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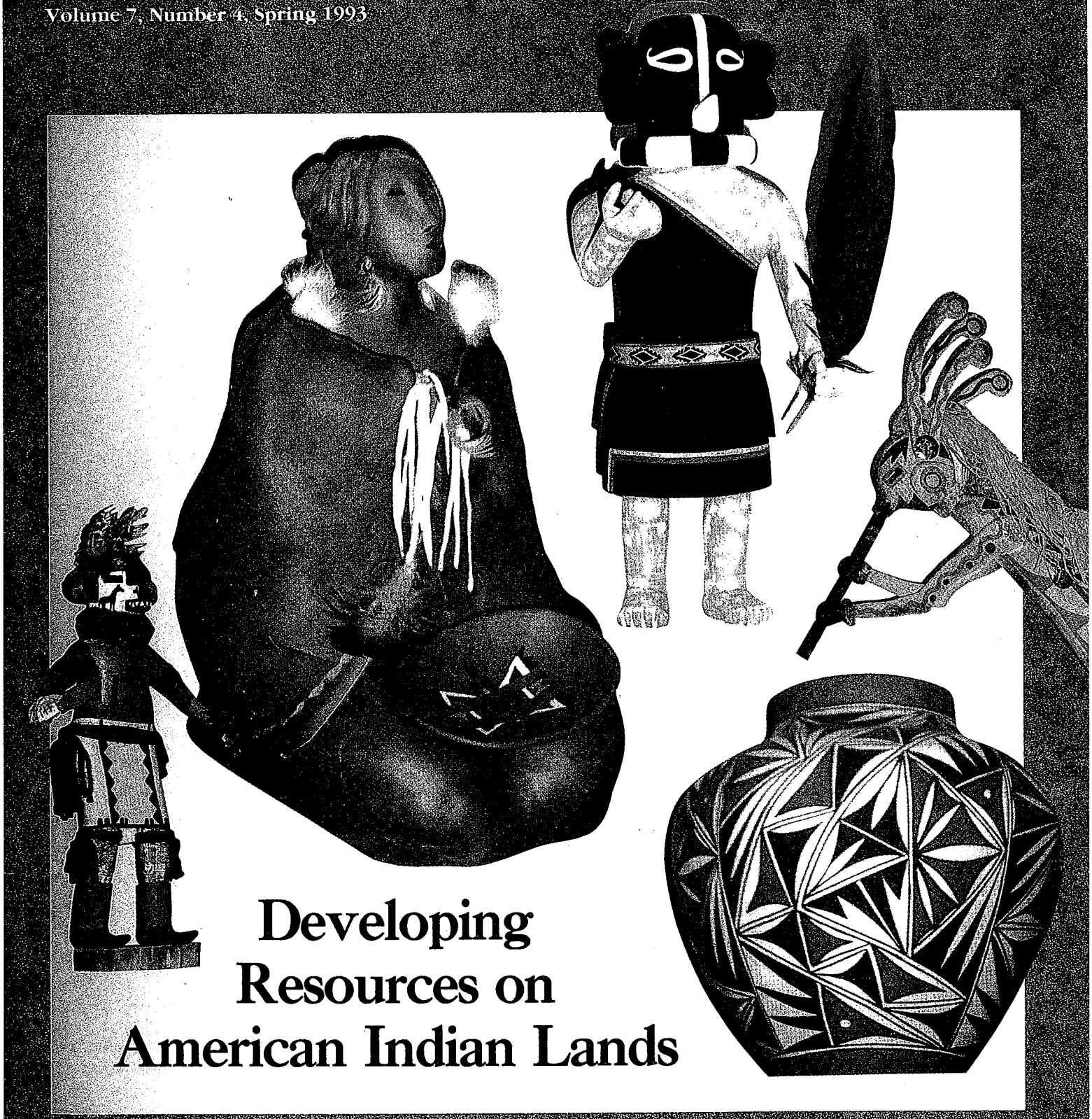

Developing Resources on American Indian Lands

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Environmental Regulation on Indian Lands: A Business Perspective

Walter E. Stern

Regulation of environmental quality and natural resource development activities on Indian lands will significantly affect the quality of the reservation environment and the vigor of the reservation-based business community. While Indian tribes occupy a pivotal position in the environmental regulation of business activities on Indian lands, state and federal governments also play an important role. This article outlines the federal law that allocates environmental regulatory authority to federal, tribal, and state governments, and describes the unique jurisdictional and environmental regulatory considerations affecting businesses on Indian lands.

