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Environmental Law: Protecting Clean Air: The Authority of Indian Governments to Regulate Reservation Airsheds

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NOTES

ENVIRONMENTAL LAW: PROTECTING CLEAN AIR: THE AUTHORITY OF INDIAN GOVERNMENTS TO REGULATE RESERVATION AIRSHEDS

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> We feel that we have a special responsibility to this planet which we call earth. I think we have been even spoken of in a sense that we are caretakers of the earth and we must do everything that we feel is humanly possible to protect the environment in which we live, and we must do it not only for ourselves but for future generations which are yet unborn who also have a stake in what happens to our lands . . . .
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> Ellis Knows His Gun, Crow Tribe, testifying for the Northern Cheyenne Class I Air Redesignation, Lame Deer, Montana, January 17, 1977.

Introduction

Montana Indian tribes are gaining recognition for their efforts to protect an important tribal resource—clean air. Three of Montana's seven Indian tribal governments—the Northern Cheyenne of the Northern Cheyenne Reservation, the Assiniboine and Sioux of the Fort Peck Reservation, and the Confederated Salish and Kootenai of the Flathead Reservation—have taken affirmative steps to protect air quality within the boundaries of their reservations. These tribal initiatives are not surprising, given past tribal involvement across the nation in water, land, timber, and fishing resource regulation within Indian reservation boundaries, particularly since air quality is interrelated to all natural resources and living things.

The proximity of Montana's Indian reservations, and those in the West generally, to substantial coal and mineral deposits pre-

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sents a great potential for a decrease in the air quality of Indian reservations from pollution arising at new industrial facilities. For example, Indian tribes own approximately one-third of the low-sulfur coal in the western United States and one-half of the nation's privately owned uranium.[1] Montana Indian tribal efforts to maintain and regulate air quality within reservation boundaries are of local, regional, and national significance because of their precedent-setting nature and the potential to affect siting and design decisions for new industrial sources planned for Montana.

Until recently, there has been a noticeable absence of formal environmental regulation by Indian tribal governments for several reasons.[2] Tribal governments face many difficulties that have had the effect of discouraging them from regulating the reservation environment.[3] Indian people are among the most impoverished minorities in the the United States. Consequently, most tribal governments view their ever present economic and social problems as having a higher priority than environmental regulations.[4] Some Indian communities do not face serious environmental problems because their reservations are located in rural areas, away from industrial and commercial centers. The tribal governments' lack of manpower skills and technical expertise in environmental regulation matters is yet another problem. This is coupled with a persistent distrust of outside expertise, including that of the federal government.[5] Some tribal governments have internal barriers to tribal environmental regulation activity because some tribal members or factions desire the relative lack of regulation and the resulting economic competitive advantage.[6]

Conflicting and competing federal policies have deterred tribal environmental regulation activity. During the past century, congressional policy toward Indian tribes has been capricious, alternating between the policies of assimilation/termination and self-determination. Understandably, tribal governments have been cautious about enacting environmental regulations.

This caution is partially based upon the tribes' uncertainty as to the scope of their regulatory authority, the newness of the

1. Ambler, *Energy Companies Seek Peace—and Resources—with Indians*, High Country News, Dec. 12, 1980, at 4.

2. Will, *Indian Lands Environment—Who Should Protect It*, 18 COLO. L. REV. J. 465 (1978) [hereinafter cited as Will].

3. *Id.* at 500.

4. *Id.*

5. *Id.*

6. *Id.*

nation's environmental laws, and the general lack of sophistication of most tribal codes, which stems from a common reliance on antiquated model codes written by the Bureau of Indian Affairs. It is only in the recent past that tribal councils have revised tribal codes to address a broad range of contemporary issues.

The 1970s ushered in a host of federal statutes evidencing a national commitment to protect important natural resources and the environment.[7] Pursuant to this legislation, federal grants have fostered state and tribal environmental regulatory programs. The 1970s also reflected a strong congressional policy supporting greater tribal self-determination and control over reservation affairs.[8]

A major report on the status of air quality in the United States and the effectiveness of the Federal Clean Air Act concludes that Indian tribes should be given increased management responsibilities over reservation airsheds. The March 1981 *Report of the National Commission on Air Quality* recommends that Indian tribes develop regulatory programs to manage reservation air quality.[9] The report recommends that the Clean Air Act be amended to explicitly identify the authority of the Environmental Protection Agency (EPA) to delegate regulatory and enforcement responsibilities to the tribes.

To date, however, no tribal government is currently exercising regulatory authority over Indian reservation airsheds in the United States. No treaties with Indian tribes expressly speak to air rights.[10] No federal case law is directly on point with respect to tribal air quality regulatory authority. Furthermore, no present federal statute limits tribal powers to protect the reservation environment.[11] In short, tribal regulatory authority over air quality within reservation boundaries is a relatively unexplored area of the Indian law labyrinth.

7. *E.g.*, Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251 *et seq.* (Supp. 1980); Federal Clean Air Act Amendments of 1977, 42 U.S.C. §§ 1871 *et seq.* (Supp. 1980); Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 *et seq.* (Supp. 1980).

8. *E.g.*, 1968 Indian Civil Rights Act, 25 U.S.C. §§ 1301 (1976); 1975 Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.* (Supp. 1980); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* (Supp. 1980).

9. REPORT OF THE NATIONAL COMMISSION ON AIR QUALITY—TO BREATH CLEAN AIR, March, 1980, at 2.2-7.

10. Petros, *The Applicability of the Federal Pollution Acts of Indian Reservations: A Case for Tribal Self-Government,* 48 U. COLO. L. REV. 63, 66 (1976) [hereinafter cited as Petros].

11. Will, *supra* note 2, at 499.

The purpose of this study is to explore tribal regulatory authority over air quality within reservation boundaries. An overview of recent activities by three of Montana's seven tribal governments to manage reservation airsheds will be discussed. The Federal Clean Air Act and associated regulations will be perused as a source of regulatory authority for tribal governments. Tribal sovereignty as a source of regulatory authority will be reviewed, and major subcategories of civil jurisdiction applicable to tribal regulatory authority within Indian reservations, with emphasis on the Montana situation, will be explained. Finally, five relevant acts of Congress will be reviewed in chronological order.

Montana Tribal Activities

Three Montana Indian Tribal governments have taken affirmative actions to protect their reservation airsheds.

Northern Cheyenne

In 1977 the Northern Cheyenne Tribe became the first political entity in the United States to voluntarily petition the Environmental Protection Agency and receive a Class I air quality redesignation. The Class I designation will require that sulfur dioxide and airborne particulate pollutants, two of the major pollutants emitted by coal-fired electrical generating facilities, be kept to minimal levels within the exterior boundaries of the Northern Cheyenne Reservation.[12]

The entire Northern Cheyenne Reservation falls within the Fort Union Coal Formation, one of the largest coal deposits in the world. Seven major strip mines are located within forty miles of the reservation. A 2,100 megawatt electrical power plant complex, Colstrip Units 1-4, is sited fifteen miles north of the reservation. Colstrip Units 3 and 4 (each 700 megawatts) must comply with the Northern Cheyenne Reservation's Class I air quality standards, but Units 1 and 2 are exempt from these standards.[13] Several energy firms have challenged the Northern Cheyenne Reservation's Class I air quality redesignation and the issue is now

12. 42 U.S.C. § 7473 (Supp. 1980).

13. Colstrip Units 1 and 2 are exempt from the Northern Cheyenne Class I air standard because they commenced construction prior to EPA's adoption of PDS regulations. Colstrip Units 3 and 4 must comply with the Northern Cheyenne Class I air standard because these units did not commence construction until after the passage of the Federal Clean Air Act Amendments of 1977. *See* Montana Power Co. v. EPA, 608 F.2d 334 (9th Cir. 1979).

before the Ninth Circuit.[14] Additional coal-fired facilities and strip mining is inevitable within the Tongue River and Rosebud Creek drainages which make up the Northern Cheyenne Reservation. The tribal government of the Northern Cheyenne Reservation, to date, has allowed no strip mining nor the construction of any major polluting sources within the reservation boundaries.

Fort Peck Reservation

On April 14, 1978, the Tribal Executive Board of the Assiniboine and Sioux tribes unanimously passed a resolution to formally request the EPA to redesignate the Fort Peck Reservation to Class I air quality status.[15] The tribal government is presently conducting the necessary research to accompany its petition as required by the Federal Clean Air Act. The eastern one-half of the Fort Peck Reservation lies within the Fort Union Coal Formation. The tribal government's most immediate air pollution concern is a 1,200 megawatt coal-fired electrical complex currently under construction twenty-five miles north of the reservation in Saskatchewan, Canada.[16] The Saskatchewan government has indicated it does not believe it is obligated to comply with the United States' Class I air quality standards should the EPA approve redesignation of the reservation airshed.[17] The first two 300 megawatt units of this Canadian electrical power complex are being constructed without "scrubbers" to remove sulfur dioxide emissions. In addition to the Canadian energy complex, several coal-fired synthetic fuel plants are being proposed for counties adjacent to the reservation.[18] A 1976 federal environmental im-

14. *See* Nance v. EPA, No. 77-3058 (9th Cir., filed Sept. 2, 1977). The case was argued before a three-judge panel, including Judge Huffstedler in July, 1979, and must be repaneled because of Judge Huffstedler's appointment to be Secretary of Education.

