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Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal Jurisdiction

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NATURAL RESOURCES DEVELOPMENT ON INDIAN RESERVATIONS: OVERVIEW OF TRIBAL, STATE, AND FEDERAL JURISDICTION

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I. Introduction

Making natural resources development work on Indian reservations requires understanding the complex jurisdictional framework applicable to Indians and non-Indians within Indian Country. Structuring successful arrangements is possible only with a complete knowledge of the jurisdictional framework within which they will operate. In particular, questions concerning jurisdiction to tax, and authority to regulate activities such as mineral extraction, production of timber and other renewable resources, hunting and fishing, zoning, and the environment will determine the viability of natural resources development for tribal entities.

As the title of this article indicates, regulation of natural resources development on Indian lands involves three players: Indian tribal governments, the states, and the federal government. The division of jurisdiction among these players has been forming since the early nineteenth century.[1] The pace of legal development, however, has increased considerably in modern times, since tribes have begun to develop reservation lands and natural resources, to exercise regulatory jurisdiction over the land's progeny, and to challenge exercise of jurisdiction by others. The outlines of tribal, state, and federal jurisdiction continue to be delineated and refined as cases come before the courts today.

This article discusses the historical development of jurisdictional analysis in Indian law, and provides a brief overview of jurisdiction in specific regulatory areas. It concentrates, in particular, on several recent cases in which the United States Supreme Court has decided questions concerning jurisdiction to tax and to zone.[2] Unfortunately, the Court's recent heavy reliance on demographic and other factors in resolution of jurisdictional issues leaves tribal, state, and federal au-

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1. The Marshall trilogy first delineated the jurisdictional outlines, which have evolved to the current time. *See infra* notes 4-6.

2. *See, e.g.*, Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

thorities, as well as non-Indian commercial entities, with less than full guidance concerning jurisdiction for purposes of structuring natural resources deals on reservation lands.

II. Historical Development of Jurisdictional Analysis: The Erosion of Tribal Sovereignty

A. Historical Origins of the Jurisdictional Framework

The origins of the trilateral division of authority in Indian Country are found in the Constitution[3] and in the jurisdictional outlines first articulated by Chief Justice Marshall in *Johnson v. McIntosh*,[4] *Cherokee Nation v. Georgia*,[5] and *Worcester v. Georgia*.[6] Drawing on the Indian Commerce Clause[7] and federal treaty-making authority,[8] doctrines of discovery and conquest,[9] and the doctrine of tribal sovereignty, Marshall constructed a set of relationships among tribes, the federal government, and the states. In doing so, Marshall emphasized the unique nature of these relationships: "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . . [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else."[10]

Marshall's model basically involved largely autonomous tribal governments subject to an overriding federal authority but essentially free of state control.[11] The three central components of the model are described below.

1. Federal Jurisdiction

The federal government has broad constitutional power over Indian tribes. This power, often described as "plenary,"[12] authorizes Congress

3. *See infra* notes 7-8.

4. 21 U.S. (8 Wheat.) 543 (1823).

5. 30 U.S. (5 Pet.) 1 (1831).

6. 31 U.S. (6 Pet.) 515 (1832).

7. U.S. CONST. art. I, § 8, cl. 3, authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

8. U.S. CONST. art. I, § 2, cl. 2, grants exclusive authority to the executive to enter into treaties.

9. *McIntosh* 21 U.S. (8 Wheat.) at 574 (holding that discovery gave the European colonial powers fee simple ownership of the domain they discovered, subject to the Indians' right of occupancy.).

10. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 14 (1831).

11. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 24 (1987).

12. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 207 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

to determine the balance of jurisdiction in Indian Country,[13] i.e., to decide what powers tribes, states, and the federal government may exercise. This broad federal power, however, is not unlimited. Concluding that the relationship of tribes to the United States resembled that of a "ward to his guardian,"[14] Marshall held that the federal government had assumed the role of protector of the Indian tribes.[15]

Congress and the Executive Branch are subject to two types of limitations in their dealings with Indian tribes. The first are constitutional limitations. For example, the Fifth Amendment to the Constitution constrains Congress and the Executive Branch in decisions concerning recognized Indian property rights.[16] Actions by the Executive and Congress have also been held subject to judicial review based on principles of constitutional and administrative law, under a standard which requires that the legislation or action under attack be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[17]

The second set of limitations are those inherent in the federal government's special trust relationship with Indian tribes. These limitations translate into several concrete requirements. Although Congress can abrogate Indian treaties, the courts have developed rules of interpretation which require that to do so Congress must exhibit a "clear and plain" expression of intent. As the Supreme Court held in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*,[18] "[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . ."[19] Likewise, the courts have applied unique doctrines of construction to other congressional and executive action, including statutes and executive orders affecting Indian tribes. Basically, federal actions have been construed liberally where the establishment of Indian rights is at issue, and narrowly where the question concerns limitations on those rights.

13. The term "Indian Country" has been defined by Congress for purposes of federal criminal law in 18 U.S.C. § 1151 (1988). That definition is generally also used in civil contexts. *See* DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). The term will be used in this paper consistent with this definition.

14. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

15. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555 (1832).

16. U.S. CONST. amend. V. This amendment, which prohibits the taking of private property for public use without just compensation, has been held to pertain to Indian property rights "recognized" by Congress, such as by treaty or statute. United States v. Sioux Nation, 448 U.S. 371 (1980); Shoshone Tribe v. United States, 299 U.S. 476 (1937).

17. COHEN, *supra* note 12, at 217-18.

18. 443 U.S. 658 (1979).

19. *Id.* at 690.

2. *Tribal Jurisdiction*

Indian tribes are sovereign governmental entities. Tribal governmental authority derives not from federal delegation, but from the tribes' original sovereignty.[20] Chief Justice Marshall held that discovery and incorporation into the United States had placed inherent limitations on the external sovereign powers of the tribes, such as the power to make treaties and establish political relationships with foreign nations.[21] In Marshall's view, however, Indian tribes had originally been treated as sovereigns and had not lost that basic sovereign authority by virtue of their relationship with the federal government. Tribal authority thus could be lost only through federal action or voluntary surrender.[22]

In matters of internal self-government Marshall viewed tribal authority as exclusive, absent limitation by treaty or statute.[23] That authority has come to include, *inter alia*, the power to determine the form of tribal government, determine membership, legislate, administer justice, and exclude persons from the reservation.

3. *State Jurisdiction*

States, of course, normally have plenary power over their territory, subject to federal constitutional authority. Marshall's construction, however, carved out an exception to this rule. In *Worcester v. Georgia*,[24] Marshall held that state law generally did not apply to Indian affairs within Indian territory, absent federal law so providing.[25] This view had two bases: first, that the Constitution delegated authority over Indian affairs to the federal government rather than to the states; and second, that the Cherokee treaties reserved governing authority within Cherokee territory to the tribe free of state interference.[26] While the Supreme Court has adhered to the constitutional principle, the tribal insulation from the states contemplated by Marshall has been eroded over time.

B. Refinements to Marshall's Original Construct

Marshall's model involved largely autonomous tribal governments subject to "plenary" federal authority but essentially free of state control. As Charles Wilkinson notes in his book, *American Indians,*

20. COHEN, *supra* note 12, at 232.

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

22. *Cherokee Nation*, 30 U.S. (5 Pet.) at 47-48.

23. *Id.* at 27, 54-55.

24. 31 U.S. (6 Pet.) 515 (1832).

25. *Id.* at 562-63. *Worcester* denied state jurisdiction over non-Indian missionaries on the Cherokee reservation in violation of Georgia law.

26. *Id.* at 538-39.

