Environmental Law - Federal Indian Law - Recent Developments - State of Washington, Department of Ecology v. United States Environmental Protection Agency

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NOTE

ENVIRONMENTAL LAW—FEDERAL INDIAN LAW—RECENT DEVELOPMENTS—State of Washington, Department of Ecology v. United States Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985)

The Ninth Circuit held that the Resource Conservation and Recovery Act which delegates to states the power to implement and enforce hazardous waste plans over “persons” within the state does not extend state power over Indian lands.

INTRODUCTION

For the past decade, the question of jurisdictional authority over environmental protection programs within Indian country has become increasingly important. Many federal environmental statutes delegate authority to the individual states to devise and implement environmental protection programs. However, it is unclear whether these same statutes also convey authority to the states over Indian country, an area over which states generally lack authority. Since many tribes have recently begun developing the valuable natural resources on their lands, and promoting economic development in general, the question has taken on great significance. State of Washington, Department of Ecology v. United States

1. "Indian country" is a term of art first defined in 1948 as:
   (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.
   This encompasses much more territory than the more commonly used term “Indian reservation,” which describes only that territory reserved for Indian occupancy by treaty, statute, or executive order, and does not include Indian communities outside of the reservation. See generally F.S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, ch. 1 (1982 ed.).


Environmental Protection Agency [Washington] is the first case to directly address this question.5

STATEMENT OF THE FACTS

The Resource Conservation and Recovery Act [RCRA],6 is a comprehensive federal program for hazardous waste management. The RCRA delegates authority to the states, in lieu of the federal government, to develop and implement such programs.7 According to the RCRA, a state has enforcement authority over "any person."8 Included in the definition of "person" is "municipality,"9 which in turn includes "an Indian tribe or authorized tribal organization."10

Relying on these statutory provisions, the Washington State Department of Ecology submitted a plan to the Environmental Protection Agency [EPA] on May 3, 1982, for interim authorization of its existing hazardous waste program.11 Washington asserted authority to regulate hazardous wastes on all lands within the state, including Indian reservations.12 The EPA approved Washington’s plan only as it applied to non-Indian lands, asserting that 1) the RCRA did not confer jurisdiction over Indian land to the states, and 2) the state had not adequately demonstrated any other

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4. 752 F.2d 1465 (9th Cir. 1985).
5. Other courts have never dealt with this issue on the merits, but have dismissed several similar cases on procedural grounds, for example, lack of ripeness. See Will, supra note 2, at 472-73.
7. 42 U.S.C. § 6926 (1984). The state must submit its plan to the EPA to receive authorization to carry it out. The EPA Administrator shall authorize the plan if the state's proposal is "substantially equivalent" to the government's requirements. Id.
8. 42 U.S.C. § 6928(a) (1984). This section actually provides for federal enforcement authority. However, § 6926(d) provides that state actions under the Act have the same force and authority as federal actions. Therefore, a state with an approved plan has authority over any person in the state just as the federal government does in the absence of a state plan.
10. 42 U.S.C. § 6903(13) (A) (1984). The CWA and the SDWA have the same provisions regarding "person," "municipality," and Indians. See 33 U.S.C. §§ 1362(4) and (5) (1982); 42 U.S.C. §§ 300f(10) and (12) (1982). Interestingly, § 300j-6(c)(1) of the SDWA also provides that:

Nothing in the Safe Drinking Water Amendments of 1977 shall be construed to alter or affect the status of American Indian lands or water rights nor to waive any sovereignty over Indian lands guaranteed by treaty or statute.

Washington used this provision to argue by negative implication that the lack of any such provision in the RCRA showed congressional intent to allow state jurisdiction over Indian lands. The court rejected this argument as contrary to the well-established principle of Indian law that Indian rights cannot be abrogated absent an express congressional statement of intent to do so. Washington, 752 F.2d at 1471, n.6.

11. 42 U.S.C. § 6926 (1984) provides that any state which had an existing hazardous waste plan at the time the Act was promulgated in 1976 could apply for temporary authorization to carry it out. States without existing plans had to wait for the EPA to promulgate guidelines.
grounds for extending its jurisdiction over Indian country. Following special provisions in the RCRA, the state petitioned the Ninth Circuit for review of the EPA’s decision.

