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Carl Bryant Rogers

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ZONING: A REBUTTAL TO “VILLAGE OF EUCLID MEETS AGUA CALIENTE”

Carl Bryant Rogers*

The impetus for this note is an article by Osborne M. Reynolds, Jr.,¹ which argues the case for the enforcement² of state authorized zoning laws on Indian reservations.³

Reynolds' general conclusion is that

[T]he federal government, to the extent it still supervises Indian reservations, and the states, to the extent they increasingly assume such control, *should* treat the reservation government as a municipal entity that can speak for its residents.⁴

A prior statement of this conclusion, keyed more directly to the zoning issue is that:

(a) . . . “municipal” treatment can be given the reservation tribes, with the state or regional agency setting the basic standards and adopting the overall plan, and . . . reservations (at least where they indicate a willingness to act, and set up an agency to do so) determining classifications of specific properties and enforcing the laws.⁵

Reynolds' conclusion rests on a number of erroneous propositions as regards the “reservation zoning issue,” and obscures the fundamental questions of (a) whether state police power may be exercised over reservation land at all, and (b) whether this power includes authority to impose and enforce a zoning ordinance on reservation land. This note will argue that exemption of on-reservation land-use conduct from the application or enforcement of state authorized zoning ordinances is mandated by the unique status of Indian tribes under federal law. The argument will focus on rebuttal of the propositions which underlie Reynolds' analysis.

Rebuttal of Reynolds' Argument

Underlying Reynolds' analysis are three propositions which speak to the relationship between states, political subdivisions of states, tribes, and the federal government *vis à vis* their respective authority

* Law Student, Harvard Law School. B.A., Mississippi State; former Coordinator of Planning, Mississippi Band of Choctaws, Choctaw Reservation.

to regulate the land-use conduct of Indians and non-Indians on reservation lands.

The first of these propositions is that current trends in congressional policy favor a relinquishment of federal control over reservations and a transfer of that control “to the *states*, not the tribes.”⁷ The primary sources from which Reynolds derives this proposition are Public Law 83-280⁷ and Public Law 90-284.⁸ These acts clearly do indicate a change in congressional policy in respect to American Indians and tribal-state-federal relations, but the trend which they represent is the converse of that asserted by Reynolds.

Congressional policy with regard to Indian affairs has reversed itself just about every twenty years since the Civil War.⁹ Generally, Congress has alternatively embraced and rejected a “termination/assimilation”¹⁰ policy and a “tribal self-government/preservation of Indian identity” policy.¹¹ Public Law 83-280 is without question a termination act¹² and it has been so characterized by the Secretary of the Interior.¹³ The dual aims of the Act as stated by the House Committee on Interior and Insular Affairs, to whom the Act was referred, were “first, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such.”¹⁴ This language was incorporated into the report of the Senate Committee on Interior and Insular Affairs recommending passage of the Act.¹⁵

Public Law 83-280 was passed just two weeks after the Senate adopted House Concurrent Resolution No. 108, which enunciated Congress’ determination to bring about a termination of federal responsibility to Indians.¹⁶

On the other hand, Public Law 90-284 (1968) clearly represents a return by Congress to the “pro-tribal self-government/preservation of Indian identity” policy and a rejection of the termination approach to Indian affairs.¹⁷

Even a cursory review of these acts will demonstrate Reynolds’ error. The effect of Public Law 83-280 was

(a) to confer on California, Minnesota, Nebraska, Oregon and Wisconsin civil and criminal jurisdiction¹⁸ over certain¹⁹ tribes and Indian lands within their borders;²⁰

(b) to give consent of the United States to states which were admitted to the Union under enabling acts containing disclaimers of jurisdiction over reservation lands²¹ and whose present constitutions disclaimed such jurisdiction, to repeal such disclaimers by constitutional amendment and to assert jurisdiction under the Act,²² and

(c) to give consent to all other states to acquire civil and criminal jurisdiction over reservation lands by affirmative legislative action whenever a state should desire to do so.²³

In contrast, Title IV of Public Law 90-284 repealed the key operative section of Public Law 83-280 to provide that states which had not already done so could in the future acquire civil and criminal jurisdiction over reservations “only after acquiring the consent of the tribes in the states by referendum of all reserved Indians.”²⁴ The Supreme Court has made it clear in *Kennerly v. District Court*²⁵ and *McClanahan v. Arizona Tax Commission*²⁶ that states which desire to acquire such jurisdiction and tribes which choose to accept state jurisdiction must follow to the letter the procedure established by Congress in Public Laws 83-280 and 90-284²⁷ or else no state jurisdiction will be recognized.²⁸

Similarly, Title II of Public Law 90-284 enacted a statutory “Bill of Rights” designed to afford certain basic rights of a “constitutional” nature to persons affected by “an Indian tribe in exercising its powers of self-government.”²⁹ This title clearly expressed congressional recognition of and commitment to the continuing exercise of powers of self-government by Indian tribes,³⁰ a notion which is flatly inconsistent with the termination policy underlying Public Law 83-280.

Aside from the acts themselves, Reynolds invokes only one other authority, a *Harvard Law Review* note,³¹ to sustain his reading of the trend in congressional policy evidenced by Public Law 83-280 and Public Law 90-284. That note does not support Reynolds’ interpretation.³²

The second proposition underlying Reynolds’ analysis is that “Indian tribes retain little governmental authority and derive what powers they do have by delegation from the states and the federal government.”³³ This proposition flies in the face of settled principles of federal law with respect to the source and status of tribal government powers. The basic framework remains as described by Felix Cohen: “Those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.”³⁴ This framework derives from Chief Justice Marshall’s landmark decision in *Worcester v. Georgia*³⁵ in which the Court held that Indian tribes were “. . . distinct political communities having territorial boundaries, within which their authority is exclusive. . . .”³⁶

The Supreme Court has consistently reaffirmed this basic framework. In *Williams v. Lee*,³⁷ the Court held that Arizona courts had no jurisdiction to hear a civil action brought by a non-Indian against

an Indian arising from an on-reservation transaction, and stated that the broad principles of *Worcester v. Georgia* continued to be accepted as law, except that the Court had “modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized.”³⁸ The Court went on to affirm the “right of reservation Indians to make their own laws and be ruled by them; . . .”³⁹ and stated:

There can be no doubt that to allow the exercise of state jurisdiction here would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations.⁴⁰

In *McClanahan v. Arizona Tax Commission*⁴¹ the Court reiterated the view originally expressed in *United States v. Kagama*⁴² that

Indian tribes were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.⁴³

In *United States v. Mazurie*,⁴⁴ the Court upheld a federal prosecution of a non-Indian for violation of a tribal ordinance regulating liquor sales as applied to the sale of alcoholic beverages from a plot of fee patented land located within the external boundaries of the Wind River Reservation. The Court stated that “. . . Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . [T]hey are a separate people possessing the power of regulating their internal and social relations. . . .”⁴⁵ The Court reversed the Tenth Circuit on the ground that the tribe’s preexisting police power jurisdiction to regulate the conduct of non-Indians within its reservation by enactment of regulatory ordinances validated Congress’ delegation of local responsibility for liquor sales regulation to the tribe.⁴⁶

Numerous lower federal court decisions reaffirm the status of Indian tribes as “distinct political communities” retaining powers of self-government except as such powers have been expressly abrogated by treaty or act of Congress.⁴⁷ In the face of these authorities, which predate his article, Reynolds’ references—three journal articles,⁴⁸ the 1973 Tenth Circuit decision in *United States v. Mazurie*,⁴⁹

and the Indian Reorganization Act⁵⁰—do not support his view⁵¹ that “Indian tribes retain little governmental authority and derive what powers they do have by delegation from the states and the federal government.”⁵² Neither the Oliver⁵³ nor Mundt⁵⁴ articles disavow the basic principles of federal Indian law set out *supra*, and the *Mazurie* decision was reversed in 1975.⁵⁵

Reynolds’ reliance on the Indian Reorganization Act to support the proposition that tribal powers of self-government are in decline is also misplaced. The purpose of the Act was to create a scheme by which the recognition and exercise of tribal government powers could be facilitated.⁵⁶ Reynolds’ interpretation of the Act as somehow curtailing the powers of tribes which choose to organize under its provisions may be rooted in his apparent misreading of note 29 in the Schaab article.⁵⁷

Reynolds also errs when he asserts that tribes organized under the IRA have only those powers “found in a constitution approved by the Secretary of the Interior”⁵⁸ and that IRA tribes enjoy more limited internal sovereignty than non-IRA tribes.⁵⁹ In fact, the IRA expressly recognizes that tribes which choose to organize under its provisions retain all powers of sovereignty which they possessed under existing law prior to such reorganization under the IRA. The Act accords those residual powers of sovereignty statutory recognition and confers certain specified rights and powers on tribes which invoke its provisions.⁶⁰

Accordingly, tribes whose existences were recognized by the federal government prior to their reorganization under the IRA⁶¹ may arguably be said to enjoy more limited internal sovereignty than non-IRA tribes only to the degree to which the exercise of any of the powers conferred by the IRA is subject to veto by the Secretary of the Interior. Furthermore, whether the Secretary of the Interior’s power to approve or disapprove certain actions by IRA tribes presents any greater impediment to the free exercise of such tribes’ governmental powers as compared to the non-IRA tribes is open to serious question.⁶²

