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FEDERAL REGULATORY STATUTES AND INDIAN SELF-DETERMINATION: SOME PROBLEMS AND PROPOSED LEGISLATIVE SOLUTIONS

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Alarm over the increasing role of Washington in the day-to-day life of the average citizen has become a mainstay of American political rhetoric. For the American Indian, however, the ubiquitous federal presence is nothing new. Federal statutes and regulations govern virtually every phase of an Indian's existence from the cradle to the grave.[1] Plenary federal power over Indians and Indian tribes[2] is derived from three sources. First, the Constitution gives Congress the power to regulate commerce with the Indian tribes,[3] and the President the power to make treaties.[4] Another source of federal power is the judge-made trusteeship doctrine, first enunciated by

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1. *See, e.g.*, 25 U.S.C. § 184 (1970) (children of white man and Indian woman have rights to tribal property); *id.* § 262 (Bureau of Indian Affairs permission required to trade with Indians); *id.* § 380 (reservation superintendent may lease allotted lands of deceased Indians when heirs have not been determined or located); 25 C.F.R. § 11.79NH (1976) (6 month jail sentence for failure to dip sheep and goats according to regulation); *id.* § 108.10 (reservation superintendent may disburse up to $2,000 of money held in trust for individual Indian to purchase an automobile, provided this will not result in inability to meet current living expenses).
2. Morton v. Mancari, 417 U.S. 535, 551 (1974).
3. U.S. CONST. art. I, § 8, cl. 3.
4. *Id.* art..II, § 2, cl. 2; *see* Morton v. Mancari, 417 U.S. 535, 551-52 (1974). Present-day power over Indians is exercised solely under the commerce clause; treaties have been abandoned as a mode of dealing with Indians since 1871. *See* Act of Mar. 3, 1871, ch. CXX, 16 Stat. 566 (current version at 25 U.S.C. § 71 (1970)); Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 957-58 (1975).

Chief Justice John Marshall in *Cherokee Nation v. Georgia*.[5] Marshall characterized Indian tribes as "domestic dependent nations" whose relationship to the United States resembled that of a ward to his guardian.[6] Occasionally, a third source of plenary federal power over Indian country comes into play; the federal government's ownership of Indian land. This source was first mentioned by Chief Justice Marshall in *Johnson v. McIntosh*,[7] in which the Supreme Court classified Indian country with other "federal enclaves" in asserting that federal sovereignty flowed inexorably from federal ownership.[8] An important distinction exists, however, in that while other public lands are held in fee, Indian lands are held in trust for tribes and individuals. The government must administer Indian lands for the benefit of the Indian beneficiaries, as against the competing claims of the public as a whole.[9]

The source of this federal plenary power, it must be remembered, is the sword of conquest. A fine legal patina now tends to obscure this fundamental fact but in the early days of the American Republic, it was frankly acknowledged. As Chief Justice Marshall noted, the Indians resisted fiercely and consistently the European attempts to appropriate their country. He wrote:

> What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claim to it, or of enforcing those claims by the sword. . . .

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5. 30 U.S. (5 Pet.) 1 (1831).
6. *Id.* at 16. The Supreme Court later explained that this relationship rested on a duty of protection, arising out of federal promises and the helplessness of the Indians; the duty to protect implied the power to do so. United States v. Kagama, 118 U.S. 375, 384 (1886). The trusteeship power is quite broad, encompassing "the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic." Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943), *quoted with approval in* Morton v. Mancari, 417 U.S. 535, 552 (1974). Despite the disturbingly paternalistic rationale for the trusteeship powers, broad construction of those powers is unquestionably beneficial to Indians. *See* Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1972).
7. 21 U.S. (8 Wheat.) 543 (1823).
8. *See id.* at 587-89. *See also* United States v. Kagama, 118 U.S. 375, 380 (1886). It is questionable whether this is actually the law today. The Supreme Court has noted that if the government sells or otherwise deprives an Indian tribe or individuals of the beneficial interest in trust land, it constitutes a complete taking under the power of eminent domain. Chippewa Indians v. United States, 305 U.S. 479, 481-82 (1939). The government must then pay just compensation. United States v. Klamath Indians, 304 U.S. 119, 123 (1938). Of course, the government is under no such obligation when it disposes of land in the public domain.