A three judge panel unanimously affirmed the EPA’s decision. The court reviewed the RCRA and found that nothing in the Act or its legislative history dealt with the question of jurisdiction over Indian country. Under the basic principles of federal Indian law, states do not have jurisdiction within Indian country unless Congress clearly expresses an intent to allow a state to exercise power. Although the RCRA’s definitional provisions concerning “persons” could be read to confer jurisdiction to the states, the court determined that these provisions only serve to make tribes “regulated entities” subject to federal authority under the RCRA, not to state authority. The court held that it must therefore defer to a reasonable interpretation of the statute by the EPA, RCRA’s administering agency. Circuit Judge Canby, writing for the court, determined that the EPA’s interpretation was reasonable because 1) the EPA has a published policy of Indian self-determination in the area of environmental protection of Indian lands; 2) the principles of federal Indian law generally preclude state authority over Indian country unless Congress clearly expresses an intent to allow it; 3) the federal trust responsibility toward Indians is best carried out if regulation of such programs remains in the federal government’s control; and 4) the long tradition of Indian

13. The EPA stated that it denied Washington jurisdiction as to Indian lands because:
   EPA assumes a State lacks authority unless the State affirmatively asserts authority and supports its assertion with an analysis from the State Attorney General. ... EPA has concluded that the State’s assertion is not adequately supported in law or by the analysis provided. ... Contrary to the State’s argument, EPA concludes that RCRA and the act of authorization do not convey to the State any authority relative to Indian lands jurisdiction. Rather, States must independently obtain such authority expressly from Congress or by treaty. The State has not demonstrated such authority; EPA, therefore, will retain jurisdiction for operating the Federal program on Indian lands in the State of Washington.

14. 42 U.S.C. §6976(a)(1) (1984) provides for review of final agency regulations only in the District of Columbia Court of Appeals. 42 U.S.C. § 6976(b) (1984) provides for review of agency actions “issuing, denying, modifying, or revoking any permit ... or in granting, denying, or withdrawing ... interim authorization” in any appropriate Court of Appeals.

15. The EPA argued that the Ninth Circuit did not have jurisdiction over this case because it contended that Washington was seeking review of regulations and not permit actions. However, the court rejected this argument saying that there had never been any regulations squarely addressing the question of jurisdiction over Indian lands which Washington could have appealed in accordance with§ 6976(a)(1). In addition, the case falls under § 6976(b) dealing with interim authorizations. The court therefore determined that it had jurisdiction over the subject matter. 752 F.2d at 1468.

16. See infra BACKGROUND, at § II.

17. 752 F.2d at 1469.

18. Id.
sovereignty must be used as a "backdrop" for interpreting ambiguous federal statutes.19

This casenote will discuss the court's decision given existing case law, the Indian law canons of statutory construction, and the EPA policy upon which the court relied. It will also discuss the ramifications of this decision in light of 1) a new EPA Indian Policy20 promulgated while Washington was pending, and 2) recent congressional amendments to the Safe Drinking Water Act,21 the Comprehensive Environmental Response, Compensation and Liability Act (Superfund),22 and the Clean Water Act.23

BACKGROUND

The precise question of jurisdiction over environmental programs in Indian country posed in this case was one of first impression. However, the Washington court was aided by precedent in two areas—the authority of an administrative agency to interpret the statutes it must administer, and the general principles of federal Indian law.

Power of an Administrative Agency to Interpret Statutes

According to the body of administrative law, an administrative agency has some power to interpret the statutes entrusted to it. The Washington court relied in particular on two prior cases dealing with this power. The first, *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*,24 recognized that when a statute is silent or ambiguous with regard to a particular issue, the administering agency is allowed to "fill in the gaps" left by Congress.25 The second, *Columbia Land Basin Protection Agency v. Schlesinger*,26 held that courts should defer to an agency's reasonable interpretations, even if the agency or the reviewing court could have made other likewise reasonable interpretations.27

19. *Id.* at 1469-71.
20. EPA Indian Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984).
25. 467 U.S. 842-44.
26. 643 F.2d 585 (9th Cir. 1981). *See also* Nance v. Environmental Protection Agency, 645 F.2d 701, 714 (9th Cir. 1981) ["Agency interpretations of federal statutes are entitled to great weight. Brubaker v. Morton, 500 F.2d 200 (9th Cir. 1974). '[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.' Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381. . . .'"].
27. 643 F.2d at 600.
Federal Indian Law

Four basic principles of federal Indian law have been developed and used by the courts to analyze questions involving tribal, federal, and state relations. They are: tribal sovereignty, preemption of state power, the federal trust responsibility, and the canons of statutory construction. These principles must be briefly discussed in order to understand the Washington court's decision.

