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Indian Natural Resource Issues in an Orderly System

Indian tribes will be posing—and facing—a number of issues in the future having to do with land and natural resources. A few tribes have unresolved claims to ownership of land now claimed by others. Many tribes have not yet fully established the measure of their water rights. Tribes are asking for a share of the power generated by hydroelectric projects on their former lands. Tribes will acquire land both on and off reservations. Tribal efforts to protect hunting and fishing rights on and off reservations will continue and intensify as use of the resources by non-Indians increases. And tribes will press for continued access to sacred sites throughout their traditional areas and to protect these sites from development.

Like all Indian issues, Indian natural resource issues are characteristically viewed either as just like other issues, manageable in exactly the same ways, or as so unique as to be virtually intractable. Seen in the proper context, their uniqueness and their ordinariness stand out in better perspective and make them easier to understand and to deal with. The prevailing view is that Indians hold the wild card in an otherwise orderly natural resource system, staking out an exceptionality that raises havoc with public policy. “Wild card” is not a good metaphor, since a wild card is played by a player in the game; Indians are viewed as non-players who can whimsically alter the game from the outside with only minimal regard for the rules. This view skews the picture toward the uniqueness of Indian issues and makes them more difficult than they in fact are.

The focus needs to be on the system of managing issues and not on the “Indian-ness” of the issue. Although many natural resource issues in the larger society are strictly between private parties, the resolution of such issues is by and large a matter of governmental action as the government defines and helps to enforce rights. If it is assumed that issues will be managed or resolved only by the state or federal governments, then Indians will always be the kibitzers affecting the game from the outside. If, on the other hand, it is assumed that Indian tribes are part of the management system as players at the table, then the zone of “uniqueness” surrounding Indian issues becomes much smaller and easier to manage.

The evolution of western water rights provides an example. In one sense, perhaps, the assertion of tribal water rights functions as a wild card in an otherwise more or less orderly system, possibly threatening what are

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viewed as established claims and throwing a monkey wrench into the inevitable transition from small agricultural use to agribusiness, industrial, and residential uses in some parts of the West. But in what sense is a myopic system an "orderly system"? It is an orderly and rational system only if one assumes that the Indians will never seek to establish their rights and that federal policy will continue to consist of helping non-Indians to maximize their water use while keeping the Indians out of the game.

Everyone in the West has known for a hundred years that Indians have had unquantified water rights and undetermined priorities. Yet throughout this period, federal and state governments have pursued water policies that could only be considered orderly, rational, and realistic if one assumed that Indian rights would never have to be dealt with. The perception of what is the Indians' "fair share" today is obviously affected by one's view of this evolutionary process. If one views the Indians as whimsical latecomers to the game, then every drop of oversubscribed water that goes to them will seem to come from someone with an "established" right. But if one sees that many of the "established" rights would never have been established if the Indian rights had been included in the "orderly process" from the outset, the perceptions of fairness are likely to be quite different.

Taxation and regulatory policies, including tribal levies on various Indian resources, provide other examples. We live in a federal system in which state governments use their taxing and regulatory authority to balance economic considerations with other public policy matters, such as environmental protection, consumer protection, and fair labor standards. One important consideration in these balancing acts is the competition among the states for investment dollars. Policy decisions by one state and more favorable conditions in another state can drive investment out. States can choose to sacrifice tax dollars in one area in the hope of attracting investments that will generate revenues in another area. Although states may be critical of each others' policies, they adjust as necessary because they understand that they live in a federal system in which state government competition is a permanent part. This system would be more "orderly" if all taxation and regulatory regimes were uniform throughout the nation. The variety of approaches is not considered a sign of disorder but rather is accepted as a desirable feature of a federal system.

