

**PUZZLING POWERS: OVERLAPPING JURISDICTIONS OF
INDIAN TRIBES, THE FEDERAL, STATE, AND LOCAL
GOVERNMENTS IN DEVELOPMENT OF NATURAL RESOURCES
IN "INDIAN COUNTRY"**

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§ X.01 Introduction

The jurisdictional uncertainty complicating minerals development in Indian country is not because there are too few Indian laws. Through treaties, statutes, executive orders, and regulations, the United States has laid down hundreds, even thousands of rules and standards addressing not only specific matters with respect to a single tribe, but also generally applicable standards addressing leasing, permitting, and scores of other subjects regarding Indians generally. But Congress and the executive have not resolved the central questions governing the allocation of regulatory, taxing, and judicial jurisdiction among the sovereigns competing in Indian country today for those powers⁽¹⁾. Consequently, determining which sovereign will have power over the many facets of natural resource development in and around "Indian country"⁽²⁾ is one of the most perplexing problems facing the natural resource developer⁽³⁾.

Developers in Indian country often are faced, before deciding how to comply with applicable law, with the dilemma of determining which sovereign's laws apply and to what court system they must resort to determine their duties and rights. A tribe or other Native American government, the federal government, and the state or its local governmental unit may all assert a power, and the Supreme Court's caselaw seldom supplies clear tests to allow the developer to predict confidently the sovereign with sway. The specific power asserted, the history of federal policy regarding the lands or governments involved, the land status and population demographics surrounding those lands, and other factors all may figure in the decision⁽⁴⁾. Overlaying the uncertainty regarding the outcome of this analysis is the dual dilemma posed by the risk that a tribal tribunal must initially decide not only whether a tribe or other government has jurisdiction, but also the merits of the underlying controversy, and by uncertainties regarding both whether a federal or other court may review the determination of the tribal tribunal and the scope of any such review.

This paper seeks to provide a framework to assist the developer, its counsel, and other involved parties and governments in analyzing competing claims to jurisdiction. It also will report on the current balance of power in contests for primacy in some specific areas. After reviewing briefly the history of federal Indian policies⁽⁵⁾, the paper will outline principles that determine sovereign power in Indian country⁽⁶⁾, including the primacy of federal law, the nature of tribal inherent powers, and the effect of land status and reservation boundaries. The paper will then analyze specific areas of jurisdictional rivalry and review recent authority that may aid developers and governments in predicting the outcomes of future contests.⁽⁷⁾ The paper also will assess the pivotal power to resolve

disputes in Indian country and the parameters of the dispute resolution process in the federal system, including the subject matter jurisdiction of the competing courts, the "Indian abstention" doctrine that requires many disputes to be resolved initially in tribal court, and the availability and scope of federal or other courts' review of tribal court rulings.⁽⁸⁾ Finally, the paper will offer suggestions for developers and tribes or governments involved in the development process for structuring development agreements and activities to the parties to confidently predict patterns of regulation and dispute resolution.⁽⁹⁾

[1] A Brief History of Federal Indian Policy.

The regulatory and legal environment in Indian country will be determined by a unique combination of the particular history of the tribe⁽¹⁰⁾ involved, the treaties, statutes, executive orders, and regulations specifically applicable to its lands and resources, and federal law generally governing the development on Indian lands of the specific resource involved.⁽¹¹⁾ Indian law, the Supreme Court has cautioned, "draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, . . . must be read in light of the common notions of the day and the assumptions of those who drafted them."⁽¹²⁾ The powers, privileges, and duties of American Indians with respect to their lands and minerals usually have been defined by a succession of federal treaties, statutes, executive orders, and regulations. Each of these enactments expressed one or more policies of the federal government towards Indians, tribes, and their lands. Those policies have changed markedly over time.⁽¹³⁾ A brief summary of the history of those policies follows.

The history of federal Indian policy has been divided roughly into five periods, described below.

[a] Treaty Period.

From colonial times through approximately 1870, colonizing nations and, later, the United States, generally dealt with Indian tribes as foreign sovereigns, having comprehensive authority over their lands and peoples. During the treaty period, the federal government entered into treaties with tribes, pursuant to which the tribe usually gave up certain disputed lands in exchange for exclusive occupancy of treaty-guaranteed lands, generally contiguous. The United States undertook to act as guarantor of the retained lands, although the vigor and success of its efforts were mixed.⁽¹⁴⁾ The Indian Non-Intercourse Act of 1790,⁽¹⁵⁾ since amended,⁽¹⁶⁾ reflected the federal commitment to protecting tribes' treaty lands and the early federal assertion of legislative primacy over transactions with tribes. The Non-Intercourse Act declared invalid any "purchase, grant, lease, or other conveyance of lands" from any Indian tribe or nation unless properly approved by the United States. That policy, reaffirmed and refined in statutes governing leasing and permitting of Indian lands,⁽¹⁷⁾ remains a central element of Indian lands management policy today.⁽¹⁸⁾

The contours of tribal sovereignty, however, were proclaimed judicially. In three still-influential opinions, *Johnson v. M'Intosh*⁽¹⁹⁾, *Cherokee Nation v. Georgia*⁽²⁰⁾, and *Worcester v. Georgia*⁽²¹⁾, Chief Justice John Marshall set forth principles that remain influential in determining jurisdictional power on Indian lands.⁽²²⁾ The "Marshall trilogy" relied on the Indian Commerce Clause of the United States Constitution,⁽²³⁾ federal constitutional treaty making authority,⁽²⁴⁾ and the history of colonial and early federal dealings with tribes to define a relationship between tribes and the federal government that Marshall found to be "perhaps unlike that of any other two people in existence. . .".⁽²⁵⁾ Understanding that unique relationship remains an initial hurdle confronting lawyers addressing Indian lands development.

The cornerstone of Marshall's analysis was recognition of broad federal power over Indian affairs and Indian lands. Federal principles determine the powers of state, tribal, and federal governments on Indian lands.⁽²⁶⁾ Marshall's recognition of a relationship of "a ward to his guardian,"⁽²⁷⁾ encompassing a federal power to control Indians' alienation of their lands, coupled with a federal trust obligation to protect their property, stand as the facets of federal-tribal relations most critical to natural resources developers.

The Marshall trilogy also laid the foundation for defining tribal and state powers. His opinions describe tribes as having long-recognized attributes of sovereignty, but still being entitled to the protection of the United States with respect to their lands. A tribe has sovereign power over its members and its lands unless divested by federal action or voluntarily relinquished by the tribe.⁽²⁸⁾ These early opinions reflected the broad territorial hegemony tribes enjoyed in treaty lands.⁽²⁹⁾ Correspondingly, Chief Justice Marshall painted state power over Indians and their lands narrowly. Marshall found no general federal cession to states of power over Indians, and held the Cherokee treaties contemplated continued tribal primacy over affairs between the tribe and non-Indians on treaty-reserved lands.⁽³⁰⁾

[b] The Termination and Allotment Period.

In 1871, Congress terminated the power of the executive branch to enter into treaties with tribes.⁽³¹⁾ For the next half century, there followed increased non-Indian pressure for tribal lands and a corresponding thrust of federal Indian policy to break up the Indian reservations, "allot" the lands into individually owned tracts, and gradually terminate the trust relationship with respect to Indians and their lands.⁽³²⁾ While there were numerous specific statutes providing for the allotment of lands on individual reservations,⁽³³⁾ the General Allotment Act of 1887⁽³⁴⁾ was the most comprehensive and widely used statute. Like many others, it provided methods by which lands could be "opened" for allotment, and authorized the Secretary of the Interior (Secretary) to negotiate with tribes for the purchase of lands not allotted. The General Allotment Act contemplated that allotments would remain in trust for twenty-five years, subject to extension by the President, following which restrictions on alienation of the lands would be removed and the lands patented in fee, leaving Indians and their fee lands subject to state law.⁽³⁵⁾ Numerous other acts, specific and general, provided additional tools to break up reservation landholdings. Furthering Allotment Act policies, subsequent statutes and executive

orders, termed "surplus lands Acts," opened numerous reservations to settlement by non-Indians furthering the allotment of lands to tribal members. Based upon subtle differences between such statutes, some have been interpreted reflecting an intention to "diminish" reservation boundaries in an area that was opened to settlement and entry⁽³⁶⁾ or "restored to the public domain"⁽³⁷⁾ while others were held to fail to reflect a sufficiently clear intent to reduce a reservation.⁽³⁸⁾

Allotment era legislative and executive actions spawned substantial non-Indian communities on privately owned lands in a "checkerboard" pattern inside the boundaries of remaining Indian reservations. The allotment acts were a potent force to reduce the Indian land base, break up many of the large reservations, and shift jurisdictional authority to states. Allotment of lands, and the consequent removal of restrictions on alienation leading to fee Indian and non-Indian land ownership, can impact jurisdiction significantly.⁽³⁹⁾

[c] Indian Reorganization Act Period.

The period initiated by President Franklin Roosevelt's New Deal and extending into the 1940's brought the allotment period of assimilation to an end and advanced policies intended to develop tribal governments and preserve tribes. The Indian Reorganization Act of 1934⁽⁴⁰⁾ ("IRA") prohibited further allotment of lands, indefinitely extended restrictions on alienation of allotments, and provided models for the creation of tribal governments along lines of modern corporations.⁽⁴¹⁾ It authorized tribes organized under its provisions ("IRA tribes") to enjoy a panoply of other specified powers (IRA § 16) and to form business corporations which the tribe could invest with enumerated powers (IRA § 17).⁽⁴²⁾ IRA era legislation affecting a tribe often reflects consistent policies to establish and strengthen tribal governments.

[d] Termination Revisited.

From approximately the mid-1940's through 1961, Indian policy shifted back towards pre-New Deal termination policies.⁽⁴³⁾ Three developments of this period may affect natural resources developers. First, a limited number of federally recognized tribes were "terminated," ending their existence as tribes and any special status or services resulting from their former tribal existence.⁽⁴⁴⁾ Second, Congress enacted the Indian Claims Commission Act of 1946 ("ICCA"),⁽⁴⁵⁾ which established a procedure for the final resolution of all tribal claims against the United States for the loss of their lands for any reason. The ICCA may be material to minerals developers because its statute of limitations and exclusive remedy provisions may bar tribes' claims to ownership of surface or mineral titles.⁽⁴⁶⁾ Third, in 1953, Congress enacted Public Law 280, empowering states to assume civil and criminal jurisdiction in "Indian country."⁽⁴⁷⁾ Public Law 280 ceded certain civil and criminal jurisdiction over Indian country to five states automatically and provided procedures by which other states could assume jurisdiction.⁽⁴⁸⁾ Even where Public Law 280 applies, it does not cover all jurisdiction: taxation of trust property, alienation of property, and other specific powers are unaffected.⁽⁴⁹⁾ Public Law 280 allows application of state statutes of general

applicability; it does not apply to county or municipal laws.⁽⁵⁰⁾ When applicable to a mineral development, these and other termination era enactments may reflect policies to limit tribal authority and enlarge that of the state.

[e] The Indian Self-Determination Era.

Beginning in the early 1960's, federal Indian policy turned again, this time further in the direction begun during the New Deal period. During this period, Presidents proclaimed repeatedly a federal policy that would end termination of Indian programs and "stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership and self-help."⁽⁵¹⁾ Self-determination era enactments that may affect natural resources development include the Indian Mineral Development Act of 1982,⁽⁵²⁾ the American Indian Religious Freedom Act,⁽⁵³⁾ amendments to federal environmental laws empowering tribes to assume program responsibilities⁽⁵⁴⁾, the Indian Civil Rights Act of 1968,⁽⁵⁵⁾ the Indian Energy Resources Act of 1992.⁽⁵⁶⁾

X.02 Principles Determining Powers.

The developer seeking to determine which government to obey should start by searching for specific treaties or statutes that specify which sovereign will have jurisdiction over a development, or elements of it. When there is no dispositive statute, broad and ill-defined judicial doctrines will control sovereign powers and even when a statute arguably addresses a matter, any such law will be interpreted against a "backdrop" of the judicial decisions defining sovereign powers in Indian country. The following portion of the paper reviews judicial interpretations of federal, tribal, and state powers in Indian country and outlines the doctrinal devices developed in the federal courts to resolve such disputes.

[1] "Plenary" Federal Power over Indian Affairs.

The Constitution barely mentions tribes, but its sparse provisions point to broad federal powers regarding Indians and tribes.⁽⁵⁷⁾ Federal power over tribes, their lands, and non-Indians dealing with tribes is broad. The United States has been held to have "plenary" power over tribes and their lands.⁽⁵⁸⁾ Consequently, an express federal statute allocating governmental authority over specific activities will be dispositive.⁽⁵⁹⁾ The federal government has been held to have power to terminate tribal existence,⁽⁶⁰⁾ to divest Indians and tribes of lands the United States held in trust for them,⁽⁶¹⁾ and to determine the terms, if any, upon which compensation for such losses is due.⁽⁶²⁾ As one scholar put it, "[t]he Court has never held a congressional exercise of power over Indian tribes to be illegal, and there is no reason to think it ever will."⁽⁶³⁾ However, federal intentions to divest tribal existence or tribal lands must be clearly expressed.⁽⁶⁴⁾

Federal statutes also can expressly divest tribes of inherent sovereign powers, under a preemption analysis.⁽⁶⁵⁾ For example, the Hazardous Materials Transportation Act was held to preempt a tribal ordinance intended to regulate the transport of nuclear waste, because Congress expressed a clear intent to foreclose tribal regulation.⁽⁶⁶⁾ Interpreting the effects of federal enactments on Indians is complicated by differing judicial opinions

concerning whether statutes of general applicability, that do not mention Indians, should be interpreted as applying to tribes and Indian. ⁽⁶⁷⁾ The cases are not easily harmonized. ⁽⁶⁸⁾ Consequently, an Indian-law specific analysis must be applied to determine whether tribal or state powers are preempted. ⁽⁶⁹⁾

[a] The Federal Trust Responsibility.

Federal actions affecting tribes and Indians also must be interpreted in light of the established relationship of guardian and trust beneficiary between the United States and tribes. ⁽⁷⁰⁾ This doctrine sometimes is paired with the notion that ambiguous expressions in treaties or statutes should be given an interpretation favorable to tribes. ⁽⁷¹⁾ Relying upon trust responsibilities, courts have interpreted federal leases and regulations as requiring federal agencies interpreting ambiguous tribal oil and gas leases and applicable regulations to interpret them in a manner favorable to the Indian or tribe. ⁽⁷²⁾ However, recent cases require the Department of the Interior also to consider lessees' "legitimate existing contractual expectations," not just the short-term financial interests of a particular tribe. ⁽⁷³⁾ These trust concepts can affect the outcome of jurisdictional disputes.

[2] Inherent Tribal Powers.

Its powers also are reduced regarding activities on fee lands or lands outside its reservation. ⁽⁷⁴⁾ Tribal powers derive from three major sources: inherent tribal authority of the sort recognized in early Supreme Court cases, treaties or executive orders reserving lands to tribes, and federal statutory delegations of authority to tribes. ⁽⁷⁵⁾ Tribal inherent power depends on a perhaps unique set of federal treaties, statutes, policies, and actions that reflect federal intentions regarding governmental powers over the persons, lands, and event at issue. Generally, a tribe has comprehensive power over its members on reservation or other tribal lands, but it enjoys much more limited powers over non-Indians and Indians who are members of other tribes. The discussion that follows will describe tribal inherent powers and recognized ways in which they may be diminished.

[a] Historic Foundations Suggested a Broad, Quasi-Territorial Tribal Power.

Worcester v. Georgia ⁽⁷⁶⁾ reflects Chief Justice John Marshall's vision of tribal inherent sovereignty. A state court judgment imprisoned a non-Indian for violating a Georgia statute that prohibited whites from residing within the Cherokee Nation without a permit from the state governor. In concluding that the state statute and judgment issued under it were, respectively, "void" and "a nullity," *Worcester* laid out several guideposts. First, it reviewed international law principles and concluded that a tribe could accept the protection of the United States without "stripping itself of the right of government, and ceasing to be a state." ⁽⁷⁷⁾ Second, relations with tribes within their reservations are a matter within exclusive federal control, on which states may not regulate. ⁽⁷⁸⁾ Finally, it recognized federal courts' powers to enforce federal law defining tribal relations. ⁽⁷⁹⁾ While these principles remain influential in jurisdictional controversies, subsequent decisions refine their meanings.

Later decisions reinforce tribal powers over members, but raise questions concerning tribal powers over non-Indians and nonmember Indians. Allotment era judicial decisions define and emphasize tribal powers over members. The Court held that tribal powers, because they pre-existed the Constitution, are not subject to the Fifth Amendment to the United States constitution,⁽⁸⁰⁾ and that tribes have inherent power to punish criminal offenses of members unless divested by federal statute.⁽⁸¹⁾ Allotment era cases tend to define tribal powers in terms of internal tribal self government.⁽⁸²⁾ Conversely, allotment era decisions confirmed federal prerogative to limit tribal powers by assuming criminal jurisdiction over crimes by and against tribal members⁽⁸³⁾ and to subject tribal lands to federal eminent domain powers.⁽⁸⁴⁾

[b] Modern Cases Defining Tribal Powers over Nonmembers.

A series of modern cases recognize tribes may have powers over non-Indian activities, but hinge such powers on whether the non-Indian activity will significantly affect a tribe and its members. These modern concepts of inherent tribal sovereignty are described vividly in three cases, *Williams v. Lee*,⁽⁸⁵⁾ *Montana v. United States*,⁽⁸⁶⁾ and *Merrion v. Jicarilla Apache Tribe*.⁽⁸⁷⁾ They address, respectively, tribal power over non-Indians to adjudicate disputes, regulate, and tax.

[i] *Williams v. Lee*: "The Right of Reservation Indians to Make Their Own Laws and be Ruled by Them."

The 1959 Supreme Court decision in *Williams v. Lee*⁽⁸⁸⁾ is the watershed. A non-Indian owner of a federally licensed trading post on the Navajo reservation sued to collect a debt owed by a Navajo living on the reservation arising from a transaction at the on-reservation trading post. *Williams* held that an Arizona state district court lacked jurisdiction, and that the action must proceed in Navajo tribal court. *Williams* discerned a central question that framed the Supreme Court's determinations concerning the jurisdiction of state versus tribal courts: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."⁽⁸⁹⁾ That influential phrase influenced later cases that subsequently have shaped the balance of judicial powers, and has become instrumental in defining other governmental powers, in Indian country.

[ii] The *Montana v. United States* Test: Whether Tribal Powers Over Non-Indians are Necessary to Protect Tribal Welfare.

