ENVIRONMENTAL LAW & INDIAN LANDS

Gregory P. Crinion and Tracey Smith Lindeen

The increased self-government of the American Indian tribes has resulted in a tug-of-war over the jurisdictional authority of the federal, state and tribal governments to regulate activities that affect the environment on tribal lands.

American Indian tribes are assuming an increasing role in regulating activities that affect the air, water and land on tribal reservations. This expanding role results, in part, from efforts of the tribes to protect tribal lands through regulatory means.

This expanding role also results from President Reagan's 1983 Federal Indian Policy encouraging American Indian tribal self-government. The federal Environmental Protection Agency (EPA) followed in 1984 with its Indian policy in which it stated that it will "give special consideration to Tribal interests in making Agency policy, and ... insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands."[2]

A consequence of this changing role of the American Indian tribes has been conflict over the jurisdictional authority of the federal, state and tribal governments to regulate activities that affect the environment on tribal lands. This conflict is illustrated by the continuing litigation between the state of Wisconsin and the EPA over EPA delegation of authority to tribes in Wisconsin to impose water quality standards concerning waters on reservation lands.

This article discusses the jurisdictional authority of the federal, state and tribal governments to regulate activities affecting the environment on tribal lands. This article also describes the jurisdictional authority conveyed to state and

tribal governments through the federal government's delegation of authority to implement federal environmental programs that apply to tribal lands.

Federal environmental law

American Indian tribes are sovereign nations whose sovereignty is limited only by treaties, federal law, and through implication due to the tribes' dependent status upon the federal government.[3] Congress has plenary authority to legislate for the tribes in all matters, and where Congress indicates that tribes are subject to a given law, no tribal sovereignty exists to bar the reach or enforcement of that law as against the tribes.[4]

The American Indian tribes generally are subject to federal laws, and the courts have enforced federal environmental laws against the tribes for matters on tribal lands. In one case, two members of the Oglala Sioux Tribe sued the tribe, the EPA, the Bureau of Indian Affairs (BIA) and the Indian Health Service, complaining that reservation garbage dumps were maintained in violation of the federal Resource Conservation and Recovery Act (RCRA). The district court held that "Indian tribes are regulated entities under RCRA," and entered judgment in favor of the plaintiffs and against the tribe, the BIA and the Indian Health Service requiring them to submit a plan to bring the garbage dumps into compliance with RCRA.[5]

