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Recent Developments

Kevin Washburn
University of New Mexico - School of Law

RECENT DEVELOPMENTS

*Kevin K. Washburn**

The past year has been an active one for practitioners of environmental and natural resources law involving Indian tribes. The following discussion does not constitute a complete summary of the cases that have occurred in these areas, but it does reflect some of the more interesting developments that have occurred in the Indian and environmental law arena.

I. Environmental Law

Congress and the United States Environmental Protection Agency (EPA) have become more aggressive in recognizing tribal governments as the entities primarily responsible for regulating the environment within Indian reservations. A new jurisdictional battleground has emerged around issues involving environmental law. The opposing actors include the Indian tribes on one side, with the state and local governments, and nonmembers who reside on reservations, on the other.[1]

A tribe's ability to regulate environmental matters border-to-border within Indian reservations is limited by the tribe's authority over nonmembers residing or owning property within the reservation. The standard set out in the Supreme Court's decision in *Montana v. United States*[2] measures a tribe's authority over nonmembers. In that case, the Court indicated that a "[t]ribe may . . . 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."[3] Based on the congressional intent underlying the environmental

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*Trial Attorney, U.S. Department of Justice, Indian Resources Section, Environment & Natural Resources Division. Member, Chickasaw Nation. J.D., 1993, Yale Law School; B.A., 1989, University of Oklahoma. The opinions expressed herein are entirely those of the author and do not necessarily reflect the views of the U.S. Department of Justice. Before joining the Department of Justice, the author clerked for Judge William C. Canby, Jr. of the U.S. Court of Appeals for the Ninth Circuit. The author also served as Editor-in-Chief of the *Yale Journal on Regulation.*

1. While tribes clearly retain jurisdiction in certain broad areas, such as taxation, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 151 (1982) (holding that tribes have inherent power to tax nonmembers who conduct business on tribal lands and who benefit from governmental services provided by the tribes); Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1386 (10th Cir. 1996) (allowing tribe to impose severance tax on oil and gas production on allotted Indian lands), tribes have lost jurisdiction in other areas, including, for example, criminal jurisdiction over nonmembers, see Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978). Tribal environmental programs generally fall within an area described as "civil regulatory" jurisdiction.

2. 450 U.S. 544 (1981).

3. *Id.* at 566.

address, the EPA and tribes have maintained that tribes can easily meet the *Montana* test for purposes of regulating pollution activities because those activities generally constitute a serious threat to tribal health and welfare.[4]

Both the EPA and Congress have sought to increase the tribal role in regulating the reservation environment. Congress has done so by explicitly authorizing the EPA to treat Indian tribes as states, that is by delegating to tribes the administration of environmental programs on Indian reservations. Moreover, the EPA has sought to increase the tribal role even where federal statutes fail to explain how the EPA should treat Indian reservations. States and nonmembers have vigorously challenged the EPA's action in recognizing tribal environmental regulation within both contexts.

A. The Treatment by the EPA of Indian Tribes in the Same Manner as States Pursuant to Congressional Enactment

In 1987, Congress amended the Clean Water Act to include a treatment-as-a-state (TAS) provision that explicitly allows tribes to administer certain programs under that Act.[5] Congress has also added TAS provisions to several other environmental statutes.[6] The existence of congressional authorization, however, has not insulated the EPA from litigation involving approval of tribal programs.

In *Montana v. EPA*,[7] the State of Montana and others brought an action challenging the EPA's decision to approve a TAS application submitted by the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana.[8] The State asserted that the EPA could not treat the Tribes as a state

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4. The Clean Water Act is but one example. The Act's primary purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nations's waters." 33 U.S.C. § 1251(a) (1994). The Act mandates minimum water quality standards throughout the country. The standards are established by taking into consideration the use and value of water resources for "public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes." *Id.* § 1313(c)(2)(A). In light of the fact that the Act seeks to insure that water remains clean enough to meet the needs of public water supplies, Congress clearly designed the Act to protect health and welfare.

5. Congress authorized the EPA to treat an Indian tribe in the same manner as a state for certain purposes, including the development of water quality standards under section 303, and certification of compliance with those standards under section 401. *See* Clean Water Act § 518(e), 33 U.S.C. § 1377(e) (1994).

6. *See, e.g.*, Comprehensive Environmental Response, Compensation & Liability Act, 42 U.S.C. § 9607(f)(1) (1994); Oil Pollution Act of 1990, 33 U.S.C. § 2706(a) (1994); Clean Air Act, 42 U.S.C. § 7601(d)(1) (1994).