Tribal Sovereignty: Preemption of State Power as a Protection of Tribal Sovereignty

In addition to relying on administrative law cases, the court relied primarily on the principles of federal Indian law developed over the past 150 years. The seminal 1832 decision of Worcester v. Georgia28 laid down one of the fundamental tenets in Indian law—that Indian tribes retain the power of self-government. Worcester established that Indian tribes are sovereign nations whose powers are "not, in general, delegated powers granted by express acts of Congress, but rather 'inherent powers of a limited sovereignty which has never been extinguished.'"29

Because Indian tribes are inherently sovereign nations, Worcester held that states are excluded from exercising jurisdiction over them.30

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28. 31 U.S. (6 Pet.) 515 (1832) [Worcester].
29. COHEN, supra note 1, at 231, quoted with approval in United States v. Wheeler, 435 U.S. 313, 322 (1978) [Wheeler]. The sovereignty of Indian tribes is "limited" because of the holding in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) [Johnson]. In an opinion by Chief Justice Marshall, the Supreme Court held that the conquering European nations, and their successors the United States, became the fee simple owners of the North American continent. Indians retained the right to use and occupy their ancestral homes, subject to the right of the United States to purchase their lands. In effect, both the Indians and the whites "held" the fee, but the ultimate ownership of the land was vested in the United States.

Tribal sovereignty stems from the Indian tribes' aboriginal, inherent power to govern themselves. Because of the "discovery and conquest" of the New World, the tribes became subject to the power of the European and later the United States government. Johnson stripped tribes of external powers such as the power to treat with other nations, and to freely convey their lands. Tribes retained their internal powers after "conquest." However, these internal powers may be, and at times have been, severely limited. The federal government has plenary power over Indians as a result treaties and congressional legislation may qualify or abrogate tribal powers, and even tribal sovereignty. See, e.g., the Major Crimes Act of 1885, 18 U.S.C. § 1152 (1982); Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903); and H.Con. Res. 108, 83rd Cong., 1st Sess. (1953), which led to the termination of 109 tribes between 1945-61.

30. The Court stated that:

[i]f the Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of [a state] can have no force, and which the citizens of [a state] have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

ter's progeny has, almost without exception, upheld this notion of exclusion of state power within an Indian reservation.31

The doctrine of tribal sovereignty has not remained static since Worcester. The recognition of the sovereign status of tribes has not been a total bar to exercises of state authority. States may, in certain circumstances, have legitimate interests in regulating some activities within Indian country.32 In such cases, the doctrine of tribal sovereignty does not definitively resolve the question of jurisdiction in favor of tribes. Instead, it "provides a backdrop against which the applicable treaties and statutes must be read."33

This "backdrop" analysis is often used in conjunction with the doctrine of federal preemption of state law within Indian country. Recent U.S. Supreme Court cases indicate an increasing reliance on preemption as a means of protecting tribal sovereignty.34 States may be expressly preempted by legislation, or may be preempted when an exercise of state authority within Indian country "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."35

31. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) [White Mountain]; Bryan v. Itasca County, 426 U.S. 373 (1976) [Bryan]; McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) [McClanahan]; Williams v. Lee, 358 U.S. 217 (1959) [Williams]; and Blue Jacket v. Board of Comm'rs of Johnson County (“The Kansas Indians”), 72 U.S. (5 Wall) 737 (1866). McClanahan and White Mountain both present the caveat that state exclusion is not complete. Since Worcester, the state exclusion doctrine has undergone some revision. E.g., states have occasionally been able to assert their legitimate regulatory interests over non-Indians on the reservation when the rights of Indians are not involved and tribal self-government is not impaired. See, e.g., discussions in White Mountain, 448 U.S. at 142-44, and McClanahan, 411 U.S. at 171. However, the Supreme Court has also allowed states to assert regulatory power even when it may impact on Indian rights of self-government. See, e.g., Rice v. Rehner, 463 U.S. 713 (1983) [Rice] and Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976) [Moe]. 

Rice allowed California to assert authority over federal Indian trader liquor licensing; Moe allowed Washington to impose state cigarette taxes on on-reservation sales by Indians to nonmembers. The Indian seller had to assess and collect the tax, which placed an administrative burden on him that the state could not normally have required.

32. McClanahan, 411 U.S. at 171. Indians within Indian country are never subject to state regulation, even in those states which were delegated or have assumed civil and criminal authority pursuant to Public Law 280. 25 U.S.C. § 1360(a) (1982) and 18 U.S.C. § 1162(a) (1982). See Bryan, 426 U.S. at 384, 390.