The courts have also observed the distinction between Indian lands and other federal lands by refusing to construe statutes granting conveyances of public lands as including Indian lands. In Leavenworth, L. & G.R.R. v. United States, 92 U.S. 733 (1875), the Court held that Indian lands were not covered by a statute granting public lands for railroad rights-of-way. A similar result with respect to grants of public lands for highways was obtained in Bennett County v. United States, 394 F.2d 8 (8th Cir. 1968). Nonetheless, the *Kagama* case is still cited for the proposition that federal power to govern in Indian country is an incident of its ownership of those lands. *See* United States v. Blackfeet Indian Reservation, 369 F. Supp. 562, 564 (D. Mont. 1973).

9. *See* Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1972).

> Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. . . . The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out accordingly to the will of the sovereign power. . . .
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> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; . . . if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[10]

The judiciary, then, has been faced with a fait accompli; federal power over Indians has emerged from the barrel of a gun and, like it or not, the courts must bow to reality. This same basic reasoning lies behind decisions affirming Congress' power to abrogate Indian treaties unilaterally[11] and to wipe out the trust status of whole tribes.[12]

On the other hand, the early opinions also recognized that the Indians had once been self-governing and still retain a residual sovereignty. Perhaps the first judicial notice of this status came in *Worcester v. Georgia*,[13] where the Court stated:

> [T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger [*sic*], and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. . . .
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> The Cherokee nation, then, is a distinct community, occupying its own territory . . . 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 [*sic*].[14]

The nature of the interrelationship between Indian tribal powers and the authority of the federal government was summarized in *Talton v. Mayes*.[15]

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10. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 590-91 (1823); *see* Tee-hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955).

11. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 564-68 (1903); Anderson v. Gladden, 293 F.2d 463, 466 (9th Cir. 1961).

12. *See* United States v. Waller, 243 U.S. 452 (1916); Crain v. First Nat'l Bank, 324 F.2d 532, 536 (9th Cir. 1963).

13. 31 U.S. (6 Pet.) 515 (1832).

14. *Id.* at 560-61. Concurring in *Worcester*, Justice McLean expressed similar thoughts: "[Y]et, having the right of self government, they, in some sense, form a state. In the management of their internal concerns, they are dependent on no power. They punish offenses under their own laws, and in doing so, they are responsible to no earthly tribunal." *Id.* at 581 (McLean, J., concurring); *accord*, United States v. Kagama, 118 U.S. 375, 381-82 (1886); *see* "Enforcement of State Financial Responsibility Laws Within Indian Country," 17 ARIZ. L. REV. 639, 831, 835-39 (1975).

15. 163 U.S. 376 (1896).

In that case, the Supreme Court ruled that the fifth amendment did not apply to criminal proceedings before a Cherokee court. The *Talton* Court noted that the existence of congressional power to limit or control the exercise of tribal self-government does not mean that Indian sovereignty is derived from the United States.[16] Thus, constitutional restraints on the federal government do not apply to Indians.[17] *Talton* represents one of the high water marks of the Indian sovereignty doctrine. The case stands for two principles, both of which are violated by indiscriminate application of general federal regulatory statutes in Indian country. First, the governmental power exercised by Indian tribes does not flow from the United States; it is inherent in the tribes themselves.[18] Second, tribes are not instrumentalities of the federal government.[19]

The plenary federal power over Indians and Indian lands on the one hand, and the tribal claims to inherent sovereignty on the other hand, come into constant conflict regarding the application of general federal regulatory statutes in Indian country. This Article will explore the reasons for and the substance of this conflict in an attempt to recommend sound legislative solutions. Initially, the modern developments in the Indian sovereignty questions will be discussed. Next, the applicability of general federal statutes to Indian country will be focused upon, and a proposal made for a statute clearly limiting such application. The second major section will address the applicability to Indian lands of federal statutes governing regulatory agencies. Following recommended legislation for clarification of this issue, the final section will discuss the need for additional legislation to limit the application of statutes delegating federal authority to the states.

