oklahoma (April 26, 1976).
16. Act of February 8, 1887, *codified in* 25 U.S.C. §§ 331-58 (1970).
17. Act of May 8, 1906, *codified in* 25 U.S.C. § 349 (1970).

and by 1934 total Indian landholdings had fallen to 48,000,000 acres from over 136,000,000 acres in 1887.[18]

To stem this alienation of Indian lands, Congress passed the Indian Reorganization Act in 1934,[19] ending the allotment system and revitalizing tribal government. This Act provided for the incorporation of the tribes and the adoption of a constitution and by-laws. Congressional action since 1934 has recognized Indian tribes as political sovereignties with distinct domestic and municipal functions.

The high point for support of Indian self-determination has been in the 1970's. Former President Nixon, in his July 8, 1970 Message to Congress, spoke of excessive Indian dependence on the federal government; he stated that "self-determination among the Indian people can and must be encouraged . . . ."[20] On January 5, 1975, Congress passed the Indian Self-Determination and Education Assistance Act[21] "to provide maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the federal government for Indians and to encourage the development of human resources of the Indian people . . . ."[22] In the Declaration of Policy section, the Act states the federal "commitment to . . . Indian self-determination . . . [and] an orderly transition from Federal domination . . . to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services."[23]

18. W. BROPHY & S. ABERLE, THE INDIAN—AMERICA'S UNFINISHED BUSINESS 20 (1966). *See also* S. STEINER, THE NEW INDIANS 162-63 (1968).

19. Act of June 18, 1934, Pub. L. No. 73-383, 48 Stat. 984 (1934), *as amended by* 25 U.S.C. §§ 461-79 (1970).

20. 116 CONG. REC. 23132-33 (1970).

21. 25 U.S.C. § 450 (Supp. V 1975).

22. H.R. REP. NO. 93-1600, 93d Cong., 2d Sess. 1 (1974), *reprinted in* (1974) U.S. CODE CONG. & AD. NEWS 7775-76.

23. 25 U.S.C. § 450a(b) (Supp. V 1975). Section 104 of the Act provides grants for training and strengthening tribal governments and other activities needed to allow tribes to assume greater responsibility for planning, operating and monitoring Bureau of Indian Affairs programs. Such funds also enable tribes to develop the governmental facility to better deal with states in resolving jurisdictional disputes.

There has been other evidence of federal support for Indian self-determination. The Bureau of Indian Affairs has established an Office of Trust Responsibility and an Indian Water Rights Office, both designed to protect Indian land and water rights from encroachment by federal, state or private interests. An Office of Indian Rights has been formed within the Department of Justice to enforce federal statutes regarding the civil rights of American Indians, primarily Title II of the 1968 Civil Rights

C. *State and Local Authority*

1. Federal Delegation

Before 1950, state jurisdiction over Indians and Indian land included only criminal jurisdiction exercised by just a few states. In 1950, Congress granted exclusive civil jurisdiction over Indians and Indian lands within its boundaries to the State of New York.[24] Finally, in 1953, Congress passed Public Law 280,[25] the first comprehensive act designed to shift greater jurisdictional authority to the states.

Public Law 280

Public Law 280 was designed to implement assimilation by extending the benefits and responsibilities of state law to reservation Indians. Those tribes with largely non-functioning governmental systems were regarded as ready for assimilation, and came under the law. Other tribes, with more organized governing systems, objected to state jurisdiction, and were excluded from coverage.

Public Law 280 divided the states into three groups:[26]

(a) Six states were given virtually complete civil and criminal jurisdiction directly;
(b) Thirty-six states were empowered to take jurisdiction over reservations by enactment of state legislation;
(c) Eight states were empowered to assume jurisdiction by amending their state constitutions.

These divisions raise many issues of both criminal and civil jurisdiction. For the purposes of this article, however, the focus is upon issues of civil jurisdiction.

The third group of states, the eight empowered to assume jurisdiction over Indian affairs by amending their state constitutions, have taken differing approaches to assuming jurisdiction. Since their enabling acts or constitutions specifically disclaimed jurisdic-

Act, commonly known as the Indian Bill of Rights. Additionally, Congress created the American Indian Policy Review Commission in January 1975, to determine federal policy and program revisions for American Indians, in light of present and future needs.

24. 25 U.S.C. § 233 (1970).

25. Act of August 15, 1953, ch. 505, 67 Stat. 588-90 (codified *as amended* in scattered sections of 18, 28 U.S.C.).

26. *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

tion over Indian lands within their borders,[27] Congress required a constitutional amendment "or existing statutes, as the case may be . . . ,"[28] to overcome these legal impediments. Some states have amended their constitutions to assume jurisdiction over reservations; others have assumed jurisdiction without going through the cumbersome amendment process. The latter argue that the *"or existing statutes, as the case may be"* clause is sufficiently broad to allow a state and its courts themselves to determine whether in fact a constitutional amendment is necessary.[29]

The Indian Civil Rights Act of 1968[30] brought an important change to Public Law 280. It provides, in pertinent parts, that after 1968, no state may assume jurisdiction without the express consent of the Indians to be affected. The Act also allows for "retrocession," i.e., the return of jurisdiction over Indian lands from the states to the federal government and the tribes. To date, no state has been fully subjected to either provision.

Public Law 280 and its subsequent amendments contained the following exceptions to jurisdiction:

> *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 deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute *with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.*[31] (Emphasis added.)

These exceptions require a preliminary examination of both the manner by which Indian land is held and the specific treaty rights

27. A typical example of this type of disclaimer clause appears in the Washington State Constitution, art. XXV, § 2: "[T]he people inhabiting this State do agree and declare that they forever disclaim all right and title to . . . lands lying within said limits owned or held by any Indian or Indian tribe; and that until the title thereto shall have been extinguished by the United States . . . said Indian lands shall remain under the absolute jurisdiction and control of the Congress . . . ."

28. 25 U.S.C § 1324 (1970).

29. *See* State v. Paul, 53 Wash. 2d 789, 337 P.2d 33 (1959); Quinault Tribe v. Gallagher, 368 F.2d 648 (9th Cir. 1966), *cert. denied*, 387 U.S. 907 (1967).

30. 25 U.S.C. §§ 1321-22 (1970).

31. 18 U.S.C. § 1162 (1970) (emphasis added). Similar language is found in 28 U.S.C. § 1360(b) (1970).

respecting Indian land before a state can evaluate the permissible range of police power regulatory activity. This entails defining the extent to which state action is pre-empted by the terms "encumbrance" and "federal treaty, agreement, or statute or any regulation made pursuant thereto."

The federal government takes the position that the term "encumbrance" should be broadly defined, thereby limiting any state action burdening Indian land which might lessen its value to the tribe. The federal government relies upon a Supreme Court definition of "encumbrance,"[32] and supportive federal and state case law.[33]

The states, however, advocate a different position. They argue that Public Law 280 granted the states wide jurisdictional authority, and therefore, "encumbrance" should be defined very narrowly. This point of view also has much federal and case law to support it.[34]

The aspect of state jurisdiction which seems fairly settled deals with personal jurisdiction over non-Indians on Indian lands. The Supreme Court held in *Surplus Trading Company v. Cook*,[35] that a reservation is "part of a state . . . and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they have only restricted application to the Indian wards."[36]

32. Squire v. Capoeman, 351 U.S. 1 (1956).

33. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975); Snohomish County v. Seattle Disposal Co., 70 Wash. 2d 668, 425 P.2d 22 (1967), *cert. denied*, 389 U.S. 1016 (1967).

34. *See* Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371 (S.D. Cal. 1971), *aff'd*, 495 F.2d 1 (9th Cir. 1974), *cert. denied*, 419 U.S. 1008 (1974) (restrictively defining "encumbrance"); Ricci v. County of Riverside, Civil No. 71-1134-EC (C.D. Cal., filed Sept. 9, 1971), *appeal dismissed as moot*, 495 F.2d 1, 9 (9th Cir. 1974) (upholding application of county building code to allotted Indian land); Madrigal v. County of Riverside, Civil No. 70-1893-EC (C.D. Cal., filed Feb. 16, 1972), *dismissed for want of jurisdiction*, 495 F.2d 1, 12 (9th Cir. 1974) (applying county rock festival ordinance to reservation); Agua Caliente Band of Mission Indians' Tribal Council v. Palm Springs, 347 F. Supp. 42 (C.D. Cal. 1972) (imposing zoning ordinace upon Indians).