15. Tribal Resolution No. 385-78-4.

16. The Saskatchewan Power Corporation, a provincially owned company, has completed construction of the first 300-megawatt unit, and has commenced construction of the second 300-megawatt unit. The water intake system for the complex has been constructed to accommodate four 300-megawatt units.

17. The Saskatchewan Power Corporation believes it is obligated only to meet United States primary and secondary ambient air standards. (Personal Communication.)

18. The following firms have filed long-range plans under Montana's Major Facility Siting Act indicating intent to construct energy facilities near or within the Fort Peck Reservation. Burlington Northern, Inc., has commenced studies regarding siting a synthetic fuels complex known as "Circle West" in western McCone County. This complex would burn lignite coal and utilize water from the Fort Peck Reservoir to produce synthetic diesel fuel, anhydrous ammonia, and methanol. Monto Resources, Inc., and several Washington state utilities have proposed a coal gasification plant for eastern McCone

pact statement, which assessed the impacts that would result from implementation of an industrial water marketing plan for the Fort Peck Reservoir, concluded that the maximum potential for energy development by the year 2000 would result in emission densities in the study area (including the Fort Peck Reservation) of "sulfur dioxide and nitrogen oxides to be of the same order of magnitude as presently exists in the Los Angeles Metropolitan Area."[19]

Flathead Reservation

On July 6, 1979, the Confederated Salish and Kootenai Tribal Council passed a resolution formally requesting that the Flathead Reservation be redesignated to Class I air quality status.[20] Though presently no known major industrial polluting sources are planned for the reservation or adjacent land, the Confederated Salish and Kootenai Tribal Council has identified important health, economic, and visibility concerns that it believes necessitates Class I air quality redesignation.[21] The tribal government completed its redesignation report on October 15, 1980, and formal public hearings on the redesignation request were held on January 15, 1981. The decision by the EPA is pending.

These three tribal governments have reason to be concerned about maintenance and regulation of existing air quality. But, achievement of Class I air quality redesignation is only one facet of tribal management of reservation air resources. The ultimate goal is a comprehensive tribal air quality control program with regulatory and monitoring capabilities. The three above-mentioned tribal governments have indicated a strong interest in moving toward this goal.

The EPA has determined that an Indian tribe qualifies under section 7403 of the Federal Clean Air Act[22] to receive federal grants to establish and administer a Federal Air Quality Control

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County approximately twenty miles south of the Fort Peck Reservation. The preferred site for Basic Electric Power Cooperative's proposed 440-megawatt coal-fired electrical plant is also in McCone County. Alternative sites listed for this power plant include the Glasgow Air Force Base, two miles west of the reservation and another site on the reservation.

19. *Water for Energy, Missouri River Reservoirs,* Draft Environmental Impact Statement, U.S. Bureau of Reclamation 3-49 (Oct., 1979).

20. Tribal Resolution No. 5627.

21. Flathead Reservation, Class I Air Quality Redesignation (Oct. 15, 1980).

22. 42 U.S.C. § 7403 (Supp. 1980). Authority to contract with tribes may also be found in 42 U.S.C. § 7405 (Supp. 1980).

Program. The three above-mentioned tribal governments have received initial funding under this section to begin groundwork for upgrading air quality management capabilities. To date, the funds are being used to purchase and operate air quality monitoring stations within the respective reservations and for legal research in preparation for a tribal regulatory program. It is the position of the EPA, and in particular Region 8 which includes Montana, that a tribal government must make adequate demonstration of its legal authority and regulatory capability prior to its being delegated authority by the EPA under the Clean Air Act to administer a Federal Air Quality Control Program within the reservation.[23]

Federal Clean Air Act

In 1955, Congress addressed the need for state and local government participation in dealing with the air pollution problems in this country.[24] In 1963, Congress amended the Act of July 14, 1955, for the purpose of improving, strengthening, and accelerating programs for the prevention and abatement of air pollution.[25] In 1967, Congress enacted the Air Quality Act of 1967,[26] which amended the Clean Air Act,[27] and which became the first air pollution control legislation recognizing the concept of prevention of significant deterioration of existing air quality. Then, in 1970, Congress amended the Clean Air Act[28] providing for a more effective program to improve the quality of the nation's air.[29] With the passage of the 1970 amendments, Congress reiterated its commitment to minimize degradation of existing clean air based upon the realization that it is easier to prevent air pollution than to control it.

23. Personal Communication with Region VIII, EPA.

24. "[That] in recognition of the dangers to the public health and welfare . . . from air pollution, it is hereby declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution . . . ." Act of July 14, 1955, Pub. L. No. 84-159, 69 Stat. 322, 42 U.S.C. §§ 7401 *et seq.* (1978).

25. Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392, 42 U.S.C. §§ 1857 *et seq.* (1978).

26. Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, 42 U.S.C. §§ 1857 *et seq.* (1978). One of the stated purposes was to protect and enhance the quality of the nation's air resources.

27. See note 25, *supra.*

28. See note 26, *supra.*

29. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 42 U.S.C. §§ 1857 *et seq.* (1978).

Although the 1970 Clean Air Act makes no mention of Indian tribes or Indian lands, Congress has the power to include reservation lands within the coverage of the Clean Air Act. The federal government's control over Indian matters is plenary.[30] The Supreme Court has construed general acts of Congress to be applicable to Indian lands and Indian people.[31]

In 1973 the United States Supreme Court provided one of the most important judicial responses to the problems caused by industrial pollution in relatively unpolluted areas.[32] The Supreme Court upheld a lower court order[33] directing the EPA to devise a program for the prevention of significant deterioration of air quality. In 1974 the EPA promulgated a program "based on the principle that clean air is a natural resource of great importance, a resource whose value cannot always be measured in terms of proven health or property damage."[34] Acting upon the judicial mandate, the EPA published proposed regulations[35] that, for the first time, recognized Indian governing bodies' management authority over reservation airsheds. The final 1974 EPA regulations expressly recognize the authority of Indian governing bodies to submit proposals to the EPA to redesignate reservation airsheds from their present Class II status to either the more restrictive Class I standards or the less restrictive Class III standards. This redesignation program is referred to as the "prevention of significant deterioration" (PSD). The Northern Cheyenne Tribe redesignated its reservation to Class I pursuant to these 1974 regulations.

The 1974 PSD regulations also stated that the regulations were not intended to alter the then existing legal relationship between the states and the Indian tribes within the states: "Nothing in this section is intended to convey authority to the States over Indian Reservations where States have not assumed such authority under

30. U.S. DEPT OF INTERIOR, FEDERAL INDIAN LAW 501 (1958). Federal authority over Indian matters is derived from federal responsibility for regulating commerce with the Indian tribes, and from treaty-making powers under the U.S. Constitution, U.S. CONST. art. I, § 8, cl. 3, and art. II, § 2, cl. 2. *See* McClanhan v. Arizona Tax Comm'n, 411 U.S. 164, 172, n.7 (1973).

31. F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 166 (1960).

32. Fri, Acting Adm'r, EPA v. Sierra Club, 412 U.S. 541 (1973).

33. Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.C. Cir. 1972).

34. U.S. ENVIRONMENTAL PROTECTION AGENCY, GUIDELINES ON RECLASSIFICATION OF AREAS UNDER EPA REGULATIONS TO PREVENT SIGNIFICANT DETERIORATION OF AIR QUALITY, Washington, D.C., June, 1975.

35. 39 Fed. Reg. 31,000 (1974).

other laws nor is it intended to deny jurisdiction which States have assumed under other law."[36] In 1977, Congress passed the Clean Air Act Amendments of 1977.[37] The 1977 amendments are the laws that are fundamental to this study, as it is in these amendments that tribal government authority concerning air quality within the exterior boundaries of the reservation is first specifically addressed by Congress.[38] The Clean Air Act Amendments of 1977 also marked the first time that Congress explicitly set forth a prevention of significant deterioration scheme[39] to limit the amount of new pollution in areas with air cleaner than the national ambient air quality.[40] In essence, Congress replaced the Environmental Protection Agency's 1974 PSD regulations with a similar statutory PSD scheme. For convenience, most areas of the nation, including Indian reservations, were originally designated Class II air quality,[41] with states and Indian governing bodies being granted authority to redesignate their lands to Class I or Class III following appropriate guidelines.[42]

36. 39 Fed. Reg. 42,513 (1974). "The State of New Mexico commented that the proposed regulations appeared to take authority away from the States to regulate air pollution over Indian lands. These regulations were not intended to alter present legal relationships between the States and Indian Reservations within the States. As these relationships vary from State to State, EPA has not attempted to define such relationships but has modified the proposed regulations to clarify that there is no intent to alter these relationships. Where States have not assumed jurisdiction over Indian lands, the regulations provide that the Indian governing body may propose redesignations to the Administrator. Boundary problems between Indian and State lands are dealt with in the same way that boundary problems between two States are dealt with . . . . This is consistent with the independent status of Indian lands not subject to State laws." *Id.* at 42,513.