Indian tribes have been considered a threat to the orderly system, especially in the last forty years (roughly since the end of the Termination Era of federal Indian policy) when they abandoned the patterns with which the larger society had become familiar. The "Indian issues" of the modern era are the result of these as yet unassimilated new patterns of behavior. Under the old system, Indian tribes passively allowed non-Indians to put their land and resources into production. Tribes acted as landowners, not governments; acquiesced in federal decisions to use leases and similar
instruments to define the tribal role and establish the benefits to the tribe; and allowed the federal government to decide which Indian rights would be pursued and when. Since the early 1960s, tribes have largely abandoned this old pattern. They have insisted on a greater role in making decisions about land and natural resource use and development. They have sometimes even taken resources out of production or refused to lease them. Most importantly, they have greatly expanded their roles as governments, imposing taxes and regulations on old leases and insisting that new development projects accommodate the possibility of changing tribal taxation and regulatory policies—much as do other governments throughout the world. The bitter legal debate over Indian severance taxes on oil and gas production under federal leases in the 1970s and early 1980s marked the new emergence of tribes exercising old governmental powers.

The role shift from landowner to government with respect to natural resources and their management has not been the only significant change. As tribes have assumed control over their own resource policies, they have not always met the stereotypes held by the non-Indian society. In some instances, such as when tribes oppose strip mines on cultural and environmental grounds, tribal policies have been pleasing to the larger society, or at least to influential interest groups. In other cases, tribes have departed from the stereotype by exploring projects with possibly high environmental impact, such as toxic waste dumps, massive pig farms, and high-density residential developments. Whether pleasing or not is beyond the point; tribes make the choices as governments.

Between the mid-1970s and mid-1980s, the American Indian Law Center, Inc., helped to create and provided the staff support for an organization called the Commission on State-Tribal Relations. During a decade of examining tribal-state-municipal inter-governmental relationships on and near Indian reservations, a number of important lessons were learned, particularly about attitudes affecting governmental behavior. When a tribe adopted tax and regulatory standards identical to those of neighboring governments, thus having net zero competitive impact, they were regarded as being good neighbors, causing no problems—in effect, they were not considered a wild card. When a tribe adopted higher taxation and regulatory standards, driving investment off the reservation, they were regarded as Noble Savages, adhering to values higher than mere moneymaking. And when they adopted standards that would attract investment, they were denounced as greedy Indians who were peddling their sovereignty. A realistic view of the “orderly process” must in fairness recognize that all policies designed to attract investment, whether by state, federal, or tribal governments, involve peddling sovereignty. Any of these policy decisions may be bad social policy, inefficient, or vulnerable to other criticisms. But to paraphrase the old joke,
we know they all peddle sovereignty; now we are merely haggling about the price.

One might wonder how the view of Indians as a wild card came about. The first answer lies in the essential ambiguity—some might say hypocrisy—of federal Indian policy. From the very beginning, Indian tribes were dealt with as sovereign entities and were promised, more or less explicitly, a permanent political, social, and governmental existence. At the same time, the very same officials, from the President on down who were telling the tribes what they wanted to hear, were publicly doubting the advisability and viability of permanent tribal existence and planning and implementing various schemes for extermination, removal, acculturation, and assimilation, often in the most dishonorable terms. These contradictory policies were communicated to the society at large and in many respects mirrored the views of that society. These policies provided the basis for the fundamental attitude that tribal governments are not a permanent part of the American governmental landscape but a temporary expedient to facilitate assimilation. To a large extent, pro-tribal federal policies were simply filtered out of the American consciousness. Because of the assimilationist policies, states were encouraged to believe that some day they would inherit the mantle of government in reservation areas. The tribes would be stripped bare of their governmental jurisdiction over all of their resources.

The second major cause of competition between tribal and state governments can be traced to the McBratney case, in which the Supreme Court held that crimes among non-Indians in Indian country are subject to state and not federal law. The significance of McBratney for the evolution of governance of Indian reservations is that it destroyed the territorial integrity of Indian country and thus destroyed tribal control of its most basic natural resource.