The scope of tribal, state, and federal environmental regulatory jurisdiction over natural resources development and other business activities on Indian lands eludes precise definition. Federal, state, and tribal governments each have certain regulatory powers. However, the unique attributes of tribal sovereignty, which may vary from tribe to tribe, and the ill-defined relationships between tribes, states, the federal government, and private business give rise to uncertainties as to the specific contours of regulatory authority. Regulatory power will vary depending on the nature of the project, the specific status of the tribe involved, ownership status of the lands involved, demographics of the reservation and the area affected, whether the lands are on- or off-reservation, and other factors. A reality for the present, jurisdictional uncertainties and the potential for overlapping and conflicting regulatory schemes are counterproductive to sound environmental regulation and efficient resource and business development. Yet, despite these regulatory uncertainties, productive opportunities abound for business development on Indian lands, if carefully conceived.

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Tribal Regulatory Authority

Indian tribes, long considered both sovereigns and wards subject to the supervision and protection of the federal government, derive powers from three principal sources: inherent tribal sovereignty, treaties with the United States, and delegation from the United States Congress. *See Montana v. United States*, 450 U.S. 544, 563–65 (1981). While treaties may create or secure important tribal powers over natural resources and business activities, *see* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 67 (1982 ed.), inherent sovereignty and congressional delegation provide the lion's share of tribal regulatory authority. In a trilogy of opinions, which have stood the test of time in large degree, Chief Justice John Marshall in the early 1800s established that tribes, independent nations before European colonization, possessed powers of inherent sovereignty. *See, e.g., Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). However, by virtue of Indian tribes' status within the federal system, their inherent sovereign powers are diminished. "Tribal sovereignty is subject to limitation by specific treaty provisions, by [federal] statute, . . . or by implication due to the tribes' dependent status." *Babbitt Ford, Inc. v. Navajo Tribe*, 710 F.2d 587, 591 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984).

Business development on reservations can occur on tribal lands (owned in fee by a tribe or held in trust by the United States for the benefit of the tribe), on lands owned by individual Indians called allotments (usually held in trust for the benefit of the allottee by the United States), or on privately owned fee lands that lie within reservation boundaries. Land ownership status may be a significant determinant of jurisdictional authority. While inherent tribal powers to regulate non-Indian activities on the reservation are well established, the scope of these powers continues to evolve. Generally, tribes 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." *Montana*, 450 U.S. at 565. A tribe also retains "inherent power to exercise civil authority over the conduct of non-Indians on [private] 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." *Id.* at 566.

Tribal assertions of regulatory jurisdiction over non-Indians have extended into certain spheres of environmental regulation and protection. *See, e.g., Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982) (zoning); *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982) (health and safety). Other areas remain unexamined by the courts. However, recent Supreme Court decisions suggest significant hurdles may confront tribal regulation over non-Indians, absent a congressional delegation of authority. *See Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

In addition to other factors, reservation boundaries and land titles play a role in delineating or limiting tribal powers. The U.S. Supreme Court emphasizes there is "a significant geographical component to tribal sovereignty. . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Absent a treaty provision or express congressional delegation of authority, tribal powers extend only to the reservation boundary. Some tribes, however, assert jurisdiction over non-Indian off-reservation activities. For example, the Navajo Tribe asserts taxing jurisdiction over the "Eastern Navajo Agency" area to the east and south of its reservation. An explication of the Tribe's theories is beyond the scope of this article. These issues are the subject of ongoing litigation. *See Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990). Nonetheless, developers should be aware that tribes may assert off-reservation jurisdiction in certain circumstances.

Little judicial precedent exists concerning inherent tribal authority to regulate clean air, clean water, and hazardous waste. However, these areas are the subject of congressional delegations to tribes.

Delegations of regulatory authority by Congress through the United States Environmental Protection Agency (EPA) to tribes represent the second major source of tribal regulatory power. In recent years, Congress has authorized delegations of regulatory authority to tribes under a growing number of environmental regulatory statutes. For example, the 1990 Clean Air Act Amendments provide tribes with sweeping new authority to regulate air quality matters on the reservation. Under the 1990 Amendments, the EPA Administrator is authorized to treat tribes as states. 42 U.S.C. § 7601 (1988 & 1990 Supp.). The same is true under the 1987 Amendments to the Clean Water Act (CWA), where EPA may delegate to tribes responsibility for National Pollutant Discharge Elimination System (NPDES) permitting, dredge and fill permitting, and water quality standard setting. *See* 33 U.S.C. § 1377(e) (1988). Regulations implementing these CWA provisions were issued December 12, 1991, 56 Fed. Reg. 64,876 (1991). The preamble to the regulations describes EPA's view of the nature of the authority "delegated" to tribes.

