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Environmental Regulation of Oil and Gas Development on Tribal Lands: Who Has the Authority?

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Introduction by Richard Collins, CU Law Faculty

Reference: 7 Thompson on Real Property (1994 ed.)
ch. 57 Indian Land

Our subject is regulation of oil and gas development on Indian lands. Three basic rules form the background. First is the constitutional rule governing Indian country. It's straightforward --federal law governs. The Supreme Court derives all the governing rules from treaties or acts of Congress. If there is an act of Congress or a treaty spelling out an answer to the question, it controls. It has been extremely rare for an act of Congress governing Indian country to be held unconstitutional.

The second rule is that land owned by an Indian tribe is subject to a restraint on alienation imposed by federal law. The land can't be sold or leased or mortgaged except as federal law permits. This reverses the presumption of alienability that governs the common law of property. The rule gets confused because of references to the trust relationship between the tribes and the federal government. Trust law does play a role, but the form of title doesn't matter; the land is restrained anyway.

Some individual Indians own land subject to a federal restraint on alienation. These are called allotments, and there are many of them on the Southern Ute Reservation. Again, sale or lease of the land can only be done in accordance with federal law.

The third rule is the tribal sovereignty doctrine. In 1832, the Supreme Court, in defiance of President Jackson, held that Indian country is beyond the reach of state jurisdiction and that tribes retain their original sovereignty except when it has been restricted by federal law. That rule lay around mostly unexercised for a century or more. Tribes exercised sovereignty in Indian Territory, now Oklahoma, but that was not within a state. There was very little exercise on reservations within states until modern times.

With the revival of tribal sovereignty, the Supreme Court had to apply the sovereignty doctrine to modern conditions. The Court

first decided that internal tribal sovereignty, over members of the tribe, had survived. Thus states have no authority over Indians in Indian country unless federal law expressly allows it.

Then came the question that underlies much of present legal warfare in Indian country, that of tribal jurisdiction over non-Indians in competition with state authority. This issue reached the modern Supreme Court with virtually no precedents. Two simple answers were all and none, that is, tribes have full territorial authority over anyone in their boundaries, or tribes have no authority over anyone except their members. Justice Marshall took the former view, but no one else. Justice Rehnquist took the latter, and he is probably now joined by Justice Scalia and maybe Justice Thomas.

The Court adopted the Rehnquist view for jurisdiction to punish non-Indians for crimes. It held that tribes lack any such authority unless Congress grants it. But for civil jurisdiction, the Court's majority arrived at a middle ground that can be summarized by the word sometimes. Sometimes tribes have authority over non-Indians in their territory. And sometimes tribal authority is exclusive of state authority. And vice versa for state jurisdiction.

Issues about civil jurisdiction arrive in court in two contexts: disputes about the reach of tribal authority, and disputes about the reach of state authority. The Court answers both questions based on an interest test. Of course, if there is a governing act of Congress, it controls. Otherwise, the rule is based on the relative strength of interests of tribe, state, and feds. Cases involving Indians and tribal land are likely to be within tribal authority, and it is likely to be exclusive. At the other end, cases involving only non-Indians and non-Indian land are likely to be within state authority, and it is likely to be exclusive. Obviously, a great mass of cases lie between these poles, and cases on the margin present close questions that divide the Supreme Court.

In the particular context of environmental regulation of oil and gas development on tribal lands, there are several governing statutes and supporting regulations. There are also issues not clearly answered by any of them.

ENVIRONMENTAL REGULATION OF ENERGY RESOURCE DEVELOPMENT ON INDIAN RESERVATION LAND

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I. Introduction.