Montana v. United States⁽⁹⁰⁾ has become the central Supreme Court decision defining tribal powers to regulate non-Indian activities within reservations. *Montana* assessed tribal power to regulate nonmembers' hunting and fishing on non-Indian owned fee lands within the Crow Reservation. Justice Stewart's majority opinion in *Montana* first concluded that tribal treaty-based powers to regulate non-Indian hunting and fishing on treaty-confirmed lands were abrogated by "the allotment and alienation of tribal lands as a result of passage of the General Allotment Act of 1887 . . . and the Crow Allotment Act."⁽⁹¹⁾ Then, the Court referred to the Court's earlier decision in *Oliphant v. Suquamish*

Indian Tribe,⁽⁹²⁾ which held tribal criminal jurisdiction over nonmembers to be implicitly divested by tribes' dependent status. Addressing the Crow Tribe's inherent sovereign power to regulate non-Indian activities on fee lands within the reservation, *Montana* concluded that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes" ⁽⁹³⁾ These considerations led the *Montana* Court to recognize a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." ⁽⁹⁴⁾

Montana concluded, however, that tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," ⁽⁹⁵⁾ This power, *Montana* held, could be supported in two ways: (1) if there is "consensual relationships" between a non-Indian and a tribe with respect to the subject matter of the regulation; or (2) if the non-Indians' conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." ⁽⁹⁶⁾ This two-pronged standard, termed the "*Montana* test," has been applied uniformly to determine whether a tribe may exercise powers over non-Indians. ⁽⁹⁷⁾ Significantly, although *Montana* premised its analysis partly on the effect of allotment era enactments on the Crow Reservation, the case has come to define tribal powers generally over non-Indians, and not just on fee lands.

Montana and cases following it suggest a presumption that tribes lack jurisdiction over non-Indian activities, and that the burden of showing *Montana* impacts or a consensual relationship rests with the proponent of tribal powers. ⁽⁹⁸⁾ Subsequent cases define the showing necessary to establish the *Montana* prongs. The requirement of conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" must be "demonstrably serious and must imperil the political integrity, economic security or the health or welfare of the tribe." ⁽⁹⁹⁾ *Montana*'s requirement of a consensual relationship with a tribe or its members, through commercial dealings, contracts, leases, or other arrangements, appears to contemplate actions, such as entering into a lease or other transaction or agreement, by which the non-Indian may be deemed to have consented to tribal jurisdiction. However, to support jurisdiction, the relationship must relate sufficiently to the subject matter of the asserted tribal power. ⁽¹⁰⁰⁾

[iii] *Merrion v. Jicarilla Apache Tribe*: Tribal Taxing Powers.

Merrion v. Jicarilla Apache Tribe ⁽¹⁰¹⁾ is the modern cornerstone of tribal taxing powers. *Merrion* affirmed tribal power to impose oil and gas severance taxes on non-Indian companies producing oil and gas from leases entered into by the tribe within the reservation. Justice Marshall's opinion for a six-member majority held "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services." ⁽¹⁰²⁾ *Merrion* rejected the contention that tribal taxing power derives solely from the tribe's power to exclude non-Indians from tribal lands: "[i]nstead, it derives from the tribe's generally authority, as sovereign, to control economic activity within its jurisdiction, and defray the cost of providing governmental

services" ⁽¹⁰³⁾ *Merrion* struck two themes: the federal policy of "fostering tribal self government . . ." and tribal needs to exercise taxing powers to finance governmental functions. ⁽¹⁰⁴⁾ This latter prong, and *Merrion's* failure to cite *Montana*, decided ten months earlier, suggest that tribal taxing powers may rest upon a broader foundation than other tribal powers. Finally, *Merrion* confirmed that tribes may function separately in a propriety and sovereign capacity, and that entering proprietary agreements may not waive sovereign powers. ⁽¹⁰⁵⁾

[c] Implicit Divestiture of Powers Inconsistent with Tribes' Dependent Status.

Montana and other recent cases imply tribal powers over non-Indians significantly narrower than those that states enjoy over, for example, non-residents within their borders. This conception of limited tribal power over non-Indians is reflected in cases that find implied limitations on tribal inherent power over non-Indians because of tribes' "dependent" status. ⁽¹⁰⁶⁾ Under this doctrine, tribes have been held to lack power to exercise criminal jurisdiction over non-Indians ⁽¹⁰⁷⁾ and nonmember Indians, ⁽¹⁰⁸⁾ or to regulate liquor distribution on the reservation. ⁽¹⁰⁹⁾ The influential decision in *Oliphant v. Suquamish Indian Tribe* ⁽¹¹⁰⁾ perhaps best reflects this doctrine. It held that tribal power to impose criminal sanctions on non-Indians was impliedly divested by history and status. *Oliphant's* extended review of opinions and actions regarding tribal criminal jurisdiction and tribal courts led the Court to conclude that the "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight." ⁽¹¹¹⁾ Then-Associate Justice Rehnquist's opinion in *Oliphant* found tribes' dependent status to be inconsistent with criminal power over non-Indians: the United States has sought to insure that its citizens be protected from "unwarranted intrusions on their personal liberty . . .", and "[b]y submitting to the overriding sovereignty of the United States, Indian tribes . . . give up their power to try non-Indian citizens . . . except in a manner acceptable to Congress." ⁽¹¹²⁾ Cases following *Oliphant* reflect that implied divestiture will continue to affect exercise of other tribal powers in future cases. ⁽¹¹³⁾

Further suggesting implied limitations are cases limiting exercise of tribal inherent powers to members, as compared to nonmember Indians. *United States v. Wheeler*, ⁽¹¹⁴⁾ decided in the same term as *Oliphant* and also relied upon by *Montana*, affirmed tribal power to punish tribal members who violate tribal criminal laws, but rather pointedly limited its holding to tribal members. *Duro v. Reina* ⁽¹¹⁵⁾ subsequently held that tribes could not punish nonmembers for criminal offenses. Although tribes are "a good deal more than private, voluntary organizations," ⁽¹¹⁶⁾ the *Wheeler-Duro* premise, that inherent tribal powers exist over members, and not nonmember Indians, further focuses tribal inherent powers on internal self-government and relations among members of a tribe.

[d] The Impact of Land Ownership and Demographics.

Tribal land ownership is an additional important determinant of sovereign power, and complex, often "checkerboard," patterns of land ownership in Indian country further complicate jurisdictional predictions. ⁽¹¹⁷⁾ Generally, tribal power will be strongest over

tribally owned land, lands within a formally established "reservation," or where the lands are within a block of solidly Indian-owned and Indian-occupied lands; tribal power will be weaker, and state power correspondingly stronger, over non-Indian fee lands, lands outside reservation boundaries, or lands within a "checkerboarded" area with dense non-Indian development.⁽¹¹⁸⁾ This relationship seems consistent with *Montana*: Surrounding landholding and demographic factors will influence the impact non-Indian activities will have on the tribe and its members. It also comports with allotment era cases equating federal Indian law jurisdiction and immunities with trust or restricted Indian title.⁽¹¹⁹⁾

The Supreme Court's *Brendale* decision⁽¹²⁰⁾ best illustrates the potential effect of landholding patterns within a reservation: a plurality of a fragmented Supreme Court held that the Confederated Yakima Tribes had power to apply their land use regulations to lands within the "closed" portion of the Yakima Reservation, where tribal land ownership and population predominated, but that Yakima County could zone the "opened" portions of the Reservation, opened to settlement and entry under allotment acts and occupied primarily by non-Indians, who owned most of the land.⁽¹²¹⁾ This holding departed markedly from earlier Supreme Court cases criticizing jurisdictional doctrines that would require law enforcement officers to "search tract books" to determine criminal jurisdiction.⁽¹²²⁾

South Dakota v. Bourland⁽¹²³⁾ reinforces *Brendale*'s recognition of the effect of divestiture of tribal lands. *Bourland* held that any treaty rights of the Cheyenne River Sioux Tribe to regulate non-Indian hunting and fishing were abrogated when treaty lands were taken to create a reservoir under the Flood Control Act. Justice Thomas's opinion for the *Bourland* majority reflects two significant premises: first, it reflects a strong presumption that loss of tribal title divests tribal regulatory power;⁽¹²⁴⁾ second, following *Brendale*, it perhaps re-invigorates the doctrine arguably rejected in *Merrion v. Jicarilla Apache Tribe*⁽¹²⁵⁾ that tribal power over non-Indians must be grounded in the power to exclude them from tribal lands.⁽¹²⁶⁾

These cases imply a presumption that tribes lack power over non-Indians' activities on fee lands within a reservation, and that a proponent of tribal power bears a burden to demonstrate interests sufficient, under *Montana* and *Brendale*, to show effects on *Montana*-protected interests. Consequently, a developer should carefully analyze not only the land status underlying the development, but also land ownership and population patterns in the area surrounding the development.

[e] The Significance of Reservation Boundaries.

[i] Reservation Disestablishment.

Whether particular lands lie within or outside "reservation" boundaries may affect governmental powers. Reservations generally are lands set aside under federal protection for the residence of tribal Indians.⁽¹²⁷⁾ However, given the history of checkerboard land ownership, "reservation" now connotes an area with a specific, federally defined boundary, often of mixed Indian, federal, and non-Indian land ownership, subject to

enhanced tribal governmental power and greater federal powers to protect Indians. Consequently, the developer may need to address an initial question, whether federal actions by which former Indian landholdings acquired fee status terminated reservation status by "diminishing" or "disestablishing" reservation boundaries.⁽¹²⁸⁾

Solem v. Bartlett⁽¹²⁹⁾ is the Supreme Court's leading, current pronouncement on reservation disestablishment issues. It reflects that Congressional or executive intentions in the actions that divested lands of their trust or restricted status will be controlling.⁽¹³⁰⁾ And, federal intentions may be gleaned from operative statutory language surrounding circumstances, and subsequent actions, including population demographics.⁽¹³¹⁾ While, as *Brendale* reflects, tribes still may lack jurisdiction over non-Indian activities within reservation boundaries, federal⁽¹³²⁾ and tribal⁽¹³³⁾ powers may be affected by whether the lands retain reservation status.

[ii] Off-Reservation Tribal Powers Over Non-Indians.

Perhaps because tribes seldom asserted jurisdiction beyond reservation boundaries, the balance of governmental power in off-reservation areas with Native American population and landholdings is poorly defined. Although "tribal sovereignty is in large part geographically determined,"⁽¹³⁴⁾ the Supreme Court has never addressed the scope of tribal powers over non-Indians outside a traditional reservation.⁽¹³⁵⁾ Several authoritative federal, scholarly, and judicial opinions have questioned tribal powers off-reservation.⁽¹³⁶⁾ Some lower court opinions reject extra-territorial tribal powers.⁽¹³⁷⁾ In the absence of clear caselaw guidance, attention has been focused on portions of the definition of "Indian country" in the federal criminal code, which empowers federal prosecutors to prosecute, among other things, defined off-reservation crimes involving Indians.⁽¹³⁸⁾

Recent decisions have suggested tribes may have civil jurisdiction over actions of non-Indian lands claimed to be off-reservation "Indian country" under the Federal Criminal Code, under 18 U.S.C. § 1151(b) or (c).⁽¹³⁹⁾ *Pittsburgh & Midway Coal Mining Co. v. Watchman*,⁽¹⁴⁰⁾ in which a mining company challenged Navajo Nation taxation of its off-reservation mine, is the most significant of these.⁽¹⁴¹⁾ In an earlier appeal, the Tenth Circuit rejected the Navajo Nation's contention that the mine area remained part of the Navajo Reservation⁽¹⁴²⁾ and remanded for consideration of whether the mine is within "Indian country" under 18 U.S.C. § 1151(b) or (c), and, if so, whether the federal district court should abstain from deciding the federal question whether the Nation could tax the mine's receipts pending tribal agency or court decisions. On remand, the district court concluded that the mine was not located within "Indian country," and the Tenth Circuit reversed.

Significantly, the Tenth Circuit held that, if the mine lies within off-reservation "Indian country," the district court must abstain pending resolution of all issues in the Navajo administrative and judicial systems.⁽¹⁴³⁾ In perhaps the first such decision by any Court of Appeals, *Pittsburgh & Midway* concluded that 18 U.S.C. § 1151 "represents an express Congressional delegation of civil authority over Indian country to the tribes."⁽¹⁴⁴⁾ Acceptance of this precept would foreshadow disputes in which businesses and

individuals seeking to ascertain whether they must comply with tribal taxing or court jurisdiction must predict the outcome of the highly unpredictable results of a four-pronged, fact-dependent test to determine whether specific off-reservation lands are located within a "dependent Indian community" as defined in 18 U.S.C. § 1151(b).⁽¹⁴⁵⁾ *Pittsburgh & Midway*, consequently, casts a shadow of jurisdictional uncertainty over vast off-reservation areas with substantial Native American landholdings and populations, where the law applicable and the courts and agencies with jurisdiction cannot be determined without litigation in one or more forums. This may extend so-called "reservation blight," where legal uncertainty impairs economic development, into the areas surrounding reservations and further limit economic opportunities in areas arguably classed as "dependent Indian communities."

Pittsburgh & Midway's holding regarding tribal power over off-reservation Indian country is significant because it relies not on tribal inherent civil power over off-reservation non-Indians, but instead on its conclusion that Congress expressly delegated such powers to tribes in its codification of the federal criminal laws. But *Pittsburgh & Midway* does not analyze the language or purpose of the federal criminal code provision upon which it relies, and the "express delegation" conclusion seems questionable. Rather, it relies on the Supreme Court's earlier observation in *dictum* in *DeCoteau v. District County Court*,⁽¹⁴⁶⁾ a case analyzing state criminal powers within a reservation, that "[w]hile § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction."⁽¹⁴⁷⁾ *Pittsburgh & Midway* also relied on Supreme Court and Tenth Circuit cases involving Oklahoma's attempts to tax tribes on tribal lands where, in the unique circumstances of Oklahoma history, no tribal "reservation" remains.⁽¹⁴⁸⁾

These authorities do not directly address the issue of a federal delegation to tribes of civil regulatory or adjudicatory power over non-Indians' activities on off-reservation fee lands within "dependent Indian communities." The criminal statute, 18 U.S.C. § 1151, expressly addresses only federal, not tribal, power to prosecute defined criminal offenses.⁽¹⁴⁹⁾ The recent Supreme Court decisions immunizing certain non-reservation Indian activities from Oklahoma state taxation similarly do not address a delegation of federal power to tribes. Rather, they appear to reflect that non-reservation trust land status may be a sufficient fulcrum upon which tribes or Indians may resist state taxes. A review of those cases to assess whether they support using off-reservation "Indian county" status as a "sword," to support a delegation of civil jurisdiction to tribes, follows.

Oklahoma Tax Comm'n v. Potawatomi Indian Tribe⁽¹⁵⁰⁾ ruled that Oklahoma could not tax the tribe's receipts from a convenience store located on lands held in trust for the tribe within any reservation, but ruled that the state could collect the tax on tribal sales at the store to non-Indians. The Court did not cite 18 U.S.C. § 1151, but it did conclude that tribal tax immunity existed because the trust lands were "validly set apart for the use of the Indians."⁽¹⁵¹⁾

A year later, *Oklahoma Tax Comm'n v. Sac and Fox Nation*⁽¹⁵²⁾ held that the income from employment with the tribe on tribal lands of tribal members residing in "Indian

county" "whether the land is within reservation boundaries, on allotted lands, or in dependent communities . . ." may be immune from Oklahoma's income taxes. *Sac and Fox* did not address tribal powers. Rather, it relied specifically upon the history of the Sac and Fox Nation, similar to that of other Oklahoma tribes, in which the Nation relinquished its reservation during the allotment period,⁽¹⁵³⁾ and the failure of Oklahoma to assume jurisdiction under Public Law 280.⁽¹⁵⁴⁾

In 1995, the Supreme Court decided *Oklahoma Tax Comm'n v. Chickasaw Nation*.⁽¹⁵⁵⁾ It upheld the Tenth Circuit's application of *Citizen Band Potawatami* to foreclose state excise taxation of gasoline sales by the tribe on tribal trust lands,⁽¹⁵⁶⁾ but reversed the Tenth Circuit's invalidation of state taxation of the income of tribal members from employment with the tribe on tribal trust lands, unless such members live within "Indian country." Justice Ginsburg, writing for a five-member majority, recognized geographic limits to immunity from state taxation and the necessity that, to avoid state taxes, the tribal members must also reside within, not outside of, "Indian country."⁽¹⁵⁷⁾

The Oklahoma tax decisions support that, in appropriate circumstances, tribes or tribal members may be immune from state taxation for activities in Indian country outside reservation boundaries, particularly on Indian trust lands; however, they do not appear to support the conclusion that 18 U.S.C. § 1151 affirmatively delegates to tribes civil authority over non-Indian activities in off-reservation Indian country. Finally, the Oklahoma cases suggest that highly specific factual, legal, and historical inquiries are necessary to determine the federal question whether off-reservation Indian country status has civil consequences of any sort. This is supported by *Mescalero Apache Tribe v. Jones*,⁽¹⁵⁸⁾ which upheld application of New Mexico's gross receipts tax to the proceeds of a tribe's off-reservation ski resort operations, but invalidated state taxes on tribal personal property used in the operations. The developer first should determine whether its operations lie within reservation boundaries. Even if it does not, the developer should assess the potential for tribal regulation based on the contention that the lands are off-reservation "Indian country."

[3] State Powers in Indian Country.

Consistent with the early Marshall Court opinions,⁽¹⁵⁹⁾ state power over activities on Indian land generally is narrow. However, non-Indians within Indian country are subject to ordinary state laws except where Indians, their property, or tribal self government are substantially affected.⁽¹⁶⁰⁾ State power is strongest over non-Indian activities on fee lands and weakest over tribal activities not directly affecting non-Indians. States may gain power by express federal delegation or, under a balancing analysis, when the state asserts its powers primarily over non-Indians, and the impact on federal or tribal interests is comparatively minimal. This balance was struck in states' favor in cases subjecting tribal enterprises to duties to collect taxes on cigarette sales to non-Indians.⁽¹⁶¹⁾ Hence, a state has power to tax the severance of tribally owned oil and gas by a non-Indian lessee on a reservation where the state tax does not materially impact the lessor-tribe.⁽¹⁶²⁾ States and counties or other political subdivisions of a state may zone privately owned lands located within predominately non-Indian areas inside reservation boundaries.⁽¹⁶³⁾ And, a state

may have powers over liquor sales on reservation lands where the activities would have impacts off the reservation.⁽¹⁶⁴⁾

State regulation of tribal economic activity carries a weighty burden.⁽¹⁶⁵⁾ However, a state has been held to have power to tax a tribe's proceeds from off-reservation businesses on non-trust lands.⁽¹⁶⁶⁾ Tribal actions off-reservation and on non-restricted lands are most subject to state regulation.⁽¹⁶⁷⁾

§ X.03 The Current Balance of Authority on Pivotal Issues Affecting Mineral Developers.