Time and the Law,[27] courts thereafter began to grapple with the real meaning and import of Marshall's model.[28] Some courts continued to treat tribes as strong sovereigns free of federal constraints absent express legislative limitations.[29] Other courts viewed tribes as subject to apparently unlimited federal power. For instance, in *Lone Wolf v. Hitchcock*,[30] the Supreme Court held that Congress had the unilateral power to abrogate Indian treaties and to transmute Indian property rights into individual allotments.[31] This line of cases treated tribes as lost societies without the ability to exercise governmental powers, which needed federal or state intervention to fill the void.

As courts grappled with these issues in the late nineteenth century, other social and demographic pressures began to affect the calculus. Before mid-century, almost all Indian land had been held communally. However, the push for assimilation of Indians into mainstream American life, in concert with the theory that assimilation would occur most effectively if Indians became farmers, led Congress to pass the General Allotment Act in 1887.[32] That Act authorized the President to allow to individual Indians up to eighty acres of agricultural or 160 acres of grazing land, to be used for those purposes.[33] At the same time, pressures for non-Indian settlement on Indian lands led Congress and the Executive Branch to try to find ways to open those lands to non-Indians. That effort led to enactment of numerous statutes and agreements opening reservations to non-Indians or terminating portions of reservations in favor of non-Indian settlement.[34] The legal effect of these agreements and statutes has been the subject of considerable litigation.[35]

27. WILKINSON, *supra* note 11.

28. *Id.* at 24.

29. As noted by Wilkinson, this line of cases is represented by *Ex parte* Crow Dog, 109 U.S. 556 (1883) (murder involving only Indians not punishable in federal courts because Congress had not expressly provided for federal jurisdiction; later superseded by the Major Crimes Act, 18 U.S.C. § 1153 (1988)), and Talton v. Mayes, 163 U.S. 376 (1896) (Indian tribes not limited by the Constitution's grand jury requirement or by the Fifth or Fourteenth Amendments because tribal powers pre-existed the Constitution).

30. 187 U.S. 553 (1903).

31. *Id.* at 566; *see also* McBratney v. United States, 104 U.S. 621 (1881) (upholding state jurisdiction over a murder involving non-Indians on Indian land in the absence of federal law explicitly providing for such jurisdiction).

32. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.).

33. 25 U.S.C. § 331 (1988).

34. *See, e.g.*, Act of May 29, 1908, ch. 218, 35 Stat. 460 (Cheyenne River Sioux Reservation); Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1035 (Lake Traverse Reservation).

35. *See, e.g.*, Solem v. Bartlett, 465 U.S. 463 (1984) (Cheyenne River Sioux Reservation held not diminished by act providing for the sale and disposition of certain

Allotment and opening of Indian lands created checkerboard patterns of Indian and non-Indian settlement on Indian reservations. Increased non-Indian settlement on or near reservations also meant that Indian lands began to emerge from the remote backwaters of the United States. As we now know, these effects represented only the beginning. Today all Indian reservations are within state boundaries. Many abut, or are even within, large cities or metropolitan areas, such as Phoenix, Tucson, Seattle, Miami, and Reno. These factors have created jurisdictional questions and pressures which, in many cases, are only now being considered by the courts.

C. *Erosion of Tribal Authority in the Modern Era*

As states began increasingly to assert jurisdictional authority over activities within Indian reservations, courts were faced with more refined jurisdictional questions. In the modern era, severe demographic, social, and other pressures have led to erosion of tribal authority.

1. *The Williams Test*

The 1959 *Williams v. Lee*[36] case is generally considered to mark the beginning of the modern era of judicial treatment of jurisdictional issues. *Williams* held that Arizona state courts lacked jurisdiction over a civil action brought by a non-Indian merchant against a Navajo Indian and his wife to collect for goods sold them on credit within the reservation.[37] In making its decision the Court articulated the test, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of the reservation Indians to make their own laws and be ruled by them."[38] Based on several factors,[39] the Supreme Court found that to allow exercise of

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lands); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) (reservation boundaries were diminished by three acts providing for cession of lands to Government); DeCoteau v. District County Court, 420 U.S. 425 (1975) (Lake Traverse Reservation held terminated by agreement "ceding" all claim, right, title, and interest in all unallotted lands); Mattz v. Arnett, 412 U.S. 481 (1973) (holding that Klamath River Reservation not terminated by 1892 act which allotted some lands to Indians and opened others to non-Indians); Seymour v. Superintendent, 368 U.S. 351 (1962) (holding that land "opened" to non-Indian ownership in 1906 remained Indian Country in spite of being owned by a non-Indian and being within township limits).

36. 358 U.S. 217 (1959).

37. *Id.* at 220.

38. *Id.*

39. Congress' consistent assumption that states lack authority to regulate the affairs of Indians on reservations unless expressly granted that power, the congressional policy promoting Indian self-government, the language of the Navajo treaty which implied that the internal affairs of the tribe remained within the jurisdiction of the tribal government, and the existence and strengthening of the Navajo tribal government and courts.

state jurisdiction over this civil action against an Indian would "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[40]

2. *Erosion of the Williams Test*

Although *Williams* departed from Marshall's notion of absolute tribal insulation from state authority, its holding was based on theoretical underpinnings similar to those used by Marshall, i.e., that tribes maintain inherent sovereign authority absent diminishment by Congress. However, these theoretical underpinnings, as well as the *Williams* test itself, have been limited in the modern era, primarily as they relate to tribal exercise of jurisdiction over non-Indians.[41]

a) Implied Divestiture of Authority Inconsistent with Tribal Status

First, and perhaps most serious, has been the theory propounded by some courts that tribes lack jurisdiction over non-Indians or nonmember Indians in some circumstances because exercise of such jurisdiction would be "inconsistent with their status."[42] This thesis was invented by Justice Rehnquist in *Oliphant v. Suquamish Indian Tribe*,[43] which held that the Suquamish Tribe lacked criminal jurisdiction over a non-Indian living on its reservation.[44] Although it was extended to criminal jurisdiction over nonmember Indians in the *Duro* decision, Congress has subsequently recognized the inherent criminal jurisdiction of tribes over nonmember Indians on the reservation.[45]

The effects of *Oliphant* and *Duro* are twofold. First, and most obvious, Indian tribes lack jurisdiction criminally to prosecute non-

40. *Id.* at 223.

41. *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); *see also* Duro v. Reina, 495 U.S. 676 (1990) (criminal jurisdiction over nonmember Indians).

42. *See, e.g.*, *Duro*, 495 U.S. at 676 (criminal jurisdiction over nonmember Indians); *Montana*, 450 U.S. at 544 (civil jurisdiction over non-Indian activity on non-Indian owned fee lands); *Oliphant*, 435 U.S. at 191 (criminal jurisdiction over non-Indians).

43. 435 U.S. 191 (1978).

44. *Id.* at 212.

45. *Duro*, 495 U.S. at 676. A number of courts have also used the term "nonmembers" rather than "non-Indians" in civil cases. Because the cases did not involve nonmembers, however, use of the more inclusive term had no legal effect. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980); United States v. Wheeler, 435 U.S. 313 (1978). Congress overrode the *Duro* decision originally for one year. Department of Defense Appropriation Act, 1991, Pub. L. No. 101-511, § 8077, 104 Stat. 1892 (amending 25 U.S.C. § 1301)). Congress later overrode *Duro* permanently. Act of Oct. 28, 1991, Pub. L. No. 102-137, § 1, 105 Stat. 646, 646.