In determining the scope of tribal governmental authority to regulate conduct, one must determine the nature of the activity to be regulated, the parties to be regulated, the territory over which regulatory authority is to be exercised, and the relative interests of the federal government, the state and the tribe. Tribal civil regulatory jurisdiction generally requires review of tribal inherent sovereign power, as well as, delegations of power from the federal government to the tribe. Inherent sovereign power has been held to include the power of tribal governments to regulate the activities of tribal members in their dealings with the tribe or in activities in which the tribe has a governmental interest.[1] Further, such authority has been held to include the power to preclude or condition the entry of non-Indians onto tribal lands or other lands over which the tribe is recognized to maintain governmental control.[2] Inherent authority has been held to not include, however, the power to prosecute non-Indians in tribal courts for violations of tribal criminal law.[3]

The federal government, while maintaining a significant supervisory presence, has long recognized tribes as having a paramount interest in the leasing and development of tribal energy resources.[4] This interest is reflected in federal leasing statutes that require tribal governmental consent to the development of tribal lands.[5] In an historical sense, however, the federal leasing statutes were directed more toward the obvious proprietary interests of tribes in the revenues to be generated from tribal resources rather than to the exercise of governmental regulatory authority to control the environmental consequences of energy development occurring either on tribal land or on neighboring land. As the federal government's interest in national environmental regulation has risen to the

forefront, a recognition that tribes have a substantial governmental interest in activities that affect the environment in "Indian country"[6] has also emerged. Since 1986, Congress has delegated to tribes specific authority to participate as regulators with respect to aspects of major federal statutory environmental programs. The precise scope of tribal civil regulatory authority under such programs or under concepts of inherent sovereignty, particularly as that authority relates to state environmental regulatory authority, remains an area for fertile dialogue in the classroom, the courts, and the halls of Congress. In order to understand the positions of the various parties involved in that dialogue, one needs to review the fundamentals of Indian law and the development of federal environmental programs in conjunction with states and tribes.

I. Relationship of States and Tribes in Indian Country.

Tension between states, tribes and the federal government about regulatory authority in Indian country has existed since the formative years of the United States. The United States Constitution delegates to Congress the authority to regulate commerce "with the Indian Tribes."[7] That constitutional authority, coupled with federal recognition of the mutual obligations between tribes and the nation contained in treaties with tribes, resulted in the time-honored tenet that the federal government, rather than states, possesses plenary authority over Indian affairs.[8] Indian tribes were viewed as distinct political communities[9] with the status of "domestic dependent nations" existing under the protection of the federal government.[10] Under alternative theories of federal preemption and unauthorized infringement upon retained sovereignty, states were prevented from engaging in regulatory activity over Indians or their lands which unduly encroached upon the competing interests of the federal government or tribes.[11]

The exercise of preemptive federal authority over Indian affairs has in many instances been accompanied by a territorial component, Indian country, which for purposes of federal criminal jurisdiction includes, among other things, all lands within the exterior boundaries of a federally recognized Indian reservation.[12] The Indian country concept codified in the federal criminal code has also been utilized by courts as the area within which tribes generally possess freedom to conduct their own affairs and to exercise certain governmental powers to the exclusion of the state, so long as not inconsistent with

federal law or policy.[13] Application of these basic concepts to particular circumstances, however, is challenging, particularly when the activity at issue involves non-Indians. For example, in the case of Montana v. United States,[14] the Supreme Court considered whether the Crow Tribe could lawfully prohibit non-Indians from hunting or fishing on non-Indian fee owned property within its reservation. Finding that such exercise of tribal authority bore "no clear relationship to tribal self-government," the Court rejected the Crow Tribe's prohibition.[15] In so ruling, however, the Court set forth the following guideline for evaluating tribal civil regulatory jurisdiction over non-Indians:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[16]