Natural resources development anywhere, and particularly on Indian lands, is beset by a dizzying array of regulation, constraints, taxes and permits. The economic consequences of which will make or break the development.⁽¹⁶⁸⁾ Litigation also may threaten the viability of the enterprise. The following discussion analyzes authority determining governmental powers to tax, regulate, and resolve disputes affecting minerals development in Indian country. These power-determinative principles have been expressed in the resolution of disputes over sovereign powers in specific areas.

[1] Taxation.

Tribal, state, and local authorities may seek to impose taxes on non-Indian development. Tribes and states both may seek to tax mineral severance, property interests, and receipts arising from minerals development. The decided cases generally affirm tribal taxation powers over non-Indian activities and reach differing results on the question of state power to tax non-Indian and Indian activities.

[a] Tribal Power to Tax Non-Indians.

Washington v. Confederated Tribes of Colville Indian Reservation⁽¹⁶⁹⁾ established that a tribe's inherent authority was not limited to tribal members, but extended to taxing non-Indian cigarette purchasers from tribal vendors. The Supreme Court decision in *Merrion v. Jicarilla Apache Tribe*, affirming a tribal oil and gas severance,⁽¹⁷⁰⁾ has led to general recognition of tribal taxing powers. The Court has since approved unanimously possessory interest (measured by leasehold value) and business activity (akin to gross receipts) taxes on non-Indian mineral lessees of tribal lands.⁽¹⁷¹⁾ Tribal taxes on the severance of minerals under leases of allotted lands have been affirmed on grounds that the lease constituted a consensual relationship subjecting the non-Indian to tribal power under *Montana*.⁽¹⁷²⁾ Similarly, a tribe may tax railroad property on an easement, where the tribe's "power to tax nonmembers derives from [its] continuing property interest."⁽¹⁷³⁾ These cases reflect that a nonmember's receipt of governmental services and acceptance of the privilege of doing business on the reservation may give rise to the obligation to pay a reasonable tribal tax.

[b] State Taxing Powers in Indian Country.

[i] State Taxation, Dual Taxation, and Federal Preemption.

The federal courts employ a preemption analysis to determine whether state taxes may be imposed in Indian country.⁽¹⁷⁴⁾ State taxing powers are strikingly different over tribes and Indians and non-Indians or nonmembers. State taxation of tribes or Indians engaging in on-reservation activities generally is preempted.⁽¹⁷⁵⁾ Preemption is determined through a "particularized inquiry" into applicable federal treaties and statutes and the specific interests at stake.⁽¹⁷⁶⁾ This inquiry has focused on the state's legitimate interests in the activities taxed, the burden of the tax on tribal interests, and federal policies. Under the preemption analysis, states enjoy relatively broad taxing powers to tax non-Indians in Indian country.

"Dual" state and tribal taxation often imposes heavy burdens on minerals development. The Supreme Court has upheld state taxation on non-Indians' severance of the same gas on which a valid tribal severance tax is imposed.⁽¹⁷⁷⁾ *Cotton Petroleum* rejected arguments that the New Mexico severance tax was preempted by federal regulation of tribal oil and gas leasing and that it violated the Commerce Clause.⁽¹⁷⁸⁾ However, under specific facts and a comprehensive federal statutory scheme, the Ninth Circuit found a state timber yield tax to be preempted where the tax was not related sufficiently to the taxed activity to be permissible.⁽¹⁷⁹⁾ Additionally, Montana's thirty percent tax on coal severance was invalidated on grounds that it would impermissibly infringe on tribal self government.⁽¹⁸⁰⁾ Given that the Supreme Court has acknowledged that there is no "rigid rule" by which to resolve state taxing powers in Indian country,⁽¹⁸¹⁾ these cases teach that preemption of state taxing power must be analyzed on the facts of each specific case, and a detailed factual record will be necessary to mount a successful challenge.

[ii] Effects of Land Status on State Taxing Powers.

The ownership of land on which development activities occur and applicable reservation boundaries also may affect tribal and state taxing powers.⁽¹⁸²⁾ It remains unanswered whether conducting such activities on fee lands where, under *Brendale* and *Montana*, the tribe may lack regulatory jurisdiction, subjects the nonmember to tribal taxes. A district court's invalidation of a tribal severance tax based on landholding and population patterns under *Brendale*, however, was reversed by the Court of Appeals for the Eighth Circuit on grounds that the suit should first be prosecuted in tribal court.⁽¹⁸³⁾ Such dismissals suggest that challenges to tribal taxation often will be heard initially in the potentially less receptive tribal forum, subject to federal court review of federal questions.⁽¹⁸⁴⁾ While not ruling specifically on the specific taxing power issue, the Tenth Circuit has suggested Navajo Nation taxing powers extend to off-reservation "Indian country."⁽¹⁸⁵⁾

The Supreme Court has clarified that fee land status supports state taxing powers. *County of Yakima*, which concerned the Yakima Reservation addressed in *Brendale*, reviewed allotment era policies pursuant to which restrictions on alienation were removed on lands now owned in fee by the Yakima Tribe or its members and concluded that the lands are subject to state taxation.⁽¹⁸⁶⁾ Similarly, tribal or Indian economic activity outside reservation boundaries and not on tribal trust or restricted land likely will be subject to

state taxes.⁽¹⁸⁷⁾ Consequently, challenges to state taxation should carefully examine the pertinent history underlying the lands in question.

[iii] Tax Considerations in Structuring Minerals Transactions.

Developers and tribes have developed several mechanisms to reduce tribal taxation.⁽¹⁸⁸⁾ Acceptance of governmental services or acquiescence in regulation by states or tribes can tilt the delicate balance affecting preemption defenses. Additionally, since state power does not extend to taxing a tribe's receipts under an oil and gas lease or development contract,⁽¹⁸⁹⁾ developers should consider structuring a transaction under the Indian Minerals Development Act as a tribal severance of oil and gas to minimize state taxation or to include tribal equity participation.⁽¹⁹⁰⁾ Consequently, the Indian country minerals developer should assess the total tribal and state taxation assertedly applicable to operations and the strength of any contention that either tax is excessive or impermissible and take actions to minimize total taxation by flexible structuring of the development.⁽¹⁹¹⁾

[2] Environmental and Land Use Regulation in Indian Country.

Divergent trends are developing in the closely related areas of land use planning and environmental regulation in Indian country. The federal courts have recognized tribal powers, under certain circumstances, to regulate land use and the environmental consequences of development. *Brendale* confirms an expanding state role, particularly in land use planning responsibility in areas with large non-Indian populations and land ownership. However, federal delegations of environmental program authority to tribes have enhanced tribes' roles in environmental regulation, and the federal courts have not resolved whether *Brendale* factors will limit tribal inherent power to regulate the reservation environment.

[a] Land Use Planning.

Many tribes have implemented tribal land use planning codes and building codes, and case law affirms that tribes may exercise land use planning powers in some circumstances.⁽¹⁹²⁾ Particularly in "checkerboarded" areas, local land use planning agencies assert jurisdiction. Zoning falls within the range of tribal regulatory powers addressed in *Montana v. United States*. However, *Brendale v. Confederated Tribes and Bands of the Yakima Reservation* specifically addressed tribal versus state zoning powers and laid down factual tests that may be dispositive in some cases.⁽¹⁹³⁾ *Brendale* makes clear that whether a tribe or a state or county has power to implement zoning within reservation boundaries will depend on population and landholding patterns and the history or land use regulation in the area in question.⁽¹⁹⁴⁾ In his pivotal *Brendale* opinion, Justice Stevens characterized tribal power to define an area's character through land use planning as grounded in the tribe's power to exclude nonmembers from communal lands.⁽¹⁹⁵⁾ Consequently, the Yakima Tribes could define the character of the lands through land use planning in the area "closed" to substantial white settlement and lost the same power in the area "opened" under the allotment acts and predominately non-Indian.⁽¹⁹⁶⁾ In the "opened" area, Justice White counseled tribes and members to present their views to

appropriate county officials.⁽¹⁹⁷⁾ Future Indian country zoning cases doubtless will focus on this *Brendale* inquiry; however, the question whether *Brendale* presents a separate analysis, displacing consideration in zoning cases of fact-specific effects on tribal health, welfare, safety, and political and economic vitality under *Montana*, remains to be resolved.⁽¹⁹⁸⁾ In predicting applicable zoning regulation, a developer would be wise to consider both applicable *Brendale* factors and probable *Montana* effects related to the proposed development.

[b] Environmental Regulation.

The developer seeking to predict applicable environmental regulation must consider potential regulation by the tribe under asserted inherent sovereignty or under an existing or potential federal delegation of authority, as well as federal and state regulation. This portion of the paper first will address inherent tribal regulatory power and, then, turn to federal statutory regulation, either by the United State EPA or by a tribe pursuant to federal delegation. Then, it will address the possibility of state regulation.

[i] Tribal Inherent Power to Regulate the Environment to Protect Tribal Members' Health and Safety.

Following the decision in *Montana v. United States*,⁽¹⁹⁹⁾ several federal court decisions recognized that tribes may have power to regulate non-Indians' activities potentially affecting the quality of reservation environments.⁽²⁰⁰⁾ Tribal power to impose environmental regulations on non-Indians based on tribal inherent sovereignty generally will be decided based on the rules in *Montana v. United States*⁽²⁰¹⁾ and, potentially, *Brendale*. The two-pronged "*Montana* test"⁽²⁰²⁾ likely will be applied to determine whether non-Indians' activities will substantially affect the health, welfare, economic, or political integrity of the tribe and its members or have entered into consensual relations with the regulator tribe related to the subject matter of the regulation. The applicability of *Brendale*'s landholding and demographic factors to tribal inherent sovereignty to regulate the environment remains unanswered.⁽²⁰³⁾ Since *Montana* and *Brendale* were decided, few cases have addressed whether tribal environmental regulation passes applicable tests.⁽²⁰⁴⁾ However, at least one court has applied *Montana* to reject tribal regulation when the tribe did not prove a proposed landfill would affect tribal health and welfare.⁽²⁰⁵⁾ As tribes increasingly develop programs and establish tribal environmental protection agencies, more cases likely will be presented.

[d] Federal Delegations of Regulatory Power under Environmental Protection Agency "Treatment as State" Programs.

Pursuant to an Indian Policy adopted initially in 1984,⁽²⁰⁶⁾ the United States Environmental Protection Agency (EPA) has embarked on a broad policy to "insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands." This Policy seeks to "view Tribal Governments as the appropriate non-Federal parties making decisions and carrying out program responsibilities affecting Indian reservations." Hence, EPA will "assist

interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands," and, "[u]ntil Tribal Governments are willing and able to assume full responsibility for delegable programs," EPA, not states, will "retain responsibility for managing programs for reservations."⁽²⁰⁷⁾ EPA has recently reaffirmed its Indian Policy.⁽²⁰⁸⁾

Pursuant to its Indian Policy, EPA has taken actions to allow tribes to achieve "treatment as state" (TAS) status over programs for most of the federal environmental statutes. For some programs, Congress expressly authorized TAS programs for tribes; however, EPA has acted without express statutory authorization under others.

[i] Express Authority to Delegate.

EPA has developed TAS programs with express Congressional authorization under the Clean Water Act,⁽²⁰⁹⁾ the Clean Air Act,⁽²¹⁰⁾ the Safe Drinking Water Act,⁽²¹¹⁾ certain functions under the "Superfund" statute,⁽²¹²⁾ and the Oil Pollution Act of 1990.⁽²¹³⁾ Describing the details of each such program falls beyond the scope of this paper, and specific rules have been promulgated or proposed to implement each TAS program. TAS programs generally require an applicant tribe to demonstrate (1) that it is a federally recognized tribe; (2) that the tribe has a governing body capable of carrying out substantial governmental functions; (3) that the tribe's functions include jurisdiction over lands and activities it would regulate; and (4) its capabilities to assume functions of an effective program.⁽²¹⁴⁾ Significantly, to obtain EPA approval, the applicant tribe need not have the program apparatus in place; it must only show its plan to acquire the requisite technical and administrative expertise.⁽²¹⁵⁾ EPA's approval of a TAS plan is subject to challenge in federal court.⁽²¹⁶⁾ EPA's approval of TAS status can have significant impacts on on-reservation and off-reservation regulated sources. For example, its approval of TAS status for the Pueblo of Laguna's water quality standards program on the Rio Grande in New Mexico significantly impacted the sewage treatment operations of the upstream and off-reservation City of Albuquerque.⁽²¹⁷⁾

[ii] Asserted Implied Delegation Authority.

Issues of statutory interpretation are presented by EPA's present efforts to delegate program authority under RCRA Subtitles C and D without express statutory authority.⁽²¹⁸⁾ Similar issues are presented by EPA's 1995 approval of TAS status authorizing the Campo Band of Mission Indians to implement a municipal solid waste management program.⁽²¹⁹⁾ Comments have been received on the RCRA Subtitle D rulemaking, and are due on the RCRA Subtitle C proposal on August 13, 1996. EPA based its power to delegate without a specific statutory authorization on decisions upholding EPA's interpretations that the Clean Air Act allowed it to authorize tribes to redesignate the quality of reservation airshed,⁽²²⁰⁾ and that state program implementation of RCRA Subtitle C does not authorize states to implement hazardous waste programs on reservation lands.⁽²²¹⁾ Opponents of EPA's assertion of implied delegation authority argue that Congress' failure to expressly authorize delegations to tribes in RCRA, in contrast to its express delegations under other statutes, reflect a Congressional intention to withhold

from EPA authority to delegate RCRA program implementation authority to tribes until Congress expressly authorizes the transfer. The outcome of the controversies arising from the proposed delegations under RCRA will significantly affect the pace at which environmental regulatory powers are transferred to tribes.

[iii] Geographic Scope of EPA Delegations.

EPA's various existing TAS and proposed programs to delegate program functions to tribes take inconsistent approaches to defining the geographic area subject to the tribal delegation.⁽²²²⁾ EPA's original 1984 Indian Policy directed itself to "reservation" environments. Since then, Congress' authorizing legislation has not been a model of consistency in its definitions of the lands or resource that could be the subject of a delegation to tribes. For example, Clean Air Act § 107(d)(2)(B) allows delegations with respect to "air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction . . .".⁽²²³⁾ The Clean Water Act TAS provision, by comparison, allows delegation with respect to "water resources which are held by an Indian tribe, held by the United States in trust for Indian, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation or otherwise within the borders of an Indian reservation . . .".⁽²²⁴⁾ The proposed RCRA rulemakings, by comparison, authorizes a delegation to any areas defined as "Indian lands" or "Indian country," with the latter being defined under the present proposal to include "all dependent Indian communities with in the borders of the United States . . .". This definition could extend tribal regulatory authority into off-reservation areas based on application of fact-intensive, multi-faceted tests. A recent test to determine "dependent Indian community" status is set forth in *Pittsburgh & Midway Coal Mining Co. v. Yazzie*,⁽²²⁵⁾ were EPA to adopt a definition authorizing tribes to assuming program responsibilities over "dependent Indian communities" outside reservation, the developer's task in predicting applicable regulation under the RCRA would be complicated indeed. Nonetheless, a developer contemplating an Indian country natural resource development must determine the potentially applicable federal environmental statutes and whether a tribal implementation program presently has been approved or potentially may be authorized with respect to such lands.

[iv] EPA Program Implementation Where No Tribal Program has been Approved.

Until and unless a tribal program pursuant to EPA delegation has been approved, program implementation under federal environmental statutes likely will be by EPA directly, rather than by an "agreement state" pursuant to an otherwise applicable statewide delegation. EPA takes the position that, absent clear and express language authorizing a state program to cover reservation lands, approval of a state program pursuant to federal environmental statutes with respect to all lands within a state does not authorize state regulation over Indian lands.⁽²²⁶⁾ However, EPA's policy guidance does not rule out the possibility that EPA might specifically approve state program implementation over areas within Indian reservations.⁽²²⁷⁾ However any such approval would have to be clear and express. Consequently, EPA urges "cooperation between

tribes and states . . . , including notification, consultation, sharing of technical information, expertise and personnel, and joint tribal/state programing." ⁽²²⁸⁾

[v] State Environmental Regulation in Indian Country.

State environmental regulatory agencies and laws may still play a significant role in Indian country. States likely will be required to show that state regulation has not been preempted by any comprehensive federal regulatory scheme and that state regulation is necessary to protect the health and welfare of nonmembers of the tribe. If these criteria are met, state power may exist if tribal regulatory power of nonmembers' conduct is lacking either because there is no evidence of impacts on the tribe's health, safety, and welfare or its financial or political integrity or, alternatively, because population, demographics, and land status reflect an ouster of tribal regulatory power under a *Brendale* analysis. ⁽²²⁹⁾

[3] Power to Regulate Activities Under Indian Mineral Leases or Development Agreements.

The uncertain balance of power in Indian country can unsettle expectations arising from basic regulation of natural resource development. While this paper does not attempt to analyze exhaustively the consequences of this uncertainty in all areas of natural resource development, the following section, by way of example, will highlight jurisdictional uncertainty that may attend oil and gas and coal development in Indian country.

[a] Oil and Gas Conservation Regulation.

Traditional patterns of regulation of oil and gas conservation by state agencies is undermined on Indian lands by the concepts of tribal sovereignty, federal supremacy, and correspondingly weak state power outlined above. ⁽²³⁰⁾ State conservation agencies generally have powers to determine appropriate well spacing to prevent physical waste of oil and gas and to maximize long-term recovery of reserves. State conservation agencies also have powers to regulate and, in certain circumstances communitize or pool properties to protect correlative rights of neighbors. ⁽²³¹⁾ However, state powers may not extend to tribal allotted lands, and often there is no affective alternative procedure available to protect these critical interests.

State conservation board orders generally are not enforceable on Indian lands unless approved by the Bureau of Land Management (BLM). ⁽²³²⁾ However, memoranda of understanding between BLM and the state conservation agencies can be enforceable, give a flexible approach to cooperation between the state and federal agencies. ⁽²³³⁾ While memoranda of agreement apportioning state and federal conservation responsibilities are rare, ⁽²³⁴⁾ BLM is taking action to broaden their usage. ⁽²³⁵⁾ Developers operating in areas covered by a state/BLM MOA should recognize that BLM may retain broad powers with respect to spacing that may conflict even with terms of a MOA to which it is a signatory. ⁽²³⁶⁾

The potential preemption of state regulatory powers over Indian minerals give rise to a further impediment to effective development in Indian country: there generally is no vehicle for "compulsory pooling" of Indian lands for oil and gas development.⁽²³⁷⁾ Forced or compulsory pooling operates by mandatorily joining divided interests within a spacing unit which has been created by formal order for the sharing of costs and production attributable to a well location within a unit. On non-Indian lands, if voluntary pooling cannot be agreed upon by all interest owners in a spacing unit, the state conservation agency upon application generally can order forced pooling, provided there is notice and opportunity for comment by non-consenting owners. On trust or restricted Indian lands, operators should be aware that tribal consent is necessary to communitize tribal lands, and there will be no authority in a state agency to compel communitization of allotted lands.⁽²³⁸⁾ Oil and gas developers should consider these regulatory consequences of oil and gas development on INdian lands and determine whether there are applicable agreements between BLM and the state conservation agency. If there are not, the developer either should address such matters in appropriate approve agreements with the Indian lessor or address unresolved issues directly, and in advance, with the BLM.