Indians on their reservations, and maintain such jurisdiction over nonmember Indians only by virtue of congressional action. Second, and less obvious, those cases broke from the traditional division of powers over Indian affairs. In initiating the notion of implied divestiture of authority inconsistent with tribal status, the Court encroached on the power to determine the outlines of tribal jurisdiction historically reserved to Congress.[46]

The *Montana v. United States*[47] decision expanded the *Oliphant* analysis into the area of tribal civil regulatory authority. Holding the Crow Tribe implicitly divested of authority to regulate non-Indian hunting and fishing on reservation lands owned in fee by non-Indians,[48] the Supreme Court relied on the following formulation:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.[49]

Therefore, at least with regard to activities on non-Indian lands within the reservation,[50] the Court seemed to view the outlines of tribal self-government as limited to relations among members of a tribe; it also viewed relations with non-Indians as an aspect of "external"

46. *See* Robert Laurence, Governmental Power in and Around Indian Country 3-6 (1989) (unpublished paper prepared for presentation to the Institute for Mineral Development on Indian Lands, co-sponsored by the Rocky Mountain Mineral Law Foundation and the American Bar Association Committee on Native American Natural Resources Law). Congress, however, reasserted its authority by recognizing inherent tribal powers in the areas denied by *Duro*. 104 Stat. at 1892; 105 Stat. at 646.

47. 450 U.S. 544 (1981).

48. The Court rendered this holding notwithstanding the fact that non-Indian owned fee lands within the boundaries of Indian reservations fall within the definition of "Indian Country" for purposes of jurisdiction. *See infra* notes 95-100 and accompanying text.

49. Montana v. United States, 450 U.S. 544, 564 (1981) (quoting United States v. Wheeler, 435 U.S. 313, 326 (1978) (emphasis supplied)).

50. The Court had no trouble holding that the tribe could exercise regulatory authority over non-Indians hunting and fishing on land belonging to the tribe or held by the United States in trust for the tribe within the reservation. *Id.* at 566.

sovereignty lost by virtue of the tribes' dependent status.[51] This view is certainly a far cry from Marshall's model in which the "external sovereignty" lost by tribes involved the power to establish relations with foreign nations.[52]

In *Montana*, the Court did mitigate this drastic thesis by holding that tribes may exercise civil regulatory authority over non-Indians, even on non-Indian fee lands, under two circumstances. First, the Court acknowledged that tribes may regulate, through taxation, licensing, or other means, the activities of non-Indians who enter into consensual relationships with the tribe or its members, such as contracts, leases, or other arrangements. Second, the Court found that tribes retain the inherent power to exercise civil authority over conduct of non-Indians on fee lands within their reservations when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[53]

It is not easy to align the holdings and analysis in *Oliphant* and *Montana*. For instance, if tribes' "external" sovereignty over non-Indians has impliedly been lost for activities on non-Indian lands, can such sovereign authority be regained by private contract? Why would a tribe's exercise of jurisdiction over criminal behavior on its reservation not rise to the level of regulation having a "direct effect on the . . . health or welfare of the tribe?" Why would regulation of non-Indian hunting and fishing not directly affect the political integrity, economic security, or health and welfare of the tribe, in view of the fact that neither fish nor wildlife stocks necessarily confine themselves to non-Indian lands, and in fact may migrate throughout the reservation? Nevertheless, these cases clearly seem to view certain aspects of tribal jurisdictional and regulatory authority over non-Indians as having been lost by implication, despite the fact that the activities to be regulated occurred on the reservation.

b) The Move Away from Sovereignty to Preemption

As applied, the *Williams* test had two parts. The first, denoted by the phrase "absent governing Acts of Congress," calls into play a federal preemption analysis, although *Williams* did not use that term. The second recognized that, absent preemption by statute or other federal action, courts would look at tribal sovereignty to determine whether state action infringed on that tribal prerogative.[54] On the theory that federal law did not govern the situation, the *Williams* court based its holding on the test's second prong.

51. *Id.* at 564.
52. COHEN, *supra* note 12, at 244.
53. *Montana*, 450 U.S. at 565-66.
54. Williams v. Lee, 358 U.S. 217, 220, 222 (1959).

Later decisions, however, tended to rely more heavily on preemption. *Warren Trading Post v. Arizona State Tax Commission*[55] struck down a gross-receipts tax imposed by Arizona on a non-Indian business located on the Navajo reservation based on federal laws regulating trading with Indian tribes. Likewise, *Kennerly v. District Court of the Ninth Judicial District*[56] relied on the preemptive effect of Public Law 280 in striking down a tribal attempt, by regulation, to give state courts jurisdiction concurrent with the tribe.

By 1973 the Supreme Court in *McClanahan v. Arizona State Tax Commission*[57] clearly acknowledged a trend "away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."[58] The Court found that the modern cases "tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power."[59] The Court used tribal sovereignty not to solve the issues, but simply as a *backdrop* against which the applicable federal statutes and treaties should be read.

In applying preemption analysis, courts generally have been willing to look broadly for preemptive activity. Findings of preemption have been based on federal policy and on broad schemes of federal regulation, as well as on explicit statutory language.[60] Because preemption in the Indian context may be implied, and because courts have generally presumed a lack of state jurisdiction in Indian Country, preemption in the Indian context differs from that in normal constitutional analysis. Its outlines are more flexible and favorable to tribes.

Nevertheless, courts in Indian cases have not always been true to the concept of Indian preemption.[61] For that reason — and because tribal sovereignty must by its very nature extend beyond matters subject to federal preemption — the retrenchment brought about by *McClanahan*'s limitation of tribal sovereignty to a "backdrop" in jurisdictional analysis has created problems in recent years.

c) Balancing of Interests

Finally, another erosion of the *Williams* test involved judicial attempts to balance interests as part of jurisdictional decision making. In the tax area, courts began looking at the balance of tribal, federal,

55. 380 U.S. 685 (1965).
56. 400 U.S. 423 (1971).
57. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).
58. *Id.* at 172.
59. *Id.*
60. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).
61. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); Rice v. Rehner, 463 U.S. 713 (1983).

and state interests in taxation of activities in Indian Country.[62] Early cases generally found state interest in collecting revenues insufficient to overcome tribal and federal interests in taxing activity on reservations.[63] As described below, however, later cases have proved troublesome.

D. Recent Judicial Interpretations of Jurisdiction

In recent cases, the Supreme Court has maintained and exacerbated the erosion of *Williams*. The basic themes from past case law are still evident: the Court continues to espouse the notion that tribes lack jurisdiction inconsistent with their status,[64] to rely primarily on federal preemption in deciding jurisdictional questions, using tribal sovereignty only as a backdrop,[65] and to continue to balance tribal, federal, and state interests.[66]

The current Court, however, has added several strange, new twists in its analysis — twists which are, indeed, bizarre if one reviews the principles underlying *Williams* and the Marshall trilogy.

1. Implied Loss of "External Sovereignty"

First, as shown in the *Brendale* case, four justices now appear to subscribe to the view, formulated in earlier cases, that "by no more than the Court's *ipse dixit*, Indian tribes have lost substantial portions of their inherent power over tribal territory."[67] Like the earlier decision in *Montana*, Justices White, Rehnquist, Scalia, and Kennedy appear to characterize tribal authority over non-Indians as part of the "external sovereignty" which tribes lost by conquest and discovery over 150 years ago.[68]

62. *See, e.g.*, Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 838 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 150-51 (1980); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 156-57 (1980); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174-75 n.13 (1973).

63. *See, e.g.*, *Bracker*, 448 U.S. at 151; *McClanahan* 411 U.S. at 174-75.

64. *See, e.g.*, Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 427 (1989); Rice v. Rehner, 463 U.S. 713 (1983).

65. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); Rice v. Rehner, 463 U.S. 713 (1983). *But see* Crow Tribe v. Montana, 819 F.2d 895, 903 (9th Cir. 1987), *aff'd mem.*, 484 U.S. 997 (1988) (holding state taxes void as interfering with tribal self-government).

66. *See, e.g.*, *Cotton Petroleum*, 490 U.S. at 163.

67. Susan Williams & Kevin Gover, State and Indian Tribal Taxation on Indian Reservations — Is It Too Taxing? (1989) (symposium paper), *in* 1989 HARVARD INDIAN LAW SYMPOSIUM 165 (Harvard Law School Publications Center 1990).

68. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 453 (1989). Although a majority of the Justices agreed on the outcome of the *Brendale* case, the Justices were split on the underlying rationale and rendered three separate opinions.