7. No. 96-35508 (9th Cir. filed Apr. 16, 1996).

8. Several similar actions are pending in the State of Wisconsin. In January 1996, Wisconsin filed an action challenging the EPA's approval of a TAS application by the Sokoagan Community Mole Lake Band of Chippewa Indians. Citing the fact that Wisconsin was admitted as a state 90 years before that tribe's reservation was established, Wisconsin argues that the tribe lacks jurisdiction over the water resources on the reservation because of the equal footing doctrine. The EPA has also approved, and Wisconsin has challenged, TAS programs for the Menominee, the

because the Tribes lack jurisdiction over the activities of non-Indians owning lands in fee simple within the Reservation. The EPA countered that the Tribes had demonstrated adequate jurisdiction because the activities of non-Indians on fee lands had potentially severe negative potential impacts on tribal health and welfare and, thus, the Tribes met the standard for jurisdiction enunciated in *Montana v. United States*. Based on the voluminous evidence in the administrative record demonstrating such impacts and in deference to the EPA's role as the country's expert in assessing the affects of water pollution on human health, the district court agreed with the EPA and upheld the EPA's decision.[9]

The State appealed, placing this case of first impression before the U.S. Court of Appeals for the Ninth Circuit. In its brief on appeal, the State argued that the *Montana v. United States* test no longer represented the applicable standard to determine whether a tribe has jurisdiction over non-Indians. It has asserted that the test was modified by the Supreme Court's later decision in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*[10] in which Justice White implied that tribal jurisdiction was precluded if adequate federal or state standards already applied to the activity in question. Citing later cases that failed to indicate any change in the *Montana v. United States* standard, the EPA responded that *Brendale* lacked a controlling majority rationale and that the State has misinterpreted the opinion of Justice White and the other splintered plurality opinions. The parties are awaiting a decision on appeal.

Though *Montana v. EPA* involves the first direct challenge to a decision by the EPA to treat an Indian tribe in the same manner as a state under the Clean Water Act, it is not the first case to arise under the Clean Water Act TAS regime. In *City of Albuquerque v. Browner*,[11] Albuquerque challenged the EPA's decision to approve a tribe's water quality standards which were more strict than existing federal standards.[12] After obtaining TAS approval, which was not challenged, the Pueblo of Isleta set water quality standards sufficient to protect the Pueblo's cultural uses of water. When the EPA approved the standards and began the process of revising Albuquerque's National Pollution Discharge Elimination System (NPDES) permit to comply with the downstream standards, Albuquerque sued the EPA in federal district court. Among other arguments raised, Albuquerque asserted that the Pueblo lacked authority to set standards more stringent than those required by the Clean Water Act and that, even if it could, such standards would not apply to upstream, off-reservation polluters. Albuquerque also argued that the standards violated the

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Lac du Flambeau, and the Oneida tribes. These cases are also pending in federal district courts in Wisconsin.

9. Montana v. EPA, 941 F. Supp. 945 (D. Mont. 1996).

10. 492 U.S. 408 (1989).

11. 97 F.3d 415 (1996).

12. Albuquerque did not challenge the EPA's decision to treat the Pueblo as a state.

Establishment Clause of the First Amendment because the purpose of the Pueblos's stringent standards was to protect religious uses.

The district court ruled against Albuquerque,[13] and the Tenth Circuit affirmed.[14] The Tenth Circuit rejected Albuquerque's argument that the Pueblo cannot set standards more stringent than the existing federal standards. It noted that the Clean Water Act prohibits the Pueblo from setting standards below the federal standards and, thus, if the court adopted Albuquerque's argument, the Pueblo could only set standards that were identical to the federal standards. Such a reading would essentially render the TAS scheme nugatory. The court concluded that the Clean Water Act did not limit inherent tribal sovereignty to set more stringent standards and, thus, the court held that the EPA reasonably approved the standards.[15] The court likewise rejected Albuquerque's argument that the Pueblo's water quality standards could not be applied to upstream polluters. The Clean Water Act clearly gave the EPA the power to respect the water quality standard of a downstream state or tribe in issuing NPDES permits.[16] Finally, the Tenth Circuit rejected the establishment clause argument, ruling that the "EPA's purpose in approving the designated use is unrelated to the Isleta Pueblo's religious reasons for establishing it."[17]

While the Tenth Circuit's decision in *City of Albuquerque v. Browner* and the district court decision in *Montana v. EPA* constitute significant victories for tribes and the EPA, congressional developments may overtake judicial decisions in this area. In the 104th Congress, the House passed an amendment to the Clean Water Act that would limit the ability of tribes to exercise regulatory authority over Indian reservations by restricting their role under TAS provisions to trust lands.[18] In light of the checkerboard pattern of property ownership on many reservations, such legislation might have resulted in regulatory regimes on reservations that are difficult to administer and impossible to enforce. Although the legislation did not pass the Senate, such amendments may arise again in the future.