The judicial branch accorded to itself enormous power to determine in any given case whether an assertion of state power transgressed the limits of the federal government’s Indian power and the corresponding power of tribes to govern themselves. From the day of McBratney on, federal courts have greatly expanded their legislative activities under the guise of making Federal Common Law, drawing lines between federal (and tribal) and state power as it suits them. Since none of these lines has been drawn on constitutional grounds, the plenary power of Congress appears to remain intact, while the Court has sharply reduced the effective scope of preemption of state powers on reservations by seeming to interpret the intent of Congress. Congress could have responded to McBratney by passing legislation explicitly federalizing all crimes in Indian country in order to

maintain peace and protect the Indians, which would have reduced the role of the judiciary to map reading rather than drawing Platonic lines between governmental interests. But it did not choose to correct *McBratney*, and states and tribes have been engaged ever since in a competition to govern the same territory. Of course Congress’s lack of response to *McBratney* is far from its only contribution to the present situation. Its various schemes over the years to open reservations, sell off “surplus” lands to non-Indians, and allow the sale of allotments have complicated the demographics of many reservations probably beyond repair.

The third source of competition between tribes and states lies in the notion of the public interest. Congress has the constitutional duty to promote the public interest, but over the course of the years this vague admonition seems to have been regarded by the courts as only an underlying duty. One might suppose that the federal commitment to continued recognition of Indian tribes and the consequent legal and political ramifications of that decision were determinations by Congress made in the public interest, not in conflict with it.

But since Nixon’s 1970 Message To Congress on Indians admitted to a federal conflict of interest between the duty to the Indians and the duty to the larger public interest, the federal government has been engaged in a balancing act. The tendency became—and still persists to this day—to identify any non-Indian interest opposing that of the Indians with the general public interest, thereby setting up a conflict that may not have needed to exist.

To give an example from the natural resources area, during the complicated working out of the Maine Indian land claim in the 1960s and 1970s, some elements of the Justice Department felt that their responsibility to the tribes bringing the land claim created a conflict of interest for the federal government. When pressed, they could not readily identify the federal responsibility that conflicted with that to the Indians. At one point, they identified a duty to the State of Maine, which is clearly not the case, because the State of Maine, as a state, is provided for in the Constitution and can be expected to take care of itself. At another point, they identified the people of the State of Maine who, insofar as they are distinguishable from the rest of the people of the United States, could be expected to be taken care of by the State of Maine. Finally, they fell back on the Public Interest as the source of their conflict. As it happened, the tribes had identified only the State of Maine and several timber companies as being the target of their claims, and if the tribes were successful only the State and the timber companies would have had to come up with land or money to satisfy the claim. In effect, then, the Carter Administration Justice Department had identified the Public Interest with the private commercial interests of several timber companies.
To be sure, the public interest may often be embodied in the interests of private parties, or, put another way, it is almost certain that some private party will benefit from government decisions made in the public interest. But this public thinking-out-loud in the Carter Administration (which in the end, despite its misgivings, helped contribute to a successful solution to the problem in Maine) tended to suggest that anyone with a problem against an Indian tribe automatically qualified as embodying the public interest of the people of the United States against that of the Indians.

There is a tendency in state government as well to see uncritically any non-Indian interests opposed to the Indians as representing those of the state at large, making it difficult for the state government to identify with and support tribal interests against virtually any non-Indian opposition. This structural problem and its impact on governmental attitudes has been at the root of the attitude of many states and tribes; there are or can be two separate economies, Indian and non-Indian, such that a dollar going to one is a dollar deprived to the other. These attitudes set up ruinous competition between states and tribes on economic matters where they might often find their interests to coincide and where both might have much more to worry about in their competition with other states and countries.