In *Brendale*, these justices ruled that the Yakima Tribe's exercise of zoning authority over non-Indians in an area of the reservation, which was demographically largely non-Indian, was necessarily inconsistent with the tribes' dependent status.[69] "[R]egulation of the relations between an Indian tribe and nonmembers of the tribe 'is necessarily inconsistent with a tribe's dependent status, and therefore tribal sovereignty over such matters of external relations' is divested."[70] The tribe did not contend that Congress had expressly delegated to it the power to zone lands owned by non-Indians. Because this power was not regarded as part of the inherent sovereignty retained by tribes, the Court found that no such authority existed.[71]

Not only did four justices in *Brendale* subscribe to the notion that the tribes have somehow lost "external sovereignty" over non-Indians on non-Indian fee land, but they also construed narrowly the Court's exceptions to that rule in *Montana*. The *Brendale* opinion acknowledged the two instances in which *Montana* had upheld tribal civil authority over non-Indians on non-Indian fee lands. The first, involving a consensual relationship, did not apply. The second, involving activity which threatened important interests of the tribe, arguably applied. Because *Montana* had prefaced that exception with the word "may," the four justices found that it did not necessarily apply in all circumstances. Holding that a literal application of the exception to the case would permit tribal regulation only as long as conduct threatened tribal interests, and would therefore result in constant switching of zoning authority between the tribe and the county, the justices declined to apply the exception in this case.[72]

Moreover, these justices also stated the *Montana* test more stringently than *Montana* had stated it. They found that an activity to which a protectable interest attaches "must be demonstrably serious and must imperil the political integrity, economic security or the health and welfare of the tribe."[73] Although the reasoning of these four justices does not represent a majority view of the Court, combined with the views of Justices Stevens and O'Connor — who argued that the power to exclude did not give the tribe authority to regulate in a heavily non-Indian area[74] — their views form a majority. Thus, this reasoning heavily influenced the decision, and certainly bears serious attention.

69. *Id.* at 408.

70. *Id.* at 427 (opinion of White, J.) (citing United States v. Wheeler, 435 U.S. 313, 326 (1978)).

71. *Id.* at 425-26.

72. *Id.* at 429-30.

73. *Id.* at 431.

74. *Id.* at 434-45 (Stevens, J., concurring).

2. Limitations on Use of Tribal Sovereignty as a Backdrop in Preemption Analysis

Another peculiar twist imposed by the current Court is the notion that tribal sovereignty can be used as a backdrop for preemption analysis only if the tribe has actually exercised sovereign authority in the specific area at issue in the case. That theory plays a part in two recent decisions, *Rice v. Rehner*[75] and *Cotton Petroleum Corp. v. New Mexico*.[76]

In *Rice*, the Court considered whether federal law preempted states from requiring federally licensed Indian traders operating businesses on Indian reservations to purchase state liquor licenses. Writing for the Court, Justice O'Connor first looked for the "backdrop" of tribal sovereignty which would inform the preemption analysis. O'Connor found that if any interest in tribal sovereignty was implicated by imposition of California's alcoholic beverage regulation, it existed only insofar as the state attempted to regulate sales to tribal members.[77] The Court erroneously characterized earlier decisions as concluding that no impact on tribal sovereignty exists where sales involve non-Indians.[78]

Second, the Court seemed to operate on the premise that tribal sovereignty was relevant as a "backdrop" to preemption analysis *only* if the tribe had actually exercised tribal self-governance in the area of liquor regulation. Because the tribe had not exercised inherent tribal authority in the area of liquor regulation, and because liquor regulation represented an area in which Congress had actually delegated authority to the tribes, the Court felt that any inherent authority that may have existed had actually been divested by Congress. Thus, the Court declined to consider tribal sovereignty as a "backdrop."[79]

Citing to *Rice*, the recent *Cotton Petroleum Corp. v. New Mexico*[80]

75. 463 U.S. 713 (1983).

76. 490 U.S. 163 (1989).

77. *Rice*, 463 U.S. at 720.

78. Justice O'Connor cited Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) and Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), for this proposition. Those cases, however, involved taxation of non-Indian purchasers, rather than Indian traders, and do not stand for the proposition that tribes have no sovereign interest in regulation of on-reservation sales to non-tribal members. *Rice*, 463 U.S. at 720 n.7.

79. In dissent, Justice Blackmun, joined by Justices Brennan and Marshall, pointed out that the Court's tying of preemption to the fact that Indian tribes historically have not regulated liquor is incorrect. They felt that the Court should have looked at federal laws with the backdrop of sovereignty, regardless of whether the particular area is traditionally within tribal control. *Moe*, they noted, held that a federally licensed Indian trader operating on the reservation could not be required to get a state cigarette retailers license. *Rice*, 463 U.S. at 738-39 (Blackmun, J., dissenting).

80. 490 U.S. 163 (1989).

decision based its holding on the notion that the "history of tribal independence in the field at issue" is one of the components of preemption analysis. At issue in *Cotton Petroleum* was whether the 1938 Indian Mineral Leasing Act[81] preempted New Mexico's taxation of oil and gas leasing on the Jicarilla Apache Reservation. Based on an analysis of the 1938 Act and its precursor, the Court found that — at least as to Executive Order reservations — state taxation of nonmember oil and gas lessees was the norm from the beginning. Thus, the Court held that no history of tribal independence from state taxation existed to form a "backdrop" against which the relevant federal legislation was to be read.[82]

3. Application of Non-Indian Preemption Analysis Where No Backdrop of Tribal Sovereignty Is Found

In addition to the inclination to look at tribal sovereignty with tunnel vision, the current Court has also redefined the relationship between the "backdrop" of tribal sovereignty and the preemption analysis. Earlier decisions used the "backdrop" of tribal sovereignty as a touchstone for broad construction of vague or ambiguous federal enactments and policies in favor of Indian interests.[83] *Rice* and *Cotton Petroleum*, on the other hand, viewed the existence of specific tribal sovereign authority in the area at issue as determinative of whether Indian preemption analysis would be applied at all. The *Rice* opinion acknowledged that the existence of a "backdrop" of tribal sovereign authority in the area usually leads to application of the traditional Indian preemption analysis:

> When we determine that tradition had recognized a sovereign immunity in favor of the Indians in some respect, then we usually are reluctant to infer that Congress has authorized the assertion of state authority in that respect "except where Congress has expressly provided that State laws shall apply." Repeal by implication of an established tradition of immunity or self-governance is disfavored.[84]

Because the Court failed to find traditional exercise of sovereign authority in the area of liquor regulation, however, it applied standard constitutional preemption analysis, with a presumption in favor of state authority rather than against it. Based on the lack of a tradition of self-government in the area of liquor regulation, the Court found

81. 25 U.S.C. §§ 396a-396g (1988).

82. *Cotton Petroleum*, 490 U.S. at 182.

83. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973).

84. *Rice*, 463 U.S. at 719-20 (citations omitted).

it "not necessary that Congress indicate expressly that the State has jurisdiction to regulate the licensing and distribution of alcohol."[85]

Although the Court in *Cotton Petroleum* spoke of "flexible" Indian preemption which resolves ambiguities in federal law in favor of tribal independence, it nevertheless applied standard constitutional preemption analysis. As pointed out by Justices Blackmun, Brennan, and Marshall in dissent, the majority ignored the broad policies and purposes underlying the mineral leasing acts[86] and the Indian Reorganization Act,[87] and instead gave the statute a narrow, technical construction not in keeping with Indian preemption analysis.[88] Thus, the Court appears to have followed *Rice's* notion that lack of specific tribal sovereignty leads to use of standard non-Indian preemption analysis rather than the more flexible Indian preemption.