More recently, in the case of Brendale v. Confederated Tribes & Bands of Yakima Indian Nation,[17] the Court rejected the position of the tribe and accepted the position of the county in holding that the county, rather than the tribe, had the power to regulate zoning on non-Indian fee owned property within the reservation. A plurality of the Court distinguished the circumstances from those in which the federal government had delegated such authority to tribes under environmental regulatory statutes.[18] In the absence of such delegations, the authority of tribes to regulate non-Indians on fee land may now require a determination that the activity poses a "demonstrably serious" threat to the political integrity, economic security, or health and welfare of the tribe.[19] Where the activity being undertaken occurs on tribal land within a reservation, however, the validity of tribal civil regulatory jurisdiction will be rejected only if such governmental action is inconsistent with the dependent status of tribes. Because tribes are recognized to possess the power to condition entry upon tribal land, it is difficult to imagine instances in which

the exercise of civil regulatory jurisdiction over tribal land would not be upheld in the absence of either federal preemption or the lack of a rational justification of the regulatory action. The concurrent exercise of state regulatory power is not automatically precluded because tribal regulatory authority over non-Indians is upheld.[20] If the exercise of state regulatory authority does not adversely impact the policies of the tribe or the federal government, it is possible that state regulatory power over non-Indians may also be valid.

III. Federal Environmental Regulatory Programs; Delegations to States and Tribes.

As first enacted, federal environmental laws generally required the Environmental Protection Agency to establish standards for limiting the continued discharge of pollutants, to create permits systems for enforcement of the standards, and to delegate to states so desiring the primary enforcement authority for such programs under standards no less rigorous than those established by the EPA. Even prior to statutory amendments addressing tribal jurisdiction, courts had upheld EPA decisions to withhold from state delegations the power to regulate activities on Indian reservations.[21] These decisions were premised on the assumption that states could not demonstrate jurisdictional authority to regulate all activities within reservation boundaries. Such decisions were also consistent with decisions in other contexts that precluded federal agencies from delegating to states the trust responsibility over tribal land resource development.[22]

Commencing in 1986, Congress amended several major environmental statutes to permit tribes to be treated as states for certain purposes under those enactments. Tribal delegation amendments authorized EPA to delegate primacy to tribes with respect to control of public water systems and underground injection under the Safe Drinking Water Act.[23] Amendments to the Comprehensive Environmental Response, Compensation, and Liability Act in 1986 also permitted tribes to participate in aspects of the Superfund program.[24] In 1987, Congress amended the Clean Water Act to allow tribal primacy under various programs, including development of water quality standards, issuing permits for nonpoint source discharge, and enforcement of tribal standards.[25] Amendments to the Clean Air Act in 1990 expanded upon previously existing provisions

permitting tribes to redesignate their reservations for air quality standard purposes and authorized tribal treatment as a state under various programs under that statute.[26]

Implementation of the tribal delegation amendments, particularly on reservations that have a checkerboard land ownership pattern, has not been without controversy.[27] One of the key guiding principles of EPA in making delegations regarding reservation lands has been assurance that delegee tribes possess regulatory jurisdiction over all lands within reservation boundaries. Indeed, Congress has conditioned program delegation in some instances upon an adequate demonstration by an applying tribe that it possesses the jurisdiction to carry out the regulatory functions sought.[28] In conducting this review, EPA has not considered the delegation amendments themselves as conferring additional tribal jurisdiction, but rather has looked to jurisdictional authority prior to the particular amendments as the relevant period for analysis. In this way, EPA has attempted to avoid a patchwork of conflicting state and tribal standards or enforcement mechanisms which would turn on land ownership patterns. For those familiar with the Southern Ute Indian Reservation, because of the three dimensional checkerboarding of ownerships, and because of specific legislative measures affecting jurisdiction, it is arguable that neither the State of Colorado nor the Southern Ute Indian Tribe will be able to demonstrate such jurisdiction over all persons on all lands within the boundaries of the reservation to the satisfaction of EPA.