Congress has authorized delegation of authority to tribes under other environmental regulatory and protection statutes, including the Safe Drinking Water Act Amendments of 1986 (SDWA), 42 U.S.C. §§ 300f–300j-12 (1988), and the "Superfund" statute, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675 (1988 & 1991 Supp.). While federal delegations to tribes are increasingly prevalent in the environmental protection area, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6987 (1988), which governs transportation and storage of hazardous wastes, does not yet contemplate a regulatory role for Indian tribes. *See Washington Department of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985). Congress currently is considering amendments to RCRA that would authorize regulatory authority delegations to tribes.

"Treatment as states" provisions are increasingly common in federal environmental legislation, and put tribes on an equal footing with states, in many respects, for purposes of delegating regulatory program authority. Such treatment is available when tribes demonstrate to EPA the ability to administer the regulatory program effectively. However, delegations to tribes are not always as comprehensive as comparable delegations to states. As a result, questions arise as to whether states and/or EPA should fill the gap or whether tribes should be able to regulate under the auspices of inherent authority. Often, EPA retains regulatory primacy over Indian lands projects.

As noted, EPA administers environmental regulatory delegations to tribes. EPA policy toward tribal environmental regulatory authority is described in the policy statement EPA Administrator William D. Ruckelshaus issued on November 8, 1984. Principles embodied in EPA's Indian policy include, among other things, EPA promotion of (1) tribal self-determination and self-government, (2) tribal regulatory primacy where tribes demonstrate the appropriate administrative and technical capabilities, (3) development of tribal regulatory and technical expertise, and (4) cooperation between states and tribes to amicably resolve environmental protection issues of mutual concern.

In July 1991, William K. Reilly, EPA Ad-

Congress has authorized delegations of regulatory authority to tribes under a growing number of environmental regulatory statutes.

ministrator under President Bush, reaffirmed the 1984 policy and embraced a "concept paper" addressing the respective roles of federal, state, and tribal governments. Among other proposals, the concept paper encouraged states to assist tribes in developing expertise and program administration capability. The paper also promoted cooperative agreements between states and tribes to facilitate consultation, information sharing, joint program administration, expertise development, and related matters.

State Regulatory Authority

In addition to tribal and federal regulation, business development on Indian lands may have to contend with state regulation. Indian tribes have emerged from a long era of paternalistic "protection" by their federal trustee to assume responsibility for developing sound reservation economies and securing healthy reservation environments. However, as tribes develop regulatory expertise and as the federal trustee appears increasingly to defer to tribal leaders' judgments, state regulators also seek to extend state authority onto reservation lands. Tribal authority does not foreclose state authority, and vice versa. Yet such concurrent jurisdictional regimes yield a host of potential complications for business development and for effective environmental protection.

At present, the extent of state authority over non-Indians doing business on reservations is "riddled with inconsistencies and major questions that are still unresolved." COMMISSION ON STATE–TRIBAL RELATIONS, HANDBOOK: STATE–TRIBAL RELATIONS 17 (1984). (While published in 1984, the quoted statement remains valid today.) As with tribal authority, the scope of state environmental regulatory jurisdiction over reservation-based activities varies with the circumstances. Recently, the U.S. Supreme Court announced that states may tax the reservation-based oil and gas production of non-Indian lessees of Indian lands, notwithstanding that the tribe already taxes the activity. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). Unanswered by *Cotton Petroleum* is the question whether the Court would analyze regulatory issues in the same fashion as tax matters. *Cotton Petroleum* suggests that state tax jurisdiction commands an analysis different from state regulation. Nonetheless, *Brendale*, *supra*, allows states and local governments to regulate use of fee lands inside reservation boundaries in certain circumstances. These decisions bolster the exercise of state jurisdiction over non-Indian on-reservation activities.

Two interrelated inquiries control questions of state jurisdictional authority. First, states may not infringe upon tribal rights of self-government. *Williams v. Lee*, 358 U.S. 217, 220 (1959). Second, federal policies promoting reservation economic development and tribal self-sufficiency limit state authority over Indian matters. These two concepts are now applied in tandem through a balancing of federal policy, state interests, and tribal interests. *See, e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). Unfortunately, the tests to determine state jurisdiction present more of a field day for lawyers than they provide concrete guidance to the businessperson looking for regulatory certainty.