Another error implicit in Reynolds’ argument is the assertion that the powers conferred by the IRA can only be obtained by a tribe which adopts a constitution and secures a federal (corporate) charter under its provisions.⁶³ There is nothing in the Act requiring tribes that organize under Section 476 (which provides for the adoption of a tribal constitution)⁶⁴ also to secure a federal corporate charter under Section 477.⁶⁵ The two sections are clearly independent and most tribes have chosen not to incorporate under Section 477.⁶⁶

Reynolds quotes from Schaab that “[t]he ordinary municipal cor-

poration has far more freedom of action than a tribal council under its constitution.”⁶⁷ The context in which this sentence appears in note 29 of the Schaab article suggests that Schaab meant this judgment to apply only to IRA-organized tribes which had also incorporated under Section 477 of the Act. When thus limited, Schaab’s observation has a great deal of practical truth—it is very difficult to act when major decisions must be approved by both a corporate board of directors (required under Section 477) and a tribal council (required by Section 476). However, only a few tribes have invoked both Sections 476 and 477 of the IRA.⁶⁸ Even as to those tribes which are so organized, the fact that they may labor under practical impediments to the exercise of their governmental powers in no way derogates from the existence of such powers.⁶⁹

More significantly, the claim that such tribes (Reynolds apparently makes the broader claim that these limitations apply to all tribes) may be less free to exercise their governmental powers than the “ordinary municipal corporation” does not speak to the more fundamental question of how the power of a municipal corporation to unilaterally initiate the zoning of land within its jurisdiction compares to the power of a tribe to do so.

An answer to this question is readily available. A municipality (whether or not it is incorporated) has no inherent police power sufficient to authorize the zoning of land within its jurisdiction.⁷⁰ On the other hand, the inherent police power jurisdiction of tribal governments over reservation land and persons on reservation land is well settled.⁷¹ That such police power includes the authority to zone reservation lands, consistent with federal law, seems equally clear.⁷²

In *Cowan v. Rosebud Sioux Tribal Court*,⁷³ involving the question of whether the Rosebud Sioux Tribe’s police power extended to the regulation of land use by enforcing terms in lease contracts against non-Indian lessees, the court stated:

... [T]he matter of use and regulation of tribal lands is a matter of tribal self-government and thus one properly left to the jurisdiction of tribal court[s].

The regulation of tribal property would seem to be one of the vestiges of tribal sovereignty and thus a matter of tribal self-government. Unquestionably a tribal government retains the powers of sovereignty over its land when those powers have not been specifically removed by Congress. . . . The fact that plaintiffs herein are not members of the Rosebud Sioux Tribe does not remove the jurisdiction of the Tribal Court over matters involving the use of tribal land.

While *Cowan* is not a reservation zoning case, the court's argument with regard to the scope of tribal police power in respect to reservation land-use regulation speaks directly to the question of whether a tribe may zone reservation land. Reynolds seems to concede that zoning of reservation land is within the power of tribal governments when he states, "... zoning . . . is comparable to taxation, grazing control, and hunting and fishing licensing—powers that have . . . often been recognized in the tribal governments."⁷⁴

The *Cowan* decision, when read in conjunction with *Williams v. Lee*,⁷⁵ *Olliphant v. Schlie*,⁷⁶ *Belgarde v. Morton*,⁷⁷ *Quechan Tribe v. Rowe*,⁷⁸ *Ortiz-Barraza v. United States*,⁷⁹ *United States v. Mazurie*,⁸⁰ and language in *Fisher v. District Court*,⁸¹ would suggest resolution of the issue of whether tribes may today assert regulatory authority to enforce a zoning ordinance over all persons within their territory (Indian or non-Indian) in favor of the tribes. This result follows without difficulty⁸² if one accepts the continuing validity of the Cohen framework:

So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign. . . . *It might punish aliens within its jurisdiction according to its laws and customs.* Such jurisdiction continues to this day, save as it has been *expressly limited* by the acts of a superior government.⁸³

In *Fisher v. District Court*, the Supreme Court upheld the Northern Cheyenne Tribe's assertion of exclusive jurisdiction over adoption proceedings involving a tribal member living on the reservation. Although this dispute involved no non-Indian parties, the Court unequivocally expressed the view that tribal jurisdiction is territorially based and not keyed to the race or tribal membership of the parties involved:

*Since the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, the jurisdiction of the tribal court is exclusive.*⁸⁴

Finally, we reject the argument that denying respondent access to the Montana Courts constitutes impermissible racial discrimination. *The exclusive jurisdiction of the Tribal Court does not derive from the race of the Plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under Federal Law.*⁸⁵

The third proposition which underlies Reynolds' argument is that "States may currently exercise police power over federal Indian reser-

uations.”⁸⁶ To support this position, Reynolds cites to Kane⁸⁷ who states that reservation land “has always been held to be ‘within the political and governmental boundaries of the state’ and consequently under the sovereignty of the state and the control of its laws.”⁸⁸ Kane invokes two lines of authority to support this contention. The first is a series of Arizona cases which do not address the question at issue: whether the state of Arizona may extend its police power jurisdiction over reservation land: *Porter v. Hall*⁸⁹ (Indians on reservations are residents of Arizona for voting purposes, but are “persons under guardianship” within the meaning of exception in the Arizona constitution restricting right to vote to persons not “under guardianship”); *Harrison v. Laveen*⁹⁰ (Indians on reservations are not “persons under guardianship” within the meaning of the Arizona constitution); and *Begay v. Miller*⁹¹ (Arizona courts will recognize divorce decrees granted by Navaho tribal courts).

The first two of these cases, and the erroneous *quid pro quo*⁹² analysis which Kane would have to have undertaken in order to view them as authority for the extension of state jurisdiction over reservation land, illustrate one of the more common mistakes to which those not schooled in “Indian law” may fall victim. In a nutshell, the *quid pro quo* analysis suggests that if a reservation Indian is entitled to the benefits of state citizenship (e.g., right to vote, to attend school, to attend state university at state resident tuition rates, etc.), then he “ought to be” or (as some would argue) “is” subject to the burdens of state citizenship (e.g., obligation to pay state taxes, to submit to state laws, etc.)

There are a number of problems with this simplistic argument, among which are the facts that it ignores the unique legal-political status accorded Indian tribes by the Constitution⁹³ and it is at war with the basic principles underlying modern federal Indian law.⁹⁴ The argument also fails to consider that many tribes were guaranteed exemption from the imposition of such burdens by treaty,⁹⁵ that many states were required to disclaim jurisdiction over Indian lands as a precondition to their entrance into the Union,⁹⁶ that subjecting reservation Indians to state law would require them to answer to three (or possibly four or five) levels of government, and that most reservation Indians have (by their very presence) manifested a preference for life under tribal/federal jurisdiction instead of state/federal jurisdiction.

These observations beg a number of obvious questions and raise several policy issues, which are analogous to those underlying Congress’ cyclical swings in federal Indian policy. The Supreme Court’s answer to this argument and to the above referenced Arizona case law

was announced in *McClanahan v. Arizona Tax Commission*⁹⁷ where the Court held that with respect to the Navaho reservation, “. . . the state is totally lacking in jurisdiction over both the people and *the lands*. . . .”⁹⁸ The Court went on to restate the general rule that “state laws do not apply to tribal Indians on Indian reservations except when Congress has expressly provided that state law shall apply.”⁹⁹

While *McClanahan* may turn to some extent on the content of treaties between the United States and the Navaho Nation, and the doctrine of tribal sovereignty,¹⁰⁰ the Court made it clear¹⁰¹ that the failure of the state to formally acquire jurisdiction over the Navaho reservation, in accord with the procedure established by Congress in Public Laws 83-280 and 90-284, was itself sufficient to rebut the state’s claim of jurisdiction.

This alternative basis for the *McClanahan* decision rests on the theory that states may not assert jurisdiction¹⁰² over territory within the borders of a reservation without prior federal consent, which can, in general, be obtained only by compliance with “a governing act of Congress.”

The phrase, “governing act of Congress,” is taken from an earlier test for deciding jurisdictional conflicts between states and tribes announced in *Williams v. Lee*: “Essentially, absent governing acts of Congress, the question has always been whether [a state] action infringed on the right of reservation Indians to make their own laws and be ruled by them.”¹⁰³

By labeling Public Law 83-280, as amended, “a governing act of Congress,” *McClanahan* reduces the *Williams v. Lee* test to an empty formula as applied to state-tribal power clashes *vis-à-vis* the regulation of on-reservation activities, where the outcome in a given case turns solely on whether the state has formally acquired jurisdiction under Public Law 83-280.¹⁰⁴ If the answer to this question is no, the state has no jurisdiction. If yes, there follows an additional level of analysis which looks to the status of tribal governments under state law as envisioned by the relevant federal policy and shaped by the degree to which the basic framework of federal Indian law remains applicable.¹⁰⁵

In recognition of the above, the courts since *McClanahan* have consistently denied state jurisdiction over reservation lands where the state has not acquired jurisdiction through the Public Laws 83-280/90-284 procedure or comparable act of Congress.¹⁰⁶

Given these decisions, no state which has not acquired such jurisdiction over a given reservation can today successfully assert the power to zone that reservation.