Another unsettled area for Public Law 280 states is the actual extent of jurisdiction over trust property. The question remains to be resolved as to whether such jurisdiction allows the state to exercise police power regulatory functions over not only the persons on the property and their activity, but also the property itself.

Those states not originally included under Public Law 280 and which have not chosen to exercise their option to be included by either constitutional or statutory amendment face even greater uncertainty as to how far they may legally go in regulating Indian activity.

35. 281 U.S. 647 (1930).

36. *Id.* at 651.

The Supreme Court made clear that only with respect to Indians as a special class of persons may state law apply differently on reservation land.[37] Civil law jurisdiction over non-Indians on Indian land can be exercised if the dispute does not involve Indians or Indian property. If it does, however, state jurisdiction is concurrent with federal jurisdiction, unless the enforcement of state law "infringes upon"[38] the Indian right to self-government.[39]

A Supreme Court decision involving Public Law 280 and the power of a state to tax reservation Indians provides useful analysis concerning state ability to regulate such Indians. In *Bryan v. Itasca County*,[40] the issue concerned whether or not Public Law 280 enabled states to impose property taxes on Indians.[41] *Bryan* dealt with a Minnesota Chippewa who fought a $147.95 county tax on his mobile home. In a unanimous ruling, the Court held that Public Law 280 does not give states power to tax reservation Indians; the Chippewa received a substantial victory for American Indians asserting tribal sovereignty against state interferences. The court stated:

> [N]othing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal

37. The extent of state jurisdiction over Indians on Indian lands is unclear. Although the relevant states would argue for authority, subject only to the "infringes upon" test (*see* note 38 *infra*), the federal position would afford no jurisdiction at all to non-Public Law 280 states. Interview with Donald R. Wharton, Esq., staff to the Federal, State and Tribal Jurisdiction Task Force of the American Indian Policy Review Commission, in Washington D.C. (May 27, 1976); *see also* Comment, *State Jurisdiction over Indian Land Use: An Interpretation of the Encumbrance Savings Clause of Public Law 280*, 9 LAND AND WATER L. REV. 421, 442-48 (1974).

38. Therefore, if a non-Indian violates state law while on the reservation, the state can assert jurisdiction. This jurisdiction, however, is not unlimited. In the criminal area, if the crime is against a non-Indian and only a violation of state law, state jurisdiction is concurrent with that of the federal government. If the crime is against an Indian or Indian property, then the federal government has exclusive jurisdiction. In certain instances, however, the state can exercise concurrent jurisdiction, if such exercise does not "infringe upon" the rights of the Indians to self-government. *See* Williams v. Lee, 358 U.S. 217 (1958), where the "infringed upon" test was established.

39. This issue is quite important with respect to state attempts to regulate the activities of non-Indian lessees on Indian land.

40. 426 U.S. 373 (1976).

41. In McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), the Supreme Court ruled that, in view of the way that tribes historically came under the jurisdiction of the federal government, states could not impose any tax that Congress had not consented to. *Id.* at 171. Thus, congressional enabling legislation was a prerequisite to state power to tax Indians on reservations.

> governments as did exist and a conversion of the affected tribes into little more than "private, voluntary organizations"—a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation of state and local governments.[42]

The Court found that the central purpose of Public Law 280 was to confer on the states criminal jurisdiction at a time when there were inadequate tribal institutions for law enforcement. It broadly decided that the provision giving states civil jurisdiction was designed primarily to provide a state forum for resolving private legal disputes involving Indians.

Thus, Minnesota's power to tax was not the only power at stake in *Bryan*; Minnesota pursued this case through the courts because it properly saw a threat to a range of state controls, including land use planning and health regulations.[43]

Other Federal Delegations

In addition to the specific congressional grants of authority over Indians and/or Indian lands and Public Law 280, the states have been given regulatory authority in certain public health areas and may gain other authority by specific grant of the Secretary of the Interior:

> 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 educational conditions and enforcing sanitation and quarantine regulations . . . .[44]

The Secretary has promulgated a somewhat complicated procedure for determining whether state law should be applied,[45] and as a result, few states have acted under this statute.

42. *Id.* at 388 (footnotes and citations omitted).

43. Another recent Supreme Court decision on the tax issue, Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976), held that reservation Indians are not subject to state sales or personal property tax, even though tribal members:

(a) are eligible to vote and do vote in city, county, and state elections;
(b) hold elective and appointed state and local offices;
(c) have state and local government services provided equally with non-Indians;
(d) attend schools on the reservation operated by the state; and
(e) use a system of state highways, county roads and streets on the reservation which were built and are maintained by the state.

44. 25 U.S.C. § 231 (1970) (emphasis added).

45. 57 Interior Dec. 162, 168 (1940).

The greatest potential for extending state regulatory authority may be a 1976 Department of the Interior regulation which provides:

> Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules, or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation by the United States.[46]

But section (b) provides:

> *The Secretary of the Interior* or his authorized representative *may* in specific cases or in specific geographic areas adopt or *make applicable* to Indian lands *all or any part of such laws*, ordinances, codes, resolutions, rules or other regulations *referred to in paragraph (a)* of this section *as he shall determine to be in the best interest of the Indian owner* or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules, or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.[47] (Emphasis added.)

Section (b) effectively makes state law generally applicable to Indians and Indian land; therefore, on its face, this regulation may be viewed as contrary to Public Law 280's grant of jurisdiction to the states. No cases have as yet tested this seeming conflict.

A final statutory authority is embodied in a recent amendment to the general Indian leasing statute. It provides that before the Secretary of the Interior approves any lease of Indian land, he must 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 height, quality, and safety of any structures or other facilities to be constructed on such lands; . . . and the effect on

46. 25 C.F.R. § 1.4(a) (1976).
47. 25 C.F.R. § 1.4(b) (1976).

the environment of the uses to which the leased lands will be subject.[48]

When considering what standards to apply for evaluating the impact of the lease, the Secretary could possibly apply state or local standards.

2. State Action

The Indian tribes have in general voluntarily complied with state police power regulation. Only when that regulation becomes burdensome do questions of jurisdiction arise. Increasing quantities of state legislation in the areas of zoning, land use planning, pollution control, and natural resource development invite confrontation over the undefined bounds of Indian and state authority over Indian lands.

Two major questions underlie a joint tribal and state jurisdiction over Indians and Indian lands: first, would state and tribal cooperation be more feasible where state law dominates, or where tribes are given greater powers of self-determination; and second, can tribes and states cooperate on matters of mutual concern, or does hatred and suspicion so permeate the relationship that cooperation is impossible. Examples of cooperation and conflict between states and tribes follow.

Cooperation

Colorado and Utah have attempted conciliation and cooperation with Indians in managing Indian reservation land.

Utah recently developed a constructive approach to deal with the conflicting demands for Indian water rights by reservation Indians and developers of land adjacent to reservations.[49] Indian use of the water for irrigation of reservation land would have been expensive and of limited utility, since the reservation land was not well suited to agriculture.[50] The water, however, could profitably be applied to municipal and industrial uses supporting the development of a major oil field and shale oil deposits.

The problem was resolved when the Indians, with the consent of the United States, signed a deferral agreement; the Indians prom-

48. 25 U.S.C. § 415(a).

49. *See* Clyde, *Special Considerations Involving Indian Rights*, 8 NAT. RESOURCES LAW. 250-52 (1975).

50. *Id.* at 250.

ised to forestall development of 15,242 acres of reservation land until the year 2005 in return for the State of Utah's agreement to build facilities to replace the deferred water.[51]

Colorado pursued a different approach. It established an agency to coordinate intergovernmental dealings between the state and the tribes within the state, to provide technical assistance to tribes and to review Indian affairs programs.[52]

Conflict

A prolific area of conflict between states and tribes concerns regulating real estate developments on reservation land. The conflict centers on a state's desire and power to tax and regulate development. Such desire and power clashes with the sovereign right of the Indians to profitably market reservation land free from state taxation or control.