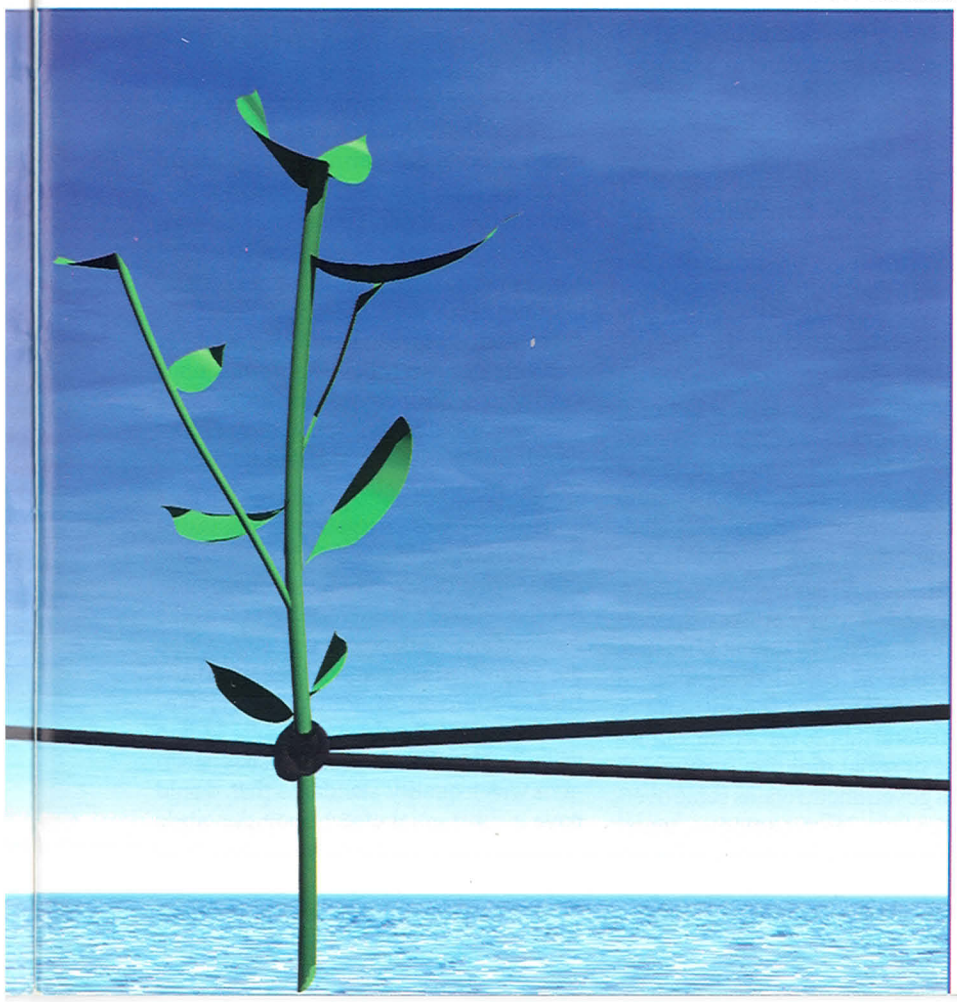
The federal environmental laws also have been applied to non-Indians on tribal lands. In the foregoing case, the court of appeals upheld the district court's judgment against the BIA and the Indian Health Service, as well as the tribe, for violating RCRA. Likewise, the federal Superfund law has been applied to both tribal members and nonmembers in connection with environmental impacts upon tribal lands.[6]

State environmental law

States have been allowed to regulate activities of nontribal members on tribal lands.[7] However, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States," and only the federal government may limit a tribe's exercise of its sovereign authority.[8] Consequently, states generally are precluded from exercising jurisdiction over tribal members on tribal lands unless Congress has clearly expressed an intention to permit that assertion of jurisdiction.[9]

There is no per se rule precluding state jurisdiction over tribes and tribal members in the absence of express Congres-

Illustration: Bob Schuchman



The State of Wisconsin has filed a series of lawsuits challenging the federal Environmental Protection Agency's decisions to give Indian tribes authority to set water quality standards for waters on reservation lands. The state has asserted that the decisions intrude on its sovereign authority to make decisions about public resources in the state. It has argued in the latest lawsuit that the Indian tribe lacks authority to set water quality standards and that the standards approved by the EPA are invalid because they give the tribe authority to regulate off-reservation activities affecting waters on the reservation.[1]

sional consent. Rather, state jurisdiction is preempted "if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." That analysis is undertaken in light of traditional notions of American Indian sovereignty and the Congressional goal of American Indian self-government.[10] Whether, under this balancing test, a state may exercise jurisdiction over the activities of tribal members having environmental impacts upon tribal lands requires a detailed examination of the proposed state legislation and the countering federal and tribal political and economic institutions and interests.

Tribal environmental law

The American Indian tribes "remain a 'separate people, with the power of regulating their internal and social relations,' ... [making] their own substantive law in internal matters, ... and ... [enforcing] that law in their own forums[.]"[11] Thus, a tribe may enact rules to protect the environment on tribal lands and enforce those rules against members of the tribe.

Whether American Indian tribes also have the inherent sovereign power to exercise jurisdiction over non-Indians on reservation lands is a more controversial issue. The tribes have jurisdiction to regulate the activities of non-Indians who enter into consensual relations with the tribe or tribal members. Tribes also may have the inherent sovereign power to exercise jurisdiction over the conduct of non-Indians on reservation lands when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[12] Tribal jurisdiction over non-Indians on reservation lands is presumed in the absence of affirmative limitations in federal treaties and statutes, but that jurisdiction arises only when the nonmember enters upon tribal lands or conducts business with the tribe.[13]

Gregory P. Crinion, U.W. 1985, and Tracey Smith Lindeen, Texas 1985, are partners in the law firm of Jackson & Walker, L.L.P., resident in the firm's Houston, Texas, office. Crinion concentrates in the defense of environmental and toxic tort claims. Lindeen concentrates in environmental law compliance, transactions and counseling matters.