The second line of cases which Kane invokes to support the conten-

tion that state laws may be enforced on reservation lands consists of *United States v. Minnesota*¹⁰⁷ (Minnesota may not acquire highway right-of-way over reservation land by eminent domain) and *Utah Power & Light Co. v. United States*¹⁰⁸ (state laws, including those relating to the power of eminent domain, have no application to United States forest lands except as they have been adopted or made applicable by Congress). These cases simply do not stand for the principle for which they were cited.¹⁰⁹ Also, the rules of substantive law applicable to “public lands” (such as the forest lands involved in the *Utah Power* case) are not synonymous to those applicable to reservation lands, and the differences cut against rather than for state claims to jurisdiction.¹¹⁰

Further, the *Utah Power* case makes it clear that where Congress has exercised its power with respect to land in which it has an interest (such as tribal trust land), neither a state nor any of its agencies has power to interfere because Congress has preempted the field.¹¹¹ That Congress, as contrasted with the states, has preempted the field as regards Indians affairs and the regulation of the use and disposition of tribal property and lands is hardly open to question at this late date.

Reynolds’ view that states have traditionally possessed broad police powers over the land within their borders apparently also relies on Kane. It is of interest that Kane, in the same article quoted by Reynolds, states that “a state court without Federal authorization may not enforce its decrees within an Indian reservation,”¹¹² and that “25 U.S.C. § 231¹¹³ seems to be a clear indication of Congressional intent that other types of state officials are prohibited from entering Indian reservations to enforce state laws without tribal consent or Federal statutory authority to do so.”¹¹⁴

Reynolds’ view of the necessity of state regulation of reservation land to achieve regional planning objectives is attributed to an *Arizona Law Review* note¹¹⁵ where the language referenced by Reynolds refutes the very contention for which the article was cited:

Logically, legislative designs for improvement of the health, education and welfare of the community can hardly be effective where a large contiguous area and population is not subject to regulation. Yet, *Indian communities are not subject to state zoning regulation and, in fact, often have conflicting rules.*¹¹⁶

Reynolds’ belief in the paramount authority of a state to prevent environmental damage is also unsupported. He cites only *Department of Game v. Puyallup Tribe*.¹¹⁷ This case addressed the issue of how to resolve a conflict between state police power regulation and

tribal treaty rights as regards off-reservation fishing,¹¹⁸ and the dicta¹¹⁹ for which Reynolds cites the case is not authority for the contention that a state may exercise its police power over reservation lands—even to forestall environmentally offensive conduct.

Reynolds has not made a case for the proposition that states may exercise police power jurisdiction to regulate the land-use conduct of persons on reservation lands by zoning in the absence of an express grant of such jurisdiction by Congress. This leaves the regulation of reservation land-use in the hands of the federal and tribal governments.

There remains the issue of whether those few states which have validly acquired general civil or criminal jurisdiction over reservation land may zone such land. This issue will be explored in the following section.

*The Reservation Zoning Cases*¹²⁰

Reynolds observes that “[a]fter the . . . federal legislation [Public Law 83-280] giving some states civil jurisdiction over Indian lands, the possibility became stronger that, within the *limits* of the legislation, the state and its localities could zone the reservation.”¹²¹

Although Reynolds’ article focuses on *Agua Caliente Band of Mission Indians Tribal Council v. City of Palm Springs*,¹²² the first case to address the issue of whether any limits to state jurisdiction obtained under Public Law 83-280 might bar the enforcement of a state authorized zoning ordinance on reservation land is *Snohomish County v. Seattle Disposal Co.*¹²³ In *Snohomish* the Supreme Court of Washington held that a county zoning ordinance was not enforceable in a civil action against a non-Indian lessee operating a garbage dump on reservation land on the ground that enforcement of the ordinance would, in effect, impose an “encumbrance” on the reservation land, and was, therefore, prohibited by the Public Law 83-280 savings clause.¹²⁴

The majority, relying primarily on *Squire v. Capoeman*,¹²⁵ argued that application of a zoning ordinance to reservation land, so as to prohibit or limit the use to which that land could be put, would reduce its value and thereby constitute an “encumbrance” on the land within the meaning of Public Law 83-280.¹²⁶ This interpretation has come to be termed the expansive view of the “encumbrance” clause¹²⁷ and reflects recognition of the current policy of furthering tribal self-government.¹²⁸ Judge Hale’s dissent, in contrast, has been termed the “narrow” view of the “encumbrance” clause.¹²⁹

The Supreme Court denied certiorari in *Snohomish* with Justices

Douglas and White dissenting.¹³⁰ The dissenting justices endorsed Judge Hale's view that a county zoning ordinance as applied to a non-Indian lessee would not constitute an encumbrance on reservation land, and indicated support for Judge Hale's argument that Indian immunity should not be allowed to frustrate state efforts to curb air and water pollution.¹³¹ The dissenting opinion also argued that it was an important federal question whether the state of Washington might already prohibit the spread of smoke from an on-reservation garbage dump through jurisdiction which might be conferred under Section 231 of Title 25 of the United States Code (1970).¹³²

Finally, the dissenting justices noted that to the degree that Section 1.4 of Title 25 of the Code of Federal Regulations (which prohibits the enforcement of state land-use regulations on reservation lands leased to non-Indians or Indians) might be found to infringe on the state jurisdiction conferred by Public Law 83-280 and Section 231, a federal question was presented which cast doubt on the validity of Section 1.4.¹³³

Significantly, the question of whether a county zoning ordinance authorized by state law is encompassed within the state grant of authority as to civil actions arising in Indian country¹³⁴ was not addressed in *Snohomish* at any stage. The Washington court and dissenting Justices Douglas and White apparently assumed that county ordinances were to be accorded the same treatment as state laws of general application under the statute.¹³⁵

Subsequent to the denial of certiorari in *Snohomish*, a number of federal district court decisions addressing the "reservation zoning issue" as regards Public Law 83-280 states (or the analogous question of whether state or local police power regulations which affect reservation land-use could be enforced on Public Law 83-280 reservations) were announced.¹³⁶ Each of these decisions adopted the "narrow" view of the "encumbrance" clause and relied heavily on the assimilationist character of Public Law 83-280¹³⁷ to support the view that Congress had intended by the Act to subject reservation Indians to state law as extensively as possible consistent with the "narrow" limits to state jurisdiction which they found in the savings clause. By and large, all of these cases tracked the *Snohomish* dissents of Judge Hale and Justices Douglas and White on this point.

Of the reported decisions, only *Rincon* (cited at note 136) addressed the issue of whether county (penal) ordinances should be held to be "criminal laws" of a state within the meaning of Section 1162(a) of Title 18 of the United States Code.¹³⁸ The court answered this question in the affirmative, relying largely on California case

law¹⁸⁹ and the unreported decision of *Madrigal* (cited at note 136), which had found that a county rock festival regulatory (criminal) ordinance was a criminal law of the state within the meaning of Public Law 83-280.¹⁴⁰

In *Rincon* the Court, again relying on *Madrigal* and continuing to track the *Snohomish* dissent of Justices Douglas and White, also held that “[25 C.F.R.] § 1.4 was void insofar as it purports to enlarge or restrict the scope of jurisdiction afforded by Public Law 280.”¹⁴¹ This result was reached to meet the tribe’s argument that to enforce the challenged ordinance on the Rincon reservation would be inconsistent with Section 1.4 and, therefore, such enforcement was barred by the second part of the savings clause in Section 1162(b), which prohibits state regulation of reservation land “in a manner inconsistent with any federal treaty, agreement or statute or with any regulation made pursuant thereto.”¹⁴²

Three years later in *Norvell* (cited in note 136), the Federal District Court of New Mexico relied on *Rincon* to hold again that Section 1.4 was invalid to the degree that it conflicted with jurisdiction conferred on states under Public Law 83-280, thereby authorizing enforcement of state land-use regulations against a non-Indian-owned corporation operating on leased reservation land.¹⁴³

Given the above, it is perhaps understandable why Reynolds should assert that the *Agua Caliente* decision had “. . . adopted what seems the majority and stronger view—‘encumbrance’ means some burden on alienability, not merely an encumbrance on use. This is in line with authority that ‘encumbrance’ does not cover an exercise of the police power. . . .”¹⁴⁴

No sooner had Reynolds’ article been set to print than were *Madrigal*, *Ricci*, *Rincon*, *Agua Caliente*, and *Norvell* reversed—each on grounds other than the merits.¹⁴⁵ At that juncture (as of January, 1975), the only reported case that had addressed the encumbrance issue and which had not been reversed was the *Snohomish* decision of the Supreme Court of Washington, which had adopted the “expansive” view of the encumbrance clause.¹⁴⁶ Because it seems clear that the *Snohomish* (Washington) majority would have held *contra* to each of the federal district court decisions discussed *supra*, and because none of these cases had been reversed on the merits, the state of the law on this issue after eight years of litigation was less clear than before the *Snohomish* decisions had been announced in 1967.