[c] Coal Surface Mining Regulation Under the Surface Mining Control and Reclamation Act of 1977.⁽²³⁹⁾

SMCRA is the central federal statute affecting surface coal mining. It established the Office of Surface Mining Reclamation and Enforcement (OSM).⁽²⁴⁰⁾ Although SMCRA Title IV create an abandoned mine lands reclamation program to reclaim old mines,⁽²⁴¹⁾ this paper will address regulatory patterns under the SMCRA Title V, regulatory program for the control of the environmental impacts of surface coal mining occurring after SMCRA's effective date.⁽²⁴²⁾ The core of SMCRA's Title V program is SMCRA § 515, setting forth quite specific and comprehensive environmental program performance standards aimed at protecting air, land, and water during mining and reclamation.⁽²⁴³⁾ SMCRA puts teeth in the performance standards by requiring any coal surface mining operation to apply for and obtain from the appropriate regulatory authority a permit that must require the mine to meet all applicable SMCRA performance standards.⁽²⁴⁴⁾ The applicable regulatory authority then is empowered to inspect permitted facilities, issue remedial orders, and seek judicial enforcement of the statute. As costs of compliance with SMCRA become an ever larger portion of total mining-related costs, the manner by which SMCRA regulation is implemented has become increasingly critical to coal operators.

"Indian lands," as defined in SMCRA, are subject to regulation by OSM under its federal program, rather than by "agreement" state operating under delegation from OSM. To this point, EPA accepts that SMCRA did not authorize delegation to a tribe of overall program implementation authority even on Indian lands; however, OSM has taken a position that it may contract with a tribe for the tribe to provide specific SMCRA implementation functions.⁽²⁴⁵⁾ SMCRA § 701 provides:

"Indian lands" means all lands, including mineral interests, within the exterior boundaries of any federal Indian reservation, notwithstanding the issuance of any patent, and

including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.⁽²⁴⁶⁾

OSM's interpretations of the SMCRA "Indian lands" definition has presented no interpretive difficulties within reservation boundaries, where OSM regulation has been recognized. However, in off-reservation, checkerboarded areas, where it has engendered disputes, OSM has been affirmed in concluding that off-reservation surface estate owned by the Navajo Nation in fee overlying privately owned minerals are "supervised by" the Navajo Nation, equating ownership with supervision.⁽²⁴⁷⁾ Off-reservation allotted lands, the title to which is held in trust by the United States, are "Indian lands" under SMCRA. Published guidance provides that "off reservation and allotted lands are included in the SMCRA definition of Indian lands only if an interest in the surface or mineral estate is held in trust for or supervised by an Indian tribe."⁽²⁴⁸⁾ OSM recently settled litigation by agreeing that allotment located within a Navajo-Hopi tribal land consolidation area approved by the Secretary under 25 U.S.C. § 2203 are "Indian lands."⁽²⁴⁹⁾ Surface coal developers should pay careful attention to the often unpredictable jurisdictional pattern that has arisen from SMCRA's "Indian lands" definition.

[4] Dispute Resolution Powers in Indian Country.

Overlaying the uncertainty over which sovereign may tax or regulate Indian country development is the overarching question regarding which sovereign's court ultimately will decide disputes, including those to determine jurisdictional primacy. This portion of the paper will first address the jurisdiction of tribal, federal, and state courts over actions in Indian country. Second, it will outline the abstention doctrine that requires state and federal courts vested with subject matter jurisdiction of an action to defer initially to tribal court. Finally, it will examine the nature and scope of federal court review of tribal court decisions.

[a] The Geopolitics of Dispute Resolution.

The first modern Supreme Court decisions to define the role of tribal courts arose in conflicts between tribal courts and state courts.

Williams v. Lee⁽²⁵⁰⁾ held that tribal court, not a state court, had jurisdiction over an action by a non-Indian-owned, reservation-based business to collect an on-reservation debt from a tribal member residing on the reservation. What is most remarkable about *Williams v. Lee* is its holding that only the tribal court had jurisdiction over the action, despite the fact that the state court plaintiff had served an Arizona state court summons on the Navajo defendant when the debtor had been off the reservation in Arizona.⁽²⁵¹⁾

Ordinarily, a state court has subject matter jurisdiction over transitory actions, like the action in *Williams* on a debt arguably occurring outside Arizona's borders, and the state court's power to proceed depends on personal jurisdiction over non-resident parties.⁽²⁵²⁾

While *Williams v. Lee* has been described as declaring that tribal court jurisdiction over on-reservation controversies is "exclusive,"⁽²⁵³⁾ it addressed only state versus tribal court

jurisdiction over an action by a federally licensed reservation Indian trader against a reservation Indian arising from an on-reservation transaction.⁽²⁵⁴⁾

Williams v. Lee reflects that the jurisdiction it found was not grounded in territorial hegemony, at least where non-Indians are parties. It recognized that state courts "have been allowed to try non-Indians who committed crimes against each other on a reservation"⁽²⁵⁵⁾ and that state court may entertain suits by Indians against outsiders.⁽²⁵⁶⁾ While *Williams v. Lee* invested tribes with important new dispute resolution powers, its recognition of state power over such on-reservation controversies clarifies that it is founded both in geography, the on-reservation situs of the transaction and parties, and in tribal affiliation and consent, including the tribal membership of the defendant and his or her actions.⁽²⁵⁷⁾

Further reflecting the balance between tribal and other courts are the Supreme Court's decisions in two cases, both named *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*⁽²⁵⁸⁾ Both *Wold* cases rejected state courts' efforts to decline subject matter jurisdiction over an action filed by a tribe in state court against non-Indians arising from on-reservation dealings, at least when the tribal court did not have jurisdiction over such a claim.⁽²⁵⁹⁾ The Supreme Court's decision in *Wold II* went further, holding that North Dakota could not condition access to its courts on a tribe's waiving its immunity from suit.⁽²⁶⁰⁾ The *Wold* cases, consequently, obligate state courts to assume and decide cases involving tribes, at least when necessary to an efficient and complete resolution of the controversy.

While the Supreme Court's cases reflect tribal court primacy over state courts in some actions involving Indians, they reflect that state courts can, and sometimes must, handle many reservation-based disputes.⁽²⁶¹⁾ Tribal court jurisdiction, even as against state courts, generally is not mandatory.⁽²⁶²⁾

[i] Tribal Court Jurisdiction over Actions Involving Non-Indians.

Recent cases present a question central to defining the nature of tribal court jurisdiction over non-Indians and the grounds necessary to support it. Many tribes contend that their courts' jurisdiction is territorial in nature, similar to that of state courts, extending to all causes of action arising within the exterior boundaries of the reservation. The dispute in the cases addressing this question focuses on whether civil judicial jurisdiction over non-Indians must be supported by a showing of *Montana* impacts flowing from the conduct at issue in the action.

A-1 Contractors v. Strate⁽²⁶³⁾ reflects the view that civil adjudicatory jurisdiction over non-Indians is not territorial, but must be supported by a showing of *Montana* impacts. *A-1 Contractors* holds that Fort Berthold Tribal Court lacked adjudicatory jurisdiction over a dispute between a nonmember plaintiff and a nonmember defendant arising from an auto accident occurring on the Fort Berthold Reservation.⁽²⁶⁴⁾ The Eighth Circuit began its analysis with the conclusion that "the standards articulated in [*Montana*], and subsequent cases applying those standards, control the resolution" whether the tribal

court had jurisdiction of the dispute.⁽²⁶⁵⁾ Finding neither a consensual relationship, nor impacts on the health or welfare of tribal members that would be affected by the resolution of the negligence case, the Eighth Circuit held tribal court lacked jurisdiction. The court specifically rejected the argument that *Montana* standards apply only to civil regulatory matters and do not affect adjudicatory jurisdictional determinations, reasoning that civil regulatory cases, like *Montana*, *Brendale*, and *Bourland*, "have never suggested that their reasoning is limited solely to regulatory matters."⁽²⁶⁶⁾ Hence, it concluded that "any attempt to create or apply a distinction between regulatory jurisdiction and adjudicatory jurisdiction . . . would be illusory."⁽²⁶⁷⁾ The *A-1 Contractors* court premised this conclusion on recognition that, "while adjudicating the dispute, the tribal court also would be regulating the legal conduct of drivers on the roads and highways that traverse the reservation."⁽²⁶⁸⁾

Supreme Court decisions have not held tribal court jurisdiction is either territorial or exclusive. Although, *Williams v. Lee*⁽²⁶⁹⁾ affirmed tribal court jurisdiction over a non-Indian and rejected state court power over a suit by a non-Indian trader against a reservation Indian, it also recognized certain state court powers on reservation.⁽²⁷⁰⁾ *Williams v. Lee* predates *Montana*, and does not analyze its jurisdictional determination in *Montana* terms. Rather, *Williams v. Lee* emphasizes that interests in tribal self government are critical to the jurisdictional determination.⁽²⁷¹⁾ The Supreme Court's two recent Indian abstention decisions are similarly equivocal on this point. In reaching its conclusions that a cause of action within the diversity jurisdiction of federal courts must first be adjudicated in tribal court, *Iowa Mutual Ins. Cos. v. LaPlante*⁽²⁷²⁾ suggested a presumption of tribal court jurisdiction. However, *National Farmers Union Inc. Cos. v. Crow Tribe* made clear that a searching inquiry that seems inconsistent with broad territorial jurisdictional powers determines that tribal court jurisdiction over non-Indians.⁽²⁷³⁾ Both cases require the question of tribal court jurisdiction to be decided in the first instance in the tribal courts, subject to federal court review, and neither holds that tribal court would have jurisdiction.

Similarly, the Ninth Circuit's decision in *Hinshaw v. Mahler*,⁽²⁷⁴⁾ which affirmed jurisdiction of tribal courts on the Flathead Reservation in Montana over an action by one resident of the Flathead Reservation against another,⁽²⁷⁵⁾ declined to engage in a *Montana* analysis. Rather, it concluded broadly that: "[t]he Tribes' jurisdiction has not been limited by treaty or statute and the Tribes have not given up their authority to exercise jurisdiction over actions such as [this]."⁽²⁷⁶⁾

Several pending cases present this issue.⁽²⁷⁷⁾ Its ultimate resolution will significantly affect the balance of judicial power in Indian country.

Developers should consider the possible implications of tribal court jurisdiction over reservation-based causes of action in fashioning their conduct and agreements. These consequences could include trial before juries composed exclusively of tribal members, constitutional-type rights limited to those afforded under the Indian Civil Rights Act of 1968,⁽²⁷⁸⁾ and potentially limited federal court review of those judgments.⁽²⁷⁹⁾

[iii] State Courts' Concurrent Jurisdiction.

The Supreme Court has recognized that state courts may have jurisdiction over actions involving nonmembers of a tribe on reservations.⁽²⁸⁰⁾ However, state courts' powers over reservation controversies remain poorly defined. As noted, state courts may have jurisdiction over actions on reservation involving only non-Indians⁽²⁸¹⁾ and over a contract executed off-reservation between a tribe and a non-Indian.⁽²⁸²⁾

[iv] Federal Question Jurisdiction over Actions in Indian Country.

The federal courts have played a central role in resolving disputes within Indian country and in shaping the contours of tribal sovereignty. Federal question jurisdiction⁽²⁸³⁾ has served traditionally as the major vehicle resolving disputes concerning the status of the tribes, the scope of their power, and the applicability of federal law to them. *National Farmers Union* expressly resolves that tribal court jurisdiction over a non-Indian is one that must be answered by reference to federal law and is a "federal question under 28 U.S.C. § 1331."⁽²⁸⁴⁾ Federal question jurisdiction is a broader font of judicial power within Indian country than elsewhere, because tribal governmental powers and possessory rights determined by federal law.⁽²⁸⁵⁾ Federal court power to resolve federal questions in Indian country is consistent with federal "plenary" power over tribal affairs.⁽²⁸⁶⁾

Specific federal statutes, however, may reflect an intention that original jurisdiction be limited to tribal court.⁽²⁸⁷⁾ The Indian Civil Rights Act of 1968⁽²⁸⁸⁾ had subjected Indian tribes, for the first time, to constitution-like duties similar to those applicable to state or federal governments. The ICRA expressly provided for federal court jurisdiction only over *habeas corpus* actions arising under the statute, and *Santa Clara Pueblo* determined that the federal courts lacked original jurisdiction over an implied cause of action to enforce the ICRA: initial federal court jurisdiction over ICRA suits against tribal officials would, the Court concluded, interfere with "tribal autonomy and self-government beyond that created by the change in substantive law itself" and may "undermine the authority of the tribal court."⁽²⁸⁹⁾ This the Court found impermissible under *Williams v. Lee*, because it would "infringe on the right of the Indians to govern themselves."⁽²⁹⁰⁾ The Supreme Court has never addressed whether federal courts have federal question jurisdiction to review tribal courts' decisions alleged to violate the ICRA.

[v] Federal Courts' Diversity Jurisdiction over Actions in Indian Country.

The policies underlying federal courts' diversity jurisdiction over causes of action between "citizens of different states,"⁽²⁹¹⁾ address concerns for bias against outsiders prevalent in jurisdictional disputes in Indian country: "[t]he constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."⁽²⁹²⁾ Exercise of diversity jurisdiction would allow federal courts to even the playing field by neutralizing the

possible effect of local bias by tribal courts and tribal court juries against outsiders. This concern often motivates diversity filings in the Indian country context.

The Supreme Court's opinion in *Iowa Mutual* makes clear that federal district courts have subject matter jurisdiction under the diversity statute over an action by an out-of-state insurer against a resident of the Blackfeet Reservation within Montana.⁽²⁹³⁾ Earlier Ninth Circuit cases rejecting diversity jurisdiction over cases cognizable in tribal court⁽²⁹⁴⁾ were "[r]elegated to a dismissive footnote"⁽²⁹⁵⁾ of *Iowa Mutual*.⁽²⁹⁶⁾ Consequently, although severely diluted the abstention doctrine, discussed below, diversity jurisdiction exists to lessen concerns arising from local prejudice against outsiders in actions in Indian country.

[b] The Tribal Abstention Doctrine.

It is ironic that the two decisions that confirmed federal court subject matter jurisdiction over federal question and diversity cases in Indian country also have severely limited federal courts' powers to initially exercise that jurisdiction. Consequently, in many cases a developer's challenge to tribal jurisdiction must be heard in the first instance by a tribal court. This section of the paper addresses the standards guiding whether a case must first be presented to tribal court.

National Farmers Union and *Iowa Mutual*,⁽²⁹⁷⁾ two relatively minor lawsuits, were personal injury suits filed in tribal court by Native American plaintiffs, and in both a non-Indian defendant subsequently filed a federal court action to avoid the tribal court. Both Supreme Court decisions, while confirming federal court jurisdiction, sent the parties back to tribal court, subject to later federal court review. These two Supreme Court decisions form the foundation, however, for ever-widening barriers to federal court review of far broader classes of cases.

[i] *National Farmers Union* and Federal Question Abstention.

National Farmers Union arose when a member of the Crow Tribe was injured in a motorcycle collision at a Montana public school on fee lands within the Crow Reservation. The tribal member sued the county school district and its insurer in tribal court and obtained a default judgment.⁽²⁹⁸⁾ Rather than move to set aside the default judgment under an available tribal court procedure,⁽²⁹⁹⁾ the defendant insurer for the school district sought injunctive relief in the United States District Court for the District of Montana.⁽³⁰⁰⁾ Although holding that federal court has federal question jurisdiction to determine whether a tribal court has exceeded its jurisdictional power, the Supreme Court in *National Farmers Union* concluded that the federal court should not address this federal question "until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made."⁽³⁰¹⁾ Although *National Farmers Union* provided exceptions to this rule, they are of narrow scope and seldom have been found applicable: exhaustion is not required when (1) tribal jurisdiction is asserted in bad faith, (2) tribal jurisdiction violates "express jurisdictional prohibitions,"

or, (3) where exhaustion would be futile for lack of an adequate tribal court opportunity to challenge jurisdiction.⁽³⁰²⁾

[ii] *Iowa Mutual* and Diversity Jurisdiction Abstention.

Iowa Mutual reached a similar result in a diversity case where the federal court plaintiff tried a bit harder in the tribal system. In *Iowa Mutual*, a member of the Blackfeet Indian Tribe, injured in an accident on a ranch on the Blackfeet Reservation in Montana, sued the ranch owner, a Blackfeet tribal member, and its insurance carrier in Blackfeet Tribal Court. The insurance company moved the tribal court to dismiss for lack of jurisdiction over the subject matter, and the tribal court declined, holding that the tribe could regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation.⁽³⁰³⁾ The Blackfeet Tribe has a Court of Appeals, but the insurer could not obtain tribal appellate review until after trial on the merits.