IV. Public Law 98-290.

The Southern Ute Indian Reservation consists of approximately 700,000 acres in southwestern Colorado. Initially established in 1868, the reservation changed dramatically in size in response to vagaries in federal Indian policy. Between 1895 and 1899, reservation lands were allotted to individual Indians, and the balance of the reservation, "surplus lands," was then opened to trust administered cash entry under the homesteading laws. In response to questions about reservation boundary location, Congress, in 1984, enacted Public Law 98-290, which confirmed the exterior boundaries of the reservation. That legislation was a compromise supported by the Tribe, the State and local governments, in which the Tribe, while continuing to possess Indian country jurisdiction over Indians throughout the reservation, relinquished Indian country territorial jurisdiction

over non-Indians conducting activities on non-Indian land. This jurisdictional act preceded the tribal delegation amendments, which arguably restored jurisdictional authority reservation-wide for environmental programs. The existence of this legislation poses unique problems for EPA in determining whether or not to grant delegations to the Tribe under the environmental tribal delegation amendments. In the absence of complete jurisdiction by the tribe, however, it appears clear that delegations of primacy to the State would be improper because of the retained Indian country jurisdiction of the tribe over its own conduct and that of its members throughout the reservation.

V. Conclusion.

The absence of resolution of environmental jurisdictional issues within the reservation has created confusion, not only for the would-be regulators, but also for those individuals who must comply with environmental laws. The Air Quality Division for the State of Colorado has apparently issued demands for reports from operators of compression and processing facilities located on fee lands within the reservation that treat coalbed methane and natural gas derived from tribal lands. The Air Quality Division has also indicated its intent to inspect such facilities for compliance with State air quality standards established under EPA Clean Air Act delegations that do not include lands within the reservation. This circumstance demonstrates the difficulty for operators in determining to whom they should answer from a regulatory standpoint. Ultimately, either special legislative resolution or some cooperative agreement blessed by EPA that includes joint participation between the Tribe and the State may be necessary to break the perceived impasse in progress in delegations.

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ENDNOTES

1. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

2. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-145 (1982).

3. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

4. *Cf.* Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968).

5. *See* Indian Mineral Development Act of 1982, 25 U.S.C.S. §§ 2101-2108 (Law. Co-op 1983); Indian Mineral Leasing Act of 1938, 25 U.S.C.S. §§ 396a-f (Law. Co-op 1995).

6. "Indian country" is a term of art in relation to Indian law matters. For purposes of tribal civil jurisdiction, court have applied the same definition as that applicable to federal criminal jurisdiction contained in 18 U.S.C.S. § 1151 (Law. Co-op 1994). *See* Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. ____, 113 S. Ct. 1985 (1993).

7. U.S. CONST. art. I, § 8, cl. 3.

8. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, ch. 3 (1982 ed.).

9. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

10. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

11. *See* Williams v. Lee, 358 U.S. 217 (1959); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

12. 18 U.S.C.S. § 1151 (Law. Co-op 1994).

13. *See, e.g.*, Chickasaw Indian Nation v. Oklahoma Tax Comm'n, 63 U.S.L.W. 4594 (U.S. June 14, 1995); County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 112 S. Ct. 683 (1992); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989).

14. 450 U.S. 544 (1981).

15. *Id.* at 564.

16. *Id.* at 565.

17. 492 U.S. 408 (1989).

18. *Id.* at 428.

19. *Id.* at 431.

20. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

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

22. Assiniboine & Sioux Tribes v. Montana Bd. of Oil & Gas Conservation, 792 F.2d 782 (9th Cir. 1986).

23. 42 U.S.C.S. §§ 300f-300j-12 (Law. Co-op 1991 & Supp. 1995), *amended by* § 300j-11.

24. P.L. 99-499, 100 Stat. 1613 (Oct. 17, 1986).

25. 33 U.S.C.S. § 1377 (Law. Co-op Supp. 1995).

26. 42 U.S.C.S. § 7474 (Law. Co-op 1989 & Supp. 1995).

27. City of Albuquerque v. Browner, 865 F. Supp. 733 (D.N.M. 1993); Montana v. EPA, CV-95-56-M-CCL (D. Mont. May 4, 1995) (challenging EPA's approval of tribe's treatment as a state for purposes of developing water quality standards within Flathead Indian Reservation).

28. *See, e.g.*, 42 U.S.C.S. § 300j-11(b)(1) (1988).