37. Clean Air Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 42 U.S.C. §§ 7401 *et seq.* (Supp. 1979).

38. 42 U.S.C. §§ 7474(c) (Supp. 1980).

39. Requirements for prevention of significant deterioration are based upon the notion that air quality, regardless of compliance with fixed ambient standards, should not be permitted to deteriorate from its present quality to a significant degree. Rather than predetermine ambient standards, prevention of significant deterioration relies upon a region's actual ambient air quality upon which to base measurements. It then permits deterioration from that level equal to certain uniformly established "increments" of degradation. The prevention of significant deterioration regulations establish three "classes" of air quality based on maximum allowable increases and concentrations over baseline concentrations of sulfur dioxide and particulate. The EPA defined baseline level as the existing level of air pollution in any area as of Aug. 7, 1977, but a recent court decision redefined the method for determining baseline ambient air levels. *See* Alabama Power Co. v. Costle, 606 F.2d 1068 (D.C. Cir. 1979).

40. 42 U.S.C § 7470-7491 (Supp. 1980).

41. *Id.* at § 7472.

42. "Indian Reservations. Lands within the exterior boundaries of federally

Neither tribal governing bodies nor states are expressly granted regulatory or enforcement authority over Indian reservation lands by the Clean Air Act. The Act discusses a state's role but makes no specific mention of this role with respect to Indian reservation lands; "[T]he prevention and control of air pollution at its source is the primary responsibility of States and local governments,"[43] and "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such . . . State."[44] Neither Indian tribes nor Indian reservations are mentioned in sections of the Act pertaining to cooperative activities,[45] federal enforcement procedures,[46] or state adoption or enforcement powers.[47]

An assertion of state air quality regulatory jurisdiction within Indian reservations based upon congressional authority found in the Clean Air Act is tenuous at best. First, such an assertion is in conflict with the language of the Act. The sections of the Act that might be interpreted to convey regulatory control over reservation airsheds to the state do not specifically mention Indian lands or reservation airsheds. To argue that states acquire jurisdiction over Indian reservations under the Act requires the statute to be interpreted so as to negate inherent tribal regulatory authority by implication. By comparison, an interpretation of the Act favoring tribal regulatory authority over reservation airsheds is supported expressly in the section of the Act discussing state and tribal responsibilities under the PSD program:

> Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body.[48]
>
> . . .
>
> If any State affected by the redesignation of an area by an Indian tribe or any Indian Tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in any State which

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recognized Indian tribes may be redesignated only by the appropriate Indian governing body." *Id.* § 7474(c).

43. *Id.* § 7401(a)(3).
44. *Id.* § 7407(a).
45. *Id.* § 7402(a), (b).
46. *Id.* § 7413.
47. *Id.* § 7416.
48. *Id.* § 7474(c).

> the Governor of an affected State or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan.[49]

Second, the 1974 PDS regulations indicate Congress' clear intent not to alter the legal relationships existing between states and Indian tribes with respect to jurisdiction to regulate air resources. This same position was echoed in the House debate concerning adoption of the conference report of the 1977 Clean Air Act Amendments when the manager of the House bill, Representative Paul G. Rogers (Fla.), stated:

> The conference bill provides that both States and Indian tribes will continue to have the power they now have to redesignate their lands to a new air quality classification. In cases where another State may object to such reclassification, and when the two jurisdictions cannot amicably come to agreement, the Administrator is granted the power to review the redesignation. But it is intended that the Administrator's review of such determinations by tribal governments be exercised with utmost caution to avoid unnecessarily substituting his judgment for that of the tribe. *The concept of Indian sovereignty over reservations is a critical one, not only to native Americans, but to the Government of the United States. A fundamental incident of that sovereignty is control over the use of their resources. Some statutes, I imagine, have enroached upon Indian sovereignty, eroding treaty rights negotiated at an earlier time. This is not such a bill,* for the Administrator should reverse the determination made by an Indian governing body to reclassify its land only under the most serious circumstances.[50]

49. *Id.* § 7474(e).
50. 123 CONG. REC. H8665 (1977) (emphasis added).

Third, EPA does not interpret its statutes as conferring implementation and enforcement jurisdiction upon states over Indian lands in the provisions that authorize state action.[51] Instead, EPA recognizes Indian governing bodies' authority to propose their own pollution standards within the constraints of EPA regulations.[52] The United States Supreme Court has ruled that an agency's interpretation of the statutes it administers deserves great respect and should be followed unless there are compelling indications it is wrong,[53] especially when this interpretation is contemporaneous with the statute it administers.[54]

Finally, canons of construction dictate that legislation affecting tribal sovereignty is to be construed in favor of the Indians.[55] The Clean Air Act clearly authorizes tribal governing bodies to redesignate reservation airsheds. The Act does not expressly grant state regulatory authority over reservation airsheds. Instead, the Act is silent on this matter. Given this statutory treatment, it is unreasonable to imply that there has been an extension of state jurisdiction over Indian lands. A fundamental tenet of Indian law is that tribes' sovereign powers cannot be implicitly repealed.[56] Congress must be explicit about its intentions to repeal tribes' inherent powers. To be explicit would require that Indian tribes be specifically mentioned in conjunction with any grant or jurisdiction to the states.[57] Tribal governing bodies are not mentioned in such context.

In sum, the Federal Clean Air Act does not grant jurisdiction to states over Indian reservations, and instead, apparently serves as an additional legal source for tribal regulatory authority within reservation boundaries. To implicitly repeal tribal regulatory authority over reservation airsheds by relying on the same federal law that expressly recognizes tribal governments' authority to

51. Will, *Questions and Answers on EPA's Authority Regarding Indian Tribes,* EPA, Apr. 21, 1974, at 3.

52. *Id.*

53. E.I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 54-55 (1977), *quoting* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). *See also* Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 660 (1976).

54. F.T.C. v. Mandel Bros., 359 U.S. 385, 391 (1959).

55. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Washington v. Confederated Bands & Tribes of Yakima Nation, 439 U.S. 463 (1979).

56. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978); Bryan v. Itasca County, 426 U.S. 373, 392-93 (1976). *See also* United States v. Winnebago Tribe, 542 F.2d 1002, 1005 (1976).

57. Will, *supra* note 2, at 475.

redesignate reservation airsheds would be irrational and an inherently conflicting interpretation of the Federal Clean Air Act. The more logical interpretation would affirm tribal regulatory authority consistent with express authority to redesignate airsheds.

Indian Sovereignty

It is axiomatic that Indian tribes hold a unique legal status in American jurisprudence, possessing attributes of sovereignty over both their members and their territory. Less than a year after the adoption of the United States Constitution in 1789, Congress enacted the first Indian Non-Intercourse Act[58] giving the federal government the exclusive right to deal with the Indian tribes for sale of the tribes' possessory interest in their lands. This Act illustrates the unique, extraordinary status and protection accorded Indian tribes and Indian lands vis-a-vis the states. Though dispossessed of complete title to the soil of their ancestors,[59] Indian nations have always been considered as distinct, independent, political communities possessing self-governing powers.[60] One of the most basic principles of Indian law is 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."[61]

In his *Handbook of Federal Indian Law*, Felix Cohen identified three fundamental principles that courts have adhered to concerning the nature of Indian tribal powers:

> (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express

58. 1 Stat. 137. The Act was substantially reenacted in the Act of June 30, 1834, ch. 161, 4 Stat. 730, *codified at* 25 U.S.C. § 171 (1963).

59. Oneida Indian Nation v. County of Onieda, 414 U.S. 661 (1974).

60. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832).

61. F. COHEN, FEDERAL INDIAN LAW 122 (1971) [hereinafter cited as COHEN]. *See also* 55 I.D. 14 (1934).

> legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and their duly constituted organs of government.[62]

Thus, these inherent tribal powers may be limited by federal statute, treaty provisions, or provisions of the tribal constitution.[63] Tribal powers may also be augmented by specific federal statute or regulation.[64]

In *United States v. Winans*,[65] the Supreme Court upheld Indian fishing rights, stating: "The treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those [rights] not granted."[66] Although tribal reserved rights are commonly thought to pertain to land, *Winans* illustrates that other valuable rights such as water (or in terms of this study—air) were not relinquished when tribes conveyed their aboriginal title to lands.[67] Though subsequent Supreme Court decisions have limited the scope of the *Worcester* and *Winans* principles by applying a more individualized treatment of particular treaties and federal statutes,[68] the *Worcester* and *Winans* principles remain positive Indian law.[69]

In *United States v. Mazurie*,[70] the Supreme Court recognized the right of tribal governments to exercise regulatory authority over non-Indians.[71] The Court upheld the Wind River tribes' authority to regulate the distribution of alcoholic beverages within the exterior boundaries of the reservation. Congress had passed local option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country. The Court found specific congressional authorization[72] for the tribes' regulatory authority but

62. *Id.* at 123.

