TRIBAL REGULATION MANUAL

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I. PURPOSE AND SCOPE OF THE MANUAL

Viewing Montana v. United States, 435 U.S. 544 (1981) positively, it may be said that the Supreme Court confirmed the inherent power of Indian tribes to regulate both Indians and, under certain circumstances, non-Indians, even on fee lands within Indian reservations. And in Merrion v. Jicarilla Apache Tribe, ___ U.S. ___, 71 L.Ed.2d 21 (1982) the Court held that the sovereign powers of a tribe are not constrained by the lack of express consent to their exercise by non-Indians who enter into consensual relationships with the tribe or its members. Thus it is now clear that tribes may assert regulatory authority not only over their own members, but over non-Indians [1/] under appropriate circumstances.

However, tribal regulatory powers must be exercised in conformity with federal and tribal law. Thus, this manual is primarily intended to provide a tribe's attorney with an overview of the major legal considerations to be taken in account in advising a tribe in the development of regulatory schemes which comply with applicable law. Examples of legislative or judicial application of the legal principles discussed are provided whenever possible.

1/ The question of whether nonmember Indians are to be treated as tribal members or as non-Indians is unsettled. Probably, their status will be found to vary on a case by case basis. See, e.g., Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 160-161 (1980); F. Cohen, Handbook of Federal Indian Law 253 n.90 (1982 ed.); Comment, "Jurisdiction Over Nonmember Indians on Reservations," 1980 Ariz.St.L.J. 727 (1980).

Because the subject area of tribal civil regulatory authority is so expansive, this manual cannot and does not attempt to raise and discuss every question that may arise or principle of law that may be applicable in the development and implementation of particular tribal regulatory schemes. Rather the manual is intended to provide an introduction to, and overview of, major principles of law generally applicable to the exercise of tribal regulatory power, whatever the subject matter. It also provides references to other authorities to facilitate more in-depth study of these principles. The manual does not attempt to discuss the law unique to any particular subject matter area of regulation, such as zoning or licensing. Nor does it discuss the law applicable to the proper assertion of the taxing or eminent domain powers since those powers are not considered to be regulatory powers, and since special legal considerations, not applicable to the regulatory powers, are involved in those areas.

The information contained in this manual is not a substitute for legal advice. The legal principles applicable to the exercise of tribal civil regulatory power are complex, and unsettled in many areas. Moreover, different federal laws are applicable to different tribes, and each tribe must also consider the applicability of its own laws including the tribal constitution, tribal ordinances, tribal court decisions, and any federal treaties and statutes which may be specially applicable to it. The facts underlying various tribal regulatory schemes will also differ from tribe to tribe. And

finally, the law itself is susceptable to change. Thus, each tribe should consult with its attorney in developing and implementing any regulatory scheme.

For the tribal attorney, there are numerous general resources available which discuss the applicable law and practice in particular subject matter areas of regulation. The manual contains citations to some of these resources. Sample ordinances may be obtained from other tribes, or from states or cities. And there are also model ordinances available in several subject matter areas.

II. THE POWER TO REGULATE AS AN ELEMENT OF SOVEREIGNTY - A GENERAL LAW PERSPECTIVE

A. The Nature And Basis Of The Sovereign Power To Regulate.

The power to regulate through the enactment of civil and criminal laws, the power to raise revenue, and the power of eminent domain are considered to be powers inherent in organized original governments. 6 McQuillan, Municipal Corporations § 24.02 at 419 (hereinafter the treaties is cited as McQuillan). These powers are considered inherent since they are necessary to fulfill the purposes of organized government to maintain a peaceful, ordered, and functioning society.[2/] They are thus considered to arise immediately upon the formation of government, and do not require recognition by constitutions. Indeed one function of a constitution is to establish limitations on the exercise of these inherent powers. 1 Nichols on Eminent Domain § 1-14[2] at 1-22 et seq. (3d ed. 1981) (hereinafter the treatise is cited as Nichols). These powers have been referred to collectively as the "police power" of sovereigns.[3/]

The broad meaning of "police power" was early explained by the Supreme Court in the License Cases, 46 U.S.

2/ The power to make war is also an inherent power of governments. States ceded this power to the federal government through the federal constitutions. Indian tribes are considered to have lost this power either through treaties or as a consequence of conquest by the federal government.

3/ While the police power "is nowhere mentioned in the United States Constitution ... the term has been a frequently cited concept in Constitutional cases, particularly in the commerce area." J. Nowak, Constitutional Law 246 (1978).

(5 How.) 504, 583 (1847), in which the Court held that the license laws of three states regulating the sale of liquor did not violate the Interstate Commerce Clause. The Court said:

> But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States.

Id. at 583; see also, Munn v. People of Illinois, 94 U.S. 113, 125 (1977).

As the term "police power" has developed in the law, however, it has come to be used in a more limited sense to refer only to the regulatory powers of sovereigns, excluding the power of eminent domain and the power to raise and appropriate revenue. See, e.g., Dakota Cent. Teleph. Co. v. South Dakota Ex Rel Payne, 250 U.S. 163, 185-86 (1919); 6 McQuillan §§ 24.02-24.04 at 419-25 (3d ed. 1980); J. Nowak, Constitutional Law 437 (1978).

But even in its more limited sense, the police power, that is, the power to regulate, is:

> ... the broadest of governmental powers, since it is governmental power over all matters affecting the peace, order, health, morals,

> convenience, comfort, and safety of citizens and other subjects. It is power to establish social order, to protect the life and health of persons, to secure their existence and comfort and to safeguard them in the enjoyment of private and social life and the beneficial use of property.
>
> * * *
>
> [It is] that power of government, inherent in sovereignty, to provide for the public order, peace, health, safety, welfare, and morals.

Id.

The following are some general characteristics of the power of governments to regulate:

1. It is the power to prefer public interests over private interests when necessary, so long as the resulting regulation is a reasonable means to accomplish that purpose. 6 McQuillan § 24.05 at 427. And the power is not defeated even though property rights are incidentally invaded or impaired. 6 McQuillan §§ 24.22 and 24.23 at 467-76.

2. The power is dynamic. The validity of a regulation depends upon whether the existing circumstances justify it. Thus, a regulation which would be invalid under present circumstances may be valid under changed circumstances. Likewise, a valid regulation may become invalid under changed circumstances. Id. § 24.08 at 433.

3. The purposes and objectives of the police power cannot be defined with precision since they may change to meet changed needs. However, some broad objectives embracing the public welfare, convenience, economy, order, health, safety, and morals are identifiable. Particular subjects of regulation

which may come within those broad objectives are too numerous to mention. See, e.g., 6 McQuillan §§ 24.11 - 24.27; and specific subject areas of regulation discussed in volumes 6 and 7 of McQuillan.

4. The exercise of the power usually is free from liability for compensation since the law presumes that the party damaged is compensated by sharing in the advantages arising from the beneficial regulation. However, as discussed below, a frequent issue in regulation is whether a regulation constitutes a taking, an exercise of the power of eminent domain, and thus requires the payment of just compensation. Id, § 24.06 at 430.

5. The power is inalienable and non-delegable to private parties. Id, § 24.07 at 431. Thus, governments cannot limit their regulatory power by agreements.

6. The exercise of the power is limited by guarantees of individual rights placed in constitutions. Id, § 24.09 at 436.

Indian tribes are inherent original sovereigns, see discussion in part II.A next. Hence, Indian tribes possess the right to exercise the police power, except as it may have been limited by applicable law.

B. The Power To Regulate Compared With The Power Of Eminent Domain.

Eminent domain is defined as "the power of the sovereign to take property for public use without the owner's

consent." 1 Nichols § 1.11 at 1-7. Like the power to regulate and the power to raise and appropriate revenue, the power of eminent domain is an inherent power of state governments.[4/]

The key distinction between the power of eminent domain and the power to regulate is that the former involves the taking of property to benefit the public, and the latter involves the regulation of property to prevent harm to the public. 1 Nichols § 1.42 at 1-127, and § 1.42[2] at 1-158. The public is liable to pay a private owner for a benefit obtained at the owner's expense through the power of eminent domain, but is generally not liable to pay the owner for action taken pursuant to regulatory powers for the prevention of harm. See, e.g., 6 McQuillan § 24.23 at 472-76.

Thus, a central issue in many cases challenging government regulation is whether the governmental interference amounts to a "taking" for which just compensation must be paid by the government.[5/] "Although the state possesses the power to regulate property without payment of compensation, if the regulation goes too far, a taking may also be found." J. Nowak, Constitution Law 440 (1978) (hereinafter Nowak).

4/ The power of eminent domain has been held to be a power of the federal government even though it is a government of delegated powers to the extent that the power is necessary to the exercise of the powers delegated to the federal government. See Kohl v. United States, 91 U.S. 367 (1876); 1 Nichols § 1.24 at 1-85 et seq., and § 3.11 at 3-12 et seq.

5/ For recent discussions of the regulatory "taking" issue, see Loretto v. Teleprompter Manhattan CATV Corp., 50 U.S.L.W. 4988 (1982); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980); and Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

Whether regulation will be considered an improper taking is a matter of degree. See, e.g., 1 Nichols § 1.42[7] at 1-208 et seq. In determining whether a regulation goes so far as to be a taking, courts will generally apply a balancing of the interests and equities approach. Nowak, 441. However, four factors have been identified, any one of which may be determinative in deciding whether a regulation will be treated by a court as a taking.

> (1) Whether or not the public or one of its agents have physically used or occupied something belonging to the claimant.
>
> (2) The size of the harm sustained by the claimant or the degree to which his affected property has been devalued.
>
> (3) Whether the claimant's loss is or is not outweighed by the public's commitant gain.
>
> (4) Whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people.
>
> While these four factors will not definitively answer the question of whether a court will find compensation due, in a specific case, they do set the parameters for argument.

Nowak, 446-47, citing Michelman, "Property, Utility, and Fairness: Commentaries on the Ethical Foundation of 'Just Compensation'" Law, 80 Harv. L. Rev. 1165, 1184 (1967).

C. The Power To Regulate As Compared With The Power To Raise and Appropriate Revenue.

The power to raise revenue is exercised by the levying of a tax. A tax is generally defined as "an enforced contribution to provide for the support of government."

United States v. Mississippi Tax Comm'n, 421 U.S. 599, 606 (1975), quoting U.S. v. LaFranca, 282 U.S. 568, 572 (1931). Distinguishing between the power to regulate and the power to raise revenue through the imposition of a tax becomes important in at least two instances.

First, it may affect the validity of a license or permit fee. A license or permit fee may be authorized under the power to regulate, or under the power to raise revenue, or sometimes under both powers. 9 McQuillan § 26.36 at 77. However, if the fee is imposed under the power to regulate, rather than under the power to tax for revenue, "the sum levied cannot be more than reasonably necessary to cover the costs of granting the license, and of investigating, inspecting and exercising proper police supervision." Id. If the amount obtained from license fees is substantially greater than the cost of regulation, the licensing measure may be found to be a tax. If so, the licensing measure may be struck down unless it also comlies with principles of law governing the exercise of taxing powers. 9 McQuillan § 26.36 at 78.

The Supreme Court in National Cable Television v. United States, 415 U.S. 336 (1974), indicated that a license fee designed to recover the entire cost of a regulatory scheme is an exercise of both the regulatory power and the revenue raising power. In that case, the Court struck down a license fee imposed by the FCC which was calculated to allow recovery of the entire costs of regulation. The Court found that in part the fee constituted a tax which the FCC was not authorized

to impose. The Court reasoned that while the license bestows a benefit on the licensee, a regulatory scheme as a whole bestows a benefit on the public. Assessment of fees to benefit the public is an exercise of the revenue raising power, not the regulatory power.

Second, it may affect the validity of a tax. Similar to license fees, a tax may be authorized under the power to regulate, or under the power to raise revenue, or sometimes under both powers. For example, in Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 425-27 (1937), the Court upheld a tax on chain stores which favored local chain stores over national chain stores. The Court viewed the tax as a regulatory measure designed to adjust competitive or economic inequalities, and thus upheld it as proper and reasonable discrimination between classes. Id. at 426. See also, Annot., "Validity, Construction, and Effect of State Statutes Affording Preferential Property Tax Treatment To Land Used For Agricultural Purposes," 98 A.L.R.2d 916 (1980).

Generally, a tax imposed under the regulatory power may be designed to encourage or discourage certain economic or social goals. The regulatory purpose of a tax may thus provide a sufficient governmental purpose to enable a court to uphold it against a challenge based upon the equal protection or due process clauses.

D. Regulatory Power Arising From Government Ownership of Land.

Like Indian tribes, the federal and the state

governments acquire and own real property. Ownership, as well as sovereignty, empowers governments to regulate the use and disposition of government lands. The acquisition, management and disposition of federal and state lands are subjects of numerous federal and state regulatory legislation and judicial decisions. The following general principles derived from this legal activity may be instructive to Indian tribes in regulating the acquisition, management and disposition of their tribal lands.

The power to acquire, manage and dispose of federal government lands is vested in the Congress by the Property Clause, Article IV, § 3, cl. 2 of the federal constitution. The power of states over their lands is derived from their status as original sovereigns, and from their status as landowners. Both federal and state governments have legislatively delegated to innumerable government agencies and subdivisions power to acquire, manage and dispose of land. See, e.g., Powell on Real Property, ¶ 161 at 656-75 and ¶ 165 at 716-23 (1981) (hereinafter the treatise is cited as Powell). Hence, federal and state codes are replete with statutes and agency regulations addressing the subjects of the acquisition, management, and disposition of all kinds of government lands.

The right to use and occupy government lands is normally granted and regulated through such contractual devices as licenses, permits, leases, easements, contracts and franchises. These devices provide governments with flexibility in regulating land use through the imposition of terms and

conditions upon the grant of the right to use and occupy. Two basic kinds of grants may be distinguished primarily by the fact that one does not rise to the status of a property right and the other does. The distinction becomes significant in terms of liability of the grantee to pay property taxes, duty of the government to afford rights of due process and equal protection, duty of the government to pay just compensation for the termination of the right to use government lands, and generally in terms of the legal protections which are applicable to property rights as opposed to non-property rights.

The non-property kind of grant usually involves a gratuitous revocable privilege of use which is available to the public at large. Such a right is generally termed a license or permit. The property kind of grant usually involves an agreement between the government and a private party for an exclusive use. Such a right is generally termed a lease, easement, contract or franchise, although the right may also be termed a license or permit.

Characteristics of a non-property right grant may include (1) temporary duration, (2) available to the public at large, i.e., a non-exclusive right, (3) no consideration paid for privilege of use, (4) no affirmative duties imposed on the grantee, (5) revocable at will by the sovereign. See, e.g., 2 Nichols § 5.751 at 5-241 et seq.; 3 Powell ¶ 428 at 34-293 et seq.; Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), cert. denied, 369 U.S. 818 (1962); Lake Berryessa

Tenants' Council v. United States, 588 F.2d 267 (9th Cir. 1978); Diamond Ring Ranch, Inc. v. Morton, 531 F.2d 1397 (10th Cir. 1976); McNeil v. Seaton, 281 F.2d 931 (D.C. Cir. 1960); United States v. Cox, 190 F.2d 293 (10th Cir. 1951), cert. denied, 342 U.S. 867 (1951). Examples of non-property right grants are grazing permits, hunting and fishing licenses, and recreational permits such as camping, swimming and hiking permits.

Characteristics of the second kind of property-right grants may include (1) granted for a term of years, (2) granted to a specific party for profit making purposes, (3) a right not ordinarily available to the general public, i.e., an exclusive right, (4) consideration exchanged, including performance of affirmative duties, (5) not subject to unilateral revocation by the government. See, e.g., 3 Powell ¶ 405 at 34-8 and ¶ 430 at 34-307. Examples include mineral leases, contracts for sale of timber, and franchises[6/] to use public rights of way, such as cable television franchises, utility franchises, and railroads.

6/ Franchises are distinguished from leases and easements in that franchises are in the nature of delegations of sovereign powers and not solely grants of property rights. The rights granted by franchise are generally public service rights typically associated with the use of public rights of way. Indeed, franchised private companies are often empowered to exercise the power of eminent domain when necessary to fulfill their public purpose. Examples of government franchises include the provision of such public services as gas, electricity, telephone, telegraph, railroads, water and sewer. See, e.g., McPhee & McGinnity Co. v. Union Pac. R. Co., 158 F. 5, 10 (8th Cir. 1907); City of Englewood v. Mt. States Tel. & Tel. Co., 431 P.2d 40, 43 (Colo. 1967); 12 McQuillan §§ 34.01-34.198; 2 Nichols § 5.75 at 5-225 et seq.

Finally, where their property rights are violated, governments are entitled to the same judicial remedies as private landowners. Governments may bring civil trespass actions to enjoin unauthorized use and occupancy of public lands and to recover damages. See, e.g., Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); Thompson v. United States, 308 F.2d 629 (9th Cir. 1962). Ejectment is also an available remedy for trespass on government lands, see, e.g., United States v. Coleman, 390 U.S. 599 (1968), as are applicable criminal sanctions, see, e.g., McKelvey v. United States, 260 U.S. 353 (1922); Diamond Ring Ranch, Inc. v. Morton, 531 F.2d 1393 (10th Cir. 1976).

III. SOURCES OF THE TRIBAL REGULATORY POWER

The power of Indian tribes to exercise civil regulatory authority over persons and property within their territory may in any particular instance be derived from one or more of three general sources: (1) the inherent sovereignty of tribal governments, (2) the power of tribes to exclude persons from territory reserved by the federal government for tribal use and occupation, and (3) delegation of power from the federal government. These three sources will be reviewed in turn below.

A. The Inherent Sovereignty Source

Without question, the power of an Indian tribe to regulate, through civil and criminal laws, persons and property within its territorial boundaries is recognized as an attribute inherent in the status of an Indian tribe as an original sovereign government predating the entry of Europeans into this country. As stated in F. Cohen, Handbook of Federal Indian Law 122 (1942 ed) (emphasis added):

> Indian self-government, the decided cases hold, includes the power of an Indian tribe to adopt and operate under a form of government of the Indians' choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice.
>
> Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited

> sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation.

This "most basic principle" has been consistently acknowledged by the Supreme Court in challenges to the governing power of Indian tribes. In McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 173 (1973), the Court held that Indians and Indian property on an Indian reservation were not subject to state tax because no act of Congress grnated the state power to infringe on the internal relations of the tribe. The Court said:

> But it is nonetheless still true, as it was in the last century, that "[t]he relation of the Indian tribes living within the borders of the United States ... [is] an anomalous one and of a complex character. ... They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." United States v. Kagama, 118 U.S. at 381-382, 20 L.Ed. 228.

See also, United States v. Wheeler, 435 U.S. 313, 322 (1978), and United States v. Mazurie, 419 U.S. 544, 556-57 (1975).