The fact-specific nature of jurisdictional determinations must be considered by businesses seeking to develop or manage tribal resources. Determining if state jurisdiction is ousted in the environmental regulatory area involves factors such as (1) land, reservation, and tribal status; (2) federal delegation to tribes or states; (3) federal regulatory schemes generally; (4) the nature of the regulated community; and (5) state, federal, and tribal environmental protection and policy interests. At present there may be no way to assure a developer whether or not state jurisdiction applies over a development project.

The Tribe as Active Business Partner and Environmental Regulator

A tribe that would implement environmental regulation, while seeking to further economic development, must recognize the needs of business for reasonable and predictable regulation. A would-be developer on tribal lands, whether Indian or non-Indian, must structure a proposal that accommodates tribal, state, and federal interests, and work with the various jurisdictions to develop a clear understanding of the regulatory environment.

Gone are the days when most tribes participated in reservation economic development only by passively receiving royalty revenue. While tribes each have unique motivations and degrees of sophistication, tribal leaders increasingly view their roles as stewards of reservation economies and environments. *See* M. AMBLER, BREAKING THE IRON BONDS: INDIAN CONTROL OF ENERGY DEVELOPMENT 172–203 (1990). A development proposal must accommodate tribes' concerns over the long-term quality of reservation environments, and recognize the expanding scope of possible tribal environmental regulatory powers.

A central question for the developer should be whether it would prefer tribal environmental or land-use regulation to state or federal reg-

Unfortunately, the tests to determine state jurisdiction present more of a field day for lawyers than they provide concrete guidance to the businessperson looking for regulatory certainty.

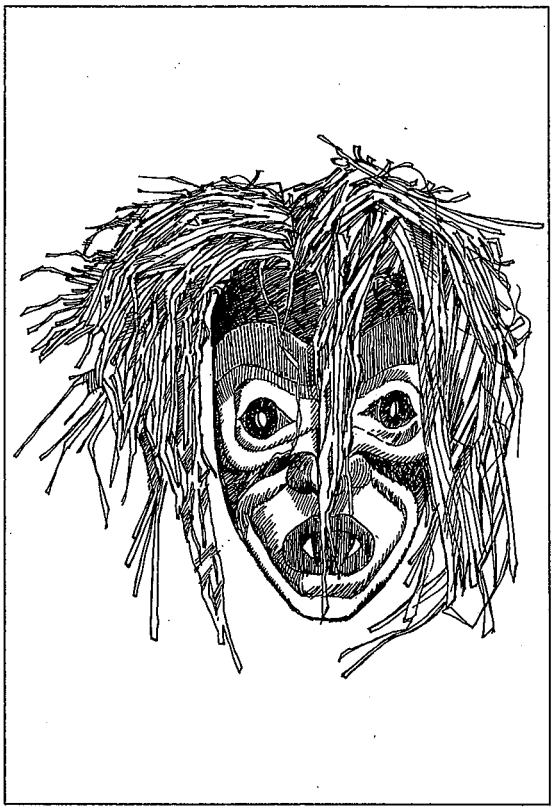
ulation. To answer the question, natural resources developers and other businesses must first ascertain the tribal political climate, looking both at tribal leaders and the tribal membership. Investigation of the tribe's leadership, attitudes, and governmental experience should precede any proposal. Tribal leaders are not always insulated from grass-roots political influences that kill well-conceived projects elsewhere. The recent experience of numerous waste disposal project developers, who sought unsuccessfully to develop waste disposal projects on countless Indian reservations, demonstrates that tribes will not accept proposals that do not address the tribe's larger economic, social, and environmental interests.

The developer should be prepared to demonstrate that the project will be environmentally sound, both in the short and long term. The developer's financial strength and commitment, planned environmental precautions, controls, and intended employment of tribal members, and long-term reclamation and monitoring commitments, backed by financial and technical guarantees, will be material. The developer also will likely need to consider an agreement to indemnify the tribe and its members against environmental risks.

The developer should determine what environmental regulatory or land-use programs the tribe has in place and should consider those the tribe may seek to assert over the project. Has Congress authorized EPA to delegate regulatory authority to the tribe to enforce federal environmental statutes that will affect the project? Is EPA considering a delegation to the tribe?

The developer should examine whether the tribe will have any regulatory authority over the project. Will the project be sited on tribal or allotted lands or will it be on non-Indian fee lands within the reservation? Has the reservation become "checkerboarded" by the issuance of allotments or the patenting of homestead or railroad lands within the reservation? These factors could affect whether the tribe can successfully assert regulatory authority.