B. The Treatment by the EPA of Indian Tribes in the Same Manner as States in the Absence of Clear Authorization by Congress

In *Backcountry Against Dumps v. EPA*,[19] the U.S. Court of Appeals for the D.C. Circuit struck down the EPA's approval of a municipal solid waste program submitted by the Campo Band of Mission Indians in Southern California under Subtitle D of the Resource Conservation and Recovery Act

13. 865 F. Supp. 733 (D.N.M. 1993).
14. City of Albuquerque v. Browner, 97 F.3d 415 (1996).
15. *Id.* at 423.
16. *Id.*
17. *Id.* at 428.
18. This legislation might have mooted *Montana v. EPA*.
19. 100 F.3d 147 (D.C. Cir. 1996).

(RCRA).[20] The EPA reviewed and approved the Campo Band's program even though RCRA lacks a "treatment-as-a-state" provision.[21]

Indeed, though Subtitle D seeks to preserve local control of solid waste, it contains no explicit provision as to how Indian tribes should be treated under the Act.[22] In light of the congressional preference in RCRA-D for local regulatory control, and because states generally lack authority to apply their programs on Indian reservations, the EPA determined that tribes may submit, and the EPA may review, tribal solid waste programs.

Under an approved program, a state or tribe obtains primary authority for overseeing the operation of individual landfills. Moreover, a state or tribe with an approved program may develop criteria for compliance with federal standards that differ from the general federal criteria.[23] The local regulatory scheme is designed to provide a regulating entity with more flexibility in meeting the purposes of safe waste disposal than the general nationwide provisions allow. Thus, the EPA's approval of the Campo Band's program allowed the Band to offer more flexible, location-specific requirements that are more attractive to an owner or operator than the general nationwide standards.

The plaintiffs in the *Backcountry* case were non-Indians who lived just outside the reservation boundaries. They argued that Congress had not given the EPA authority to approve tribal solid waste programs and that federal agencies possess only that authority which Congress affirmatively provides. Since Congress never enacted a treatment-as-states provision in RCRA, the plaintiffs argued that the EPA lacked authority to treat a tribe in the same manner as a state.

The D.C. Circuit agreed with the plaintiffs. The court rejected the EPA's argument that its statutory interpretation was reasonable and consistent with the congressional intent in providing for local control of waste disposal. It also rejected the EPA's argument that denial of otherwise adequate tribal programs

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20. 42 U.S.C. §§ 6941-6949(a) (1994) [hereinafter RCRA or RCRA-D]. RCRA sets forth the national policy for regulation of non-hazardous solid waste. In enacting the RCRA-D scheme, Congress sought to preserve local control of solid waste and small quantities of hazardous waste. Therefore, it created a scheme in which state and local governments have primary authority. Under Subtitle C of RCRA, on the other hand, which governs most hazardous waste, Congress directed that the EPA would have primary authority. *Id.* § 6925.

21. For a detailed discussion of the Campo Band's environmental regime, see Kevin Gover & Jana L. Walker, *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, 10 YALE J. ON REG. 229, 250-59 (1993).

22. Besides RCRA, other environmental statutes also lack TAS provisions, including the Federal Insecticide, Fungicide & Rodenticide Act, 7 U.S.C. §§ 136-136y (1994) [hereinafter FIFRA] and the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (1994) [hereinafter TSCA]. One explanation for failure of Congress to include a TAS provision in RCRA is that, unlike the federal statutes which have TAS provisions, RCRA has not been comprehensively revisited by Congress since it was enacted. Congress apparently did not begin to consider the unique issues involving regulatory authority on federal Indian reservations until 1987.

23. The revised criteria for approved programs are set out in 40 C.F.R. § 258 (1994).

would create a gap, that is, owner-operators that chose to locate municipal waste disposal projects in Indian country would be unable to obtain the flexible requirements available under an approved state program.

The court ruled that this was not a "gap," but a recognition that RCRA treats Indian tribes differently than states, stating "[a]lthough treating tribes differently from states may be unfair as a policy matter, and may be the result of Congressional inadvertence, the remedy lies with Congress, not with EPA or the courts."[24] With that statement, the court made it clear that, in the absence of a "treatment-as-a-state" provision, the EPA is not entirely free to validate tribal programs. This ruling makes it more difficult for the EPA to eradicate the inequities created by the jurisdictional checkerboard that exists in Indian country.