Tribal jurisdiction over nonmembers has been held to include the right to tax economic activities and control economic development within tribal boundaries, regulate riparian rights of non-Indians owning land within reservation boundaries, control hunting by nonmembers on tribal fee lands, and impose health and safety laws against non-Indian merchants on non-Indian fee land within a reservation.[14]

Tribal jurisdiction over nonmembers on tribal land is by no means unlimited.[15] Moreover, tribal sovereignty also may be restricted through preemption by federal law. For example, one tribe's attempt to require Northern States Power Company to obtain a license to transport nuclear materials over reservation lands in Minnesota was rejected because the tribal ordinance greatly exceeded the provisions of the federal Hazardous Materials Transportation Act and caused inconsistency between the tribal law and the federal law which the federal law was intended to prohibit.[16]

Determining the extent of a tribe's jurisdiction requires a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested or diminished, and a detailed study of relevant statutes, executive branch policies, and administrative and judicial decisions.[17]

Delegation of federal environmental authority to Indian tribes

In addition to their original jurisdictional authority to regulate environmental activities on tribal lands, American Indian tribes may obtain certain authority from the federal government to implement federal environmental laws on tribal lands.

Under the federal environmental laws, states and tribes may undertake responsibility to regulate environmental matters through either a federal delegation of authority to enforce the federal laws or through federal approval of an authorized state or tribal program over which the federal government retains some oversight authority. For example, under RCRA, a state may apply to the EPA for authorization to implement its own program. The EPA must authorize the proposed state program if it is equivalent to the federal program. Where a state program is in effect, the EPA retains certain oversight and enforcement powers.[18]

When the major federal environmental laws were first enacted, they provided for delegation to states, but did not include explicit references to American Indian tribes in their delegation provisions. Between 1986 and 1990, three of these laws were amended to allow tribes to be treated as states for purposes of implementing regulatory programs. In general, the "tribes as states" provisions under these laws require a tribe to demonstrate that it meets three criteria in order to be treated as a state:

1) the tribe must have a governing body carrying out substantial governmental duties and powers;

2) the functions to be exercised by the tribe must pertain to managing and protecting resources that are held by a tribe, in trust for American Indians or within the borders of a reservation; and

3) the tribe must be reasonably expected to be capable of carrying out its functions in a manner consistent with the statute and its regulations.[19]

There are limitations on the authority of American Indian tribes to enforce the criminal penalties of the federal statutes.[20] The EPA has noted these limitations and has indicated that it will retain responsibility for those enforcement obligations that a tribe is not permitted to perform when the EPA approves requests for delegation to a tribe.[21]

As the various states and tribes have sought permission to implement federal environmental laws, there have been conflicts and disagreements over whether the states or the tribes should have authority to control environmental matters affecting tribal lands. Some of the recent developments in this area are discussed further in this article.

Authority over upstream wastewater discharges. The right of an American Indian tribe to regulate water quality under the federal Clean Water Act was the focus of a recent court decision in which the city of Albuquerque challenged the EPA's approval of water quality standards set by the Isleta Pueblo Indian tribe.[22] The tribe had established stringent water quality standards that would have a substantial effect upon the city's upstream wastewater discharge to the Rio Grande.

Albuquerque argued that the tribe's

standards would be technically unattainable. Nevertheless, the court held that the EPA may not reject stringent standards on the grounds of harsh economic or social effects. The court also concluded that the tribe could designate ceremonial use as a basis for its water quality standards, even though the city argued that this would be a violation of the Constitution's Establishment Clause. Finally, the court held that the EPA could approve tribal water quality standards that were more stringent than those established by the federal government. In contrast to some of the litigation between the state of Wisconsin and the EPA, the authority of the tribe to control the actions of non-Indian, off-reservation wastewater dischargers such as Albuquerque was not directly raised.