In New Mexico, an example of the controversy centered around a lease by the Pueblo de Cochiti.[53] A developer entered into a 99-year lease with the Pueblo de Cochiti for the purpose of developing a resort community with a potential population of 50,000. The lease was signed in 1969 and in 1970 a charter for the Town of Cochiti Lake was approved by the Pueblo and appended to the lease. Late in 1970 the Attorney General of New Mexico filed suit against various Department of the Interior and Bureau of Indian Affairs officials seeking a declaration that they had acted without authority in approving the creation and existence of the Town of Cochiti Lake. The suit contended that the Indian actions were void, since the state had sole and exclusive authority to create a municipality within its borders.

In June 1971, the suit was settled by New Mexico, the developer and the town.[54] The stipulation agreement recognized New Mexico's jurisdiction over all construction undertaken under the lease, its civil and criminal jurisdiction over all activities of the developer

51. *Id.* at 251. The State of Utah expressed some concern over the impact of the project, the Bonneville Unit of the Central Utah Project, on fisheries. The state, however, is merely investigating the impact of non-Indian water consumption, and not attempting to interfere with Indian water use.

52. Colo. H.B. 1213 (1976).

53. *See* Comment, *Indians-State Jurisdiction over Real Estate Developments on Tribal Lands*, 2 NEW MEX. L. REV. 81 (1972).

54. *Id.* at 81-82.

and his non-Indian employees,[55] and its power to tax any interest held by the developer in Pueblo lands.[56]

III. ENVIRONMENTAL MANAGEMENT ISSUES

All states have programs directed toward the enhancement of environmental quality.[57] Some programs were enacted to enforce federal legislation.[58] For example, state air[59] and water[60] pollution programs regulate environmental quality according to federal permit requirements.

The states also administer a host of regulatory programs concerned with environmental and natural resource management which are based solely upon state law. These programs range from wildlife habitat management to land use regulation.[61] While most programs are administered at the state level, states occasionally delegate authority to local government.[62]

55. *Id.* at 82. The Town of Cochiti Lake agreed not to exercise any criminal jurisdiction over non-Indians without state consent.

56. It should be noted that neither the Pueblo nor the Department of the Interior were made a party to the stipulation. The resolution involved only the state itself. Since New Mexico has a constitutional disclaimer of state jurisdiction over Indian tribes, and has not acted pursuant to Public Law 280 to accept such jurisdiction, a question remains as to the force and effect of the stipulation. The stipulation, being formed by New Mexico, a party without jurisdiction to make such an agreement, may actually be only an unenforceable contract if it violates lease terms.

57. Since 1970 the President's Council on Environmental Quality has issued an annual report detailing the myriad activities by all levels of government directed toward enhancing environmental quality.

58. *See generally* Comment, *A History of Federal Air Pollution Control*, 30 OHIO ST. L. J. 516 (1969); THE CONSERVATION FOUNDATION, TOWARD CLEAN WATER: A GUIDE TO CITIZEN ACTION (1976).

59. Section 110 of the Clean Air Act Amendments of 1970 (42 U.S.C. §§ 1857-58a (1970), *as amended by* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 695, re-codifying the Clean Air Act to 42 U.S.C. §§ 7401-7626) requires states to submit State Implementation Plans (SIP) to the U.S. Environmental Protection Agency (EPA) for approval. The Act mandates that an SIP must contain emission limitations for sources, schedules and timetables for compliance with these limitations, and other measures necessary for the attainment of the standards, including land use and transportation controls.

60. Sections 106 and 303 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §§ 1251-1376 (Supp. V 1975)) detail the state role. The state must develop a "continuing planning process," which includes "adequate implementation, including schedules of compliance . . . ."

61. *See* A. REITZE, ENVIRONMENTAL PLANNING: LAW OF LAND AND RESOURCES (1974); N. ROSENBAUM, LAND USE AND THE LEGISLATURES: THE POLITICS OF STATE INNOVATIONS (1976).

62. *See* COUNCIL OF STATE GOVERNMENTS, INTEGRATION AND COORDINATION OF STATE ENVIRONMENTAL PROGRAMS (1975); COUNCIL OF STATE GOVERNMENTS, LAND: STATE ALTERNATIVES FOR PLANNING AND MANAGEMENT (1975).

The state environmental programs pose a serious question as to the extent to which a state or its local governments may impose their regulatory schemes upon Indians and Indian lands. The question remains unresolved even after careful examination of state statutes and case law, and federal treaties and statutes. A number of such state programs and the problems they present follow.

A. *Land Use Regulation*

States exercise their police power to regulate development of land use by mechanisms such as zoning, planning, subdivision regulations and building codes.[63] These mechanisms control development on Indian land subject to the mandates of Public Law 280; states and local governments may enforce land use legislation of general application on Indian reservations if such legislation does not act as an "encumbrance" within the meaning of Public Law 280.[64] The purpose and definition of "encumbrance" has been interpreted by conflicting case law.[65]

In 1967, the Washington Supreme Court found a county zoning ordinance an "encumbrance" and therefore unenforceable on Indian land. In *Snohomish County v. Seattle Disposal Co.*,[66] the Tulalip Tribe leased land to a disposal company for use as a sanitary landfill without applying for the required conditional use permit. The county sued the Tribe and the disposal company, arguing that the landfill activity could not be carried on without the permit;

63. States traditionally delegate land use regulatory authority to local governing bodies. Recently, a number of states have begun to regulate development at the state level, and/or require local governments to make use of their regulatory tools. At least thirteen states require their local governments to undergo comprehensive planning, at least ten require subdivision controls, and at least six require zoning. *See* N. ROSENBAUM, LAND USE AND THE LEGISLATURES: THE POLITICS OF STATE INNOVATION (1976); *see also* R. HEALY, LAND USE AND THE STATES (1976).

64. *See* notes 24-34 *supra* and accompanying text. The staff of the American Indian Policy Review Commission is of the opinion that in mandatory Public Law 280 states, only laws of general applicability, such as state legislation, would pertain to Indian land, and then only if such laws are not considered "encumbrances." A non-Public Law 280 state would lack jurisdiction to regulate development on Indian reservation land. As for local ordinances, which are not state laws of general application, the Review Commission believes that such ordinances have no force or effect on Indian land. Interview with Donald R. Wharton, Federal, State and Tribal Jurisdiction Task Force, American Indian Policy Review Commission, in Washington D.C. (May 27, 1976).

65. Until recently, the federal courts have been fairly silent on this issue; thus, state court decisions comprise most of the case law.

66. 70 Wash. 2d 668, 425 P.2d 22 (1967), *cert. denied*, 389 U.S. 1016 (1967).

the Tribe and the disposal company alleged such an ordinance was a prohibited "encumbrance" on the Indian land. The Court agreed with the Tribe, reasoning "that any burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee constitutes an encumbrance."[67] (Citations omitted).

Until recently California state law has generally taken a contrary view, holding state land use regulation not to be within the meaning of "encumbrance."[68] A California federal district court also upheld both a county's power to impose its building code on allotted Indian land,[69] and the applicability of a county rock festival ordinance to reservation lands.[70] To distinguish the contrary trend in Washington these cases cited the earlier federal case, *Rincon Band of Mission Indians v. County of San Diego*,[71] which stated:

> Whatever the term encumbrance denotes in Washington law, this court finds no warrant for expanding the definition of encumbrance as that term appears in Public Law 280 beyond its usual application indicating a burden on the land imposed by third persons which may impair alienability of the fee, such as a mortgage, lien, or easement.[72]

The *Rincon* court based its interpretation of "encumbrance" on the word's juxtaposition with "alienation" and "taxation" in Public Law 280,[73] suggesting that Congress intended those words to protect

67. *Id.* at 672, 425 P.2d at 25. In reaching this decision, the court also cited an opinion of the Acting Solicitor for the Interior Department which concluded that a state, by exercise of its police power, could not use zoning ordinances which would interfere with land held in trust by the United States for Indians. 58 Interior Dec. 52 (1942). The court also cited a similar opinion by the Attorney General of Washington, 59-60 OP. ATT'Y GEN. NO. 59 (1959).