II. Taxation of Natural Resources

Tribes scored significant victories last year involving both state and tribal taxation of natural resources. In *Crow Tribe v. Montana*,[25] for example, the Ninth Circuit ordered a lower court to enter a $55 million judgment in favor of the Crow Tribe as restitution against the State of Montana and Big Horn County for severance and gross proceed taxes improperly collected from coal mining on the Crow Reservation. The court also ordered the lower court to consider the Tribe's claim for prejudgment interest.[26]

The *Crow Tribe* opinion is noteworthy primarily because it reversed a district court under the deferential "abuse of discretion" standard for failing to grant equitable relief to the Tribe, which had demonstrated in earlier cases the merits of its claim.[27] In a previous opinion, the Ninth Circuit made it abundantly clear that the taxes were unlawful.

The district court paid the Crow Tribe $23 million in severance taxes that the lessee had paid into the court's registry following the Tribe's successful assertion of its right to bring a claim.[28] This most recent case established that the Tribe can recover restitution for monies that the State and County had collected under the unlawful tax prior to the order that all such taxes be paid into the court's registry. This decision sets firm precedent that states will not be allowed to keep from Indian tribes the proceeds of taxes collected unlawfully.

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24. *Backcountry*, 100 F.3d at 152.

25. 92 F.3d 826 (9th Cir. 1996) (per curiam).

26. *Id.* at 830.

27. *Id. Crow Tribe* represented the fourth time that the case had been before the Ninth Circuit. The first two cases established law on the state's authority to impose taxes on tribal natural resources. *See, e.g.*, Crow Tribe v. Montana, 665 F.2d 1390 (9th Cir. 1982) (*Crow I*); Crow Tribe v. Montana, 819 F.2d 895 (9th Cir. 1987), *aff'd without opinion*, 484 U.S. 997 (1988) (*Crow II*).

28. *Crow II*, 484 U.S. at 903.

Another significant victory for tribes occurred in *Mustang Production Co. v. Harrison*[29] in which the Tenth Circuit ruled that a tribe may impose severance taxes on oil and gas removed from allotted lands held in trust by individual tribal members. While it previously was settled that a tribe could impose taxes on tribal lands, the Tenth Circuit ruled that a tribe may tax any allotted trust lands within "Indian country" as that term is defined in the Major Crimes Act.[30] In light of the breadth of the definition, the Tenth Circuit's decision confirms broad taxing authority for tribes.

III. Water Rights Cases

In the McCarran Amendment,[31] Congress waived sovereign immunity in state courts for the adjudication of federal water rights. Under that provision, many western states have taken jurisdiction over the determination of federal Indian reserved water rights in adjudications undertaken to determine all water rights in a given river. Accordingly, unlike most other areas of Indian law in which litigation occurs primarily in federal or tribal courts, many of the most important developments in water rights law occur in state courts. Within the past year, tribes have obtained two significant victories in state courts in water rights cases.

In Montana, the Confederated Salish and Kootenai Tribes successfully blocked the state from granting new water rights permits within the boundaries of the Flathead Indian Reservation in *In re Beneficial Water Use Permit Nos. 66459-76L* (the *Pope* case).[32] The *Pope* case began when the Flathead Tribes objected to the State's decision to grant two new applications for water use permits and an application for a change of use for an existing permit.

According to statutory water law in Montana, the Montana Department of Natural Resources and Conservation may issue a new water use permit only if, first, the applicant can prove that there are unappropriated waters; second, the water rights of a prior appropriator will not be adversely affected by the grant of the new permit; and, third, the new permit will not interfere with the use of existing rights or permits.[33]

Because the Flathead Tribes' water rights indisputably are senior to any new appropriators on the Reservation and because their rights have not yet been quantified in Montana's general stream adjudication, the Tribes argued that it was practically and theoretically impossible for an applicant to meet its burden of proof under any of the three elements set forth in the statute.[34] The

29. 94 F.3d 1382 (10th Cir. 1996).

30. 18 U.S.C. § 1151(c) (1994).

31. 43 U.S.C. § 666 (1994).

32. 923 P.2d 1073 (Mont. 1996).

33. Montana Water Use Act, MONT. CODE ANN. § 85-2-311(1) (1995); *see also Pope*, 923 P.2d at 1076.

34. *Pope*, 923 P.2d at 1077.

