

Alternative Disputes Resolution in Inter-Jurisdictional Disputes

by Lynn H Slade

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ALTERNATIVE DISPUTES RESOLUTION IN INTER-JURISDICTIONAL DISPUTES: AN INDUSTRY PERSPECTIVE

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Lynn H. Slade

Modrall, Sperling, Roehl, Harris & Sisk, P.A.

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- **Introduction.** Natural resource development and industrial operations on Indian lands or within "Indian country" frequently present issues of conflicting or overlapping regulatory jurisdictions. It may be unclear whether federal, state, or tribal environmental regulators have primacy. Additionally, environmental regulatory issues may be inter-related with other issues, including taxation and adjudicatory jurisdiction. These disputes can be complex and unmanageable. Alternative dispute resolution may afford an opportunity to achieve workable solutions without compromising parties' broader interests.

- **Issues.** Inter-jurisdictional disputes within Indian country present a variety of inter-related issues. Jurisdictional issues are complicated by the United States Supreme Court's often subjective and unpredictable tests for determining the scope of tribal jurisdiction over non-members. Even within reservation boundaries, tribal vs. state jurisdiction can depend upon land status, population demographics, and historic regulatory patterns. Issues may include:
 - Whether a tribe has inherent sovereign regulatory authority over activities.

 - What role EPA will play and how its Indian policy will affect outcomes:
 - EPA has primary regulatory under EPA-administered programs within reservation boundaries.
 - Potential for EPA delegations to tribes pursuant to "treatment as state" (TAS) programs.
 - Effect of treatment-as-state programs under Clean Water Act, Safe Drinking Act, FIFRA; proposed TAS program under Clean Air Act, RCRA Subtitles C and D, but see Backcountry Against Dumps v. EPA, 100 F.3d 147 (D.C. Cir. 1996).

 - Other federal agencies may have jurisdiction:

- Bureau of Indian Affairs.
 - Bureau of Land Management.
 - Others.
- Potential role for state law or regulation in on-reservation land use planning, potential regulation, common law depending upon land use, population patterns. See *Brendale v. Confederated Tribes of Yakima Indian Reservation*, 492 U.S. 408 (1989). In off-reservation areas, impacted with Indian population landholdings, greater potential for application of state law and regulations.
- Unpredictable regulatory patterns create potential for conflicting or inconsistent standards and complicate task of determining applicable regulatory standards.
- Uncertainties regarding dispute resolution:
 - Industry often inexperienced with tribal courts.
 - Supreme Court suggests narrow limits on tribal adjudicatory powers, at least over issues arising on non-member fee lands. See *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997).
- A difficult dialogue:
 - Tribes sensitive to jurisdictional challenges.
 - Industry reluctant to submit to relatively unpredictable tribal jurisdiction with uncertain judicial review.
 - However, tribes and industry often have complementary interests in economic development, sound and predictable regulatory patterns protecting tribal environments.
- Using ADR to Resolve Inter-Jurisdictional Disputes in Indian Country.
 - ADR can bring competing sovereigns, agencies, affected industry and public together at the same table.
 - May develop information critical to each participant.
 - Identifies common interests.
 - Allows parties to isolate and weigh significance of jurisdictional complexities.
 - May resolve objections within consultative process.

- Reduce delay and expense necessary to resolve jurisdictional uncertainty through litigation.
- Impediments to Negotiated Solutions.
 - Inexperience among participants in resolving Indian country jurisdictional issues in open settings.
 - Mistrust and lack of information.
 - Parties' unwillingness to compromise on jurisdictional positions.

 - Difficulty in implementing issue-by-issue resolution.
 - Difficulties in crafting enforceable agreements reflecting outcomes.
- Keys to an Effective Alternative Dispute Resolution.
 - Involve appropriate participants:
 - Appropriate tribe.
 - Affected industries.
 - Affected communities.
 - Necessary federal agencies.
 - Involve disinterested mediator/facilitator with cross-cultural experience who can be trusted by all parties.
 - Understand the setting:
 - Industry must understand tribal interests, perspectives, history.
 - Select negotiators who can bridge cultural differences.
 - Recognize legitimate interests.
 - Build on common interests.
 - Plan for extended negotiations.
 - Agreements reflecting outcomes must be drafted carefully in light of Indian law considerations.