Hot Topics in Natural Resources
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COLORADO OIL AND GAS COMMISSION JURISDICTION OVER ENVIRONMENTAL MATTERS ON INDIAN LANDS

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I. Introduction.

Over the last two decades, the Federal Government has become more and more committed to a policy of strengthening and supporting Indian sovereignty. Accordingly, jurisdiction over numerous matters affecting "Indian lands" has, slowly but surely, been placed by Congress with the Tribes. This transition has been particularly noticeable in the mineral resource development area. The Indian Mineral Development Act of 1982[1] was enacted with the express purpose of enabling the Tribes to exercise more control over the development of their mineral resources. Further, Congress continues to authorize certain agencies of the Federal Government to delegate to the Tribes specific enforcement and regulatory authority.[2]

As this trend of Indian self determination continues to expand, particularly in the environmental arena, there will be more and more occasion for jurisdictional conflict between individual States and the Tribes that reside within them.

II. Survey of Federal Indian Environmental Rights and Jurisdiction.

A. CERCLA.

The Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") authorizes the Tribes to be treated "substantially the same" as States for certain purposes.[3] The Tribes have a right to notification of release of hazardous substances, a right to be consulted with respect to formulation of remedial action, and a right to access to information concerning hazardous substances maintained by operators of facilities, among others. The Tribes do not have the right of initiation, development, and selection of remedial actions to be undertaken on the reservation; rights that are provided to individual States under CERCLA.

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[1] 25 U.S.C.A. § 2101

[2] See Clean Water Act, 33 U.S.C.A § 1377 (1988); Clean Air Act, 42 U.S.C.A § 7601 (1988); Safe Drinking Water Act, 42 U.S.C.A § 300h-l (1988).

[3] Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 1988.

B. Clean Water Act.

In recent years, Congress has increased the Tribes' control over water quality issues. Amendments to the Clean Water Act have authorized the Environmental Protection Agency to delegate to a qualifying tribe regulatory authority, comparable to that granted to the States, to grant NPDES discharge permits for dredging and filling under CWA § 404 and to set water quality standards under CWA § 303.[4]

C. Clean Air Act.

The 1990 amendments to the Clean Air Act gave a sweeping authorization to the EPA administrator to treat Tribes as States whenever Tribes are capable of carrying out air quality functions, including permitting "in a manner consistent with the terms and purposes of the Act."[5]

D. EPA Indian Policy.

Following Congress' various authorizations to delegate to Indian Tribes certain enforcement and regulatory authority, the EPA developed an "Indian Policy", the expressed purpose of which is to expand tribal involvement in EPA program implementation. The EPA Indian Policy requires that the EPA or Tribes, rather than the States, should implement federal environmental statutes on Indian lands, and that where authorized, the EPA will cooperate with and assist Tribes in developing and implementation tribal programs under Federal environmental statutes.

III. States Role in Environmental Matters on Indian Lands.

A. Indian Lands.

A key determinant in assessing a States ability to exercise jurisdiction over Indian lands in the environmental arena is how Indian lands is defined. If lands are not considered Indian lands then the State will have jurisdiction. Unfortunately, there is not a clear cut answer as to what constitutes Indian lands and what does not. There is general agreement that land within a formally established reservation, in which the Tribe owns the surface and the mineral rights, is clearly Indian lands. However, there are other fact situations in

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[4] 33 U.S.C.A § 1377 (1988); See 58 Fed. Reg. 67966-67985 (Dec. 22, 1993), adopting final rule implementing CWA tribal program regulations.

[5] 42 U.S.C.A § 7601 (D)(2)(1988 and Supp.II 1990).

which the characterization of the land as Indian land may be disputed. For example, what if the Tribe owns the surface and a non-Indian owns the minerals, or vice versa? Further, what about land that was originally non-Indian fee land that has since been acquired by the Tribe? Does the answer change if the lands are inside or outside a delineated reservation? What about "checkerboard" pattern land ownership characteristic of the Southern Ute Reservation?