33. McClanahan, 411 U.S. at 172.

34. See, e.g., Rice, 463 U.S. at 718, White Mountain, 448 U.S. at 143, McClanahan, 411 U.S. at 172 (this was the first case to actually use the word "preemption" in the context of Indian law); Warren Trading Post v. Arizona State Tax Comm'n, 380 U.S. 685, 690-91 (1959).

Preemption is a federal doctrine which provides that state laws have no force when 1) the federal government has acted in a particular area so as to "occupy the field," thus leaving no room for state law to act; 2) state laws and federal laws are in conflict so that it is impossible to comply with both; or 3) Congress expressly denied state authority in its legislation. See, e.g., Pacific Gas and Electric v. State Energy Resources Conservation Comm'n, 461 U.S. 190, 203-04 (1983).

Preemption in Indian law is somewhat different. No express congressional statements are required for a court to find that state law has been preempted. Instead, "'[t]he tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by the operation of federal law." White Mountain, 448 U.S. at 143-44 (citations omitted).

35. Williams, 358 U.S. at 220.
However, states are not necessarily completely preempted from acting within Indian country. The Supreme Court has recognized that a state may have legitimate regulatory interests which justify assertion of authority over non-Indian activities within the reservation. For example, in *White Mountain Apache Tribe v. Bracker*, Justice Marshall, writing for the Court in a six-to-three opinion, developed a "balancing test" to use in such cases. This test "call[s] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."  

The Supreme Court's most recent articulation of the balancing test was given in *California v. Cabazon Band of Mission Indians*. In the absence of express congressional preemption:

> [s]tate jurisdiction is preempted . . . if it interferes . . . with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. *[New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983)]. The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development. *Id.* at 334-35.

### The Federal Trust Responsibility

Concomitant with the tenet of tribal sovereignty is the trust responsibility imposed on the federal government. The trust responsibility arose from the long history of federal-tribal relations, in which the federal government offered tribes its protection, through treaties and statutes, in exchange for Indian lands. The trust responsibility requires that the United States, as fiduciary, act in the best interest of the beneficiary tribes to promote tribal self-government and to protect tribal lands and sovereignty. Historically, the trust responsibility has been used to prohibit...
the exercise of state jurisdiction over Indians and Indian lands in order to protect tribal sovereignty.43

The Canons of Statutory Construction

The common law canons of statutory construction of Indian law are another means used to protect tribal sovereignty. Four canons have developed over the past century and a half for use in interpreting treaties and statutes affecting Indians. These canons work to counteract the historically unequal bargaining position of Indian tribes vis-a-vis the United States government. They provide first, that courts must construe Indian treaties and statutes liberally in favor of the Indians.44 Second, courts must resolve any ambiguities in treaties and statutes in favor of the Indians.45 Third, courts must construe treaties as the Indians would have understood them.46 Finally, an abrogation of tribal sovereignty or Indian rights generally requires a clear expression of congressional intent.47 Therefore, states may not assert jurisdiction over Indians in Indian country unless Congress clearly delegates jurisdiction to the state, or unless an act's legislative history makes such an intent clear.48

ANALYSIS

The court in State of Washington, Department of Ecology v. United States Environmental Protection Agency performed a two-tier analysis of the jurisdictional issue. The first tier involved a determination that the EPA had the authority to interpret the RCRA; the second involved a determination that the EPA's interpretation was reasonable.

First, the court determined that the EPA had authority to interpret the RCRA in a reasonable manner. Relying on a solid line of precedent dating


43. See, e.g., McClanahan, 411 U.S. 164, Williams, 358 U.S. 217, and Worcester, 31 U.S. (6 Pet.) 515. Although the exclusion of state power in Indian country has relaxed somewhat since the absolute prohibition laid down in Worcester, the general rule of exclusion is still viable. Today, federal preemption of state law acts in conjunction with the trust responsibility to protect tribal sovereignty by generally prohibiting state exercises of power within Indian country. See also Chambers, supra note 41, at 1219-20.


47. See, e.g., Wheeler, 435 U.S. at 323; Bryan, 426 U.S. at 381.

from 1921, the court held that the EPA, as the RCRA's administering agency, could interpret the Act in any reasonable manner. Thus, the court was on firm ground in deferring to the EPA's authority to decide the extent of state power over Indian lands under the RCRA.

Once the court determined that the EPA had authority to "fill in the gaps," it was necessary to decide whether the agency exercised this authority reasonably. Because of the well-developed "deference to agency interpretation" test, the Ninth Circuit did not have to determine whether the EPA could have made any other reasonable interpretation. The court had only to view the agency's action in light of the EPA's own Indian policy and the body of federal Indian law.

