

NATIVE AMERICAN CONTROL OF TRIBAL NATURAL RESOURCE DEVELOPMENT IN THE CONTEXT OF THE FEDERAL TRUST AND TRIBAL SELF- DETERMINATION

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I. INTRODUCTION

When the United States and the Indian Tribes entered into treaties last century, in exchange for the tribes' land the government promised protection and assistance.¹ The fulfillment of this promise is the historic trust owed by the federal government to the tribes.² Today, the trust still plays a role, and the official federal policy supports tribal self-determination.³ One manifestation of this policy is the recent set of amendments to environmental protection statutes⁴ that grant the tribes a role in reservation regulation.⁵ This manifestation of the federal policy supporting tribal self-determination is particularly fitting because a number of tribes are leasing their land for the development of natural resources,⁶ and these

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¹ See generally Fromboise & Fromboise, *Critical Legal and Social Responsibilities Facing Native Americans*, in INDIANS AND CRIMINAL JUSTICE 25 (L. French ed. 1982).

² See generally *id.*

³ See *infra* notes 8-22 and accompanying text. The term "self-determination" is described as the realization of self-government, the group act of controlling the relationships both among themselves and with outside governments, organizations, and persons. 1975 Indian Self-Determination and Educational Assistance Act, codified at 25 U.S.C. § 450(a)(1)-(2) (1982).

⁴ See, e.g., Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f-300j-11 (1982 & Supp. IV 1986); Clean Water Act (CWA), 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1988); Clean Air Act (CAA), 42 U.S.C. §§ 7401-7642 (1982 & Supp. IV 1986).

⁵ See, e.g., SDWA, 42 U.S.C. § 300j-11; CWA, 33 U.S.C.A. § 1377; CAA, 42 U.S.C. § 7474(c).

⁶ For example, the Navajo and Crow tribes are involved with coal mining. See *Indians Seek Coal Development to Offset Federal Aid Cuts*, COAL AGE, Jan. 1985, at 19 [hereinafter COAL

amendments offer some ways to control such development, control that for several reasons often seems beyond the tribes' capacities. The control of such development is crucial to the tribes' quest for economic self-determination.

This Comment first examines the historic trust and the history of federal-tribal relations, including the present era of the official federal policy encouraging tribal self-determination. The Comment then explores recent amendments to environmental protection statutes that permit the tribes a new role, tribal natural resource development under the auspices of the federal government and the problems therein, and the role of the United States Environmental Protection Agency in facilitating tribal self-regulation. The Comment then considers President Reagan's Indian policies and the general position of reservation economies. This Comment ultimately suggests ways of improving the tribes' self-determination posture through increasing tribal control over reservation resource development.

II. THE HISTORIC TRUST AND THE HISTORY OF FEDERAL GOVERNMENT-INDIAN RELATIONS

The European colonial powers that explored this continent, and later the United States government, entered into many treaties with various Indian tribes.⁷ Under mounting pressure from the government, the tribes surrendered their lands.⁸ The Indians understood that, in exchange for their land, they were to receive services relating to education, health, welfare, and economic development.⁹ This exchange included a guarantee by the United States government to give the Indians certain lands for the sole use and benefit of the Indian people forever.¹⁰ This guarantee is commonly known as the historic trust that the federal government holds for the tribes.¹¹

AGE]. The Navajo have been involved in uranium mining for decades. *See infra* notes 161-66 and accompanying text.

⁷ Statement by President Reagan: Indian Policy (Jan. 24, 1983), *reprinted in* DEP'T OF INTERIOR & DEP'T OF HEALTH AND HUMAN SERVICES, *MOVING TOWARD SELF-SUFFICIENCY FOR INDIAN PEOPLE 2* (1984) [hereinafter *Reagan Indian Policy*].

The Supreme Court has also expressed their opinion on the status of treaties between the tribes and the federal government. "[A] treaty was not a grant of rights to the Indians, but a grant of rights from them . . . a reservation of those [rights] not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). The Supreme Court used this definition recently in *United States v. Wheeler*, 435 U.S. 313, 327 (1978).

⁸ Fromboise & Fromboise, *supra* note 1, at 25.

⁹ *Id.*

¹⁰ *Id.*

¹¹ The trust was first described in 1831 by Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Marshall described the Cherokee as a "domestic dependent

The trust has three basic characteristics.¹² First, the trust covers a wide range of areas, from protection and enhancement of Indian trust resources¹³ and tribal self-government to social and economic programs designed to raise the Indians' standard of living.¹⁴ Second, the trust extends to individuals as well as to tribes in general.¹⁵ Third, the responsibility to honor the trust applies to all federal agencies, not only to those charged specifically with administering tribal affairs.¹⁶

The federal government, as trustee, can be liable for breach of the trust.¹⁷ The government's liability, however, is limited.¹⁸ Although the federal government exercises a general fiduciary relationship with the tribes that governs federal-tribal relations, liability only attaches in cases where the trust responsibility breached is one where the federal government clearly plays a specific dominant role.¹⁹ In *United States v. Mitchell*, for example, the Supreme Court found the federal government liable to the Quinault Tribe for damages for mismanaging the harvesting of the tribe's timber, a specific fiduciary duty.²⁰

nation" that looked to the federal government for protection, to "rely on its kindness and power [and to] appeal to it for relief to their wants." *Id.* at 17.

An earlier source, the Northwest Ordinance of 1787, also supplied a basis for the federal trust responsibility to Native Americans. Leventhal, *American Indians—The Trust Responsibility: An Overview*, 8 HAMLINE L. REV. 625, 627 (1985). The Ordinance, ratified by the first Congress, declared:

The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Id. at 627–28 (citing 1 Stat. 50, 52 (1789)). The Supreme Court recently discussed the trust in *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The *Mitchell* Court stated that the trust principle "has long dominated the [federal] Government's dealings with Indians." *Id.*

¹² ARKANSAS, LOUISIANA, NEW MEXICO, OKLAHOMA, AND TEXAS ADVISORY COMM., *Indian Tribes: Unique Sovereign Governments*, in THE NEW WAVE OF FEDERALISM: BLOCK GRANTING AND CIVIL RIGHTS IN THE SOUTHWEST REGION 23 (1983) (Report to the United States Comm'n on Civil Rights) [hereinafter ADVISORY COMM.].

¹³ See P. RENO, MOTHER EARTH, FATHER SKY, AND ECONOMIC DEVELOPMENT 8–9, 24–25 (1981).

¹⁴ ADVISORY COMM., *supra* note 12, at 23.

¹⁵ *Id.* This duty extends to Native Americans living off reservations. See Leventhal, *supra* note 11, at 655, 662–65.

¹⁶ ADVISORY COMM., *supra* note 12, at 23; see also Leventhal, *supra* note 11, at 645.

¹⁷ Leventhal, *supra* note 11, at 667–69; see also *infra* note 20 and accompanying text.

¹⁸ Leventhal, *supra* note 11, at 669.

¹⁹ *Id.* at 668–69.

²⁰ 463 U.S. 206 (1983). The Court concluded that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to

The federal government continues to invoke the trust today.²¹ President Reagan spoke of the trust in his 1983 Statement on Indian Policy: "[W]e shall continue to fulfill the federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members. The fulfillment of this unique responsibility will be accomplished in accordance with the highest standards."²²

Despite the presence of the trust, federal-tribal relations have not been consistent. The history of federal-tribal relations has evolved through several stages, each distinguishable by the government's attitude and action toward the tribes. These stages alternate between federal government respect for tribal self-determination and federal attempts to assimilate the tribes into mainstream American society.²³

In 1831, Chief Justice Marshall wrote for the Supreme Court in *Cherokee Nation v. Georgia* that the Cherokee tribe was in effect a

Indians." *Id.* at 225. See also *Seminole Nation v. United States*, 316 U.S. 286, 300 (1942) (recognizing that the federal government would be liable for damages for trust violations if the government knowingly assisted a corrupt tribal council).

²¹ The trust exists without formal trust documents. A recent congressional commission summarized the trust as follows:

The Federal duty can be likened to the "implied trust" in common law whereby a trust is created by operation of law. Generally, such trusts are recognized by the courts on the basis of an implied intention of the parties to a transaction (resulting trust) or on the basis that recognition of a trust is necessary in order to prevent the unjust enrichment of one party who committed fraud, deception or some other wrongdoing (constructive trust). In such circumstances, the requirements and restrictions imposed on a trustee are recognized even though no formal trust document creates them.

The analysis of the United States duty to Indians as that of a trustee to his beneficiary is supported by many judicial decisions where common law trust principles were used to measure the actions of the Federal Government toward Indians. Whether the creation of the responsibility is deemed an express trust or implied trust and whether the nature of the duty is identified as an active trust or a passive trust, the results are the same: the Federal Government is a fiduciary and as such is "judged by the most exacting fiduciary standards." This means that it must act with good faith and utter loyalty to the best interests of the beneficiary. It must keep the beneficiary informed of all significant matters concerning the trust and must not engage in "self-dealing."

AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT 125, *quoted in* Leventhal, *supra* note 11, at 633.

²² Reagan Indian Policy, *supra* note 7, at 3. See *infra* notes 248-63 and accompanying text for a discussion of President Reagan's Indian policy. The Reagan Administration's goal was to *limit* the focus of the trust to physical and financial resources. See Leventhal, *supra* note 11, at 656. For example, shortly before his January 1983 Statement on Indian Policy, President Reagan pocket vetoed a bill containing language construing the trust responsibility to include education for American Indian students. *Id.* (citing S. REP. NO. 64, 98th Cong., 1st Sess. 5, *reprinted in* 1983 U.S. CODE CONG. & ADMIN. NEWS 2055, 2059).

²³ See *infra* notes 24-86 and accompanying text.

state, a distinct political society separate from others, and was therefore able to manage its own affairs and govern itself.²⁴ In *Cherokee Nation*, Marshall recognized that the Cherokee had indeed "been uniformly treated as a state from the [time of the] settlement of our country."²⁵ Despite this recognition, however, the Court denied the Cherokee claim to status as an independent nation.²⁶ The Court stated that the tribes were not foreign nations but rather were "domestic dependent nations."²⁷

One year after the *Cherokee Nation* decision, the Court in *Worcester v. Georgia* stated that the laws of the state of Georgia had no effect in Cherokee territory.²⁸ Significantly, the Court ignored the wishes of the State of Georgia and recognized the Cherokee tribal sovereignty to the state's exclusion.²⁹ Justice Marshall stated:

The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves or in conformity with treaties, and with the acts of Congress.³⁰

Worcester and *Cherokee Nation* set the framework of federal Indian law that remains to this day. Within this framework, Indian policy is the prerogative of the federal government and the tribes are sovereign entities "with inherent powers of self-government."³¹

The tribal right of self-government, however, did not serve to protect the tribes from white encroachment. Even though the case law remained essentially undisturbed for more than a century after Marshall's opinions, the federal government has since that time in-

²⁴ 30 U.S. (5 Pet.) 1, 16.

²⁵ *Id.* at 15. This treatment of the tribe as a state provides the historical basis for the contemporary treatment of the tribes as states for the purposes of environmental protection statutes. See *infra* notes 193-241 and accompanying text. Unfortunately, this recognition of treatment as a state did not protect the Cherokee and other tribes from being driven from their homelands in the southeastern United States to Oklahoma in what the Cherokee, Creek, and Choctaw tribes called the "Trail of Tears." See G. JAHODA, *THE TRAIL OF TEARS* foreword (1975).

²⁶ *Cherokee Nation*, 30 U.S. at 17.

²⁷ *Id.* For a modern-day detrimental effect of the Court-imposed limitation on tribal sovereignty, see *infra* note 295 and accompanying text.

²⁸ 31 U.S. (6 Pet.) 515, 561 (1832).

²⁹ *Id.* at 539-40.

³⁰ *Id.* at 561.

³¹ Canby, *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 1 (1987).

consistently supported tribal self-government.³² Congress and the Executive branch have alternated between policies supportive of tribal self-government and those facilitating the alienation of Indian lands and the termination of tribes' official recognition and status.³³

In the late 19th and early 20th centuries, the goal of the United States government was to assimilate Indians into mainstream American society.³⁴ Central to this policy was separating the Indians from their tribal-held land.³⁵ The government gave individual Indians land, interests known as allotments,³⁶ in exchange for the allottee's interest in the tribal estate.³⁷ Humanitarian reformers supported this method of terminating tribal existence because they were convinced that the Indian could and should participate fully in the American system.³⁸ Between 1887 and 1934, the Indians sold two-thirds of their land allotted under this method.³⁹ The federal government's role in this mass disenfranchisement was to increase the ease with which the Indians could sell or lease their land.⁴⁰

Congress enacted the Indian Reorganization Act (IRA)⁴¹ in 1934 as a result of a new attitude⁴² toward the tribes. Specifically, the new attitude resulted from an emerging historical and anthropological respect for the tribes, in contrast to the previous desire to see Native Americans wholly assimilated into mainstream America.⁴³ Congress specifically intended the IRA to encourage Indian tribes to revitalize their self-government.⁴⁴ The IRA provided a congressional sanction of tribal self-government under which the tribes could adopt a constitution and enter into negotiations with local, state, and

³² See generally F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47-206 (1982 ed.). Cohen divides the past 100 years of federal government-tribal relations into four periods: Allotments and Assimilation (up to 1928); Indian Reorganization (1928-42); Termination (1943-61); and Self-Determination (1961-present).