The work of the State-Tribal Commission revealed two models of intergovernmental relationships serving reservations that can serve as overall models for the resolution of natural resource issues. An immature and unhealthy tribal-state relationship, it seems, is one in which the governments contest power for the sake of power. No attention is paid to whether the standards by which a tribe or a state might govern are unacceptable; the only question is which government is entitled to make the decision. Thus, in many states—New Mexico especially—activities on the reservation that are not subject to state taxation or regulation are characteristically referred to by the press and elected officials as “untaxed” or “unregulated,” meaning untaxed or unregulated by the state, as if the tribe had made no policy decision regarding taxes or regulations. Accepting the permanence and legitimacy of the federal system and their fellow states, the local press and government officials may complain about neighboring state policies that affect them, but not as if the other state governments constitute a government vacuum.

This competitive model of state-tribal relations encourages each government to see the other as a wild card. The states dream of the day when they no longer have to deal with tribal governments, and the tribes dream of the day when the states are at least driven back to the original reservation boundaries and the tribes need only negotiate power-sharing with the federal government. Both sides are dreaming. Congress lacks the political will to break the deadlock definitively, either trying to abolish tribal government or restoring its territorial integrity and confirming full
tribal power over non-Indians. Nevertheless, state and tribal governments in this model are not encouraged to engage each other but instead are encouraged to constantly seek federal intervention in their favor in any forum that shows promise—Congress, the courts, or executive agencies.

The flaw in this approach is that, as long as the two forms of government exist, federal support for one side on one issue or another results only in minor adjustments of power. Regardless of the outcome, tribes and states will have to confront their relationship and deal with each other’s independence. Although it makes a difference whether the line between the governments is drawn at the original reservation boundary or at the edge of each piece of trust land, the same questions must be addressed by each government in either case.

Ironically, the last thing the states should want is the termination of the federal-tribal relationship and the abolition of tribal governments. Indians bring huge amounts of federal money into states by virtue of their Indian status, and most of it finds its way into the off-reservation economy quickly. Recent gaming successes have masked the fact that many of the 560 federally-recognized tribes are on land inadequate for development and that Indians as a group still constitute the poorest population group in the United States. The abolition of the tribal-federal relationship would cost the states billions of dollars and leave them saddled with responsibility for pockets of poverty to which—if the Equal Protection Clause under this Supreme Court means anything like it used to—they would be obligated to provide the same level of state services as they provide throughout the state, with little addition to their tax base. It is possible that the dreams of some states are to sever the tribal connection with the federal government and divert the federal cash flow for Indian programs to state government. Such a naked and irresponsible power grab would shock the conscience and be readily pointed out to Congress and the American people by the tribes. But the competitive model is not the only one in existence. The Commission found many examples of healthy, cooperative, and productive state-tribal relationships throughout the nation, most often in a few selected subject matter areas rather than across the board. When the Commission was launched, skeptics said that it was unrealistic to think that tribes could ever “trust” states or that tribes and states could ever agree on everything. Of course the Commission was not so naive as to seek unanimity between tribes and states or to convince these essentially competitive governments that “trust” was a meaningful goal. The healthy and productive relationships, it turned out, were those in which the governments each accepted the permanence and legitimacy of the other and acknowledged that each government has a zone in which it has exclusive power to set policy. The settlement of some of the long-pending efforts to define tribal water rights may have accomplished just that.
Having mutually accepted the policy-making prerogatives of the other government, the states and tribes were able to transform their relationship from a mock-Hobbesian battle to the death to one in which the issues became those of any other intergovernmental relationship. That is, efforts previously expended in courts or in lobbying Congress and the federal executive antagonistically were more usefully employed in a continuing process of tribal-state interaction. Rather than grousing about who has the power to set a standard, the governments spend their time examining the ways in which their interests coincide—economic development, for example—and the ways in which their interests conflict (other than the basic competition for power). The assumption that the other government’s power will be used solely to frustrate one’s own government is set aside. Under the competitive model, control is the only issue and any power in the other government constitutes a fundamental threat. It is the very existence of an independent policy that is the threat, not what that policy is ("untaxed and unregulated"), and all actions of the other government are unacceptable simply because of the very existence of the other government.