The many decisions of the Supreme Court upholding the right of tribes to exercise governmental powers of various kinds show that the inherent power possessed by Indian tribes as self-governing sovereigns is the police power, also possessed by states. See discusssion, supra at II.A. Among the powers upheld by the Supreme Court are the following: the power to

determine its own form of government, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55, 62-63 (1978); to determine tribal memberships, Cherokee Intermarriage Cases, 203 U.S. 76; Roff v. Burney, 168 U.S. 218, 222-223 (1897); to regulate domestic relations among tribal members, Fisher v. District Court, 424 U.S. 382 (1976); United States v. Quiver, 241 U.S. 602 (1916) to prescribe rules for the inheritance of property, Jones v. Meehan, 175 U.S. 1, 29; United States ex rel. Mackey v. Coxe, 18 How. 100, 15 L.Ed. 299 (1856), to enforce criminal laws against tribal members; United States v. Wheeler, 435 U.S. 313, 328 (1978); to enforce tribal laws in tribal forums, Williams v. Lee, 358 U.S. 217 (1959); to regulate commerce and raise revenue through a licensing or permit scheme, Morris v. Hitchcock, 194 U.S. 384 (1904); to levy taxes for regulatory and revenue raising purposes, Merrion v. Jicarilla Apache Tribe, _____ U.S. _____, 71 L.Ed.2d 21, 29, 43 (1982); to regulate the conduct of non-members who enter consensual relationships with the tribe or its members, or whose conduct threatens or directly affects a significant tribal interest, Montana v. United States, 450 U.S. 544, 565-566 (1981). And see generally, Powers of Indian Tribes, 55 I.D. 14 (1934).

Tribes are considered to be sovereigns completely separate from the state and federal governments in the sense that tribal sovereign powers derive from the consent of separate peoples whose governments were in existance at the time Europeans entered this country. Since tribal government predate the formation of the state and federal governments, and are not

derived from or dependent upon the federal constitution, tribal governments are not bound by the provisions of the federal constitution.

> As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically or limitations on federal or state authority. Thus, in Talton v. Mayes, 163 U.S. 376 (1896), this Court held that the Fifth Amendment did not "[operate] upon" "the powers of local self-government enjoyed" by the tribe. Id at 384. In the ensuing years the lower federal courts have extended the holding of Talton to other provisons of the Bill of Rights, as well as to the Fourteenth Amendment.

Santa Clara Pueblo v. Martinez, supra at 56.

However, the Treaty Clause, Article II, § 2, cl. 2, the Indian Commerce Clause, Article I, § 8, cl. 3, and the Supremacy Clause, Article VI, cl. 2 of the United States Constitution have been interpreted broadly to grant plenary and exclusive power to the federal government over Indian tribes and generally over Indian affairs. Morton v. Mancari, 417 U.S. 535, 551-552 (1974); Antoine v. Washington, 420 U.S. 194, 199-204 (1975); Williams v. Lee, 358 U.S. 220-221 (1959). Thus, tribal sovereign "powers are subject to qualification by treaties and by express legislation of Congress." F. Cohen, Handbook of Federal Indian Law, 241-242 (1982 ed); United States v. Wheeler, 435 U.S. 313, 323 (1978). Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57-58 (1978). Moreover, tribal sovereign powers are limited to the extent such powers are inconsistent with the overriding interests of the paramount sovereignty of the federal government. See, e.g., United States

v. Wheeler, 435 U.S. 313, 323, 326 (1978); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 124, 153-154 (1980); Montana v. United States, 450 U.S. 544, 564-566 (1981).

Tribal sovereign powers over its internal affairs involving tribal members on the reservation are plenary and exclusive absent limitation by an act of Congress. See, e.g., United States v. Wheeler, 435 U.S. 313, 326 (1978) (power to prescribe and enforce criminal laws against tribal members upheld as an inherent not a delegate power); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 179-180 (1973) (state cannot tax Indians and Indian property on a reservation when no acts grant such power); Fisher v. District Court, 424 U.S. 382, 388 (1976) (tribe has exclusive jurisdiction over adoption where all parties are members of the tribe and residents of the tribal reservation; and no act grants state jurisdiction); Bryan v. Itasca County, 426 U.S. 373, 377, 385 (1976) (county held to have no power under P.L. 280 to tax mobile homes of tribal members on trust land in reservation); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-60 (1978) (the Indian Civil Rights Act held not to grant a private cause of action in federal courts to enforce its guarantees, except by habeas corpus; thus limiting enforcement to tribal forums). Where the conduct of tribal members on the reservation is concerned, states can claim no power even if the power sought to be asserted over the members does not infringe on tribal sovereignty. McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 179-180 (1973).

On the other hand, tribal inherent sovereign powers to assert civil authority over non-Indians have been held to be divested except to the extent they are based on consensual relationships between the tribe or its members and nonmembers, or to the extent the conduct of nonmembers threatens or has some direct effect on significant tribal interests. Montana v. United States, 450 U.S. 544, 564-566 (1981). These limitations on tribal authority over non-Indians are based upon the principle 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 the Tribe, and so cannot survive without express congressional delegation." Montana v. United States, supra at 564. Thus, tribal civil regulatory authority over non-members may be asserted only when the conduct of nonmembers directly affects a tribal interest.

B. The Power To Exclude Source.

Indian tribes have the power to exclude nonmember, nonresidents from their property and the concommitant power to impose conditions upon entry. Merrion v. Jicarilla Apache Tribe, __ U.S. ___, 71 L.Ed.2d 21, 44-63 (1982); Quechan Tribe v. Rowe, 531 F.2d 408, 410-411 (9th Cir. 1976); Nance v. Environmental Protection Agency, 645 F.2d 701, 715 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3447 (1981); "Powers of Indian Tribes," 55 I.D. 14, 48-50 (1934); cf. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156 (1980). In many instances involving licenses, permits, and other tribal grants of privileges, the power to exclude blends with the tribe's police power as a basis for the exercise of such authority. However, there may be instances when it is advantageous to the tribe to be able to distinguish between those two sources of power. As discussed below, the power to exclude may be based not only upon the tribe's ownership of property, but upon its sovereign power to prevent entry of nonmembers into its reservation.

1. As A Proprietary Power - The Power To Exclude From Tribally Owned Land.

Tribally owned property, whether held in fee simple or in trust, is property over which the tribe has the same authority as any private landowner.

> Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty.

Merrion v. Jicarilla Apache Tribe, supra at 35 n.12 quoting

United States Solicitor for the Department of Interior, Federal Indian Law 439 (1958).

In its capacity as a property owner, tribes have the same rights and contractual authority as private property owners, subject to applicable federal restrictions.

> The powers of an Indian tribe over tribal property are no less absolute than the powers of any landowner, save as restricted by general acts of Congress restricting the alienation or leasing of tribal property, and particular acts of Congress designed to control the disposition of particular funds on lands.

"Powers of Indian Tribes," 55 I.D. 14, 50 (1934).

Hence, with respect to tribally owned land, tribes may, through leases, licenses, permits, franchises, and other forms of agreements or conveyances, obtain authority over the other party comparable in many ways to that which may be exercised under its sovereign powers. General terms and conditions of such proprietary agreements may be set forth in legislation. Any agreement may be evinced by the issuance of a written permit, license, etc.

Recent cases construing the scope of Congress' proprietary power over federal lands may provide a significant analogy for defining the extent of a tribe's proprietary power over its lands. Those cases establish that Congress' proprietary power over federal lands empowers it to regulate activities on non-federal lands where necessary to protect the use of its lands. See, e.g., Kleppe v. New Mexico, 426 U.S. 529 (1976); United States v. Brown, 552 F.2d 817 (1977).

Similarly, the Ninth Circuit has held that the Crow Tribe's power to prevent intrusions into its reservation supports the enforcement of reservation air quality standards outside the reservation to the extent off reservation activities cause a deterioration of reservation air quality below the established standards. See, e.g., Nance v. Environmental Protection Agency, 645 F.2d 701, 714 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3447 (1981). The Court rejected the argument that the tribe lacked the independent off reservation authority to support a federal delegation of power to regulate air quality even to the extent of regulating off reservation activities affecting on reservation air quality.

Federal proprietary power properly exercised over non-federal lands was held preemptive of conflicting state law based upon the Supremacy Clause of the federal constitution. See, e.g., Kleppe, supra. Similarly, tribal proprietary power properly exercised over non-tribal lands may arguably preempt conflicting state law, unless the state's interests weigh heavier than the tribe's in the balancing test under White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980). The tribal proprietary power by its nature would not apply to trust allotments; although such lands would be subject to the tribe's sovereign power.

2. As An Inherent Sovereign Power - The Power To Regulate Nonmember Entry Into Tribal Territory.

The power of Indian tribes to exclude nonresident, nonmembers from tribal territory and the incidental power to

condition entry into tribal territory may be comparable to the power of the federal government to regulate the immigration or admission of aliens into this country. That power is plenary and absolute; it is not limited by the due process clause of the federal constitution and other constitutional restrictions because until admitted into the country, aliens are not entitled to the protections of the federal constitution. See, e.g., J. Nowak, Constitutional Law 591-92, 895-99 (1978) (hereinafter Nowak). Thus, Congress may impose whatever conditions it deems appropriate as terms of admission of aliens into this country. Id. Only after an alien is admitted into this country is he or she entitled to rely upon the protections afforded to "persons" as opposed to "citizens" by the federal constitution. Nowak 592-601. If the conditions for continuing residence are violated, the alien may be deported, but he or she will have a right to a hearing before deportation. Id. at 592.

In this sense, the power to exclude, i.e., the power to regulate immigration, is an inherent power of sovereignty. See, e.g., Nowak 591 n.14.

> Congress does not derive its power to regulate immigration from a specific constitutional grant. It is simply regarded as a power inherent to a sovereignty. See Chinese Exclusive Case, 130 U.S. 581 (1889).

See also, Id. at 591-92, 895-99.

The view that the tribal power to exclude is comparable to the federal power to regulate immigration was advanced by the dissent in Merrion v. Jicarilla Apache Tribe, ___ U.S. ___, 71 L.Ed.2d 21, 44-63 (1982). The majority,

however, discussed the power to exclude in proprietary terms rather than in sovereignty terms.

As pointed out by the dissent in Merrion, supra at 60 n.44: "States do not have any power to exclude non-residents from their borders." See also, Id. at 44. Indeed, under the federalism scheme established by various provisions of the federal constitution, the power of states to regulate immigration of non-residents into their borders has been suppressed in favor of interstate comity and federalism. See, e.g., Nowak 252-66 (interstate commerce clause); 274-79 (full faith and credit, privileges and immunities, and fugitive from justice provisions); 378 (privileges and immunities provision); 365-67 (privileges and immunities provision - protection against discriminatory license fees based on residency); 666-74 (equal protection clause - protection of fundamental right to travel).

This principle is not applicable, however, where "persons" within the meaning of the constitution are not involved. Thus, a state's power to license foreign corporations to do business in the state may be based upon its power to exclude. Until a foreign corporation has been granted a state license to do business, it is not a "person" in that state entitled to the protection of the fourteenth amendment. Thus, states may impose conditions on such a license even though the conditions might be held invalid under the equal protection clause if imposed upon an individual non-resident "persons." Indeed, a license condition by which a corporation agreed to pay taxes otherwise discriminatory under the equal protection clause has been upheld. See, e.g., Nowak 343-44.

In constrast to states, Indian tribes are not limited by the federal constitution from excluding nonmember nonresidents from their borders or conditioning entry of nonmember nonresidents into their borders for the purpose of engaging in economic activity. See, e.g., Merrion v. Jicarilla Apache Tribe, supra at 60 n.44 (dissenting opinion). And similarly, if a nonmember nonresident does not achieve the status of a person subject to the tribe's jurisdiction until a tribal license or permit is granted to enter the reservation, a tribe conceivably could attach conditions to such a license by which certain of those protections granted by the Indian Civil Rights Act or implied from the dependent status of the tribe are waived, or by which the applicant for entry agrees to be subject to the full scope of the tribe's inherent sovereignty.

For example, an applicant for a tribal license might agree to pay a higher tax than that imposed on similar businesses of tribal members even though such a tax might otherwise be invalid under the equal protection clause of the Indian Land Rights Act. However, any such unequal treatment of nonmembers will raise serious policy concerns which should be weighed against any benefit to the tribe from an agreement by a nonmember to be treated unequally. Note, for example, the concern expressed by the Merrion dissent over the possibility that tribes might impose discriminatory taxes on nonmembers, since they are not bound by the equal protection clause of the federal constitution (the dissent ignored the applicability of the ICRA). See, e.g., Merrion at 60 n.44.

3. General Considerations Concerning The Power To Exclude.

At least as to nonresident nonmembers, the proprietary or sovereign power to exclude may offer a basis for the tribe to assert a measure of authority through the imposition of conditions upon licenses or other permits of entry into reservation commerce or for the use of tribal land which would not be permitted under the police power either because tribes have been divested of such authority, or because its exercise would offend the guarantees of the Indian Civil Rights Act. For example, since Indian tribes do not have criminal jurisdiction over nonmembers, and since many enforcement mechanisms used by governments to enforce their regulations are quasi-criminal, it is difficult for tribes adequately to enforce their regulations as to nonmembers. However, the power to exclude, i.e., to regulate immigration, may be sufficiently broad to support as a condition of entry an agreement that the licensee will be subject to all applicable enforcement provisions relative to the license sought notwithstanding whether such provisions are classified as quasi-criminal devices.

Also as noted earlier, the power to exclude may support as a condition to a license or permit an agreement to be subject to any taxes imposed notwithstanding whether such taxes might be held invalid as discriminatory. These kinds of conditions essentially require a waiver by applicant licensees of any legal right they might otherwise possess. The question arises as to the extent to which such waivers will be upheld

insofar as they opwerate to subject nonmembers to the tribe's criminal jurisdiction.

The tribal power to exclude, by its nature, would not empower a tribe to exclude or to condition entry of non-members who are legal residents of a tribe's reservation or even perhaps their licensees. And, if the power is the sole basis for the exercise of tribal authority, it may not support the exercise of any authority to which tribal licensees, lessees, or other such parties have not consented. See, e.g., United States v. Montana, 604 F.2d 1167-69 (9th Cir. 1979), rev'd on other grounds, 450 U.S. 544 (1981). However, after the decision in Merrion v. Jicarilla Apache Tribe, supra, it is plain that tribal governmental powers over its lands are not based solely on the power to exclude, but on the tribe's inherent sovereign police power.

Thus, under the majority view in Merrion, tribal regulatory power may not only be predicated upon a tribe's power to condition admission into its reservation or onto its lands, but also may be predicated upon the inherent police power of the tribe to regulate for the health, safety, welfare, and morals of the tribe -- a power which is not surrendered by failure to include it as a condition of entry into the reservation community.

C. The Federal Delegation Source.

1. General Principles.

The third source of tribal regulatory authority is federal legislation delegating to tribes authority over particular subjects. The advantages of federally delegated power is (1) it permits tribes to preempt state law without the necessity of a judicial balancing of tribal and state interests, and (2) in some instances it permits tribes to utilize federal enforcement authority and penalties.

Congress' power to delegate its authority under the Indian Commerce Clause to Indian tribes was specifically upheld in United States v. Mazurie, 419 U.S. 544 (1975). The Court relied on the principle that limitations on Congress' power to delegate authority are less stringent where the recipient itself possesses independent authority over the subject matter. Thus, since Indian tribes are independent sovereigns possessing inherent "sovereignty over both their members and their territory," id at 557, Congress' decision to vest its authority under the Indian Commerce Clause to regulate the introduction of alcoholic beverages into Indian country was sustained. The Court found it unnecessary to determine whether the tribe's "independent authority is itself sufficient for the tribes to [regulate the subject matter]." Id at 557.

The Court expressly noted that it did not reach the question of "[w]hether and to what extent the Fifth Amendment would be available to correct arbitrary or discriminatory

tribal exercise of its delegated federal authority. ..." Id. at 558 n.12. The respondents made no claim that the tribe's "decision to deny them a license constituted a denial of equal protection or that it resulted from a hearing which lacked due process." Id. In conjunction with this reserved question, the Court mentioned the protections available under the Indian Rights Act, 25 U.S.C. § 1302, and the protection provided by 18 U.S.C. § 1161's requirement that the Secretary approve the tribal regulatory ordinance. Id. Finally, the Court reaffirmed Congress' power under the Indian Commerce Clause to regulate the conduct of non-Indians on fee lands within territory reserved for a tribe. Id. at 553-56.

Aside from express delegations of authority as found in 18 U.S.C. § 1161, federal delegation of regulatory authority may be based upon an administrative interpretation of an act or federal statutory scheme through regulations. See, e.g., Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3447 (1981).

Moreover, federal delegation of regulatory authority to tribes may also be implied from pervasive federal statutory and regulatory activity in an area. See, e.g., Mescalero Apache Tribe v. State of New Mexico, 630 F.2d 724 (10th Cir. 1980); Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission, 588 F.2d 25 (4th Cir. 1978).

Thus, in cases involving a tribe's authority to regulate pursuant to congressional delegation of federal

authority, the following may be issues: (1) in cases where the Court is asked to imply a delegation of federal authority, the threshold issue becomes whether Congress intended to delegate such authority; and (2) in any delegation case, the question may be raised as to Congress' authority to delegate such power to tribes; in resolving this issue, courts will ask whether the tribe possesses some independent measure of authority over the subject of the power, not necessarily sufficient to empower it to exercise the full scope of authority delegated. Another issue which may be raised is that reserved in Mazurie, e.g., whether the tribe's exercise of the delegated authority is limited by the fifth amendment as federal action, or whether it is limited solely by the Indian Civil Rights Act, see, e.g., United States v. Moss, 614 F.2d 166, 171 (8th Cir. 1980) (remanding this question to the district court).

The remainder of this section will discuss selected federal statutes and regulations which have been or may be deemed delegations of federal authority to Indian tribes.

2. Regulation of the Introduction of Liquor Into Indian Country - 18 U.S.C. § 1161.

Since the early 1800s Congress has regulated comprehensively the subject of trafficking in liquor in tribal territory, including the introduction of liquor into Indian country, and possession or sale to an Indian therein. See, e.g., 18 U.S.C. §§ 1154, 1156, 3113, 3618; F. Cohen, Handbook of Federal Indian Law, 306-307 (1982 ed.); Rehner v.

Rice, 678 F.2d 1340, 1343 n.6 (9th Cir. 1982); and J. Doak, "Liquor Regulation in Indian Country: The Modern Picture in an Antique Frame," 23 Ariz. L. Rev. 825 (1981) (hereinafter cited as Doak). Before 1949, federal laws regulating liquor were applicable to those areas defined as "Indian country" pursuant to 18 U.S.C. § 1151.[7] However, in 1949, the term "Indian country" insofar as the application of federal liquor laws is involved

> was given a narrower meaning, insofar as relevant to the liquor prohibition, so as to exclude both fee-patented lands within "non-Indian communities" and rights of way through reservations.

United States v. Mazurie, supra at 547; 18 U.S.C. § 1154 and 1156.[8]

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[7] 18 U.S.C. § 1151 provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the 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.