³³ *Id.*

³⁴ See *id.* at 130-31.

³⁵ *Id.* at 136.

³⁶ *Id.* at 129.

³⁷ *Id.* at 130.

³⁸ *Id.* at 131.

³⁹ *Id.* at 138.

⁴⁰ See *id.* at 136-37.

⁴¹ Pub. L. No. 73-383, 48 Stat. 984 (1934). For a thorough background on the IRA, see V. DELORIA & C. LYTLE, *THE NATIONS WITHIN* (1984); see also C. KELLY, *THE NAVAJO INDIANS AND FEDERAL INDIAN POLICY 1900-1935* 163-66 (1968).

⁴² See F. COHEN, *supra* note 32, at 144, 145.

⁴³ *Id.* at 144. "Unquestionably, the Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).

⁴⁴ *Mescalero*, 411 U.S. at 151.

federal governments.⁴⁵ Many of these constitutions, however, were standard boilerplate documents "prepared by the Bureau of Indian Affairs (BIA)⁴⁶ and based on federal constitutional and common law notions rather than on tribal custom."⁴⁷ The good intentions of Congress notwithstanding, then, this procedure was a form of assimilation, because tribal custom was not the basis of the written constitutions.⁴⁸ In addition, the federal government did not realize that only a minority of tribal members, consisting of those members who had already assimilated, supported the newly sanctioned tribal councils.⁴⁹

Assimilation and termination have recurred in a number of forms, some of them benign.⁵⁰ Examples include the education by missionaries and the present-day leasing of land to energy companies in exchange for royalties and jobs.⁵¹ Given that traditional tribal existence in most cases was no longer possible, self-determination under the white man's tutelage was the best available course of action to preserve the tribes as cultural entities. The IRA signalled the beginning of the modern era of federal-tribal relations, characterized by support of Indian self-government and self-determination.⁵²

⁴⁵ F. COHEN, *supra* note 32, at 149.

⁴⁶ The BIA is the federal agency, under the Department of the Interior, charged with conducting relations with the tribes.

⁴⁷ F. COHEN, *supra* note 32, at 149.

⁴⁸ *Id.*

⁴⁹ Howland, *U.S. Law As A Tool of Forced Social Change: A Contextual Examination of the Human Rights Violations By the United States Government Against Native Americans At Big Mountain*, 7 B.C. THIRD WORLD L.J. 61, 65 (1987). For example, the Hopi Tribal Council was created in a 1936 election in which only 29% of the eligible members voted. The Council collapsed the next decade and the traditional leaders reestablished their roles. The traditional leaders were unwilling to exploit minerals discovered near the reservation. In 1952, a pro-development tribal council was reinstated with the help of a lawyer who was attorney for both the Hopi and a coal company. The majority of the Hopi boycotted the 1952 election as well as all subsequent tribal council elections. *Id.* at 66-67. The Hopi Tribal Council played a key role in the forced relocation at Big Mountain. For a discussion of the role of the Hopi Council in contemporary resource development, see *infra* notes 275-84 and accompanying text.

⁵⁰ B. JOHNSON & R. MAESTAS, WASI'CHU 211 (1979). Wasi'chu is a Lakota (Sioux) word for "greedy person." The tribes used the word to describe the white newcomers. Today the term refers to "those corporations and individuals, with their governmental accomplices, who continue to covet Indian lives, land, and resources for private profit." *Id.* at introduction.

For a discussion supporting the use of works of people who have experienced discrimination, poverty, and the like as key sources for criticisms of the legal system, see Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 343-49 (1987).

⁵¹ B. JOHNSON & R. MAESTAS, *supra* note 50, at 211.

⁵² See *infra* notes 64-85 and accompanying text.

Unfortunately for the development of tribal self-government and self-determination, congressional and executive branch opponents of the IRA policies, citing the expense and dubious nature of the programs, had by the mid-1940s shifted the emphasis of federal Indian policy back to assimilation.⁵³ In the early 1950s, termination of many tribes' official status accomplished this pre-IRA directive of assimilation.⁵⁴ Congress also enacted Public Law 280 (PL 280),⁵⁵ which gave many of the states criminal⁵⁶ and civil⁵⁷ jurisdiction over Indian lands. Previously, the federal government had exercised such jurisdiction exclusive of the states.⁵⁸

Later in the decade, however, the Supreme Court ruled more favorably for the interests of Indian self-determination. In the 1959 case of *Williams v. Lee*,⁵⁹ the Court emphasized that the basic policy of *Worcester v. Georgia*⁶⁰ was still in effect, that policy being that the tribes were to be respected as sovereign, distinct communities occupying their own territory under federal, not state, jurisdiction.⁶¹ The Court did state, however, that the *Worcester* principles would be modified "in cases where essential tribal relations were not involved and the rights of Indians would not be jeopardized."⁶² The federal policies in effect at this time reflected the changes since *Worcester*, not the continuation of the *Worcester* principles. Assimilation, termination, and PL 280 clearly jeopardized essential tribal relations and the rights of Indians.⁶³ For example, taking away a

⁵³ See generally F. COHEN, *supra* note 32, at 154-56.

⁵⁴ See generally *id.* at 170-74. Congress announced this termination policy in 1953. Leventhal, *supra* note 11, at 630 (citing H.R. CON. RES. 108, 83d Cong., 1st Sess. (1953)). For an account of the federal termination policy, see generally L. BURT, *TRIBALISM IN CRISIS* (1982).

⁵⁵ Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953), *amended by* 25 U.S.C. §§ 1321-1322 (1982).

⁵⁶ 18 U.S.C. § 1162 (1982).

⁵⁷ 28 U.S.C. § 1360 (1982).

⁵⁸ F. COHEN, *supra* note 32, at 174-75; Skibine, *The Courts*, AM. INDIAN J., Jan. 1980, at 11.

⁵⁹ 358 U.S. 217 (1959).

⁶⁰ 30 U.S. (5 Pet.) 1 (1831); see also *supra* notes 24-31 and accompanying text.

⁶¹ *Williams*, 358 U.S. at 219. The Court stated that "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the the right of Indians to govern themselves." *Id.* at 223.

⁶² *Id.* at 219.

⁶³ See *supra* notes 53-55 and accompanying text. Perhaps the Court intended to author a narrow holding in *Williams*, one covering the tribal court's jurisdiction over the petitioner American Indian. Such limited jurisdiction is odd (the language of *Williams*), because although tribal court jurisdiction is a vital ingredient in tribal sovereignty, the deliberate federal policies of assimilation and tribal termination contradict the Court's assurances that Marshall's mandate still controlled. Another possible explanation of this dichotomy is that there was incon-

tribe's official recognition is the opposite of recognizing a tribe as a distinct political society that is able to manage its own affairs.

This contradiction between the stated continuation of the recognition of tribal self-determination and the reality of federal policy lessened in the 1960s with the advent of the self-determination era, which continues to the present time.⁶⁴ The federal government began to actively "promote the practical exercise of inherent sovereign powers possessed by Indian tribes."⁶⁵ This policy change reflected the increased public concern for minorities' civil rights⁶⁶ and the reform-oriented presidential administrations of that decade.⁶⁷

The tribes themselves were very much in favor of increasing their role in self-governance. Early in the modern self-determination era, in June of 1961, representatives from sixty-seven tribes adopted a "Declaration of Indian Purpose," calling for a change in the federal administration of Indian affairs.⁶⁸ "The Indians, as responsible individual citizens, as responsible tribal representatives, and as responsible tribal councils, want to participate, want to contribute to their own personal tribal improvements and want to cooperate with their Government on best how to solve the many problems"⁶⁹

sistency between the various branches of the federal government—Congress and the agencies on the one hand, and the Court on the other.

⁶⁴ F. COHEN, *supra* note 32, at 180.

⁶⁵ *Id.* For example, in 1968 Congress amended Public Law 280 to require tribal consent to state assumption of criminal and civil jurisdiction over Indian territory. Indian Civil Rights Act, Pub. L. No. 90-284, §§ 401-402, 82 Stat. 73, 78-79 (1968) (codified at 25 U.S.C. §§ 1321-1322 (1982)). According to the Supreme Court, Congress amended Public Law 280 as a result of dissatisfaction "with the involuntary extension of state jurisdiction over Indians who did not feel they were ready to accept such jurisdiction, or who felt threatened by it." Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 892 (1986). "Tribes have been critical of Public Law 280 because it authorizes the unilateral application of State law to all tribes without their consent and regardless of their needs or circumstances." *Id.* at 892-93 (quoting S. REP. NO. 721, 90th Cong., 1st Sess. 32 (1967) (statement of Sen. Ervin)).

⁶⁶ F. COHEN, *supra* note 32, at 180-81.

⁶⁷ See Danziger, *A New Beginning or the Last Hurrah: American Indian Response to Reform Legislation of the 1970s*, 7 AM. INDIAN CULTURE AND RES. J. 69, 71 (No. 4) (1983). Unfortunately, documenting legal rights on paper does not guarantee their availability and protection. For example, *Brown v. Board of Education*, 347 U.S. 483 (1954), did not automatically desegregate schools. Years of struggle and much time in the courtroom finally overcame the resistance to the Court's mandate. The same is true for American Indian tribes, except that the more legally nebulous right of self-determination is even more difficult to enforce. Significantly, however, these legal rights in themselves provide for only minimal change regarding equality of opportunity and respect for diversity.

The Northern Cheyenne used a provision in the Clean Air Act to enforce its right to clean air. See *infra* notes 224-26 and accompanying text.

⁶⁸ F. COHEN, *supra* note 32, at 183-84.

⁶⁹ *Id.*

A statutory landmark during the modern self-determination era of Native American-federal government relations was the 1968 Indian Civil Rights Act (ICRA).⁷⁰ According to the Supreme Court, which interpreted the congressional purpose of ICRA in *Martinez v. Santa Clara Pueblo*,⁷¹ the Act contained two competing purposes.⁷² In addition to granting individual tribal members rights against tribal governments similar to some of the rights granted in the first ten and fourteenth amendments to the United States Constitution, Congress intended ICRA to promote the well-established federal policy of furthering Indian self-government.⁷³ In *Martinez*, the Court held that the latter purpose prevailed over the former.⁷⁴ Thus the Court held that ICRA promoted tribal self-determination.

A more recent statute affecting the self-determination of the tribes is the Indian Self-Determination and Education Assistance Act (ISDEAA).⁷⁵ In 1975, Congress enacted ISDEAA after reviewing the federal government's historical relationship with, and resulting responsibilities to, the American Indian people. This Act recognized that

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization

⁷⁰ Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified at 25 U.S.C. §§ 1301-1341 (1982)). For an analysis of the ICRA, see Zionitz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D.L. REV. 1 (1975); de Raismes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D.L. REV. 59 (1975).

⁷¹ 436 U.S. 49 (1978). For commentary on *Martinez*, see Note, *Tribal Sovereignty: Santa Clara Pueblo v. Martinez: Tribal Sovereignty 146 Years Later*, 8 AM. INDIAN L. REV. 139 (1980).

⁷² 436 U.S. at 62.

⁷³ *Id.* at 61-62. For example, individual tribal members are granted the right not to be compelled to be a witness against oneself in a criminal case. 25 U.S.C. § 1302(4) (1982).

⁷⁴ 436 U.S. at 62-64. See, e.g., 25 U.S.C. §§ 1321-1326, which repealed Public Law 280. See *supra* notes 55-57 and accompanying text. In *Martinez*, the Court denied federal court jurisdiction to an individual tribal member plaintiff who claimed that the Pueblo government had violated her ICRA rights. The Court stated that where Congress seeks to promote dual objectives in a single statute, courts must be very hesitant to infer a cause of action that, while serving one legislative purpose, will thwart another. The Court explained that although the availability of a federal remedy might be useful in securing tribal government compliance with the protection of individual rights afforded under ICRA, the federal remedy "plainly would be at odds with the congressional goal of protecting tribal self-government." *Id.* at 64. For example, the availability of the federal remedy would undermine the authority of the tribal forum. *Id.*

⁷⁵ Indian Self-Determination and Education Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450(a), 450a (1982)).

of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.⁷⁶

ISDEAA represented Congress' recognition of the tribes' desires to control their own destinies.⁷⁷ Various groups such as national task forces, commissions, and congressional committees had investigated reservation living conditions and had brought the need for such legislation to the attention of Congress.⁷⁸ These investigations uncovered many problems, such as poor health care and poor education.⁷⁹ Presidents Johnson and Nixon both recognized the need to address these problems.⁸⁰

⁷⁶ *Id.* The stated purpose of this statute was to "promote maximum Indian participation in the government and education of the Indian people." H.R. REP. NO. 1600, 93d Cong., 2d Sess. 1, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7775. The tribes could now contract with the Departments of the Interior and Health, Education, and Welfare (now divided into the Departments of Education and Health and Human Services) for the operation of programs and services provided by the Bureau of Indian Affairs and the Indian Health Services. 1974 U.S. CODE CONG. & ADMIN. NEWS at 7776. The intent of ISDEAA was to promote more extensive tribal self-determination through the contracting process. R. BEE, THE POLITICS OF AMERICAN INDIAN POLICY 95 (1982). By 1978, however, it was clear that the Bureau of Indian Affairs was not effectively implementing the Act. See *id.* at 95-104. Some commentators feel that the Bureau has thwarted attempts to increase tribal self-determination. See, e.g., Nelson & Sheley, *Bureau of Indian Affairs Influence on Indian Self-determination*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 177-96 (V. Deloria ed. 1985).