Authority over air quality and permitting. Many of the major programs under the federal Clean Air Act are implemented through a cooperative partnership between the states and the EPA. Under this form of implementation, the EPA issues national standards and the states assume primary responsibility for implementing them. Although states must meet minimum federal standards to have their proposed programs approved, they may tailor their programs for state-specific needs. An example of this cooperative federal/state arrangement is Title V of the Clean Air Act which contains requirements for an operating permit program.

The EPA issued its proposed Air Quality Planning and Management Rule for Indian tribes in 1994. The proposed rule sets forth the Clean Air Act provisions for which the EPA believes it is appropriate to treat American Indian tribes as states, establishes the requirements that tribes must meet if they choose to seek such treatment, and provides for awards of federal financial assistance to tribes.[23]

The EPA proposes to interpret the Clean Air Act to grant tribes jurisdiction over all air resources within the boundaries of a reservation, including jurisdiction over non-Indian fee lands. The EPA believes that American Indian tribes very likely already have the inherent authority to regulate the conduct of non-Indians within reservation boundaries under the Clean Air Act because of the high mobility of air pollutants, the resulting area-wide effects and the seriousness of such impacts on tribes. However, a tribe has inherent regulatory authority over non-Indians only if a case-by-case determination establishes that the conduct of the non-Indians would affect the health or welfare of the tribe. Under the EPA's proposed finding of a statutory grant of authority by Congress, this determination would not be needed.[24]

Under the proposed rule, the EPA also would authorize tribes to assert jurisdiction over air resources outside reservation boundaries. This authorization would, however, be subject to a requirement that the tribe demonstrate its inherent authority over such resources.[25]

Consistent with its proposed rule, the EPA has recognized the authority of American Indian tribes to regulate air quality over tribal lands to the exclusion of the state governments. The state of Washington sought approval under the Clean Air Act to implement its interim air program on all lands within its boundaries, including most Indian lands. The EPA had rejected the portion of the proposed program that would apply to most Indian lands because the state had not adequately demonstrated its authority to regulate air emission sources on tribal lands.[26] The EPA's analysis of jurisdictional authority was based upon whether the Indian tribe had inherent sovereign authority over the activities at issue, and not upon whether the state could effectively regulate such conduct in lieu of the tribe.

Regulation of waste disposal. RCRA, which governs the management of hazardous and nonhazardous waste, is the only remaining major federal environmental statute that does not specifically address the rights and duties of Indian tribes to enforce its regulatory programs.[27]

Nevertheless, the Campo Band of Mission Indians applied for a determination of adequacy to develop and implement permit programs for disposal of municipal solid waste. In approving the application, the EPA relied in significant part upon its view that it may adopt any interpretation of RCRA which, in its expert judgment, is reasonable in light of the goals and purposes of the statute as a whole. According to the EPA, there is no indication in RCRA that Congress intended to authorize states to implement municipal solid waste programs on tribal lands or to otherwise change the sovereign relationship of states and tribes for purposes of RCRA. Because the EPA believes it is precluded from enforcing RCRA's municipal solid waste landfill requirements, the EPA must authorize tribes to oversee the regulation of municipal landfills on tribal land; otherwise a gap in regulation of tribal municipal solid waste landfills would exist.[28] The EPA also noted that it has previously granted authorization to American Indian tribes where the statutes involved did not explicitly provide for such authorization.[29]

With respect to regulation of non-member activities on tribal lands, however, the EPA stated it would continue to examine a tribe's authority in light of the evolving case law discussed earlier in this article; and will, in particular, require a showing that the potential impacts of the regulated activities on the tribe are serious and substantial before allowing the tribe to assume regulatory responsibility.[30]