Similarly, because there had been no decisions *contra* (1) to the *Rincon*¹⁴⁷ holding that county ordinances should be treated as state laws under Public Law 83-280, and (2) to the *Rincon* and *Norvell*¹⁴⁸

holdings that 25 C.F.R. § 1.4 was invalid to the degree that it was inconsistent with state jurisdiction (which these decisions had held to be conferred by 18 U.S.C. § 1162), these questions were also unresolved.

Each of these issues was recently addressed in an unreported (as of yet) Ninth Circuit decision in *Santa Rosa Band of Indians v. Kings County*.¹⁴⁹ In *Santa Rosa*, the court focused on the question of whether a state-authorized county zoning ordinance and building code can be applied and enforced on a reservation over which a state has acquired civil and criminal jurisdiction under Public Law 83-280 so as to regulate Indian use of Indian trust lands. The court's answer to this question is a firm and unequivocal "no."

The *Santa Rosa* decision¹⁵⁰ articulated four distinct bases for its denial of state power to authorize the enforcement of a county zoning ordinance on Public Law 83-280 reservations.¹⁵¹

(1) Since County ordinances are not "civil laws of the state that are of general application within the state" within the meaning of 28 U.S.C. § 1360(b), such ordinances cannot be applied to reservations pursuant to jurisdiction acquired thereunder.

(2) Even if county zoning ordinances were held to be "civil laws of the state," such ordinances are not enforceable on reservation land since such enforcement is prohibited by 25 C.F.R. § 1.4 (barring application of state land-use regulations to leased reservation land), which is a reasonable and valid regulation enacted pursuant to the Secretary of the Interior's statutory authority, and may (alternatively) be justified as an administrative interpretation of the term "encumbrance" in 28 U.S.C. § 1360(b).

(3) An ordinance regulating reservation land-use conduct constitutes an encumbrance on such land and is prohibited by 28 U.S.C. § 1360(b).

(4) Application of the ordinance on the facts of this case is prohibited by 28 U.S.C. § 1360(b) since the ordinance interferes with Federal efforts to upgrade reservation housing and sanitary conditions.

The *Santa Rosa* decision reflects the Ninth Circuit's belief (even given Public Law 83-280) in the continued vitality of certain basic principles of federal Indian law which it considered and affirmed in the context of the factual situation before it: the notion of federal preemption of the regulation of reservation land,¹⁵² the principle that ambiguities in statutes affecting Indian rights should be resolved in favor of the Indians,¹⁵³ the right of reservation Indians to be self-

governing;¹⁵⁴ and (consistent with federal law and policy) to control the development of reservation resources;¹⁵⁵ the principle that states have no inherent police power jurisdiction over reservations and can exercise only such jurisdiction over reservations as the federal government grants them;¹⁵⁶ the doctrine of inherent tribal sovereignty as a basis for tribal self-determination.¹⁵⁷

On the role of tribal governments under Public Law 83-280 jurisdiction, the court stated:

*[E]xtension of local jurisdiction is inconsistent with tribal self-determination and autonomy.*¹⁵⁸

We think it more plausible that Congress had in mind a distribution of jurisdiction which would make the tribal government over the reservation more or less the equivalent of a county or local government in other areas of the state, empowered subject to the paramount provisions of state law, to regulate matters of local concern within the areas of its jurisdiction.¹⁵⁹

After *Santa Rosa*, assuming it is not overturned, no state within the Ninth Circuit can, if challenged, successfully assert the authority to zone reservation land even if it has acquired Public Law 83-280 jurisdiction, whether or not it does so directly or through a state-authorized local zoning ordinance. Furthermore, although the court emphasized at the outset of its decision, “that this suit involves an attempt to regulate Indian land use of Indian trust lands,”¹⁶⁰ the various rationales offered to prohibit enforcement of a county zoning ordinance on reservation land apply with equal force to prohibit state regulation of non-Indian as well as of Indian land users of land falling within the territorial jurisdiction of tribal governments.¹⁶¹ It also seems clear¹⁶² that the Ninth Circuit would treat “penal” zoning ordinances (which authorize criminal sanctions) sought to be enforced against on-reservation land users pursuant to state criminal jurisdiction acquired under 18 U.S.C. § 1162,¹⁶³ just as it did the “civil” zoning ordinance in *Santa Rosa*, which the state argued was enforceable against reservation land users via state civil jurisdiction acquired under 28 U.S.C. § 1360.¹⁶⁴

Three additional points should be noted. The first is that the federal courts have consistently interpreted the savings clause in 18 U.S.C. § 1162(b)¹⁶⁵ so as to prohibit state regulation of tribal rights such as the right to hunt, fish, or trap (on or off the reservation)¹⁶⁶ or to regulate such activities on the reservation,¹⁶⁷ where such rights are recognized by federal treaty, agreement, or statute. This question was not considered in any of the cases discussed above.

The second point is that the Tenth Circuit has held in *Davis v. Morton*¹⁶⁸ that the leasing of reservation land (which requires federal approval) constitutes major federal action within the meaning of the National Environmental Policy Act (NEPA),¹⁶⁹ and accordingly, that NEPA regulations must be complied with before such a lease can be consummated. While the *Davis* holding would not require all leases of reservation land to comply with NEPA, *e.g.*, as in the leasing of three acres to an Indian family as a garden plot,¹⁷⁰ it is clear that major leases of the type there involved (a 99-year lease of 5,400 acres of land sufficient to support development of a community of 15,000 persons), and comparable leases to potentially polluting industrial developers, are covered.¹⁷¹

Accordingly, *Davis* somewhat diffuses the “environmentalist” argument that state zoning authority is necessary to protect state citizens and the off-reservation environment from reservation-based, environmentally offensive activities. It should also be noted that reservation Indians themselves have an obvious stake in preserving the environment in which they live, and that Indian tribes have a history of according respect to the environment which long preexists that of even the most well-established non-Indian environmental protection organizations.¹⁷²

Finally, securing a general resolution of the “reservation zoning issue” along the lines suggested by *Santa Rosa* has more important implications for the future of tribal governmental authority to control reservation development efforts in Public Law 83-280 states than might be suggested by Reynold’s analysis of the issue. This is because Reynolds’ analysis proceeds on the unstated premise that what one means by zoning is “static districting or platting of lands.”¹⁷³ The stakes riding on resolution of the reservation zoning issue are obviously much higher to both the states and the tribes when one openly acknowledges that “zoning as platting” is only one of the many land-use regulatory tools now available to a governmental entity having police power jurisdiction over a given land area,¹⁷⁴ and that an affirmative answer to the question of whether states can zone reservation land is likely to be simply a prelude to state (or non-Indian environmentalists) attempts to assert control over the development of mineral resources, water, gas and oil, etc., on reservations.¹⁷⁵

Reynolds undoubtedly recognizes this, but his analysis obscures more than clarifies the bridge between state power to zone reservation land, state power to control the development and use of other reservation resources, and state (or non-Indian) desires to secure control over such resources.¹⁷⁶

Conclusion

The basic question which Reynolds addresses is whether a state may authorize the zoning of federal Indian reservation land. Although Reynolds ultimately suggests that tribal governments ought to be treated as municipalities as regards the power to enact local zoning ordinances, this suggestion rests on the prior conclusion that states do have authority to regulate land-use conduct on reservations. That conclusion is erroneous.

In accord with the fundamental principles of federal Indian law, principally the doctrines of inherent tribal sovereignty and the plenary power of Congress over Indian affairs, states are prohibited from zoning reservation land absent express congressional authorization to do so. After the *Santa Rosa* decision, so long as it is not reversed by the United States Supreme Court, no state affected thereby can successfully claim that Public Law 83-280 grants the requisite federal authorization to zone reservation land, either directly or through the enactment of local zoning ordinances.

If reservations are to be zoned, it lies with the tribal governments or the federal government to zone them. The unfortunate record of the federal government in looking out for the interests of American Indians, the current federal policy of Indian self-determination, and the desire of reservation Indians to be self-governing argue for leaving determination of the reservation zoning issue in the hands of tribal governments.

Two recent expressions of federal policy would seem to mandate this resolution of the issue. In 1970, President Richard M. Nixon called for formal establishment of the principle of Indian self-determination as federal policy:

It is long past time that the Indian policies of the Federal Government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which *the Indian future is determined by Indian acts and Indian decisions*.¹⁷⁷

President Nixon's call for a federal commitment to the principle of Indian self-determination has been answered by Congress:

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establish-

ment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.¹⁷⁸

Proper recognition of Indian tribes as governments requires that they—not states, nor municipalities, nor county governments, nor even the federal government—decide, on consideration of the costs and benefits as measured by the values of tribal members resident on their reservations, if there is to be formal regulation of reservation land-use through zoning, and if so, what the nature of that regulation shall be. The authority of the tribes to enforce such land-use regulations against all persons engaged in on-reservation conduct affecting reservation land and resources should also be recognized.

NOTES

1. Reynolds, *Zoning the Reservation—Village of Euclid Meets Agua Caliente*, 2 AM. INDIAN L. REV. 1 (No. 2 1974) [hereinafter cited as Reynolds].

2. Reynolds' article does not focus on practical problems which might be encountered by a state in attempting to enforce a zoning ordinance on an Indian reservation. Reynolds does briefly acknowledge such practical enforcement problems: "Actual enforcement of any land policy can often be best achieved at a local level. . . . [t]he very distrust of state and local law, and the history behind it, argue against an application of such law to the reservation without local participation." *Id.* at 11. See U.S. CODE CONG. & ADMIN. NEWS, 83d Cong., 1st Sess., 2313-14 (1953) (noting the dissatisfaction of reservation Indians over unilateral assertion of state jurisdiction over their reservations due to mistreatment or fear of mistreatment by state law enforcement personnel).