The insurer then filed suit in federal court under the diversity statute. It sought a declaration that it was under no duty to defend or indemnify its insured. Unlike the insurance company in *National Farmers Union*, the insurer did not challenge the jurisdiction of the tribal court under federal question jurisdiction;⁽³⁰⁴⁾ rather, it sought a declaration that it had no duty to defend or indemnify the ranch owner because LaPlante's injuries fell outside its coverage.⁽³⁰⁵⁾ The Supreme Court held that diversity jurisdiction existed, but the insurance company must first exhaust available tribal remedies, including tribal appellate court review, before the federal court may act.⁽³⁰⁶⁾

Iowa Mutual and *National Farmers Union* articulate broad interests favoring abstention. Justice Marshall's opinion in *Iowa Mutual* found in *National Farmers Union* a policy that "directs" a federal court to stay its hand until the tribal court has determined its jurisdiction.⁽³⁰⁷⁾ This policy avoids placing the federal courts "in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."⁽³⁰⁸⁾ Finally, *Iowa Mutual* concluded that "[a]djudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law."⁽³⁰⁹⁾

Iowa Mutual and *National Farmers Union* have several common traits. First, in both cases the tribal court action was first-filed and the federal court action was filed in response. Second, in neither case did the federal court action progress substantially before the tribal court plaintiff moved to dismiss the federal court case. Third, *National Farmers Union* and *Iowa Mutual* affirmed the existence of federal court jurisdiction over federal question and diversity actions, respectively, although both required that the issues be presented first to the tribal court. Finally, both cases affirmed the availability of federal court review following required tribal court decisions.⁽³¹⁰⁾ Given these limitations, *National Farmers Union* and *Iowa Mutual* can be seen as appropriate extensions of the abstention doctrines that the federal courts have developed to determine whether a federal court should proceed despite ongoing state proceedings.⁽³¹¹⁾ In federal question cases to enjoin state proceedings, a line of cases emanating from *Younger v. Harris*⁽³¹²⁾ balance the federal interest in resolving federal issues against the interests of the state in smooth,

uninterrupted functioning of its administrative and judicial machinery. In diversity and other cases where two cases are proceeding in competing court systems, under the *Colorado River* doctrine, six factors focusing on fairness to the parties and the federal interests involved determinance whether the federal court should proceed or stay its hand.⁽³¹³⁾ Both the *Younger* and *Colorado River* doctrines recognize the duty of a federal court to exercise Congressionally established jurisdiction absent the "exceptional circumstances" prescribed for abstention,⁽³¹⁴⁾ and both operate only when proceedings are pending simultaneously in the state and federal systems.⁽³¹⁵⁾

The lower federal courts have applied *National Farmers Union* and *Iowa Mutual* to require abstention in situations hardly compelled by the facts, procedural postures, and holdings of the Supreme Court's cases. With important exceptions,⁽³¹⁶⁾ they have shown little regard for factors which motivate abstention decisions in off-reservation situations. Consequently, the federal courts are according to tribal courts substantially more deference than they do to state courts. Given that *National Farmers Union*⁽³¹⁷⁾ and *Iowa Mutual*⁽³¹⁸⁾ both cite federal/state abstention authority in describing the rules to be prescribed, this greater deference is hardly compelled by those cases.⁽³¹⁹⁾

Since its 1987 decision in *Iowa Mutual*, the Supreme Court has not written on the Indian abstention doctrine.⁽³²⁰⁾ Six of the eleven Circuit Courts of Appeal and several state appellate courts have decided Indian abstention cases in the nine years since *Iowa Mutual* was decided. The Circuits have vacillated between implying that abstention is mandatory, unless one of the three exceptions recognized in footnote 21 of *National Farmers Union* is present, to applying a "particularized inquiry" to determine whether to abstain.⁽³²¹⁾ The following discussion emphasizes several strands of the developing doctrine that reflect the effect the doctrine may have on the allocation of judicial power in Indian country.

[c] The Necessity of a Prior Pending Tribal Proceeding.

Although a prior state court proceeding is mandatory to justify abstention in the state/tribal context, federal court vacillate over the significance of a prior pending tribal judicial or administrative proceeding. Several federal courts have found the absence of a prior tribal case material to a decision not to abstain.⁽³²²⁾ Other cases have held the absence of prior tribal proceeding to be irrelevant.⁽³²³⁾ The absence of a prior proceeding at least is pertinent to whether federal proceedings would disrupt tribal judicial administration.

[i] Conflicting Presumptions Regarding Tribal Regulatory and Adjudicatory Jurisdiction.

Decisions applying the abstention doctrine generally have disregarded both *Montana's* presumption regarding power over nonmembers,⁽³²⁴⁾ particularly on fee lands, and *Brendale's* demographic and land ownership factors⁽³²⁵⁾ in deciding whether a federal or tribal court should initially decide federal questions. *National Farmers Union*, which arose on fee lands on the Crow Reservation involved in *Montana*, did not address the *Montana*-declared presumption that tribes generally lack power over nonmembers in requiring the federal court to abstain in deference to Crow Tribal Court,⁽³²⁶⁾ and *Iowa*

Mutual, immediately following a citation to *Montana*, stated "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts" ⁽³²⁷⁾ Consequently, *National Farmers Union* and *Montana/Brendale* may create "conflicting presumptions" regarding tribal jurisdiction over non-Indian activities on fee lands within a reservation: Tribal power presumptively exists to determine tribal court adjudicatory jurisdiction, but, under *Montana*, not to assert legislative jurisdiction. ⁽³²⁸⁾

In two recent cases challenging tribal assertions of regulatory or taxing jurisdiction over development activity on fee lands similar to the "open" portion of the Yakima Reservation at issue in *Brendale*, federal courts, relying on the *Iowa Mutual* "presumption" of tribal court jurisdiction, have dismissed federal question actions, even though parallel proceedings were not pending in tribal courts. In *Middlemist*, non-Indian fee land owners within the Flathead reservation filed a federal question action in federal court to compel the Secretary of the Interior to disapprove application of a tribal aquatic lands conservation ordinance. ⁽³²⁹⁾ Rather than address adjudicatory jurisdiction as a matter to be demonstrated by the tribe, *Middlemist* addressed this contention under the second of *National Farmers Union*'s three exceptions to the exhaustion rule, whether tribal jurisdictional assertions violate "express jurisdictional prohibitions," suggesting a burden on the opponent of tribal jurisdiction. Quoting *Iowa Mutual*, the *Middlemist* district court commented that original adjudicatory jurisdiction "presumptively" lies in tribal court. ⁽³³⁰⁾

Duncan Energy ⁽³³¹⁾ challenged tribal taxing and employment regulatory powers over the Northeast Quadrant of the Fort Berthold Reservation, where population and landholding tilt decidedly in the non-Indian direction under a *Brendale* analysis. The Eighth Circuit reversed the district court's decision not to abstain, expressly rejecting the position that "*National Farmers Union* and *Iowa Mutual* are inapplicable to cases involving fee lands . . .", and commenting "[c]ivil jurisdiction over tribal-related activities on reservation land presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or by federal statute. ⁽³³²⁾

Interpreting *National Farmers Union* and *Iowa Mutual* to allow tribal courts to determine all factual issues potentially dispositive of the jurisdictional question whether such powers exist seems inconsistent with primary federal responsibility to decide federal questions and threatens to tilt the outcomes of these critical controversies in tribes' favor. Given that *Montana* and *Brendale* require tribes to shoulder a threshold burden to support jurisdiction; important issues of federalism are present if *National Farmers Union* is construed to allow tribal courts to determine initially in all cases whether they met that burden. ⁽³³³⁾

[ii] Cases Strictly Required Abstention Unless *National Farmers Union* Exceptions Apply.

Some lower federal courts have applied the exhaustion rule inflexibly to require exhaustion unless one of the three exceptions recognized in *National Farmers Union* apply. ⁽³³⁴⁾ *Bank of Oklahoma v. Muscogee (Creek) Nation* reflects the Tenth Circuit's

recent caselaw. It held that an off-reservation bank's effort to use the federal interpleader statute to determine rights in off-reservation accounts used by an Indian tribe and a gaming management firm did not warrant an exception from the exhaustion requirement.⁽³³⁵⁾ Consequently, the bank's contention that there is no tribal court jurisdiction over its off-reservation activities of fee lands in management of an account "should first be heard in tribal court."⁽³³⁶⁾

Pittsburgh & Midway Coal Mining Co. v. Watchman,⁽³³⁷⁾ reflects inconsistencies in the Tenth Circuit's abstention law. *Pittsburgh & Midway* challenged the Navajo Nation's taxation of its revenues from off-reservation coal mining activities in an area the Navajo Nation contended was "Indian country" within the meaning of 18 U.S.C. § 1151, because it allegedly was part of a "dependent Indian community." *Texaco, Inc. v. Zah*,⁽³³⁸⁾ had prescribed a "particularized inquiry" to determine whether to abstain from addressing an off-reservation tax challenge.⁽³³⁹⁾ Noting *Texaco*, *Pittsburgh & Midway* observed that "the tribal abstention doctrine applies throughout Indian country, not just on formal reservations . . .",⁽³⁴⁰⁾ but that "[t]his case falls farther down the sliding scale because it involves `non-Indian activity occurring outside the reservation.'"⁽³⁴¹⁾ However, *Pittsburgh & Midway* did not mention or engage in a "particularized inquiry," and its conclusion appears to foreclose a "particularized inquiry" into factors affecting whether to abstain: "the district court must abstain if the South McKinley Mine lies within Indian country."⁽³⁴²⁾ *Pittsburgh & Midway* suggests, however, that it reached this conclusion because the federal court action challenged a tribal tax and might employ a different analysis in a non-tax case.⁽³⁴³⁾ It does not discuss matters a particularized inquiry might address, including the interests of non-Indian residents and businesses outside a reservation in a dispute resolution before a non-tribal forum and the difficulties of ascertaining whether a particular matter arose in a "dependent Indian community."

While early Ninth Circuit decisions reflected a flexible application of abstention factors,⁽³⁴⁴⁾ recent cases have more strictly required abstention. Later decisions sharply curtail discretion to balance the interests that are considered in federal/state abstention cases. *Burlington Northern R.R. v. Crow Tribal Council*,⁽³⁴⁵⁾ held that the "district court had no discretion" to relieve a non-Indian challenging tribal jurisdictional assertions "from exhausting tribal remedies prior to proceeding in federal court"⁽³⁴⁶⁾ Perhaps most extreme, *Crawford v. Genuine Parts Co.*⁽³⁴⁷⁾ reversed a district court's refusal to abstain in a diversity action for personal injuries, holding that the district court lacked discretion to retain the case, notwithstanding that the action, originally filed by Native American plaintiffs in state court and removed to federal court, had been pending in state and federal court over five years when the plaintiffs moved to "transfer" the case to tribal court on the eve of trial.⁽³⁴⁸⁾ Because the accident occurred on the reservation, the Ninth Circuit deemed dispositive that the case was a "reservation affair."⁽³⁴⁹⁾

Still more recent Ninth Circuit cases pay homage to district courts' discretion to balance material factors, but still require abstention in cases presenting persuasive reasons for the federal action to proceed.⁽³⁵⁰⁾ The *Stock West* case also observed that the decision to abstain involves a discretionary exercise of a court's equity powers and cited two federal/state abstention cases in support of this rule.⁽³⁵¹⁾ An *en banc* Ninth Circuit

required abstention because "colorable questions" were presented as to whether the tribal courts would have jurisdiction or would need to interpret tribal law, and over whether immunity from suit shields a non-Indian tribal attorney from damages arising from an opinion letter delivered off-reservation.⁽³⁵²⁾

Recent cases of the Eighth⁽³⁵³⁾ and Fourth Circuit⁽³⁵⁴⁾ have employed similar analyses to the Ninth and Tenth Circuits, decisions discussed above, concluding that these absence of the three *National Farmers Union* exceptions require exhaustion. Cases applying this rule focus narrowly on whether protectable tribal interests are involved; they often disregard or inadequately weigh in the balance nonmember interests.

[iii] Abstention Not Required Where Federal Law Preempts Tribal Forum's Jurisdiction.

A decision of the Eighth Circuit Court of Appeals suggest a rule that exhaustion of tribal remedies is not required where a federal statute preempts tribal adjudicatory jurisdiction. In *Blue Legs v. United States Bureau of Indian Affairs*,⁽³⁵⁵⁾ the Eighth Circuit held that an action against a tribe and others under the federal Resource Conservation and Recovery Act may be brought in federal court, without need for exhaustion of tribal court remedies, because federal courts have exclusive jurisdiction over such suits and federal policies favor "prompt federal adjudication" of RCRA citizens' suits. In *Northern States Power Co. v. Prairie Mdewakanton Sioux Indian Community*,⁽³⁵⁶⁾ the Eighth Circuit concluded that the Hazardous Materials Transportation Act⁽³⁵⁷⁾ preempted the tribal ordinance. The Eighth Circuit clarified these holdings in *Reservation Telephone Cooperative v. Three Affiliated Tribes of Fort Berthold Reservation*,⁽³⁵⁸⁾ in abstaining from hearing a challenge to a tribal tax. The contention that a 1901 right-of-way preempted the tribal tax was inadequate; rather, the federal statute must foreclose the tribal forum's "assertion of jurisdiction." These decisions comport with *National Farmers Union's* express exception from abstention requirements where tribal court jurisdiction "is patently violative of express jurisdictional prohibitions."⁽³⁵⁹⁾ *Blue Legs* and *Northern States*, consequently, recognize federal courts' jurisdiction to initially determine when federal law forecloses tribal adjudicatory jurisdiction.

[iv] A Particularized Inquiry into Factors Influencing Whether to Abstain.

Several courts have examined the issues and parties in efforts to strike a balance between the interests of the competing courts and parties. *Alzheimer & Gray v. Sioux Mfg. Corp.*⁽³⁶⁰⁾ applied the abstention doctrine to a suit addressing the validity under federal law of a contract between a tribally owned corporation and a non-Indian-owned corporation. In the contract, the tribe and tribal corporation waived all claims to immunity from suit, agreed that the contract would be "interpreted in accordance with the laws of the State of Illinois," and agreed "to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois."⁽³⁶¹⁾ The Seventh Circuit also recognized that many factors held to favor abstention were absent: "there has been no direct attack on a tribal court's jurisdiction, there is no case pending in tribal court, and the dispute does not concern a tribal ordinance as much as it does state and federal law."⁽³⁶²⁾

Similarly, *Myrick v. Devils Lake Sioux Mfg. Corp.*,⁽³⁶³⁾ held that abstention was not required over a tribal member's age discrimination claim against a corporation organized under state law. There was no challenge to any pending tribal court case, the tribe or an arm of the tribe was not a party, and the case "predominately presents issues of federal law."⁽³⁶⁴⁾ Other courts have recognized the propriety of a "particularized inquiry" in appropriate circumstances.⁽³⁶⁵⁾ Properly applied, a particularized analysis allows a pragmatic balancing consistent with that the federal courts apply in federal/state abstention cases.

[v] The Enforceability of Forum Selection Agreements.

Developers often seek to limit jurisdictional uncertainty by contractual stipulation to federal court, state court, or arbitral dispute resolution. *Alzheimer & Gray v. Sioux Mfg. Co.*⁽³⁶⁶⁾ reflects that contractual stipulations to non-tribal dispute resolution may be enforced by a federal court order declining to abstain. A forum selection or dispute resolution provision may not, however, be bullet proof. *Tamiami Partnership Ltd. v. Miccosukee Tribe*,⁽³⁶⁷⁾ required exhaustion of tribal remedies in an action to compel contractually specified arbitration to resolve a dispute between a tribe and a gaming operator, despite a written agreement in which the tribe waived its immunity from suit, agreed to arbitration to resolve any dispute, and agreed that federal court would have jurisdiction to enforce the agreement.⁽³⁶⁸⁾ Developers would be wise to consider including carefully drafted dispute resolution provisions in development of agreements specifying dispute resolution in an agreeable forum and waiver of tribal remedies.

[d] Federal Court Review of Tribal Court Decisions.

Both *National Farmers Union* and *Iowa Mutual* also contemplate federal court review of tribal courts' federal question rulings. "At a minimum," federal court review of questions decided by the tribal courts should await final action by tribal appellate courts.⁽³⁶⁹⁾ Then, if the tribal appeals court affirms tribal court jurisdiction, "petitioner may challenge that ruling in the District Court."⁽³⁷⁰⁾ And, the Supreme Court has not clarified whether federal court review will extend to issues other than the jurisdictional issues involved in those cases. However, if the federal court determines that the tribal court lacked jurisdiction, presumably the federal court plaintiff may start from scratch in federal court.⁽³⁷¹⁾

Federal courts have begun to develop a common law of judicial review of tribal court rulings. Although tribal court findings of fact may be reviewed on a "clearly erroneous standard,"⁽³⁷²⁾ legal rulings of tribal courts likely will be reviewed *de novo*.⁽³⁷³⁾ At least one federal court has specifically rejected the contention that tribal courts have expertise in Indian law that is entitled to deference.⁽³⁷⁴⁾ Nonetheless, particularly on the highly fact-dependent jurisdictional controversies framed by recent Supreme Court opinions, deference to tribal courts' findings of fact could significantly affect the outcome of close cases.

Arizona Public Service Co. v. Aspaas,⁽³⁷⁵⁾ reflects application of these standards by the Court of Appeals for the Ninth Circuit in its affirmance of a district court decision on review of a decision of the Navajo Supreme Court. The district court had enjoined the Navajo Nation from seeking to enforce Navajo employment law against a lessee of the tribe in violation of a lease provision that the Nation would not "directly or indirectly regulate or attempt to regulate" the lessee. The lease provided for a specific dispute resolution procedure before the Secretary of the Interior.

The Court of Appeals ruled that the contractual non-regulation covenant and subsequent detailed contractual provisions governing hiring preferences, reflected an "unmistakable waiver" by tribal officials of power to regulate the lessee's employment decisions and both the non-regulation covenant and the dispute resolution mechanism were enforceable.

Finally, federal or state court review of tribal court judgments also may come into play at the time a tribal court judgment is presented for proceeding in and of execution. *Wilson v. Marchington*⁽³⁷⁶⁾ is a recent example; it limits review to the grounds assertable on review of a judgment of a foreign sovereignty.⁽³⁷⁷⁾

§ X.04 Conclusion and Considerations In Structuring Development

If tribal, as compared to state or local, regulation and taxation affords a more hospitable business environment, structuring the transaction as a joint venture or operating agreement with tribal equity participation, rather than as a conventional lease, may improve the odds of a tribal primacy ruling. Tribal equity participation also may allow some developers to take advantage of statutes giving preference in federal agency contracting or purchasing to "Indian owned" ventures.⁽³⁷⁸⁾ However, the developer must determine whether it needs complete control of project operations, or if there is room for the tribe to joint venture the project or have other management and equity participation. This evaluation will develop information that will be critical to the decision whether and, if so, how to develop a project on tribal lands.

ENDNOTES

1. See Charles F. Wilkinson, *American Indians, Time, and the Law* 10-12 (1987).
2. Except where the context indicates otherwise, this Paper uses the colorful but deceptively complex term, "Indian country," in a non-technical sense, to describe Indian owned lands or lands or close enough on Indian reservations that governmental powers with respect to such lands arguably may be affected. See § X.02[d] and [e], *infra*.
3. See generally, Michael E. Webster, *Mineral Development of Indian Lands: Understanding the Process and Avoiding the Pitfalls*, 39 Rocky Mt. Min. L. Inst. 2-1 (1993); B. Kevin Gover, Catherine Baker Stetson, *Development of Natural Resources on Indian Lands*, 34 Rocky Mt. Min. L. Inst. 3-1 (1988).