Under a cooperative model, tribal, state, and municipal approaches to government are compared in a negotiating framework. Some standards adopted by tribes and states will turn out to be identical, e.g., under a cooperative approach there is no incentive for a tribe to insist on a 60-mile per hour speed limit only to resist the state’s 55-mile per hour limit. Some standards will turn out to be different but compatible, e.g., a housing code that recognizes indigenous building practices and Indian economic needs on the reservation need not cripple a statewide code more suited to towns and cities. Tax incentives to encourage investment on the reservation could help the state economy in the long run and reduce the demand on public services caused by Indian poverty while having a negligible effect on immediate state tax revenues. The cooperative model largely resembles any intergovernmental relationship in this country—state, counties, and municipalities constantly negotiate and mediate the issues arising from their independent policy-making postures and constantly seek to improve cooperation and coordination (or cope with their failure to do so), as tribes, states, and municipalities do in the best of situations.

Comparative taxation and regulatory standards will not always be identical or compatible. Some variances between tribal and state standards will be found to be unacceptable to one or the other government. But whereas in the competitive model these situations are deemed to be the norm, i.e., the tribal standard is unacceptable not on the merits but because it is the tribal standard, they look very different in the cooperative model in several respects. In the cooperative model, tribal and state standards are contextualized. Both the tribe and the state are made aware that their areas of conflicting interests and incompatible standards are much narrower than
they thought when they operated under the competitive model. They are contextualized in another sense as well. Differences between the governments are not seen merely as examples of the need to resolve the power struggle and bring about an "orderly" system, i.e., a system in which one government makes all the decisions. Instead, disagreements about policy are seen in the context of a comprehensive intergovernmental relationship in which many other matters of cooperation and coordination may be jeopardized by an insistence on control over one issue. Other issues of importance are likely to make an insistence on dominance in one area not worth the fight, and compromise can often be reached by concessions in other areas.

Still and all, there will be times when the importance accorded to one area of conflict is so great that compromise and cooperation cannot be achieved. The question is whether this possibility—or likelihood—is a fatal flaw of the cooperative model. Any approach to conflict prevention or resolution that purports to resolve all possible problems successfully is biblical in aspiration, not political. Potential deal breakers cannot be ruled out in any relationship. In the competitive model, the very existence of two governments who see their relationship as only competitive and fundamentally incompatible is the deal breaker. In the cooperative model, any potential deal breaker is the exception to an otherwise manageable relationship. As the Commission found, despite the competitive rhetoric of tribal and state governments at the national and sometimes state level, at ground level, state, tribes, counties, and municipalities cooperate on a daily basis with varying degrees of formality on all manner of issues, including natural resources ones. The dissonance between this fact of reservation governance and the competitivist rhetoric has fortunately not prevented the flourishing of intergovernmental cooperation.

One final consideration recommends the cooperative model over the competitive. In a competitive relationship, as has been repeatedly stated, it is enough to reject the actions of the other government because they are the actions of another government. In a cooperative relationship, both governments are put in a position in which they are expected to give reasons for their actions and for their disagreements. If the general public or the federal government are asked to choose between competing tribal and state views of public policy, they are more likely to make a good choice if each side is obliged to defend its policy and to give reasons for the rejection of the alternative policy. This approach allows—in a controlled setting—an appropriate adversarial relationship not on the primal level of the government's very right to exist but on the more appropriate level of the rationale for a particular policy choice.