In determining that the EPA's interpretation was reasonable, the court relied on federal Indian law which has developed in the 150 years since Worcester v. Georgia. Although the development of Indian law has been by no means a smooth path, the broad general outlines of tribal sovereignty, federal plenary power, and the exclusion of state power have remained relatively constant. The court did not deviate from these general principles, nor should it have, given the extensive reliance courts have placed on them.

In interpreting the RCRA, the Ninth Circuit followed the principle of state exclusion from Indian lands in the absence of an express congressional delegation. The RCRA definitional provisions incorporate tribes under the definition of "person." It may be argued, of course, that these

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50. 752 F.2d at 1469.
51. See supra text accompanying notes 24-27 and 29.
52. Federal Indian law has undergone several distinct periods, each with its own policy goals for treatment of Indian tribes. Each period is usually diametrically opposed to both its predecessor and its successor, creating confusion and, often, disastrous results for tribes and Indian peoples. Briefly, these periods are:
1) 1820-50—Removal of tribes from populated to unpopulated, and usually undesirable, areas.
2) 1850-80s—Movement of tribes to established, "permanent" reservations. This period was accompanied by extensive treaty making.
3) 1871-1928—Allotment and assimilation, during which time reservation land was changed from communally to individually held, with the aim of making Indians into farmers and "mainstream" Americans. The result was the diminishment of tribal land holdings from 138 million acres to 48 million acres, almost half of which was arid or semi-arid.
4) 1928-43—Indian Reorganization Act and preservation of the tribes.
5) 1943-61—Tribal termination. This policy ended federal recognition and the federal relationship between 109 tribes and bands and the United States.
6) 1961-present—Tribal self-determination.
See generally, COHEN, supra note 1, ch. 2.
53. See supra notes, §11.
54. See supra text accompanying notes 8-10.
provisions are a delegation of authority to the states. However, the court determined that the provisions are ambiguous since the question to be resolved was whether the language of the provisions constituted an express delegation of jurisdiction to the states. The court stated that these provisions:

... indicate only that tribes are regulated entities under RCRA ... [and do] not say whether states have authority to enforce state hazardous waste regulations against tribes or individual Indians on Indian lands. The legislative history of RCRA is totally silent on the issue of state regulatory jurisdiction on the reservations.  

This determination that the statute is ambiguous reflects the strict standard which must be met in order to show that Congress intended to delegate jurisdiction over Indian country to the states, a question examined repeatedly since Worcester.  

Once the court found the RCRA provisions ambiguous, the canons of statutory construction required that the ambiguities be resolved in favor of the tribe.  

In this case, that meant that the RCRA's definitional provisions must be read as not granting states jurisdiction over Indian lands for environmental protection.  

In addition to resolving ambiguities in favor of the tribes, the court viewed the RCRA against the "backdrop" of tribal sovereignty as described by the Supreme Court in McClanahan v. Arizona State Tax Commission. As discussed above in White Mountain Apache Tribe v. Bracker, courts may balance a state's regulatory interests against the tribe's interests in self-government. Unless the state advances significant regulatory interests to justify its assertions of authority, the "backdrop" of tribal sovereignty will tip the scales toward tribal, not state, authority for on-reservation activities. Since Washington did not present any regulatory interests which would be impaired, the court found that the EPA's

55. 752 F.2d at 1469.
56. See supra text accompanying notes 44-48.
57. See supra notes 32-33 and accompanying text.
58. See supra text accompanying notes 36-40.
59. White Mountain, 448 U.S. at 150.
60. Washington might have been able to assert a legitimate state regulatory interest given the fact that pollution is transitory. Uncontrolled emissions from an Indian reservation could well jeopardize a state's ability to comply with the federal requirements specified in this, and all other, environmental protection statutes. Whether such an interest would be deemed to outweigh the tribe's interest in self-government is questionable since the court stated [(w)e recognize the vital interest of the State of Washington in effective hazardous waste management throughout the state, including on Indian lands. The absence of state enforcement power over reservation Indians, however, does not leave a vacuum in which hazardous wastes go unregulated. EPA remains responsible for ensuring that the federal standards are met on the reservations.]