4. See Mary Beth West, *Natural Resources Development on Indian Lands: Overview of Tribal, State, and Federal Jurisdiction*, 17 Am. Ind. L. Rev. 71 (1992).
5. See Point X.01.B., *infra*.
6. See Point X.02, *infra*.
7. See Point X.03, *infra*.
8. See Point X.03, *infra*.
9. See Point X.04, *infra*.
10. In this paper, the term "tribe" refers to any federally recognized tribe, band, nation, or other native or Indian community, *see* 25 C.F.R. § 83 (1995); this paper refers to recognized members of such tribes as "Native Americans" or "Indians," *see* 25 C.F.R. § 83.1 (1995).
11. See Susan R. Stockstill & Lynn H. Slade, *Oil and Gas Development on Indian Lands: Shifting Sovereignties in the Oil Patch*, 45th Oil & Gas Inst. 10-5 to 10-12 (Matthew Bender 1994).
12. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).
13. See Charles F. Wilkinson, *American Indians, Time and the Law* 24 (1987); Francis Paul Prucha, *The Great Father: The United States and the American Indians* (1984).
14. See Prucha, *supra* note [13], at 108-114.
15. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137; *see* Prucha, *supra* note [13], at 89-93.
16. Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177 (1988).
17. See, e.g., 25 U.S.C. § 396a-e (1988) (Mineral leasing of tribal lands); 25 U.S.C. § 2102-2108 (1988) (Indian Minerals Development Act of 1982).
18. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677-78 (1974) (Oneida National can maintain action for trespass on lands never sold in compliance with Non-Intercourse Acts); *Quantum Exploration v. Clark*, 780 F.2d 1457 (9th Cir. 1986) (tribe may rescind minerals agreement after execution but before Secretarial approval).
19. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).
20. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).
21. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

22. *See generally*, Mary Beth West, *Natural Resources Development on Indian Reservations: Overview of Tribal, State and Federal Jurisdiction*, 17 Am. Ind. L. Rev. 71 (1992).

23. U.S. Const. art. I, § 8, cl. 3.

24. U.S. Const. art. I, § 2, cl. 2.

25. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 16.

26. Felix S. Cohen's *Handbook of Federal Indian Law*, 207 (R. Strickland et al., eds., 1982) (Cohen 1982).

27. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 17.

28. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 47-48.

29. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) at 561:

The Cherokee nation, then, is a distinct community, occupying its own territory, within boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.

30. *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 555.

31. Act of March 3, 1871, § ____, ____ Stat. ____; *see Prucha, supra* note [13], at 527-33.

32. Cohen 1982 at 127-143; *see Montana v. United States*, 450 U.S. 544, 559 n.9 (1981) ("the policy of the [General Allotment] Act was the eventual assimilation of the Indian population, and the 'gradual extinction of Indian reservations and Indian titles.'") *quoting Draper v. United States*, 164 U.S. 240, 246 (1896).

33. *See Judith V. Royster, Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 U. Tulsa L. J. 541, 548 (1993).

34. 25 U.S.C. § 331-334, 339, 341, 342, 348, 349, and 381 (1988).

35. *See General Allotment Act* § 5, 25 U.S.C. § 331 (1988); *see generally* M. Sharon Blackwell, *Resource Development Issues on Allotted Lands*, ABA SONREEL 5th Annual Conference on Natural Resource Management and Environmental Enforcement on Indian Lands (1993).

36. *See, e.g., DeCoteau v. District County Clerk*, 420 U.S. 425, 444-49 (1975); *see* § X.02[e], *infra*.

37. *See* Hagen v. Utah, 114 S. Ct. 1580 (1994)
38. *See* Solem v. Bartlett, 465 U.S. 463, 467 (1984) ("[i]t is settled law that some surplus lands Acts diminished reservations and other surplus lands Acts did not.") (Citations omitted.)
39. *See* Point X.02[d] and [e], *infra*.
40. 25 U.S.C. § 461, et seq. (1988 and 1993 Supp.); *see generally*, Lawrence C. Kelly, The Assault on Assimilation, John Collie and the Origins of Indian Policy Reform, 213-377 (1983).
41. Cohen 1982 at 142-44.
42. *See* 25 U.S.C. §§ 476, 477 (1988). These provisions can be used to structure development transactions with IRA tribes.
43. *See* House Concurrent Resolution 108, calling for a policy of termination of the federal-tribal relationship, contemplating the policy would be implemented in statutes to be enacted subsequently. H. R. Con. Res. 108, 67 Stat. [B132??] (1953).
44. *See* Cohen 1982 at 162-80; *see, e.g.*, South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986).
45. 60 Stat. 1049, formerly codified at 25 U.S.C. §§ 70a-70v-3; *see* Cohen 1982 at 160-61.
46. *See* ICCA § 12, formerly 25 U.S.C. § 70k; Navajo Tribe v. New Mexico, 809 F.2d 1455, 1464 (10th Cir. 1987) (ICCA bars tribe's claims to title to lands and minerals).
47. Public Law 280, 67 Stat. 588, codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360. "Indian country" was defined in a further termination era enactment, the 1948 revision to federal criminal laws affecting Indians, *see* 18 U.S.C. § 1151, to include Indian reservations, allotments, and "dependent Indian communities." *See generally* Cohen 1982 at 162-64; Conference of Western Attorneys General, American Indian Law Deskbook 143-47 (1993).
48. California, Oregon, Minnesota, Nebraska, and Wisconsin received automatic cessions; Alaska was ceded jurisdiction in 1958. In other states, the developer should investigate whether the state has assumed Public Law 280 jurisdiction over specific reservation lands. *See* Cohen 1982 at 175-77.
49. *See* 25 U.S.C. § 1322(b); *see also* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (Public Law 280 power does not allow California to regulate Indian gaming).

50. *See Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 662 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).
51. Lyndon B. Johnson, *Special Message on Problems of the American Indian*, March 6, 1968. Presidents Kennedy, Nixon and others stressed similar policies. *See Cohen* 1982 at 185.
52. 25 U.S.C. §§ 2101-08 (1988) (authorizing increased flexibility in minerals contracting).
53. 42 U.S.C. § 1996 (1988) (recognizing Native American traditional religion).
54. *See Point X.03[2][d]*, *infra*.
55. 25 U.S.C. §§ 1301-41 (1988) (imposing defined constitution-like duties on tribes).
56. 25 U.S.C. §§ 3501-3506 (Supp. 1993) (grants and other projects to promote tribal energy development); *see* Judith V. Royster, *Mineral Development in Indian Country: the Evolution of Tribal Control Over Mineral Resources*, 29 U. Tulsa L. J. 541, 596-602 (1993); *See* Marjane Ambler, *Breaking the Iron Bonds, Indian Control of Energy Development* 185-95 (1990).
57. The Indian Commerce Clause vest Congress with power to "regulate Commerce . . . with the Indian Tribes" *See* U.S. Const. art I, § 8, cl. 3. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), observed "[t]hese powers comprehend all that is required for the regulation of our intercourse with the Indians."
58. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 195 (1876); *Cohen* 1982 at 207-10.
59. *See United States v. Mazurie*, 419 U.S. 544, 557-58 (1975) (affirming Congressional power to delegate to tribe power to regulate non-Indians' liquor sales on reservation).
60. *See United States v. Nice*, 241 U.S. 591 (1916); *Tiger v. Western Inv. Co.*, 221 U.S. 286 (1911).
61. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903).
62. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 396-97 (1980).
63. Milner Ball, *Constitution, Court, Indian Tribes*, 1987 Am. Bar Fnd. Res. J. 1, 12 (1987).
64. *See United States v. Santa Fe Pacific R.*, 314 U.S. 339, 354 (1941).

65. *See, e.g.*, Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458 (8th Cir. 1993).
66. 991 F.2d at 462.
67. *See, e.g.*, United States v. Dion, 476 U.S. 734 (1986); F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960); E.E.O.C. v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989) (Age Discrimination in Employment Act does not apply to tribal business); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1114-15 (9th Cir. 1985) (Occupational Safety and Health Administration Act applies to tribal farming enterprise); Donovan v. Navajo Forest Products Indus., 692 F.2d 709 (10th Cir. 1982) (due to treaty provision, OSHA does not apply to tribally owned entity operating on tribal lands); Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972) (National Environmental Policy Act applies to Indians lands).
68. *See* Alex T. Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Indian Reservations*, 25 U. C. Davis L. Rev. 85 (1991).
69. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381 (1993).
70. *See* United States v. Mitchell, 463 U.S. 206, 225 (1983).
71. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973).
72. *See* Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir. 1986), *adopting dissenting opinion from* 728 F.2d 1555 (1984), *cert. denied sub nom.*, Southern Union Co. v. Jicarilla Apache Tribe, 479 U.S. 970 (1986).
73. Woods Petroleum Corp. v. United States Dep't of Interior, 18 F.3d 854 (10th Cir. 1994), *cert. denied*, 116 S. Ct. 54 (1995); *see also* Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983) (in determining best interest of the tribe, BIA must consider long-term interest in tribal reputation for business reasonableness).
74. *See* Montana v. United States, 450 U.S. 544, 564-65 (1981); *see generally* Walter E. Stern, *Environmental Compliance Considerations for Developers on Indian Lands*, 28 Land & Water Rev. 77, 79-92 (1993); Mary Beth West, *Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal Jurisdiction*, 17 Am. Ind. L. Rev. at 74.
75. *See* Stern, *Environmental Compliance*, 28 Land & Water Rev. at 81-83.
76. 31 U.S. (6 Pet.) 515 (1832); *see* § X.01[1][a], *supra*.

77. *Id.* at 561; *see also* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) (Cherokees are not a state of the Union or a foreign state, within jurisdiction of Supreme Court subject to suit in Supreme Court; although a "distinct political society separated from others, capable of managing its own affairs and governing itself. . .," *Id.* at 16, they are "domestic dependent nations . . ." by virtue of the United States' protection of them and its control of alienation of their lands. *Id.* at 17.

78. *Id.* at 561-62; Samuel Worcester "entered the . . . Cherokee nation in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions, under the authority of the president of the United States . . .," *Id.* at 538, and his seizure and incarceration by Georgia were "in direct hostility with treaties . . ., which mark out the boundary that separates the Cherokee country from Georgia, [and] pledge the faith of the United States to restrain their citizens from trespassing on it" *Id.* at 561-62.

79. *Id.* at 541.

80. *See Talton v. Mayes*, 163 U.S. 376, 382-84 (1896).

81. *See Ex Parte Crow Dog*, 109 U.S. 556, 558-59 (1883) (tribal members subject to tribal, not federal or territorial court, punishment for murder). The Supreme Court earlier had held that a white man adopted by Indian tribe was subject to federal, not tribal, criminal prosecution. *See United States v. Rogers*, 45 U.S. (4 How.) 567, 572-73 (1846).

82. *See, e.g., Ex Parte Crow Dog*, 109 U.S. at 558-59 ("highest and best" aim of federal policy was to promote tribal "self government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.").

83. Immediately following *Crow Dog*, Congress enacted the Major Crimes Act, codified as amended at 18 U.S.C. § 1151 (1988), which authorized federal criminal prosecutions of identified crimes, and the Supreme Court affirmed the federal divestiture of tribal powers. *See United States v. Kagama*, 118 U.S. 375 (1886) (Congress had power to assert exclusive federal jurisdiction over crime by Indian against another Indian in "Indian country"); *see also Donnelly v. United States*, 228 U.S. 243, 271 (1913) (crime by non-Indian against Indian).

84. *Kansas Railway* _____.

85. 358 U.S. 217 (1959).

86. 450 U.S. 544 (1981).

87. 455 U.S. 130 (1982).

88. 358 U.S. 217 (1959); see Charles F. Wilkinson, *American Indians, Time, and the Law* at 1 (*Williams v. Lee* "opened the modern era of federal Indian law").

89. 358 U.S. at 220.

90. 450 U.S. 544 (1981).

91. *Id.* at 558-59.

92. 435 U.S. 191, 210 (1978). See § 02[2][d], *infra*.

93. *Id.* at 564; the Court also relied for this point on *United States v. Wheeler*, 435 U.S. 313, 326 (1978), which held that among the areas where tribes' powers had been divested implicitly were those involving "the relations between an Indian tribe and non-members of the tribe . . .".

94. 450 U.S. at 564.

95. *Id.*

96. *Id.* at 565-66.

97. See, e.g., *A-1 Contractors v. Strate*, 76 F.3d 930, 934 (8th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3795 (U.S. May 16, 1996) (No. 92-3359) (tribal court civil jurisdiction); 61 Fed. Reg. 2584, 2589 (Jan. 26, 1996) (proposed tribal regulation under Resource Conservation and Recovery Act recognize *Montana* impacts as prerequisite to any tribal delegation).

98. See, e.g., *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F. Supp. 878, 888-89 (D.S.D. 1995) (tribe must meet *Montana* burden to support tribal landfill regulation); Laurie Reynolds, *Extolling Tribal Sovereignty*, 73 N. Car. L. Rev. 1089, 1129-30 (1995); N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 Am. Ind. L. Rev. 353, 387 (1994).

99. *Brendale*, 492 U.S. at 431 (White, Jr.); see *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 266-67 (1992) (Justice White's "demonstrably serious impacts" standard in *Brendale* consistent with *Montana*).

100. See *FMC Corp. v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1315 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) ("at some point, the commercial relationship becomes so attenuated or stale that *Montana's* consensual relationship requirement would not be met."); see also *UNC Resources, Inc. v. Bennally*, 514 F. Supp. 358, 362 (D.N.M. 1981).

101. 455 U.S. 130 (1982).

102. 455 U.S. at 137. The court relied upon *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980) ("[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependence status.").

103. 455 U.S. at 137.

104. *Id.* at 138, n.5, quoting *Colville*, 447 U.S. at 155.

105. *Id.* at 145-49. *Merrion* also declined to invalidate the Jicarilla tax on grounds asserted that it violated the Indian Commerce Clause of the United States Constitution; without deciding whether the Commerce Clause imposes restrictions on tribal taxation, the Court held the tax would not violate the Commerce Clause if it were applicable. *Id.* at 154-58.

106. The doctrinal underpinnings of the implied divestiture doctrine have been criticized as "fundamentally flawed." See N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 Am. Ind. L. Rev. 353, 380 (1994).

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

108. *Duro v. Reina*, 495 U.S. 676 (1990).

109. *Rice v. Rehner*, 463 U.S. 713, 731 (1983) (state can regulate liquor sales to members and nonmembers in absence of tradition of tribal regulation of alcoholic beverages).

110. 435 U.S. 191 (1978).

111. 435 U.S. at 206; see also *Rice v. Rehner*, 463 U.S. 713, 722 (1983) (state may regulate liquor on reservation where ". . . tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians.").

112. *Id.* at 210.

113. See *Brendale v. Confederated Tribes and Bands of Yakima Reservation*, 492 U.S. 408, 426 (1989) (White, J.) (list, "by no means exclusive," of prior divestiture cases); *South Dakota v. Bourland*, 508 U.S. 679 (1993).

114. 435 U.S. 313, 326 (1978) (" . . . the powers of self-government, including the power to prescribe and enforce internal criminal laws . . . involve only the relations among members of a tribe.")

115. 495 U.S. 676, 682 (1990); Congress, however, enacted legislation to overturn this result, to fill the void in criminal law enforcement it concluded would result from *Duro*.

Pub. L. 101-511, § 8077, 104 Stat. 1893 (codified at 25 U.S.C. § 1301-1303 (1988)). *See* Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 Am. Ind. L. Rev. 109 (1992).

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

117. *See* *South Dakota v. Bourland*, 508 U.S. 679 (1993). *Hagen v. Utah*, 114 S. Ct. 958 (1994) (when reservation surplus lands "restored to the public domain," reservation status terminated).

118. *See* *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 427 (1989); *compare* *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 113 S. Ct. 1985 (1993) (state taxation of Indians' reservation-based income impermissible), *with* *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir.), *cert. denied, sub nom.*, *United Keetoowah Band of Cherokee Indians v. Oklahoma Tax Comm'n*, 114 S. Ct. 555 (1993) (allowing state taxation of tribal tobacco sales revenues on fee lands not within a recognized reservation).

119. *See* *Bates v. Clark*, 95 U.S. 204, 208 (1877); *Goudy v. Meath*, 203 U.S. 146, 149 (1906) (lands rendered alienable under General Allotment Act subject to state taxation).

120. *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 423-24 (1989).

121. 492 U.S. at 431-32; a recent decision argues that *Brendale* should not be extended from the land use planning area to water quality regulation, *State of Montana v. Browner*, 1996 U.S. Dist. Ct. Lexis 4753 (D. Mont. 1996); *see* § X.03[2][2], *infra*.

122. *See, e.g.*, *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962).

123. 508 U.S. 679, 113 S. Ct. 2309 (1993).

124. 113 S. Ct. at 2316-17 ("In taking tribal trust lands . . . and broadly opening up those lands for public use, Congress . . . eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe.").

125. 455 U.S. at 141 (rejecting dissent's argument that a tribe's "only source" of power to tax is the power to exclude: "Limiting the tribes' authority to tax in this manner contradicts the conception that Indian tribes are domestic, dependent nations . . .").

126. *Id.*; *see* *Brendale*, 113 S. Ct. at 2321 ("These statutes clearly abrogated the Tribe's "absolute and undisturbed use and occupation" of these tribal lands, and thereby deprived the Tribe of the power to license non-Indian use of the lands.").

127. *See* *Cohen* 1984 at 34.

128. See § X.01[1][b], *supra*.

129. *Solem v. Bartlett*, 465 U.S. 463 (1984); *see also* *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

130. *Compare* *Solem v. Bartlett*, 465 U.S. at 472-78 (statute authorizing Secretary to "sell and dispose of" surplus lands, in light of subsequent demographic patterns, did not reflect clear intent to diminish reservation), *with* *Hagen v. Utah*, 114 S. Ct. 1580 (1994) (statute providing that unallotted lands be "restored to public domain" reduced reservation).

131. *Solem*, 465 U.S. at 473-80.

132. *See, e.g.*, 18 U.S.C. § 1151(a) (1988) (federal criminal jurisdiction over certain crimes occurring on "all land within the exterior boundaries of any Indian reservation . . .").

133. *See* *Solem v. Bartlett*, 465 U.S. 463, 467 (1984) ("As a doctrinal matter, the States have jurisdiction over unallotted opened lands if the applicable surplus lands Act freed that land of its reservation status . . ."); *General Motors Acceptance Corp. v. Chischilly*, 628 P.2d 683, 685 (N.M. 1981) (Navajo law inapplicable to repossession of Navajo member's vehicle on trust land outside reservation).

134. *Brendale*, 492 U.S. at 457 (Blackmun, J.).

135. The Court has addressed state powers over Indians and tribes on lands not within reservations in Oklahoma. *See* notes [144] - [152], *infra*.