63. MANUAL OF INDIAN LAW ch. 1, A-2, A-4 (1976).

64. *Id.* at A-2.

65. 198 U.S. 371 (1905).

66. *Id.* at 381.

67. United States v. Michigan, 471 F. Supp. 192, 254 (W.D. Mich. 1979). *See also* Mescalero Apache Tribe v. New Mexico, 630 F.2d 724, 728-29 (10th Cir. 1980).

68. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); United States v. Jackson, 600 F.2d 1283 (9th Cir. 1979).

69. *Worcester* is cited in *McClanahan, id.* at 168; *Winans* is cited in Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 657, 680 (1979).

70. 419 U.S. 544 (1975).

71. Israel, *The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development*, 47 U. COLO. L. REV. 617, 631 (1976) [hereinafter cited as Israel].

72. 18 U.S.C. § 1161 (1976).

also noted that the tribes possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life.[73] Declining to ground its decision solely on inherent tribal powers, the Court found that inherent tribal powers coupled with congressional authorization provided sufficient authority.[74]

The Supreme Court has identified several important attributes of tribal sovereignty. Indian tribes possess inherent power to regulate their "internal and social relations."[75] Indian tribes "are unique aggregations possessing attributes of sovereignty over both their members *and their territory*."[76] In 1978 the Court limited tribal governmental authority over non-Indians in criminal matters in *Oliphant v. Suquamish Indian Tribe*.[77] The same year, the Court reiterated the point in *United States v. Wheeler*:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication *as a necessary result of their dependent status*.[78]

The scope of the "dependent status" test in *Oliphant* and *Wheeler* continues to trouble Indian tribes today. It represents a change from the traditional yardstick for measuring limitations on tribal powers (federal statutes, treaty provisions, and tribal constitutions). A recent Supreme Court decision relieves some of these tribal concerns by indicating that the Court will limit the use of the "dependent status" test to criminal matters. In *Washington v. Confederated Tribes of the Colville Indian Reservation*[79] (hereafter *Colville*), the Court upheld the Colville, Makah, and Lummi tribes' right to impose their cigarette taxes on tribal and nontribal purchases. The Court held that the tribes' right to

73. United States v. Mazurie, 419 U.S. 544, 557 (1975).

74. *Id.*

75. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 599 (1832); United States v. Kagama, 118 U.S. 375 (1886), *quoted in* United States v. Wheeler, 435 U.S. 313, 322 (1978).

76. United States v. Wheeler, 435 U.S. 313, 323 (1978) (emphasis added), *citing* United States v. Mazurie, 419 U.S. 544, 557 (1975); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 542 (10th Cir. 1980), *cert. granted,* 49 U.S.L.W. 3245 (1981).

77. 435 U.S. 191 (1978).

78. United States v. Wheeler, 435 U.S. 313, 323 (1978) (emphasis added). *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

79. 447 U.S. 134 (1980).

tax is an inherent attribute of Indian sovereignty that is not implicitly divested by virtue of the tribes' dependent status,[80] adding, "tribal sovereignty is dependent on and subordinate to only the Federal Government, not the States."[81]

A 1981 decision of the Supreme Court provides some clarification of the approach the Court will use to resolve regulatory disputes between states and Indian tribes. In *Montana v. United States*,[82] the Court held that the ownership of the bed of the Big Horn River, which bisects the Crow Reservation, belongs to the state of Montana, and that the Crow Tribe has no power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the tribe. In its opinion, the Court infers that the principles behind the *Oliphant* dependent status test may apply in civil jurisdiction matters.[83] Within the same paragraph, however, the Court makes an important statement on tribal regulatory authority: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[84] In sum, Indian tribes retain important sovereign powers over their members and their territory in civil matters.

Civil Jurisdiction

General

Land ownership and demographic patterns on most Indian reservations in Montana or elsewhere in the nation complicate the determination of which governmental body—federal, tribal, or state—has civil jurisdiction over a particular individual or subject matter. Within the exterior boundaries of a typical Indian reservation there are tribal members, nonmember Indians, and non-Indians, and there are tribal trust and fee lands, individual Indian allottee trust and restricted and unrestricted fee lands, non-Indian fee lands, federal lands, and state-owned lands. Determining which governmental body has jurisdiction in any given situation is not a perfunctory task but one that requires close scrutiny of

80. *Id.* at 153.
81. *Id.*
82. 447 U.S. 903 (1981).
83. *Id.* at 907.
84. *Id.*

the particular factual setting, treaty provisions (if any), federal and state legislative enactments, and applicable case law. In attempting to organize the jurisdictional maze into some manageable categories, this analysis relies heavily upon the 1979 Jurisdictional Study prepared by the Department of Interior that analyzes civil jurisdictional matters associated with tribal regulation of strip mine reclamation programs for Indian lands.[85]

Promulgation of air quality regulatory standards and procedures by tribal governments applicable to all persons and all lands within the reservation boundaries will strengthen the tribes' ability to resist a state's assertion of regulatory authority over reservation airsheds. But, until recently (see discussion in the introduction), tribal governments have been reluctant to assume environmental regulatory jurisdiction over their reservations. At least one tribe, however, has taken steps in this direction. The Navajo Nation has passed a tribal resolution establishing an Environmental Protection Commission.[86] The commission is empowered to promulgate environmental standards, but thus far has not done so. The Navajo Tribe has also enacted a tax on sulfur emissions applicable to the Four Corners coal-fired power plant complex located within the reservation.[87]

An interesting situation has arisen in the state of Arizona with respect to state regulation of air pollution over Indian lands. The state of Arizona purports to have assumed jurisdiction over enforcement of air and water pollution within Indian reservations by enacting legislation.[88] Strong arguments, however, can be made that this state assumption of regulatory jurisdiction over Indians in Indian country is illegal.[89]

Civil Regulatory Jurisdiction Over Reservation Unrestricted Fee Lands

Tribal Jurisdiction. No Supreme Court decision directly addresses the question of whether tribes possess the power to regulate the use of all lands within the reservation boundaries for

85. The jurisdictional study was required by the 1977 Federal Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 *et seq.* (Supp. 1980).

86. Navajo Tribal Code 2 §§ 3401 *et seq.* (1978).

87. *Id.* at 24, §§ 1 *et seq.*

88. ARIZ. REV. STAT. ANN. § 36-1801 (1974).

89. A study by the Regional Counsel's Office of EPA Region IX, "*Applicability of State Pollution Control Laws to Indian Reservations,* concluded: "Arizona's attempted assumption of jurisdiction over Indian country for pollution control purposes is illegal. Arizona has no legal power to enforce her pollution control laws on Indians in Indian

environmental purposes.[90] The most vexing area of Indian regulatory jurisdictional law concerns the unrestricted fee lands. These reservation fee lands are usually owned by non-Indians under various homestead laws enacted in the late nineteenth and early twentieth centuries. Reservation fee lands, however, may also be owned by the tribe, by individual Indians, by Indian or non-Indian organizations or corporations, or by the federal government or even the state or its political subdivisions.[91] Among some Montana Indian reservations, the amount of non-Indian-owned fee lands is substantial. For example, non-Indians own about half of the reservation lands on the Flathead and Fort Peck reservations.[92]

In determining whether Indian tribes have jurisdiction to regulate the use of reservation fee lands, the analysis should be: (1) Is the power to regulate the use of reservation fee lands an attribute of the inherent sovereignty of Indian tribes? (2) If so, has this power been limited or eliminated (a) by federal law or treaty, or (b) by implication as a necessary result of the dependent status of Indian tribes?[93] In its task force report to Congress, the American Indian Policy Review Commission suggested that case law strongly supported tribal jurisdiction over fee patent lands within the reservation boundaries.[94]

The authority of an Indian tribe to regulate land belonging to its members is supported by a 1934 Solicitor's Opinion that states: "The authority of an Indian tribe in matters of property is not restricted to those lands or funds over which it exercises the rights of ownership. The sovereign powers of the tribe extend over the property as well as the person of its members."[95] The

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country nor has she the power to try Indians for causes of actions arising from pollution in Indian country. Apparently, until rebuked by the U.S. Supreme Court, Arizona will continue to claim jurisdiction to which she is not entitled." *Id.* at 1. *See also* Petros, *supra* note 10, at 80 n.92; Will, *supra* note 2, at 471 n.34.

90. Jurisdictional Study, (Draft) Dep't of Interior, Office of the Solicitor, Division of Indian Affairs, November, 1979, at 40 [hereinafter cited as Jurisdictional Study].

91. *Id.* at 39.

92. *Flathead Reservation, Class I Air Quality Redesignation* 21 (Oct. 15, 1980); *Fort Peck Tribes, Progress on the Overall Economic Development Plan* 16 (Feb., 1976).