The Indian Self-Determination Amendments of 1987 Bill stated that the Indian Self-Determination and Education Assistance Act "has furthered the development of local self-government and education opportunities for Indian tribes, but its goal and progress have been impeded by lack of clarity and direction on the part of Federal agencies regarding their role in implementing the Federal policy of Indian self-determination." H.R. 1223, 100th Cong., 1st Sess. § 2(a), 133 CONG. REC. 9018 (1987). The amendments were intended to address such problems. 133 CONG. REC. H9019-20 (daily ed. Oct. 27, 1987) (statement of Rep. Richardson). The bill also reiterated the federal policy of self-determination for Indian tribes: "the Federal responsibility for the welfare of Indian tribes demands effective self-government by Indian tribal communities." H.R. 1223, 100th Cong., 1st Sess. § 2(a), 133 CONG. REC. 9018.

A law similar to ISDEAA, the Indian Health Care Improvement Act of 1976, allows the tribes to contract for public health programs. Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified as amended at 42 U.S.C.A. §§ 1601-1680 (West 1983 & Supp. 1988)).

⁷⁷ Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450(a), 450a (1982)). Not all tribal leaders are satisfied with the extent of the changes brought about by the Act. See Danziger, *supra* note 67, at 69-70.

⁷⁸ Danziger, *supra* note 67, at 70.

⁷⁹ *Id.*

⁸⁰ President's Message to Congress on the Problems of the American Indian: "The Forgotten

ISDEAA is only one manifestation among many of the federal government's policy supporting Indian self-determination and self-government. Other manifestations include court holdings,⁸¹ statutes,⁸² and policy statements.⁸³ This language affirming tribal self-determination had been used in Supreme Court decisions in the 1830s⁸⁴ as well as in 1980s policy statements of the Reagan Administration.⁸⁵ Thus, the federal government has made very clear its policy of promoting tribal self-determination. Unfortunately, the federal government has inconsistently promoted this tribal right, and the future of tribal self-determination remains uncertain.

In the 1970s and 1980s, the Supreme Court has handed down inconsistent holdings affecting the jurisdictional rights and the self-determination prospects of Indians.⁸⁶ Most of the cases address the encroachment of state jurisdiction into Indian affairs.⁸⁷ The Court has clouded Marshall's mandate⁸⁸ despite its reaffirmation in *Williams*.⁸⁹ As a result, there is no longer a clear federal prerogative of jurisdiction over Indian lands to the exclusion of the states.⁹⁰

The doctrine of pre-emption has replaced exclusive federal jurisdiction over Indian lands.⁹¹ State law applies unless pre-empted by federal law:⁹² "[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."⁹³ In upholding the pre-emption doctrine, the Court ignores the tradition of interpretation of treaties and statutes in favor of the right of tribal self-government.⁹⁴

American," 113 PUB. PAPERS 335-44 (Mar. 6, 1968); President's Message to Congress on Indian Affairs, 213 PUB. PAPERS 564-76 (July 8, 1970).

⁸¹ See, e.g., *State of Washington, Dep't of Ecology v. EPA*, 752 F.2d 1465, 1470 (9th Cir. 1985).

⁸² See, e.g., 25 U.S.C. §§ 450(a), 450a (1982).

⁸³ See, e.g., *The Environmental Protection Agency and Tribal Governments*, 18 AM. INDIAN L. NEWSL. 4, 4-5 (1985) [hereinafter *EPA Statement*].

⁸⁴ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

⁸⁵ Reagan Indian Policy, *supra* note 7, at 2-7.

⁸⁶ See *infra* notes 88-112 and accompanying text.

⁸⁷ See *Skibine*, *supra* note 58, at 10. For examples of these cases, see *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982).

⁸⁸ See *McClanahan*, 411 U.S. at 172 (1973); *Rice v. Rehner*, 463 U.S. 713, 718 (1983); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 884 (1986).

⁸⁹ 358 U.S. 217 (1959).

⁹⁰ See *McClanahan*, 411 U.S. at 172.

⁹¹ Canby, *supra* note 31, at 6-7.

⁹² *McClanahan*, 411 U.S. at 172; *Rice*, 463 U.S. at 718; *Three Tribes*, 476 U.S. at 884.

⁹³ *McClanahan*, 411 U.S. at 172.

⁹⁴ F. COHEN, *supra* note 32, at 273.

Although the behavior of the federal government in meeting its trust duties to the tribes has been questionable, the states are less suitable to exercise jurisdiction over the tribes.⁹⁵ As one commentator has observed, "[f]rom the earliest days of this Republic, local interests have placed the greatest pressures on Congress to limit the land bases and powers of tribal governments."⁹⁶ To allow state encroachment upon the tribes, endangering Indian sovereignty, could represent a violation of the federal government's trust responsibility.

In 1978, the Supreme Court struck down tribal jurisdiction over crimes committed by non-Indians on reservations.⁹⁷ The Court, in *Oliphant v. Suquamish Indian Tribe*,⁹⁸ held that tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, and that only Congress could authorize such tribal criminal jurisdiction.⁹⁹ The *Oliphant* holding was based, inter alia, on a century-old notion that tribes need protection from illegal and harmful intrusion into their territory, which they could not themselves provide.¹⁰⁰ Because this reasoning denies the tribes a crucial aspect of sovereignty, *Oliphant* is one of the least popular Court decisions among the tribes.¹⁰¹ As the dissent pointed out, because the power to preserve order on a reservation is inherent in a tribe's original sovereignty and is not affirmatively withdrawn by treaty or statute, the tribes should continue to enjoy this aspect of their sovereignty.¹⁰²

In contrast to *Oliphant*, the Court's recent decisions have not all served to limit tribal self-determination. In *Merrion v. Jicarilla Apache Tribe*¹⁰³ and *Kerr-McGee Corp. v. Navajo Tribe*,¹⁰⁴ the Court upheld the tribal right to tax non-Indians' natural resource development activities on the reservation.¹⁰⁵ The Court considered the

⁹⁵ See Knapp, *Search for Common Ground*, STATE GOV'T NEWS, June, 1984, at 5. There does appear to be some tribal-state cooperation on the horizon. *Id.* at 5-6.

⁹⁶ Wilkinson, *Basic Doctrines of American Indian Law*, in INDIANS AND CRIMINAL JUSTICE 90 (L. French ed. 1982). The Supreme Court recognized the hostility of the locals toward the tribes in *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the States where [the tribes] are found are often their deadliest enemy.").

⁹⁷ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁹⁸ *Id.*

⁹⁹ *Id.* at 212.

¹⁰⁰ *Id.* at 207.

¹⁰¹ Skibine, *supra* note 58, at 13.

¹⁰² *Oliphant*, 435 U.S. at 212 (Marshall, J., dissenting).

¹⁰³ 455 U.S. 130 (1982).

¹⁰⁴ 471 U.S. 195 (1985).

¹⁰⁵ *Merrion*, 455 U.S. 130, 137 (1982) (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 130, 137 (1980)); *Kerr-McGee*, 471 U.S. at 198.

power to tax an essential attribute of Indian sovereignty¹⁰⁶ because taxation is a necessary device for carrying out self-government and territorial management, that is, raising revenues for essential government services.¹⁰⁷ The Court has thus recognized a tribe's right as a sovereign entity to control economic activity within its territory.¹⁰⁸

These cases provide positive developments for the tribes in that the tribes receive a better return from the development of their natural resources, effected by the collection of taxes, an important governmental function. There is another side to the *Merrion* decision, however, that serves to limit the tribes' sovereignty.¹⁰⁹ The *Merrion* Court recognized that tribal authority to tax non-members is "subject to constraints not imposed upon other government entities."¹¹⁰ The Secretary of the Interior must approve taxes placed on non-members and the federal government has the power to take away a tribe's right to tax.¹¹¹ These constraints ensure that the tribes do not tax "in an unfair or unprincipled manner" and that tribal taxation is exercised in a manner "consistent with national policies."¹¹²

The federal government's Indian policy has evolved over time, resulting in today's official respect for tribal self-determination, although federal policies in practice at least partly contradict the official line. The judiciary has shaped the self-determination policy of the executive and legislative branches. Nevertheless, the Supreme Court, with its recent emphasis on the preemption doctrine, may be limiting the tribes' sovereignty by allowing the states greater opportunity for jurisdiction over tribal affairs.

III. TRIBAL NATURAL RESOURCE DEVELOPMENT

A crucial application of federal Indian policy and practice affecting tribal self-determination is in the area of natural resources found on or under tribal lands. Natural resource development presents a significant application of federal policy and practice both because of the United States' need for natural resources and because the resources

¹⁰⁶ *Washington*, 447 U.S. at 152; *Merrion*, 455 U.S. at 137; *Kerr-McGee*, 471 U.S. at 198.

¹⁰⁷ *Merrion*, 455 U.S. at 137.

¹⁰⁸ *Id.*

¹⁰⁹ Williams, *Redefining the Tribe*, INDIAN TRUTH, Apr. 1985, at 8.

¹¹⁰ *Merrion*, 455 U.S. at 141.

¹¹¹ *Id.*

¹¹² *Id.*

represent a number of tribes' economic wealth, potential or realized. Not surprisingly, there are many conflicting interests in the consideration of tribal natural resources and their development. The country's need to develop sources of energy, the energy companies that extract and refine the minerals, protection of the tribes' physical and cultural environments, the tribes' economic needs, and the federal trust responsibility for the tribes' physical and financial resources¹¹³ combine to create a complicated situation. Conflicts of interest abound. Most relevant to tribal self-determination is the inherent conflict within the federal government between the need to develop energy supplies and the traditional trust responsibility to protect the tribes' physical and financial resources. Given the unequal economic forces that affect this conflict, development dominates.

The tribes do possess a great deal of natural mineral wealth. About sixty percent of known United States uranium reserves lie under Indian lands, as does one-third of the country's low-sulphur coal.¹¹⁴ The Indians receive an average of 3.4 percent of the market value of their uranium and about two percent for their coal from the energy companies that extract the minerals through tribal leases.¹¹⁵ These 1984 figures run up to eighty-five percent less than the royalty rates paid to non-Indians for the same minerals.¹¹⁶

As of 1986, twenty-one Indian tribes in this country had entered into about 4,600 lease agreements with mining and energy companies for exploration and/or development of natural resources.¹¹⁷ The statutory authority permitting the leasing of Indian lands specifically includes the development and utilization of natural resources.¹¹⁸ Sta-

¹¹³ See Reagan Indian Policy, *supra* note 7, at 2-7.

¹¹⁴ Churchill, *American Indian Lands: The Native Ethic Amid Resource Development*, ENVIRONMENT, July/Aug. 1986, at 16.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Department of the Interior and Related Agencies Appropriations For 1987, Part 12: Royalty Management, Hearings Before the Subcomm. on Interior Appropriations of the House Comm. on Appropriations*, 99th Cong., 2d Sess. 218 (1986) [hereinafter *Royalty Hearings*] (letter of William D. Bettenberg, Director, Materials Management Service, to Donald Hodel, Sec. of the Interior (Sept. 30, 1986)).

¹¹⁸ Indian Long-Term Leasing Act of 1909, 35 Stat. 783 (codified as amended at 25 U.S.C. § 396 (1982)); Mineral Leasing Act of 1938, Pub. L. No. 75-506, 52 Stat. 347 (codified as amended at 25 U.S.C. §§ 396a-396g (1982)); Indian Mineral Development Act of 1982, Pub. L. No. 97-382, 96 Stat. 1938 (codified at 25 U.S.C. §§ 2101-2108 (1982)).