3. This note will assume Reynolds' definition of the term "Indian reservation," which limits the discussion to federal Indian reservations occupied by federally recognized tribes. Reynolds' definition is taken from *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd per curiam*, 373 U.S. 758 (1973). The Department of the Interior's longstanding administrative distinction between "recognized" and "nonrecognized" tribes has recently been declared an invalid basis for an Interior Department decision not to enforce trust obligations imposed on the federal government in respect to tribal land by 25 U.S.C. § 177 and its antecedents. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me. 1975), *aff'd*, 528 F.2d 370 (1st Cir. 1975).

4. Reynolds, *supra* note 1, at 11 (emphasis added).

5. *Id.*

6. *Id.* at 10. The statements in Reynolds' article from which this proposition is abstracted are: (1) "Congressional legislation in 1953 gave Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin general jurisdiction over the boundaries of those states. Congress has now authorized all states, with tribal consent, to assume general jurisdiction over tribes and reservations." (Footnotes omitted.) Reynolds, *supra* note 1, at 3. (2) ". . . the legislation means that tribes can no longer exercise governmental authority free from state supervision." *Id.*; (3) "It seems clear that the general

tendency is to increase state control over reservations, and to allow within such areas state exercise of police power except as clearly limited by statute or treaty." *Id.* at 4; (4) ". . . the handwriting is on the wall; the federal government . . . is relinquishing much of its jurisdiction and generally relinquishing it to the *states*, not the tribes." *Id.* at 10.

7. Act of Aug. 15, 1953, 67 Stat. 588 (1953); Section 2 of the Act codified at 18 U.S.C. § 1162 (1970); Section 4 of the Act codified at 28 U.S.C. § 1360 (1970).

8. Act of Apr. 11, 1963, 82 Stat. 77 (1968); Titles II, III, IV, and V of the Act codified at 25 U.S.C. §§ 1301-1303, 1311, 1312, 1321-26, 1331, 1341 (1970).

9. Henderson & Barsh, Part II, *The Courts and the Indian Tribes*, HARVARD LAW SCHOOL BULLETIN, 10-15, 13 (June, 1974); Comment, *State Jurisdiction over Indian Land Use: An Interpretation of the "Encumbrance" Savings Clause of Public Law 280*, 9 LAND AND WATER L. REV. 421, 424-29 (1974) [hereinafter cited as Comment]; *The Indian Bill of Rights and the Constitutional States of Tribal Governments*, 82 HARV. L. REV. 1343 (1968).

10. Comment, *supra* note 9, at 424-29.

11. *Id.* at 424.

12. Note, *The Extension of County Jurisdiction Over Indian Reservations in California: Public Law 280 and the Ninth Circuit*, 25 HASTINGS L.J. 1451, 1467 (1974). But note that some commentators and two recent decisions have also argued that Pub. L. 83-280 can be legitimately termed a "law and order" act designed to provide better law enforcement on reservations. See note 10 *supra* and note 120 *infra*. See also Bryan v. Itasca County, 44 U.S.L.W. 4832 (U.S. June 14, 1976); Santa Rosa Band of Indians v. Kings County, No. 74-1565 (9th Cir., Nov. 3, 1975).

13. SECRETARY OF THE INTERIOR ANNUAL REPORT 221 (1954).

14. H. REP. No. 848, 83d Cong., 1st Sess., 1 (1953).

15. S. REP. No. 699, 83d Cong., 1st Sess., 5 (1953).

16. H. CON. RES. No. 108, 83d Cong., 1st Sess. (1953).

17. Santa Rosa Band of Indians v. Kings County, No. 74-1565, p. 12 (9th Cir., Nov. 3, 1975); Note, *The Extension of County Jurisdiction over Indian Reservations in California*, 25 HASTINGS L.J. 1451, 1472 (1974); Reiblich, *Indian Civil Rights under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617 (1968).

18. The jurisdiction was conferred subject to a saving clause which provides that nothing in Pub. L. 83-280 is to be read as authorizing "the alienation, encumbrance, or taxation of Indian property." 18 U.S.C. § 1162(b) (1970); 28 U.S.C. § 1360(b) (1970). Discussion of the significance of this clause as regards the reservation zoning issue is *infra* in this note. Comparable jurisdiction was conferred on Alaska by Pub. L. 85-615, 72 Stat. 545 (1958).

19. The Red Lake Reservation of Minnesota, the Warm Springs Reservation of Oregon, and the Menominee Reservation of Wisconsin were expressly excepted from state jurisdiction under Pub. L. 83-280. See the note cited at *supra* note 12. See also 67 Stat. 588 (1953) §§ (a) and 4(a). These reservations contained the largest concentrations of tribal lands and the most populous tribes in these states.

The Menominee Tribe was later terminated and placed under Wisconsin jurisdiction by the Act of Aug. 24, 1954, 68 Stat. 795. The Menominees regained their tribal status and their reservation was again placed under federal jurisdiction in 1973. 25 U.S.C. §§ 903(a)-903(f) (1975 Supp.).

20. 67 Stat. 588, § 2(a) and 4(a). See 18 U.S.C. § 1162(a) (1970); 28 U.S.C. § 1360(a) (1970).

21. It is not certain how many states fall into this category, as the enabling acts and constitutions of most states are open to varying interpretations. One study lists the

following states as having been admitted to the Union on the condition that they disclaim jurisdiction over reservation lands: Washington, Oklahoma, Montana, North Dakota, South Dakota, Idaho, Wyoming, Utah, New Mexico, Arizona, Alaska, Kansas. Henderson, *Indian Statehood: Reconsidered*, unpublished third-year paper, Harvard Law School (1974). (The author notes that the disclaimer is stated most forcefully in the Kansas Enabling Act. 12 Stat. 85 (1864).)

22. 67 Stat. 588, § 6.

23. 67 Stat. 588, § 7.

24. 82 Stat. 77, 401; 1968 U.S. CODE CONG. & ADMIN. NEWS, p. 1865 (emphasis added).

25. 400 U.S. 423 (1971).

26. 411 U.S. 164 (1973).

27. *Kennerly v. District Court*, 400 U.S. 423, 429 (1971): "Legislative action by the Tribal Council does not comport with the explicit requirements of the act."

28. *Id.* See *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 177 n.17 (1973).

29. 25 U.S.C. §§ 1301-1302. This legislation was felt necessary because "the Federal Courts generally have refused to impose constitutional standards on Indian Tribal governments, on the theory that such standards apply only to state or Federal governmental action, and that Indian tribes are not states within the meaning of the 14th Amendment." 1968 U.S. CODE CONG. & ADMIN. NEWS, p. 1864. See Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969).

30. Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D.L. REV. 337, 347-48 (1969). See note 17 *supra*. This interpretation lends support to the view that Congress intended only a limited role for the federal courts *vis à vis* tribal governments under ICRA—principally through the habeas corpus provision, 25 U.S.C. § 1303, and that the federal courts have improperly asserted jurisdiction to hear civil actions for damages claimed to arise under the Act, and have erroneously read the Act as waiving tribal sovereign immunity from damage suits, thereby infringing on tribal sovereignty and jeopardizing the capacity of tribes to operate as viable governmental entities to a far greater extent than Congress intended when enacting Pub. L. 90-284. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D.L. REV. 1 (1975). But see De Raimes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D.L. REV. 59 (1975).

31. Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969). It should be noted that this source contains two substantial errors. The first was directly incorporated into Reynolds' argument and the second may have influenced it. The first error is the observation that "the following states have been given jurisdiction by Federal Statute over the reservations within their borders: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. . . . The tribes within these states no longer exercise governmental functions independent of the state" (emphasis added). *Id.* at 1343 n.2. As was pointed out in note 19 *supra* the major reservations in Minnesota, Oregon, and Wisconsin were excepted from the automatic imposition of state jurisdiction under Pub. L. 280.

The second error is an inaccurate citation identifying 67 Stat. 588 as the "Act of August 15, 1963" (emphasis added), *id.* at 1343 n.2, when the correct date for 67 Stat. 588 is 1953 (see note 7 *supra*). This 10-year error may very well have contributed to Reynolds' conclusion that Pub. L. 83-280 and Pub. L. 90-284 constituted a "recent" trend in congressional termination policy as regards Indian affairs.

32. "Historically the federal government's Indian policy has fluctuated radically

between protection of tribal existence and assimilation. . . . The requirement of tribal consent for state assumption of jurisdiction, passed with the Indian Bill of Rights, 25 U.S.C.A. §§ 1321-1322 (Supp. 1969), and actions of the Committee investigating the bill . . . show the present policy to be favorable to the preservation of tribal communities as self-governing, culturally autonomous entities." *Id.* at 1344-45 n.8.