68. People v. Rhoades, 12 Cal. App. 3d 720, 90 Cal. Rptr. 794 (1970) (California statute requiring firebreaks to be built around any building on forested land held not to create an encumbrance); Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371 (S.D. Cal. 1971), *aff'd*, 495 F.2d 1 (9th Cir. 1974), *cert. denied*, 419 U.S. 1008 (1974) (county gambling ordinance held not to create an encumbrance).

69. Ricci v. County of Riverside, Civil No. 71-1134-EC (C.D. Cal., filed Sept. 9, 1971), *appeal dismissed as moot*, 495 F.2d 1, 9 (9th Cir. 1974).

70. Madrigal v. County of Riverside, Civil No. 70-1893-EC (C.D. Cal., filed Feb. 16, 1972), *dismissed for want of jurisdiction*, 495 F.2d 1, 12 (9th Cir. 1974).

71. 324 F. Supp. 371 (S.D. Cal. 1971), *aff'd*, 495 F.2d 1 (9th Cir. 1974), *cert. denied*, 419 U.S. 1008 (1974).

72. *Id.* at 376. *Rincon*, although dealing with the applicability of a county gambling ordinance, examined Public Law 280 as it related to land use regulation.

73. *See* note 31 *supra* and accompanying text.

the Indian from himself as well as from swindlers rather than from state land regulatory laws.[74]

The Ninth Circuit Court of Appeals, however, changed California law in 1975. It held that Kings County, California had no jurisdiction to enforce its zoning ordinance or building code on mobile homes provided under the Bureau of Indian Affairs Housing Improvement Program on Indian reservation trust lands. *Santa Rosa Band of Indians v. Kings County*[75] overruled *Rincon*, finding "that P.L. 280 subjected Indian Country only to the civil laws of the state, and not to local regulation."[76] In examining the intent of Congress in passing Public Law 280, the Ninth Circuit stated:

> We think it more plausible that Congress had in mind a distribution of jurisdiction which would make the tribal government over the reservation more or less the equivalent of a county or local government in other areas within the state, empowered, subject to the paramount provisions of state law, to regulate matters of local concern within the area of its jurisdiction.[77]

The court supported its holding that local jurisdiction would not apply to Indian lands with the following reasons:

> [T]ribal use and development of tribal trust property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life. Extension of local jurisdiction to the reservation would burden that development by increasing its cost . . . . But more critically, subjecting the reservation to local jurisdiction would dilute if not altogether eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially

74. The court then went on to examine the exceptions to the jurisdiction of Public Law 280, which provided that nothing in the act "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." In comparing this section with the "alienation, encumbrance, or taxation" phrase, the *Rincon* court decided that "[i]f all state laws regulating land use were made inapplicable by the earlier language describing encumbrances, then this language would be totally unneeded." 324 F. Supp. at 376. A case going even further is Agua Caliente Band of Mission Indians' Tribal Council v. Palm Springs, 347 F. Supp. 42 (C.D. Cal. 1972), *vacated and remanded by* Ninth Circuit in an unpublished order, January 24, 1975. The court held that the Indian lands could be legally included within the city, and that application of the city zoning regulations did not constitute an unlawful interference with tribal sovereignty.

75. 532 F.2d 655 (9th Cir. 1975).

76. *Id.* at 661.

77. *Id.* at 662-63.

> hostile local non-Indian majorities. Local communities may not share the usually poorer Indian's priorities, or may in fact be in economic competition with the Indians and seek, under the guise of general regulations, to channel development elsewhere in the community. And even when local regulations are adopted in the best of faith, the differing economic situations of reservation Indians and the general citizenry may give the ordinance of equal application a vastly disproportionate impact.[78]

The *Santa Rosa* court recognized, however, that Indian reservation autonomy could result in conflict between Indians and non-Indians.

Another important recent California case is *United States v. Humboldt*.[79] Humboldt County, in northern California, attempted to enforce local ordinances and the state's Environmental Impact Report (EIR) requirement[80] on a four million dollar proposed development in the Hoopa Valley Indian Reservation. The County argued that it had jurisdiction under Public Law 280. The U.S. Justice Department contended that the projects were to be built on Indian land, and were therefore subject only to federal controls. The court held that Indian trust lands were not subject to local zoning and land use controls or the state EIR requirement, and enjoined the state and Humboldt County from imposing those controls on the twelve square mile reservation.

The decisions of the Supreme Court of New Mexico appear to be consistent with the current law in Washington and California. In *Sangre de Cristo Development Corp. v. Santa Fe*,[81] the city sought to impose its planning and subdivision controls over land leased by the Pueblo Indians to a private developer for 99 years. In holding that the alleged authority did not interfere with tribal self-government or with a right granted, reserved or preempted by Congress, the court stated:

> Since defendants seek to impose their claimed authority only over lands leased by the Pueblo for 99 years to plaintiff, and only for the purpose of controlling the platting, planning, and subdivision activities of plaintiff, we are unable to see how the exer-

78. *Id.* at 664.

79. United States v. Humboldt, Civil No. C-74-2526 RFP (N.D. Cal., filed Mar. 31, 1976).

80. California Envionmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21176 (West).

81. 84 N.M. 343, 503 P.2d 323 (1972). The court examined the disclaimer of right and title to Indian lands in the New Mexico State Constitution, and found that it was a disclaimer of proprietary interest and control, and not a disclaimer of government control. Therefore, the disclaimer did not prevent the exercise of regulatory powers.

> cise by defendants of this authority would interfere with the self-government of the Tesque Pueblo.[82]

The State of New Mexico Attorney General then filed suit in federal district court[83] against the U.S. Department of Interior and the Sangre de Cristo Development Corporation to establish state jurisdiction over the leased development.[84] He also sought to have the court declare invalid 25 C.F.R. § 1.4, which provides that no state law regulating or controlling zoning, use or development of property shall be applicable to leased Indian lands. The United States, on behalf of the Pueblo, argued that it had exclusive jurisdiction over the development absent specific Congressional consent to state jurisdiction.[85] The District Court held for the State, declaring 25 C.F.R. § 1.4 *ultra vires* and therefore invalid. The decision, however, rendered state regulations inapplicable only to non-Indian lessees.

In summary, as urbanization continues to have an impact on Indian reservations, the jurisdictional conflict among the various regulatory interests (the Department of the Interior, the tribes, and the states and their local governments) will be exacerbated.[86] As discussed, litigation has not settled this conflict; nor has litigation defined "encumbrance" for purposes of determining permissible limits of state Public Law 280 jurisdiction. The emerging trend appears to restrict state and local government regulatory authority over Indian trust lands.

B. *Water Rights*

The "Reservation Doctrine"[87] protects Indian rights to water on reservations. State issuance of water use permits, expansion of

82. *Id.* at 330.

83. Norvell v. Sangre de Cristo Development Co., 372 F. Supp. 348 (D. N.M. 1974), *rev'd as premature for lack of case or controversy*, 519 F.2d 370 (10th Cir. 1975).

84. The Attorney General maintained that the development was subject to the Construction Industries Licensing Act, Land Subdivision Act, Water Quality Act, various New Mexico acts regulating the dispensing of liquor, and the false advertising statute, as well as subject to the ad valorem property tax and gross receipts tax.

85. The United States based its argument on the Supreme Court decision, Williams v. Lee, 358 U.S. 217 (1959). The United States also argued that the exercise of state jurisdiction would infringe upon tribal sovereignty.

86. *See* GOLDBERG, PUBLIC LAW 280: THE LIMITS OF STATE JURISDICTION OVER RESERVATION INDIANS, 22 U.C.L.A. L. REV. 535 (1975); Note, *The Indian Stronghold and the Spread of Urban America*, 10 ARIZ. L. REV. 706 (1968).