[8] 18 U.S.C. §§ 1154 and 1156 define "Indian country" as follows:

> The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

In 1953, Congress enacted 18 U.S.C. § 1161 which is

> local-option legislation allowing Indian tribes, with the approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country, so long as state law was not violated.

Id. 18 U.S.C. § 1161 provides that 18 U.S.C. §§ 1154, 1156, 3113, 3488 and 3618 shall not apply to liquor trafficking

> providing such act or transaction is in conformity both with the laws of the state in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such areas of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

In light of the preemptive federal legislation prior to enactment of 18 U.S.C. § 1161 and of principles favoring Indian self-government, 18 U.S.C. § 1161 has been held to grant tribes exclusive authority to license and regulate liquor traffic within Indian country subject to federal liquor laws. See, e.g., Rehner v. Rice, supra at 1342, 1343[9/]; United States v. New Mexico, 590 F.2d 323, 328-29 (10th Cir. 1978), cert. denied, 444 U.S. 832 (1979); Zaste v. North Dakota, No. A1-75-29 (D.N.D. June 29, 1977); 78 ID 39 (1971). Thus, neither tribes nor individuals operating liquor stores on reservations need obtain a state license under 18 U.S.C. § 1161. See, e.g., Rehner v. Rice, supra (tribes and individuals); United States v. New Mexico, supra (tribes), and Zaste v. North Dakota, supra (individual). Where the tribe

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9/ The decision in Rehner v. Rice, supra at 1342, was reached notwithstanding that the State of Washington maintains an absolute monopoly on liquor sales in the state.

has exercised its regulatory authority under section 1161, that section merely "incorporates state liquor laws as a standard of measurement to define what conduct is lawful or unlawful under that act. Rehner v. Rice, supra at 1345, 1347 n.15; F. Cohen, Handbook of Federal Indian Law 308 (1982 ed.)

Acts or transactions involving liquor in Indian country, as defined by the federal liquor laws, which are not in conformity with state law and tribal law invoke the federal penalties of the federal liquor laws. F. Cohen, Handbook of Federal Indian Law, supra at 308.

The authority of the federal government to regulate liquor trafficking in Indian country has been upheld as to non-Indians on fee lands located within Indian country. See United States v. Mazurie, supra at 553-56.

Hence, questions which may be raised cases challenging a tribe's authority under 18 U.S.C. § 1161 include (1) whether 18 U.S.C. § 1161 authorizes a state to license and regulate liquor trafficking within Indian country as defined by the act,[10/] (2) the factual question of whether the particular act or transaction takes place within "Indian country" which under 18 U.S.C. §§ 1154 and 1156 excludes "fee-patented lands in non-Indian communities or rights-of-way through Indian reservations; the question is usually articulated

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10/ This issue is, of course, now settled in the 9th and 10th Circuits. See, e.g., Rehner v. Rice, supra; and United States v. New Mexico, supra.

as whether a liquor outlet is within a "non-Indian community"[11/]; (3) the effect of state laws vesting a monopoly in the state over liquor sales and distribution[12/]; (4) the effect of state laws establishing so called "dry states"[13/]; (5) whether inherent tribal sovereignty preempts state licensing and regulatory jurisdiction, at least where only tribal members are involved in liquor transactions[14/]; (6) whether the twenty first amendment authorizes states to regulate liquor transactions within Indian country[15/]; (7) whether states may tax sales of liquor in Indian country.[16/]

11/ See, e.g., United States v. Mazurie, supra at 551-53 (reviewing evidence that liquor store was located in "Indian country", i.e., not within a "non-Indian community"); United States v. Morgan, 614 F.2d 166, 170-71 (8th Cir. 1980) (bar found to be located in "non-Indian community"); Berry v. Arapaho and Shoshone Tribes, 420 F. Supp. 934, 940 (D.Wyo. 1976) (lodge found to be located in Indian country, e.g., not within a "non-Indian community").

12/ See, e.g., Rehner v. Rice, supra at 1347 n.15, and 1352 (dissent).

13/ See, e.g, Rehner v. Rice, supra 1348 n.16 indicating that section 1161 intended "to ensure that dry states would be able to remain dry by entirely "restricting" liquor sales within and without Indian country."

14/ See, e.g., Rehner v. Rice, supra at 1348, and 1349 n.18 wherein the Court found it unnecessary to reach the question - which is more likely to arise in "dry" states.

15/ See, e.g., United States v. New Mexico, supra at 329 (holding it does not); Rehner v. Rice, supra at 1350 (holding it does not); and Doak, supra at 847-54.

16/ See, e.g., United States v. New Mexico, supra at 529 (question not raised by case); Rehner v. Rice, supra at 1349 (remanding issue to district court in light of Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Doak, supra at 855-56 (arguing for state taxing authority of sales to nonmembers); but see, Ramah Navajo Sch. Bd. v. Bureau of Revenue, 50 U.S.L.W. 5101 (U.S. July 2, 1982).

3. The Indian Reorganization Act - 25 U.S.C. §§ 476 and 477.

Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, expressly grant tribes which adopt constitutions under section 476 the power to veto any alienation of tribal lands or interests therein. Section 476 provides that tribes are empowered

> to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. ...

Since under federal law, tribal lands may be alienated only as authorized by Congress, 25 U.S.C. 177, the power of tribes under section 476 to veto alienation of tribal property is arguably a delegation of federal authority to tribes to impose terms and conditions upon grants by federal officials of tribal lands or interests therein. Thus, in any instance involving the power of a federal official to grant interests in tribal land or other assets, the tribe's authority to impose conditions on such grant arguably preempts conflicting state law by operation of the Supremacy Clause. This advantage becomes important in disputes between states and tribes regarding taxing or licensing authority over non-Indians on tribal lands. Presumably, any such tribal regulation must be consisitent with applicable federal regulations.

In several statutes enacted subsequent to the IRA, Congress has taken care to preserve expressly the tribes' power under the IRA to consent to the alienation of their property.

a. Mineral Leasing Act of 1938.

The Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-g and the implementing regulations, 25 C.F.R. §§ 171.1 - 3.0,

expressly preserve the power of IRA tribes to control the alienation of their property by giving IRA "tribal governments control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of the Interior, where before the responsibility for such decisions was lodged in large part only with the Secretary." Crow Tribe v. Montana, 650 F.2d 1104, 1112 (9th Cir. 1981). Indeed, 25 U.S.C. section 396b of the Act provides

> That the foregoing provisions [authorizing leases, establishing procedures, and authorizing the Secretary to prescribe terms and conditions for such leases] shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein prescribed and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to [the IRA].

Provisions of the Act following section 396b require performance bonds from lessees (25 U.S.C. § 396c) and authorize the Secretary to regulate "all operations under any oil, gas, or other mineral lease," and to require that any leases be made subject to "any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior to subsequent to the issuance of any such lease. ..." (25 U.S.C. § 396d).

The Secretary's implementing regulations are published at 25 C.F.R. § 171.1 - .30, and at 30 C.F.R. §§ 221.1 - .80 (1981). Part 171 of 25 C.F.R. implements all provisions of the Mineral Leasing Act except the provision authorizing the regulation of operations. Part 221 of 30 C.F.R. establishes oil and gas operating regulations.

Section 171.29 of 25 C.F.R. implements the proviso of 25 U.S.C. § 396b which establishes that IRA tribes may regulate the leasing of their lands. Section 171.29 authorizes tribes which have constitutions or charters issued pursuant to the IRA, or the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501-509, or the Alaska Act, 48 U.S.C. §§ 362, 258a, to supersede the Secretary's regulations in 25 C.F.R. Part 171. 25 C.F.R. § 171.20 provides:

> The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461.479), the Alaska Act of May 1, 1936 (49 Stat. 1250; 48 U.S.C. 362, 258a), or the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. and Sup., 501-509), or by ordinance, resolution or other action authorized under such constitution, by-law or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

However, there is no comparable provision providing fro tribal supersession of the Secretary's operating regulations published at 30 C.F.R. Part 221. And indeed, the language of the proviso 25 U.S.C. § 396b indicates that it applies to preserve the tribes' rights to supersede only as to the "foregoing provisions" of the Act. The provision of the Act authorizing the Secretary to regulate "operations" follows 25 U.S.C. § 396b. Thus, there is a question as to whether IRA tribes may enact regulations to supersede the Secretary's oil and gas operating regulations in 30 C.F.R. Part 221. In this regard, however, it is relevant to note that the provision of the Act authorizing

the Secretary to subject leases to cooperative unit plans (25 U.S.C. § 396d) also follows 25 U.S.C. § 396b. However, the Secretary's regulations with respect to cooperative or unit development plans are included in Part 171 of 25 C.F.R., specifically at 25 C.F.R. § 171.21(b). Thus, presumably IRA tribes may supersede these regulations along with all other regulations in 25 C.F.R. Part 171, even though the language of the proviso in 25 U.S.C. § 396b seems to preclude its application to later provisions of the Act. See, e.g., 25 C.F.R. § 171.29. Similarly, the provision of the Act requiring performance bonds from lessees (25 U.S.C. § 396c) follows the proviso in § 396b. However, that provision is implemented as a section of the regulations in 25 C.F.R. Part 171, specifically, 25 C.F.R. § 171.6, and thus subject to being superseded by regulatory action of IRA tribes pursuant to 25 C.F.R. § 171.29.

The question of whether tribes may supersede the Secretary's "operating" regulations in 30 C.F.R. Part 221 is at this time academic. As a practical matter, it is generally acknowledged that the task of enforcing operating regulations is a particularly onerous and expensive one requiring the use of technical expertise and equipment which to date tribes seem to find financially prohibitive to assume.

Finally, the Mineral Leasing Act of 1938 does not affect oil and gas leases of allotted lands. Thus, that Act's delegation of authority to IRA tribes to supersede secretarial regulation does not apply to the Secretary's regulations

concerning allotted lands. See, e.g., 25 U.S.C. § 396, 25 C.F.R. Part 172. However, tribal regulations affecting such lands are arguably valid insofar as they are not inconsistent with the Act or the Secretary's implementing regulations.

For example, 25 C.F.R. § 172.24(c) provides that all leases of allotted lands shall be subject to a cooperative or unit development plan if and when required by the Secretary. Arguably this provision could be implemented by the Secretary approving tribal regulations concerning utilization of oil and gas leases affecting allotments.

b. The Surface Mining Control and Reclamation Act of 1977 - 30 U.S.C. §§ 1201-1328.

The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328, directs the Secretary of the Interior to study and subsequently propose "legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands."[17/] 30 U.S.C. § 1300(a). See discussion of legislative history of the provision in In re Surface Min. Regulation Litigation, 627 F.2d 1346, 1363-65 (D.C. Cir. 1980). As of the date of the opinion in that case, the Secretary had not yet submitted the

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17/ The fact that Congress in The Surface Mining Control and Reclamation Act contemplated new legislation to give tribes "full regulatory authority" over surface mining leases indicates that the proviso in 25 U.S.C. § 396b does not give tribes "full regulatory authority" over mining on tribal lands. It is thus consistent with the concern that the section 396b proviso does not authorize tribes to supplant the Secretary's operating regulations or performance standard regulations.

results of his study or proposed legislation to Congress. The Act is not applicable to Indian lands except as provided in 30 U.S.C. § 1300. Otherwise, surface mining leases are covered by 25 U.S.C. § 396a-g. However, pending adoption of the legislation contemplated by 30 U.S.C. § 1300(a), the Secretary is authorized by section 1300 to enforce as to surface mining leases on Indian lands his regulations establishing performance standards for lessees. See, e.g., In re Surface Mining Regulation Litigation, supra at 1363. Those regulations are applied to Indian lands through 25 C.F.R. §§177.112 - .114.

c. The All Purposes Indian Right Of Way Act Of 1948 - 25 U.S.C. §§ 323-328.

Enacted in 1948, the All Purposes Indian Rights Of Way Act, 25 U.S.C. §§ 323-328 (hereinafter the 1948 Act) was intended to unify and consolidate various special rights of way statutes authorizing the Secretary of the Interior to grant rights of way for various special purposes over tribal and allotted lands. See, e.g., 25 U.s.C. § 311 (highways); §§ 312-318 (railroads); § 319 (telephones and telegraph lines); § 321 (oil and gas pipeline); 43 U.S.C. §§ 959, 961 (electric transmission lines). The 1948 Act not only authorizes the Secretary to grant rights of way for all purposes over tribal and allotted lands, under such terms and conditions as he may prescribe, 25 U.S.C. § 323; it also expressly preserves the power of IRA tribes, as well as tribes in Oklahoma with constitutions adopted pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501-509 (a companion statute to the IRA), to consent to any such

grant before it is effective. 25 U.S.C. § 324 provides

> No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461-473 and 474-479 of this title; section 473a of this title and sections 358a and 362 of Title 48; and sections 501-509 of this title, shall be made without the consent of the proper tribal officials.

The Secretary has issued extensive regulations under the 1948 Act which effect one uniform regulatory scheme covering all the aforementioned special statutes, as well as the 1948 Act itself. See, e.g., 25 C.F.R. Part 161. The regulations expressly defer to the tribal power to consent to any grant by providing that

> [n]o right of way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the proper written consent of the tribe.

25 C.F.R. § 161.3(a). Another section of the regulations requires applicants to deposit with the Secretary the total consideration and damages for the right of way at the time of filing an application for the right of way. But

> [i]n no case shall the amount deposited as consideration for the right of way over any parcel be less than the amount specified in the consent covering that parcel.

25 C.F.R. § 161.14. And further, the regulations recognize a tribe's power to grant its consent subject to conditions. 25 C.F.R. § 161.15 provides

> Upon satisfactory compliance with the regulations in this Part 161, the Secretary is authorized to grant the right of way by issuance of a conveyance instrument on the form approved by the Secretary. Such instrument shall incorporate all conditions and restrictions set out in the consents obtained pursuant to § 161.3.

Presumably, any conditions or restrictions attached to the tribal consent to the right of way must be consistent with the Secretary's regulations in Part 161. Of course, the Secretary has expressly retained "the power to waive or make exceptions to his regulations [in 25 C.F.R.] in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians." 25 C.F.R. § 1.2. Tribal restrictions or conditions on right of way consents could be imposed either by general tribal regulatory legislation, or on a case by case basis, or through use of both means.18/

d. Federal Approval of Tribal Constitutions and Ordinances Pursuant to the § 16 of the IRA or Other Similar Federal Statute Has Been Held Insufficient To Evince a Congressional Intent to Delegate Regulatory Power To Tribes and The Resulting Power To Preempt State Laws.

The argument has been advanced that federal approval of tribal constitutions and ordinances, including approval of tribal ordinances enacted pursuant to constitutions approved under § 16 of the IRA, 25 U.S.C. § 476, constitutes a delegation to tribes of the federal power, derived from the Indian Commerce Clause and the Supremacy Clause of the federal constitution, to preempt state laws. Such a proposition, if upheld, would eliminate judicial balancing of tribal and state interests in

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18/ In those instances in which rights of way grants to public service companies for public purposes are involved, as opposed to rights of way grants to private parties for private purposes, tribes might look to the law and practice relating to the granting of franchises for models of legislation. See, e.g., 12 McQuillan, The Law of Municipal Corporations § 34.01 - 34.198 (3d ed. 1970).

subject areas which are not directly preempted by federal legislation. However, a review of caselaw reveals that courts have generally rejected the argument, in the absence of a federal scheme evincing an intent to preempt an area and to authorize tribal regulation as a part of the scheme.

In Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), the Supreme Court rejected the argument that state taxtation of on reservation sales of cigarettes to nonmembers was preempted by tribal legislation taxing such sales. The Court said:

> Finally, although the Tribes themselves could perhaps pre-empt state taxtation through the exercise of properly delegated federal power to do so [citations omitted], we do not infer from the mere fact of federal approval of the Indian taxing ordinance, or from the fact that the Tribes exercise congressionally sanctioned powers of self-government, that Congress had delegated the far-reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe.

Id. at 156. Of the three plaintiff tribes involved in this case, one was organized under the IRA, and two were not, although they each operated under federally approved constitutions. Id. at 143 n.11.

In White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir. 1981), the Colville Tribes and White Mountain Apache Tribe sought to prevent the enforcement of state hunting and fishing license requirements and substantive regulations against non-Indians hunting and fishing on the reservations. One basis urged to support preemption of state law was the

argument that Congress has delegated to tribes, through federally approved constitutions, the power to enact legislation preemptive of state law. Id. at 1281. The Court relying on Washington v. Confederated Tribes of the Colville Indian Reservation, supra, rejected the argument. The Court said

> Congress has manifested no intent whatsoever to delegate to tribes the "far-reaching authority" to preempt state fees and regulations otherwise applicable to non-Indians, nor would the opposite be inferred even from "federal approval of the Indian taxing ordinances, or from the fact that the Tribes exercise congressionally santioned powers of self-government." See Colville Cigarette Case, 100 S.Ct. at 2082-83.

White Mountain Apache Tribe v. Arizona, supra at 1281. And the Court specifically rejected the argument that § 15 of the IRA delegated preemptive authority to a tribe. Id. at 1281 n.6.

The Court in White Mountain Apache Tribe v. Arizona, supra, also failed to find a federal preemptive scheme in facts showing pervasive federal and tribal activity in developing and maintaining the tribes' wildlife programs. Id. at 1277. In contrast, very similar facts in Mescalero Apache Tribe v. State of New Mexico, 630 F.2d 724, 726-27 (10th Cir. 1980) and in Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission, 588 F.2d 75, 78 (4th Cir. 1978) persuaded those circuits to rule that tribal regulatory ordinances constituted an integral part of a federal scheme intended to preempt state game laws from being enforced on the reservation against nonmembers.

In Mescalero Apache Tribe v. State of New Mexico, 630 F.2d 724 (10th Cir. 1980), reinstated on remand from the Supreme

Court, 677 F.2d 55 (10th Cir. 1982), the Tribe sought to enjoin New Mexico from enforcing its game laws against non-Indians on tribal trust lands within the reservation. The Court found that tribal game ordinances enacted pursuant to the IRA in conjunction with applicable treaties and federal statutes constituted a federal scheme preempting state game laws. The Court said

> In this case, the treaty and statutory basis for federal preemption is strong. We see as sources for preemption (1) the treaty; (2) the Enabling Act for New Mexico; (3) the Indian Reorganization Act of 1934; (4) the tribal constitution and ordinances enacted pursuant to the IRA; (5) the extensive federal developmental assistance; and (6) the negative inferences from Public Law 280. These factors considered in light of the Tribe's inherent powers over reservation land and wildlife, compel our conclusion of preemption.

Id. at 731; cf. Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission, 588 F.2d 75 (4th Cir. 1978) ("We conclude that the strong federal policy supporting the Band's fishing program and the significant federal efforts sustaining it demonstrate an intention to preclude state regulation of non-member fishing on the Band's reservation." Id. at 78); Fisher v. District Court, 424 U.S. 382, 390 (1976) (holding that a tribal ordinance enacted by an IRA tribe conferring jurisdiction on tribal courts over adoptions involving reservation Indians defeats state jurisdiction because it "implements an overriding federal policy...."