93. Jurisdictional Study, *supra* note 90, at 41. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 228 (1978).

94. AMERICAN INDIAN POLICY REVIEW COMM. TASK FORCE II; TRIBAL GOVERNMENT 197-98, (1976).

95. 55 I.D. 14, 54 (1934).

power of a tribe to tax the property of its members' nontrust property is absolute.[96]

The following cases define contemporary civil jurisdiction powers of tribes over the property of non-Indians. In *Buster v. Wright*,[97] the Eighth Circuit upheld the power of the tribe to tax the property of non-Indians within the reservation, stating: "the jurisdiction to govern the inhabitants of a country is not conditional or limited by the title to the land which they occupy in it . . . ."[98] A tribe may tax non-Indian lessees of reservation land,[99] and also non-Indian purchasers of cigarettes.[100] The legal principle established in *Buster* in 1902 continues today. In *Merrion v. Jicarilla Tribe*,[101] a 1980 case, the Tenth Circuit upheld the Jicarilla Apache Tribe's inherent power to levy a tax on oil and gas severed from land within the reservation though the tax falls on non-Indians. The court in *Merrion* stressed the territorial element of inherent tribal powers.[102] In all of these cases, the non-Indians' nexus to the tribe or reservation property was sufficient to enable the federal court to recognize tribal sovereign powers over non-Indians.

Tribal governmental regulatory powers over land use within the exterior boundaries of the reservation provides the most direct analogy to environmental regulation. Two federal court decisions are on point. In *Shoshone & Arapahoe Indian Tribes v. Knight*,[103] the Shoshone and Arapahoe tribes filed suit to enjoin non-Indian defendants and to recover damages for the develop-

96. *Id.* at 50.

97. 135 F. 947 (8th Cir. 1905).

98. *Id.* at 951.

99. Barta v. Oglala Sioux Tribes, 259 F.2d 553, 556 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 99 (8th Cir. 1956).

100. Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980).

101. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3245 (1981).

102. *Id.* at 550. "While the territorial element of inherent tribal powers is not necessarily exclusive . . . and may not exist in some circumstances . . . we do not think the decisions eliminate this aspect of tribal powers." The court noted that in most respects the *Oliphant* rationale does not apply to noncriminal cases.

103. 7 Indian L. Rptr. 3116 (D. Wyo. 1980). Approximately 6,000 Indians reside on the Wind River Reservation, while approximately 42,000 non-Indians reside in Fremont County, Wyo., on or near the reservation. Of the land adjacent to the land in question, approximately one-third of it is owned by individual Indians, one-third is held in trust for the tribes, and one-third owned by non-Indians. Within a 3-mile radius of the land in question, the non-Indian to Indian population ratio is about 11 to 1.

ment of a subdivision within the exterior boundaries of the Wind River Reservation. The land in question is owned in fee by the defendants. On November 15, 1978, the tribal business councils enacted a tribal zoning code applicable to "all lands within the exterior boundaries of the Wind River Reservation, whether held in trust by the United States for the benefit of individual Indians, or for the Shoshone and Arapahoe Tribes, or held in fee by Indians or non-Indians." The Bureau of Indian Affairs informed the tribes by letter that enactment of the code was within the authority of the tribes and did not require Bureau approval. The zoning code requires tribal council approval before any subdivision can be built on the reservation. Without receiving tribal council approval, the defendants proceeded to have the land platted and surveyed, and began selling lots to purchasers. The district court ruled that "the Indian Tribes have inherent authority to zone lands within the Wind River Reservation arising from their sovereign status and as a valid exercise of their police power over the Reservation.[104] Relying on *Mazurie, Merrion,* and *Buster*, the court held that "Tribal attributes of sovereignty extend to lands within the Reservation owned by non-Indians in fee . . . ."[105] The court relied on the Wyoming tribes' "significant interest"[106] in the lands in question, which were located close to traditional tribal celebration grounds, two Indian schools, an Indian irrigation project, and an Indian community center.[107] The court also relied on the definition of "Indian country" contained in 28 U.S.C. § 1151. The court found that the tribes' inherent power to zone had not been withdrawn as a necessary result of their dependent status "or that such power is in any way inconsistent with their independent status."[108] And finally, the court noted that the *Oliphant* principles do not apply because the *Shoshone* case is a noncriminal case and deals with tribal rights over land, not tribal rights over people.[109]

An important case currently on appeal to the Ninth Circuit is *Confederated Salish & Kootenai Tribes v. Namen (NamenII).*[110]

104. *Id.* at 3118.

105. *Id.*

106. *See* Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980).

107. Shoshone & Arapahoe Indian Tribes v. Knight, 7 Indian L. Rptr. 3116, 3118 (D. Wyo. 1980).

108. *Id.* at 3119.

109. *Id.*

110. 7 Indian L. Rptr. 3098 (D. Mont. 1980). This suit involves the consolidation of

In July 1977, the Salish and Kootenai tribes adopted a "Shoreline Protection Ordinance," which was approved by the Secretary of Interior. By its terms, the ordinance applies to the southern half of Flathead Lake within the reservation boundaries and to any other navigable waters within the reservation. The ordinance, *inter alia*, requires tribal permits prior to the installation of new wharves, docks or breakwaters, or other similar structures on the bed or banks of any navigable water within the exterior boundaries of the reservation. The non-Indian defendants own shoreline fee land from which a breakwater extends 340 feet into Flathead Lake. They refused to get a tribal permit for the breakwater. The federal district court concluded that the Flathead Allotment Act of 1904, which opened the reservation to non-Indian homesteading, divested the tribe of the power to impose tribal land use regulations on non-Indian fee land.[111] Relying on *Oliphant* and *Wheeler*, the court reasoned that the tribes have lost their sovereign powers to assume regulatory authority over nonmembers "by virtue of their dependent status."[112] Citing *Wheeler*, the court found that the power to regulate non-Indian riparian rights (i.e., structures on a tribal lake bed) is a matter affecting the tribe's external relations, which they lost when lands were homesteaded to non-Indians.[113]

Although an exhaustive 74-page opinion was rendered, the court gave less than sufficient consideration to Indian sovereignty, the Flathead Allotment Act, and *Mazurie*. Tribal sovereignty arguments were quickly discarded under the "dependent status" test of *Oliphant* and *Wheeler*, notwithstanding the noncriminal and nonpersonal nature of *Namen II*.[114] *Colville* suggests the "dependent status" test of *Oliphant* and *Wheeler* may not be as broad as *Namen II* suggests. Relying on *Wheeler*, the court found that tribal assertion of regulatory authority over non-Indians is an attempt to exercise external powers, *ergo*, a power they have lost as a result of their dependent status. But in *Colville*, the Washington tribes succeeded in asserting taxing author-

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three lawsuits to resolve the following questions: (1) whether the Flathead Reservation had been disestablished to the extent of its lands alienated in fee; (2) whether the tribes can enact and enforce regulations regarding the use of the bed and banks of the Flathead Lake; and (3) ownership of the bed and banks of Flathead Lake.

111. *Id.* at 3108.

112. *Id.*

113. *Id.*

114. *See* Shoshone & Arapahoe Indian Tribes v. Knight, 7 Indian L. Rptr. 3116, 3119 (D. Wyo. 1980).

ity over non-Indians and the Supreme Court specifically rejected the dependent status argument.[115] The court gave little attention to legislative history surrounding the Flathead Allotment Act to justify its finding of implicit divestiture of tribal jurisdiction and did not apply the canon of construction that legislation affecting tribal sovereignty is to be construed in favor of the Indians.[116] The Montana federal court gave no reasons for distinguishing the *Mazurie, Barta,* and *Iron Crow* cases. *Colville* recognizes that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest.[117] It seems reasonable that the tribes would have a significant interest in protecting the integrity of the shores of Flathead Lake. Yet there is no finding on the effects of Namen's breakwater on the environment.

The *Montana v. United States* opinion (discussed *supra*) provides an important insight into the Supreme Court's perspective on Indian tribes' regulatory authority over fee lands owned by non-Indians. First, the Court describes its decision on regulatory authority as a narrow one.[118] Second, the Court interprets the allotment acts from an assimilationist perspective, concluding that alienated allotted non-Indian lands are not subject to tribal regulatory authority.[119] Third, the Court comes very close to extending the *Oliphant* dependent status test and rationale to civil regulatory matters.[120] Last, and most important, the Court seemingly contradicts these statements by stating that tribes retain inherent power to exercise civil regulatory authority over non-Indians on fee lands when their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[121]

Montana v. United States appears to support retained inherent power of a tribal government to exercise regulatory authority over a major polluting source sited on non-Indian-owned fee lands within an Indian reservation. The pollution from such a fa-

115. Confederated Salish & Kootenai Tribes v. Namen, 7 Indian L. Rptr. 3098, 3108 (D. Mont. 1980). *See* Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980).

116. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979).

117. Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980).

118. Montana v. United States, 101 S. Ct. 1245, 1254 (1981).

119. *Id.* n.9.

120. *Id.* at 1258.