87. The "reserved rights" or "reservation doctrine" was originally titled in

sewer and water service, and assurance to growing industries of water requirements are all subordinate to Indian rights to Indian water. Two leading cases, *Winters v. United States*[88] and *Arizona v. California*,[89] established "beyond dispute that water rights may attach to Indian Reservations upon the creation of reservations by lawful means (treaties, Acts of Congress, executive orders, etc.)"[90]

In *Winters*, pursuant to an 1888 treaty between the United States and the Gros Ventre and Assiniboine Indians in the territory of Montana, the Indians ceded to the United States their claims to a large tract of hunting land in exchange for the Fort Belknap Indian Reservation, a smaller portion of their aboriginal land. The center of the Milk River was designated as one of the boundaries of the Fort Belknap Reservation. The treaty included no specific mention of rights to the use of waters. In 1889, Montana was admitted to the Union as a state. Thereafter, Milk River waters upstream from Fort Belknap Reservation were diverted for irrigation of land acquired by private individuals. The United States filed suit in the federal district court of Montana seeking to enjoin the upstream uses to the extent that they interfered with water needs on the Reservation. The defendants, private land owners, contended that no water rights were reserved for the Reservation since the treaty was silent as to water rights. The defendants also argued that even if water rights were reserved by the 1888 treaty, this reservation was repealed by the admission of Montana into the union upon an equal footing with the original states.

The U.S. Supreme Court held that the 1888 treaty created an implied reservation of water rights, and that this was not repealed by the admission of Montana into the Union:

> The power of the government to reserve waters and exempt them from appropriation under state laws is not denied, and could not be. *The United States v. The Rio Grande Ditch and Irrigation Company*, 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371. That the government did reserve them we have decided, and for a use which would necessarily be con-

Arizona v. California, 373 U.S. 546 (1963), notes 96-99 *infra* and accompanying text. However, the theory underlying the doctrine was developed by the Supreme Court as early as 1908 in Winters v. United States, 207 U.S. 564 (1908), notes 91-92 *infra* and accompanying text.

88. 207 U.S. 564 (1908).

89. 373 U.S. 546 (1963).

90. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE (June 14, 1973) (footnotes omitted).

> tinued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant leaving them a barren waste—took from them the means of continuing their old habits, but did not leave them the power to change to new ones.[91]

With respect to the absence of any language within the treaty reserving water rights the court stated:

> By a rule of interpretation of agreements and treaties with the Indian, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to be determined between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.[92]

The Court in *Winters* left open the question of how much water the Indians may "reserve." The Supreme Court hinted, however, that the amount could be quite extensive,[93] and that beneficial use

91. 207 U.S. at 577 (1908).

92. *Id.* at 576-77. In so deciding, the Supreme Court adopted the Ninth Circuit's view below that the Indians were the owners of the water usage rights which they retained under the agreement of 1888; being the grantors in the agreement, the Indians retained all of their right, title and interest in the reservation which they did not convey to the United States. Thus, water rights were immune from interference by the State of Montana or the laws enacted by it pertaining to the non-Indian community (over which the State had jurisdiction). *Cf.* United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir. 1939), which dealt with Indian water rights on the Walker River Indian Reservation. The Reservation was established in 1874 pursuant to an executive order by President Grant. The court held that a treaty specifically reserving Indian water rights was not a requisite:

> In the *Winters* case, as in this case, the basic question for determination was one of intent—whether the waters of the stream were intended to be reserved for the use of the Indians or whether the lands only were reserved. We see no reason to believe that the intention to reserve need be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of the intent.

Id. at 336.

93. *Cf.* Cappaert v. United States, 426 U.S. 128 (1976), ruling that when the federal government acquires land, it also obtains, by implication, the water rights necessary to support use of the land. *Cappaert* dealt with the National Park Service's efforts to protect a rare fish (designated an endangered species) in Devil's Hole, Nevada. The fish were jeopardized by the pumping and lowering of ground water by the Cappaerts, who owned a nearby ranch. In holding for the United States, the Court reasoned that the implied reservation doctrine, applicable to both surface and ground water, included the amount of water necessary to achieve the purpose of federal reservation or purchase. Applying such reasoning to Indian reservations, *Cappaert* supports *Winters'* suggestion that when the United States establishes an Indian reservation, rather than purchases park land, it reserves waters sufficient to support the lifestyle of the Indians.

of the water should be made possible whether the lands were "kept for hunting, 'grazing roving herds of stock', or turned to agriculture and the arts of civilization."[94] Since the "arts of civilization" was left undefined, the amount of water potentially subject to reservation remains undefined and is arguably unrestricted.[95]

In *Arizona v. California*,[96] a case more than fifty years after *Winters*, the Supreme Court clarified the Reservation Doctrine. In *Arizona*, the State sued in the Supreme Court for equitable apportionment of the waters of the lower Colorado River. The Court decided, *inter alia*, that:

(a) Waters could be reserved for Indian reservations before and after statehood;[97]

94. 207 U.S. 564, 576 (1908).

95. In Conrad Investment Co. v. United States, 161 F. 829 (9th Cir. 1908), the court immediately confronted the *Winters* issue of the quantity of water subject to reservation. The case involved the Investment Company's diversion of the entire summer flow of the Birch Creek in Montana to non-reservation lands. The middle line of the creek formed the southern and eastern boundaries of the Blackfeet Indian Reservation. The court, following *Winters*, found the Indians of the Blackfeet Reservation to have "paramount right" to the use of the waters "of Birch Creek to the extent reasonably necessary for purposes of irrigation and stock raising, and domestic and *other useful purposes*." (emphasis added). *Id.* at 831. With reference to the amount of water needed, the court also relied upon *Winters*:

> What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water of Birch Creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the *Winters* case.

Id. at 832.

It is important to note the Court's concern for the future water needs of the Indians. *But see* United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir. 1939), note 105 *supra*, which permanently fixed the amount of water to which the Indians were entitled on the basis of the then present demand. Also of import is the *Conrad* court's failure to explain the meaning of "other useful purposes." (This is similar to the *Winters* decision which did not define "arts of civilization.") Subsequent cases have not attempted to define these terms. *See* United States v. Powers, 305 U.S. 527 (1939) and United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir. 1939).

96. 373 U.S. 546 (1963). The United States intervened and asked that its water rights in the lower Colorado River be adjudicated. Later, Nevada, Utah, and New Mexico became parties to this action. A special master, appointed by the Court, conducted a lengthy trial and filed a report containing his findings, conclusions and recommended decree. In an extensive opinion, the Court reaffirmed the *Winters* case stating "[w]e follow it [the *Winters* case] now and agree that the United States did reserve the water rights for Indians effective as of the time the Indian Reservations were created." *Id.* at 600.

97. *Id.* at 597-98.

(b) Waters could be reserved by implication whether the reservation was established by treaty or an executive order;[98]

(c) The amount of water reserved was the amount sufficient to satisfy the future as well as the present needs of the Indian reservation. (In this case, the measure of the ultimate future needs was defined as sufficient water to irrigate all of the practicably irrigable acreage on the Indian reservations in question.)[99]

The *Arizona* approach was affirmed by the National Water Commission in its 1973 report;[100] *Arizona* embodies today's general rule respecting Indian water rights.[101]

C. *Hunting and Fishing*

Dispute between Indian tribes and state governments over the regulation of hunting and fishing has been increasing. This is espe-

98. *Id.* at 598.

99. *Id.* at 600-01. The Supreme Court in *Arizona* also found that the doctrine of equitable apportionment did not apply to Indian Reservations, *id.* at 597; and that the "Reservation Doctrine" extended to navigable as well as non-navigable waters, *id.* at 597-98.

100. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE, at 477 (June 14, 1973). The Commission concluded the following:

(a) Indian water rights are different from federal reserved rights for such lands as national parks and national forests, the United States is not the owner of the Indian rights but is a trustee for the benefit of the Indians. While the United States may sell, lease, quitclaim, release, or otherwise convey its own federal reserved water rights, its powers and duties regarding Indian water rights are constrained by its fiduciary duty to the Indian tribes who are beneficiaries of the trust.