4. Tribal Authority Dependent on Demography

Brendale also adds another twist to Indian jurisdictional analysis. Chief Justice Rehnquist and Justices White, Scalia, and Kennedy asserted that the tribe could not regulate non-Indian activities on fee land within the reservation. Justices Blackmun, Brennan, and Marshall upheld tribal zoning authority over all such lands on the reservation. The outcome thus rested on the two swing justices, Justice Stevens and Justice O'Connor, who ruled that the tribe had jurisdiction in the closed area (mostly forest land held in trust) but no jurisdiction in the open area (mostly agricultural and commercial land almost fifty percent owned in fee). Those justices held that because alienation of about half of the property in the open area had produced an integrated community "not economically or culturally delimited by reservation boundaries,"[89] the tribe had lost its power to exclude nonmembers from fee land in that area, and therefore its sovereign authority to define the essential character of the territory.[90]

The case adds to the tests advanced by *Montana* the notion that jurisdiction may depend on demography. Whether demography oper-

85. *Id.* at 731.

86. Act of May 29, 1924, Pub. L. No. 68-158, 43 Stat. 244 (codified at 25 U.S.C. § 398 (Supp. I 1983)); Act of May 11, 1938, Pub. L. No. 75-506, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396f (Supp. I 1983)).

87. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (current version at 25 U.S.C. §§ 461-497 (1988)).

88. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 204 (1989). It is also possible that the Court saw *Cotton Petroleum* more as an intergovernmental tax immunity case than as an Indian case because no tribal entity was a party to the suit before the Court. However, the tribe had presented the preemption arguments clearly in its *amicus curiae* brief before the Court. *See id.* at 170.

89. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 444 (1989).

90. *Id.*

ates as a factor to be considered in determining that state jurisdiction threatens tribal interests, or as a separate test capable of defeating jurisdiction by itself, is unclear. Nonetheless, the use of such factors in jurisdictional analysis significantly reduces the predictability of that analysis and the guidance lower courts and relevant officials can draw from the case law.

5. *Deference to State Interests and Restriction of Tribal and Federal Interests in Balancing in Tax Cases*[91]

Before *Cotton Petroleum* the Court balanced governmental interests in determining whether state jurisdiction existed. Particularly in the tax area, the balancing test analyzed: (1) the backdrop of tribal sovereignty (in some cases viewed narrowly); (2) the applicable federal law and policy which were to be construed liberally in favor of the tribes; (3) whether a tribal injury existed in conflict with a federal regulatory scheme; and (4) any state interest that might justify the state tax, notwithstanding its conflict with the federal scheme.[92] *Cotton Petroleum*, however, altered the elements of this balancing test.

As noted above, the Court looked at the backdrop of tribal sovereignty narrowly and, finding no traditional exercise of sovereign authority by the tribe, applied narrow non-Indian preemption analysis. The Court also modified the interest analysis. In concluding that *Cotton Petroleum* was distinguishable from earlier cases, the Court evidenced an unwillingness to construe liberally the existence of tribal injury in analyzing conflicts with governing federal policy. In fact, the Court implied that to have an effect, tribal injury must be "substantial." Likewise, it implied that in order for the pervasive federal regulatory aspect of the federal preemption test to apply, federal regulation must be not only pervasive, but also exclusive *vis-a-vis* any state regulation.[93] Finally, the decision seems to indicate that virtually any state service provided to Indians would be enough to justify state taxes. If that were the case, minimal state interests might be sufficient to support state regulatory jurisdiction.[94]

Cotton Petroleum is arguably unique in that no showing of tribal injury was made and the state interests were not well documented. The twists it puts on the interest analysis may also be limited to tax cases. In fact, the *Brendale* case, which was decided after *Cotton*, found that state and tribal interests were to be weighed carefully and did not imply that minimal state interests would be sufficient to justify

91. Because balancing of interests has played a unique role in tax cases, it is unclear whether these changes in the balancing test would apply outside the tax area.

92. Williams & Gover, *supra* note 67, at 182.

93. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 185-86 (1989).

94. Williams & Gover, *supra* note 67, at 184.

state regulatory jurisdiction, at least in areas predominantly populated by Indians. Nevertheless, the *Cotton* decision does indicate the Court's tendency to retrench somewhat in its application of preemption analysis to taxation of non-Indian activity on Indian reservations.

E. The Common Thread

Reviewing the historical development of jurisdictional principles in Indian law, it is important to refer back to the strong outlines of tribal jurisdiction as conceived and implemented by Marshall. Marshall's model of inherent tribal sovereignty under federal authority, with independence from the states, remains the basis of federal Indian law. The recognition of tribal sovereign authority over Indians and non-Indians alike is a given in jurisdictional analysis. It is this authority which gives Indian tribes the ability to undertake and control natural resources development on reservation lands.

The common thread in recent jurisdictional analysis, however, is also important. The Court appears concerned about assertion of tribal authority over non-Indians, and in some cases nonmembers, absent a strong showing that the exercise of state authority, would threaten basic tribal interests. This concern translates into a tendency to avoid application of traditional, favorable Indian preemption analysis in some cases. Likewise, the Court apparently routinely scrutinizes whether tribal authority over non-Indians has been divested by virtue of tribal dependent status. These tendencies are particularly aggravated where tribal authority is asserted over non-Indians in areas heavily non-Indian in demography. While some of the recent decisions involve unique factors or may be limited in application, the unwillingness to construe broadly tribal jurisdictional authority over non-Indians will necessarily have implications for natural resources development on Indian reservations. At the very least, creative lawyers and tribal officials structuring deals for natural resources development in Indian Country may wish to consider contractual arrangements with non-Indian lessees concerning jurisdiction, cooperative arrangements with state and federal authorities, and other arrangements to ensure that jurisdiction is clearly delineated.

III. Outlines of Tribal, Federal, and State Jurisdiction in Specific Areas Related to Natural Resources Development

The remainder of this article outlines briefly the current status of tribal, federal, and state jurisdiction in areas relevant to natural resources development.

A. Land Status as a Benchmark for Jurisdiction

Civil jurisdiction depends heavily on whether the activity at issue occurred within or outside "Indian Country." The scope of "Indian

Country" has been defined legislatively for purposes of criminal law.[95] This definition is also generally used in the civil context, subject to resistance by a few lower courts.[96]

Indian Country encompasses all land within reservation boundaries, however owned or held. Thus, it includes trust land held individually and by the tribe, allotments, fee land, whether owned by Indians or non-Indians, and any other land within the reservation boundaries. In addition, some lands outside reservation boundaries are also included within the definition of Indian Country. These are (1) dependent Indian communities, including Pueblo lands, and (2) Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through such allotments.[97]

It is often said that tribal power does not extend beyond reservation boundaries.[98] With the exception of tribal "long arm" statutes and cooperative arrangements with local authorities, that adage is generally true. Thus, the jurisdictional rules set forth in this article apply basically to activities taking place within reservation boundaries. Because jurisdiction rests heavily on the distinction between what is on-reservation and off-reservation, reservation boundaries often become critical. The myriad cases which have litigated reservation boundary issues rest, no doubt, on underlying jurisdictional concerns.[99] As noted above, the way lands are held within reservation boundaries is also a factor in determining whether tribes have jurisdiction over non-Indian activities on those lands.[100]

B. Jurisdiction to Tax

1. Tribal Taxation

No one disputes that tribes may tax their own members for activities on the reservation.[101] However, since non-Indian individuals and bus-

95. 18 U.S.C. § 1151 (1988).

96. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975) ("While section 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction."). Some courts, however, have been reluctant to follow this tenet in some cases. *See* G.M.A.C. v. Chischilly, 628 P.2d 683, 685 (N.M. 1981) (holding that Navajo law was not applicable to auto repossession on trust land outside reservation boundaries).

97. 18 U.S.C. § 1151 (1988).

98. *See, e.g.*, Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973).