752 F.2d at 1472 (emphasis added).
decision to prohibit state jurisdiction was reasonable. 61

Besides resolving the RCRA’s ambiguities in favor of the tribe, the court also adhered to the requirement of express congressional intent to grant a state jurisdiction over Indian country. 62 The court found that the RCRA does not present a clear expression of congressional intent to abrogate Indian rights in favor of state jurisdiction. Absent this expression, allowing a state to assert jurisdiction would be a violation of the duties imposed by the federal trust responsibility to protect tribal lands and tribal sovereignty and to promote tribal self-determination. 63

The court’s determination that the EPA’s decision was reasonable was further buttressed by its reliance on two federal Indian policies promulgated by the EPA and the Reagan administration. The EPA’s policy at the time of Washington was to “promote an enhanced role for tribal government in relevant decisionmaking and implementation of Federal environmental programs on the reservations.” 64 Reagan administration policy, then and now, promotes tribal self-determination in general. 65

61. Significantly, the Ninth Circuit did not follow a recent Supreme Court case which, if read literally, would limit tribal sovereignty to those areas in which the tribe has historically exercised its authority. Rice, 463 U.S. 713, allowed California to impose its liquor license restrictions on a federally licensed Indian trader selling liquor on the reservation. Justice O’Connor wrote that the “backdrop” of tribal sovereignty comes into play only in those areas where the tribe has a “tradition . . . of self-governance.” Id. at 720 (emphasis added). Such an interpretation of the backdrop of tribal sovereignty could significantly limit the extent of a tribe’s power to manage its internal affairs. Since many issues now facing tribal governments are relatively new there can be no tradition of self-government; a narrow reading of Rice could effectively foreclose a tribe from exercising its full powers over issues which it literally could not have dealt with previously. In Washington, a narrow reading could have given Washington power to assert authority over Indian country within the state since few tribes have ever implemented and overseen environmental protection programs, and could not, therefore, have a tradition of self-governance in this area.

Perhaps Rice will be limited to its facts. Certainly the dissenting justices, Blackmun, Brennan, and Marshall, felt that it should be. In their dissent, they rejected the Court’s “tradition of self-governance” holding, saying that

[the Court’s analysis] has never turned on whether the particular area being regulated is one traditionally within the tribe’s control . . . [In Mescalero Apache Tribe v. Jones, 411 U.S. 145, . . . (1973), the Court concluded that a State could not impose a use tax on personalty installed in ski lifts at a tribal resort, yet it could scarcely be argued that the construction of ski resorts is a matter with which Indian tribes historically have been concerned.]

463 U.S. at 739 (Blackmun, J., dissenting, emphasis in original).

The most recent Supreme Court opinion dealing with state regulatory authority over Indian reservations seems to limit Rice to its facts. See Cabazon, ___ U.S. at ___, 107 S.Ct. at 1094.

62. See supra note 47.

63. See generally COHEN, supra note 1, ch. 3, at § C2, and Chambers, supra note 41, at 1219-21.

64. 752 F.2d at 1471 (quoting EPA Policy for Program Implementation on Indian Lands, Dec. 19, 1980, at 5). See also EPA Office of Federal Activities, Administration of Environmental Programs on Indian Lands 83 (1983). See infra, text accompanying notes 71-74 for a discussion of the current EPA policy.

65. See President’s Statement on Indian Policy, WEEKLY COMP. OF PRES. DOC., 96 (Jan. 24, 1983).
The EPA's decision to prohibit state jurisdiction over Indian lands was consonant with these policies. Had the EPA ruled in favor of Washington's plan, the result would have been an impermissible extension of state regulatory jurisdiction over Indian country. Such a result would be contrary to the principle of self-determination which is met by allowing tribal control of tribal lands. Thus, it was logical for the court to determine that the EPA interpretation was reasonable.

Finally, the 1981 case of *Nance v. Environmental Protection Agency* provided further precedent for the Ninth Circuit. *Nance* upheld a provision of the Clean Air Act which delegates authority to Indian tribes to redesignate their airsheds as either Class I or Class III (designations which allow only certain degrees of air pollution). The portion of the Clean Air Act at issue was section 7474(c) of the "Prevention of Significant Deterioration" (PSD) provisions. The EPA allowed the Northern Cheyenne tribe to redesignate its reservation airshed from Class II to Class I, a stricter standard which allows no deterioration of ambient air quality. Various local coal developers protested, asserting that the delegation was unconstitutional because the Clean Air Act allows delegation of authority to states only. The *Nance* court affirmed the delegation to the tribes based on the principles of inherent tribal sovereignty and deference to an agency interpretation of an act it must administer. The court held that in the area of air quality management "the states and Indian tribes occupying federal reservations stand on substantially equal footing."