Congress enacted the Indian Long-Term Leasing Act in order to allow the Department of the Interior to "oversee the leasing of the Indian lands so as to prevent exploitation of and prejudice to the Indians' interest, or injustice to them." *Pawnee v. United States*, 820 F.2d 187, 189 n.2 (Fed. Cir. 1987) (citing H.R. REP. No. 1225, 60th Cong., 1st Sess. 1-2 (1908)), *cert. denied*, 108 S. Ct. 3818 (1988). A major purpose of the Mineral Leasing Act was to

tutory law empowers the Secretary of the Interior to approve tribal mineral agreements.¹¹⁹ In approving or disapproving a mineral agreement, the Secretary must take into account such concerns as the potential economic return to the tribe and potential environmental, social, and cultural effects of the agreement on the tribe.¹²⁰ The Secretary, however, apart from the requirements of the National Environmental Policy Act (NEPA),¹²¹ is not required to prepare any study of these effects on the tribe.¹²²

Although the Secretary's mandatory duties are limited, the Secretary does have a statutory responsibility to respect the trust obligation in order to ensure that tribal and individual rights are not violated.¹²³ The Federal Circuit Court of Appeals in *Pawnee v. United States* recently imposed this fiduciary duty on the Secretary of the Interior.¹²⁴ As a result, the Secretary is responsible for ensuring that the tribes are treated fairly with respect to the making and administration of leases and the collection and payment of royalties on the tribes' lands leased for mineral extraction purposes.¹²⁵

The Materials Management Service (MMS) branch of the Department of the Interior oversees the lease and payment process, collecting the royalties from minerals and energy companies holding tribal leases.¹²⁶ The Bureau of Indian Affairs

ensure that Indians received "the greatest return from their property." H.R. REP. NO. 1872, 75th Cong., 3d Sess. 2 (1938), *quoted in* *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 767 n.5 (1985). Congress enacted the Indian Mineral Development Act in response to business limitations inherent in the Mineral Leasing Act. *See* H.R. REP. NO. 746, 97th Cong., 2d Sess. 1-5, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 3465-67.

¹¹⁹ 25 U.S.C. § 2102 (1982). Regulations for the surface exploration, mining, and reclamation of tribal land are listed at 25 C.F.R. pt. 216 (1988).

¹²⁰ 25 U.S.C. § 2103(b).

¹²¹ 42 U.S.C. § 4332(2)(C) (1982). NEPA requires a written environmental impact statement for major federal actions "significantly affecting the quality of the human environment." *Id.*

¹²² 25 U.S.C. § 2103(b).

¹²³ *Id.* § 2103(e).

¹²⁴ 830 F.2d 187, 189 (Fed. Cir. 1987), *cert. denied*, 108 S. Ct. 3818 (1988); *see also* *United States v. Mitchell*, 463 U.S. 206, 226 (1983) (recognizing the federal government's fiduciary obligation in the management and operation of Indian natural resources). The federal government's trust responsibilities were also recognized by Congress in the enactment of the Federal Oil and Gas Royalty Management Act of 1982, Pub. L. No. 97-451, 96 Stat. 2447 (codified at 30 U.S.C. §§ 1701-1757 (1982)). The purposes of the Act include "to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources." 30 U.S.C. § 1701(b)(4).

¹²⁵ *Pawnee*, 830 F.2d at 189; *Mitchell*, 463 U.S. at 226.

¹²⁶ *See Royalty Hearings*, *supra* note 117, at 1-3 (statement of Rep. Yates, Subcomm. Chairperson). The MMS manages royalty payments from mineral-producing activities on federal and tribal lands. Barnes, *Interior's Struggle to Track Billions in Oil and Gas Royalties*, GOVERNMENT EXECUTIVE, June 1988, at 38. The states receive one-half the royalties from

(BIA)¹²⁷ then distributes the royalties to the tribes and to individual Native Americans holding land allotments.¹²⁸ A major problem with the MMS and the lease system in general is underpayment and undercollection of royalties.¹²⁹ Five to ten percent of the royalties due to the tribes from leases for the tribes' natural resources go uncollected.¹³⁰ A congressional subcommittee found that more than twenty percent of royalties due from energy companies is not paid under the present system, which is, in effect, an honor system.¹³¹ A study showed that for oil royalties in the years 1978-1983, tribes in Oklahoma lost \$3.7 million, tribes in Utah lost \$6.5 million, and tribes in Wyoming lost \$12 million in royalties.¹³² A recent Department of Interior Inspector General Report acknowledged the problem of underpayment and undercollection.¹³³

Congressional commentators have suggested that the Department of the Interior let another agency, probably the IRS, handle royalty collection.¹³⁴ The Department has not fulfilled the federal government's obligations to the tribes under the trust.¹³⁵ One problem is

federal lands within their borders. The tribes receive 100 percent of the royalties from production on their land. *Id.* The regulations applying to the calculation of the value of the oil and gas extracted are listed at 25 C.F.R. pt. 206 (1988).

¹²⁷ For an account of the past, present, and possible future of the BIA, see T. TAYLOR, *THE BUREAU OF INDIAN AFFAIRS* (1984).

¹²⁸ Barnes, *supra* note 126, at 38. For Bureau regulations concerning the leasing of tribal lands for mining, including rents and royalties, see 25 C.F.R. pt. 211 (1988).

¹²⁹ See *Royalty Hearings*, *supra* note 117, at 1-3. The "[f]ederal royalty management and collection system is in disarray. Hundreds of millions of dollars due [from developer company lessees] to the U.S. Treasury, the States, Indian tribes, and individual Indian allottees are going uncollected every year due to the inadequacies in the system." *Id.* For letters from several states and one Indian tribe expressing dissatisfaction with the MMS, see *id.* at 136-47. Critics have labeled the MMS royalty collection as "Washington's worst-run program." Barnes, *supra* note 126, at 38.

¹³⁰ *Royalty Hearings*, *supra* note 117, at 3 (statement of Rep. Yates, Subcomm. Chairperson).

¹³¹ Hershey, *Washington Watch: Underpayment of Oil Royalties*, N.Y. Times, Feb. 23, 1987, at D2, col. 1; UNITED STATES DEPT OF THE INTERIOR INSPECTOR GENERAL REPORT No. 88-63, at 7 (Apr. 1988) [hereinafter INSPECTOR GENERAL].

¹³² *Royalty Hearings*, *supra* note 117, at 26-30 (Investigative Staff Study: Oil Royalties on Indian Lands 1978-1983).

¹³³ INSPECTOR GENERAL, *supra* note 131, at 1. The Report recognized that the MMS has improved its operations. For example, the change to a comprehensive audit system resulted in a 500 percent increase in findings of royalties due the Navajo tribe. *Id.* at 6. See also Barnes, *supra* note 126, at 38.

¹³⁴ See, e.g., *Royalty Hearings*, *supra* note 117, at 2 (statement of Rep. Yates, Subcomm. Chairperson).

¹³⁵ See B. JOHNSON & R. MAESTAS, *supra* note 50, at 198, 204-05, 257. On July 4, 1976, when most of the United States was celebrating the Bicentennial, a group of American Indians calling itself the Trail of Self-Determination Caravan delivered to Congress a statement on

that the BIA, also under the Department, is at odds with the MMS.¹³⁶ The BIA is supposed to assert itself against the Department to ensure adequate collection for and distribution to the tribes.¹³⁷ Considering the amount of royalties not collected, it is clear that this system is not working.¹³⁸ In response to this failure, a Senate Committee recently approved financing for an investigation of the BIA, hoping to recover "billions of dollars in mineral royalties to which Indians are entitled."¹³⁹

The MMS contends that it has instituted mechanisms to improve the collection of royalties.¹⁴⁰ MMS has for several years audited a portion of the leases, resulting in the collection of millions of dollars in additional royalties.¹⁴¹ In addition, MMS has instituted a "comprehensive enforcement and penalty strategy to assure prompt and accurate reporting and payment,"¹⁴² consisting of interest charges,¹⁴³ erroneous, late, and non-reporting assessments,¹⁴⁴ and civil penalties.¹⁴⁵ For example, since 1980 MMS has collected \$3.2 million for the tribes through interest charges.¹⁴⁶

Although the MMS claims that it has reduced underpayment to two to three percent, the tribes and states are not satisfied.¹⁴⁷ The tribes and states, along with allies in Congress, complain that the Department of the Interior continues to allow the energy industry to set its own values for the gas and oil produced.¹⁴⁸ Critics of the Department are calling for the establishment of netback pricing, whereby the values of the natural resources are set according to the open market price of the end products.¹⁴⁹ The combined effect of

the Department of the Interior: "[citing other events] and the strip mining monstrosity on the Northern Cheyenne point out the Interior Department's perversion of responsibility to Indian people. . . . In truth the Interior Department serves oil, mineral, land-trust, transportation, fisheries, shipping, forestry and other energy interests at the expense of Indian lives." *Id.* at 198.

¹³⁶ *Id.* at 184.

¹³⁷ *Id.*

¹³⁸ See generally *id.* at 1-3.

¹³⁹ N.Y. Times, Oct. 31, 1987, at A8, col. 6.

¹⁴⁰ See *Royalty Hearings*, *supra* note 117, at 217-18, 227-28 (letter of William D. Bettenberg, Director, MMS, to Donald Hodel, Secretary of the Interior).

¹⁴¹ *Id.* at 218.

¹⁴² *Id.* at 227.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 228.

¹⁴⁵ *Id.* at 227, 229.

¹⁴⁶ *Id.* at 227-28.

¹⁴⁷ Hershey, *supra* note 131, at D2, col. 1.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at D2, col. 2.

more effective royalty collection and netback pricing would allow tribes to earn a greater return from the development of their natural resources. For example, the greater return would benefit the Navajo, who depend on natural resource development for revenue and have been hurt by the decrease in oil and gas prices.¹⁵⁰

Despite the royalties owed and paid to the tribes, many tribal members do not share in the benefits from resource development,¹⁵¹ and all tribal members endure the side effects of development such as pollution.¹⁵² In the Southwest, the energy produced in local power plants from locally mined coal is delivered to cities hundreds of miles away, while half the Navajo and Hopi homes are without electricity.¹⁵³ Much of the coal is extracted by strip mining.¹⁵⁴ Reclamation¹⁵⁵ attempts in the arid west have not been successful, according to the National Academy of Sciences, and true reclamation "will take centuries."¹⁵⁶ Devastation of the land, overuse of scarce water resources for coal slurries, and air pollution emitted from power plants are the side effects of the mineral extraction that provides the benefits of royalties and jobs.¹⁵⁷

In addition to recurrent problems such as air pollution, several incidents of major environmental degradation connected with the mineral exploitation process have occurred on and near reservations,¹⁵⁸ and some are arguably the result of company carelessness.¹⁵⁹ The Kerr-McGee Corporation, operating a uranium¹⁶⁰ mine through

¹⁵⁰ N.Y. Times, Dec. 11, 1986, at B19, col. 1, 4; Knudsen, *Zoning the Reservations for Enterprise*, N.Y. Times, Jan. 25, 1987, § 4, at 4, col. 1, graph.

¹⁵¹ See Garitty, *The U.S. Colonial Empire Is As Close As The Nearest Reservation: The Pending Energy Wars*, in *TRILATERALISM* 245 (H. Sklar ed. 1980); B. JOHNSON & R. MAESTAS, *supra* note 50, at 147.

¹⁵² See P. RENO, *supra* note 13, at 9.

¹⁵³ Garitty, *supra* note 151, at 245.

¹⁵⁴ For a description of the devastating effects of strip mining, see B. JOHNSON & R. MAESTAS, *supra* note 50, at 143-49.

¹⁵⁵ 25 C.F.R. § 216.104(a) (1988) dictates that all areas affected by surface coal mining "shall be restored in a timely manner . . . to conditions that are capable of supporting the uses which they were capable of supporting before any mining," or in some circumstances, restored to higher or better uses.

¹⁵⁶ B. JOHNSON & R. MAESTAS, *supra* note 50, at 149, 154.

¹⁵⁷ See generally Garitty, *supra* note 151, at 245.

¹⁵⁸ See *infra* notes 161-77 and accompanying text.

¹⁵⁹ See, e.g., *Mill Tailings Dam Break At Church Rock, New Mexico: Hearings Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 96th Cong., 1st Sess. 1-3 (1979) [hereinafter *Dam Break Hearings*] (statement of Rep. Udall, Comm. Chairperson).

¹⁶⁰ For an account of the Navajo experience with uranium mining, see P. RENO, *supra* note 13, at 133-42.

a lease by the BIA and endorsed by the Navajo tribal council, allowed improper ventilation in its mine shafts which, by 1959, had exposed miners to levels of radiation ninety to one hundred times the permissible safety limits.¹⁶¹ By 1980, thirty-eight of the approximately one hundred fifty Navajo miners had died of radiation-induced lung cancer and ninety-five others were ill with cancer or other serious respiratory ailments.¹⁶² When the company left the area in 1970, they left behind about seventy acres of mounds of radioactive uranium tailings.¹⁶³ Some of these mounds lay only sixty feet from a river that was the only significant surface water in the area.¹⁶⁴ The tailings contaminated drinking water and radiation-related birth defects dramatically increased.¹⁶⁵ Despite the Kerr-McGee experience, many similar uranium mines operate today on or near Navajo land.¹⁶⁶

A more recent example of environmental degradation caused by corporate carelessness was the 1979 United Nuclear Corporation radioactive spill, the largest radioactive spill in United States history.¹⁶⁷ A uranium tailings impoundment dam burst, releasing millions of gallons of contaminated liquid and 1100 tons of hazardous solid waste.¹⁶⁸ The radioactive and chemically dangerous materials

¹⁶¹ Churchill, *supra* note 114, at 17.

¹⁶² *Id.* at 17, 28.

¹⁶³ *Id.* at 17. Uranium tailings are the "waste by-products of uranium ore refinement [which] retain 85% of the original radioactivity of the ore." LaDuke & Churchill, *Native America: The Political Economy of Radioactive Colonialism*, THE INSURGENT SOCIOLOGIST, Spring 1986, at 57 [hereinafter *Radioactive Colonialism*].