Apparently, however, the Ninth Circuit will not imply a federal intent to delegate preemptive power to tribes from

a comprehensive statutory scheme designed generally to encourage tribal self-government. Rather that Court will require that any delegation be express. In the case of Crow Tribe of Indians v. State of Montana, 650 F.2d 1104 (9th Cir. 1981), the Tribe may be able to meet this standard. In this case a question raised by the Tribe's complaint was whether Montana's coal severance tax was preempted by the Tribe's enactment of its own severance tax code. The lands involved were tribal lands. The Court, remanding to the district court on finding that the Tribe's complaint stated causes of action, said with respect to the preemption question:

> Absent a demonstration of congressional intent to delegate authority to the Tribe to preempt Montana's taxing statutes, the tribal ordinances carry no such preemptive effect.
>
> The Tribe will have an opportunity to demonstrate on remand that Congress intended to delegate such regulatory and preemptive authority to the Tribe, and that there is a "direct conflict between state and tribal schemes." Washington v. Confederated Tribes of Colville, 447 U.S. 134, 156, 100 S.Ct. 2069, 2083, 65 L.Ed.2d 10. We note in this regard that 30 U.S.C. § 1300(a) (Supp. 1 1977) indicates that Congress is contemplating a delegation to Indian tribes of some authority over surface mining on Indian lands.

Id. at 1111-12 n.8. The tribe on remand will likely rely, for its argument that Congress has delegated to it the authority to regulate and thus to preempt state laws on section 476 of the IRA, on the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-g, and in particular, on the proviso in 25 U.S.C. § 396b which authorizes IRA tribes to supplant a measure of the Secretary's

authority under that Act. See also, the implementing regulation published at 25 C.F.R. § 171.29. Cf. Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981).

In summary, the argument that tribes have been delegated the federal authority to preempt state laws through the enactment of federally approved tribal ordinances will not prevail if its sole basis is the IRA or other federal act constituting general approval of tribal legislation. However, the argument should prevail where a specified statute or regulation expressly authorizes tribal regulation over a given subject area. And absent such express delegation, the argument may prevail where the tribal regulatory scheme can be shown to be an integral part of a broader and preemptive federal scheme to control a given subject area.

4. Federal Delegation by Interpretive Regulations.

In at least one instance, courts have upheld a delegation of federal authority to tribes by federal administrative regulations when the authorizing statute was silent as to the proprietary of such delegation.[19] Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981); cert. denied, 50 U.S.L.W. 3447 (Dec. 7, 1981). Nance involved a challenge to the Environmental Protection Agency's power to delegate to tribes redesignation authority over a quality standards within their reservations in the absence of express statutory approval. The Act, while expressly delegating certain authority to states, failed to mention Indian tribes. The Court reviewed the legislative history of the Clean Air Act and construed its provisions in light of principles of statutory construction favoring agency interpretation of its authorizing statute and tribal sovereignty, and upheld the delegation as an appropriate interpretation of the Act.

Two instances of federal delegation by interpretive regulations are discussed next.

a. Regulations Under the Clean Air Act - 42 U.S.C. §§ 7401-7642.

In 1977, Congress amended the Clean Air Act to add a new provision expressly delegating to tribes the power to

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19/ However, a question which may arise where tribal power is based solely upon an agency's interpretive regulations is whether the agency will be allowed to waive or withdraw such delegation. See, e.g., 25 C.F.R. § 1.2 wherein the Secretary of the Interior reserves the right "to waive or make exceptions to his regulations."

redesignate their reservations from Class II to Class I air quality standards. See, e.g., 42 U.S.C. § 7474(c); see also, 40 C.F.R. § 52.21(g)(1). Class I standards allow the least amount of air quality deterioration and thus the least amount of economic development.

Prior to 1977, however, the Clean Air Act made no specific mention of the role of Indian tribes in the federal regulatory scheme established by the Act. On the other hand, the Act expressly delegated to states authority over air quality within these boundaries. See, e.g., Sierra Club v. Environmental Protection Agency, 540 F.2d 1114, 1138 (D.C. Cir. 1976). Notwithstanding the pre-1977 Act's failure to make express provision for tribes in its scheme, the Environmental Protection Agency (EPA) issued regulations which authorized tribes to redesignate the lands within their reservation as Class I air quality. See, e.g., Nance v. Environmental Protection Agency, 645 F.2d 701, 704 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3447 (Dec. 7, 1981). This portion of the EPA's regulations was challenged as inconsistent with the Clean Air Act, id at 712-14, and an unconstitutional delegation of redesignation authority to tribes. The Ninth Circuit, inter alia, rejected both arguments and upheld the EPA's delegation of authority to tribes.

Essentially, the Court based its decision that the delegation of redesignation authority to tribes was valid on rules of statutory construction favoring agency interpretation and tribal sovereignty, and on the absence of any "compelling

indications that the EPA's interpretation of the Clean Air Act was wrong." Id. at 714. And, as discussed earlier, the Court based its decision that the delegation was constitutional on a finding that tribes possessed the power to exclude pollutants from its borders. Id. at 715.

The broader question under this Act is the extent to which it limits or preempts tribal authority generally to regulate air quality within their reservations.

b. Regulations Under the All Purposes Indian Rights of Way Act - 25 U.S.C. §§ 323-328.

As discussed previously, the All Purpose Indian Rights of Way Act of 1948, 25 U.S.C. §§ 323-328, authorizes the Secretary of the Interior to grant rights of way for any purpose across trust lands subject to whatever terms and conditions he may prescribe. 28 U.S.C. § 323. And the Act also authorizes IRA tribes, and tribes organized under similar acts, to consent to such rights of way grants over tribal lands. 25 U.S.C. § 324.

Unlike the Act, the Secretary's regulations under the Act do not distinguish between IRA, or similar situated, tribes and non-IRA tribes in terms of the power to consent. See, e.g., 25 C.F.R. § 161.3(a). Thus, the Secretary has in effect delegated by regulation to non-IRA tribes the power to consent to right of way grants.

Furthermore, none of the various special right of way acts which were consolidated by the 1948 Act expressly delegate to tribes the power to consent to right of way grants under those acts. However, the Secretary's regulations in

25 C.F_R. Part 161, require tribal consent not only to grants under the 1948 Act, but under all special rights of way acts as well. This may also be a delegation of power by regulation to IRA and non-IRA tribes, if those special acts are not deemed by the court to amended by the 1948 Act to require tribal consent.

In a case now pending the Ninth Circuit Court of Appeals, Southern Pacific Transportation Co. v. Watt, Nos. 80-4505 and 80-4506 (appeal filed October 8, 1980), a challenge is made to the Secretary's authority to delegate to an IRA tribe the power to consent to a railroad right of way grant where application is made pursuant to a special right of way statute, 25 U.S.C. §§ 312-318, which itself provides no express authority for such delegation. This challenge assumes that the railroad right of way was not amended by the 1948 Act such that tribal consent is statutorily required by 25 U.S.C. § 324 of the 1948 Act.[20/] If the challenge prevails on appeal, Indian tribes would not have the power to consent to rights of way applied for and granted under special rights of way acts, instead of the 1948 Act. See, e.g., 25 U.S.C. § 311 (highways); §§ 312-318 (railroads)); § 319 (telephone and telegraph lines); § 321 (oil and gas pipelines); 43 U.S.C. §§ 959, 961 (electric transmission lines).

The problem inherent in a federal delegation of authority by interpretive regulations is illustrated by an incident

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20/ The lower court ruled that the special railroad right of way act was not amended by the 1948 Act to require tribal consent to grants, and that the Secretary's regulations requiring tribal consent were inconsistent with the intent of the special railroad right of way grant.

IV. SOURCES OF LIMITATIONS ON THE TRIBE'S POWER TO REGULATE

Generally, there are three sources of limitations on the inherent power of tribes to regulate or otherwise to govern persons and property within their jurisdiction: (1) treaties and statutes, see, e.g., McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 172 (1977); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1977); United States v. Wheeler, 435 U.S. 313, 323 (1978); F. Cohen, Handbook of Federal Indian Law 242-244 (1982 ed.); C. Wilkinson, "Judicial Review of Indian Treaty Abrogation: 'As Long As Water Flows, or Grass Grows Upon The Earth' - How Long A Time Is That?," 63 Cal.L.Rev. 601, 602-08 (1975) (NILL No. 2622); (2) implications from the dependent nation status of Indian tribes, Montana v. United States, 450 U.S. 544, 564-66 (1981); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153-54 (1980); United States v. Wheeler, 435 U.S. 313, 323 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209-11 (1978), F. Cohen, Handbook of Federal Indian Law 244-46 (1982 ed.), and (3) tribal constitutions.

A. Limitations Based on Treaties and Statutes.

1. Defining Territorial Limits.

a. The "Indian Country" Statute.

Like other governments, tribal governments have territorial boundaries within which they may exercise their governmental authority. Since 1948, tribal territory has been determined by reference to the federal statute which defines the term "Indian country." See, e.g., 18 U.S.C. § 1151. Although

section 1151 is a criminal statute, the Supreme Court has applied the statute to determine the territorial limits of a tribe's civil jurisdiction as well. See, e.g., Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 477-479 (1976); DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975); and see generally, R. Collins, Implied Limitations on the Jurisdiction of Indian Tribes, 54 Wash.L.Rev. 479, 525-528 (1979) (NILL No. 4096); D. Getches, Federal Indian Law 348-357 (1979); F. Cohen, Handbook of Federal Indian Law 27-46, 617-618 (1982 ed.).

18 U.S.C. § 1151 provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the 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.

The status of land as "Indian country" depends upon the construction of treaties, agreements, statutes, or executive orders affecting the reservation boundaries of particular tribes, or authorizing the acquisition or disposal of lands for individuals. Generally, there has been a substantial amount of litigation concerning the questions of whether a particular area constitutes Indian country, and of whether a particular area's status as Indian country has been terminated. See, e.g., discussion in authorities cited above.

In two instances, the "Indian country" definition in 18 U.S.C. § 1151 has been modified. First, the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, defines Indian country more broadly than section 1151. Essentially, the Indian Child Welfare Act incorporates the section 1151 definition and adds to it tribal trust lands outside a reservation or dependent Indian communities, and individual trust or restricted lands outside reservations or dependent Indian communities which are not classifiable as allotments within 18 U.S.C. § 1151(c). See, e.g., 25 U.S.C. § 1903 (10). Second, the Indian country Liquor Prohibition Laws, 18 U.S.C. §§ 1154 and 1156 exclude from "Indian country" for purposes of that Act fee patented lands within non-Indian communities, and all rights-of-way.

Since 1948 and the passage of the "Indian country" statute defining "reservations", 18 U.S.C. § 1151(a), several cases have been brought challenging the continuing existence of reservation boundaries as originally created by treaty, statute, or executive order. Many of these cases involve the construction of an agreement between a tribe and the United States effecting the opening of a portion of the original reservation to non-Indian homesteading. 21/ These cases raise the question

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21/ See, e.g., Decoteau v. District County Court, 420 U.S. 425 (1975) (habeas corpus (1) for release of children from foster home placement by state and (2) for release from state penal institution - court found agreement between Sisseton-Wahpeton Tribe and United States effected disestablishment of Lake Traverse reservation); Tooisgah v. United States, 186 F.2d 93 (10th Cir. 1950) (Kiowa, Comanche, and Apache); United States v. Oklahoma Gas and Electric Co., 318 U.S. 206 (1943) (Kickapoo reservation disestablished by agreement for purposes of application of 43 U.S.C. § 959 and § 961 regarding electric transmission line rights-of-way); and Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir. 1980) (Red Lake retained no hunting and fishing rights within diminished reservation).

of whether the agreement effected a termination of all or a part of the original reservation area as "Indian country." Some cases involve the construction of the effect of a unilateral congressional act upon the continuing existence of a reservation. 22/

Numerous court decisions have adjudicated the reservation diminishment question for various reservations. Many of these are cited in F. Cohen, Handbook of Federal Indian Law 44-45 n.153. Tribes or reservations affected by those decisions include Crow Creek Sioux; Standing Rock; Rosebud; Pine Ridge; Puyallup; Cheyenne River; Fort Berthold; Cheyenne & Arapaho; Uintah & Ouray; Pyramid Lake; Wind River; Yankton; Fort Peck; Flathead. Other tribes affected by decisions on reservation boundaries include Sisseton-Wahpeton; Kiowa; Comanche, and Apache; Kickapoo; Red Lake, Colville, Klamath River, Walker River Paiute, and Lower Brule Sioux. See, e.g., footnote ____ supra.

A Tribe should be aware that the reservation diminishment issue might be raised as a defense against a tribe's effort to assert regulatory jurisdiction over fee lands within a

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22/ See, e.g., Seymour v. Superintendent, 368 U.S. 351 (1962) (writ of habeas corpus - found no congressional intent to disestablish by act the south half of Colville Indian reservation, although north half disestablished); Mattz v. Arnett, 412 U.S. 481 (1973) (Indian intervention in state proceeding for forfeiture of gill nets - found no intent to disestablish by act Klamath River Indian reservation); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) (found congressional intent to terminate part of a reservation in an act which incorporated terms of previously unratified cession agreement between Rosebud Tribe and United States); United States v. Southern Pacific Transportation Co., 543 F.2d 646 (9th Cir. 1976) (Walker River); Lower Brule Sioux Tribe v. South Dakota, Civ. 80-3046 (April 30, 1982).

reservation. Whether any agreement or statute terminates, diminishes, or merely opens a reservation for settlement or other non-Indian entry depends upon the intent of Congress and, where an agreement is involved, the understanding of the Indians. The Court will analyze the particular treaties, agreements, or statutes involved, their legislative history, and generally the circumstances surrounding those legal transactions.

Finally, the Supreme Court has recently ruled that a tribe's regulatory power over fee land owned by non-members within its reservation is subject to certain standards not imposed where tribal members or trust lands are involved. See, e.g., United States v. Montana, 450 U.S. 544, 563-657 (1981). This subject is addressed more fully later in this manual. Tribal authority over fee land within reservations owned by members is probably no different than it is over trust lands within the reservation. See, e.g., Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 447-479 (1976) (holding that section 6 of the General Allotment Act, 25 U.S.C. § 349, does not subject tribal members on fee land to state law because section 6 has been impliedly repealed by later statutes vesting authority in tribes over fee lands within reservations, e.g., 45 U.S.C. § 476 of the IRA and 18 U.S.C. § 1151(a)); see also, 58 I.D. 455 (1943) (asserting position that section 6 of the General Allotment Act applies state law only to original allottees); and see F. Cohen, Handbook of Federal Indian Law 380 (1982 ed.).

b. Tribal Governmental Power Outside Reservations.

(1) Tribal Trust Property.

The status as "Indian country" of tribal trust property located outside an Indian reservation, including such property located within a disestablished reservation, is uncertain. See, e.g., F. Cohen, Handbook of Federal Indian Law 45 (1982 ed.); but cf. Cheyenne-Arapaho Tribes v. Oklahoma, 618 F.2d 665 (10th Cir. 1980) (holding tribal trust land within a disestablished reservation to be a reservation within 18 U.S.C. § 1151(a)); and United States v. John, 437 U.S. 634 (1978).

As a general guide, however, it has been suggested that such lands should be considered "Indian country" within 18 U.S.C. § 1151(a) "so long as they are used for the federal purpose of residence and support of Indians." F. Cohen, Handbook of Federal Indian Law, supra at 45.

Compare, however, the decision in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) in which the Court held that income from land outside the reservation leased by the Tribe pursuant to 25 U.S.C. § 465 for a ski resort was not immune from state tax, although the permanent improvements on such land were immune from state tax under section 465. The Court said that the test for tribal immunity from state taxes where an off-reservation tribal business was concerned is whether there is an "express federal law" granting the tribe immunity from "indiscriminating state law otherwise applicable to all citizens of the state." Id. at 148-149. The Court did not discuss the resort's status as "Indian country."

involving an application for a railroad right of way across lands held in trust for the Navajo Tribe and several tribal members. The Navajo Tribe is not organized under the IRA. On August 3, 1979, in the face of indications that the Tribe and several individuals would not consent to the right of way grant, the Secretary of the Interior approved a memorandum dated July, 1979 from the Director of the Bureau of Land Management which proposed that a railroad right of way be granted across BLM lands and lands held in trust for the Navajo Tribe and individual members, subject to tribal and individual consent, pursuant to 25 C.F.R. § 161.3(a). However, the memorandum also stated that "[i]f the consent of the Tribe and individual Indians cannot be obtained, the Secretary could waive the regulations pursuant to 25 C.F.R. 1.2. Such waiver would be permissible in this situation, if a finding is made that such waiver is in the best interest of the Tribe and the individual Indians."

In Crow Tribe of Indians v. State of Montana, 650 F.2d 1104, 1115 (9th Cir. 1981) the Tribe is seeking to tax mining activity on ceded lands outside its reservation boundaries in which it holds mineral rights. In denying a motion to dismiss, the Court noted that the Secretary was considering approval of the Tribe's proposed taxing ordinance. Id. at 1115 n.19. The Court's note indicates that it views the issue of federal and tribal preemption of the state coal severance tax to be the same whether the tribal mineral interests are located on or off the reservation. Id. At minimum, it would seem that the Tribe could base its tax on its power to exclude persons from developing tribal mineral interests.

(2) Off-Reservation Treaty Hunting and Fishing Rights.

In a number of instances, tribes have expressly reserved in treaties rights to hunt and/or fish at designated sites off the reservation. The language of the treaties establishing these rights varies, and a substantial amount of litigation has occurred defining and enforcing these rights. Where an off-reservation treaty right is found to exist, tribes have the power to regulate their own members in the exercise of the reaty rights. See, e.g., Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974); United States v. Washington, supra; United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), cert. denied, 50 U.S.L.W. 3481 (Oct. 15, 1981) (pet. for cert. to 6th Cir. before judgment). Moreover, the treaty guarantees constitute "express federal law" preempting state regulation. See, e.g., United States v. Washington, 520 F.2d 676 (9th Cir. 1975); cert. denied, 423 U.S. 1086 (1976). States,

however, retain the power to regulate Indian off-reservation hunting and fishing rights where necessary to preserve a species. Id.; and Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968); Department of Game of Washington v. Puyallup Tribe, 414 U.S. 44 (1973). And see generally, D. Getches, Federal Indian Law 617-54 (1981); F. Cohen, Handbook of Federal Indian Law 456-462 (1982 ed.).

2. Delegating Jurisdiction Over Indian Country To States.

Congress has enacted several statutes which delegate or offer to delegate all or some measure of a tribe's jurisdiction over Indian country to states. These kinds of statutes inevitably raise questions as to the extent of the jurisdiction granted. Probably the most infamous of these kinds of statutes are Public Law 280 and Termination Acts.

a. Public Law 280.