33. Reynolds, *supra* note 1, at 4. The statements from which this proposition is abstracted are: (1) ". . . to refer to tribal governments as sovereign, or even internally sovereign, is today often misleading. Basically, the tribes' powers these days cover such matters as form of tribal government, conditions of tribal membership, and taxation, with at least some authority also existing as to property regulation and administration of justice." (Footnotes omitted.) (2) "But, since the passage of 1934 legislation, a tribe's rights of self government are only those found in a constitution approved by the Secretary of Interior and in the corporate charter given the tribe by the Secretary." *Id.* at 5. (3) ". . . any reference to tribal sovereignty can mean no more than that the federal and state governments have delegated to the tribes certain of their powers over land and taxation." (Footnotes omitted.) *Id.* (4) "The Indian Reorganization Act did not apply to any reservation where a majority of the adult Indians voted against it. The Navajos rejected the Act and thus enjoy less limited internal sovereignty." *Id.* at 13 n.36. (5) "The ordinary municipal corporation has far more freedom of action than a tribal council under its Constitution." (Footnote omitted.) *Id.* at 5.

34. F. COHEN, *FEDERAL INDIAN LAW* 122 (1945 ed.); Office of the Solicitor, *Federal Indian Law* 395 (1966) [hereinafter cited as COHEN].

35. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (Georgia state courts do not have jurisdiction to punish a non-Indian for conduct within territorial jurisdiction of Cherokee Nation; fact that Cherokee territory was within borders of state irrelevant); 55 I.D. 14, 53 n.34 (1934).

36. *Id.* at 557.

37. 358 U.S. 217 (1959).

38. *Id.* at 219.

39. *Id.* at 220.

40. *Id.* at 223.

41. 411 U.S. 164 (1973) (Arizona has no jurisdiction to impose individual income tax on reservation Navaho Indians with respect to income wholly derived from reservation sources).

42. 118 U.S. 375, 381-82 (1886).

43. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 175 (1973).

44. 419 U.S. 544 (1975).

45. *Id.* at 557 (emphasis added).

46. The Tenth Circuit had held this delegation to be invalid on the ground that "Congress cannot delegate its authority to a private, voluntary organization, which is obviously not a governmental agency, to regulate a business on privately owned lands, no matter where located." 487 F.2d 14, 19 (10th Cir. 1973).

47. *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir., 1975); *Native American Church v. Navajo Tribe*, 272 F.2d 131, 134 (10th Cir. 1959); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 94 (8th Cir. 1956).

48. *Mundt, Indian Autonomy and Indian Legal Problems*, 15 KAN. L. REV. 505 (1967) [hereinafter cited as *Mundt*]; *Schaab, Indian Industrial Development and the Courts*, 8 NATURAL RESOURCE J. 303 (1968) [hereinafter cited as *Schaab*]; *Oliver, Legal Status of American Indian Tribes*, 38 ORE. L. REV. 193, 225-26 (1959) [hereinafter cited as *Oliver*].

49. 419 U.S. 544 (1975). See note 46 *supra*.

50. 25 U.S.C. §§ 461-79 (1970).

51. Reynolds' suggestion that tribal powers are powers delegated by the federal government has some support. See 18 U.S.C. § 1161, upheld in *United States v. Mazurie*, 419 U.S. 544 (1975), but only with respect to express delegations of specific federal powers by Congress to tribes. The suggestion that tribal powers may be considered as delegated by states has absolutely no foundation, e.g., *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973).

52. See note 32 *supra*.

53. Oliver, *supra* note 48, at 225, states that "[the] Courts have ordinarily, if not uniformly, proceeded upon the recognition of an unextinguished 'limited sovereignty,'" and he quotes Cohen for the proposition that "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." Oliver does go on to suggest that the restrictions on tribal government action imposed by "Federal powers over the tribe" make "tribal sovereignty seem . . . a fantasy." *Id.* at 232. But he never disavows the basic notion of tribal government sovereignty as described by Cohen.

54. Mundt, *supra* note 48, at 505, offers Reynolds even less support. Mundt quotes with approval the same passage from COHEN which I have cited to note 34 *supra* (describing the basic framework of tribal government sovereignty). Mundt then states, "[T]hus residual jurisdiction appears to lie in the tribal courts based on the sovereignty of tribes" (emphasis added). *Id.* at 506. At no point does Mundt suggest that tribes do not retain their inherent powers of sovereignty.

55. 419 U.S. 544 (1975).

56. Henderson & Marsh, *Part II, The Courts and the Indian Tribes*, HARVARD LAW SCHOOL BULLETIN, 10-15, 12 (June, 1974).

57. Schaab, *supra* note 48, at 311 n.29.

58. Reynolds, *supra* note 1, at 5.

59. *Id.*

60. 55 I.D. 14 (1934). Schaab's suggestion, to the contrary, must give way to the language of the statute. Schaab, *supra* note 48, at 311-12.

61. See discussion on such tribes and the various types of governmental structures and charters which they had in FEDERAL INDIAN LAW 408 (1966).

62. There is some evidence to suggest that current Interior policy as to the scope of Secretarial approval power regarding resolutions and ordinances adopted by IRA (and non-IRA) tribes is limited to the question of whether the action sought to be taken by the tribe is consistent with federal law, and that in most cases, such "approval" follows as a matter of course once this threshold question is answered in the affirmative. See 55 I.D. 14, 15, 1955 (1934). See also *Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1972).

It is undoubtedly true that for IRA (and non-IRA) tribes where tribal leadership has not been sufficiently forceful or sophisticated, or where the political and economic stakes and pressures brought to bear on the Interior Department are unusually high, e.g., as in respect to issues regarding control of water or mineral resources on and adjacent to western reservations, the scope of federal "approval" authority exercised by the Bureau of Indian Affairs has often (if not systematically) exceeded that described above. See Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1824 (1968); THE NAVAJO NATION: AN AMERICAN COLONY: A REPORT OF THE UNITED STATES COMM'N ON CIVIL RIGHTS, 9 (Sept. 1975). However, in three years (1971-1974) as Planning Coordinator for the Tribal Council, Mississippi Band of Choctaw Indians (a tribe not recognized prior to its organization under IRA in 1945), the author of this note did not observe a single instance out of hundreds of

tribal council actions—including a resolution to remove the local non-Indian BIA Superintendent—being vetoed by the Secretary of the Interior. (The Superintendent was removed and replaced with a Mississippi Choctaw selected by the Tribal Council.)

The strong Choctaw tribal government to which the above observations attest is in large part attributable to Philip Martin, former Choctaw Tribal Chairman (1959-1966, 1971-1975), and his undeviating commitment to substituting tribal control for federal management of the Choctaw Reservation. See ACCELERATED PROGRESS THROUGH SELF-DETERMINATION, FIRST ANNUAL REPORT OF THE CHOCTAW SELF-DETERMINATION REPORT, Mississippi Band of Choctaw Indians (1972). The Mississippi Choctaws are now fighting for their survival as a tribe and for their retention of “trust status” land in litigation arising from an attempt by the state of Mississippi to assert control over the Choctaw Reservation through the imposition of state taxes on reservation activities by the tribal construction company. *United States v. Mississippi Tax Comm’n*, 505 F.2d 633 (5th Cir. 1974), *judgment vacated*, Apr. 11, 1975, *reh. denied*, July 19, 1976.

63. Reynolds *supra* note 1, at 5.

64. 25 U.S.C. § 476 (1970).

65. 25 U.S.C. § 477 (1970).

66. See FAY, OCCASIONAL PUBLICATIONS IN ANTHROPOLOGY. *Charters and Bylaws of Indian Tribes of North America*, part I-X (1970).

67. Reynolds, *supra* note 1, at 5 n.36.

68. See Fay, *supra* note 66. The Seminole Tribe of Florida is one such tribe. See *Maryland Cas. Co. v. Citizen’s Nat’l Bank*, 361 F.2d 517 (5th Cir. 1966).

69. 55 I.D. 14, 28 (1934).

70. *Kline v. City of Harrisburg*, 362 Pa. 438, 68 A.2d 182 (1949) (in the absence of the granting of specific power from the legislature municipalities do not have the authority to pass zoning ordinances). See *Robertson v. Montgomery*, 285 A. 421, 233 So. 2d 69 (Ala. 1970).

71. E.g. *United States v. Mazurie*, 419 U.S. 544 (1975).

72. See, e.g., Navajo Tribal Code, 14 N.T.C. § 121; 16 N.T.C. § 201. See 78 I.D. 229 (1971) (Indian tribes have police power jurisdiction to prohibit aerial crop spraying within the confines of a reservation). See also § 298, The Land Use Planning Act of 1973, adopted by Senate June 21, 1973, 93d Congress, 1st Sess. (incorporating recognition of authority of tribal governments to regulate reservation land use).

73. 404 F. Supp. 1338, 1341 (D.S.D. 1975).

74. Reynolds, *supra* note 1, at 9.

75. *Williams v. Lee*, 358 U.S. 217 (1959), cited at note 37 *supra* and accompanying text.

76. *Olliphant v. Schlie*, Cause No. 511-7362 (D. Wash., decided Jan. 25, 1974), appeal docketed No. C. H. 74-2154, 9th Cir. 1974)) (Suquamish Tribe may arrest and prosecute non-Indian for offenses committed on reservation trust land).

77. *Belgarde v. Morton*, No. C. 74-6835 (D. Wash., Aug. 18, 1975 (Suquamish Tribe may arrest and prosecute non-Indian for offenses committed on state highway within external boundaries of reservation).