99. *See, e.g.*, Solem v. Bartlett, 465 U.S. 463 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962). Recent cases which present similar issues are Jicarilla Apache Tribe v. State, 742 F. Supp. 1487 (D.N.M. 1990), and Pittsburgh & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990).

100. *See, e.g.*, Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989); Montana v. United States, 450 U.S. 544 (1981).

101. COHEN, *supra* note 12, at 432; Williams & Gover, *supra* note 67, at 166.

inesses may be heavily involved in natural resource development in Indian Country, tribal authority to tax those individuals and entities is also critical.

As noted above, tribal taxation of non-Indian activity is an area of current controversy. Nonetheless, some rules of thumb do exist. Tribal power to tax both Indians and non-Indians derives from the tribe's general authority, as a sovereign, to control economic activity within its jurisdiction and to defray the cost of providing governmental services.[102] The tribal power to tax hence derives from tribal powers as sovereign governmental units rather than tribal ownership of land. The extent of tribal taxation power over non-Indians, however, has been held to depend on the nature of the lands on which the activity to be taxed occurs.

a) Activities on Indian Lands

Non-Indians engaging in activities on Indian lands have been held subject to tribal taxation. In *Washington v. Confederated Tribes of Colville Indian Reservation*,[103] the Supreme Court upheld tribal taxation of non-Indians engaging in commercial transactions with tribes on Indian lands — in that case, purchasing cigarettes from tribal smokeshops. Tribal jurisdiction exists even though the tax may have been imposed after rather than at the time, the non-Indian began doing business on the reservation.[104]

b) Activities on Non-Indian Fee Lands

Because the Supreme Court has not yet decided a case concerning tribal authority to tax non-Indians on non-Indian fee land within the reservation, tribal power to tax such activity is based on analogy from other aspects of civil regulatory authority. The basic outlines of tribal civil regulatory jurisdiction are described above. Suffice it to say that under the rationale of *Montana*, tribes may tax non-Indians for activities on non-Indian fee land *if* the non-Indian involved has entered a consensual relationship with the tribe or if his or her conduct threatens or has some direct effect on the political integrity, economic security, or health and welfare of the tribe.[105] With the recent Supreme Court "twists" described above, this remains the basic rule applicable to

102. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982). This is true whether or not the tribe falls under the auspices of the Indian Reorganization Act. Kerr McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985).

103. 447 U.S. 134 (1980); *see also* Burlington N. R.R. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3294 (U.S. Oct. 2, 1991) (No. 91-545).

104. *Merrion*, 455 U.S. at 145.

105. *See* Montana v. United States, 450 U.S. 544, 565-66 (1981).

exercise of taxing jurisdiction over non-Indians on non-Indian land in Indian Country.

2. State Taxation

States have taxing jurisdiction over non-Indians on tribal lands only to the extent that the exercise of such jurisdiction is not preempted by federal legislation or comprehensive federal regulation or policy.[106] As noted above, in the early cases the Court read federal statues and policies expansively and presumed that injury would result to the tribe or other persons protected by federal statutes. In *Crow Tribe of Indians v. Montana*,[107] the Crow Tribe challenged application of Montana's severance tax to production by non-Indian lessees of tribal coal interests. The Ninth Circuit struck down the state tax as conflicting with the statutory goals of the 1938 Indian Mineral Leasing Act and impermissibly infringing on the tribe's right of self-government.[108] That decision was summarily affirmed by the Supreme Court.[109] Shortly thereafter, however, the Supreme Court upheld Montana's severance tax as to coal leases on federal lands, finding that different acts and policies were at issue.[110]

The more recent *Cotton Petroleum* decision upheld New Mexico's imposition of a severance tax on the on-reservation production of oil and gas by non-Indian lessees, even though production was also subject to an Indian tribe's severance tax.[111] The "twist" added to preemption analysis by this and other more recent cases indicates that such analysis may not be applied as expansively in favor of tribal jurisdiction as it has in the past.[112] However, the infringement analysis also maintains some vitality in the taxation area.[113] Under the *Crow Tribe* case, state taxation jurisdiction does not exist where it would interfere with tribal self-government, at least where it would also threaten Congress' overriding general objective of encouraging tribal self-government and economic development.[114]

105. States may not, however, tax tribal royalty income generated by leases issued pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1988). Montana v. Blackfeet Tribe, 471 U.S. 759 (1985).

107. 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 484 U.S. 997 (1988).

108. *Id.* at 900, 903.

109. 484 U.S. 997 (1988) (mem.).

110. Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981).

111. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 186 (1989).

112. *See supra* notes 80-82, 86-88 and accompanying text.

113. Crow Tribe v. Montana, 819 F.2d 895 (9th Cir. 1987).

114. The Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 1, may also pose a barrier to state taxation on Indian lands. Although this issue had been raised in several cases, the Supreme Court has not held, to date, that the Indian Commerce Clause represents a *per se* barrier to state taxation. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989). It has recently been held that state taxation of fee-patented

C. Regulatory Jurisdiction — Zoning

Indian tribes have jurisdiction to zone trust and allotted lands within their reservations.[115] The recent *Brendale* decision also confirms exclusive tribal authority to regulate land use on non-Indian owned fee lands in reservation areas which are heavily Indian-owned and populated. States and counties have no authority to regulate land use of tribal or allotted lands,[116] and no authority to regulate zoning of non-Indian lands within reservation areas which are demographically Indian.[117]

In areas that are at least fifty percent demographically non-Indian, however, *Brendale* upholds state and county zoning authority over non-Indian lands.[118] *Brendale* also recognizes the inherent conflict and unworkability of concurrent tribal and state zoning.[119] To the extent that such concurrent authority is the outcome of *Brendale*, the inherent conflicts and inconsistencies will be troublesome and may well need attention through legislation or cooperative agreements.

D. Jurisdiction over Mineral and Timber Production

Pursuant to federal law, the federal government has promulgated comprehensive regulatory schemes governing mineral and timber production in Indian Country. The effects of this regulatory scheme are twofold. First, a good part of the leasing activity on Indian lands is federally controlled.[120] Although tribes may, as sovereigns, seek to regulate lessees both by contract and through the exercise of their

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Indian lands is authorized under § 6 of the General Allotment Act, 25 U.S.C. § 349 (1988), and does not depend on a case-by-case analysis of the economic, political and social effects of such tax on tribes. County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 60 U.S.L.W. 4067 (U.S. Jan. 14, 1992).

115. *See* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 461 (1989); *cf.* Montana v. United States, 450 U.S. 544, 557 (1981) (regulation of hunting and fishing).

116. *See* Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977); United States v. County of Humboldt, 615 F.2d 1260 (9th Cir. 1980).

117. *See, e.g.*, Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 462 (1989) ("[In] all of this Court's inherent sovereignty decisions, including *Montana*, tribes retain the power to zone non-Indian fee lands on the reservation.").

118. *Brendale*, 492 U.S. at 444; *see also* Sangre de Cristo Dev. Co. v. Santa Fe, 503 P.2d 323 (N.M. 1972), *cert. denied*, 411 U.S. 938 (1973) (city planning authority over Indian lands leased by the Pueblo for 99 years for building of subdivision held not to interfere with tribal self-government).

119. *Brendale*, 492 U.S. at 466.

120. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982).

police power, the overlapping federal and tribal schemes have led to considerable litigation concerning tribal authority over lessees,[121] the federal trust responsibility for tribes in the area of mineral and timber development,[122] and the relationship of federal and tribal authority.