Public Law 280 does not delegate to States any new general civil regulatory authority over Indian country. It merely delegates jurisdiction over private causes of action arising in Indian country and the authority to apply state rules of decision. Hence, Public Law 280 does not limit a tribe's civil regulatory authority over Indian country. On the other Land, Public Law 280 grants states broad criminal jurisdiction over Indian country subject to certain exceptions, although tribes may have concurrent criminal jurisdiction.

(1) The Act.

Public Law 280 was enacted in 1953. It unilaterally delegates to six states jurisdiction over most crimes and some civil matters within most areas of Indian country. See, 18 U.S.C. § 1162, and 28 U.S.C. § 1360. The six states are Alaska, California, Minnesota (except Red Lake), Nebraska, Oregon (except Warm Springs), and Wisconsin (the "mandatory states").

In addition Public Law 280 offers all other states the opportunity of accepting all or some measure of the jurisdiction delegated to the six "mandatory" states. See, 25 U.S.C.

§ 1321 (criminal jurisdiction), 1322 (civil jurisdiction); 1324 (federal permission for states to amend disclaimer clauses in their constitutions or statutes). However, in 1968, this offer was modified to require tribal consent as a precondition to the states acceptance. See 25 U.S.C. § 1326. Ten "optional" states acted to accept all or some measure of Public Law 280's offer: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. For a description of jurisdiction assumed by each of the ten, and the present status of the assumption, see, F. Cohen, Handbook of Federal Indian Law, 362 n.125 (1982 ed.) (hereinafter Cohen).

Any mandatory or optional state which prior to 1968 had assumed all or some measure of Public Law 280 criminal or civil jurisdiction may retrocede all or some measure of the jurisdiction back to the federal government. See, e.g., 25 U.S.C. § 1323. Public Law 280 makes no provision for retrocession of jurisdiction by optional states which assumed jurisdiction after 1968; however, it has been suggested that the Act "may allow tribes or states to condition their respective consents to jurisdiction on the future possibility of retrocession." See, e.g., Cohen, supra at 370. Retrocessions have been accepted in six instances: Menominee Reservation in Wisconsin; 15 named reservations in Nevada; Nett Lake Reservation in Minnesota; Port Madison Reservation in Washington; Omaha Reservation in Nebraska; and Quinault Reservation in Washington. For citations to the federal register notices of acceptance of the foregoing retrocessions, and a description of the method utilized by the state involved, see Cohen, supra

at 370-371 n.195.

(2) Scope of Delegation of Civil Authority.

The landmark case of Bryan v. Itasca County, 426 U.S. 373 (1976) established that Public Law 280 does not delegate to states any new general regulatory authority over "Indian country." Rather, Public Law 280 granted the states civil jurisdiction to apply their rules of decisions in private causes of action. Bryan at 383-384. On this basis, the Bryan court invalidated the application of a state's personal property tax on an Indian's mobile home located in "Indian country."

A similar conclusion was reached earlier by the Ninth Circuit in Santa Rosa Band of Indians v. Kings County, 532 F.2d 656 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977) in which the Court invalidated the application of a county zoning and building code to Indians on reservation trust lands subject to Public Law 280. And see, United States v. County of Humboldt, 615 F.2d 1260 (9th Cir. 1980) (reaffirming holding in Santa Rosa). As in Bryan, supra at 377, in Santa Rosa, supra at 658-659, the Ninth Circuit began with the proposition that state and county civil authority over Indian country is preempted unless conferred by Public Law 280. The Court found that Public Law 280 did not confer civil authority upon local political subdivisions of the state; but even if it did, such laws are preempted by 25 U.S.C. § 465 and 25 C.F.R. § 1.4 which prohibits the application of state and local laws to trust lands, as well as other federal acts applicable to housing and sanitation aid to Indians. Further, the Santa Rosa court found that the zoning and building code were "encumbrances" on trust

land prohibited by Public Law 280. See also, Snohomish County v. Seattle Disposal Co., 425 P.2d 22 (Wash. 1967) (invalidating application of county law requiring use permit for garbage disposal on trust lands as a prohibited "encumbrance" under Public Law 280).

In summary, after Bryan, supra, it is clear that Indian tribes subject to Public Law 280 have general civil regulatory authority over Indian country subject to their jurisdiction; and that Public Law 280 delegates to states only jurisdiction over private causes of action. For discussions of the application of Public Law 280 in both the civil and criminal areas, see, e.g., F. Cohen, Handbook of Federal Indian Law 362-372 (1982 ed.); D. Getches, Federal Indian Law 466-494 (1979); C. Goldberg, "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians," 22 UCLA L.Rev. 535 (1975) (NILL No. 001873).

Since Bryan, the question has arisen in two cases as to whether a state law is "civil regulatory" and thus invalid as applied to Indians in Indian country, or "criminal prohibitory" and valid. See, e.g., Oneida Tribe of Indians of Wisconsin v. Wisconsin, 518 F.Supp. 712 (W.D. Wis. 1981); and Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981). Both cases concluded that the state statutes were intended to regulate and not prohibit a bingo operation, and were therefore invalidly applied to the tribal bingo operations within Indian country. Cf. United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977) (holding a state fireworks law to be criminal prohibitory in nature and not civil regulatory, and thus applicable as rules

of decision for federal prosecution of crimes committtee in "Indian country" under the Assimilative Crimes Act, 18 U.S.C. § 13.

b. Termination Statutes.

Generally, statutes terminating federal supervision over particular Indian tribes purport to end the federal trust responsibility for tribes and their lands and to impose state legislative, including regulatory, authority, as well as judicial jurisdiction over the tribes, their members, and their reservations. Although terminated tribes retain some powers, such as the power to determine membership, as a practical matter, termination statutes effectively ended the ability of affected tribes to exercise tribal powers of self-government over "Indian country." See, e.g., C. Wilkinson & E. Biggs, The Evolution of the Termination Policy, 5 Am.Ind.L.Rev. 139, 151-154 (1977), reprinted in part in D. Getches, Federal Indian Law 91-94 (1979); and F. Cohen, Handbook of Federal Indian Law 170-175 (1982 ed.). During the mid-1950s through the mid-1960s, approximately 109 tribes and bands were terminated. Wilkinson & Biggs, supra at 151 (containing a list of tribes and bands terminated), see also, F. Cohen, Handbook of Federal Indian Law 173-174, 811-818 (1982 ed.) (hereinafter Cohen).

However, in 1973, the first federal statute reversing termination was enacted with respect to the Menominee Tribe of Wisconsin. The Menominee Restoration Act repealed the previous termination act and restored the Tribe to its former status as a federally recognized sovereign Indian tribe. See, e.g, 25 U.S.C. §§ 903-903f. In 1977, the Siletz Tribe of Oregon was

restored to its former status as a federally recognized and protected tribe. See, e.g, 25 U.S.C. §§ 711-711f. In 1978, the Wyandotte, Peoria, and Ottawa Tribes of Oklahoma were restored. See, e.g., 25 U.S.C. §§ 861-861c. And in 1980, the Paiute Indians of Utah were restored. See, e.g., 25 U.S.C. § 761-768. And see generally regarding congressional repudiation of termination policy, Cohen, supra at 180-188 (1982 ed.), and D. Getches et al, Federal Indian Law 86-106 (1981).

With respect to tribes which remain terminated, however, the landmark case of Menominee Tribe v. United States, 391 U.S. 404 (1968) established the principle that a termination statute does not abrogate treaty hunting and fishing rights unless Congress has clearly evinced the intent to do so. See also, Kimball v. Callahan, 493 F.2d 564 (9th Cir. 1974); cert. denied, 419 U.S. 1019 (1974). Thus, since termination does not literally terminate the tribe as a sovereign government, see Menominee Tribe v. United States, supra at 1000; Cohen, supra at 815, a terminated tribe can conceivably exercise regulatory authority over reserved hunting and fishing rights. Id. Other areas of regulation available to terminated tribes include maintaining tribal rolls, regulating water rights, tribal contracting, and receipt and implementation of grants. Id. Generally, terminated tribes may exercise powers of self-government not inconsistent with their particular termination act.

It is important to note that in analyzing the scope of self-governing power of any terminated or restored tribe, it will be necessary to analyze the particular statutes applicable to each such tribe, since different statutes apply to each such tribe.

c. 25 U.S.C. § 231. Enforcement of State Laws Affecting Health and Education; Entry of State Employees on Indian Lands.

25 U.S.C. § 231 provides

> The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or (2) to enforce the penalties of State compulsory school attendance laws against Indian children, and parents, or other persons in loco parentis except that this subparagraph (2) shall not apply to Indians of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such application.

There are no present regulations permitting states to enforce their health laws in Indian country. However, there are regulations granting state officials permission, predicated upon tribal consent, to enter Indian country to inspect school conditions in public schools located therein, and to enforce state compulsory school attendance laws. 25 C.F.R. § 273.52 (1981).

The Secretary's longstanding position is that the statute does not compel him to allow state inspection or enforcement. 57 I.D. 162, 167-168 (1970); Op.Sol.Int. M-3676 (Feb. 7, 1969) reprinted in 2 Op. of the Sol. of the Dept. of the Int. Relating to Ind. Aff. 1917-1974 at 1986.

With respect to this statute, see the discussion in F. Cohen, Handbook of Federal Indian Law, 377-378 (1982 ed.) (hereinafter Cohen).

d. Other Statutes.

(1) Statutes Operating Within Specific Areas.

There are also numerous special statutes delegating to certain states certain authority over Indians and their lands located in the state. These are discussed in F. Cohen, Handbook of Federal Indian Law 372-373 (New York); 373-376 (Kansas, North Dakota, Iowa); 739-769 (Alaska); 770-788 (Oklahoma) (1982 ed.).

(2) Statutes Which Adopt State Regulatory Standards.

Tribes should be aware that some federal statutes expressly incorporate state regulatory standards as federal standards of regulation, but do not confer upon states the power to enforce the state standards, unless the statute expressly prevails for such.

Examples include 25 U.S.C. § 357 incorporating state condemnation standards, but held not to confer judicial jurisdiction upon state courts over actions brought pursuant to the statute, see, e.g., Minnesota v. United States, 305 U.S. 382 (1939); 18 U.S.C. § 1161 mandating that liquor transactions in Indian country be in conformity with state law, but held by two circuit courts not to confer enforcement authority upon states, see, e.g., United States v. New Mexico, 590 F.2d 323, 328-329 (10th Cir. 1978), cert. denied, 444 U.S. 832 (1979); Rehner v. Rice, 678 F.2d 1340, 1345, 1348, 1349 (9th Cir. 1982); 25 U.S.C. § 348 incorporating state heirship laws into General Allotment Act scheme, but held not to confer probate jurisdiction upon state courts, see, e.g., McKay v. Kalyton, 204 U.S. 458 (1907); 25 U.S.C. § 372a recognizing state adoption judgment

or decrees as documentation of heirship status in federal probate proceedings, but held not to confer jurisdiction upon state courts over adoption by Indians, see, e.g., Fisher v. District Court, 424 U.S.C. 382, 388-389 (1976).

Other examples in the area of purely criminal jurisdiction include the Assimilative Crimes Act, 18 U.S.C. § 13 and the Major Crimes Act, 18 U.S.C. § 1153. Under the Assimilative Crimes Act, state law is incorporated as federal law for federal prosecution of interracial offenses, "but no state jurisdiction is involved." Rehner v. Rice, supra at 1347; and United States v. Brown, 608 F.2d 551, 553 (5th Cir. 1979). And under the Major Crimes Act, state law is incorporated for certain designated crimes, and to fill gaps in the federal laws. "No state jurisdiction, however, is involved." Rehner v. Rice, supra at 1347; and Youngbear v. Brewer, 549 F.2d 74, 75-76 (8th Cir. 1977).

3. Limitations Implied From General Federal Regulatory Legislation.

a. General.

The inherent regulatory power of Indian tribes may be limited by judicial or administrative interpretation of federal regulatory legislation of general applicability. There are numerous federal statutes which establish a national regulatory program as to specific subjects. While some such statutes make express, albeit limited, provisions for the role of Indian tribes in the regulatory scheme of the statute, many fail to mention tribes.

Such statutes, if construed as applicable to Indian reservations and "Indian country" generally, will conflict with tribal powers to regulate the subject area involved in the federal scheme raising questions of federal preemption of tribal power. Many of these statutes specifically authorize states in cooperation with federal agencies to administer and enforce aspects of the statute's goals raising questions of whether the state has been granted jurisdiction over Indian reservations within it. See generally, the discussions in F. Cohen, Handbook of Federal Indian Law 191-92, 282-86, 466-67 (1982 ed.); D. Getches et al., Federal Indian Law 200-204 (1979); R. Collins, "Implied Limitations on the Jurisdiction of Indian Tribes," 54 Wash. L. Rev. 479, 521-23 (1979); R. McCoy, "The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests," 13 Harvard Civil Rights-Civil Liberties L. Rev. 357, 408-18 (1978); J. Brecher, "Federal Regulatory Statutes and Indian Self-Determination: Some

Problems and Proposed Legislative Solutions," 19 Ariz. L. Rev. 286 (1977), NILL No. 3887. The intent of Congress controls the resolution of whether a general federal statute impacts upon tribal sovereignty.

b. The Rule of Constitution and Its Confused Application.

Generally, in cases where it is alleged that tribal authority is limited or extinguished by a general federal act, the central issue concerns a determination of the intent of Congress. In many instances, Congress simply did not consider the impact of a general act upon tribal sovereignty. In some instances, the consideration given was extremely limited and thus of limited assistance to interpreters of the act. In instances where there is little to nothing in the language or legislative history of an act to indicate whether Congress intended the act to limit tribal authority, rules of statutory construction take on special significance. Much of the legal commentary concerning the subject of the applicability of general federal laws to tribes devotes considerable attention to applicable rules of construction.

Essentially, the rule established by a series of Supreme Court cases is that in resolving issues of whether a general federal act limits tribal sovereignty or other federally guaranteed Indian rights, special Indian rights will not be deemed affected unless there are clear indications that Congress intended to limit or extinguish such rights. This rule has been applied in several Supreme Court cases, although

no Supreme Court case contains a definitive discussion of the rule. See, e.g., Merrion v. Jicarilla Apache Tribe, ___ U.S. ___, 71 L.Ed.2d 21 (1982) (finding no "clear indications" that Congress intended implicitly to deprive the Tribe of taxing power in enacting, inter alia, national energy legislation); Squire v. Capoeman, 351 U.S. 1 (1956) (held general federal income tax inapplicable to income from trust allotments in light of language and purpose of the General Allotment Act); Morton v. Mancari, 417 U.S. 535 (1974) (held Equal Employment Opportunity Act of 1972, guaranteeing nondiscrimination in federal employment, did not repeal preexisting Indian preference statutes). And see, e.g., C. Wilkinson & J. Volkman, "Judicial Reivew of Indian Treaty Abrogation: 'As Long As Water Flows, Or Grass Grows Upon The Earth' - How Long A Time Is That?", 63 Cal. L. Rev. 601, 623-24 (1975); J. Brecher, supra at 292-95, 309-12; D. Getches, supra at 201-04.

Unfortunately, much confusion has been generated by the case of Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1970). In that case, the Court held that tribal fee land could be condemned under general condemnation authority granted by the Federal Power Act. The Court enunciated the controlling principle in broad terms indicating that general federal laws apply to Indians in the absence of a clear expression to the contrary. The principle enunciated in Tuscarora is, however, limited by the facts in that case in which no special Indian rights under federal law were involved. The tribal land allowed to be condemned in that case was not

trust land nor was there a treaty involved. However, some courts have applied the rule in Tuscarora indiscriminately and allowed Indian rights under special federal laws to be limited or extinguished by general federal acts, where the acts contained no saving language. See, e.g., D. Getches, supra at 201-03.

Moreover, even when courts agree that the controlling rule is that there must be clear indications that Congress intends to limit or abrogate Indian rights by general legislation, they may disagree as to the nature of the showing which is sufficient to constitute a "clear indication" of congressional intent. Such confusion among the lower courts results from the failure of the Supreme Court to enunciate definitive standards to be applied in construing the applicability of general legislation to Indians. See, e.g, C. Wilkinson & J. Volkman, supra.

Compare, for example, the decision in United States v. White, 508 F.2d 453 (8th Cir. 1974) with that in United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980). The issue in both cases was whether the Eagle Protection Act, 16 U.S.C. § 668(a), modified tribal treaty hunting rights by generally prohibiting the killing of bald eagles without first obtaining a federal permit. The Eighth Circuit found that the act and its legislative history failed to evince a clear expression by Congress to abrogate tribal treaty rights because there was an absence of congressional expression in the act and legislative history evincing an intent to modify treaty rights. On the

other hand, the Ninth Circuit found that there were clear indications in the legislative history and in the circumstances surrounding the passage of the Act that Congress intended to modify treaty rights. The Ninth Circuit adopted an analysis which essentially balanced the national interest in conserving eagles against what the Court perceived to be "a relatively insignificant modification of the Indians' hunting rights." Id. at 1014. Based upon this balancing of federal and tribal interests, the Court found that "surrounding circumstances" and "legislative history" showed clearly that Congress intended that Indian treaty rights be subordinated to the federal conservation scheme. The Ninth Circuit's balance of interests approach in Fryberg to resolve conflicts between federal interests and tribal interests is also the approach advocated by R. McCoy, supra at 408-21; see also, R. Burk, "The Endangered Species Act: Should It Affect Indian Hunting And Fishing Rights?", 2 Public Land L. Rev. 123 (1981), NILL No. 4498; and K. Forsgaard, "Statutory Construction - Wildlife Protection Versus Indian Treaty Rights" - United States v. Fryberg, 622 F.2d 1010 (9th Cir.), cert. denied, 449 U.S. 1004 (1980), NILL No. 4493. Cf. Andrus v. Glover Constr. Co., 446 U.S. 608 (1980) (holding that a special statute authorizing the BIA to prefer Indians in letting BIA road contracts was partially displaced by a general federal act requiring all federal agencies to engage in competitive bidding).

On the other hand, it has also been suggested that Congress eliminate the present state of confusion as to the

proper approach to determining the intent behind general federal legislation by simply enacting legislation which states that Indian rights are not be deemed limited or abrogated by general federal legislation unless such legislation expressly refers to such rights. See, e.g., J. Brecher, supra at 295, 311.

c. Examples.

The several federal statutes regulating environmental areas of concern provide examples of the questions which can arise when general federal legislation either does not mention tribes, or provides a limited role for them.[23/] The Environmental Protection Agency is generally responsible for the implementation of these acts. The EPA has considered the question of how these various acts were intended to impact upon tribal sovereignty. Generally, such statutes either do not mention tribes at all, or if they do assign a regulatory role to tribes, it is not equal to that assigned states, but rather it is commensurate with roles assigned to municipalities and other local governments.

According to one commentator, when such statutes authorize states to enforce parts of the federal regulatory scheme within the state, the EPA has construed such authorization as not empowering states to regulate on Indian lands.

23/ These laws include the Clean Air Act, 42 U.S.C. §§ 7401-7642, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376, the Noise Control Act, 42 U.S.C. §§ 4901-4918, the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6984, the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y, and the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-10.