Montana Supreme Court agreed.[35] It ruled that an applicant could not meet the statutory burden until the Tribes' rights are quantified in a water compact or under a decree entered in a general stream adjudication.[36]

Likewise, in Arizona, Indian tribes were successful in preventing the State from harming the tribes' interests in federal reserved water rights. Following the Arizona state legislature's enactment of comprehensive amendments in 1995, the San Carlos, Tonto, Yavapai and Camp Verde Apache tribes in Arizona filed a petition for a special action in the Arizona Supreme Court. A year-long battle over the constitutionality of numerous comprehensive amendments to the Arizona Water Code concluded with a victory for the Indian tribes that opposed the changes in *In re Apache Tribes' Special Action.*[37]

In the petition, the tribes asked the Supreme Court to accept original jurisdiction to hear the tribes' challenges to the amendments to the Arizona Water Code.[38] The Arizona Supreme Court granted the Apache Tribes' petition and ordered the special action to proceed before a trial court judge. Before that judge, the Apache Tribes argued that the comprehensive changes to Arizona's general stream adjudication scheme were unconstitutional and placed the state court adjudication outside of the limited waiver of sovereign immunity set forth in the McCarran Amendment, thus effectively withdrawing the state courts' jurisdiction over federal Indian reserved water rights.

The Apache Tribes' arguments were based on numerous provisions in the comprehensive amendments. Boldly, the amendments explicitly applied to, and thereby attempted to modify, water rights that had long since been perfected.[39] The Apache Tribes argued that the legislature could not retroactively change existing property rights.

In addition, the amendments sought to exclude from the Arizona general stream adjudication certain "*de minimis*" categories. Under the *de minimis* provisions, certain small water uses would be excluded from the adjudication. Under the new provision, however, the legislature sought to exclude small claims which, in the aggregate, encompassed between two-thirds and four-fifths

35. *Id.* at 1080.

36. *Id.*

37. *In re* Special Action Proceedings Initiated by the Apache Tribes, No. CV-95-0161-SA (Ariz. Superior Ct. Aug. 30, 1996) [hereinafter Special Action Proceedings].

38. The Apache Tribes have also made arguments similar to those by the Flathead Tribes in *Pope*. They have sought to halt new water rights claims in Arizona by asking the Arizona courts to declare the Gila River Basin "fully appropriated" and, thus, to forbid new water rights claims from being made on that water source. Action on that motion has been stayed pending the Arizona Supreme Court's decision on whether to adopt the Superior Court findings or declare them unconstitutional.

39. H.R.J. Res. 2276, 42d Leg., 1st Sess., 1995 Arizona Laws 36 (codified at 45 ARIZ. REV. STAT. ANN. §§ 141-272 (Supp. 1996)).

of all the claims in the adjudication.[40] Much more conservative standards for so-called *de minimis* uses had already been determined by the courts after extensive litigation in the general stream adjudication, leading the Apache Tribes to argue that the state was attempting legislatively to overturn each victory they had obtained in the state courts. Indeed, the legislature departed significantly from the water use levels that the courts found to be *de minimis* and therefore subject to exclusion from the adjudication.

The statute contained numerous other provisions, many of which the Apache Tribes challenged. Since its inception, Arizona's water rights scheme has incorporated concepts of prior appropriation and beneficial use. Under these principles, if water is not put to beneficial use, the water right claimed is deemed abandoned. A determination of abandonment benefits every user junior to the abandoned water right. One amendment sought to create several exceptions to the abandonment rule, listing numerous circumstances in which nonuse of a water right would not cause abandonment.

After analyzing the comprehensive changes, the court found many of the amendments ineffective because they purportedly applied to existing perfected water rights.[41] It found that the amendments could not retroactively change perfected water rights. As to the *de minimis* categories set out in the legislation, the court found that the legislative determinations of what constituted a *de minimis* use violated the doctrine of separation of powers because the courts had already carefully considered and determined what amount of water use constituted *de minimis*.[42] Moreover, because the *de minimis* provisions constituted a legislative, rather than a judicial declaration of water rights, the court ruled that the provisions, if given effect, would take away the "judicial" nature of the action and take the Arizona general stream adjudications outside the waiver of sovereign immunity set out in the McCarran Amendment[43] which enables state courts to adjudicate federal water rights.[44] Finally, the court ruled ineffective the legislature's attempt to enact a retroactive change in the law of abandonment, ruling that anyone who sought to invoke one of the exceptions to abandonment named by the legislature must prove that the exception merely codified existing law.[45] The parties are now awaiting the Arizona Supreme Court's acceptance, reversal, or modification of the trial court judge's opinion on the special action issue.

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40. 45 ARIZ. REV. STAT. § 258 (repealed 1980).
41. Special Action Proceedings, *supra* note 37, slip op. at 9-15.
42. *Id.* at 18.
43. 43 U.S.C. § 666 (1994).
44. Special Action Proceedings, *supra* note 37, slip op. at 43-45.
45. *Id.* at 23-26.