78. *Quechan Tribe v. Rowe*, 350 F. Supp. 106 (S.D. Cal. 1972) (if Quechan Tribe had asserted jurisdiction over non-Indians in its constitution and code, the tribe’s residual governmental powers would have supported such jurisdiction absent clear congressional policy, statute, or treaty to the contrary).

79. *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975) (Papago Tribe has inherent power to authorize and conduct investigation of possible lawbreaking by non-Indian located on state highway within boundaries of Papago reservation).

80. *United States v. Mazurie*, 419 U.S. 544 (1975), cited at note 44 and accompanying text.
81. *Fisher v. District Ct.*, No. 75-5366, — U.S. — (decided Mar. 1, 1976).
82. But compare *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1346-53 (1969), suggesting potential constitutional barriers to the assertion of tribal jurisdiction over non-Indians, *i.e.*, enforcement of a zoning ordinance without affording them the full panoply of constitutional safeguards (beyond 25 U.S.C § 1302), which they would be accorded in state enforcement proceedings. Tribes might overcome these barriers by affording explicit notice that persons who enter Indian reservations are expected to abide by the same tribal laws and enjoy the same procedural protections are accorded tribal members.
83. 55 I.D. 14, 57 (1934) (footnotes omitted) (emphasis added). The Solicitor's Opinion to the contrary, dated Aug. 10, 1970, was withdrawn on Jan. 25, 1974, in the wake of trenchant criticism, *e.g.*, Baldassin & McDermott, *Jurisdiction Over Non-Indians: An Opinion of the Opinion*, 1 AM. INDIAN L. REV. 13 (1973).
84. *Fisher v. District Ct.*, No. 75-5366, — U.S. — (decided Mar. 1, 1975), at B 1143, CCH (emphasis added).
85. *Id.* at B 1143 (emphasis added).
86. The statements from which this proposition is abstracted are: (1) “. . . it has been asserted that as to land within a reservation, the state must be considered to have some degree of territorial sovereignty so long as its laws do not conflict with Federal enactments.” Reynolds, *supra* note 1, at 2; (2) “The state has traditionally possessed broad police powers and, in particular, far-reaching control over all the land within its boundaries.” *Id.* at 10. (3) “. . . regional planning and development can be hampered if large areas are excluded from the *authority of the government having general police power jurisdiction.*” (emphasis added). *Id.*; (4) “undoubtedly the state can . . . overrule . . . reservations where the preservation of the environment is vitally concerned.” *Id.* at 11.
87. Kane, *Jurisdiction over Indians and Indian Reservations*, 6 ARIZ. L. REV. 237 (1964) [hereinafter cited as Kane].
88. *Id.* at 239-40.
89. 34 Ariz. 308, 271 P. 411 (1928).
90. 67 Ariz. 337, 196 P.2d 456 (1948).
91. 222 P.2d 624 (1950).
92. See, *e.g.*, *Good Luck v. Apache County*, Nos. CIV 73-626 PCT, CIV 74-50 PCT (D. Ariz., filed Sept. 16, 1975) (Arizona argued that reservation Indian immunity from state taxes bars them from voting in state elections).
93. U.S. CONST. art. I, § 8 construed in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965).
94. See note 34 *supra*.
95. *E.g.*, *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973).
96. *Id.* See note 21 *supra*.
97. 411 U.S. 164 (1973).
98. *Id.* at 181 (emphasis added).
99. *Id.* at 171. The recent decisions in *Moe v. Salish & Kootenai Tribes*, No. 74-1656, — U.S. — (decided Apr. 27, 1976), *Salish & Kootenai Tribes v. Moe*, No. 75-50, — U.S. — (decided Apr. 27, 1976), and *Bryan v. Itasca County*, 44 U.S.L.W. 4832 (U.S. June 14, 1976) reaffirm the principles enunciated in *McClanahan*.
100. *Id.* at 174-75.
101. *Id.* at 177 n.17. See *Kennerly v. District Ct.*, 400 U.S. 423 (1971).
102. The question of whether a state may impose a tax on income earned by a

non-Indian from on-reservation activity was not addressed in *McClanahan*. For two cases applying the *McClanahan* rationale to bar state jurisdiction over non-Indians to adjudicate civil actions arising within reservation boundaries in non-Public Law 83-280 states, cf. *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685 (1965) (barring state taxation of Arizona domestic corporation for on-reservation trading activities). But see *Moe v. Salish & Kootenai Tribes* and *Salish & Kootenai Tribes v. Moe*, cited at note 99, *supra* (upholding state power to tax on-reservation cigarette sales by Indians to non-Indians, but exempting reservation Indians from personal property taxes, cigarette sales taxes, and vendor licensing statute).

However, if the Supreme Court eventually upholds the assertion of tribal police powers over non-Indians in criminal matters, as seems likely (see notes 75-85 *supra*), then the *Williams v. Lee* test would seem to bar enforcement of state authorized zoning ordinances against non-Indians for on-reservation land-use conduct. For whether such ordinances are "penal" or "civil" in character, since such enforcement would interfere with legitimate tribal government authority, see *Williams v. Lee*, 358 U.S. 217 (1959); *Cowan v. Rosebud Sioux Tribal Court*, 404 F. Supp. 1338 (D.S.D. 1975); *Santa Rosa Band of Indians v. Kings County*, No. 74-1565 (9th Cir. 1975).

Furthermore, the "federal preemption" rationale of *Warren Trading Post* might also prohibit state enforcement of such ordinances against non-Indians. See *Santa Rosa*, *supra*; *Bryan v. Itasca County*, 44 U.S.L.W. 4832 (U.S. June 14, 1976).

103. 358 U.S. 217, 220 (1959).

104. Comment, *Indian Property and State Judgment Executions*, 52 ORE. L. REV. 313, 316 (1973).

105. *Santa Rosa Band of Indians v. Kings County*, No. 74-1565 (9th Cir. 1975).

106. *Gourneau v. Smith*, 207 N.W.2d 256, 258 (N.D. 1973) (state highways within boundaries of Indian reservation are a part of reservation; state has no jurisdiction); *Schantz v. White Lightning*, 502 F.2d 67, 68 (8th Cir. 1974).

107. 95 F.2d 67, 68 (8th Cir. 1974).

108. 243 U.S. 389 (1916).

109. There is some very weak dicta which appears in both cases (originating with *Utah Power*) to the effect that ". . . for many purposes a state has civil and criminal jurisdiction over (public) lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States . . . to control their use. . . ." *Utah Power supra*, at 404.

110. *Berger & Mounce, Applicability of State Conservation and Other Laws to Indian and Public Lands*, 16 ROCKY MOUNTAIN MINERAL L. INSTITUTE 347, 361 (1971); FEDERAL INDIAN LAW 588 (1966).

111. *E.g.*, *Berger & Mounce supra* note 110, at 385.

112. *Kane, supra* note 87, at 254.

113. 25 U.S.C. § 231 (1970) gives the Secretary of the Interior authority to conditionally approve the enforcement of state sanitary and quarantine regulations on reservations. Some have argued that § 231 would enable a state to enforce a "disguised" zoning ordinance on reservations with Secretarial approval. *Snohomish County v. Seattle Disposal Co.*, 389 U.S. 1016 (1967) (dissenting opinion from denial of certiorari by Justices Douglas and White). This provision clearly does not, however, authorize the unilateral extension of a state zoning ordinance to reservation land.

114. *Kane, supra* note 87, at 254.

115. Note, *The Indian Stronghold and the Spread of Urban America*, 10 ARIZ. L. REV. 706 (1968).

116. *Id.* at 715-16 (emphasis added).

117. 414 U.S. 44 (1974).

118. As noted in *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168, 176 n.15 (1973), the Supreme Court has consistently differentiated between questions involving the treaty rights of Indians to engage in certain off-reservation conduct free of state interference, and the quite distinct questions involved in state attempts to regulate the conduct of Indians or non-Indians on reservations.

119. 414 U.S. 44, 49 (1974): "The police power of the State is adequate to prevent the steel head from following the fate of the passenger pigeon; and the treaty does not give the Indians a Federal right to pursue the last living steel head until it enters their nets."

120. The reservation zoning cases abstracted in this section, with the exception of *Santa Rosa Band of Indians v. Kings County*, No. 74-1565 (9th Cir. 1975), are extensively analyzed in three recent and excellent journal articles: Goldberg, *Public Law 280: The limits of state jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975); Note, *The Extension of County Jurisdiction over Indian Reservations in California: Public Law 280 and the Ninth Circuit*, 25 HASTINGS L. REV. 1451 (1974); Comment, *State Jurisdiction over Indian Land Use: An Interpretation of the "Encumbrance" Savings Clause of Public Law 280*, 9 LAND AND WATER L. REV. 421 (1974).

121. Reynolds, *supra* note 1, at 8 (footnote omitted, emphasis added). This statement fails to take proper account of (1) the distinction between state and criminal jurisdiction obtained under 18 U.S.C. § 1162 (1970) and state civil jurisdiction obtained under 18 U.S.C. § 1360 (1970); and (2) the distinction between state law and local ordinances. Each of these distinctions prove significant in the reservation zoning cases.