On the other hand, the commentator indicates that the EPA has generally determined that in such instances, the EPA itself will assume authority to regulate on Indian lands. See, e.g., D. Schaller, "The Applicability of Environmental Statutes to Indian Lands," 2 American Indian Journal 15-22 (1976), NILL No. 3061; and cf. L. Petros, "The Applicability of the Federal Pollution Act To Indian Reservations. A Case for Tribal Self-Government," 48 U. of Colo. L. Rev. 63 (1976), NILL No. 3527.

In at least one instance involving tribal authority under the Clean Air Act, however, the EPA by regulation delegated authority to tribes to classify their reservations as to air quality standards, even though the Act was silent as to tribes. This delegation was upheld as a reasonable construction of the Clean Air Act in Nance v. Environmental Protection Agency, 645 F.2d 701, 712-14 (9th Cir. 1981).

A second example involves an administrative decision by the Department of the Interior interpreting the applicability of the Wholesale Meat Act of 1967, 21 U.S.C. §§ 601-691, to Indian reservations. The Interior Solicitor found that the Act did not authorize the Secretary of Agriculture to operate meat inspection programs on Indian reservations, nor did it authorize states to enforce their meat inspection laws on reservations where they do not otherwise have jurisdiction. The Solicitor stated that Tuscarora provided the rule that general federal acts apply to Indians; however, his decision turned on the specific language in the statute which he construed not to

include Indian reservations within its scope nor to enlarge preexisting state jurisdiction over reservations. See, e.g., 78 I.D. 18 (1971).

A third example is found in recent opinions of the Solicitor of the Department of the Interior which take the position that treaty hunting and fishing rights are subject to general federal laws regulating hunting and fishing for conservation purposes. See, e.g., "Application of Eagle Protection and Migratory Bird Treaty Acts To Reserved Indian Hunting Rights," Opinion of the Solicitor of the Department of Interior, M-36936 (June 15, 1981), NILL No. 4466 (holding treaty rights subject to Eagle Protection Act, 16 U.S.C. §§ 668 et seq., and Migratory Bird Treaty Act, 16 U.S.C. §§ 703 et seq.); and "Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights," Opinion of the Solicitor of the Department of the Interior (Nov. 4, 1980), NILL No. 4307 (holding Indian hunting and fishing rights under treaty, statute, or executive order subject to the Endangered Species Act, 16 U.S.C. § 1533(d)). Both the above Interior Solicitor's opinions are based on the rationale that Indian treaty rights to hunt and fish do not extend to the taking of threatened or endangered species, and thus since there is no treaty right to hunt or fish for such species, there is no conflict between treaty rights and federal legislation protecting such species. But cf., R. Burk, supra at 136 n.87.

An example of the problems which may result when a

statute expressly permits the application of state laws, but fails to mention tribal laws, is found in the case of Lower Brule Sioux Tribe v. South Dakota, Civ. No. 80-3046 (D. S.D. April 30, 1982). That case construes the 1944 Flood Control Act, specifically section 3, codified as amended at 16 U.S.C. § 460d. The question presented was the effect of that Act upon the power of the Tribe to regulate members and nonmembers within a particular area of the reservation. After finding that the Tribe's treaty hunting and fishing rights were abrogated within the area by separate taking acts, the Court, relying upon (1) the express language of the 1944 Act, its legislative history, (2) the finding that the tribe's treaty hunting and fishing rights were abrogated within the area, and (3) the policy disfavoring a confused jurisdictional pattern over an area, held that the Act was intended to vest exclusive regulatory jurisdiction in the state and in the federal government over both members and nonmembers within the reservation area.

Another illustration of problems inherent in general federal statutes which make reference to a state role in the congressional scheme, but are silent as to tribes, is provided by the so-called McCarran Amendment, 43 U.S.C. § 666. The McCarran Amendment grants state courts jurisdiction over the United States when the suit involves a comprehensive adjudication of water rights. The Amendment does not mention Indians, tribes or reservations. In 1976, the Supreme Court held that the Amendment granted the courts of Colorado jurisdiction over Indian water rights when the rights are asserted by the United

States as trustee. Colorado River Conservation District v. United States, 424 U.S. 800 (1976).

Subsequent to the Supreme Court's decision, the issue was raised as to whether state disclaimer clauses constitute a barrier to state court jurisdiction granted by the McCarren Amendment. The Tenth Circuit in Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir.), cert. denied, 444 U.S. 995 (1979), held that the disclaimer clause in the New Mexico constitution disclaimed only proprietary and not governmental authority over Indian lands, and therefore the state had jurisdiction over Indian water rights.

However, the Ninth Circuit in Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982), expressly disagreed with the Tenth Circuit. The Court held that while the McCarren Amendment waived the sovereign immunity of the United States and consequently granted Colorado courts personal jurisdiction over the United States and implicitly over Indians, the McCarren Amendment did not grant subject matter jurisdiction over Indian water rights. Further, the Court held that the Montana constitution's disclaimer clause is a disclaimer of subject matter jurisdiction to adjudicate the rights of Indians to water, and since Montana has never repealed its disclaimer clause pursuant to authority in P.L. 280, it lacks jurisdiction to adjudicate Indian water rights. The Court distinguished situations in which "a state may have a strong governmental interest that empowers it to regulate certain

limited conduct concerning non-reservation Indians or non-Indians on reservations." Id. at 1087.

d. The Rule Applicable When The General Federal Law Is One Regulating Indians In Indian Country.

In those instances where the conflicting general federal law is one regulating Indians in Indian country, the Supreme Court has said that such statutes should be construed to comport with principles of tribal sovereignty. In Ramah Navajo School Board v. Bureau of Revenue, 50 U.S.L.W. 5101 (U.S., July 2, 1982), the Court said:

> We have consistently admonished that federal statutes and regulations relating to Tribes and tribal activities must be "construed generously in order to comport with ... traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence. White Mountain, supra, 448 U.S., at 144; see also McClanahan v. Arizona State Tax Comm'n, 411 U.S., at 174-175 and n.13 (1973); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S., at 690-691. This guiding principle helps relieve the tension between emphasizing the pervasiveness of federal regulation and the federal policy of encouraging Indian self-determination. Although we must admit our disappointment that the courts below apparently gave short shrift to this principle and to our precedents in this area, we cannot and do not presume that state courts will not follow both the letter and the spirit of our decisions in the future.

Id., slip opinion at 14, accord, Merrion v. Jicarilla Apache Tribe, ___ U.S. ___, 71 L.Ed.2d 21, 39 (1982); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978).

Examples of such statutes include the Indian Civil Rights Act, 75 U.S.C. §§ 1301-1303, imposing on tribes many of the limitations imposed by the federal constitution on federal

and state governments; Public Law 280, 67 Stat. 589-90, codified as amended at 28 U.S.C. § 1360; 25 U.S.C. §§ 1322-1326, vesting states with jurisdiction over private causes of action, the federal traders statutes, 28 U.S.C. §§ 68, 261-64, 25 C.F.R. §§ 251-52 establishing an extensive regulatory scheme over persons trading with Indians in Indian country; federal laws governing allotted lands, in particular, heirships and partition, 25 U.S.C. §§ 335, 348; condemnation, 25 U.S.C. § 357; mortgage foreclosure, 25 U.S.C. § 483a; wills and probate, 25 U.S.C. §§ 372-73; sale of allotments, 25 U.S.C. § 349; and federal laws establishing terms and conditions for the acquisition of rights of way grants across tribal and allotted land, 25 U.S.C. §§ 323-28, 25 C.F.R. Part 161.

It has been observed that such general federal statutes regulating Indian country should not prevent tribes from regulating to fill gaps in the various statutory schemes, so long as such tribal legislation does not conflict with the federal purpose. See, e.g., R. Collins, supra at 521-23. Furthermore, it may be possible for administrative officials charged with the responsibility of implementing the act through regulations to delegate to tribes the authority to regulate specified areas. See, e.g., United States v. Mazurie, 419 U.S. 544 (1975); Nance v. Environmental Protection Agency, 645 F.2d 701, 712-14 (9th Cir. 1981) (upholding EPA's delegation of air standards reclassification authority under the Clean Air Act to tribes).

B. Limitations Implied From The Dependent Nation Status Of Indian Tribes.

1. General Principles.

The Supreme Court has said that tribal sovereign powers may in some instances be implicitly limited or divested by virtue of the dependent nation status of Indian tribes in those areas in which tribal powers are inconsistent with overriding national interests.

> Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978); accord, United States v. Wheeler, 435 U.S. 313, 326 (1978); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153-54 (1980). Limitations on tribal powers based on the dependent nation status of tribes have generally been implied in situations involving tribal relations with nonmembers. See, e.g., R. McCoy, "The Doctrine Of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests," 13 Harvard Civil Rights-Civil Liberties L. Rev. 357, 367-69 (1978).

The Supreme Court has identified four instances involving relations between tribes and nonmembers in which inherent tribal sovereign powers have been deemed divested because the dependent nation status of tribes implicitly requires that their powers not conflict with overriding national interests. Three of these areas are identified in United States v. Wheeler,

supra at 326:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-68, 39 L.Ed.2d 73, 94 S.Ct. 772; Johnson v. Mc'Intosh, 8 Wheat. 543, 575, 5 L.Ed. 681. They cannot enter into direct commercial or governmental relations with foreign nations. Worcester v. Georgia, 61 Pet. 515, 559, 8 L.Ed. 483; Cherokee Nation v. Georgia, 5 Pet. at 17-18, 8 L.Ed. 25; Fletcher v. Peck, 6 Cranch 87, 147, 3 L.Ed. 162 (Johnson, J., concurring). And, as we have recently held, they cannot try nonmembers in tribal courts. Oliphant v. Suquamish Indian Tribe, ante, p. 191, 55 L.Ed.2d 209, 90 S.Ct. 1011.

See also, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153-54 (1980).

Recently, in Montana v. United States, 450 U.S. 544 (1981), the Court identified a fourth area of implicit divestiture involving tribal relations with nonmembers. The fourth area concerns the scope of a tribe's power to exercise civil authority over nonmembers within its reservation. It will be discussed next.

2. The Montana Rule to Determine Whether A Tribe Has Power To Regulate Nonmembers.

a. The Rule: Tribes Surrendered Power to Exercise Civil Authority Over Non-Indians Except When Non-Indian Conduct Directly Affects Tribal Interests In Self-Government Or Internal Relations.

In Montana v. United States, 450 U.S. 544 (1981), the Court held that Indian tribes by virtue of their dependent nation status surrendered their general inherent sovereign

powers to assert civil authority over nonmembers within tribal territory. Thus, the Court said

> 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 the tribes, and so cannot survive without express congressional delegation.

Montana, supra at 564. Accordingly, the Court identified two instances in which the exercise of tribal civil authority would be deemed "necessary to protect tribal self-government or to control internal relations" and thus constitute exceptions to the principle of implicit divestment. The Court held that tribes retain inherent power to assert civil authority over non-Indians: (1) when the nonmember enters into consensual relationships with the tribe or its members, and (2) when the conduct of the nonmember threatens to have or has a direct effect upon tribal interests. As stated by the Court:

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

Montana, supra at 565-66.

In Montana the United States sued for a declaratory judgment quieting title to the navigable Big Horn River in

the United States and the Crow Tribe, and to establish that the Tribe and the United States had sole authority to regulate hunting and fishing of non-Indians within the reservation. The suit also sought to enjoin the state from issuing licenses for use within the reservation without tribal consent. The Tribe had enacted an ordinance prohibiting hunting and fishing by nonmembers within its reservation.

The Court, after finding that title to the Big Horn River vested in the State by virtue of the equal footing doctrine, applied the Montana rule to the facts in that case to determine whether the power claimed by the Crow Tribe to regulate the hunting and fishing of nonmembers within its reservation fell within either of the two areas excepted from the rule of implicit divestment. The Court held (1) that "[n]on-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction," Montana, supra at 566; and (2) "nothing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation." Montana, supra at 566.

In finding that non-Indian hunting and fishing on fee lands within the reservation did not directly affect any tribal interests, the Court noted the following factors as the bases for its finding: (1) there was no allegation that the subsistence on welfare of the Tribe was imperiled, (2) the district court found that the Tribe had accommodated itself to

near exclusive state regulation of hunting and fishing on fee lands, (3) there was no allegation that the state had abdicated or abused its regulatory responsibility, (4) there was no allegation that the state's regulations impair treaty rights to hunt and fish, (5) there was no allegation that the state had imposed less stringent regulations within the reservation than without it. Montana, supra at 566, 566 n.16.

b. The Rationale For The Rule.

In finding that tribes have lost inherent power to assert civil authority over non-Indians except when protection of self-government or control of internal relations are involved, the Montana court cited a line of cases recognizing the states' interests in regulating non-Indians on reservations and the limitation on state power to the extent it infringed on tribal interests. The rationale of this line of cases is set forth in McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973), one of the cases cited by the Montana court:

> This is not to say that the Indian sovereignty doctrine, with its concomitant jurisdictional limit on the reach of state law, has remained static during the 141 years since Worcester was decided. Not surprisingly, the doctrine has undergone considerable evolution in response to changed circumstances. ...
>
> [N]otions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians. See, e.g., New York ex rel Ray v. Martin, 326 U.S. 496, 90 L.Ed. 261, 66 S.Ct. 307 (1946); Draper v. United States, 164 U.S. 240, 41 L.Ed. 419, 17 S.Ct. 107 (1896); Utah & Northern R. Co. v. Fisher, 116 U.S. 28, 29 L.Ed. 542, 6 S.Ct. 246 (1885). This line of cases was summarized in this Court's landmark decision in Williams v. Lee, 358 U.S. 217,

> 3 L.Ed.2d 251, 79 S.Ct. 269 (1959): "Over the years this Court has modified [the Worcester principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. ... Thus, suits by Indians against outsiders in state courts have been sanctioned. ... And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. ... But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive. ... 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." Id., at 219-220, 3 L.Ed.2d 251 (footnote omitted).

See also, cases cited in Montana, supra at 564, including Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); Williams v. Lee, 358 U.S. 217, 219-220 (1959); United States v. Kagama, 118 U.S. 375, 381-82 (19).

The Montana court also said that the principles upon which Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978) relied to find divestment of tribal criminal authority over non-Indians "support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Montana, supra at 565. But see, R. Collins, "Implied Limitations on the Jurisdiction of Indian Tribes," 54 Wash. L. Rev. 479, 508-10, 516-21 (1978) (hereinafter R. Collins).

Essentially, the Oliphant case relied upon one basic general principle - that, given the great difference between Indian and non-Indian societies during the formative years of the dependent nation status of tribes, the "commonly shared presumption" of Congress, the Executive, and the Courts was

that Indian tribes did not retain the authority to try and punish non-Indians within reservations after assuming their status as dependent status. In support of this basic principle, the Oliphant court relied upon (1) inferences from a variety of legislative, executive, administrative, and judicial decisions addressing criminal jurisdiction in Indian country; (2) inferences from the dependent nation status of tribes, i.e., that tribal powers inconsistent with national interests were surrendered; and (3) the assumption that the United States did not intend to allow persons under its protection to be tried and punished without the protection of the Bill of Rights. For an analysis of the Oliphant decision including the foregoing three factors, see R. Collins, supra.

The Montana court apparently concluded that the great differences between Indian and non-Indian societies during the formative years of the dependent nation status, and the early inability of tribes to afford the protections of the federal Bill of Rights to non-Indians in tribal proceedings evinced the presumption at that time that Indian tribes surrendered their inherent sovereign power to exercise civil, as well as criminal, authority over non-Indians within tribal territory, except where tribal interests were directly affected by non-Indian activities. The Court relied upon judicial precedent to support this conclusion.

Thus, the overriding federal interest in Montana which was found implicitly to limit the civil authority of Indian tribes over non-Indians was basically the interest in

providing persons with the protections of the federal Bill of Rights, i.e., due process, in civil proceedings, which tribes in the formative years of federal Indian policy were considered unable to provide.[24/]

And, while not articulated expressly by the Montana court, the rationale for giving the federal interest in tribal criminal authority over non-Indians greater significance than the federal interest in tribal civil authority against non-Indians is based upon principles which afford more limited due process protections in civil than in criminal proceedings. This difference is reflected in the fact that historically there has been comprehensive federal criminal legislation governing interracial matters, while civil authority over such matters was left to the tribes or the states, depending upon the balance of interests in any given matter. As explained in R. Collins, supra at 508-09:

24/ In Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen, 665 F.2d 951 (9th Cir. 1982), the issue concerned the Tribes' power to regulate the riparian non-Indian owners' use of a lakebed. The Court cited Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (Colville) as establishing a test whereby tribal civil authority would be upheld unless it conflicted with an overriding federal interest. However, the Court failed to discern in Montana any overriding federal interest which was found to be inconsistent with the Crow Tribe's power to regulate non-Indian hunting and fishing. Thus, the Court could see no basis for reconciling the principles in Montana with the principles in Colville and questioned whether the Supreme Court intended to create two tests for determining tribal civil authority over non-Indians. Id. at 962-63. However, the Court avoided its problem simply by applying both its perception of the Colville test, as well as the Montana test in Namen.

> [A]n important basis for the [Oliphant] decision was the presumed intent of the government to guarantee its citizens due process of law. This concern has traditionally been less important in civil litigation than criminal prosecution.
>
> Federal law has always been less comprehensively involved in civil than in criminal jurisdiction. In the treaties, the tribes placed themselves under the protection of the United States, and the government implicitly undertook to provide that protection. This duty of protection was fulfilled by comprehensive criminal laws governing interracial matters. But most civil matters are not within the government's duty of protection, and Congress has never attempted to supply a legal system governing civil relationships between Indians and non-Indians in tribal territory.
>
> The denial of tribal criminal authority is thus set against a backdrop of comprehensive federal court authority. A similar denial of tribal civil authority would leave most interracial matters to state or formerly territorial law. But federal policy in the formative years consistently excluded state authority over Indians in tribal territory. The states were recognized as hostile to the Indians. ... Thus, the absence of federal statutes governing the field impairs any inference that tribes were presumed not to have civil authority in interracial matters.
>
> Finally, tribal authority over non-Indians has historically been sustained in a variety of circumstances where non-Indians enter into voluntary relationships with Indians.

See also, R. McCoy, "The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests," 13 Harvard Civil Rights-Civil Liberties L. Rev. 357, 420-22 (1978) ("the due process requirements in civil enforcement proceedings are far more limited than those in criminal cases." Id. at 421).

c. The "Consensual Relationship" Exception.

The Montana court relied upon four cases in support of its holding that Indian tribes retain inherent sovereign

power to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Montana, supra at 510.

Three of the cases illustrate the "commercial dealing" kind of consensual relationships. Williams v. Lee, 358 U.S. 217 (1959) held that tribal courts had exclusive jurisdiction over a non-Indian merchant's action against a tribal member to collect a debt which arose by virtue of the merchant doing business on the reservation with tribal members. The case does not indicate whether the merchant's business was located on fee or trust land. Buster v. Wright, 135 F. 947 (1906) upheld the Creek Nation's inherent sovereign power to license and collect fees from non-Indian merchants for the privilege of doing business on fee lands within the reservation. And Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) upheld the power of certain tribes to tax sales of cigarettes to non-Indians on trust lands within reservations by stores with which the tribes were involved as either retailers or wholesalers.