¹⁶⁴ Churchill, *supra* note 114, at 17.

¹⁶⁵ *Id.* at 28.

¹⁶⁶ *Id.* "[U]ranium mining and milling are the most significant sources of radiation exposure to the public of the entire nuclear fuel cycle, far surpassing nuclear reactors and nuclear waste disposal . . ." La Duque, *Native America: The Economics of Radioactive Colonialism*, REV. OF RADICAL POL. ECON., Fall 1983, at 18 (statement of Victor Gillinsky, United States Nuclear Regulatory Comm'n, 1978).

¹⁶⁷ Garitty, *supra* note 151, at 260. The Nuclear Regulatory Commission called the spill, before Chernobyl, "the worst contamination in the history of the nuclear industry." Johnson, *Indian Land, White Greed*, THE NATION, July 4, 1987, at 16. A U.S. Geological Survey report stated that trace elements and radionuclides exceeded Arizona standards in many water samples. *Id.*

Radioactive spills have long-term effects. A spill similar to that of United Nuclear Corporation occurred in South Dakota in 1962. Churchill, *supra* note 114, at 30. Indian Health Service groundwater testing eighteen years later revealed radioactive contamination. *Radioactive Colonialism*, *supra* note 163, at 59. In addition to accidental damage to groundwater, aquifers are susceptible to contamination from regular mining activities and natural leaching from uranium ore. *Dam Break Hearings*, *supra* note 159, at 8 (statement of Frank E. Paul, Vice Chairman, Navajo Tribal Council).

¹⁶⁸ *Dam Break Hearings*, *supra* note 159, at 1 (statement of Rep. Udall). Although the dam

flowed through an arroyo into a river flowing through Navajo grazing lands, eventually leaving a trail of contamination nearly one hundred miles long.¹⁶⁹ The company knew about cracks in the dam structure at least two months before the break,¹⁷⁰ and yet made no repairs.¹⁷¹

As a result of the spill, the sole water source of 1700 Navajos was contaminated, as was their livestock.¹⁷² United Nuclear, however, contested the findings of contamination.¹⁷³ The company refused to supply needed food and water to the people,¹⁷⁴ and made no redress until an out-of-court settlement a year later.¹⁷⁵ The Governor of New Mexico, faced with this crisis, did not declare the site a disaster

was not on reservation land, the spill nonetheless affected such land. *Id.* at 8 (statement of Frank E. Paul, Vice Chairman, Navajo Tribal Council).

¹⁶⁹ *Id.* at 1 (statement of Rep. Udall).

¹⁷⁰ Churchill, *supra* note 114, at 28. Before the dam was licensed, a United Nuclear consultant predicted that the soil under the dam "was susceptible to extreme settling which was likely to cause the cracking and subsequent failure of the structure." *Dam Break Hearings*, *supra* note 159, at 2 (statement of Rep. Udall). Apparently, none of the state and federal agencies involved required detailed independent assessments of United Nuclear's construction practices. *Id.* The Army Corps of Engineers reviewed the site after the accident, concluding that the dam contained design defects. *Id.* at 3. The company contended that the 1977 cracks in the dam were not related to the failure of the dam at the time of the spill. *Id.* at 27 (statement of Lawrence A. Hansen, Engineer).

¹⁷¹ Churchill, *supra* note 114, at 28.

¹⁷² *Id.* United Nuclear contended that the spill "did not and does not represent a significant hazard to local representatives or to downstream communities." *Dam Break Hearings*, *supra* note 159, at 25 (statement of J. David Hann, Vice President, United Nuclear Corp.). There is disagreement within the scientific community as to the health effects of exposure to low level radiation. *Id.* at 10 (statement of Dr. Thomas Gesell, Health Physics).

¹⁷³ *Dam Break Hearings*, *supra* note 159, at 20-25 (statement of J. David Hann, Vice President, United Nuclear Corp.). The company claimed that no substantial radiological danger was created by the spill. *Id.* at 23-24. The company measurements of the radioactivity of the surface waters were much lower than the measurements conducted by the state of New Mexico. *Id.* at 11 (statement of Dr. Thomas Gesell, Phd. Health Physics). United Nuclear attributed the variations to differences in analytical techniques. *Id.* at 28 (statement of Todd Miller, Manager, Environmental Operations for Mining and Milling Division, United Nuclear Corp.). Measurements taken of groundwater at a thirty to forty foot depth before and after the spill showed a ten-fold increase in alpha radiation and uranium. *Id.* at 94 (letter of Paul Robinson, Environmental Analyst, Southwest Research and Information Center, to Andrea Dravo, Staff Consultant, Comm. on Interior and Insular Affairs (Feb. 22, 1980)).

¹⁷⁴ Churchill, *supra* note 114, at 28; *contra Dam Break Hearings*, *supra* note 159, at 25 ("United Nuclear has acted with responsibility and dispatch in cleaning up the spill, . . . aiding local residents . . .") (statement of J. David Hann, Vice President, United Nuclear Corp.). At the time of the congressional hearings, three months after the spill, United Nuclear had cleaned up less than one percent of the volume of the material spilled. *Id.* at 47 (statement of Paul Robinson, Environmental Analyst, Southwest Research and Information Center).

¹⁷⁵ The level of citizen outrage in this type of event may be tempered by the uranium industry's position as supplier of local jobs and income. Such a muted reaction has been described as the result of a locality held "economic hostage." *Radioactive Colonialism*, *supra* note 163, at 58.

area.¹⁷⁶ Navajo leaders complained that congressional hearings three months after the spill represented the first expression of serious national concern, whereas a smaller incident at Three Mile Island commanded a Presidential Commission.¹⁷⁷

The Navajo reservation has been plagued by many of the preceding problems associated with natural resource development, such as radioactive spills¹⁷⁸ and air pollution.¹⁷⁹ Despite these problems, Navajo leaders have embarked on a pro-development course. For example, Peter MacDonald, tribal chairman, advocates resource exploitation at the best price the tribe can get from an energy company.¹⁸⁰ Tribes such as the Navajo are turning to resource development to make up for federal budget cuts, which along with a depressed energy market have hit the tribes hard in recent years.¹⁸¹ As a result, tribal leaders are "hoping for prosperity through large-scale private-sector development."¹⁸²

The experience of a Montana tribe with a less pro-development attitude exposes some of the problems of resource development. The Northern Cheyenne initially leased one-half of their land to coal companies.¹⁸³ Although they had originally been attracted by the prospect of jobs and money, the tribe realized at some point that strip mining and gasification plants presented a permanent trade of their land for money.¹⁸⁴ In addition, the tribe felt that their right to fair dealing had been violated by both the energy company and the BIA.¹⁸⁵ The tribe proceeded to direct the BIA to cancel its leases. The Secretary of the Interior suspended all the leases the following year.¹⁸⁶

¹⁷⁶ Garitty, *supra* note 151, at 260. Some commentators allege that the governor did not even admit that an emergency existed, "for fear of hurting the uranium mining industry in his state." *Id.*

¹⁷⁷ *Dam Break Hearings*, *supra* note 159, at 6 (statement of Frank E. Paul, Vice Chairman, Navajo Tribal Council).

¹⁷⁸ See *supra* notes 160-77 and accompanying text.

¹⁷⁹ See *supra* note 157 and accompanying text.

¹⁸⁰ B. JOHNSON & R. MAESTAS, *supra* note 50, at 151-52. For a recent account of the controversial Chairman MacDonald, see *The Boston Globe*, Feb. 13, 1989, at 2, col. 2.

¹⁸¹ Forty percent of the adults on the Navajo reservation are unemployed. Forty-nine percent of the households live below the poverty line, versus an overall United States figure of twelve percent. Knudsen, *supra* note 150, at 4, col. 3; *N.Y. Times*, July 27, 1987, at D2, col. 5.

¹⁸² *N.Y. Times*, July 27, 1987, at D2, col. 5.

¹⁸³ B. JOHNSON & R. MAESTAS, *supra* note 50, at 171.

¹⁸⁴ See *id.* at 171-72.

¹⁸⁵ *Id.* at 172.

¹⁸⁶ *Id.* at 172, 173. The neighboring Crow tribe, which had entered similar coal leases, also successfully persuaded the Department of the Interior to cancel the leases. *Id.* at 173. The

Among other charges, the tribe claimed that the Department of the Interior had failed to include the required environmental protection clauses in the leases and had not completed environmental impact statements.¹⁸⁷ The tribe also charged that the BIA had violated its trust responsibility to the tribe by not informing them of the negative aspects of mining and energy development and by recommending that the tribe accept an unconscionably low price for the coal.¹⁸⁸

Resource development is clearly fraught with dangers such as not receiving a fair return on the extracted minerals and suffering from the pollution resulting from the extraction and refining process. The federal government has a well-recognized trust responsibility to the tribes regarding the tribes' physical and financial resources.¹⁸⁹ By facilitating financially and environmentally irresponsible company activity on tribal land, the government has been less than vigilant in fulfilling its trust responsibilities to the tribes insofar as providing protection.

IV. THE EPA, ENVIRONMENTAL PROTECTION STATUTES, AND TRIBAL SELF-DETERMINATION

One of the major problems associated with mineral extraction is pollution. Reservations currently face many other pollution problems as well.¹⁹⁰ Serious deficiencies exist in water quality, solid waste disposal, hazardous waste management, sewage treatment and disposal, and other areas.¹⁹¹

The executive branch of the federal government, through the Environmental Protection Agency (EPA), facilitates tribal jurisdiction over environmental protection, thereby manifesting its prom-

original lease contract provided for a royalty of seventeen and one-half cents a ton, and the tribe was later reported to be renegotiating for three dollars a ton. P. RENO, *supra* note 13, at 116.

¹⁸⁷ B. JOHNSON & R. MAESTAS, *supra* note 50, at 172.

¹⁸⁸ *Id.*

¹⁸⁹ See Reagan Indian Policy, *supra* note 7, at 2.

¹⁹⁰ See generally ENVIRONMENTAL PROTECTION AGENCY, SURVEY OF AMERICAN INDIAN ENVIRONMENTAL PROTECTION NEEDS ON RESERVATION LANDS: 1986 (1986) [hereinafter EPA SURVEY].

¹⁹¹ *Id.* at 7-13; EPA Surveys Indian Tribes for First Look at Environmental Problems on Reservations, 17 Env't Rep. (BNA) 1424 (Dec. 19, 1986); see also Cook Stresses Enforcement in EPA's Safe Drinking Water Office, 16 Env't Rep. (BNA) 1822 (Jan. 31, 1986) [hereinafter EPA Enforcement]; Study Finds 1200 Sites Near Indian Lands, 16 Env't Rep. (BNA) 1228 (Nov. 8, 1985).

ised support of tribal self-determination.¹⁹² Recent amendments to various pollution control statutes and the ensuing regulations grant the tribes the right to act as states for certain purposes under these statutes.¹⁹³

The policies and practices of the EPA reflect a federal commitment to tribal self-regulation.¹⁹⁴ The EPA was the first federal agency to issue a policy pursuant to President Reagan's Indian policy.¹⁹⁵ The agency's existing policy also favored tribal self-regulation.¹⁹⁶ A 1980 EPA statement announced the agency policy as "promot[ing] an enhanced role for tribal government in relevant decisionmaking and implementation of Federal environmental programs on Indian reservations."¹⁹⁷ The EPA policy includes working with tribal governments in a government-to-government relationship and recognizing "tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with agency standards and regulations."¹⁹⁸

In contrast to the agency's ambitious policy, however, the EPA is beset by constraints such as decreased grants and personnel resources.¹⁹⁹ The EPA is working with level or decreased funding in most programs.²⁰⁰ In addition, the agency recognizes that "[i]n general, EPA programs have not been effectively applied on Indian reservations."²⁰¹

Interestingly, however, there may be a positive effect of the EPA's limitations. The limited effective application of EPA programs spurs

¹⁹² *Department of Housing and Urban Development, and Certain Independent Agencies Appropriations for Fiscal Year 1987: Hearings Before the Subcomm. on HUD-Independent Agencies of the Senate Comm. on Appropriations, Part 2*, 99th Cong., 2d Sess. 806 (1986) (EPA Indian Policy) [hereinafter *EPA Hearings*]. For a recent account of tribal sovereignty in the context of environmental protection, see Breslin, *Addressing Environmental Problems on Indian Lands: Issues of Tribal Sovereignty Versus State and EPA Regulatory Authority*, 19 Env't Rep. (BNA) 1920 (Jan. 27, 1989).

¹⁹³ See *infra* notes 204-26 and accompanying text.

¹⁹⁴ *State of Washington, Dep't of Ecology v. EPA*, 752 F.2d 1465, 1471 (9th Cir. 1985).

¹⁹⁵ OFFICES OF FEDERAL ACTIVITIES AND EXTERNAL AFFAIRS: EPA INDIAN POLICY INTERIM STRATEGY [hereinafter INTERIM STRATEGY], reprinted in *EPA Hearings*, *supra* note 192, at 815. For a presentation of Reagan's policy, see Reagan Indian Policy, *supra* note 7, at 2-7.