Consistent with the Campo Band decision, the EPA has taken the general position that states may not assert jurisdiction over tribal lands in the absence of an express act of Congress or a treaty. For example, the state of Washington applied to the EPA for authority under RCRA to manage hazardous waste throughout the state, including tribal lands. The EPA denied the state's request for delegation of authority over tribal lands because RCRA does not grant states the authority to assert jurisdiction over tribal lands, and there is no other Congressional act or treaty allowing states to assert such jurisdiction. The EPA approved the state's application to operate the hazardous waste management program only as to nontribal lands.[31]

The state sued for a review of the EPA order. The court of appeals held that the EPA reasonably interpreted RCRA not to grant jurisdiction to states over the activities of tribal members on tribal lands. Moreover, according to the court, the federal government has committed to tribal self-regulation in environmental matters, and states generally are precluded from exercising jurisdiction over tribal members on tribal lands unless Congress has clearly expressed its intention to allow it. Thus, in this case, the tribal interest in managing the reservation environment and the federal policy of encouraging American Indian tribes to assume or participate in management responsibility were controlling.[32]

Conclusion

The American Indian tribes clearly occupy an increasing role in regulating environmental resources on tribal lands. Tribal governments are enacting their own environmental laws and asserting

(continued on page 60)

Indian Lands

(from page 17)

authority over both tribal members and nonmembers for activities within and outside of reservation boundaries. The EPA has encouraged an expanding role of the American Indian tribes through its policies and regulations and by delegating regulatory authority to the tribes. At the same time, states have continued to assert the right to regulate environmental matters affecting tribal lands, including land within and outside of tribal boundaries.

These efforts by the federal government, state governments and American Indian tribes to control the environmental regulatory process occasionally cause an overlap and conflict between the federal, state and tribal regulations, and not infrequently have lead to uncertainty within the regulated community over the laws applicable in a specific context. Because of the possibility of conflicting laws, practitioners would be well-advised to proceed cautiously in advising clients on matters involving environmental laws on Indian lands.

Endnotes

[1]*See State Files Fifth Water-Quality Suit,* Wisconsin St. J, May 22, 1996, at 3D.

[2]EPA Policy for the Administration of Environmental Programs on Indian Reservations at 1 (Nov. 8, 1984), reaffirmed, Improving EPA's Indian Program Operations, 59 Fed. Reg. 38461 (July 28, 1994).

[3]*United States v. Wheeler,* 435 U.S. 313, 322-23 (1978).

[4]*Id.* at 319; *Blue Legs v. U.S. Bureau of Indian Affairs,* 867 F.2d 1094, 1096 (8th Cir. 1989).

[5]*Blue Legs v. U.S. EPA,* 668 F. Supp. 1329, 1337-39 (D. S.D. 1987), *aff'd, Blue Legs v. U.S. Bureau of Indian Affairs,* 867 F.2d 1094; *see also Atlantic States Legal Found. v. Salt River Pima - Maricopa Indian Community,* 827 F. Supp. 608 (D. Ariz. 1993).

[6]*Razore v. The Tulalip Tribes of Washington,* 66 F.3d 236 (9th Cir. 1995); *cf.* Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Laws and Regulations,* 23 Envtl. L. Rep. 101, 109-10 (1993) (tribal liability under CERCLA is uncertain).

[7]*See Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976) (state allowed to impose tax on sales of cigarettes to nontribal members on tribal lands).

[8]*California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207 (1987); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 154 (1980); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 147 (1982).

[9]*Bryan v. Itasca County, Minnesota,* 426 U.S. 373, 376-77 and n. 2 (1976); *California v. Cabazon Band of Mission Indians,* 480 U.S. at 207.

[10]*California v. Cabazon Band of Mission Indians,* 480 U.S. at 214-16.

[11]*Babbitt Ford Inc. v. Navajo Indian Tribe,* 710 F.2d 587, 592 (9th Cir. 1983), *cert. denied,* 466 U.S. 926 (1984).

[12]*Montana v. United States,* 450 U.S. 544, 565-66 (1981); *Babbitt Ford Inc. v. Navajo Indian Tribe,* 710 F.2d at 592.