(b) The volume of water to which Indians have rights may be large, for it may be measured by irrigable acreage within a reservation (i.e., land which is practicably susceptible of being irrigated) and not by Indian population, present use, or projected future use. It may also be measured by other standards such as flows necessary to sustain a valuable species of fish relied upon by the tribe for sustenance.

(c) [N]either Indian tribes nor the United States as the trustee of their property, can enjoin the use of water by others outside the Reservation prior to the time the Indians themselves need the water.

101. Recent Supreme Court litigation indicates that state and federal courts have concurrent jurisdiction over adjudication of Indian water rights. *See* Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) and United States v. District Court (Eagle County), 401 U.S. 520 (1971). *See also* INTERSTATE CONFERENCE ON WATER PROBLEMS, FINAL REPORT OF THE INTERSTATE CONFERENCE ON WATER PROBLEMS SPECIAL TASK FORCE ON THE PROPOSED FEDERAL WATER RIGHTS LEGISLATION (1975) and NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE, at 477-78 (June 14, 1973).

cially true in the area of commercial fishing, where environmental problems have reduced the catch, and intensified the competition between Indians and non-Indians. The chief issue concerns the extent to which a state, within its police power, may impose hunting and fishing regulations on Indians.

Public Law 280 contains specific language exempting state control of Indian hunting and fishing from the regulatory powers over Indians and reservations delegated to Public Law 280 states.[102] Therefore, those states acting under Public Law 280 as well as non-Public Law 280 states[103] seem prohibited from regulating hunting and fishing on reservations. Case law, however, holds differently. In mandatory Public Law 280 states, regulation of hunting and fishing is impermissible[104] unless both reasonable and necessary,[105] notwithstanding statutory termination of the tribe's existence[106] or termination of the reservation status of the land.[107] However, Indians in mandatory Public Law 280 states are not immune from state regulation when they lack a treaty and when regulations are authorized under an administrative agency.[108]

The state most actively attempting to resolve this jurisdictional issue appears to be Washington, a non-Public Law 280 state, which exercises jurisdiction under state statute. In 1942, the U.S. Supreme Court held that Washington could regulate, under its police powers, hunting and fishing in order to insure the success of state programs to conserve fish, as long as the Indians were not discriminated against.[109] Twenty-six years later, the U.S. Supreme Court mentioned a state's power to regulate fishing by making ref-

102. *See* note 31 *supra* and accompanying text.

103. Non-Public Law 280 states do not have jurisdiction to regulate any Indian activities on reservations. *See* notes 27-34 *supra* and accompanying text.

104. Arnett v. Five Gill Nets, 48 Cal. App. 3d 454, 121 Cal. Rptr. 906 (1975), *cert. denied*, 423 U.S. 1030, *on remand from* Mattz v. Arnett, 412 U.S. 481 (1973).

105. *See* Kennedy v. Becker, 241 U.S. 556 (1916) and State v. Cloud, 179 Minn. 180, 228 N.W. 611 (1930). *See also* Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1969), where a regulation for fish conservation limited the Indians to taking only a fair and equitable share of fish.

106. *See* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968), where hunting and fishing rights granted by treaty survived the tribe's termination (via the Termination Act of 1954, 25 U.S.C. § 899 (1970)), and deprived Wisconsin of regulatory authority.

107. *See* Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971), *denial of motion to intervene aff'd*, 486 F.2d 888 (8th Cir. 1973), declining Minnesota authority to regulate hunting and fishing.

108. Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

109. Tulee v. Washington, 315 U.S. 681 (1945).

erence to the "reasonable and necessary" test.[110] Under the test, a state may regulate the manner of fishing, the size of the take, and the type of fishing, if the regulation is "reasonable and necessary" for the preservation of game. A state may not, however, impair Indians' rights to fish.

In an important 1975 case, *United States v. Washington*,[111] the Fifth Circuit clarified and applied the "reasonable and necessary" test. The specific question in *Washington* was the extent to which off-reservation Indian fishing rights, provided by treaty, might be regulated by the State of Washington.[112] The litigation began in 1970 when the United States on its own behalf and as trustee for several Washington Indian tribes, later joined by some of the name tribes on their own behalf and by additional tribes, filed a complaint against the State of Washington.[113] The plaintiffs sought a declaratory judgment and injunctive relief to enforce the Treaty of Medicine Creek.[114]

The trial court, finding for the plaintiffs in a 200-page opinion, held that

> Enforcement of state fishing laws and regulations against treaty Indians fishing at their usual and accustomed fishing places has been in part responsible for the prevention of the full exercise of Indian treaty fishing rights, loss of income to the Indians, inhibition of cultural practices, confiscation and damages to fishing equipment, and arrest and criminal prosecution of Indians.[115]

The court also found that the regulations of the Washington Department of Fisheries, as then framed and enforced, allowed all or

110. Puyallup v. Department of Game of Washington, 391 U.S. 392 (1968).

111. 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

112. For several decades preceding this suit, the controversy persisted between the enforcement of the tribes' treaty rights and the growing non-Indian commercial fishing fleet in the Puget Sound area. Frequently the non-Indian fishing enterprises would catch salmon or steelhead in areas of the Sound before the runs of fish could return to the tribes' "usual and accustomed grounds and stations," thus emasculating much of what the tribes had reserved by their treaty entitlement.

113. The Washington Department of Fisheries and the Washington Game Department, their respective directors, and the Washington Reef Net Owners Association subsequently intervened as additional defendants.

114. The Treaty (*ratified* March 3, 1855, 10 Stat. 1132) provided a section typical of those guaranteeing off-reservation fishing rights: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with* all citizens of the Territory . . . . (emphasis added). United States v. Washington, 384 F. Supp. 312, 350 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

115. 384 F. Supp. at 388.

a large portion of the harvestable fish from given runs to be taken by persons with no treaty rights before such runs could reach many of the tribes' "usual and accustomed fishing places" to which the treaties applied. Washington regulations of off-reservation Indian fishing were declared unlawful since they were unnecessary to preserve and maintain the resource, discriminatory against the tribes, and in derogation of the language and purposes of the Treaty provisions.[116]

The district court also decided that the State could continue to regulate the tribes' fishing at their off-reservation usual and accustomed grounds and stations for conservation purposes, but only if such regulations (a) did not discriminate against the tribes' rights reserved by treaty, (b) met appropriate standards of substantive and procedural due process and (c) were shown to be both "reasonable and necessary" to preserve and maintain the resource.[117]

An additional important aspect of the case was the court's provision for the self-regulation of off-reservation fishing by qualifying treaty Indians. The *Washington* court held that qualifying plaintiff tribes might exercise their governmental power to regulate their members' treaty right to fish *free from* the "reasonable and necessary" standard of state regulation;[118] qualifying tribes must have a

116. *Id.* at 403.

117. *Id.* at 402. The court supported its conclusions with a discussion of the nature and scope of treaty fishing rights:

> The right secured by the treaties to the Plaintiff tribes is a reserved right, which is linked to the marine and fresh water areas where the Indians fished during treaty times and which exists in part to provide a volume of fish which is sufficient to the fair needs of the tribes. The right is to be exercised in common with non-Indians who may take a share which is fair by comparison with the share taken by the tribes. Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.
>
> The right secured by the treaties to the plaintiff tribes is not limited as to species of fish, the origin of fish, the purpose or use, or the time or manner of taking except to the extent necessary to achieve preservation of the resource and to allow non-Indians an opportunity to fish in common with treaty right fishermen outside the reservation boundaries.

Id. at 401.

118. In response to requests by both the United States and the Department of Fisheries, the court set forth a formula for determining the allocation of fish between treaty tribes and non-Indian fishermen. The court, in its interpretation of the treaty language "in common with," (*see* note 114 *supra*) provided a formula which entitled tribes to the opportunity to catch up to one-half the run of fish that normally would pass by their off-reservation sites. In order to guarantee that the tribes would be granted the opportunity to take 50 percent, the court ordered the State of Washington to rescind many of its regulations dealing with off-reservation Indian fishing practices. 384 F. Supp. at 415-17.

well-organized self-government with a mechanism for enforcing adequate conservation measures.[119]

D. *Air and Water Quality*

The legislation which presently directs the management of air and water quality was initiated by the federal government rather than the states. Both the Clean Air Act[120] and the 1972 Federal Water Pollution Control Act amendments[121] set minimum quality standards; they also allow states discretion to develop and administer regulatory programs under Environmental Protection Agency (EPA) guidance. State programs may set standards higher than federal minimums, which an increasing number of states are now doing.