The second result of comprehensive federal regulation is that state authority over mineral development is generally preempted. Using Indian preemption analysis, the Supreme Court in *White Mountain Apache Tribe v. Bracker*,[123] struck down a state tax on a non-Indian contractor of the Fort Apache Timber Company, the tribal enterprise that managed, harvested, processed, and sold timber from the reservation. The holding was based on comprehensive federal regulation of timber harvesting and use of roads on reservation lands; the underlying federal policy of assuring that the profits derived from timber sales will inure to the benefit of the tribe; the Secretary of the Interior's authority to set fees and rates with respect to the harvesting and sale of tribal timber; and the fact that imposition of state taxes would adversely affect the tribe's ability to comply with the sustained-yield management policies imposed by federal law. Balancing state, tribal, and federal interests, the Court found no state regulatory interests, as opposed to a significant economic burden on the tribe, which threatened to undercut the comprehensive federal regulatory program and policies.[124]

Although *Bracker* involves taxation, the comprehensive federal regulatory scheme and underlying policies similarly preempt the exercise of other types of regulatory authority over timber and mineral production. Many states have resource conservation laws that authorize state agencies to issue orders creating drilling units, pooling orders, utilization agreements, and other similar orders for all oil and gas extraction in the state. Because of the pervasive federal regulatory scheme governing timber and mineral production, however, the applicability of these types of regulations in Indian Country depends on action by the Secretary of Interior.[125]

E. Hunting and Fishing

New Mexico v. Mescalero Apache Tribe[126] established the basic rules governing state and tribal jurisdiction over hunting and fishing on

121. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Tenneco Oil Co. v. Sac & Fox Tribe, 725 F.2d 572 (10th Cir. 1984).

122. *See, e.g.*, Mitchell v. United States, 463 U.S. 206 (1983); Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982); Youngbull v. United States, No. 31-88L (Cl. Ct., Jan. 4, 1990); *see also* Winifred T. Gross, Note, *Tribal Resources: Federal Trust Responsibility: United States Energy Development Versus Trust Responsibilities to Indian Tribes*, 9 AM. INDIAN L. REV. 309 (1981).

123. 448 U.S. 136 (1980).

124. *Id.* at 148.

125. *See generally* Richard K. Books, Note, *Oil and Gas: The Effect of Oklahoma Conservation Laws on Federal and Indian Lands*, 29 OKLA. L. REV. 994 (1976).

126. 462 U.S. 324 (1983).

Indian lands in Indian Country. In that case, the state conceded the tribe's exclusive authority to regulate hunting and fishing by tribal members and conceded that the tribe could also exercise authority over nonmembers. However, the state contended that it could exercise concurrent jurisdiction over nonmembers. The Court noted the historic importance of hunting and fishing to the tribe, the geographic nature of tribal sovereignty, and the strong federal policy favoring tribal self-sufficiency and economic development. The Court found that concurrent state and tribal jurisdiction "would effectively nullify the Tribe's authority to control hunting and fishing on the reservation" and would "disturb and disarrange . . . the comprehensive scheme of federal and tribal management [of hunting and fishing] established pursuant to federal law."[127] Therefore, the Court asserted that the exercise of state authority over hunting and fishing of nonmembers on tribal lands was preempted.[128]

As noted above, *Montana v. United States* found that tribal authority to regulate hunting and fishing by non-Indians on non-Indian owned fee land on the reservation was limited to circumstances involving consensual relationships between the tribe and the non-Indian involved, or situations in which exercise of state jurisdiction would threaten or have some direct effect on the political integrity, economic security, or health and welfare of the tribe. In *Montana*, the Court found no such circumstances; the complaint did not allege that non-Indian hunting and fishing on fee land imperiled the subsistence or welfare of the tribe. In fact, the district court had made express findings that the Crow Tribe had traditionally accommodated itself to the State's "near exclusive" regulation of hunting and fishing on fee lands within the reservation.[129] Although the unique factual circumstances led the Court in *Montana* to uphold state jurisdiction, lower courts deciding cases in related areas have generally upheld tribal jurisdiction under the *Montana* test.[130]

F. Environmental Regulation

Federal, state, and tribal governments all assert some regulatory authority over environmental matters on Indian lands. The primary

127. *Id.* at 338.

128. *Id.* at 325.

129. Montana v. United States, 450 U.S. 544, 564 n.13 (1981).

130. Williams & Gover, *supra* note 67, at 171. *see, e.g.*, Knight v. Shoshone & Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982) (zoning); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981) (administration of water). Some more recent decisions, however, have been influened by *Brendale*. *See* Confederated Salish & Kootenai Tribes v. Montana, 18 Indian L. Rep. (Am. Indian Law. Training Program) 3009 (D. Mont. 1990).

issues in the area of environmental regulation have concerned state attempts to implement state environmental programs in Indian Country, and whether tribes are on the same footing as states under federal statutes regulating the environment.

Absent express legislative action, state attempts to implement state environmental programs in Indian Country have been challenged. *Washington Department of Ecology v. EPA*[131] involved Washington's attempt to impose its hazardous waste management program, developed pursuant to the federal Resource Conservation and Recovery Act (RCRA), over Indians living on reservations within state boundaries. The RCRA allows states to develop and implement hazardous waste programs "in lieu" of the general federal program, and the scheme submitted by Washington extended the state's regulations to Indians on Indian lands. When the Environmental Protection Agency (EPA) rejected application of Washington's program, Washington sued. Deferring to the EPA's interpretation, the Ninth Circuit struck down the state regulation. Its holding, however, was specifically limited to the exercise of state authority over Indians on Indian land. The court stated that it was not addressing state regulation of non-Indians within reservations.[132]

Despite the existence of sovereign tribal authority in the area of environmental regulation, that authority was often ignored in early federal legislation and environmental policy. Recently, it has increasingly been recognized by federal authorities.[133] On November 8, 1984, the EPA issued a policy statement seeking to make the EPA Indian policy consistent with the overall federal position in support of tribal self-government.[134] For the first time, the EPA officially recognized tribal governments as the primary parties responsible for establishing standards and managing programs on reservation lands. The agency promised to take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands.[135]

131. 752 F.2d 1465 (9th Cir. 1985).

132. *Id.* at 1468.

133. *See* Judith V. Royster & Rory S.A. Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation and the Limits of State Intrusion*, 64 WASH. L. REV. 581 (1989); Karen Breslin, *Addressing Environmental Problems on Indian Lands: Tribal Sovereignty Versus State and EPA Regulatory Authority*, 19 Env't Rep. (BNA) 1920 (1989).

134. EPA Policy for the Administration of Environmental Programs on Indian Reservations 1 (Nov. 8, 1984) [hereinafter EPA Policy]; *see* NAT'L CONGRESS OF AM. INDIANS, ENVIRONMENTAL PROTECTION IN INDIAN COUNTRY: A HANDBOOK FOR TRIBAL LEADERS AND RESOURCE MANAGERS, IV 1-29 (National Congress of American Indians 1988) [hereinafter ENVIRONMENTAL PROTECTION].

135. EPA Policy, *supra* note 134, at 2; ENVIRONMENTAL PROTECTION, *supra* note 134, at IV 4. This policy has recently been reaffirmed. Memorandum from William K. Reilly, Administrator, EPA, to Assistant Administrators, General Counsel et al. (July 10, 1991) (on file with the *American Indian Law Review*).

The EPA's efforts to delegate authority to the tribes in the environmental area have been upheld.[136] The translation of federal policy into statutory and regulatory action, however, has sometimes been inconsistent and unclear. In some cases Congress has passed amendments clearly placing tribes on an equal footing with states. For example, the 1986 amendments to the Safe Drinking Water Act (SDWA) and the Clean Water Act place tribes on an equal footing with the states in establishing standards and managing programs on reservation lands.[137]

Even in the face of ostensibly clear congressional action, however, uncertainties still exist. For example, to be classified as a state under the SDWA, tribes must meet enumerated criteria. Three of these — recognition by the Department of Interior, existence of an active governing body, and capability of administering an effective water program — are relatively straightforward. The fourth, however, requires a tribe to demonstrate that its tribal government has the necessary "subject matter and geographical jurisdiction."[138] The EPA regulations issued under the SDWA recognize that tribal jurisdiction over some areas on reservations may be in dispute. With regard to those areas, the EPA requires tribes to submit statements explaining the legal basis for their jurisdiction, permits comment by neighboring tribal and state governments, and then provides for the EPA, in coordination with the Secretary of the Interior, to decide questions of jurisdiction where competing claims exist.[139] While this policy may make good sense when reservation boundaries are in question, it raises questions as applied to jurisdiction over non-Indian fee land on reservations. In those cases, it effectively places the EPA and Department of Interior in the position of applying the *Montana* test to determine jurisdiction.[140]

The issue of whether and how the EPA should require tribes to demonstrate jurisdiction on their reservations has sparked substantial debate. Based on the theory that reservations should be regulated as legal and administrative units, the EPA has recently announced that as a general matter it will delegate environmental programs only to governments (state or tribal) which have adequate jurisdiction over *all*

136. *See, e.g.*, Nance v. EPA, 645 F.2d 701 (9th Cir.), *cert. denied*, 454 U.S. 1081 (1981) (delegation of Clean Air Act authority to tribes upheld).