121. *Id.*

cility has some direct effect on the health or welfare of the tribe. In addition, air pollution has deleterious effect on any agricultural industry located within a reservation, which competes with nonagricultural industries for the same natural resources—land, air, and water. This air pollution impacts on the health and welfare of a tribe and, coupled with the revenue generated by a major facility, would likely have some direct effect on the "economic security" of the particular tribe. Finally, the large non-Indian population that may accompany the construction of major industrial facilities may threaten or have a direct effect on the tribe's political integrity.

State Jurisdiction. It is no longer true that states have no authority whatever within Indian reservations.[122] Cohen stated the general rule: "plenary authority over Indian affairs rests in the Federal Government to the exclusion of the State governments," but recognized that two major exceptions to the rule had developed in the case law subsequent to *Worcester v. Georgia*.[123] The first was "where Congress has expressly declared that certain powers over affairs shall be exercised by the state."[124] The second was "where the matter involves non-Indian questions sufficient to ground state jurisdiction."[125] *McClanahan v. Arizona Tax Commission* makes clear that courts should look to the applicable treaties and statutes to define the limits of state power, with less emphasis on inherent Indian sovereignty as a bar to state jurisdiction.[126] At the same time, both tribal sovereignty and the long-standing policy of leaving Indians free from state jurisdiction remain important considerations,[127] particularly where essential tribal relations or Indian rights will be jeopardized.[128] In *Williams v. Lee*[129] the Supreme Court established an important test. When there are no governing acts of Congress that control, the question becomes whether state jurisdiction infringes on the right of reservation Indians to make their own laws and be governed by them.[130]

122. Jurisdictional Study, *supra* note 90, at 53.

123. *Id.*

124. COHEN, *supra* note 61, at 119.

125. *Id.*

126. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 (1973).

127. Jurisdictional Study, *supra* note 90, at 54.

128. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 (1973).

129. 358 U.S. 217 (1959).

130. *Id.* at 220. See also the discussion of *Williams* in the section Jurisdiction over Non-Indians, *infra*.

In *Moe v. Confederated Salish & Kootenai Tribes*[131] and in *Colville*, the Supreme Court upheld state taxation of cigarette purchases by non-Indians on the reservation. State regulation of land use with respect to reservation fee lands owned by non-Indians, however, may be invalid under the *Williams* test, at least where such regulation would conflict with the exercise of tribal authority over such lands.[132] Unlike the exercise of dual taxation (state and tribe) on a given subject, dual application of land use laws, or air quality laws, over the same property is inherently conflicting. For example, the tribal government and the state may have completely different new source performance standards for a given pollutant or different enforcement and penalty provisions. Application of both state and tribal air quality regulatory laws on an industrial facility hinders rather than facilitates efficient resource management. Moreover, the tribal government's ability to protect the health and welfare of its members and to protect important tribal economic interests is dependent upon appropriate supervision of polluting sources within the reservation. State interference with a tribe's efforts to protect these interests would frustrate tribal self-government. By comparison, multiple taxation (state and tribal) as in *Moe* and *Colville* can be layered without the comparable disruption to tribal self-governing powers.

Summary. (a) Indian tribes possess the inherent authority to regulate the use of reservation fee lands, regardless of whether they are owned by Indians or non-Indians, and although this power is subject to limitation by federal law, no existing statutory provision limits tribal jurisdiction;[133]

(b) State jurisdiction over reservation fee land might be precluded to the extent that state regulation of reservation fee lands interferes with tribal regulations;[134] and,

(c) The federal government has residual jurisdiction to regulate

131. 425 U.S. 463 (1976).

132. Jurisdictional Study, *supra* note 90, at 67.

133. *Id.* at 71-72. States have attempted to find regulatory authority under 25 U.S.C. § 231. The Department of Interior, however, has consistently taken the position that 25 U.S.C. § 231 is not self-executing and that in the absence of implementing regulations cannot serve as a source of authority for state enforcement of state health laws on Indian reservation lands, whether held in trust or in fee. *See* Op. Sol. M-36768, Feb. 7, 1969. There do not exist any regulations promulgated by the Secretary of Interior to implement 25 U.S.C. § 231, and therefore this section does not as yet provide a legal basis for extension of state regulatory jurisdiction over reservation tribal trust or tribal fee lands.

134. *Id.* at 72.

both Indian and non-Indian reservation fee lands to the exclusion of either or both Indian tribes and the states.[135]

Civil Regulatory Jurisdiction Over Tribal Trust and Tribal Fee Land

Indian tribes are not only governmental entities but are also landholders on their reservations.[136] Tribal land ownership takes two general forms: (1) fee ownership but with restrictions on tribal authority imposed by federal law; and (2) beneficial ownership, with legal title to the land in the United States, in trust for the tribe.[137] There is no distinction between tribal proprietary powers over land owned in fee and land owned beneficially.[138]

The proprietary powers of an Indian tribe over its trust and fee land are not less absolute than the power of any landowner.[139] The only limitations on the exercise of tribal proprietary powers are those imposed by general laws of the federal government restricting the alienation[140] and the leasing[141] of tribal property. In *Wheeler* the Supreme Court stated that: "The powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never been extinguished.*' "[142] Although Indian tribes no longer possess the full attributes of sovereignty,[143] tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[144]

The concept of zoning was upheld and firmly established by the Supreme Court's holding in *Euclid v. Ambler Realty Co.*,[145]

135. *Id.*

136. *Id.* at 73.

137. *Id.*

138. *Id.* For an example of reservation lands the tribe owns in fee, *see* Morris v. Hitchcock, 194 U.S. 384 (1904), and for an example of the lands the tribe owns in trust, *see* Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958).

139. 55 I.D. 14, (1934). "Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty." One commentator suggests that when tribes act with respect to tribal resources they are exercising both governmental and proprietary powers. The authority should be regarded as plenary. Israel, *supra* note 71, at 634.

140. 25 U.S.C. § 177, 321, 323 (1976).

141. *E.g.*, 25 U.S.C. § 396a, 402 (1976).

142. United States v. Wheeler, 435 U.S. 313, 322 (1978) (quoting Cohen, at 122) (emphasis in original).

143. United States v. Kagama, 118 U.S. 375, 381 (1886).

144. See text at note 78, *supra*.

145. 272 U.S. 365 (1926).

with the source of the power to zone generally being recognized to be the sovereign's exercise of its police power. This power is inherent in sovereign entities and need not be expressly delegated by the United States.[146] In *Shoshone & Arapahoe Indian Tribes v. Knight*, the court recognized that Indian tribes retain inherent police powers to zone within the exterior boundaries of the reservation.[147] The Secretary of Interior has consistently approved tribal land use planning and environmental protection ordinances as applied to tribal trust and tribal fee lands within reservation boundaries.[148]

Thus, Indian tribes by virtue of their sovereign powers as governments retain the power to regulate land use on tribal trust and fee lands.[149] Unless there is express authorization by the federal government, state jurisdiction does not extend to reservation Indians or their property.[150]

Civil Regulatory Jurisdiction Over Trust and Restricted Reservation Lands Held By Individual Indians

Civil regulatory jurisdiction over lands allotted to individual Indians and held in trust, or fee patented with restrictions against alienation, and lands acquired by the United States in trust for individual Indians pursuant to the Indian Reorganization Act of 1934[151] or other congressional acts (allotted lands), are substantially similar because of the Act of February 14, 1923, which provides: "Unless otherwise provided the provisions of . . . [the General Allotment Act] are extended to all lands heretofore pur-

146. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Izaak Walton League of America v. St. Clair, 353 F. Supp. 698 (D.C. Minn. 1973).

147. 7 Indian L. Rptr. 3116, 3118 (D. Wyo. 1980). *See also* COHEN, *supra* note 61, at 145.

148. Jurisdictional Study, *supra* note 90, at 74-75. *See* Shoshone & Arapahoe Tribes v. Knight, 7 Indian L. Rptr. 3116, 3117 (D. Wyo. 1980), and Op. Sol., dated Dec. 21, 1972.

149. Jurisdictional Study, *supra* note 90, at 75; 55 I.D. 14, 54 (1974).

150. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 170-71 (1973) ("State laws generally are not applicable to tribal Indians or an Indian reservation except where Congress has expressly provided that State laws shall apply."); William v. Lee, 358 U.S. 217, 220 (1959) ("Congress has also acted consistently upon the assumption that the states have no power to regulate the affairs of Indians on a reservation."). *See also* United States v. County of Humboldt, 615 F.2d 1260 (9th Cir. 1980) (court held that county was without jurisdiction to enforce its zoning ordinance on building code on Indian reservation trust lands and that P.L. 280 did not grant the county jurisdiction to do so); Bryan v. Itasca County, 426 U.S. 373 (1976); Santa Rosa Band of Indians v. King's County, 532 F.2d 655 (9th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

151. 25 U.S.C. § 465 (1963).

chased or which may be purchased by the authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians."[152]

The scope of federal and state regulatory authority over these allotted lands is similar to the scope of federal and state regulatory authority over tribal trust and restricted lands.[153] In other words, by virtue of their sovereign powers, tribal governments retain the power to regulate allotted lands held by individual Indians.