If the tribe regulates or seeks to regulate the environmental impact of the development, the developer should assess the reasonableness of the likely regulation and whether the business will be able to enforce claims for fair treatment. Does the tribe have a court system? An administrative procedure act? Can tribal judges be removed or disqualified? What is the track record of tribal courts or administrative agencies in treating business fairly when the tribal government is the opponent? The answers to these various questions will inform the approach the project proponent chooses to follow in structuring a development proposal.



While tribes may have economic interests that coincide with the success of a proposed development, a developer and tribal leaders should examine carefully whether tribal regulatory agencies are sufficiently independent from tribal economic interests to ensure that tribal regulations serve only environmental purposes. Tribal regulators and economic managers must wear different hats.

Tribes also must be prepared to work with developers. Tribes should seek input from industry in developing tribal regulatory programs, and should structure those programs to ensure continued opportunity for the regulated community to comment and participate. Tribes should recognize the legitimate interest of business in administrative and judicial review that affords meaningful protection in disputes with the tribe.

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Tribe and State Cooperation in Environmental Management

A conflict between tribes and states for regulatory power over Indian lands has raged since at least 1832, when Chief Justice John Marshall ruled that Georgia could not regulate non-Indian missionaries on Cherokee lands. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). As

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in his *Merrion* dissent, Justice Stevens explicitly recognized that nonmembers cannot participate in tribal government through the ballot box, and receive no constitutional protection from the actions of such governments through the Bill of Rights. *Id.*

To be sure, Justice Stevens also explicitly recognized in his dissent that tribal governments have the power to exclude nonmembers from Indian-owned lands, and can thus place conditions upon their remaining on that land, such as the payment of tribal taxes. However, he believed this source of power had in effect been voluntarily surrendered by the tribe in *Merrion* when it entered into leases with the oil and gas producers it was attempting to tax.

Justice Stevens' approach in *Brendale* represents, admittedly, an exception to the rule he would have applied in *Merrion*. However, it in no way represents a repudiation of that general rule, or of the reasoning behind it, as expressed in his *Merrion* dissent. Rather he finds a narrow exception to that rule, grounded upon congressional intent that tribes be allowed to preserve the existing pristine character of tribal lands if, in fact, such character still exists. The tribal power which he finds is, in short, very narrow and specific in purpose and scope. Thus, the approach of Justice Stevens is not just a modified version of the "territorial" approach of Justice Blackmun in *Brendale*. It is fundamentally different, and is thus limited, not just geographically, but also in the type of tribal power that it confers.

Assuming our analysis of Justice Stevens' position is correct, we may hazard some predictions of what that position would mean as a practical matter. It would mean, for example, that even in a "closed area" a tribe could not tax nonmembers or their property, because such taxing power would hardly be necessary to preserve the character of the area. It might mean, however, that the tribe could regulate the fish and wildlife resources within this area if it could show that such regulation is necessary to preserve such resources, which are migratory in nature, on the Indian-owned land. *Cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

It might mean also a very limited and indirect control over other resources as well. For example, if a coal company owned a deposit which it wished to strip mine and then transport outside the reservation through a coal slurry, the tribe might well be able to prevent such an operation. This would not be because of any general regulatory authority over the exploitation of the coal resource or over non-*Winters* water rights; rather, it would be because the specific operation would change the character of the area in question. The coal slurry and the strip mining operation would simply be incompatible with the pristine character of that area.

A final comment. The Court will soon revisit the same basic question of tribal civil jurisdiction over nonmembers that left the Court so fractured in *Brendale*. *See South Dakota v. Bourland*, 949 F.2d 984 (8th Cir. 1991), *cert. granted*, 113 S. Ct. 51 (1992). The Eighth Circuit there held that the Sioux Tribe has jurisdiction to regulate hunting and fishing on land previously owned by the tribe but taken by the United States as part of a flood control project. Justices Souter and Thomas, who became members of the Court after *Brendale*, will have the opportunity to decide which of the positions in the *Brendale* debate they will now take. They thus have as well the opportunity to resolve that debate and to provide the guidance so sorely lacking after *Brendale*. Indeed one cannot avoid the suspicion—and the hope—that this is precisely why the Court decided to review the case.

The tribal power which [Justice Stevens] finds is, in short, very narrow and specific in purpose and scope.