122. 347 F. Supp. 42 (C.D. Cal. 1972). Reynolds, *supra* note 1, at 8-9.

123. 70 Wash. 2d 668, 425 P.2d 22, *cert. denied*, 389 U.S. 1016 (1967). See Note, *The Indian Stronghold and the Spread of Urban America*, 10 ARIZ. L. REV. 706, 716 (1968).

124. 28 U.S.C. § 1360(b) (1970). The identical clause appears at 18 U.S.C. § 1162(b) (1970) authorizing state criminal jurisdiction over reservations.

125. 351 U.S. 1 (1956) (holding that the terms "charge or encumbrance" as they appear in the General Allotment Act of 1887 should be interpreted broadly with any doubts resolved in favor of the Indians.)

126. 70 Wash. 2d 668, 425 P.2d 22, *cert. denied*, 389 U.S. 1016 (1967).

127. *Santa Rosa Band of Indians v. Kings County*, No. 74-1565 (9th Cir. 1975). See articles cited at note 120 *supra*.

128. See *Santa Rosa Band of Indians v. Kings County*, No. 74-1565 (9th Cir. 1975).

129. *Snohomish County v. Seattle Disposal Co.*, 70 Wash. 2d 668, 425 P.2d 22, *cert. denied*, 389 U.S. 1016 (1967).

130. *Id.*

131. *Id.*, 389 U.S. at 1018-1019.

132. *Id.*

133. *Norvell v. Sangre de Cristo Develop. Co.*, 372 F. Supp. 348 (N.M. 1974) (declared 25 C.F.R. § 1.4 invalid as applied to bar state regulation of non-Indians).

134. 28 U.S.C. § 1360(a) (1970). The equivalent phrase for criminal jurisdiction appears at 18 U.S.C. § 1162(a) (1970).

135. See *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371, 374 (S.D. Cal. 1971).

136. *Madrigal v. County of Riverside*, C.A. No. 70-1893-E.C. (C.D. Cal., Feb. 16, 1971), *vacated* 495 F.2d 1 (9th Cir. 1974), *cert. denied*, 419 U.S. 1008 (1974); *Ricci v. County of Riverside*, C.A. No. 71-1134-E.C. (C.D. Cal., Aug. 5, 1971),

vacated 495 F.2d 1 (9th Cir. 1974); *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371 (S.D. Cal. 1971), *vacated* 495 F.2d 1 (9th Cir. 1974); *Agua Caliente Band of Mission Indians v. City of Palm Springs*, 347 F. Supp. 42 (C.D. Cal. 1972), *vacated and remanded* by 9th Cir., unpublished order on Jan. 24, 1975. See *Capitan Grande Band of Mission Indians v. Helix Indus. Dist.*, 514 F.2d 465, 468 n.3 (9th Cir. 1975); *Norvell v. Sangre de Cristo Develop. Co.*, 372 F. Supp. 348 (N.M. 1974), *rev'd* 519 F.2d 370 (10th Cir. 1975).

137. See note 12 *supra*.

138. 18 U.S.C. § 1162(a) (1970).

139. *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371, 373-76 (S.D. Cal. 1971), *vacated* 495 F.2d 1 (9th Cir. 1974).

140. *Madrigal v. County of Riverside, C.A. No. 70-1893-E.C.* (C.D. Cal., Feb. 16, 1971), *vacated* 495 F.2d 1 (9th Cir. 1974), *cert. denied*, 419 U.S. 1008 (1974).

141. *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371, 378 (S.D. Cal. 1971), *vacated* 495 F.2d 1 (9th Cir. 1974).

142. *Id.* at 377-78.

143. *Norvell v. Sangre de Cristo Develop. Co.*, 372 F. Supp. 348 (N.M. 1974), *rev'd* 519 F.2d 370 (10th Cir. 1975).

144. Reynolds, *supra* note 1, at 9.

145. See note 136 *supra*.

146. See text accompanying notes 121-129 *supra*.

147. 324 F. Supp. 371, 375 (S.D. Cal. 1971), *vacated* 495 F.2d 1 (9th Cir. 1974).

148. *Id.* at 377; 372 F. Supp. 348, 355 (N.M. 1974), *rev'd* 519 F.2d 370 (10th Cir. 1974).

149. No. 74-1565 (9th Cir. 1975), affirming the district court holding, Civ. No. F-836 (E.D. Cal. 1973).

150. The Court relies heavily on the three law review articles cited at note 120 *supra*.

151. *Santa Rosa Band of Indians v. Kings County*, No. 74-1565 (9th Cir. 1975), at 14-20.

152. *Id.* at 18.

153. *Id.* at 19.

154. *Id.* at 3, 4, 11, 12.

155. *Id.* at 13, 19.

156. *Id.* at 3, 4.

157. *Id.* at 4n.1a, 12, 13.

158. *Id.* at 12.

159. *Id.* at 11. Cf. *Rincon Band of Mission Indians v. County of San Diego*, 324 F. Supp. 371, 378 (S.D. Cal. 1971), *vacated* 495 F.2d 1 (9th Cir. 1974), where the court gave as one reason not to hold reservation Indians exempt from the county ordinance there at issue was that to do so would be to confer on tribal governments the status of county or municipal governments.

160. *Id.* at 3. See also *Bryan v. Itasca County*, 44 U.S.L.W. 4832 (U.S. June 14, 1976).

161. See note 102 *supra*. The district court in *Norvell v. Sangre de Cristo Develop. Co.*, 372 F. Supp. 348 (N.M. 1974) did make this distinction in holding that a non-Indian-owned corporate lessee of reservation land was subject to state land-use regulations.

162. *Santa Rosa Band of Indians v. King's County*, No. 74-1565 (9th Cir. 1975), at 21 (the court notes that ". . . controlling principles we have discussed above bar county regulations of Indian land by indirect subterfuges . . ."). *But cf. Rincon*, 324

F. Supp. 371, 376-77 (S.D. Col. 1971) (the court argues that "whether or not a zoning law such as that in the *Snohomish* case is an encumbrance, we are confronted here not with a zoning ordinance but with a criminal statute; even the broad definition of encumbrance adopted by the majority in *Snohomish* would not require that this criminal statute be regarded as an encumbrance). Query: whether the *Rincon* court would so argue where the criminal statute more directly affects reservation land use.

163. 18 U.S.C. § 1162 (1970). See notes 124, 128 *supra*.

164. 28 U.S.C. § 1360 (1970). See notes 87, 128 *supra*.

165. See text accompanying note 142 *supra*.

166. *Antoine v. Washington*, 95 S.Ct. 944 (1975); *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1974); *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

167. *E.g.*, *Quechan Tribe of Indians v. Rowe*, 350 F. Supp. 106 (S.D. Cal. 1972).

168. 469 F.2d 593 (10th Cir. 1972).

169. 42 U.S.C. §§ 4321 *et seq.*, 4331(b), 4332(2)(C) (1970).

170. See *Maddox v. Bradley*, 345 F. Supp. 1255 (N.D. Tex. 1972).

171. See Comment, *Environmental Law—National Environment Policy Act—Approval by Interior Department of Indian Lease Constitutes Major Federal Action*, 19 N.Y.L. FORUM 386 (19—).

172. Josephy, *Indians and Environmentalists*, *New York Times*, Nov. 27, 1975, at 16, cols. 1-3.

173. *E.g.*, *Rockhill v. Chesterfield Township*, 23 N.J. 117, 128 A.2d 473 (1956); *Eves v. Zoning Board of Adjustment*, 401 Pa. 211, 164 A.2d 7 (1960).

174. See, *e.g.*, Ahrens, *Planned Unit Development*, 35 Mo. L. REV. 27 (1970); Rose, *Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 51 J. OF URBAN L. 461 (1974); Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. ST. U.L. REV. 35 (1974); Costonis, *Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 539 (1975); *State v. Diamond*, 50 Hawaii 33, 429 P.2d 825 (1967) (aesthetic considerations alone may warrant an exercise of the police power via land use regulations).

175. See, *e.g.*, Anderson, *Strip Mining on Reservation Lands: Protecting the Environment and the Rights of Indian Allotment Owners*, 35 MONT. L. REV. 209 (1974); Berger & Mounce, *Applicability of State Conservation Laws to Indian and Public Lands*, 16 ROCKY MOUNTAIN MINERAL L. INST. 347 (1971); Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1842 (1968); CAHN, *OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA* 68-100 (1970); Josephy, *Indians and Environment*, *New York Times*, Nov. 27, 1975, at 16, cols. 1-3.

176. As noted in text, Reynolds appears to recognize this reality: "Other land use controls are usually related, or analogous, to zoning and thus are likely to receive similar treatment." Reynolds, *supra* note 1, at 1; "Indian reservations are, because of their wealth of open space, scenery, and minerals, of vital importance in the fight to halt helter-skelter growth and waste of natural resources." *Id.* at 10; ". . . if zoning the reservation is left to non-Indian authorities, the reservation may—with some environmental justification—be classified so as to limit its development. . . ." *Id.* at 10. But his argument does not reflect this recognition.

177. President Richard M. Nixon, Message to Congress, July 8, 1970 (emphasis added).

178. Indian Self-Determination and Education Assistance Act, Pub. L. 93-638; Act of Jan. 4, 1974, at § 3(b).