The United States Supreme Court discussed the "checkerboard" situation in the context of Tribal zoning authority in Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989). In Brendale, the Court, relying on their holding in Montana v. United States 450 U.S. 544 (1981)[6] determined that any regulatory power the Tribe might have under their applicable treaty "cannot apply to lands [within reservation boundaries] held in fee by non-Indians." In so holding the Court also acknowledged that although the Allotment Act had been repudiated in the Indian Reorganization Act , 48 Stat. 984, it did not restore to the Indians the exclusive use of and control over those lands that had already passed to non-Indians or prevent already allocated lands for which fee patents were subsequently issued from thereafter passing to non-Indians.

B. State Authority on Indian Lands.

Generally speaking, State power over activities on Indian lands is very limited. States may exercise power conferred by express federal delegation or when, under a balancing analysis, State regulatory interests are strong and federal or tribal interest are comparatively weak.[7] This balancing test results in a highly subjective analysis and determining what constitutes a sufficiently strong state interest is an uncertain and often frustrating task. The State of Colorado has delegated to the Colorado Oil and Gas Conservation Commission ("COGCC"), regulation of oil and gas operations, including regulation of certain drilling, permitting, and spacing issues.[8] The applicable statute does not expressly state an intention to include Indian lands within the jurisdiction of the

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[6] In analyzing the effect of the Indian General Allotment Act, on a Tribes's treaty rights to regulate activities of non-members on fee land, the Montana Court concluded that "[i]t defies common sense to suppose Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribe government."

[7] See Slade and Stern, *Environmental Regulations on Indian Lands: A Question of Jurisdiction*, The Compleat Lawyer, Fall 1995, for a more detailed discussion of state and federal environmental regulatory authority on Indian lands.

[8] C.R.S. 34-60-106 (1995).

COGCC[9], and, to date, the COGCC has not tried to directly assert such jurisdiction. It is conceivable, however, that the interests set forth in the State Legislative Declaration for the COGCC might be considered sufficiently strong to warrant an assertion of jurisdiction in a particular circumstance.[10]

Certain Memorandum of Understanding exist between the Colorado Bureau of Land Management and the COGCC, and between certain Tribes and the BLM. These MOUs purport to give the COGCC authority to conduct hearings, review certain matters, and make decisions affecting Indian lands. However, the authority granted to the COGCC is not only limited by the language of the MOU itself, but also by constraints on the delegative authority of the federal government. In reviewing the justiciability of a case concerning a Tribe's claim that a certain cooperative agreement (very similar to the MOUs referenced above) constituted an impermissible delegation of authority by the BLM, the United States Court of Appeals for the Ninth Circuit noted that "if the Tribes could prove that the Cooperative Agreement has resulted in BLM approval of State Board orders without meaningful independent review, then its procedures would constitute an unlawful delegation of authority."[11]

IV. Conclusion.

To date, the COGCC and the Tribes have chosen to work cooperatively in regulating oil and gas activities and, as a result, jurisdictional controversies have been kept to a minimum. If such controversies do arise, however, two primary interrelated questions would need to be answered: "Are the lands affected 'Indian land'?" and "What are the respective regulatory interests of the State and the Tribe?"

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[9] C.R.S. 34-60-105 (1) states, in relevant part, that "[t]he commission has jurisdiction over all persons and property, public and private, necessary to enforce the provisions of this article", but whether Indian lands and Tribes are to be included in "public and private" is left open.

[10] C.R.S. 34-60-102 (1) provides in part that "[i]t is declared to be in the public interest to foster, encourage, and promote the development, production and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with the protection of public health, safety, and welfare; to protect the public and private interests against the evils of waste in the production and utilization of oil and gas by prohibiting waste; to safeguard, protect and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas to the end that each such owner and producer may obtain a just and equitable share therefrom."

[11] Assinibione Tribe v. Board of Oil and Gas Conservation of Montana, 792 F.2d 782 (1986).