¹⁹⁶ See *EPA Policy for Program Implementation on Indian Lands* (Dec. 19, 1980), quoted in *State of Washington*, 752 F.2d at 1471 [hereinafter *EPA Policy*].

¹⁹⁷ *Id.*

¹⁹⁸ *EPA Statement*, *supra* note 83, at 5.

¹⁹⁹ INTERIM STRATEGY, *supra* note 195, at 817.

²⁰⁰ *Id.*

²⁰¹ *Id.*

on the need for improved local tribal environmental regulation.²⁰² In addition to aiding the process of tribal self-government by supplying an opportunity for the tribes to take on a challenging government role, the EPA's policy is expected to result in better environmental protection on reservations.²⁰³

A recent manifestation of this policy is the 1986 Amendment to the Safe Drinking Water Act (SDWA).²⁰⁴ The SDWA Amendment allows tribes to act as states in carrying out primary enforcement responsibility for public water systems and for underground injection control programs²⁰⁵ if the tribes meet the criteria qualifying them to be treated as states.²⁰⁶ To be eligible for such responsibility, (1) the tribe must be recognized by the Secretary of the Interior;²⁰⁷ (2) the governing body of the tribe must be such that it carries out "substantial governmental duties and powers over a defined area";²⁰⁸ (3) the tribe must show that the public water systems and/or injection wells that the tribe intends to regulate are within the area of the

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Pub. L. No. 99-339, 100 Stat. 642 (1986). The United States' reliance on groundwater has dramatically increased over the past thirty years and scientists are unsure as to the extent of groundwater pollution. Habicht, *Protecting Groundwater: State and Federal Roles*, ENVIRONMENT, July/Aug. 1986, at 4. Thus, groundwater contamination is high on the list of national environmental priorities. *EPA Enforcement*, *supra* note 191, at 1822. Tribal water systems are particularly poor; as many as one-half do not meet minimal national standards for purity. 132 CONG. REC. S6294 (daily ed. May 21, 1986) (statement of Sen. Hart). A co-sponsor of the amendment stated that although Indian water systems only represent one and one-half percent of the small systems in the country, their impurity standards exceedance is almost four times greater than all other public water supply systems. *Id.* at S6295 (statement of Sen. Burdick). Senator Hart, another co-sponsor of the SDWA Amendment, invoked the trust responsibility as requiring the federal government to remedy the water problem. *Id.* at S6294. The sponsors of the amendments "recognized that tribal governments, unlike state governments, do not have a regulatory program base, an underlying financial and budgetary foundation or a supporting tax infrastructure which could be used in cost-sharing on these programs." *Id.* at S6295 (statement of Sen. Durenberger). The tribes are exempt from the 25% matching funds requirement. *Id.* (statement of Sen. Burdick). Congress recognized that the tribes were capable and willing to begin assuming responsibility for safe drinking water programs but that they could not "act as states" insofar as contributing funds. *See infra* notes 205-12 and accompanying text.

²⁰⁵ 42 U.S.C. § 300j-11(a) (Supp. IV 1986).

²⁰⁶ 52 Fed. Reg. 28,119, 28,121 (1987) (to be codified at 40 C.F.R. §§ 142.72, 145.52) (proposed July 27, 1987). The concept of treating the tribes as states has its historical roots in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). *See supra* notes 24-27 and accompanying text.

²⁰⁷ 52 Fed. Reg. 28,113 (1987).

²⁰⁸ *Id.* The EPA thus requires that the tribe perform "essential governmental functions traditionally performed by sovereign governments," such as taxation and police power. *Id.*

tribe's jurisdiction;²⁰⁹ and (4) the tribe must demonstrate a reasonable capability to administer an effective program in accordance with the terms and purposes of the SDWA.²¹⁰

In the interest of encouraging tribal participation in these programs, tribes can apply for programs one at a time so as not to overtax limited tribal government infrastructure and resources.²¹¹ Several small tribes located in proximity to each other can apply for group primary enforcement authority status.²¹² The EPA also recognizes that many tribes may decide, for one reason or another, not to apply for primary enforcement authority.²¹³ The EPA will continue to regulate these tribes' public water systems and underground injection wells.²¹⁴

The regulations also take into account the limited tribal facilities. For example, tribes do not have to act as states for the purposes of utilizing their own testing laboratories or exercising criminal jurisdiction.²¹⁵ In fact, the Supreme Court in *Oliphant v. Suquamish Indian Tribe*²¹⁶ held that tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, and may not assume such jurisdiction unless specifically authorized to do so by Congress.²¹⁷

The 1987 Amendments to the Clean Water Act²¹⁸ provide a similar opportunity for tribes to act as states, subject to similar qualifications.²¹⁹ For example, the tribe may bring enforcement actions

²⁰⁹ *Id.* at 28,114. In determining whether a tribe is capable of administering a public water system, the EPA will consider several factors, including the tribe's previous managerial experience and existing environmental or health programs administered by the tribe. *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 28,112.

²¹⁴ *Id.*

²¹⁵ *Id.* at 28,115.

²¹⁶ 435 U.S. 191 (1978).

²¹⁷ *Id.* at 212. Two Justices dissented, arguing that the power to preserve order on the reservation is inherent in the original sovereignty that the tribe possessed. *Id.* (Marshall, Brennan, JJ., dissenting). Because this power was not affirmatively withdrawn by treaty or statute, "Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation." *Id.* (Marshall, J., dissenting). Native American writers agreed with the dissent. See Oliverio & Skibine, *The Supreme Court Decision That Jolted Tribal Jurisdiction*, AM. INDIAN J., May 1980, at 2.

The lack of criminal jurisdiction is unfortunate in that it is an important aspect of sovereignty, and would be useful in the context of enforcing environmental statutes.

²¹⁸ Pub. L. No. 100-4, 101 Stat 7 (1987).

²¹⁹ 33 U.S.C.A. § 1377(e) (West Supp. 1988).

against persons in violation of the Act.²²⁰ Another important function authorized by the Amendment is that a tribe may administer its own permit program for discharges into navigable waters within its jurisdiction.²²¹

Another significant manifestation of the tribal right of self-determination is found in the Clean Air Act.²²² Under this statute, tribes have the right to redesignate reservation air quality standards.²²³ Pursuant to this right, the Ninth Circuit Court of Appeals upheld EPA approval of the Northern Cheyenne redesignation of their reservation into the cleanest category so as to prevent deterioration.²²⁴ This decision is a significant victory for the Northern Cheyenne in that the tribe used an environmental statute to protect itself from the environmental effects of coal mining.²²⁵ The tribe thus used the statute to facilitate its self-determination.²²⁶

Congressional enactment of these statutes and EPA promulgation of the necessary regulations manifest the federal policy of supporting tribal self-government and self-determination.²²⁷ The EPA issued an Indian Policy Statement²²⁸ in 1980 that commentators have heralded as "an excellent model for other Federal Agencies"²²⁹ and thus is important to the encouragement of overall tribal self-government.

Some commentators feel that the EPA is not inclined to impose economically burdensome controls on Indian activities, and is thus not likely to take a strong enforcement position "except where serious environmental problems exist."²³⁰ This position may be consistent with tribal self-determination because the tribes are left with the responsibility for making choices regarding development and

²²⁰ 33 U.S.C.A. § 1319 (West 1986 & Supp. 1988).

²²¹ 33 U.S.C. § 1342(b) (1982).

²²² 42 U.S.C. § 7474(c) (1982), implemented by 40 C.F.R. § 52.21(g) (1987). The prevention of significant deterioration section of the Clean Air Act, 42 U.S.C. §§ 7470-7491 (1982 & Supp. IV 1986), addresses the need to protect clean air from becoming dirty due to the construction of new sources of air pollution. Will, *Indian Lands Environment—Who Should Protect It?*, 18 NAT. RESOURCES J. 465, 484 (1978).

²²³ 42 U.S.C. § 7474(c).

²²⁴ *Nance v. EPA*, 645 F.2d 701, 704 (9th Cir. 1981).

²²⁵ *See id.* at 701-18.

²²⁶ Congress has also enacted amendments to allow tribes to act as states for purposes of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136(u) (1982), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 126, 42 U.S.C. § 9626 (Supp. IV 1986).

²²⁷ *See supra* notes 75-85 and accompanying text.

²²⁸ EPA SURVEY, *supra* note 190, at ii-iii.

²²⁹ *Id.* at iii. Tribal environmental regulation can serve as a model for other areas of self-government.

²³⁰ Will, *supra* note 222, at 504.

environmental protection. A problem with the EPA practice, however, has been the agency's unwillingness to request funds for the Indian programs.²³¹ After supporting the Indian amendments in Congress, the EPA did not ask for the funds necessary to conduct the surveys and inventories of reservation pollution problems called for in the statutes.²³²

Because the EPA is less likely to respond to "ordinary" environmental problems,²³³ the burden falls on the tribe to develop environmental protection programs. Many tribes do have their own programs.²³⁴ These local pollution control efforts are very important, both for improving the environment and for exercising tribal self-government, the stated goal of federal policy.²³⁵

There are two factors that serve to retard these local efforts, however, in addition to the usual problems of poor facilities and lack of trained personnel. One factor is the necessity of, and sometimes overriding concern with, resource development as a source of tribal income.²³⁶ The other factor is the budget cuts at the hands of the Reagan Administration.²³⁷ These two factors interrelate in that a reduction in federal grant money pushes the tribes toward more resource development in order to compensate for budget cuts.²³⁸ As a result, the tribes with natural resources are likely to both increase pollution due to development and to be less capable of environmental self-regulation.

²³¹ *Department of Housing and Urban Development-Independent Agencies Appropriations for 1988: Hearings Before the Subcomm. on HUD-Independent Agencies of the House Comm. on Appropriations*, 100th Cong., 1st Sess. 675 (1987) [hereinafter *1987 Hearings*] (statement of the Council of Energy Resources Tribes).

²³² *Id.* For examples of the statutory authority for the surveys, see CERCLA § 126, 42 U.S.C. § 9626(c) (Supp. IV 1986); CWA § 518(a), 33 U.S.C.A. § 1377(b) (West Supp. 1988); SDWA § 302(e), Pub. L. No. 99-339, 100 Stat. 666 (1986). The EPA told the Committee on Appropriations that the Agency was using 1987 funds to undertake the survey of Indian land drinking water. *1987 Hearings*, *supra* note 231, at 672 (statement of Rep. Traxler).

²³³ Will, *supra* note 222, at 504.

²³⁴ EPA SURVEY, *supra* note 190, at 5.

²³⁵ Reagan Indian Policy, *supra* note 7, at 3 (reaffirming the national commitment "to strengthen tribal governments . . . and to pursue the policy of self-government for Indian tribes").

²³⁶ See generally COAL AGE, *supra* note 6, at 19 (tribes such as the Navajo and Crow have become more receptive to coal mining on their reservations).

²³⁷ See Winslow, *Reagan's Indian Policy: Speaking With Forked Tongue*, THE NATION, Feb. 12, 1983, at 177. Four tenths of one percent of President Carter's proposed 1982 budget was dedicated to Federal Indian programs. *Id.* The Reagan Administration singled out these programs for 2.9 percent of their proposed budget cuts. *Id.* Federal funding for programs affecting American Indians was cut by 22 percent from 1982 to 1983. *Id.*

²³⁸ See COAL AGE, *supra* note 6, at 19.

Protection of the environment is surely one of the most vital and most difficult government functions. Environmental protection requires identifying the problems,²³⁹ supplying financial and personnel resources including scientific expertise, and most basic, a balancing of societal values.²⁴⁰ The tribes' acquisition of jurisdiction over this challenging matter is indicative of their desire to exercise sovereign authority over their lands.²⁴¹ The environmental protection statute amendments that grant this jurisdiction also indicate Congress' belief that at least some tribes are or will be capable of handling such a complex matter. Logically, tribal environmental jurisdiction should be co-extensive with the tribes' ability to exercise practicable jurisdiction over the natural resources whose exploitation contributes to such pollution. Unfortunately, current federal practice will not facilitate tribal control over their natural resources.

V. CURRENT FEDERAL INDIAN POLICY AND PRACTICE

Economic pressure to exploit natural resources has led many developing nations to exploit their resources without fully considering all the impacts.²⁴² American Indian tribes are similarly pressured, especially given the recent federal budget cuts in Indian allotments.²⁴³ Resource development, whatever the environmental impacts, could help compensate for the cuts as well as provide jobs.²⁴⁴ Ironically, the budget cuts in education "have stalled development of desperately needed *human* resources."²⁴⁵ This lack of human resources may effectively prevent the tribes from fully developing their natural resources, the alleged means to tribal self-sufficiency. These budget cuts expose the Reagan Administration's policy supporting tribal self-determination as an empty concept, where basic needs such as housing and health care cannot be met,²⁴⁶ let alone

²³⁹ See EPA SURVEY, *supra* note 190, at 7-13.

²⁴⁰ See Will, *supra* note 222, at 500.

²⁴¹ See *id.* at 465.

²⁴² Arthur, *Preface to NATIVE AMERICANS AND ENERGY DEVELOPMENT 2* (Anthropology Resource Center ed. 1978).