136. *See* *Powers of Indian Tribes*, 55 Interior Dec. 14, 63 n.34 (1934) ("the jurisdiction of the Indian tribe ceases at the border of the reservation."); Felix Cohen, *Handbook of Indian Law* 148 n.23 (Univ. N.M. Ed. 1971, reprinting Cohen's original 1942 Handbook) (Cohen 1942); 18 Op. Atty. Gen. 440 (1880); *see also* *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980) (tribes "possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands . . ."); *cf.* *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

137. *See, e.g.*, *UNC Resources, Inc. v. Benally*, 514 F. Supp. 358, 362 (D.N.M. 1981); *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046, 1051 (D. Ariz. 1981); *see also* *GMAC v. Chischilly*, 628 P.2d 683, 684 (N.M. 1981).

138. 18 U.S.C. § 1151(b) and (c) (1988); *see* note [137], *infra*.

139. 18 U.S.C. § 1151, enacted as part of the re-codification of the federal criminal laws in 1944, defines the term "'Indian Country,' as used in this chapter [of the Federal Criminal Code]" to mean

(a) all land within the limits of any Indian reservation . . . , (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same (emphasis supplied).

Act of June 25, 1948, ch. 645, 62 Stat. 757, 80th Cong., 2d. Sess., H.R. 3190; Act of May 24, 1949, ch. 139, 63 Stat. 94, 81st Cong., 1st Sess., H.R. 3762.

140. *Pittsburgh & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995). The author was one of the counsel for an *amicus curiae* supporting Pittsburgh & Midway in the proceeding.

141. *See also* *Texaco, Inc. v. Zah*, 5 F.3d 1374 (10th Cir. 1993), *appeal after remand*, 81 F.3d 934 (10th Cir. 1996); *United States v. Tsosie*, 849 F. Supp. 768 (D.N.M. 1994).

142. *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir.), *cert. denied*, 498 U.S. 1012 (1990).

143. 52 F.3d at 1539.

144. *Id.* at 1541. Pittsburgh & Midway Coal Mining Company did seek certiorari review of the Tenth Circuit opinion.

145. Under *Pittsburgh & Midway*, whether a particular area is a dependent Indian community depends on a consideration of several factors.

These include: (1) whether the United States has retained "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting this territory"; (2) "the nature of the area in question, the relationship of the inhabitants in the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area"; (3) whether there is "an element of cohesiveness . . . manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality"; and (4) "whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples.

Id. at 1545.

146. *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *see also* *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987).

147. *DeCoteau*, 420 U.S. at 427 n.2; *DeCoteau* cited in support of the quoted language cases involving on-reservation tribal or state powers. *See, e.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 177-78 (1973); *Kennerly v. District Court*, 400 U.S. 423, 424 (1971); *Williams v. Lee*, 358 U.S. 217, 220-22 (1959).

148. *Pittsburgh & Midway* observed that the *DeCoteau* language had been "followed" consistently by Tenth Circuit decisions. 52 F.3d at 1540, *citing*, *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988), *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.), *cert. denied*, 114 S. Ct. 555 (1993); *see Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 113 S. Ct. 1985, 1991 (1993).

149. *See Confederated Tribes & Bands of Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1217 (9th Cir. 1990) (§ 1151 "does not have general applicability in the civil context . . . [B]y its own terms [it] is a criminal statute"); *aff'd*, 502 U.S. 251, 112 S. Ct. 683, 689 (1992) (Court rejects contention that § 1151 and alleged implied repeal of § 6 of General Allotment Act preclude state taxation of tribal members' fee lands within reservation).

150. 498 U.S. 505 (1991).

151. *Id.* at 511.

152. 508 U.S. 114, 113 S. Ct. 1985, 1990-92 (1993).

153. *Id.* at 1991.

154. 25 U.S.C. §§ 1321(a), 1322(a); *Id.* at 1992, *quoting*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 178-79. *See also Chickasaw Nation v. State of Oklahoma*, 31 F.2d 964 (10th Cir. 1994), *cert. granted*, 115 S. Ct. 714, *aff'd. in part, rev'd. in part*, 115 S. Ct. 2214 (1995) (Treaty of April 28, 1866, forecloses Oklahoma income taxation of income of Chickasaw Tribal members, earned from tribal enterprises on the reservation or in Indian Country, regardless of whether tribal member actually lives on reservation or in Indian Country.)

155. 115 S. Ct. 2214 (1995).

156. 115 S. Ct. at 2220-21.

157. *Id.* at 2222-24.

158. 411 U.S. 145, 148-49 (1973) ("Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.").

159. *See* Notes [82-89] *supra*.

160. *See, e.g., A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3795 (U.S. May 16, 1996) (No. 92-3359) (tribal court lacks jurisdiction over action between two non-Indians); *see generally*, *Conference of Western Attorneys General, American Indian Law Deskbook* 110-17 (1993).

161. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 482-83 (1976); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 159-60 (1980).
162. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 (1989).
163. *Brendale*, 492 U.S. at 431.
164. *Rice v. Rehner*, 463 U.S. at 724-25.
165. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The state/tribal balance can be affected when the state has authority pursuant to Public Law 280. *See* § X.01[1][d], *supra*.
166. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 (1973).
167. *See* [Acoma case].
168. On Indian lands, these constraints have been catalogued comprehensively, *see* Michael E. Webster, *Mineral Development on Indian Lands; Understanding the Process and Avoiding the Pitfalls*, 39 Rocky Mt. Min. L. Inst. 2-1 (1993), and this paper will not undertake to recap that analysis.
169. 447 U.S. 134, 152 (1980).
170. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *see* § _____, *supra*.
171. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985).
172. *Mustang Fuel Corp. v. Hatch*, 890 F. Supp. 995, 1002 (W.D. Okla. 1995) (rejecting federal question challenge to Cheyenne-Arapahoe Supreme Court decision upholding tribal tax).
173. *Burlington Northern Railroad Co. v. Blackfoot Tribe*, 924 F.2d 899, 904 (9th Cir. 1991).
174. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-71 (1973); *see generally*, Conference of Western Attorneys General, *American Indian Law Deskbook* at 304-25.
175. *See, e.g., Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 764 (1984).
176. *See Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 837 (1982); *White Mountain Apache Tribe v. Brocker*, 448 U.S. 136, 144-45 (1980); *Peabody Coal Co. v. State*, 761 P.2d 1094, 1100 (Ariz. Ct. App. 1988), *cert. denied*, 490 U.S. 1051 (1989).

177. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 188-89 (1989). The Supreme Court noted that the *Cotton Petroleum* district court had found that the state tax imposed "no economic burden" on the tribe. 490 U.S. at 185.

178.

179. *See* Hoopa Valley Tribe v. Nevins, 881 F.2d 657, 661 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990).

180. *See* Crow Tribe v. Montana, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 484 U.S. 997 (1988).

181. Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 838 (1982).

182. *See* County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251 (1992); *accord*, Lummi Indian Tribe v. Whatcom County, Wash., 5 F.3d 1355, 1357-59 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2727 (1994) (state has power to impose ad valorem property tax on lands the tribe reacquired in fee after United States approved prior tribal alienation of the lands: "if . . . land is alienable, it is taxable."); Leech Lake Band of Chippewa Indians v. Cass County, Minn., 23 Ind. L. Rep. 3027, 3031 (D. Minn. 1995).

183. *See* Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation, 27 F.3d 1294, 1300 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 779 (1995); *see also* Reservation Telephone Coop. v. Three Affiliated Tribes of Fort Berthold Reservation, 76 F.3d 181 (8th Cir. 1996) (challenge to tribal possessory interest tax must first be heard in tribal forum).

184. *See* § X.03[4][b] and [c], *infra*.

185. *See, e.g.*, Pittsburgh & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995); *see* § X.02[2][d], *supra*.

186. *County of Yakima*, 502 U.S. at 258-66; *cf.*, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214, 2220-21 (1995) (significance of residence of Indian taxpayer on trust lands).

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

188. *See* Webster, *supra* note [1], at 2-46.

189. *See* Montana v. Blackfoot Tribe, 471 U.S. 759 (1985) (state cannot tax tribe's proceeds from oil and gas royalties on tribal lands).

190. *See* § 102[2][d], *infra*.

191. *See generally*, M. Julia Hook & Patrick Day, *Current Mineral Taxation and Dispute Resolution Issues*, ABA SONREEL 5th Ann. Conference on Natural Resource Management and Environment Enforcement on Indian Lands (1993); Alan L. Sullivan, *Minimizing the Double Tax Burden on Oil and Gas Production in Indian Country*, 36 Rocky Mt. Min. L. Inst. 17-1 (1990).

192. *See Knight v. Shoshone & Arapaho Indian Tribes*, 670 F.2d 900 (10th Cir. 1982) (affirming tribal zoning power); *Pinoleville Indian Community v. Mendecino County*, 684 F. Supp. 1042, 1045 (N.D. Cal. 1988) (upholding tribal moratorium on new industrial uses on fee land within reservation).

193. 492 U.S. 492 (1989); discussed § X.02[2][d], *supra*.

194. *See* 492 U.S. at 427.

195. 492 U.S. at 434.

196. *Compare* 411 U.S. at 441-444 (closed area), *with id.* at 445-47 (opened area).

197. *Id.* at 431 (White, J.), *see also id.* at 446 (Stevens, J.).

198. *See Holly v. Confederated Tribes and Bands of Yakima Indian Nation*, 655 F. Supp. 557, 559 (E.D. Wash. 1985), *aff'd.*, 812 F.2d 714 (9th Cir.), *cert. denied*, 484 U.S. 823 (1987) (rejecting tribe's control of non-Indian water rights on non-Indian fee lands for absence of *Montana* impacts); *see also State of Montana v. USEPA*, 1996 U.S. Dist. Lexis 4753 at 25, n.7 (D. Mont. 1996) (suggesting that zoning and water quality management cases are different, because "zoning impacts are normally discrete and localized, whereas water pollution creates environmental health risks that may affect people many miles from the source.").

199. 450 U.S. 544 (1981).

200. *See Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982) (tribal shoreline protection ordinance satisfies second *Montana* prong because of potential serious impacts on water quality); *see also Lummi Indian Tribe v. Hallauer*, 9 Ind. L. Rep. 3025, 3026 (W.D. Wash. 1982) (tribe can require non-Indian property owners to connect to and pay fee for cost of tribal sewage treatment facility); *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982), *cert. denied*, 459 U.S. 967 (1982) (tribe can enforce health regulations on nonmember within reservation).

201. 450 U.S. 544 (1981).

202. *Id.* at 547; *see notes* _____, *supra*.

203. See *State of Montana v. USEPA*, 1996 U.S. Dist. Lexis 4753 at 25, n.7 and 34-44 (D. Mont. 1996) (*Montana*, not *Brendale*, standards govern review of EPA's approval of tribal Clean Water Act program encompassing nonmembers' fee-owned lands).

204. Some cases have been dismissed or stayed pending exhaustion of tribal administrative or judicial remedies. See, e.g., *Middlemist v. United States Dep't of Interior*, 824 F. Supp. 940, 944 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir.) (mem.), *cert. denied*, 115 S. Ct. 420 (1994) (non-Indians challenging jurisdiction of tribal shoreline protection agency must exhaust tribal administrative remedies).

205. *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F. Supp. 878, 888-89 (D.S.D. 1995) (tribe lacked power to regulate landfill because it failed to show *Montana* impacts); see also *Holly v. Yakima Indian Nation*, 655 F. Supp. 557, 559 (E.D. Wash. 1985), *aff'd*, 812 F.2d 714 (9th Cir. 1989) (failure to show *Montana* impacts).

206. EPA Policy for the Administration of Indian Environmental Programs on Indian Lands (Nov. 1984). See generally, Jana Walker, *Authorization for Tribal Enforcement of Environmental Programs*, ABA SONREEL 7th Ann. Conference on Natural Resource Management and Environmental Enforcement on Indian Lands (1995).

207. EPA Indian Policy at 2.

208. Memorandum, "EPA/State/Tribal Relations," from William K. Reilly to Assistant Administrators (July 10, 1991).

209. Clean Water Act Amendments of 1987, 42 U.S.C. § 1377 (1988); implementing rule at 56 Fed. Reg. 64, 876 (Dec. 12, 1991).

210. Clean Air Act, 42 U.S.C. 7601(D) (1988 & Supp. II 1990); proposed rule at 59 Fed. Reg. 43, 956 (Aug. 25, 1994).

211. See 42 U.S.C. § 300j-11 (1988).

212. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9626 (1988).

213. P.L. 101-380 (August 18, 1990), 33 U.S.C. § 2701-2761 (Supp. 1996).

214. See, e.g., 56 Fed. Reg. 64876 (Dec. 12, 1991), compiled at 40 C.F.R. 131.8(9) (1995) (TAS requirements for Clean Water Act § 303 water quality standards program).

215. See, e.g., C.R.F. § 131.8(b)(4)(v).

216. *See, e.g.*, *State of Montana v. Browner*, 1996 U.S. Dist. LEXIS 4753 (D. Mont. 1996) (EPA's approval of Confederated Salish & Kootenai Clean Water Act plan affirmed).
217. *City of Albuquerque v. Browner*, 865 F. Supp. 733 (D.N.M. 1993).
218. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991 (1988), proposed rule at 61 Fed. Reg. 2584 (Jan. 26, 1996) (EPA proposes RCRA Subtitle D delegation); proposed rule at 61 Fed. Reg. 30472 (June 14, 1996) (proposed Subtitle C delegation program).
219. *See* 60 Fed. Reg. 21191 (May 1, 1995); *see* Dan McGovern, *The Campo Indian Landfill War, The Fight For Gold In California's Garbage* (1995); *see also* 59 Fed. Reg. 16642 (April 7, 1994) (proposing tentative approval for MSWLF permit program for Cheyenne River Sioux Tribe).
220. *Nance v. EPA*, 745 F.2d 701, 713 (9th Cir. 1981).
221. *See* *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985).
222. *See* EPA Concept Paper, July 10, 1991, *Federal, Tribal and State Roles in the Protection of the Environment* at 3 ("the Agency will view Indian reservations as single administrative units for regulatory purposes . . .").
223. 42 U.S.C. § 7601(d)(1)(B) (1988).
224. 33 U.S.C. § 1377(e) (1988).
225. 52 F.3d 1531, 1545 (10th Cir. 1995); *see* discussion at note [145], *supra*.
226. *See* *Washington Dep't. of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985).
227. *See* EPA Concept Paper *Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments* at 1-2 (July 10, 1991).
228. *Id.* at 4.
229. *See* *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 890 F. Supp. 878, 888-89 (D.S.D. 1995).
230. *See generally*, Kemp J. Wilson, *Oil and Gas Conservation Regulation in Indian Country*, ABA SONREEL 6th Annual Conference on Natural Resource Management & Environmental Protection (hereinafter, Wilson, "Conservation"); Susan R. Stockstill and Lynn H. Slade, *Oil and Gas Development on Indian Lands, Shifting Sovereignties in the Oil Patch*, 45th Ann. Inst. on Oil & Gas Law & Taxation, 10-42 to 1052 (1994).

231. *See* Wilson, "Conservation" at 4-5.
232. *Assiniboine & Sioux Tribe of the Fort Peck Indian Reservation v. Board of Oil & Gas Conservation of Montana*, 792 F.2d 782, 794 (9th Cir. 1986).
233. *Id.* at 795 (suggesting that BLM approval of the state agencies orders could be based on a record developed in the state agency).
234. A recent article recorded MOAs on only two reservations, between BLM and Montana covering Fort Peck Reservation lands, and between BLM and the Colorado Oil & Gas Conservation Commission ("COGCC") covering Southern Ute Reservation lands. *See* Wilson, "Conservation" at 12.
235. BLM's Native American Minerals Policy Office in Santa Fe, New Mexico is developing a directive to all BLM state offices on this subject. *Id.*
236. *See* San Juan Citizens Alliance, 129 IBLA 1, 6-7 (1994) (BLM rejection of Colorado spacing upheld despite its procedural non-compliance with August 22, 1991 Memorandum of Agreement between BLM and the COGCC).
237. Wilson, *supra* note [60], at 23-25.
238. *Id.*
239. Pub. L. 95-87, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (1988) (SMCRA).
240. SMCRA § 101(a), 30 U.S.C. § 1211(a) (1988).
241. SMCRA § 501-529, 30 U.S.C. §§ 1251-1279 (1988).
242. *See generally* Lynn H. Slade, *Coal Surface Mining on Indian Lands: From Checkerboard to Crazy Quilt*, Inst. on Mineral Development on Indians Lands, Paper No. 10 at 10-1 (Rocky Mt. Min. L. Fdn. 1989) (hereinafter Slade, *Coal Surface Mining on Indian Lands*).
243. 30 U.S.C. § 1265 (1988).
244. *See* SMCRA §§ 506-515, 30 U.S.C. §§ 1256-65 (1988).
245. *See* *Hopi Indian Tribe v. Babbitt*, 22 Ind. L. Rep. 3235, 3236 (D.D.C. 1995). *Hopi Indian Tribe* confirmed the Secretary's view that the Department of the Interior has authority to contract to tribes specific functions in the regulatory program pursuant to the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, 25 U.S.C. § 450-458e (1988). The Indian Self-Determination Act's contracts to perform federal administrative functions may increasingly involve tribes in the administration of Indian oil and gas and mining leases and development contracts.

246. SMCRA § 701(9), 30 U.S.C. § 1291(9) (1988); *see also* 25 C.F.R. § 216.101 (1995); 30 C.F.R. § 700.5 (1995) (Secretarial regulations adopting statutory definition).
247. *New Mexico v. Lujan*, 21 Ind. L. Rep. 3113 (D.N.M. 1994), *affirming* *Valencia Energy Co.*, 109 IBLA 40 (1989); *see also* *Pittsburgh & Midway Coal Mining Co. v. Office of Surface Mining Reclamation and Enforcement*, 115 IBLA 148 (1990), *aff'd*, *Pittsburgh & Midway Coal Mining Co. v. Babbitt*, No. CIV-90-730 JC (D.N.M., Sept. 13, 1994).
248. *See* 53 Fed. Reg. at 3993 (Preamble) (date) (emphasis added).
249. *Hopi Indian Tribe v. Babbitt*, 22 Ind. L. Rep. at 3236.
250. 358 U.S. 217 (1959); *see* § X.02[b][i], *supra*.
251. *Id.* at 218.
252. *See* Ragsdale, *The Deception of Geography* at 72. [Need full citation]
253. *See* Charles F. Wilkinson, *American Indians, Time, and the Law* at 1-3 (1987).
254. It appears that the citizenship of the parties could not support federal court diversity jurisdiction. *See* § X.03[4][a][iv], *infra*.
255. *Williams*, 358 U.S. at 220 (citing *People of State of New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946)).
256. *Williams*, 358 U.S. at 219 (citing *Felix v. Patrick*, 145 U.S. 317 (1892)).
257. Supreme Court cases following *Williams v. Lee* which reject state court jurisdiction do not compel interpreting *Williams v. Lee* as declaring exclusive tribal court jurisdiction over on-reservation controversies. *Kennerly v. District Court*, 400 U.S. 423, 427-30 (1971) (*per curiam*), found a tribal council resolution that purported to give tribal court and state court concurrent jurisdiction over suits against tribal members to be ineffective under Public Law 280 to establish jurisdiction in Montana state court over an action against tribal members to collect an on-reservation debt. *Fisher v. District Court*, 424 U.S. 382, 387-90 (1976), held that Montana courts lack jurisdiction over an adoption proceeding in which all parties were members of the Northern Cheyenne Tribe and reservation residents. Neither case holds that state courts could not have jurisdiction if tribal interests were not directly affected.
258. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138 (1984) (*Wold I*); and *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877 (1986) (*Wold II*).