Jurisdiction Over Non-Indians

The question of legal authority to regulate reservation airsheds involves the ancillary question of jurisdiction to regulate the activities of facility employees and their agents in connection with the operation of stationary sources, and the tribes' ability to civily enforce tribal laws and regulations relating to air quality management against non-Indians. Therefore, it is necessary to examine the question of jurisdiction over non-Indians apart from jurisdiction over Indian lands. The issue of state and tribal civil jurisdiction over non-Indians within the reservation is a complex and changing body of law. The purpose of this analysis is merely to highlight some of its major features.

At the time of *Worcester v. Georgia,* discussed *supra*, state jurisdiction within Indian reservations, including jurisdiction over non-Indians, was precluded because tribes were viewed as dependent sovereign nations whose territory was extraterritorial to the the states. The Supreme Court's opinion in *McClanahan, supra*, reflected the devolution in case law in the subsequent century and a half since *Worcester*: "[T]he Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of State law, . . . [has] been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians."[154]

In the landmark case of *Williams v. Lee*, *supra*, the Supreme Court held that the tribal court retained exclusive jurisdiction over a lawsuit brought by a non-Indian against a reservation Indian involving a cause of action that arose on the reservation. In doing so, the Court laid down the seminal test that remains positive law: "[A]bsent governing Acts of Congress, the question

152. 25 U.S.C. § 335 (1963).

153. Jurisdictional Study, *supra* note 90, at 84.

154. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 171 (1973).

has always been whether the State action infringed on the right of reservation Indians to make their laws and be ruled by them."[155] The Court stated that the fact the plaintiff was non-Indian was immaterial.[156]

The *Williams* test employs both federal preemption and tribal sovereignty as a two-pronged test to define the limits of state jurisdiction over persons within the reservation.[157] The first prong of the *Williams* test is federal preemption.[158] It is only "absent governing Acts of Congress" that state law may apply to non-Indians within the Indian reservation. For example, federal laws dealing with the sale of liquor on the reservation or dealing with trust or restricted Indian lands may limit state authority over non-Indian activities vis-a-vis these matters. Assuming state jurisdiction over non-Indian activities within Indian reservations is not preempted by federal law, the second prong of the *William* test comes into play—noninterference with tribal self-government. The impact of state regulation of non-Indians on the ability of the tribe to carry out its legitimate governmental functions appears to be the most obvious area of potential infringement under the noninterference test.[159] The *Williams* test has permitted the state to exercise jurisdiction over non-Indians on the reservation. The subject matter of the attempted state jurisdiction, however, is of critical importance.[160] In cases where the tribe has not itself attempted to regulate non-Indians, state jurisdiction over non-Indians will generally not be found to constitute an interference with tribal self-government.[161] Possibly one of the stronger cases for exclusive tribal jurisdiction over non-Indians under the *Williams* test would exist in the regulation of air quality. Air pollution certainly has the potential to directly affect the health, safety, and welfare of all reservation residents. Tribal governments would have a legitimate interest in regulating the activities of non-Indians directly related to the emissions of air pollution within the reservation. A dual state-tribal air quality regulatory

155. Williams v. Lee, 358 U.S. 217, 220 (1959).

156. *Id.* at 223.

157. Jurisdictional Study, *supra* note 90, at 66.

158. Federal preemption of state regulatory jurisdiction over reservation Indian lands and their property, regardless of whether it is held in trust or fee, could also be supported by provisions found under the enabling acts for the admission of states. *See* Jurisdictional Study, *supra* note 90, at 56-57.

159. Jurisdictional Study, *supra* note 90, at 153.

160. *Id.* at 162.

161. *Id.* at 163.

program would be inherently problematic, jeopardizing the tribe's self-governing powers (see State Jurisdiction).

In sum, although the Supreme Court has established general criteria as to when state jurisdiction over non-Indians is permissible, the test is dependent on the facts of each case. Although the application of the second prong of the *Williams* test—interference—has usually failed to exclude all state jurisdiction over non-Indians, a strong factual setting for exclusive tribal jurisdiction would exist in the situation of air quality management.

State Disclaimer Clauses

State disclaimer clauses, contained in certain states' enabling statutes and by congressional mandate incorporated into those states' constitutions, are promises made by those states to the federal government not to assert state control over Indians or their lands, but to leave the management of Indian matters entirely within the hands of the federal government. The United States Supreme Court has said that state and federal governments derive power from different sources, that is, each from the organic law that established it.[162] The federal enabling act for the state of Montana provides:

> That the people inhabiting said proposed States do agree and declare that they forever disclaim all rights and title . . . to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until title thereto shall have been extinguished by the United States, the same shall be and remain under the absolute jurisdiction and control of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.[163]

This same doctrine is incorporated into the Montana constitution.[164] The two major principles behind disclaimer clauses carried forward from Justice Marshall's opinion in *Worcester* are:

162. United States v. Wheeler, 435 U.S. 313 (1978).

163. Act of Feb. 22, 1889, 25 Stat. 676, § 4 pt. 2.

164. "All provisions of the enabling act of Congress (approved Feb. 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the State of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian Tribes shall remain under this absolute jurisdiction and control of the Congress of the United States continue in full force and effect until revoked by the consent of the United States and the people of Montana." MONT. CONST. art. I.

(1) that the federal government has plenary authority to deal with the Indian tribes to the exclusion of the states, and (2) that the Indian tribes are quasi-soverign entities occupying their own territory and not subject to the authority of any state government.[165]

Late nineteeth-century court opinions relating to state court criminal jurisdiction over non-Indians narrowed the apparent range of disclaimer clauses. The United States Supreme Court in *United States v. McBratney*[166] reasoned that unless the exclusion of Indian lands from the jurisdiction of a state is express in the enabling legislation (e.g., Montana) such Indian lands are included within the territorial boundaries of the state. *McBratney* left open the question of whether a reservation could be included within the jurisdictional boundaries of a state if, regardless of any treaty provisions, the state enabling act contained a disclaimer of state authority over Indians and their lands. A series of subsequent Supreme Court decisions over the next twenty years settled this question.[167]

In one of the most important of these decisions, the Court in *Draper v. United States*[168] considered the following provisions in Montana's enabling act: "[A]nd said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."[169] In interpreting this language the Court stated that the mere reservation of jurisdiction and control by the United States of "Indian lands" does not of necessity signify a retention of jurisdiction in the United States to punish all offenses committed on such lands by others than Indians or against Indians.[170] The *Draper* decision, together with other Supreme Court opinions,[171] brought an end to the principle so strongly stated by Justice Marshall in *Worcester* that Indian lands within a state were extraterritorial to the state. Disclaimer clauses are no longer regarded as describing a geographical area over which the state had no jurisdiction whatever. Rather, they are viewed as a federal guarantee of property rights granted by treaty or statute and protection against direct state interference with federal and tribal governmental authority over Indian lands.

165. Jurisdictional Study, *supra* note 90, at 183.

166. 104 U.S. 621 (1881).

167. *E.g.*, Thomas v. Gay, 169 U.S. 264 (1898); Utah & Northern Ry. v. Fisher, 116 U.S. 28 (1885).

168. 164 U.S. 240 (1896).

169. *See* Act of Feb. 22, 1889, 25 Stat. 676, § 4, pt. 2.

170. Draper v. United States, 164 U.S. 240, 245 (1896).

171. See cases cited at note 167, *supra*.

Presently, disclaimer clauses essentially serve as a statement of the established tribal, state, and federal jurisdictional relationships in Indian law. The United States Supreme Court has said: "*Draper* and *Williams* indicate that absolute federal jurisdiction and control is not invariably exclusive jurisdiction . . . . The disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest."[172]

In 1973 the United States Supreme Court in *McClanahan v. Arizona Tax Commission*[173] strongly reaffirmed the right of Indian tribes to be self-governing, subject only to the general supervision of the federal government, over all matters of internal tribal affairs, and clarified the intent of disclaimers, which was to codify these principles of Indian law.[174] To date, disclaimers have not, in and of themselves, been determinative of the reach of state jurisdictional authority as a matter of federal law. Disclaimer causes found in state constitutions, however, may be of independent significance as a matter of state law.