²⁴³ *Id.* Government financing for employment and anti-poverty programs decreased from \$264 million in 1980 to \$117 million in 1984. N.Y. Times, Dec. 11, 1986, at B19, cols. 3-4.

²⁴⁴ COAL AGE, *supra* note 6, at 19. Unemployment on reservations is several times the national average. Hertzberg, *Reaganomics on the Reservation*, NEW REPUBLIC, Nov. 22, 1982, at 17.

²⁴⁵ Beck, *Reservations on Reaganomics: "Beggars in Our Own Land"*, NEWSWEEK, Nov. 29, 1982, at 49 (emphasis in original).

²⁴⁶ Winslow, *supra* note 237, at 178 (quoting the House Interior Appropriations Subcommittee). "Reservation Indians are the poorest people in the nation, with the lowest income,

tribal-controlled resource development. Current federal Indian policy has been described as flowing from the budget rather than the usual method of the budget flowing from the policy.²⁴⁷

In his 1983 Statement on Indian Policy, President Reagan stated that the answer to the tribes' economic woes lay in the free market, which would "supply the bulk of the capital investments required to develop tribal energy and other resources."²⁴⁸ Reagan's vision was aimed at reducing the federal presence on reservations and increasing private sector investment.²⁴⁹ Unfortunately for the tribes, reducing the federal presence meant sizable cuts in vital programs.²⁵⁰ One commentator complained that Reaganomics and the new federalism are being mechanically applied to the tribes without taking into account the tribes' needs.²⁵¹ Moreover, it may be unrealistic to expect a capitalist economy to bloom in just a few years.²⁵²

In his 1983 Statement, President Reagan also called for the establishment of a Commission on Indian Reservation Economies to assess the tribal economic situation and advise the President on Indian matters.²⁵³ In November 1984, the Commission announced its recommendations.²⁵⁴ The Commission called for a change in the direction of tribal development efforts from social goals to private ownership and the profit motive.²⁵⁵

Tribal leaders overwhelmingly rejected these recommendations.²⁵⁶ The leaders were disturbed by the emphasis on "altering the communal philosophy behind tribal enterprises."²⁵⁷ This alteration represents a subtle but powerful attempt by the federal government to assimilate the tribes into mainstream society, a position contrary to

the fewest economic opportunities, the highest death rate, and the least education." Hertzberg, *supra* note 244, at 16.

²⁴⁷ Hertzberg, *supra* note 244, at 15.

²⁴⁸ Reagan Indian Policy, *supra* note 7, at 6.

²⁴⁹ Williams, *supra* note 109, at 6.

²⁵⁰ See Winslow, *supra* note 237, at 177-78.

²⁵¹ Hertzberg, *supra* note 244, at 15.

²⁵² The industrial capitalism of Europe and the United States evolved gradually and was facilitated by imperialism and colonialism to ensure a supply of raw materials and cheap labor. Ortiz, *Choices and Directions*, in *ECONOMIC DEVELOPMENT IN AMERICAN INDIAN RESERVATIONS* 152 (R. Ortiz ed. 1979). Today's newly developing nations, such as American Indian tribes, cannot develop on the same time scale and in the same manner as did the nations that industrialized in the nineteenth century. *Id.*

²⁵³ Reagan Indian Policy, *supra* note 7, at 6.

²⁵⁴ Williams, *supra* note 109, at 6.

²⁵⁵ Peterson, *Indians Resist Shift in Economic Goals Urged By U.S. Panel*, N.Y. Times, Jan. 13, 1985, at A1, col. 6.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at A16, col. 1.

the stated federal policy supporting tribal self-determination.²⁵⁸ Many tribal leaders felt that the recommendations, if implemented, would separate the tribes from their natural resources.²⁵⁹

Through its budget cuts and its desire to redefine the tribes' group-oriented philosophy, the Reagan Administration is violating the historic trust responsibility of the federal government²⁶⁰ to the tribes as well as the spirit of the Self-Determination Act.²⁶¹ While simply pouring money into reservations is not the answer, true self-determination will require continuing federal-tribal cooperation.²⁶² For example, the relationship between the EPA and the tribes²⁶³ represents a hopeful partnership. The success of such cooperative efforts will influence federal government decision-making as to whether the tribes will be given the opportunity to develop true self-determination, even if the end result is not aligned with the American individual-oriented and profit-oriented mainstream.

VI. TRIBAL CONTROL OVER NATURAL RESOURCE DEVELOPMENT IS VITAL TO SELF-DETERMINATION

The tribes need to control the development of their natural resources if they are to gain a profound measure of self-determination. A number of tribes own great mineral wealth. For example, about sixty percent of North America's uranium deposits lie within reservation boundaries.²⁶⁴ Eighty percent of the mining and one hundred percent of the national production, however, was taking place there as of the late 1970s.²⁶⁵ One possible reason for the one hundred percent is that mining companies can operate more cheaply on reservations, both for leasing²⁶⁶ and for labor costs.²⁶⁷ Another

²⁵⁸ See generally Williams, *supra* note 109, at 7. Contrast this subtle assimilation with the blatant methods in the late nineteenth and early twentieth century and again in the 1940s and 1950s. See *supra* notes 34-40 and 53-58 and accompanying text.

²⁵⁹ Peterson, *supra* note 255, at A16, col. 1.

²⁶⁰ See *supra* notes 7-22 and accompanying text.

²⁶¹ Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified at 25 U.S.C. §§ 450(a), 450a (1982)). Senator Daniel K. Inouye has ordered a study of government injustices toward American Indians. Barnes, *supra* note 126, at 38. Part of this study will focus on MMS royalty collection. *Id.*; see also *supra* notes 126-33 and accompanying text.

²⁶² See Beck, *supra* note 245, at 49 (comments of David Lester, Executive Director, Council of Energy Resource Tribes).

²⁶³ See *supra* notes 192-203 and accompanying text.

²⁶⁴ Churchill, *supra* note 114, at 16. It is ironic that such mineral wealth lies under some Indian reservations, for the tribes were placed on these lands because such land was considered useless to whites. *Id.*

²⁶⁵ *Id.* at 17.

²⁶⁶ See *id.* at 16.

²⁶⁷ See *id.* at 17.

possibility is the desirability of company mining operations in an environment where the companies may take fewer precautions, even to the extent of avoiding those precautions required by law.²⁶⁸ Arguable examples of such corporate exploitation are the Kerr-McGee and United Nuclear incidents.²⁶⁹

Whether or not these incidents involved violations of laws and regulations,²⁷⁰ they nonetheless portray a disregard for the safety of employees and local inhabitants.²⁷¹ This disregard represents exploitation of people and the environment in the name of profit. Whether this disregard for human life and property is purposely facilitated by the federal government, as some commentators assert,²⁷² or is the result of the federal government's failure to regulate properly the energy companies that do business with the tribes,²⁷³ the government is not meeting its trust responsibilities regarding the tribes' physical environment and physical resources.²⁷⁴

Another contemporary event, the forced relocation of Hopi and Navajo from a portion of their traditional homeland at Big Mountain, Arizona,²⁷⁵ exemplifies the failure of the federal government to meet its responsibilities to the tribes. In the case of Big Mountain, one of the government's major partners is the pro-development Hopi Tribal Council.²⁷⁶ Contrary to the media-purchased²⁷⁷ image of this relocation as the result of a dispute between the Hopi and Navajo, the

²⁶⁸ See *id.* at 16-17. Taking fewer precautions allows for bigger profits. *Id.*

²⁶⁹ See *supra* notes 159-77 and accompanying text.

²⁷⁰ History has shown that the legality of actions does not guarantee their "rightness." See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding "separate but equal" facilities for blacks and whites); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding curfew applying to only the Japanese-Americans).

Criticism of the use of law to legitimize the illegitimate is a central tenet of the Critical Legal Studies movement. Matsuda, *supra* note 50, at 329. "The Constitution, [the incarcerated Japanese-Americans] found, offered no protection from the guns of military police or from the orders of racist generals . . ." *Id.* at 339.

²⁷¹ See *supra* notes 161-66 and accompanying text for a description of such an event involving radioactive poisoning.

²⁷² See, e.g., Churchill, *supra* note 114, at 16-17; *Radioactive Colonialism*, *supra* note 163, at 55-56.

²⁷³ See Owens, *Can Tribes Control Energy Development?*, in NATIVE AMERICANS AND ENERGY DEVELOPMENT 60 (Anthropology Resource Center ed. 1978). For an example of this failure, see *supra* notes 183-88.

²⁷⁴ See *supra* notes 7-22 and accompanying text for a discussion of the trust doctrine. See *supra* notes 123-25 and accompanying text for a discussion of the federal government's specific fiduciary duty concerning the leasing of tribal lands for mineral extraction.

²⁷⁵ Howland, *supra* note 49, at 61, 63; see also Johnson, *supra* note 167, at 15-18.

²⁷⁶ Howland, *supra* note 49, at 65.

²⁷⁷ The Council hired an advertising agency "to secure passage of a bill that would divide" the Joint Use Area. *Id.* at 62.

conflict was really between the Hopi Council and the traditional Navajo and Hopi at Big Mountain.²⁷⁸ The two tribes had held the land at Big Mountain jointly since 1882, land which happens to lie above huge deposits of low-sulphur coal.²⁷⁹ Most Navajo and Hopi opposed the development of these minerals.²⁸⁰ In spite of this opposition, the pro-development Hopi Council proceeded to convince Congress to divide the land in order to open the land up to mining.²⁸¹ Congress obliged in 1974 by enacting Public Law Number 93-531,²⁸² a law that required thousands of Navajos to leave their homeland.²⁸³ This forced relocation, legal under United States law, violates the traditional Navajo and Hopi right to self-determination under international law.²⁸⁴ The right to live in one's homeland is one of the most

²⁷⁸ *Id.*; see also Johnson, *supra* note 167, at 17. One commentator addressed non-Native Americans regarding the development of tribal natural resources:

Your people will do *anything* to get their hands on our mineral-rich lands. They will legislate, stir up internal conflicts, cause inter-tribal conflicts, dangle huge amounts of monies as compensation for perpetual contracts and promise lifetime economic security. If we object, or sue to protect our lands, these suits will be held in litigation for fifteen to twenty years with "white" interests benefitting in the interim.

Sanchez, *Sex, Class, and Race Intersections, Visions of Women of Color*, in *GATHERING OF SPIRIT: WRITING AND ART BY NORTH AMERICAN INDIAN WOMEN* 163, 166 (B. Brant ed. 1984), *quoted in* Matsuda, *supra* note 50, at 327.

²⁷⁹ Howland, *supra* note 49, at 61.

²⁸⁰ *Id.* at 61-62.

²⁸¹ *Id.* at 62-63.

²⁸² Pub. L. No. 93-531, 88 Stat. 1712 (1974) (codified as amended at 25 U.S.C. §§ 640d-640d-28 (1982 & Supp. IV 1986)). The 1980 amendment, Pub. L. No. 96-305, 94 Stat. 929 (1980), somewhat mitigated the effects of the relocation, but did not address the basic problems of the statute. Members of Congress and traditional Native Americans felt that the relocation act, as amended, was "harsh, inhumane, and in need of repeal." Howland, *supra* note 49, at 70-71.

²⁸³ Howland, *supra* note 49, at 61. This program will result in the largest removal of an ethnic group in the United States since the Japanese-Americans during WWII. *Id.* at 63.

²⁸⁴ *Id.* at 80. Native Americans meet the definition of "peoples" as defined by the International Court of Justice. Article 55 of the United Nations Charter mandates the self-determination of peoples. *Id.* The Article states:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

U.N. CHARTER art. 55, *reprinted in* Howland, *supra* note 49, at 80. Forced relocation violates the Native Americans' right to self-determination. This right is also recognized in Article One of the International Covenant on Economic, Social, and Cultural Rights, Article One of the International Covenant on Civil and Political Rights, and Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid. Howland, *supra* note 49, at 80-81. For an account of the United States treatment of the tribes in the context of the recognized international rights of indigenous peoples, see O'Brien, *Federal Indian*

basic rights of peoples everywhere. The federal government, by enforcing the relocation, has ignored its policy supporting tribal self-determination.

A more general criticism of the federal government's treatment of the tribes concerns reservation economic and political conditions. Although some tribes are endowed with large mineral resources, the tribes are not even able to support themselves.²⁸⁵ The system in which the tribes only share in a minority of the wealth generated by the exploitation of their natural resources may be termed a metropolis-satellite economy,²⁸⁶ or neocolonialism.²⁸⁷ In this model, a tribe on a reservation acts as a satellite by providing the natural resources and the labor necessary to extract the resources,²⁸⁸ but does not own or control the mining industry.²⁸⁹ The metropolis, or urban center of political and economic power, owns and controls the industry.²⁹⁰ The metropolis grows at the expense of the satellite,²⁹¹ which does not share proportionately in the surpluses from its own area, and has little political and economic power.²⁹²

In the context of Indian reservations, which play the role of satellite, the mining companies and the federal government facilitate the dominance by the metropolis. The metropolis, most broadly, consists of these companies and the government, as well as other businesses, shareholders, and consumers. All of these persons benefit, directly or indirectly, from the mineral extraction and the en-

Policies and the International Protection of Human Rights, in *AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY* 35-60 (V. Deloria ed. 1985).