137. *See, e.g.*, Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-11 (1988); Clean Water Act, 33 U.S.C. § 1377 (1988).

138. 42 U.S.C. § 300j-11(b) (1988); *see* 53 Fed. Reg. 37,398 (1988).

139. 40 C.F.R. § 145.52-.58 (1990).

140. *Montana*'s provision for tribal jurisdiction based on contractual relationships and on actions affecting significant tribal interests would seem to apply, particularly in view of the fact that water in aquifers is transient and can easily migrate from non-Indian sources in "checkerboard" areas of reservations into the main water sources of the tribe.

reservation pollution sources, including both those on trust and fee lands.[141] As a general matter,[142] the EPA believes that tribes will meet this standard. The agency has announced its intention to view activities regulated under environmental statutes as presumptively having serious and substantial impacts on human health and welfare, thus falling within tribal jurisdiction under the *Montana* test, whether on fee or trust lands within reservations.[143]

In some cases, Congress itself has been less definitive. For example, the RCRA defines "municipalities" to include Indian tribes, but authorizes only states or regional authorities to assume responsibility.[144] Likewise, tribes have traditionally had authority to act as states under the Clean Air Act (CAA)[145] only with regard to the establishment of pristine air areas,[146] although the CAA now treats tribes as states for purposes of implementing national primary and secondary ambient air quality standards.[147] Thus, the jurisdictional arrangements and degree of uncertainty vary according to the type of environmental regulation as well as from case to case.[148]

G. Water Rights

Water rights as well as jurisdiction to administer those rights and to regulate water use are also critical to tribal natural resources development. A full discussion of Indian water law is far beyond this article's scope. It should be noted that Indian tribes generally possess reserved rights to water with priority dates often dating from the

141. Memorandum from William K. Reilly, *supra* note 135, at 3-4.

142. Although this legal analysis is published in the context of the Clean Water Act, its language indicates the EPA's intention to apply the analytical thrust described in the announcement more broadly to environmental statutes permitting tribal regulation on reservations. 56 Fed. Reg. at 64,878-79.

143. Indian Reservation Water Quality Standards Regulation, 56 Fed. Reg. 64,878 (EPA 1991) (section titled Legal Analysis of the EPA). As set forth in the analysis, once a tribe has made a relatively simple factual showing and asserted that activities of non-Indians on fee lands have serious and substantial effects on the health and welfare of the tribe, the EPA will presume an adequate showing of tribal jurisdiction on fee lands unless an appropriate governmental entity demonstrates lack of jurisdiction. *Id.* at 64,879. The EPA also views the Clean Water Act itself as constituting a legislative determination that activities which affect surface water and critical habitat quality may have serious and substantial impacts, as expressing a congressional preference for tribal regulation of surface water quality. *Id.* at 64,878. The EPA has chosen to use a "serious and substantial" standard based on the subsequent judicial interpretations of the *Montana* test. *Id.*

144. 42 U.S.C. § 6903(13)(A) (1988).

145. *Id.* §§ 7400-7642.

146. *Id.* § 7474(a)(2)(C)(c), (e).

147. *Id.* § 7601(d).

148. For an excellent description of the various programs and jurisdictional arrangements, see ENVIRONMENTAL PROTECTION, *supra* note 134.

creation of their reservations and in amounts necessary to fulfill the purposes of those reservations. In *Wyoming v. United States (the Big Horn Case)*,[149] the Court recently reaffirmed the doctrine of tribal reserved rights and use of the "practicably irrigable acreage" standard to measure rights.[150] It is also well established that subsequent uses of water are not limited to the purposes for which the reservation was created.[151]

One of the issues left open by the *Big Horn Case* is administration of water rights. As tribes increasingly enact ordinances and codes extending tribal authority over all water resources and water users on their reservations — often in conflict with state assertions of jurisdiction over the same elements — this issue becomes critical.

Tribes have exclusive authority to regulate water use on reservations where such use has no impact off the reservation.[152] State authority in this instance is preempted by the tribe's right to self-government. However, based on the *Montana* holding, states have been held to possess the authority to regulate the use of excess Indian water by non-Indians on fee land where the water flowed past the edge of the reservation.[153] How questions of administration would be resolved in cases which have facts less polar than those involved in the above situations is unclear. The district court for the Eastern District of Washington held that the Yakima Tribal Water Code was invalid insofar as it purported to regulate non-Indian uses of excess water on fee lands within the reservation.[154] In that case, no evidence was presented from which the court could conclude that regulation was appropriate under the *Montana* test, either based on a consensual relationship or on a showing that non-Indian water use affected the political integrity, economic security, or health and welfare of the tribe.[155] More recently, however, the Shoshone Tribe was found to have authority to regulate water by all users on its reservation under the earlier *Big Horn* decree.[156]

149. 753 P.2d 76 (Wyo. 1988), *aff'd sub nom.* Wyoming v. United States, 492 U.S. 406 (1989) (*In re* The General Adjudication of All Rights to Use Water in the Big Horn River System).

150. *See Big Horn*, 753 P.2d at 76. The Wyoming Supreme Court found that groundwater was not included in Indian reserved water rights, but that issue was not presented for Supreme Court decision.

151. *See, e.g.*, Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

152. *Colville*, 647 F.2d at 42.

153. United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984).

154. Holly v. Confederated Tribes, 655 F. Supp. 557 (E.D. Wash. 1985), *aff'd sub nom.* Holly v. Totus, 812 F.2d 714 (9th Cir.), *cert. denied*, 484 U.S. 823 (1987).

155. *Holly*, 655 F. Supp. at 559.

156. *In re* The General Adjudication of All Rights to Use Water in the Big Horn River System, 18 Indian L. Rep. (Am. Indian Law. Training Program) 5073 (1991).

Thus, numerous questions which will affect tribal development of water resources are yet to be resolved. In addition to administration, these include questions of water marketing, an issue tied perhaps even more directly to tribal natural resources development policy.

IV. Conclusion

The complexity surrounding jurisdiction over activities in Indian Country is overwhelming. Many issues remain to be resolved, and recent Supreme Court cases indicate that now may not be the time for tribes to test the limits of their jurisdiction before the Supreme Court, at least as that jurisdiction relates to non-Indians and non-Indian activities.

Hence, the current situation argues for a need for cooperation, wherever possible, among tribal, state, and federal officials. In making deals concerning natural resources development on Indian reservations, cooperation can be enhanced by structuring the deals so that surrounding jurisdictions, as well as tribes, have an interest in making them work. Contractual arrangements with non-Indian lessees and cooperative arrangements with state and federal authorities are a necessary part of successful deal-making. In drafting cooperative agreements, it would also seem advisable for attorneys to attempt to resolve jurisdictional and enforcement uncertainties, reserving applicable legal positions if necessary.

Regulation of non-Indian rights is to be administered according to state water law by the tribal agency, with appropriate judicial review in state district court. This case is currently on appeal in the Wyoming Supreme Court.