General Allotment Act

There is a possibility that states may attempt to assert authority to regulate reservation fee lands owned by Indians under section 6 of the General Allotment Act.[175] Section 6 of the Act provides that when allotted lands on an Indian reservation are patented in fee, "each and every allottee shall . . . be subject to the laws, both civil and criminal, of the State . . . in which they may reside."[176] The scope of section 6, however, has been limited by subsequent legislation reflecting changes in federal Indian policy, even though the section has never been expressly repealed. The United States Supreme Court in *Moe v. Salish & Kootenai Tribes*, has said:

> If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on "fee patented" lands, then for all jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size. A similar claim was made by the State in *Seymour v. Superintendent*, 368 U.S. 351 (1962), to which we responded: "[T]he ar-

172. Organized Village of Kake v. Egan, 369 U.S. 60, 68-69 (1962).
173. 411 U.S. 164 (1973).
174. *Id.*
175. 25 U.S.C. §§ 331 *et seq.* (1963).
176. *Id.* at § 349.

gument rests upon the fact that where the existence or non-existence of an Indian Reservation and therefore the existence or non-existence of Federal Jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government." *Id.* at 358. We concluded that [s]uch an impractical pattern of checkerboard jurisdiction, *ibid.*, was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction. See also *United States v. Mazurie*, 419 U.S. 544, 554-555 (1979).

[This] Court has recently said of the present effect of the General Allotment Act and related legislation of that era: "Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished.... The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act . . . ." Congress by its more modern legislation has envinced a clear intent to eschew any such "checkerboard" approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.[177]

However, as noted in a memorandum by the Associate Solicitor dated March 22, 1979, although *Moe* can be read as limiting state jurisdiction over activities on fee patented allotments involving Indians, it cannot be extended to preclude state taxation of fee patented allotments in light of a proviso to section 6, which provides that upon the issuance of a fee patent to an allottee "all restrictions as to sale, encumbrance, or taxation of such land shall be removed." The memo points out that 24 U.S.C. § 355 extended the provision of the General Allotment Act to all lands purchased for individual Indians by authority of Congress, but, as noted above, state jurisdiction over such lands is limited to applying its property tax to lands held in fee.

Indian Reorganization Act

The Indian Reorganization Act of 1934[178] (hereinafter IRA) re-

177. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 478-79 (1976).
178. 25 U.S.C. §§ 476 *et seq.* (1963).

pudiated the policies of the General Allotment Act.[179] Of importance, the IRA creates several specific grants of power from Congress and confirms the broad scope of tribal governmental and proprietary powers by recognizing "all powers vested in any Indian tribe or tribal council by existing law . . . ."[180] This language in the Act incorporates the recognition of inherent powers of an Indian tribe.[181] In addition to affirming the self-governing powers of Indian tribes,[182] the IRA authorizes Indian tribes to take positive control of their own resources.[183] One of the sponsors of the IRA, Senator Wheeler, stated: "This bill . . . seeks further to give the Indians the control of their own affairs and of their own property; to put it in the hands either of an Indian Council or in the hands of a corporation to be organized by the Indians."[184]

In its preamble, the IRA describes one of its purposes as being "[t]o conserve and develop Indian lands and resources."[185] The IRA ended further allotments,[186] indefinitely extended the trust periods[187] and restrictions on alienation of all Indian lands,[188] and provided the procedures to return remaining surplus lands to tribal ownership.[189] Furthermore, the IRA authorized tribes to adopt constitutions and bylaws[190] and brought all Indians residing on the reservation within the scope of the tribes' governing powers.[191]

In sum, the IRA granted additional powers to tribes, and it complements and affirms inherent tribal powers while establishing a federal Indian policy that advocates self-determination principles.

179. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 479 (1976).

180. 25 U.S.C. § 476 (1963).

181. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 541 (10th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3245 (1981).

182. COHEN, *supra* note 61, at 126; Cheyenne River Sioux v. Andrus, 566 F.2d 1085, 1087 (8th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).

183. COHEN, *supra* note 61, at 86.

184. 78 CONG. REC. 11125 (1934).

185. Pub. L. No. 73-383, 48 Stat. 984.

186. 25 U.S.C. § 461 (1963).

187. *Id.* at § 462.

188. *Id.* at § 464.

189. *Id.* at § 463.

190. *Id.* at § 476.

191. *Id.* at § 479.

Public Law 280

In 1953 Congress passed Public Law 280,[192] which was an attempt to legislatively resolve jurisdictional disputes between states and Indian tribes. Public Law 280 was heavily influenced by the termination and assimilation policies existing in the early 1950s. In five states the Act transferred civil and criminal jurisdiction over reservation Indians to the state.[193] Other states were given the option of assuming such civil and criminal jurisdiction without the affected tribes' consent.[194] The Act contained limitations on the jurisdiction transferred to the state, and it did not terminate the trust status of reservation lands.[195] As a result of political pressure from tribes and Indian organizations, the Act was amended in 1968 to add a tribal consent requirement.[196]

The extent of jurisdiction asserted over Indian lands by the state of Montana pursuant to Public Law 280 is found codified at section 2-1-301, Montana Code Annotated (1980). Only the Salish and Kootenai tribes of the Flathead Reservation have consented to limited state jurisdiction pursuant to the Montana statute. The jurisdictional agreement between the Salish and Kootenai tribes and the state of Montana does not include air quality regulatory authority. Therefore, Public Law 280 should have no effect on the determination of jurisdiction for regulating airsheds in the state of Montana.

Moreover, Public Law 280 does not alter the exclusive authority of Indian tribes and the federal government to regulate trust property, such as land use planning or airshed regulatory authority control. In *Santa Rosa Band v. King's County*,[197] the Ninth Circuit upheld a broad interpretation of the word "encumbrance" found in the savings clause of Public Law 280[198] and denied the state the power to apply zoning regulations to trust property. *Santa Rosa* involved the applicability of a county zoning ordinance to the Santa Rosa Rancheria in California. In *Bryan v.*

192. 18 U.S.C. § 1162; 28 U.S.C. § 1360 (and other scattered sections in 18 and 28 U.S.C.).

193. *See* 18 U.S.C. § 1162(a)(1970) and 28 U.S.C. § 1360(a)(1970). A sixth state, Alaska, was added in 1958. Act of Aug. 8, 1958, Pub. L. No. 85-615, § 2, 72 Stat. 545.

194. Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 590.

195. 18 U.S.C. § 1162(b) (1970); 28 U.S.C. § 1360(b) (1970).

196. These amendments were part of the 1968 Civil Rights Act. They are now codified at 25 U.S.C. §§ 1321-26 (Supp. 1980).

197. 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

198. 25 U.S.C. § 1322(b) (Supp. 1980).

Itasca County[199] the United States Supreme Court held that the state of Minnesota could not under Public Law 280 impose a personal property tax on a mobile home located on trust property within the Leach Lake Reservation. The Court refused to construe section 4 of the Act as granting state regulatory or taxing jurisdiction over reservation trust lands: "And certainly the legislative history of Title IV makes it difficult to construe § 4 jurisdiction acquired pursuant to Title IV as extending *general state civil regulatory authority*, including taxing power, to govern Indian reservations."[200] Thus, Public Law 280 does not pose any limitations on tribal governmental authority to regulate reservation airsheds.

Indian Self-Determination and Education Assistance Act

The passage of the Indian Self-Determination and Educational Assistance Act[201] (hereinafter the Self-Determination Act) in 1975 solidified Congress' repudiation of the termination and assimilation policies of the 1950s. The Self-Determination Act's statement of congressional finding expresses the Act's purpose in clear terms:

> The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—
>
> (1) The prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and,
>
> (2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.[202]

The resulting congressional policy is a commitment to Indian self-determination:

199. 426 U.S. 373 (1976).
200. *Id.* at 387 (emphasis added).
201. 25 U.S.C. §§ 450 *et seq.* (Supp. 1980).
202. *Id.* at § 450.

> The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities. 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 establishment 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.[203]

The Self-Determination Act addresses two issues: (1) it provides for contracting with the secretaries of Interior and Health, Education and Welfare for the direct delivery of services to Indians,[204] and (2) it reinforces and strengthens tribal control over Indian education.[205] Thus, the Self-Determination Act is relevant to air quality regulatory concerns for two reasons. First, the Act expresses congressional endorsement of a general policy of Indian self-determination. And second, the Act recognizes contracting of services from federal agencies to the tribal governments as the most effective means of fostering the self-determination policy.

Conclusion

Tribal legal authority to regulate reservation airsheds has not been directly addressed by the courts. Affirmative steps by Montana and Arizona Indian tribes to expand tribal capabilities to manage reservation airsheds may force a judicial review of these matters. The Federal Clean Air Act can be reasonably interpreted to provide congressional authority for Indian tribes to assume full regulatory and enforcement capabilities over reservation airsheds. Notwithstanding the Federal Clean Air Act, tribes have inherent sovereign authority to manage air quality control programs for their respective reservations. The Indian Reorganization Act's repudiation of the General Allotment Act, the limitations of Public

203. *Id.* at § 450a.
204. *Id.* at § 450f and g.
205. 25 U.S.C. §§ 450 *et seq.* (Supp. 1980).

Law 280, and the Indian Self-Determination Act provide additional support for the principle that Congress, in exercising its plenary power over Indian affairs, regards tribal governing bodies as the appropriate entities to conserve and regulate reservation airsheds. No federal statutes appear to limit tribal regulatory authority over reservation airsheds. And finally, a strong case can be made for exclusive tribal regulatory jurisdiction over all lands within the reservation and over all persons whose activities affect reservation air quality.