259. *See Wold I*, 467 U.S. at 148-51; *Wold II*, 476 U.S. at 883. North Dakota had acted to accept jurisdiction over actions involving Indian citizens arising on Indian reservations under Public Law 280, *Wold I*, 467 U.S. at 144, and a major purpose of Public Law 280 was to allow "State courts to adjudicate civil controversies" arising in Indian country. *Bryan v. Itasca County*, 426 U.S. 373, 383-84 (1976).

260. 476 U.S. at 889. The *Wold II* court also found a need for state court enforcement that "the Tribe has no other effective means of securing relief for civil wrongs" *Id.*

261. *See, e.g., Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. S. Ct. 1995), *cert. denied*, 116 S. Ct. 1675 (1996) (Oklahoma courts have jurisdiction over action to enforce contract between a tribe and non-Indian executed outside Indian country).

262. Further confirming that tribal court jurisdiction is not exclusive is the Supreme Court's only decision whether diversity jurisdiction extends to reservation disputes, *Iowa Mutual Ins. Cos. v. LaPlante*, 480 U.S. 9, 18 (1987); *Iowa Mutual* confirms that, subject to appropriate abstention, a federal court's diversity jurisdiction otherwise present is not defeated because one diverse party resides on a reservation. *See* § x.03[4][b][ii], *infra*.

263. 76 F.3d 930 (8th Cir. 1996) (*en banc*), *petition for cert. filed*, 64 U.S.L.W. 3795 (U.S. May 16, 1996) (No. 92-3359).

264. 76 F.3d at 933-34.

265. *Id.* at 934.

266. *Id.* at 938.

267. *Id.*

268. *Id.*; *see also BMW of North American v. Gore*, 116 S. Ct. 1589, 1598 (1996) ("[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute").

269. 358 U.S. 217 (1959).

270. *See* notes [85 and 85], *supra*.

271. 358 U.S. at 220 (state court jurisdiction in the circumstances of the case would infringe "right of reservation Indians to make their own laws and be ruled by them").

272. 480 U.S. 9, 18 (1987) ("Civil jurisdiction over such activities [the activities of non-Indians on reservation lands] presumptively lies in the tribal court unless affirmatively limited by a specific treaty provision or federal statute.")

273. 471 U.S. 845, 855-56 (1985) ("... the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.")

274. 42 F.3d 1178, 1180 (9th Cir.), *cert. denied*, 115 S. Ct. 485 (1994). *Hinshaw* has been followed on this point by one district court. *See Wilson v. Marchington*, U.S. District Court Cause No. CV-92-127-GF (D. Mont. 1995), *on appeal*, No. 96145 (9th Cir.).

275. *See* 42 F.3d at 1181.

276. 42 F.3d at 1180.

277. *See Wilson v. Marchington*, No. CV-92-127-GF (D. Mont. 1995), *on appeal*, No. 96-35145 (9th Cir) (tribal court had jurisdiction over claim against off-reservation, non-Indian company for on-reservation automobile accident); *Lewis County, Idaho v. Allen*, No. Civ. 93-0382 N-HLR (D. Idaho August 18, 1994), *on appeal*, No. 94-35979 (9th Cir.) (tribal court lacks jurisdiction over claim for false arrest and malicious prosecution against county and sheriff for on-reservation arrest); *see also Red Wolf v. Burlington Northern Railroad Co.*, Crow Tribal Court No. 94-31 (\$250 million tribal court jury verdict and judgment against railroad for wrongful death), No. CV-96-17 JDS (D. Mont. Feb. 28, 1996) (preliminary injunction against enforcement of judgment), *on appeal*, No. 96-35254 (9th Cir.).

278. *See* 25 U.S. § 1302(8) (1988).

279. *See* § X.03[4][c], *infra*.

280. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877 (1986).

281. *See A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996) (*en banc*), *petition for cert. filed*, 64 U.S.L.W. 3795 (U.S. May 16, 1996) (No. 92-3359).

282. *See, e.g., Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. S. Ct. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).

283. *See* 28 U.S.C. § 1331 (1988); U.S. Const. art. III, § 2; a specific statute makes clear that the federal courts have jurisdiction over actions by any "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior" to bring federal question actions. *See* 28 U.S.C. § 1362 (1988); *see generally*, F. Cohen's Handbook of Federal Indian Law at 311-12 (1982).

284. *See National Farmers Union*, 471 U.S. at 852.

285. *See, e.g.*, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974) (possessory action by tribe presents federal question because "Indian title is a matter of federal law and can be extinguished only with federal consent."); *see also* *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law.").
286. *See* *United States v. Wheeler*, 435 U.S. 313, 319 (1978), cited in *National Farmers Union*, 471 U.S. at 846 n.14.
287. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).
288. 25 U.S.C. § 1301-03 (1988) ("ICRA").
289. 436 U.S. at 59.
290. *Id.*
291. 28 U.S.C. § 1332(a).
292. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816); *see also* Henry Friendly, *The Historic Basis of the Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 498 (1928); *see also* Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3, 22-28 (1948) (among two other reasons for diversity jurisdiction, "the desire to avoid regional prejudice against commercial litigants . . .").
293. *See Iowa Mutual*, 480 U.S. at 17-22 (Stevens, J., concurring in part and dissenting in part).
294. *See, e.g.*, *R. J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 982 (9th Cir. 1983); *cert. denied*, 472 U.S. 1016 (1985); *compare* *Hot Oil Service, Inc. v. Hall*, 366 F.2d 295, 297 (9th Cir. 1966) (exercise of diversity jurisdiction barred) *with* *Poitra v. DeMarrias*, 502 F.2d 23 (8th Cir. 1974), *cert. denied*, 421 U.S. 934 (1975).
295. *Brown & Desmond*, *supra* note 24, at 259.
296. *Iowa Mutual*, 480 U.S. at 20 n.13.
297. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).
298. 471 U.S. at 847-48.
299. *Id.* at 856 n.22. The Crow Tribal Court's rules provided for a motion to set aside a default judgment.

300. *See* 560 F. Supp. 213, 217 (D. Mont. 1983) (finding specifically that a tribal court lacked jurisdiction over non-Indian activities on fee lands within the reservation because the judge found lacking any of the grounds held necessary to support regulatory jurisdiction in such circumstances by *Montana v. United States*, 450 U.S. 544, 556-57 (1981)).

301. *National Farmers Union*, 471 U.S. at 857. On remand, following the Supreme Court decision in *National Farmers Union*, the Crow Tribal Court denied the insurer's motion to dismiss, finding jurisdiction under the *Montana* test, and the Crow Tribal Court affirmed. *Sage v. Lodge Grass School Dist.*, 10 Ind. L. Rep. 6019, (Crow Trib. Ct. Sept. 12, 1995); *see* Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 Mont. L. Rev. 211, 250-51 (1991) (discussing implementation of the tribal court exhaustion requirement).

302. *National Farmers Union*, 471 U.S. at 856 n.21.

303. *Iowa Mutual*, 480 U.S. at 11-12.

304. *See* 480 U.S. at 20 (Stevens, J., concurring in part and dissenting in part) (noting that the insurer did not question the jurisdiction of the tribal court).

305. *Id.* at 13.

306. *Id.* at 19.

307. *Id.* at 16; *Iowa Mutual* does declare in a footnote, 480 U.S. at 16 n.8, that the abstention rule "is analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*," 424 U.S. 800 (1976), which set flexible standards to guide the abstention decision in federal cases generally.

308. *Id.*

309. *Id.*

310. *See* Laurie Reynolds, *Extolling Tribal Sovereignty*, 73 N.C. L. Rev. at 1119-25.

311. *See generally*, Erwin Chemerinsky, *Federal Jurisdiction*, 660-75 (1994); Lynn H. Slade, *Dispute Resolution in Indian Country: Harmonizing National Farmers Union, Iowa Mutual, and the Abstention Doctrine in the federal Courts*, 71 N.D. L. Rev. 519 (1995), reprinted at 33 Pub. Land and Resources Law Digest 11 (1996).

312. 401 U.S. 37 (1971).

313. 424 U.S. 800 (1976).

314. *Id.* at 813.

315. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (federal question action to enjoin state action); *Crawley v. Hamilton County Comm'rs*, 744 F.2d 28, 31 (6th Cir. 1984) (abstention inappropriate where no parallel state proceedings); Slade, *Dispute Resolution in Indian Country*, 71 N.D. L. Rev. at 527, 33 Pub. Land and Resources Law Digest at 19.

316. *See* *Alzheimer & Gray v. Sioux Mfg. Corp.* 983 F.2d 803 (7th Cir., *cert. denied*, 114 S. Ct. 621 (1993)); *see also* *Stock West Corp. v. Taylor*, 964 F.2d 912, 917 (9th Cir. 1992).

317. 471 U.S. at 856, n.21, *citing* *Judice v. Vail*, 430 U.S. 327, 338 (1977) (federal question action to enjoin state civil contempt proceeding).

318. 480 U.S. at 16, n.8, *citing* *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (federal court action to adjudicate state law water rights of tribes and others).

319. *See* Slade, *Dispute Resolution in Indian Country*, 71 N.D. L. Rev. 528-34, 33 Pub. Land and Resources Law Digest at 20-26.

320. To the contrary, it has denied writs of certiorari in numerous cases. *See, e.g.*, *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 779 (1995); *Middlemist v. Secretary of the United States Dep't of the Interior*, 19 F.3d 1318 (9th Cir.), *cert. denied*, 115 S. Ct. 420 (1994); *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993); *Crawford v. Genuine Parts Co.*, 997 F.2d 1405 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992); *Burlington Northern R.R. v. Blackfoot Tribe*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992); *see also* *Granberry v. Greer*, 481 U.S. 129, 131 n.4 (1987) (citing *Iowa Mutual* and *National Farmers Union* in a footnote referencing "nonexhaustion as an inflexible bar to consideration of the merits . . . by the federal courts . . .").

321. *See* the analyses of Circuit-by-Circuit exhaustion cases in Lynn H. Slade, *Exhaustion of Tribal Remedies: Jurisdiction, Geography, and the Interest of the Litigants*, ABA/SONREEL 7th Ann Conference on Natural Resources Development on Indian Lands (1995), and Phillip Wm. Lear and Blake D. Miller, *Exhaustion of Tribal Court Remedies: Rejecting Brightline Rules and Affirmative Action*, 71 N.D. L. Rev. 276, 286-92 (1995).

322. *See* *Alzheimer & Gray v. Sioux Mfg. Co.*, 983 F.2d 803, (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993); *Myrich v. Devil's Lake Sioux Mfg. Co.*, 718 F. Supp. 753, 755 (D.N.D. 1989).

323. *Id.*; *see, e.g.*, *Burlington Northern R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991); *United States v. Plainbull*, 957 F.2d 724, 728 (9th Cir. 1992); *Crowford*

v. Genuine Parts Co., 947 F.2d 1405, 1407 (9th Cir. 1991), *cert. denied*, 502 1096 (1992) ("Whether proceedings are . . . pending in . . . tribal court is irrelevant").

324. *See* notes [94-104], *supra*.

325. *See* notes [124-130], *supra*.

326. *National Farmers Union* only mentioned *Montana* in its recognition that the existence of tribal adjudicatory powers presented a federal question, commenting that *Montana* had applied federal law to determine tribal power to regulate hunting and fishing. 471 U.S. at 851 n. 12. *See* Part _____, *supra*.

327. 480 U.S. at 18.

328. *See* Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. Rev. 1089, 1129-30 (1995).

329. *Middlemist*, 824 F. Supp. at 942-43.

330. *See id.* at 946.

331. *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1296 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 779 (1995).

332. 27 F.3d at 1299-1300. In neither *Middlemist* nor *Duncan Energy* was an action pending in the tribal court or agency.

333. Existing decisions reflect that federal court review of tribal court action will be deferential. *See* § X.03[4][c], *supra*.

334. 471 U.S. at 851, n.2 (tribal jurisdiction is "asserted in bad faith," or violates "express jurisdictional prohibitions," or affords no procedure pursuant to which tribal jurisdiction may be challenged).

335. 972 F.2d 1166, 1170-71 (10th Cir. 1992); *see also* *Smith v. Moffett*, 947 F.2d 442, 443-44 (10th Cir. 1991) (*sua sponte* dismissal of tribal member's civil rights action).

336. 972 F.2d at 1170.

337. 52 F.3d 1531 (10th Cir. 1995); discussed at § X.02[2][d], *supra*.

338. 5 F.3d 1374, 1378 (10th Cir. 1993), *appeal following remand*, *Texaco, Inc. v. Hale*, 81 F.3d 934 (10th Cir. 1996) (affirming decision to abstain pending exhaustion of tribal remedies).

339. In *Texaco*, the Tenth Circuit remanded the case, directing the district court to engage in a particularized inquiry to determine whether abstention would be required in the off-reservation situation. 5 F.3d at 1378. *Texaco* contrasted this analysis with that applicable within reservations: "[w]hen the activity at issue arises on the reservation, . . . we have characterized the tribal exhaustion rule as 'an inflexible bar to consideration of the merits of the petition by the federal court.'" *Id.*

340. 52 F.3d at 1537.

341. *Id.*

342. 52 F.3d at 1539.

343. The *Pittsburgh & Midway* court emphasized: "[t]he power to tax is a sufficiently essential aspect of sovereignty to require P&M to initiate its jurisdictional challenge in Navajo tribal court" and "P&M's lawsuit presents a direct challenge to the Navajo Nation's jurisdiction and involves the interpretation of Navajo law." *Id.* at 1538.

344. *See, e.g.*, *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899, 902 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992) (abstention not required because "[t]he complaint presents issues of federal, not tribal, law; no proceeding is pending in any tribal court; the tribal court possesses no special expertise; and exhaustion would not have assisted the district court in deciding federal law issues).

345. 940 F.2d 1239, 1241-42 (9th Cir. 1991).

346. *Id.* at 1245.

347. 947 F.2d 1405, 1406 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992).

348. *Id.* at 1406-07.

349. *Id.* at 1408. "[R]eservation affair" has been deemed a litmus test for requiring abstention in several cases, without regard to whether other factors favor exercise of federal jurisdiction. *See* _____.

350. *See* *United States v. Plainbull*, 957 F.2d 724, 726 (9th Cir. 1992) (Requiring abstention, but that abstention is discretionary, and "is an extraordinary and narrow exception" to the duty of a district court to adjudicate a controversy properly before it. *Id.* at 727, quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959).

351. 964 F.2d at 917, *citing* *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964) and *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 501 (1941).

352. 964 F.2d 912, 919-20 (9th Cir. 1992) ("*Stock West II*").

353. *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 779 (1995) ("the examination of tribal sovereignty and jurisdiction should be conducted in the first instance by the tribal court itself"); *see also* *Reservation Telephone Coop. v. Three Affiliated Tribes of Fort Berthold Reservation*, 76 F.3d 181 (8th Cir. 1996) (decision to abstain in action challenging tribal possessory interest taxation of telephone lines and right-of-way within reservation).

354. *Tamiami Partnership Ltd. v. Miccosukee Tribe*, 788 F. Supp. 566, 567 (S.D. Fla. 1992), *rev'd on other grounds*, 999 F.2d 503, 508 (11th Cir. 1993).

355. 867 F.2d 1094, 1097-98 (8th Cir. 1989).

356. 991 F.2d 458, 463 (8th Cir. 1993).

357. 49 U.S.C. § 1811 (Supp. V 1993).

358. 76 F.3d 181 (8th Cir. 1996).

359. *National Farmers Union*, 471 U.S. at 856, n.21.

360. 983 F.2d 803 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993).

361. 983 F.2d at 807.

362. 983 F.2d at 814.

363. 718 F. Supp. 753, 754-55 (D.N.D. 1989).

364. *Id.* at 755.

365. *See* *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1378 (10th Cir. 1993) (off-reservation taxation), *but see* *Pittsburgh & Midway Coal Mining Co. v. Zah*, 52 F.3d 1374, 1378 (10th Cir. 1995); *see also* *Stock West v. Taylor*, 942 F.2d 655, 651 (9th Cir. 1991).

366. 983 F.2d at 807; *see also* *Arizona Public Service Co. v. Aspaas*, 77 3rd 1128, (9th Cir. 1995), in which the Ninth Circuit enforced the parties' written dispute resolution agreement.

367. 788 F. Supp. 566, 567 (S.D. Fla. 1992), *rev'd on other grounds*, 999 F.2d 503, 508 (11th Cir. 1993) (lack of federal question jurisdiction); *compare* *Warn v. Eastern Band of Cherokee Indians*, 858 F. Supp. 524, 527 (W.D.N.C. 1994) (abstention required where agreement "clearly provides that Tribal Court is the proper forum for any dispute concerning the breach of the lease").

368. 788 F. Supp. at 568 ("[t]he waiver clause is clear and unambiguous.").

369. *Iowa Mutual*, 480 U.S. at 17.

370. *Id.* at 19.

371. *Id.*

372. *See FMC Corp. v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991).

373. *See FMC Corp.*, 905 F.2d 1311, 1313-14; *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995); *Mustang Fuel Corp. v. Hatch*, 890 F. Supp. 995 (W.D. Okla. 1995).

374. *Mustang Fuel*, 890 F. Supp. at 998-99; *see also Duncan Energy Co. v. Three Affiliated Tribes of Forth Berthold Reservation*, 27 F.3d 1294, 1301 (8th Cir. 1996), *cert. denied*, 115 S. Ct. 779 (1995).

375. 69 F.3d 1026 (9th Cir. 1995), *reversing Arizona Public Service Co. v. Office of Navajo Labor Relations*, 17 Ind. L. Rep. 6105 (Navajo S. Ct. 1990).

376. No. 90-CV-127-GF (D. Mont. Jan. 24, 1996), *app. pending*, No. 96-35145 (9th Cir.) (review on attempt to enforce tribal court judgment in federal court).

377. *Hilton v. Guyot*, _____.

378. *See 25 U.S.C. §§ 1451, 1481* (1988).