Environmental Regulation

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noted, states recently have experienced a rejuvenation of their power to tax or regulate reservation activities. This development and other factors have moved state environmental regulators to resist tribal environmental and land-use regulations during a period when tribes also are seeking to expand their regulatory powers.

Businesses subject to environmental regulation sometimes have been caught in the cross fire between these competing sovereigns. Predictability of the environmental regulation with which a business will need to comply is critical to successful planning and establishment of any business which affects the Indian lands environment. Uncertainty over whether state or tribal regulation or both will govern an aspect of a project creates risks that a project designed to comply with one sovereign's regulations will be deemed unfit under those of the other. To date, the United States Supreme Court has resolved those contests with unpredictable balancing tests, rather than with "bright lines." The resulting uncertainty is particularly acute in checkerboard areas, where Indian and non-

Indian landholdings and populations are interspersed.

Tribes and states often have addressed similar dilemmas in the law enforcement area by "cross-deputization" agreements. Under such schemes, tribal police and state or municipal police are authorized, within defined geographic spheres, to exercise powers of the other sovereign. This permits the law enforcement officer on the scene to handle the matter without being stymied by reservation boundary lines or tract ownership questions that would otherwise affect jurisdictional authority.

States and tribes should not allow competition for jurisdictional primacy to override the need for uniform and predictable environmental regulation.

The same principle can be applied in the environmental area. State and tribal regulations should agree that the standards of the tribal or state agency are appropriate to govern particular environmental concerns, and one agency should agree that the other will have regulatory primacy. Usually called "cooperative agreements," these intergovernmental contracts can alleviate developers' uncertainty over which regulatory authority to obey. A sound cooperative agreement should, among other things (1) specify the precise scope of the agreement, (2) provide for the nonregulatory government to have notice and a right to comment on all proposals to change the regulatory scheme, (3) set forth agreements for any sharing of the cost of regulation, (4) reflect agreements as to the regulatory standards to be applied, (5) reflect agreements for dispute resolution arising under the cooperative agreement, and (6) recognize that entry into the cooperative agreement does not waive or qualify the governmental power of either party that would exist absent such an agreement. Many other matters can and should be addressed in a cooperative agreement, including the sharing of technical or legal expertise and personnel.

States and tribes should not allow competition for jurisdictional primacy to override the need for uniform and predictable environmental regulation. Rather, they should work together, with EPA assistance, to provide effective environmental regulation on Indian lands. Both should explore using cooperative agreements to allocate jurisdiction over environmental regulation. Developed expertise in the regulatory skills required, availability of resources to implement and maintain a sound program, and commitment to effectively discharging regulatory duties in the area concerned—not intragovernmental geopolitical concerns—should determine which sovereign should regulate.

Environmental regulation on Indian lands presents a complex pattern of federal, tribal, and state jurisdictional authorities. Careful analysis and planning are necessary to implement successfully business development that may affect the environment on Indian lands. Business and regulators must work cooperatively and creatively to prevent uncertainty over future regulatory requirements from becoming yet another impediment to developing tribal economies.

Waste on Indian Lands

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cial waste projects on Indian lands is preventing and minimizing environmental liability. Because environmental liability can be incredibly expensive, it is critical for tribes and developers to understand the liabilities that apply not only to commercial solid waste and hazardous waste disposal projects, but also to leases and other economic development transactions involving tribal land. The parties to such transactions should carefully consider the likelihood of liability being imposed and structure their arrangements to minimize exposure, to maximize their ability to deal with the exposure, and to reduce the chances of a discharge or other event creating liability.

One should assume that RCRA and CERCLA liability applies to anyone who buys, sells, leases, develops, or manages land, including tribal land.

One should assume that RCRA and CERCLA liability applies to anyone who buys, sells, leases, develops, or manages land, including tribal land. These liabilities may arise whether a tribe or developer knew about the problem and contributed to it or not. EPA may enforce its waste laws and regulations against generators, transporters, and owners and operators of hazardous waste treatment, storage, and disposal facilities and against any person operating an open dump. Moreover, under CERCLA, owners and operators are strictly liable (negligence, intent, and fault are irrelevant) and jointly and severally responsible for releases of hazardous substances from a facility, even if no damage has occurred. "Releases" are broadly construed and may even include threatened releases or merely moving barrels of the hazardous substances, and virtually anything can be considered a "facility." Developers must realize that reservations do not insulate them from liability under the federal environmental laws, and they remain subject to the same liabilities under these laws as they would be subject to if the projects were located off of the reservations.