The fourth case, Morris v. Hitchcock, 194 U.S. 384 (1904) illustrates an instance in which the consensual relationship was a livestock grazing contract between non-Indians and members of the Chickasaw Tribe for grazing privileges on the members' allotments located within the Chickasaw Reservation. The power of the tribe to require the non-Indians in such situations to obtain a tribal permit and to pay a permit fee for the privilege of being allowed to graze livestock within the

reservation was upheld.

And see the discussion of precedent upholding tribal civil authority in instances where non-Indians have entered into consensual relationships with Indians or for the use of Indian lands in R. Collins, supra at 510-16.

d. The "Direct Effect" Exception.

In establishing the "direct effect" exception permitting tribal civil authority over non-Indians, the Montana court relied upon a line of cases which illustrate the principle that tribes have power to assert preemptive civil authority within their reservations where Indian interests are involved, and that states have power to assert their civil authority within reservations so long as Indian interests are not directly affected. See, e.g., Fisher v. District Court, 424 U.S. 382, 386 (1976) (state jurisdiction over adoption proceeding involving only tribal members residing on the reservation held preempted by tribal ordinance conferring jurisdiction over such proceedings on tribal courts); Williams v. Lee, 358 U.S. 217, 220 (1959) (tribal court jurisdiction over a civil suit by a non-Indian doing business on the reservation against a tribal member to collect a debt incurred on the reservation upheld as against state court jurisdiction); Montana Catholic Missions v. Missoula County, 200 U.S. 118, 128-29 (1906) (upheld county tax on non-Indian cattle grazing on Indian reservation by permission of tribe, which cattle were used for benefit of Indians by missionaries, because Indians had no vested interest in cattle); Thomas v. Gay, 169 U.S. 264, 273 (1898) (upheld Oklahoma tax on cattle grazed on Indian reservation under agreement with the

tribe because the tax was found to be "too remote and indirect to be deemed a tax upon the lands or privileges of the Indians).

This line of cases illustrates the range of interests that tribes and states may have in asserting civil authority over Indians and non-Indians on reservation. The tribes have an overriding interest in governing conduct involving only tribal members residing on the reservation. Fisher, supra. Tribes also have an overriding interest in asserting civil authority over interracial disputes arising on the reservation. Williams v. Lee, supra. On the other hand, states may assert civil authority over non-Indians in instances where such assertion will not have a direct effect on Indians or their property. Montana Catholic Missions v. Missoula County, supra, and Thomas v. Gay, supra.

And see the discussion and analysis of the rationale for the "direct effect" exception in R. Collins, supra at 516-521.

3. The Montana Rule Applied By Lower Courts.

Several lower courts have applied the Montana rule to determine tribal civil authority over nonmembers.

a. The Direct Effect Exception.

For purposes of providing an overview of the trend of the decisions under the direct effect exception, the relevant decisions are discussed below under three general categories based upon the tribal interest alleged to be the basis for the tribal regulation.

(1) Protection of Tribal Resources.

Mescalero Apache Tribe v. New Mexico, 677 F.2d 55 (10th Cir. 1982) (hereinafter Mescalero II). This decision reinstated the court's previous decision in Mescalero Apache Tribe v. New Mexico, 620 F.2d 724 (10th Cir. 1980) (hereinafter Mescalero I). Mescalero I was vacated and remanded to the Tenth Circuit by the Supreme Court for reconsideration in light of Montana. While the Tenth Circuit was considering the case on remand, the Supreme Court decided Merrion.

In Mescalero I and II, the Mescalero Apache Tribe had sued to enjoin New Mexico from enforcing its game laws against non-Indians who hunt and fish on the reservation. The reservation is almost entirely owned by the Tribe. There was no evidence that the State provided any game management services on the reservation. The Tribe had developed the game resource on its reservation with no State aid, and was seeking to manage its resources for economic return.

The Court viewed the issue in the remanded case of whether the Tribe had authority to regulate non-Indian hunting and fishing on tribal land as governed by the decision in Merrion, and not Montana, because the activity sought to be regulated was the use of a tribal resource on tribal lands, and not the use of fee land. The Court said: "In contrast to Montana v. United States, but like Merrion v. Jicarilla, the case before us deals with the broad power of the Tribe to control, exploit, and regulate tribal resources on tribal lands." Id. at 57.

Furthermore, the Court enjoined the state from exercising dual regulatory authority over the use of the resources because such "dual regulation ... would interfere with the Tribe's efforts to manage, preserve, and improve wildlife resources on its reservation." Id.

In Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen, 665 F.2d 951 (9th Cir. 1982), the Tribe sued to establish its power to regulate the riparian rights of non-Indians on a navigable lake within the reservation. The Court sustained the Tribes' power to regulate the non-Indians' riparian rights including building and maintaining docks, breakwater and a storage shed. The Court, having found that the Tribe owned the lakebed, also found that the lake was an "important tribal resource" and that the Tribe was empowered to regulate non-Indian conduct which threatened that resource. 25/

25/ The Court also concluded that the regulation did not conflict with any overriding national interest, and that the tribe's power to condition entry of persons on its lake also supported the tribe's regulation.

> The conduct that the Tribes seek to regulate in the instant case - generally speaking, the use of the bed and banks of the south half of Flathead Lake - has the potential for significantly affecting the economy, welfare, and health of the Tribes. Such conduct, if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of most important tribal resources. Hence the challenged ordinance falls squarely within the exception recognized in Montana.

Id. at 964.

(2) Protection Of Tribal Economy Or Lifestyle.

Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), review denied, 50 U.S.L.W. 3448 (Dec. 1. 1981). The Tribes sued to enjoin a non-Indian owner of fee land from using surface and ground water from the No Name Creek basin within the reservation. The State intervened. The Court held that water rights of a non-Indian on fee land within a reservation were subject to federal and tribal regulation, and that state authority was preempted by the creation of the reservation. The Court held that regulation of water rights by the Tribe falls within the "direct effect" exception to the Montana finding that tribes cannot regulate non-Indians. The Court explained:

> A water system is a unitary resource. The actions of one user have an immediate and direct effect on other areas. The Colvilles' complaint ... alleged that the [non-Indians] appropriations from No Name Creek imperiled the agricultural use of downstream tribal lands and the trout fishing among other things. [Citation to Montana omitted.]
>
> Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially

> in arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power.

Id. at 52.

Lummi Indian Tribe v. Hallauer, No. C79-682R (W.D. Wash. Feb. 5, 1982) reported in 9 I.L.R. 3025. The Court upheld the Tribe's authority to operate a sewer system to service non-Indians on fee land within the reservation. The Court applied the Montana test and found that "the conduct the Limmi Tribe seeks to regulate in this case has the potential for significantly affecting the economy, welfare, and health of the tribe." Id. at 3026-27.[26/] The specific tribal interests in requiring non-Indians to hook up to the tribal sewer system included the interest in preventing the unsanitary and unhealthful conditions on the reservation caused by inadequate septic tank systems, and the resulting pollution of the waters which threatened the aquaculture and oyster-raising ventures vital to the Tribe's economy. Non-Indians were found to contribute to the unsanitary conditions on the reservation. Also, the Court noted that due to the checkerboard pattern of Indian and non-Indian ownership, to permit a state sewer district to serve non-Indian lands would threaten the efficiency, and the economic and administrative feasibility

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26/ The court also followed the decision in Namen, supra, and found, first, that the Tribe's exercise of authority is not inconsistent with overriding federal interests, but indeed advances the federal interest "in promoting and improving water and sewage conditions on Indian reservations." Lummi Indian Tribe, supra at 3026.

of the tribal system. And finally, the Court found that regulation of sewage disposal is as critical to the lifestyle of the reservation as is the regulation of water, citing Colville Confederated Tribes v. Walton, supra.

The Court rejected the argument that the state's interest in regulating sewage, disposal on non-Indian lands should preempt the Tribe's interest; the Court noted that the state had approved the operation of a reservation wide tribal sewer system.

Knight v. Shoshone & Arapaho Indian Tribes, 670 F.2d 900 (10th Cir. 1982). The Tribe sued to enforce its zoning code to prevent the subdivision and development of fee lands within the reservation. The code applied to Indian and non-Indians, and to fee and trust lands. The issues presented were (1) does the Tribe have power to regulate non-Indian fee lands, and (2) if so, is the zoning code a valid exercise of the power under the facts of the case.

The Court readily found that the first issue was governed by the Montana case, and that tribes have power to regulate non-Indians on fee land where their activity directly affects tribal interests. Id. at 902.

As to the second issue, the Court found that the tribal zoning code was a valid exercise of regulatory power and that power was retained over the non-Indians under the "direct effect" test.

The rationale of the Court in finding a valid exercise of power essentially was a due process analysis.[27/]

Footnote is on next page.

First, the Court found that the Tribe had a legitimate governmental interest in protecting against the perceived threat to the rural character of the reservation and the lifestyle of a majority of those living on the reservation. A governmental purpose to protect residents from the ill effects of urbanization has long been recognized as a legitimate use of the police power. Agins v. Tiburon, 447 U.S. 255, 261. Id. at 903. This interest was also expressly set forth in the Tribe's zoning code.

> Uncontrolled use and development of land within the Wind River Reservation poses a threat to the use of the Reservation as a homeland for the Shoshone and Arapahoe Tribes for whom the Reservation was established and jeopardizes the value of the land and water, impairs the economic benefits of the natural resources and damages the environment. All residents of the Reservation are affected. To protect the interests of the Tribes and all persons on the Reservation this Code is adopted.

Id. at 903 (quoted in the decision).

Second, the Court found that the tribal ordinance "substantially advances tribal goals." Id. at 904. The code "relates substantially to the general welfare of those living on the Reservation. ..." Id. at 903. The code was designed to control land use and development within the reservation.

After establishing the legitimacy of the tribe's interest in controlling land use and development, and the

Footnote from previous page.

27/ The Court's jurisdiction to adjudicate the issue of whether the tribal ordinance was a valid exercise of the Tribe's power seems questionable in light of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The validity of the exercise of power raises the due process issue under the Indian Civil Rights Act. Under Martinez, tribes have exclusive jurisdiction over that issue.

reasonableness of the code in achieving that interest, the Court found that the activity of the non-Indian developers directly affected the tribe's interest in protecting the use and development of tribal and allotted lands adjacent to the fee land in question. The Court explained:

> The subdivision proposed by the Developers is located in the 25 square mile Lower Arapahoe Area of the Reservation. About one-third of the land immediately adjacent to the subdivision is tribal land held in trust. Theother two-thirds is about equally divided between land held in trust for individual Indians, and fee land largely owned by non-Indians. The trial court found that the Tribes have a significant and substantial interest in the area. It includes grounds where traditional tribal ceremonies are held annually. Two major pow wows are held annually within five miles of the subdivision. Within the same distance are two predominantly Indian schools, two Indian cemeteries, and an Indian activity hall. The subdivision is within an Indian reclamation project and the developers have made seven unauthorized ditch crossings. Within the Lower Arapahoe Area are 241 Indian-occupied dwellings housing 1,345 people and 110 non-Indian occupied dwellings.

Id. at 903. In addition, the Court noted that the record did not show that the state or its political subdivisions exercised land use control within the reservation. Id.

Sechrist v. Quinault Indian Nation, No. C76-823M (W.D. Wash. May 7, 1982). The Court simply relied upon Cardin v. De La Cruz, supra, to uphold the tribe's authority to zone a non-Indian's fee land within the reservation. The Court did not discuss the rationale for the decision except to state that the issue "is virtually the same as the one resolved" in Cardin, supra. However, the tribal interest in Sechrist was not health

related. More likely it was related to the protection of the tribal lifestyle.

(3) Protection of Tribal Health.

Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982). The non-Indian owner of a grocery and general store located on fee land within the Quinault Indian Reservation sued to enjoin enforcement of the Tribe's building, health, and safety regulations against him on the ground that the tribe lacked jurisdiction over a non-Indian on fee land. The tribe had issued a temporary certificate of occupancy to the owner conditioned on his making certain repairs and improvements. He failed to do so and the tribe obtained an injunction in tribal court to compel him to close the store. The Court applied the Montana rule, and held that the Tribe's regulations fell within both exceptions, and thus that the Tribe had authority to enforce its regulations against the store owner. The store owner was found to have a consensual relationship with the tribe through commercial dealing, and his conduct was found to directly affect the health and welfare of the tribe. Id. at 366.

b. The Consensual Relationship Exception.

Mescalero I and II, supra, plainly involved a consensual relationship based upon the tribe's licensing of non-Indians for the purpose of hunting and fishing on tribal land. However, the Court did not base its decision in Mescalero II on this ground.

Cardin v. De La Cruz, supra, involved a consensual relationship arising out of the non-Indian store owner's

doing business on the reservation. The Court expressly relied on this relationship as one of the grounds for sustaining the applicability of the tribal health regulations to the non-Indian.

c. Decisions Striking Down Attempted Tribal Regulation of Non-Indians.

Lower Brule Sioux Tribe v. South Dakota, Civ. 80-3046 (D.S. April 30, 1982). In this case the tribe sought a declaratory judgment that it had the power to regulate hunting and fishing of Indians and non-Indians on fee lands within the reservation. One issue presented was whether the Tribe had exclusive authority to regulate the hunting and fishing of non-Indians on fee lands within the reservation when a federal act applicable to the area in question expressly provided that "no use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the state in which such area is situated." 16 U.S.C. § 460d. The Act made no mention of the applicability of tribal game laws.

The Court recognized that the tribal regulation might be valid under the Montana "direct effect" test and noted the decisions of the Ninth Circuit in Cardin, Namen and Walton. The Court, however, distinguished these three cases from the present case on the ground that "the challenged conduct in each of these cases was not subject to state regulation." Because non-Indian conduct within the area in question was subject to state and federal regulation, the Court found that such conduct did not threaten the political or economic

security, health or welfare of the tribe. Id., slip op. at 35. Moreover, the Court noted that there was no credible claim that nonmember fishing depleted reserves needed for tribal subsistence, and that there was no allegation that the State inadequately regulates nonmember conduct and thus impairs the tribe's rights in the area. Id.

Wisconsin v. Baker, 524 F. Supp. 726 (W.D. Wis. 1981). Wisconsin sued tribal officials to establish its exclusive authority to regulate hunting and fishing by non-members in navigable waters within the reservation. The Court reaffirmed its prior decision that title to the beds of navigable waters within the reservation vested in Wisconsin. See, e.g., Wisconsin v. Baker, 464 F. Supp. 1377 (W.D. Wis. 1978). The issue in the present case was whether, notwithstanding title to the beds, the tribe was "granted exclusive powers, the 1854 treaty to control the use of these navigable waters by both members and nonmembers." Id. at 734.

In this case, the tribal power to regulate non-Indians on fee land was predicated on a specific treaty right alleged to be exclusive, and not on the tribe's inherent sovereignty. Hence, in resolving the issue of the tribe's power to regulate, the Court did not apply the Montana "direct effect" test to determine the validity of the tribal regulation. Indeed, the Court expressly declined to receive evidence on this issue. Id. at 735. Rather, the Court applied the Montana rule for determining ownership of beds of navigable waters, apparently viewing the alleged treaty right as being in the nature of a property

right, rather than a governmental power. Thus, the Court held that power to control hunting and fishing was not granted to the tribe because (1) there was no "definite and plain language" in the treaty granting the right, and (2) there was no showing of "exigent circumstances and proving need, as of the time of the treaty," from which the inference might be drawn that such right was to be in the tribe. Id. at 734.

4. Consistent With The Principles in Montana, Merrion Holds That Non-Indian Activities Which Significantly Involve Tribal Interests Subjects The Non-Indian To The Tribe's Inherent Taxing Power.

In Mescalero Apache Tribe v. New Mexico, 677 F.2d 55 (10th Cir. 1982) the Court sustained the inherent power of the Tribe to regulate the hunting and fishing of non-Indians upon tribal trust lands and to preempt state regulation. The Court held that its decision was controlled by the principles enunciated in Merrion v. Jiracilla Apache Tribe, ___ U.S. ___, 71 L.Ed.2d 21 (1982), rather than those enunciated in Montana. Id at 57. If the Court viewed the Merrion legal principles as different from the Montana principles, it is incorrect. 28/ While the Merrion Court did not expressly rely upon the Montana decision in deciding that case, the principles it relied upon are nevertheless consistent with the principles enunciated in Montana.

In Merrion, the Court upheld a tribal severance tax on oil and gas removed from tribal lands by a non-Indian company pursuant to a lease with the Tribe. The purpose of the tax was solely to raise revenue; it was not for a regulatory purpose. The Court relied upon the principle enunciated in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (Colville) in which a tribal tax on sales of cigarettes to non-members on trust lands was upheld.

28/ The Court would have been more accurate to state that its decision was controlled by the result in Merrion, since the controlling facts in Mescalero are more like those in Merrion, than those in Montana.

The Colville principle is as follows:

> The power to tax transactions occuring 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 dependent status.

Id at 152, emphasis supplied.

Thus under the principle enunciated in Colville and reaffirmed in Merrion, a tribe has inherent sovereign power to tax non-Indians only where the activity which is the basis for the tax significantly involves a tribe or its members. 29/ This rule is consistent with the Montana rule that the inherent power of Indian tribes to exercise civil authority over non-Indians arises only when the non-Indians' conduct directly affects significant interests of the tribe or is based upon a consensual relationship with a tribe or its members.

In effect, then, Merrion established that tribal taxing power, like regulatory power, is one of those inherent civil powers retained by Indian tribes over non-Indians whose conduct significantly involves or directly affects Indians. The Merrion principles are thus consistent with the Montana principles. 30/

29/ The quoted portion of Colville appears also to limit the tribe's taxing power to transactions which occur on trust lands. However, it is likely that the reference to trust lands in the above quoted portion is simply reflective of the facts in both Colville and Merrion where only tribal trust lands were involved.

30/ The dissent in Merrion apparently viewed the tribe's interest in raising revenue as less significant than its interest in regulating. Thus the dissent viewed the tribe's interest in raising revenue as insufficient to support retained sovereign power over non-Indians even when the activity involved significantly affects the tribe or its members. The dissent however, would have based tribal taxing power on the power to condition entry unto tribal lands.

Finally, in applying the Colville principles, both Colville and Merrion show that the Court considers non-Indian activity on tribal trust lands pursuant to a consensual relationship with the tribe to be significant tribal involvement sufficient to support the exercise of tribal inherent civil authority over non-Indians. Probably it was this application of the Colville principle to a set of facts, namely an activity on tribal trust lands pursuant to tribal consent, that the Tenth Circuit in Mescalero relied upon in sustaining the Tribe's hunting and fishing regulation. If so, the Court was correct in distinguishing Mescalero/Colville/Merrion from Montana. Indeed the Mescalero court in distinguishing the Montana case placed great reliance upon the fact that the lands in Montana were fee lands while the lands in Mescalero and Merrion were tribal trust lands.