While *Nance* helped pave the way for *Washington*, the court in *Nance* resolved a much narrower issue. *Nance* dealt with a single provision of the Clean Air Act which presented the court with an express congressional delegation of authority to the tribes, thus leaving no ambiguity in the PSD provisions. *Washington* dealt with the question of whether the state

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68. The Prevention of Significant Deterioration provisions were added to the Clean Air Act in 1977 to deal with complaints that the Act did not provide for retention of air quality in those areas which met or bettered the minimum standards which the Act required. All areas of the country were designated as Class II. States, and Indian tribes, could redesignate these areas to allow for some degradation of air quality (Class III), or to allow for no future significant deterioration of air quality (Class I). 42 U.S.C. § 7474 (1982).

69. The coal developers were worried that higher standards on the Crow reservation would affect their ability to extract coal by strip mining. *Strip mining creates "fugitive emissions," i.e., pollutant emissions which escape from a source, spread over a large area, and could impact on the adjoining areas' ability to maintain compliance with federal emissions standards imposed by the Clean Air Act. Nance, 645 F.2d at 706-07.*

70. 645 F.2d at 714. Since the *Nance* court was deciding tribal authority to implement environmental protection programs only over a single section of the Clean Air Act which contained an express delegation, it is safe to say that the question before the *Washington* court, dealing with Indian authority over an entire act which lacked an express delegation, was one of first impression.
could implement the entire RCRA on the reservation. Moreover, the
RCRA lacks the express delegation, either to a tribe or a state, which
was present in Nance. Therefore, the court in Washington was required
to analyze the general principles of federal Indian law and, in light of
these principles, the reasonableness of the agency action in the absence
of the express delegation. The Nance court was able to avoid the extensive
analyses required in Washington. Because of this more in-depth treatment
of the issue of authority over environmental protection programs,
Washington’s precedential value is much greater than Nance’s. This pre-
cedential value is enhanced by subsequent congressional and executive
treatment of this issue.\footnote{71}

NEW EPA INDIAN POLICY PROMULGATED DURING
THE PENDENCY OF WASHINGTON

On November 8, 1984, the EPA released a new policy statement re-
garding environmental program administration on Indian reservations.\footnote{72}
Its purpose is to “consolidate and expand on existing EPA Indian Policy
statements in a manner consistent with the overall Federal position in
support of Tribal ‘self-government’ and ‘government-to-government’ re-
lations between Federal and Tribal governments . . . [and to] significantly
enhance environmental quality on reservation lands.”\footnote{73} The policy
described nine principles which the EPA would pursue to reach these goals:

1. The Agency stands ready to work directly with Indian Tribal
Governments on a one-to-one basis (the ‘government-to-govern-
ment’ relationship) rather than as subdivisions of other Govern-
ments.

2. The Agency will recognize Tribal Governments as the primary
parties for setting standards, making environmental policy deci-
sions and managing programs for reservations, consistent with
Agency standards and regulations.

3. The Agency will take affirmative steps to encourage and assist
Tribes in assuming regulatory and program management respon-
sibilities for reservation lands.

Until Tribal Governments are willing and able to assume full
responsibility for delegable programs, the Agency will retain re-
ponsibility for managing programs on reservations.

4. The Agency will take appropriate steps to remove existing legal

\footnote{71. See infra text accompanying notes 72-89.}
\footnote{72. EPA Policy for the Administration of Environmental Programs on Indian Reservations, Nov.
8, 1984. EPA released the new policy during the pendency of Washington. However, since oral
argument for Washington was on Sept. 6, 1984, the Ninth Circuit could not, of course, use the new
policy in its decision.}
\footnote{73. Id. at 1.
and procedural impediments to working directly and effectively with Tribal Governments on reservation programs.

5. The Agency, in keeping with the Federal Trust Responsibility, will assure that Tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect Tribal environments.

6. The Agency will encourage cooperation between Tribal, State, and Local Governments to resolve environmental problems of mutual concern.

7. The Agency will work with other Federal agencies which have responsibilities on Indian reservations to enlist their interest and support in cooperative efforts to help Tribes assume environmental program responsibilities for reservations.

8. The Agency will strive to assure compliance with environmental statutes and regulations on Indian reservations.

9. The Agency will incorporate these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system and ongoing policy and regulation development processes.

This new policy bolsters the holding in Washington. The policy could have effectively negated a contrary holding by the court, and stripped it of precedential value. The new policy also forecloses further litigation on the question of jurisdiction over environmental programs on Indian reservations, because an official federal policy is now in effect.

RECENT STATUTORY CHANGES IN SOME ENVIRONMENTAL STATUTES SINCE WASHINGTON

Since the decision in State of Washington, Department of Ecology v. United States Environmental Protection Agency, the 99th and 100th Congresses amended several environmental statutes which were up for reauthorization. The Safe Drinking Water Act (SDWA), the Comprehensive Environmental Response, Compensation and Liability Act (Superfund), and the Clean Water Act (CWA), have all been amended to provide that the EPA administrator may, at his discretion, treat Indian tribes as states for the purposes of the acts.