²⁸⁵ See Churchill, *supra* note 114, at 16.

²⁸⁶ For a discussion on metropolis-satellite economies, see Jorgensen, *Energy, Agriculture, and Social Science in the American West*, in *NATIVE AMERICANS AND ENERGY DEVELOPMENT* 9-12 (Anthropology Resource Center ed. 1978).

²⁸⁷ See *id.* at 12-13. Neocolonialism occurs worldwide. For a description of its effects in the Caribbean, see Seigle, 'We Caribbean Revolutionaries Can Overcome Insularity': Interview with Don Rojas, *THE MILITANT*, Feb. 5, 1988, at 9, col. 2. For a description of the distinction between old colonialism, with its reliance on territorial conquest and manpower, and the new neocolonialism, see R. DAVIS & M. ZANNIS, *THE GENOCIDE MACHINE IN CANADA: PACIFICATION OF THE NORTH*, quoted in La Duque, *supra* note 166, at 12.

²⁸⁸ Jorgensen, *supra* note 286, at 9.

²⁸⁹ Page, *Reservation Development in the United States: Peripherality in the Core*, 9 *AM. INDIAN CULTURE AND RES. J.* 21, 28 (No. 3) (1985).

²⁹⁰ *Id.*

²⁹¹ Jorgensen, *supra* note 286, at 10.

²⁹² *Id.* at 9. The Navajo, for example, are not receiving a fair return on their energy resource leases. P. RENO, *supra* note 13, at 116. For example, a 1957 agreement between the tribe and the Utah Mining & Construction Company provided for tribal royalties of 15 cents a ton for "as long as coal is being produced in paying quantities." *Id.* at 114. Since 1957, coal prices have risen and inflation has lowered the value of that 15 cents. The loss to the tribe means gain to the company. *Id.* at 114-15.

ergy produced therefrom. They benefit, in fact, to a much larger degree than the reservation inhabitants, who live amidst the stripped land and the pollution.

The federal government, which led the tribes into the prejudicial mining lease agreements with the energy companies,²⁹³ facilitates the companies' role. The companies can mobilize legal and political clout far beyond the tribes' capability.²⁹⁴ The metropolis-satellite relationship has blossomed since natural resources were discovered on tribal land, although the relationship has historical roots. The framework was set more than 150 years ago when Chief Justice Marshall, although ostensibly supporting tribal self-determination, termed the tribes "domestic dependent nations,"²⁹⁵ thereby limiting the tribes' autonomy.

Tribal self-determination requires the ending of the colonial relationship facilitated by the energy companies and the government,²⁹⁶ and the tribes' genuine assumption of control over their resources.²⁹⁷ Ideally, the tribes themselves should undertake the resource development.²⁹⁸ The tribes receive royalties and tax revenues from the mining and energy companies under natural resource development leases,²⁹⁹ resulting in the collection of significant funds.³⁰⁰ Additionally, the federal government could provide the necessary capital to allow tribes to start resource development companies. The tribes' lack of trained personnel,³⁰¹ however, makes this scheme not realistic at present. Reinstatement of the education and training programs cut by President Reagan would help compensate for the personnel shortage. In addition, the tribes could require lessee energy companies to participate in joint ventures that would assure management positions to tribe members, and generally "promote a transfer of technical and managerial skills."³⁰² In order for the tribes to gain

²⁹³ P. RENO, *supra* note 13, at 116.

²⁹⁴ *Id.*

²⁹⁵ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). See *supra* notes 24-27 and accompanying text. A modern commentator has similarly described the tribes as "internal colonies." Jorgensen, *supra* note 286, at 12.

²⁹⁶ B. JOHNSON & R. MAESTAS, *supra* note 50, at 211-12.

²⁹⁷ See INTERIM STRATEGY, *supra* note 195, at 816.

²⁹⁸ Some tribes are undertaking development on their own. Beck, *supra* note 245, at 50; see also P. RENO, *supra* note 13, at 115-16. For example, the Crow tribe announced plans to mine its own coal. *Id.* Federal law recognizes the right of the tribes to develop mineral resources. 25 U.S.C. § 2108 (1982); see also 1982 U.S. CODE CONG. & ADMIN. NEWS 3470.

²⁹⁹ See *supra* notes 103-08 and accompanying text.

³⁰⁰ See La Duque, *supra* note 166, at 12; *Radioactive Colonialism*, *supra* note 163, at 56.

³⁰¹ See Owens, *supra* note 273, at 50.

³⁰² See Ruffing, *Strategy For Asserting Control Over Mineral Development in American*

control over the development of their natural resources, both the tribes and the federal government must take bold steps. Unfortunately, the Reagan Administration practices have further removed the tribes from this goal.

Control over resources is a major element of control of the tribal economy, which in turn is a prerequisite for self-determination. In addition to actually conducting exploration and mining, the tribes can assert a measure of control over reservation resource development under environmental regulation.³⁰³ Congress has already amended several statutes to permit tribal participation in environmental regulation.³⁰⁴ More federal action should follow, including regulations granting greater tribal participation in resource development itself.

Exploitation of natural resources is a course of action available to tribes, but most of the benefits should flow to the people who own the land and suffer the side effects of the development process. For all of the federal government's rhetoric about Indian self-determination,³⁰⁵ the tribes will not really attain this state until they control their resources. This control becomes all the more critical because natural resources such as coal, oil, and uranium are non-renewable. For example, the Navajo reservation's mineral resources are expected to be depleted by the year 2010.³⁰⁶ If development continues at the present rate or increases, there is little time left for the tribes to increase their control over, and/or the benefits they receive from, resource development.³⁰⁷

Some commentators believe that the tribes will never be granted political and economic justice inside the United States, and therefore must seek international recognition of their plight and must pressure the United States government to grant the tribes greater autonomy.³⁰⁸ If the tribes were able to act as independent nation-states,

Indian Reservations, in *ECONOMIC DEVELOPMENT IN AMERICAN INDIAN RESERVATIONS* 142 (R. Ortiz ed. 1979). The Navajo tribe in the 1950s attempted to create a partnership with a major corporation for the purpose of developing uranium resources, but the Department of the Interior never approved the plan. U.S. COMM'N ON CIVIL RIGHTS, *THE NAVAJO NATION: AN AMERICAN COLONY* 133 (1975) [hereinafter *AMERICAN COLONY*].

³⁰³ See *supra* notes 222-25 and accompanying text.

³⁰⁴ See, e.g., SDWA, 42 U.S.C. § 300j-11 (Supp. IV 1986); CWA, 33 U.S.C.A. § 1377 (West Supp. 1988); CAA, 42 U.S.C. § 7474(c) (1982).

³⁰⁵ Some tribal leaders feel that President Reagan's motives were "to get the Indians off the government's back by pandering to their desire for independence while ignoring their needs." Winslow, *supra* note 237, at 177.

³⁰⁶ *AMERICAN COLONY*, *supra* note 302, at 24.

³⁰⁷ *Id.*; see also P. RENO, *supra* note 13, at 10.

³⁰⁸ B. JOHNSON & R. MAESTAS, *supra* note 50, at 215-16; Owens, *supra* note 273, at 61.

they might nationalize the mining operations in their territory, as many former colonies have done.³⁰⁹ Customary international law recognizes the legitimacy of such expropriation, whereby the expropriating state makes a good-faith effort, over time, to reimburse the individuals and corporations whose property the state expropriates.³¹⁰ This law dictates that the expropriating state compensate foreign individuals and corporations in the same manner that the state compensates native citizens.³¹¹

Domestically, the tribes may wish to reorganize their tribal leadership or restructure the leases, perhaps by challenging the royalty payments as unfairly low. In addition, the tribes may find the long-term nature of leases unacceptable. Presently, the statutory limit is twenty-five years.³¹² Leases shorter than this maximum would allow greater tribal flexibility. Tribes could renegotiate leases as conditions change, such as market prices of natural resources, tribal attitudes toward development, and increasing tribal capacity to undertake development on their own.

In the interest of protecting the environment, the tribes should utilize the provisions in the recent statutory amendments permitting them to "act as states" for purposes of setting standards and/or enforcing the provisions.³¹³ In line with this latter duty, tribes should

³⁰⁹ See U.S. Department of State Report on Nationalization, Expropriation, and Other Takings of U.S. and Certain Foreign Property Since 1960, 11 I.L.M. 84 (1972). Argentina, Chile, Mexico, Algeria, Congo, Libya, and the People's Republic of Yemen, among other nations, have nationalized foreign corporations' natural resource extraction operations, providing a variety of forms and degrees of compensation. *Id.* at 89-115.

A 1962 United Nations General Assembly Resolution declared that "[t]he right of people's [sic] and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people in the state concerned." *Permanent Sovereignty Over Natural Resources General Assembly Resolution 1803 (XVII)*, Dec. 14, 1962, reprinted in J. SWEENEY, C. OLIVER, & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 1114-15 (2d ed. 1981) [hereinafter SWEENEY].

³¹⁰ SWEENEY, *supra* note 309, at 1112. This is known as the Calvo doctrine. *Id.* This doctrine was incorporated into the 1962 U.N. General Assembly Resolution. *Id.* at 1115. The United States opposes the Calvo doctrine, asserting instead an international minimum standard under which the entity whose property is expropriated is entitled to prompt, adequate, and effective compensation from the expropriating country. *Id.* at 1108-12; see also Carasco, *A Nationalization Compensation Framework in the New International Economic Order*, in *THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW* 659-89 (F. Snyder & S. Sathirathai eds. 1987).

³¹¹ SWEENEY, *supra* note 309, at 1112.

³¹² 25 U.S.C. § 415(a) (1982). The tribes may also want to petition the federal government to end the MMS and BIA intermediary roles and to require the lessee energy and minerals companies to pay royalties directly to the tribes. For a discussion on the problems of the MMS, see *supra* notes 126-33 and accompanying text.

³¹³ See *supra* notes 192-229 and accompanying text.

be granted jurisdiction over energy companies for the purposes of enforcing environmental regulations. This jurisdiction would include the use of a NEPA-type written requirement to study potential societal and environmental effects of any significant resource development. This study would be most effective if required before any disturbances began. A tribe would use this study to design a development plan that would include the roles and requirements for the tribal government and the energy companies.

It makes sense that the tribes should have increased practicable control over the development of their natural resources, because given the tough choices inherent in this development, the tribes will benefit most if the choices are made as freely as possible in the economic circumstances. The tribes with energy-rich reservations have reached a turning point with regard to political and economic choices.³¹⁴ Many people feel that the tribes' dependency on the federal government can be fought with economic development.³¹⁵ In addition, there is a perception that energy development can be the manifestation of economic development.³¹⁶ Energy development alone, however, is not the answer. As one commentator stated:

[w]hatever decisions individual tribes make about energy development, it is clear that without substantial changes, energy development is not the panacea to end Indian poverty and underdevelopment. And if the problems raised here are not solved, energy development will prove to be the latest and most devastating fiasco of federal Indian policy.³¹⁷

There already exists a distressing model for one possible future of tribal natural resource development, the coal mining areas of Appalachia. The poverty and scoured land of Appalachia provide us with the realization that economic colonialism in America is not limited to Indian reservations.³¹⁸ The post-coal mining depression in

³¹⁴ La Duque, *supra* note 166, at 12.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ Owens, *supra* note 273, at 62. The implications of resource development on culture and vice versa cannot be overestimated. See Vinje, *Cultural Values and Economic Development on Reservations*, in *AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY* 155-75 (V. Deloria ed. 1985). Native American cultures include a relationship to the land that differs from that of Western white culture. For traditional Native Americans, the Earth is alive and people are part of the Earth. See P. ALLEN, *THE SACRED HOOP* 119 (1986). Many South-western tribes, for example, share a belief that when they lose their land the world will end. P. RENO, *supra* note 13, at 10. A land deadened by excessive exploitation may have the same effect as the loss of land.

³¹⁸ See B. JOHNSON & R. MAESTAS, *supra* note 50, at 232.

parts of Appalachia provides the tribes with a vision of their own future if they do not act to control their resources and their land.³¹⁹

VII. CONCLUSION

Congress has honored the historic trust and the modern federal policy supporting tribal self-determination by amending environmental protection statutes to allow tribal participation. There are impediments, however, that serve to make these amendments the exception rather than the rule. The Reagan Administration's budget cuts and the federal government's apparent tacit approval of corporate economic domination over the tribes amount to a violation of the trust. This government and corporate partnership serves to further remove the Indians from their goal of self-determination.

Natural resources development serves as both a prerequisite for and a manifestation of self-determination for some tribes. If the federal government carries out its stewardship over tribal natural resources in a manner conducive to increasing tribal control, the tribes will have the opportunity to control the methods, pace, and location of resource development. Tribal control would allow into the resource extraction process consideration of tribal lifestyles, traditional as well as modern, protection of the environment, and financial needs. Such control would also recognize that the allotment of ultimate control over resource development should not come down to a choice between development and tribal existence. Control over and the benefits of resource development should flow to the people who live on the land and whose lifestyle and environment suffer from the extraction and refinement processes.

³¹⁹ *Id.*