[13]*Blue Legs v. U.S. Bureau of Indian Affairs,* 867 F.2d at 1097; *Babbitt Ford Inc. v. Navajo Indian Tribe,* 710 F.2d at 592.

[14]*Cardin v. De La Cruz,* 671 F.2d 363 (9th Cir.), *cert. denied,* 459 U.S. 967 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980); *Confederated Salish & Kootenai Tribes v. Namen,* 665 F.2d 951 (9th Cir.), *cert. denied,* 459 U.S. 977 (1982); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982); *Montana v. United States,* 450 U.S. 544 (1981); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation,* 492 U.S. 408 (1982).

[15]*See Montana v. United States,* 450 U.S. 544 (tribe did not have authority to regulate non-Indian hunters and fishermen on non-Indian fee land within the reservation).

[16]*Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community,* 991 F.2d 458 (8th Cir. 1993).

[17]*Blue Legs v. U.S. Bureau of Indian Affairs,* 867 F.2d at 1097-98.

[18]*See* 42 U.S.C. §§ 6926(b) and (e), 6928(a) and 6973(a); *State of Washington, Dep't of Ecology v. U.S. EPA,* 752 F.2d 1465, 1467 (9th Cir. 1985).

[19]42 U.S.C. § 7601(d)(2) (Clean Air Act); 33 U.S.C. § 1377(a) and (e) (Clean Water Act); 42 U.S.C. § 300j-11(b)(1) (Safe Drinking Water Act).

[20]*See Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978); 25 U.S.C. § 1302(7).

[21]*See e.g.,* Indian Tribes; Air Quality Planning and Management, 59 Fed. Reg. 43956, 43966 (Aug. 25, 1994) (each tribe seeking approval under a Clean Air Act program must sign a Memorandum of Agreement with EPA providing for the referral of criminal enforcement matters to EPA).

[22]*City of Albuquerque v. Browner,* 865 F. Supp. 733(D. N.M. 1993).

[23]Indian Tribes; Air Quality Planning and Management, 59 Fed.Reg. at 43956-57.

[24]*Id.,* 59 Fed. Reg. at 43958 and n.5, *citing South Dakota v. Bourland,* 113 S. Ct. 2309, 2320 (1993).

[25]*Id.*, 59 Fed. Reg. at 43959, n.6.

[26]Clean Air Act Final Interim Approval of Operating Permits Programs in Washington, 59 Fed. Reg. 55813 (Nov. 1994); *see also* Clean Air Act Final Interim approval of the Operating Permits Program; Wisconsin, 60 Fed. Reg. 12312 (Mar. 6, 1995).

[27]*But see* proposed Authorization of Indian Tribes Hazardous Waste Programs Under RCRA Subtitle C, 61 Fed. Reg. 30472 (June 14, 1996).

[28]Campo Band of Mission Indians; Final Determination of Adequacy of Tribal Municipal Solid Waste Permit Program, 60 Fed. Reg. 21191, 21192-210 (May 1, 1995); Campo Band of Mission Indians; Tentative Adequacy Determination of Tribal Municipal Solid Waste Program, 59 Fed. Reg. 24422, 24423-24 (May 11, 1994), *citing Chevron, U.S.A. v. Natural Resources Defense Counsel Inc.,* 467 U.S. 837, 844 (1984) and *California v. Cabazon Band of Mission Indians,* 480 U.S. at 216 and n.18.

[29]Campo Band of Mission Indians; Final Determination of Adequacy of Tribal Municipal Solid Waste Permit Program, 60 Fed. Reg. at 21192.

[30]Campo Band of Mission Indians; Tentative Adequacy Determination of Tribal Municipal Solid Waste Program, 59 Fed. Reg. at 24425.

[31]*See* Washington; Phase I and Phase II, Components A and B, Interim Authorization of the State Hazardous Waste Management Program, 48 Fed. Reg. 34954, 34957 (Aug. 2, 1983).

[32]*State of Washington, Dep't of Ecology v. United States EPA,* 752 F.2d at 1469-70 and 1372. ■