Both the SDWA and Superfund were passed by Congress and signed
into law by President Reagan, despite earlier veto threats.\textsuperscript{79} The CWA, after passage by the 99th Congress, was pocket vetoed by President Reagan on November 6, 1986.\textsuperscript{80} The amendments were resubmitted and passed by the 100th Congress in January, 1987, actively vetoed on January 29th, and finally became law after Congress overwhelmingly overrode the veto on February 3 and 4, 1987.\textsuperscript{81}

The amendments to the SDWA and the CWA are virtually identical regarding the EPA administrator's discretion to treat Indian tribes substantially as states. He may do so when he finds that the tribe may reasonably be expected to be capable of carrying out a federal protection program.\textsuperscript{82} Each act has added a new section detailing this process.\textsuperscript{83} Section 1451 of the SDWA amendments provides that:

The [EPA] Administrator shall . . . promulgate final regulations specifying those provisions of this title for which it is appropriate to treat Indian tribes as states. Such treatment shall be authorized only if:

- (A) the Indian tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers;
- (B) the functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction, and;
- (C) the Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this title and of all applicable regulations.\textsuperscript{84}

The Superfund amendments do not require such a finding by the Administrator. This is because the Superfund is not a protection program like the SDWA and the CWA, but rather a clean-up program. The states do not develop and implement plans under the Superfund. Instead, the Act provides for various clean-up procedures, including 1) notifying a state when releases of hazardous substances are threatened or have occurred; 2) choosing the types of remedies to be employed in treating the release; 3) defining the roles and responsibilities of the government and any liable parties under the national contingency plan; and 4) general information access.\textsuperscript{85}
Under the new Superfund amendments, tribes "will be afforded substantially the same treatment as a State with respect to [the above] provisions." This treatment does not include allowing tribes to include one facility on the national priority list for clean-up as the states do.

The SDWA and the CWA amendments also provide that tribes may receive grant and contract assistance to carry out the new duties which may be delegated to them. Lack of funding has been one of the crucial reasons that tribes have not previously overseen environmental protection programs on reservation lands. Since tribes were not deemed states under prior environmental legislation, funding provisions were not readily available. When combined with the fact that many tribes have limited financial resources, the lack of federal funding effectively barred tribes from carrying out costly environmental protection programs.

Many tribes own valuable natural resources which they lease as a means of generating revenue and employment. Severe environmental problems may be associated with resource development such as coal mining, oil and gas extraction, and nuclear and coal-fired electric generating plants presently occurring on some Indian reservations. Tribes are also trying to combat unemployment problems by seeking out other means of economic development. For example, the Navajo Nation recently held an "economic summit" to devise ways to attract other types of industry to the reservation.

Treatment as states will place new responsibilities on tribal shoulders. These new responsibilities will require the tribes to learn to balance the need for the revenues generated by these activities against the need to preserve their equally precious natural resources.

CONCLUSION

The new EPA Indian policy effectuates the Washington holding that states lack jurisdiction to implement environmental protection plans under the RCRA, and by analogy, similarly unclear statutes. Relitigation of the issue in Washington is now unnecessary. The new provisions of the SDWA, Superfund, and the CWA also foreclose litigation of the jurisdiction issue for these acts.

Undoubtedly, there will be litigation over a tribe’s ability to assume enforcement power, and over the quality of its actual enforcement. However, the extension of state authority over Indian country is effectively

87. Id.
88. SDWA, 42 U.S.C. § 300j-11(3), CWA, Pub. L. No. 100-04, § 518(c) and (f), 101 Stat. 78.
89. Will, supra note 2, at 500-501.
barred, at least for these newly amended statutes allowing delegation to the tribes.

Presumably, other statutes such as the Clean Air Act, the Noise Pollution Control Act, and the RCRA will be amended to conform with the SDWA, Superfund, and the CWA when they are reauthorized. In the interim, Washington offers sound guidance for courts which may be faced with the jurisdiction issue.

The Ninth Circuit was confronted in Washington with an issue which has only recently become an important issue in federal Indian law—environmental regulation. The court correctly identified the principles needed to resolve it, and accurately applied and interpreted them. The general principles of Indian law, the EPA's assessment of the issue, and the federal policies promoting tribal self-determination used by the court could not logically or consistently have led to any other conclusion.

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