Many states with specific air and water quality problems have passed their own legislation to insure the success of their environmental quality goals. This legislation ranges from sedimentation

119. The Fifth Circuit affirmed this decision, 520 F.2d 676 (5th Cir. 1975), and remanded the case to the District Court to maintain jurisdiction while its order was being implemented, and to adjudicate any dispute arising over interpretation of the order. 520 F.2d at 693 (1975). To settle the law in the area, the Court of Appeals made a number of important conclusions. Among them were:

1. "The federal government may . . . preempt state control over fish and game by executing a valid treaty and legislating pursuant to it . . . . Furthermore, such a treaty may preempt state law even without implementing legislation . . . ." *Id.* at 684.
2. "In deciding whether . . . [Indian] treaties created federal rights immune from abridgment by state law . . . [the court] must read their terms against a 'backdrop' of Indian sovereignty, recalling that, when the treaties were signed, the United States regarded the tribes as nations, independent and sovereign." *Id.*
3. "The treaties [between the United States and the Indian nations] were 'not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted'." *Id.*
4. "The extent of . . . [the grant of rights from Indians to the United States in a treaty] will be construed as understood by the Indians at that time, taking into consideration the lack of literacy and legal sophistication, and the limited nature of the jargon in which negotiations were conducted." *Id.*
5. "Direct regulation of treaty Indian fishing in the interests of conservation is permitted only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction." *Id.* at 686.
6. Once a tribe is determined to be a party to a treaty, its rights under that treaty may be lost only by unequivocal action by Congress." *Id.* at 693.

120. 42 U.S.C. §§ 1857-58a (1970), *as amended by* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, recodifying the Clean Air Act to 42 U.S.C. §§ 7401-7626.

121. 33 U.S.C. §§ 1251-1376 (Supp. V 1975).

control laws to surface mining regulations and power plant siting programs.[122] The major issue concerning Indians is the extent to which these regulatory programs are applicable to Indian lands.[123]

Public Law 280's section dealing with exceptions to state jurisdiction, in pertinent part, reads: "Nothing in this section 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* . . . ."[124] (Emphasis added.) Under this language, it is possible that only the federal minimum standards would apply to Indian lands, rather than the stiffer state standards, as the latter may be held to be "inconsistent" with the regulations promulgated under the federal statutes. Conversely, the federal legislation delegating to qualifying states the power to administer air and water quality programs to meet national goals may include the delegation of authority to administer such programs on Indian land. If the stiffer state standards are deemed necessary to meet national goals, then, under Public Law 280, state legislation would not be considered "inconsistent" with the federal statutes. The contrary argument, however, is that Congress must

122. For a recent study of state environmental legislative activity, *see* AMERICAN INSTITUTE OF PLANNERS, SURVEY OF STATE LAND USE PLANNING ACTIVITY (1976).

123. States with jurisdiction pursuant to Public Law 280 appear to have authority to apply their air and water quality regulatory programs to Indian lands. Some states not acting under Public Law 280 seem to have regulatory authority over Indian lands. For example, the Attorney General of Arizona has interpreted the State's constitutional disclaimer of jurisdiction to apply only to Indian lands as property, and not to state sovereignty over those lands; thus Arizona could claim jurisdiction over air and water pollution by statute. [1957] OP. ATT'Y GEN. OF ARIZ. 96 (Op. No. 106); [1966] OP. ATT'Y GEN. OF ARIZ. 41 (Op. No. 19). Other non-Public Law 280 states, such as North Dakota, seemingly do not have environmental regulatory authority over Indian lands. The North Dakota air pollution control, water pollution control, solid waste management, pesticide control, strip-mine reclamation and water appropriation programs were primarily adopted pursuant to federal requirements and delegation, and are administered under the auspices of the Environmental Protection Agency. The EPA posits that any federal grant of jurisdiction over Indians to a state must contain an express authorization. As there are no provisions in any of the federal enabling statutes (e.g. Federal Water Pollution Control Act and the Clean Air Act) granting the states jurisdiction over Indian reservations, the state laws implementing federal environmental programs must be administered similarly to other state laws, subject to Indian jurisdiction. There has been no litigation on this subject.

It is the general position of the EPA that *its* regulations for air and water pollution control programs apply with full force and effect upon Indian tribes. The basis for this position is undoubtedly the federal government's supervisory powers over Indians by virtue of the Commerce Clause Federal Treaty powers, and the federal power to supervise and regulate federally owned land.

124. *See* note 31 *supra* and accompanying text.

explicitly, rather than implicitly, delegate such authority over Indian land. These issues remain to be judicially decided.[125]

Two recent Supreme Court opinions suggest, by analogy, that state air and water management programs, enacted and approved pursuant to federal legislation, will not apply to Indian activities on Indian land, absent express authorization by Congress. Neither the Federal Water Pollution Control Act nor the Clean Air Act grants states jurisdiction over federal installations. *Hancock v. Train*[126] dealt with federal installations discharging air pollutants; *EPA v. State Water Resources Control Board*[127] concerned federal installations discharging water pollutants. In both cases, the Supreme Court held that under Section 118 of the Clean Air Act[128] and Section 313 of the Federal Water Pollution Control Act,[129] federal installations need not obtain a permit from a federally approved state permit program.[130] The reasoning was that federal installations were subject to state regulation only when and to the extent of clear and unambiguous congressional authorization.[131] If Indian land can be analogized to a federal facility, since such land is reserved by federal treaty, then under *Hancock* and *State Water Resources*, Indian activities on Indian land need not comply with state regulations.

125. Assuming a state may accept jurisdiction under the Clean Air Act or Federal Water Pollution Control Act, there remains a question of the power of a state to regulate environmental quality on Indian land if the state regulatory program delegates administrative and enforcement functions to local government. Public Law 280 jurisdiction extends only to "those civil laws of such State or Territory that are of general application to private persons or private property." 28 U.S.C. § 1360(a) (1970). The Indians (and the U.S. Department of Justice, on their behalf) argue that only state statutes, not county or municipal ordinances, satisfy the requirement of "general application." *See* notes 46-47 *supra* and accompanying text. If, however, the local ordinances are approved by EPA as complying with the federal statute and regulations, there is a strong argument that they should pass the "general application" test and be effective delegations.

126. 426 U.S. 167 (1976).

127. 426 U.S. 200 (1976).

128. Section 118 of the Clean Air Act obligates federal facilities to comply with state "requirements respecting control and abatement of air pollution." 426 U.S. at 190.

129. Section 313 of the Federal Water Pollution Control Act Amendments of 1972 obligates federal installations to comply with state "requirements respecting control and abatement of pollution." 426 U.S. at 202.

130. *But see* the 1977 amendments to § 118 which negate the effect of *Hancock v. Train*, thereby rendering federal facilities subject to all state and local substantive and procedural requirements. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 116, 91 Stat. 685 (*amending* 42 U.S.C. § 1857f (Supp. V 1964)).

131. *Id.* at 227.

Those state acts passed on state initiative and for which no federal parent statute exists, such as sediment control, surface mining or power plant siting statutes, apply to Indian lands if both the "general application"[132] and the "encumbrance"[133] tests are met.

E. *Energy Development and Mineral Exploitation*

Energy problems became a matter of national urgency in 1973,[134] but shortages of energy existed long before then.[135] The 1973 embargo by the Organization of Petroleum Exporting Countries (OPEC) focused renewed attention on this nation's need to become more self-sufficient in energy production and on the critical importance of domestic resources to our economy.