A persistent issue in evolving Indian law involves the rights of non-Indians affected by tribal law. Because non-Indians cannot participate directly in the tribal political process, members of Congress, such as former
Senator Slade Gorton of Washington, and the Supreme Court have expressed great solicitude for their rights. It is essential to the governmental aspirations of Indian tribes that this problem be taken seriously not only for the sake of fundamental fairness but because of the political potency of the issue and its potential for undermining support for tribal government. On the one hand, it would obviously destroy the purpose of tribal government to allow non-members to participate in tribal government on the same basis as members. There would then be a redundancy between county governments and tribal governments. On the other hand, the notion underlying recent Supreme Court jurisprudence in the case of Indian tribes' "self-government" means governmental power over only members, or citizens, is so constricted as to render tribal governments virtually impotent. Any rational concept of self-government must include a reasonable amount of power to affect any behavior of non-members that affects the tribal society. That line is being drawn so strictly as to render tribes little more than landowning membership associations, despite repeated denials by the Supreme Court that that is its intent.

The cooperative model of reservation governance does not fully solve this problem, but it goes a long way toward alleviating and managing it. Fundamentally, no ultimate solution of the problem is possible as long as tribal governments maintain their essential character and still seek to exercise any governmental (rather than proprietary) power over non-Indians. They either participate or they don't. As long as the issue is framed in the largest, most abstract terms—inclusion in tribal government or helplessly under its power—it presents the kind of all-or-nothing choice characteristic of the competitive inter-governmental model. But, in fact, the cooperative inter-governmental model provides a realistic vehicle for the representation of non-Indians in the reservation governmental process. To the degree that tribes seek to cooperate and coordinate with state, county, and municipal governments, the interests of non-Indian reservation residents are well represented by these governments. Even in the best of circumstances tribes will assert power that affects non-Indians in ways that

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2 In the mid-1970s, in response to the ill-considered and unrealistic Report of the American Indian Policy Review Commission, two members of Congress, Meeds and Cunningham, introduced legislation that would have drastically altered the balance of governmental power on reservations. The net impact of their legislation would have restricted tribal power to trust land and tribal members. The legislation failed ignominiously, not because Congress felt it merely restated the law but because it was considered to be far too radical a realignment of power on reservations. Ironically, the greatest threat to intergovernmental stability on reservations today is posed by the United States Supreme Court. That group of strict constructionists are well along their way to enacting their own Indian policy in the guise of determining congressional intent, an Indian policy virtually identical to the Meeds-Cunningham legislation soundly rejected by Congress in 1977.
arguably affect their fundamental rights despite the best efforts of all governments to assure otherwise. But the cooperative inter-governmental model contextualizes these issues in the cases of individuals as it does in the inter-governmental context, and many of them can be compromised as well. The final question has to do with how tribes and states can be encouraged to adopt the cooperative approach to reservation governance. The result of the Indian gaming legislation shows that Congress cannot bring about greater inter-governmental cooperation by trying to force tribes to the bargaining table. In several states, tribes were forced into sham negotiations in which the states held virtually all the cards and the federal government stood behind the tribes with the threat that it would close the casinos if the tribe did not agree to the state’s terms.

The single greatest factor promoting the improvement of state-tribal relations, that is, the success of the cooperative model, is a consistent federal Indian policy. If Washington holds out no hope to either government that they can wheedle and cajole changes in federal policy, they accept responsibility for governing reservation areas and sit down to work out a relationship that is mutually acceptable, designed by the parties, and tailored to local conditions. To the degree that the federal government holds out the false hope to either government that it will realign power, the incentive of the governments to accept their responsibilities is removed.

At the local level, tribes and states must accept the permanence of their coexistence. Tribal and state officials alike, appointed as well as elected, must be judged not only on how well they bluster at each other but on a more sophisticated level. They must justify the need for conflict as the failure of all attempts to cooperate and coordinate, not as some primitive instinct.

Future natural resource issues involving Indian tribes will be as complex as those in the larger society and may very much resemble them. They can appear to be examples of unreason and overreaching. They will surely from time to time shatter stereotypes. But, properly considered, they can be far from unmanageable. The management of natural resources is fundamentally political. Once everyone recognizes that tribal governments sit at the same table as the state and federal governments, mutually beneficial natural resource management can begin.