And finally, Merrion established that the "consent" of non-Indians while a predicate of the contractual relationship with a tribe (or its members) is not a predicate of the tribe's inherent power. Thus, tribal civil authority over non-Indians arises indirectly from their consensual relationship with Indians, not from any direct "consent" of a non-Indian to the tribe's authority. Merrion, supra at 35-36. And see R. Collins "Implied Limitations on the Jurisdiction of Indian Tribes," 54 Wash.L.Rev. 479, 519 n.232 (1979), NILL No. 4096.

C. Limitations Based On Tribal Constitutions.

1. General.

The third source of limitations on tribal power to regulate within its territory is the constitution of the tribe which may not delegate to tribal representatives the requisite authority to exercise power over a given person or property. Although the requisite power may be reserved to the tribal members to exercise through referendum, the exercise of regulatory power through referendum is impractical and elections to delegate reserved powers to tribal representatives are time consuming and costly, and may simply cause the tribe to forego exercise of the requisite powers.

Most Indian tribes are organized as governments pursuant to a written constitution adopted by tribal members. Many tribes adopted constitutions pursuant to the authority contained in section 16 of the Indian Reorganization Act, 48 Stat. 987, 25 U.S.C. § 476. Other tribes while electing to be subject to the provisions of the IRA chose not to adopt constitutions pursuant to § 16 of the Act. For a list of tribes which elected to be subject to the IRA and those which chose to adopt constitutions pursuant to § 16 up to the date of the publication, see, Haas, Ten Years of Tribal Government Under The IRA (Dept. of Int. 1947), NILL No. 2902.

2. The Lack of Constitutionally Delegated Power to Tribal Representatives

Two major purposes of a constitution are to delegate governmental powers to tribal representatives to be exercised, and to protect numbers and other persons subject to tribal governmental powers from abuses of power. Two approaches can be

taken to accomplish these purposes. First, the tribe may withhold many powers from their elected representatives by enumerating the powers delegated to them and reserving the remainder to be exercised by tribal members by referendum. Usually, a constitution based on the enumerated powers approach also subjugates the exercise of the delegated powers to guarantees of individual rights. Alternatively, the tribe may delegate to the tribal representatives the authority to exercise all sovereign powers to the tribe, present and future, and establish a system of internal checks and balances among branches, as well as imposing selected express restrictions on the scope of various powers or on their exercise.

The enumerated powers approach to tribal constitutions was the approach adopted by most tribes upon the advice of the B.I.A. in the 1930's. See, e.g., D. Getches, et al, Federal Indian Law 302 (1979). The problem with the enumerated powers approach is its tendency not to wear well over the years. That is, enumerated powers considered sufficient to meet tribal needs at a given time are likely to be insufficient to meet tribal needs and aspirations forty years later. Thus powers needed by tribes to meet present tribal needs may have been inadvertently omitted from those enumerated powers delegated to the tribal government by a tribal constitution adopted several decades earlier.

In the 1930's, most tribes were neophytes in governing under principles of American constitutional law. The IRA and the B.I.A., however, led many tribes to adopt written constitutions

based upon the enumerated powers approach. The model for tribal constitutions may have been the enumerated powers approach of the federal constitution, rather than the general powers approach of state constitutions. During the period that most constitutions were drafted, the BIA took a restriction view of the scope of tribal powers commensurate with its skeptical view of the ability of tribes to be self-governing. See, e.g., F. Cohen, "Indian Self Government," The American Indian, 5, No. 2 at 3-12 (1949) reprinted in The Legal Conscience 222-314, see especially 309-310 (1960). Moreover, the BIA was, in the 1930's, providing a great many of the governmental services which the tribes needed and which, at the time, the newly organized tribes were unable or unwilling to provide due perhaps to a lack of finances, a lack of familiarity with their new governments, a lack of expertise, or the fact that the BIA was satisfactorily providing such services.

As a result, many tribal constitutions adopted in the 1930's, in enumerating delegated powers, delegated to the tribal government a fairly restricted scope of powers intended to permit the government to meet the modest and unambitious needs and desires of the tribes in the 1930's. Thus some failed to delegate powers to representatives over non-Indians, or over off-reservation rights. Some failed to vest any regulatory authority in the tribal government. In instances in which the tribal government is prevented from acting in the tribe's best interests because it lacks constitutionally authority inadvertently reserved, the tribe must amend its constitution. And generally, the amendment

of a constitution is a time consuming, expensive, and risky operation.

See discussion on tribal constitutions in D. Getches et al, Federal Indian Law, supra at 302-306.

The following are examples of the kinds of problems which can occur when a tribe's constitution enumerates the powers of the tribal government.

In 1980, the BIA advised the Lac Courte Oreilles Governing Board that the tribal constitution would have to be amended to delegate to the board power to legislate regarding child custody matters before the tribe's petition to reassume jurisdiction over such matters under the Indian Child Welfare Act could be approved. The letter states:

> The Band's constitution does authorize the Governing Board 'to establish a tribal court for the purpose of enforcing tribal ordinances'. Article V, Section 1, Clause (q). The constitution, however, authorizes the board to enact ordinances dealing only with assignment or lease of tribal lands, the conduct of business, the imposition of taxes or license fees, the exercise of tribal rights to hunt, fish, trap, gather wild rice, and other usual rights of occupancy, and the activities of hunting, fishing, ricing, trapping or boating by members and non-members. Article V, Section 1, Clauses (g), (n), (o) and (p).
>
> The power to enact tribal ordinances governing child custody matters is not among those powers which the constitution authorizes the Governing Board to exercise and, consequently, is among those reserved powers that may only be exercised through the adoption of an appropriate amendment to the constitution.

See Letter from Deputy Asst. Sec. of Indian Affairs to Chairman of LaCourte Oreilles Governing Board, dated April 2, 1980, reprinted in Indian Child Welfare Act: A Tribal Handbook 20-21 (Wisc. Judicare 1981), NILL No. 4462.

Similarly, by memborandum dated February 7, 1978, the Department of Interior Solicitor's Office notified the BIA of its conclusion that the constitution of the Ponca Tribe of Oklahoma did not authorize the governing body to exercise law enforcement powers. The constitution "limits the powers to be exercised by the Ponca Business Committee to those set forth in its corporate charter." The Solicitor concluded this delegation was of power to conduct business, and did not delegate the sovereign powers of a government to the governing body. Thus the BIA advised the Tribe that it would be required to amend its constitution before the BIA could certify that the Tribe exercised law enforcement jurisdiction for purposes of LEAA funding.

In Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976) the Court declared that it need not determine whether the Tribe had inherent criminal authority over nonmembers who hunt and fish in violation of tribal ordinances because the Tribe's constitution did not empower the governing body to apply tribal ordinances to non-members. "Consequently, the Quechan Tribe, if it had the power to try non-members of the tribe for violations of tribal law, has foresworn it." Id.

And in Crow Tribe v. Montana, 650 F.2d 1104, 1115 n.19 (9th Cir. 1981), the Court noted that the Crow tribal constitution disclaimed jurisdiction over lands outside the reservation boundary, and thus the tribe's ordinance levying a coal severance tax based on oil and gas removed from the tribe's mineral estate located outside reservation boundaries was disapproved by the

Secretary, pending constitution revision.

For tribes in the Tenth Circuit's jurisdiction, the failure of a tribal constitution, or ordinance to delegate to the tribal government the authority to provide a tribal judicial forum to non-Indians for the resolution of Indian Civil Rights Act claims will result in federal courts taking jurisdiction over such issues.

In Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981), the Tenth Circuit held that the principle in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) that federal courts have no jurisdictionover Indian Civil Rights Act calims does not apply when a non-Indian claimant is denied a forum by a tribe.

3. Ordinance Based Restrictions On Power.

And, in some instances, even though the tribal constitution does not restrict the power of the government in a particular matter, tribal ordinances may do so by not asserting the full measure of the powers vested in the tribal government by the constitution. For example, in United States ex rel. Cobell v. Cobell, 421 U.S. 999 (1975), the court held that the tribal court lacked jurisdiction over custody determinations incident to divorce actions because the tribal law and order code explicitly disclaimed jurisdiction over marriage, divorce, and adoption and deferred to state law and state jurisdiction in such matters.

Although, such problems are relatively easy to remedy as compared with constitutional limitations, it is well to be aware of the possibility of ordinance based limitations on tribal regulatory power in developing regulations.

4. Constitutional Provisions Requiring Approval of Tribal Ordinances.

Many tribal constitutions contain provisions which require that tribal ordinances in general, or tribal ordinances that relate to specified subjects, be approved. Some constitutions require such approval to be obtained by tribal referendum. Others authorize the Secretary of the Interior to approve ordinances in general, or ordinances which deal with certain subjects.

Generally approval by referendum is required as to subjects which are of great importance to tribes, such as distribution of tribal income or sale of tribal land. And approval by the Secretary is required as to subjects of great interest to the federal government, such as regulation or taxation of non-Indians. See, discussion of secretarial approval power in D. Getches, et al, Federal Indian Law, supra at 306-308.

It is well to be aware that secretarial approval of ordinances has, in some cases challenging the validity of such ordinances, been a factor which courts have weighed in favor of the tribe. See, e.g., Merrion v. Jicarilla Apache Tribe, ___ U.S. ___, 71 L.Ed.2d 21, 41 (1982) (tribal ordinance taxing non-Indians); cf. Nance v. Environmental Protection Agency 645 F2d 701, 715 (9th Cir. 1981) (EPA approval of tribal action establishing air quality standards for reservation).

V. LIMITATIONS ON THE EXERCISE OF THE TRIBAL REGULATORY POWER: THE INDIAN CIVIL RIGHTS ACT

A. The Act.

Assuming that a tribe has inherent sovereign power to regulate in a given instance, the exercise of the power is subject to the provisions of the Indian Civil Rights Act, 82 Stat. 77, 25 U.S.C. §§ 1301-1303 (ICRA). The ICRA protects any person subject to tribal jurisdiction, both members and nonmembers. The Act provides:

> § 1301. Definitions
>
> For purposes of this subchapter, the term--
>
> (1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
>
> (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and
>
> (3) "Indian court" means any Indian tribal court or court of Indian offense.
>
> § 1302. Constitutional rights
>
> No Indian tribe in exercising powers of self-government shall--
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

§ 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

Many of the provisions are relevant only to exercises of tribal criminal jurisdiction. The provisions which are relevant to the exercise of civil regulatory authority are 25 U.S.C. § 1302(1), (8), and (9). Section 1302(8), however, which prohibits tribes from denying "to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law" is the provision which is most likely to engender claims challenging

exercises of tribal regulatory authority.

B. ICRA Jurisdiction Is Primarily in Tribal Courts--Martinez.

The ICRA is enforceable primarily in tribal forums since the Supreme Court, in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), held that the ICRA does not confer jurisdiction on federal courts except as to habeas corpus jurisdiction over persons in tribal custody. However, the Tenth Circuit has held that if no tribal forum is available to nonmembers to assert an ICRA claim, the federal courts may assume jurisdiction over that claim. Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981). Martinez confirmed the basic principle established by pre-Martinez federal decisions that Congress did not intend, throught the ICRA, to impose on tribal governments the same standards imposed on federal and state governments by the federal due process and equal protection clause. Rather Congress intended to allow tribes to develop their own standards of due process and equal protection by balancing tribal views of individual rights against tribal views of tribal interests in maintaining the unique traditions, customs, and political values of the tribe. See, e.g., R. Johnson and E. Crystal, "Indians and Equal Protection," 54 Wash. L. Rev. 587, 616-625 (1979), NILL No. 4100; A. Ziontz, "After Martinez: Civil Rights under Tribal Government," U.C.D.L.Rev. 1, 1-9 (1979), NILL No. 4116, J. Lynch, "Indian Sovereignty and Judicial Interpretations of the Indian Civil Rights Act," 1979 Wash. U. L. Quarterly 897, 908-918 (1979), NILL No. 4409.

C. Relevant Precedents.

Notwithstanding the Martinez decision in 1978, there are apparently few decision of tribal courts construing the ICRA.[31/] "Very few civil matters are brought before Indian courts . . . . [Those that are brought are] mostly domestic relation cases and collection matters initiated against Indians." National American Indian Court Judges Association, Indian Courts and the Future (D. Getches ed. 1978), reprinted in D. Getches, et al., Federal Indian Law 313, 320 (1979). When civil cases do find their way into tribal courts, those courts are likely to turn to judicial precedents in federal and state courts for guidance in resolving issues, including issues under the ICRA, due to the lack of written and reported tribal court decisions. See, e.g., authorities cited in footnote ___, supra, and reported tribal court cases in I & II Tribal Court Reporter (American Indian Lawyers Training Program, Inc., 1980) (no longer in publication).

Until the Martinez decision, federal courts decided several cases under the ICRA. Therefore, in determining the standards by which tribal regulatory ordinances will be judged in tribal courts under the ICRA, it is advisable to be familiar with those decision.

31/ See, e.g., F. Cohen, Handbook of Federal Indian Law, 664, 664 n.4 (1982 ed.) (suggesting as a reason for the lack of tribal court civil decisions under the ICRA in the Navajo tribal courts the fact that ownership of land in the reservation is predominantly tribal reducing private property disputes); A. Ziontz, "After Martinez: Indian Civil Rights Under Tribal Government," 12 U.C.D. L. Rev. 1, 10-25 (1979) (suggesting the lack of a separation of powers in many tribal governments between the tribal legislative body and the tribal courts as making enforcement of ICRA by tribal courts unfeasible).

1. Federal Decisions Under the ICRA.

Pre-Martinez federal decisions show a "conscientious effectuation of Congress' intent to provide Indians with civil rights protection but minimize infringement upon tribal sovereignty." J. Lynch, supra at 913; see also R. Johnson and E. Crystal, supra at 620. Many of these decisions are cited and discussed in the following sources: see, J. Lynch, supra, at 913-915; R. Johnson & E. Crystal, supra at 620-625; D. Getches, et al., Federal Indian Law 337-338; F. Cohen, Handbook of Federal Indian Law 669-670 (1982 ed.).

2. Standards under the Federal Due Process and Equal Protection Clauses.

It is also advisable to be familiar with the standards established by the Supreme Court for testing the validity of federal and state governmental actions under the due process and equal protection clauses of the United States Constitution. See, e.g., J. Nowak, et al., Constitutional Law 385-450 (substantive due process); 476-514 (procedural due process); and 515-687 (equal protection); see also 1 Antieau, Municipal Corporation Law §§ 5.17-5.20 (1982). The following is a brief summary of the major principles in these areas.

Essentially procedural due process guarantees that there will be a fair decision making process before a government takes some action directly impairing a person's liberty or property.

> [O]ne should note the different elements of the adversary process which may be required as part of the "due process" which must be afforded to an individual when the government deprives

> him of life, liberty or the property. The essential elements are: (1) adequate notice of the charges or basis for government action; (2) a neutral decision maker; (3) an opportunity to make an oral presentation to the decision maker; (4) an opportunity to present evidence or witnesses to the decision maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case to the decision maker; (7) a decision based on the record with a statement of reasons for the decision. Additionally there are five other procedural safeguards which tend to appear only in connection with criminal trials or formal judicial process of some type. Those are: (1) the right to compulsory process of witnesses; (2) a right to pre-trial discovery of evidence; (3) a public hearing; (4) a transcript of the proceedings; (5) a jury trial. There will also be a question concerning the burden of proof which either the individual or the government must bear. Additionally there will be a question of the individual's right to appeal from an adverse decision by the initial decision maker. To date the Supreme Court has never found a right to appeal as inherent in the right to due process of law.

Nowak at 499.

Analysis of whether governmental action complies with the equal protection guarantee is similar to that used to determine compliance with the substantive due process guarantee. That is, the court will determine whether the legislation rationally relates to a legitimate end of government. Where the legislation burdens all persons equally, the law will be tested under the substantive due process clause. Where the legislation distinguishes between persons who are benefitted or burdened, the law will be tested under the equal protection clause because the question becomes whether the classification is a rational means to achieve the purpose of the law. See, e.g.,

Nowak at 383. When no fundamental rights are impaired by the legislation and no suspect classification is involved, i.e., a classification based on race, national origin, or alienage, the courts will uphold the legislation under the substantive due process and equal protection clauses if it arguably relates to a legitimate function of government. See Nowak at 384. As stated by the Supreme Court in a recent decision upholding a state statute banning retail sale of milk in plastic nonreturnable, nonrefillable containers, but not the sale of other nonreturnable, nonrefillable containers;

> [T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. [citations omitted].
>
> Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, [citation omitted], they cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable." [Citation omitted].
>
> Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981).

However, if fundamental rights are impaired or if suspect classifications are involved, the courts will conduct a "strict scrutiny" of the legislation to determine whether it is necessary to promote a compelling or overriding governmental interest. See, e.g., Nowak 380-384; Schael v. Borough

of Mount Ephraim, 452 U.S. 61, 68 (1981), striking down a zoning ordinance which prohibited live nude dancing as unjustified infringement of first amendment rights. In Shael, the Court said: "[A]s is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial governmental interest." Id.

The Court has also applied a middle level form of strict scrutiny to classifications based on gender or legitimacy. That is, the Court will not presume the validity of the legislation, but will independently review the basis for such classifications to determine if they reasonably (legitimacy) or substantially (gender) advance a legitimate (legitimacy) or important (gender) purpose. See, e.g., Nowak 601 and 608.

It should be noted that procedural due process has also been held to require that legislation "be sufficiently clear so as to provide adequate guidance to one who would be law-abiding." 1 Antieau, Municipal Corporation Law § 5.17 at 5-49 (1982). However, the due process clause does not require that notice be given or a hearing be held before a law is enacted, although such procedures are to be encouraged. Bowles v. Willingham, 321 U.S. 503, 519 (1944).

In summary, tribal courts are faced with the task of developing standards of review under the ICRA that properly balance tribal and individual interests. They are faced with the task of determining what individual rights should be

considered as fundamental to the welfare of tribal society, and thus entitled to greater than normal weight in the balancing process. They are also charged with the responsibility of identifying tribal interests which are legitimate subjects of tribal regulation. And, at least one commentator has raised the inevitable question concerning the extent to which tribes may, commensurate with the equal protection and due process clauses, justify legislation treating nonmembers differently than members, particularly in the areas of taxation and zoning. See, e.g., R. Johnson & E. Crystal, supra at 630-631. Another commentator has expressed concern over the ability of tribes to enforce the ICRA where the tribal legislature itself also functions as the tribal court, or where the tribal courts have no, or questionable, authority to review the validity of tribal legislation. See, e.g., Ziontz, supra at 10-28. In instances involving challenges to tribal legislation based upon the ICRA, a tribe might consider establishing a special independent tribal court empowered to hear such cases. The general concern is that if tribes fail to satisfy the congressional concerns which motivated the passage of the ICRA, Congress may be persuaded to impose even greater restrictions upon tribal sovereignty.