Indian land contains rich domestic supplies of coal, oil and oil shale, natural gas and minerals. The federal and state governments must, therefore, negotiate with the tribes to obtain access to the land and to determine the terms under which extraction will be allowed.[136]

Many tribes, however, prefer to collect benefits from leases and at the same time protect their resources from abuse.[137] In *Choctaw*

132. *See* notes 46-47 *supra* and accompanying text.

133. *See* notes 31-34 *supra* and accompanying text.

134. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 1974 (1974), at 94.

135. Natural gas supplies to the northern and eastern United States had been interrupted with increasing frequency since the mid-1960s. Shortages of fuel oil in the winter of 1972-73 forced the closing of schools and public buildings in Denver and other areas remote from coastal refineries. *Id.* at 95. Independent gasoline stations and fuel oil companies were going out of business because of their inability to receive consistent supplies. OIL AND GAS JOURNAL, April 16, 1973, at 55.

136. Future negotiations will cover production guarantees, royalties, joint venturing, tribal taxation, tribal greenbelt zoning, prior approval rights, and reclamation protection. These negotiations will reflect the growing sophistication of Indian tribes resulting from their special status as energy resource owners.

137. Examples of this Indian organizing for environmental protection are beginning to appear. A coalition of 26 tribes, the Native American Natural Resources Development Federation and the 22-tribe Council of Energy Resource Tribes met in Denver in late 1975 to coordinate strategy for litigating their coal and water demands. In Montana both the Northern Cheyenne and the Crow tribes have filed suit to acquire control of waters flowing through their reservations. Since much of this water already has been sold by state and federal authorities for eventual use by energy companies, the outcome could have a serious effect on plans for electric power and coal gasification plants. An example from 1975 is the Navajos' postponement of El Paso Natural Gas Co.'s lease renewal for a coal gasification plant on Navajo land. Proposals for giant energy developments in Montana, North Dakota, Wyoming, Colorado, Utah, New Mexico and Arizona are especially vulnerable to Indian challenges because many of these developments would use water or coal on or

Nation v. Oklahoma,[138] the Supreme Court honored Indian property rights to oil, gas, and mineral producing land. The Choctaw were granted several million acres of Oklahoma land by an 1835 federal treaty. They sued the State of Oklahoma and various corporations, to which the State had leased oil, gas and mineral rights on Choctaw land, to prevent future interference with their property rights below the mean high-water level of the Arkansas River and also to recover royalties. The Court held the plaintiff-Indians to be owners of the riverbed and the value of their interest to be $177 million. Mr. Justice Douglas, in his concurrence, expressed the judicial attitude: "[O]nly the continuation of a regime of discrimination against these people, which long plagued the relations between the races, can now deny them this just claim."[139]

The possibility of large-scale energy development on Indian reservations, together with the shift of responsibility for decision making from the Interior Department to the tribes themselves, will affect United States energy policies and programs. Coordination of energy development and minimal environmental impact will be a joint responsibility between the states and tribes. Lines of communication between state and tribal governments must be improved; the energy area keenly illustrates that decisions of one government will vitally affect the other.

IV. Summary and Conclusions

A. The Legal Climate

Federal policies favor Indian governmental and economic independence. These policies have been formalized in the Indian Civil Rights Act (1968)[140] and Indian Self-Determination and Education Assistance Act (1975).[141] For several decades, the Congress and

near reservations, or would require long-distance, high-voltage transmission lines that would cross reservation lands. Lichtenstein, *A New Warpath . . . Indians Seek Rights in Courtroom*, The Courier Journal, December 26, 1975, at 1, col. 1.

138. 397 U.S. 620 (1970).

139. *Id.* at 643 (Douglas, J., concurring). Congress subsequently appropriated $440,000 for an appraisal of that part of the riverbed, and to the surprise of all involved, the value of the tribes' interest was set at $177 million. Included in that value was $99.5 million for the electrical generation value, $2.6 million for the land, $18 million for the sand and gravel, $13.5 million for the coal, $200,000 for the oil and gas, etc.

140. 25 U.S.C. §§ 1321-22 (1968).

141. 25 U.S.C. § 450 (Supp. V 1975).

federal agencies have been promoting greater tribal sovereignty with the objective of promoting Indian political and economic independence. This effort to encourage Indian self-government and economic self-sufficiency has reinforced Indian initiatives to win political and legal confirmation of their claims to property and resources in states across the Nation. This pursuit has led the Indians into innumerable confrontations with state and local governments.

Concurrently, state governments are in a precarious position in attempting to implement environmental management policies, including those mandated by federal law and regulation. Confusion concerning the applicability to Indians of land use, water and air quality, and other environmental controls, and contradictory state and federal court decisions are not helpful.[142] This confusion is compounded by uncertainty as to whether delegated state jurisdiction encompasses Indian property or only Indian people. Further complications are created by the conveyance of Indian property and development rights to non-Indian individuals and corporate interests whose subsequent operations are nonetheless within the boundaries of Indian jurisdiction.

Ownership, jurisdictional, management and political conflict have caused inevitable hostility between Indians and state governments. States have not fared well in the courts, and thus, have lost authority to apply state environmental policy and programs to Indian domains.

B. *State Options*

Court fights have soured state-Indian relations. In some instances, resort to the courts is a necessity for both state government and the Indians; only through definitive court judgments can fundamental jurisidictional issues be resolved. However, in many situations, negotiation is a legitimate alternative, and one that may offer a resolution of greater mutual benefit to the parties involved. The use of federal mediation is a device to facilitate agreement. Notwithstanding the political risks involved, negotiation would appear to offer states a better approach than litigation to establish amicable relations with Indian groups. Such a basis of communication is critical in facilitating reasonable state influence and possible

142. For example, state jurisdiction under Public Law 280 has been successfully challenged. Conversely, many non-Public Law 280 states have been permitted to administer environmental programs on Indian lands. These results are contrary to the intent of Public Law 280. *See* notes 27-34 *supra* and accompanying text.

intervention in questions affecting natural resource and environmental management in Indian territory.

To further develop a positive and mutually beneficial state-Indian relationship, states would be wise to accept and promote national policies favoring Indian self-determination and economic independence. State initiatives to provide aid and technical assistance are vital to the improvement of Indian capacity for self-government and economic independence. By acting to strengthen tribal organization and economies, states will be laying the groundwork for cooperative endeavors in environmental management.

It is important that state environmental laws and regulations explicitly recognize the separate status of Indians and Indian lands. If Indians, as state citizens, are given a voice in framing statutory language, it is more likely that they will favor extension of state environmental programs to Indian land.

State-local links in program administration have become increasingly important since the passage of the Intergovernmental Cooperation Act of 1968.[143] The Act gives states a new leadership role in state-local coordination and the potential for substantial control over federal programs previously administered on a federal-local basis.[144] In developing this role, the states have devised a variety of mechanisms to manage state-local relations including the creation of community affairs departments, the expansion of sub-state regional planning and development agencies, and the delegation of program planning and administration to local and regional levels. These mechanisms often have provided the opportunity for local intervention and participation in state policymaking. These mechanisms could also serve as a model for state-Indian intergovernmental communications.

In conclusion, states must consider alternatives to litigation with Indians. Recent history suggests that constant resort to the courts has engendered hostility and produced conflicting legal decisions. Moreover, judicial decision has substantially limited state power to regulate critical resources. The following proposals serve to establish a positive, productive base for state-Indian intergovernmental relations:

143. 40 U.S.C. §§ 531-35 (1970), 42 U.S.C. §§ 4201-44 (1970).

144. Although local governments are creatures of the state in a legal sense, they are often intensely independent. Local home rule predominates. Some local governments have bypassed the state in establishing direct and often very dependent relations with the federal government and its agencies.

(a) Recognize the doctrine of Indian self-determination;
(b) Assist Indians in building governmental capability;
(c) Provide grants and technical assistance to foster Indian economic self-sufficiency;
(d) Acknowledge special Indian status in environmental statutes and regulations;
(e) Assert mutual state-Indian interest in resource conservation and environmental quality, and develop binding agreements on resource and environmental management systems; and
(f) Establish state-Indian intergovernmental structures and mechanisms to facilitate communication, cooperation and coordination.