THE MODERN APPROACH TO SOVEREIGNTY: INDIAN SELF-DETERMINATION

The strong sovereignty doctrine of *Worcester v. Georgia*[20] and *Talton v. Mayes*[21] is no longer conceptually palatable to the Supreme Court. In

16. *Id.* at 384.
17. The Court stated:

> [T]he existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government.

Id. See Native Am. Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959), which describes Indian tribes as "subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States." *Id.* at 134.

18. 163 U.S. at 384; *see* Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231, 1234 (4th Cir. 1974).

19. 163 U.S. at 384. This principle has often been reaffirmed. Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971) ("An Indian tribe or nation is not a federal instrumentality and is not within the reach of the Fifth Amendment."); Dodge v. Nakai, 298 F. Supp. 17, 23 (D. Ariz. 1968) (court rejected the argument that the Navajo tribal government "functioned in part as a federal agency"). *But see* United States v. Wheeler, 545 F.2d 1255 (9th Cir. 1976).

20. 31 U.S. (6 Pet.) 515 (1832); *see* text & notes 13-14 *supra*.

21. 163 U.S. 376 (1896); *see* text & notes 15-19 *supra*.

McClanahan v. Arizona State Tax Commission,[22] the Court acknowledged the old cases, but noted that the doctrine has not "remained static during the 141 years since *Worcester* was decided."[23] It noted that the doctrine had been limited in some fact situations,[24] and concluded: "Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty."[25]

Justice Thurgood Marshall, writing for a unanimous Court in *McClanahan*, emphasized that while the rubric of sovereignty may no longer be in vogue, the concept of Indian self-determination is very much alive.[26] Thus, Indians remain a separate people, with the power to regulate their internal relations, and are generally not subject to the laws of the state within whose limits they reside.[27] The Court therefore concluded that the state's attempt to tax the income of a reservation Indian earned entirely on the reservation violated the Navajos' treaty guaranteed right to govern themselves.[28]

The Supreme Court's tendency to foster Indian self-government is especially evident in a remarkable recent decision, *Bryan v. Itasca County*,[29] in which a unanimous Court severely limited the scope of state jurisdiction under section 4 of Public Law 280.[30] It had been assumed that section 4 granted the enumerated states the power to regulate all affairs on Indian reservations, including taxation, to the same extent as on private lands. However, the Court, holding that Public Law 280 gave Minnesota no authority to levy personal property taxes on reservation Indians, flatly rejected the concept that "the entire array of state non-criminal laws" were

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22. 411 U.S. 164 (1973).
23. *Id.* at 171.
24. "Over the years this Court has modified [the Worcester principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. . . . Thus, suits by Indians against outsiders in state courts have been sanctioned. . . . And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation."

Id. (quoting Williams v. Lee, 358 U.S. 217, 219 (1959)).

25. 411 U.S. at 172 (footnote & citation omitted). The Court has now relegated the sovereignty doctrine to the role of a "backdrop" against which to apply other canons of construction. *See* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 475 (1976); United States v. Mazurie, 419 U.S. 544, 557 (1975).
26. 411 U.S. at 172-73.
27. *Id.* at 173; *accord*, United States v. Kagama, 118 U.S. 375, 381-82 (1886).
28. 411 U.S. at 181.
29. 426 U.S. 373 (1976).
30. Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 589 (codified at 28 U.S.C. § 1360 (1970)). *See generally* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975). Section 4 granted to certain enumerated states:

> jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . .

28 U.S.C. § 1360 (1970).

meant to be applied.[31] Instead, the Court held, section 4 amounts to nothing more than a grant of state court jurisdiction over private civil litigation involving reservation Indians,[32] and an authorization for state courts to apply their own rules of decision in such proceedings.[33] The Court relied primarily on the legislative history of section 4 and the rules of express legislative revocation,[34] but also recognized the manifest congressional policy of fostering Indian self-government.[35]

The power of Indian tribes to govern themselves, originally unlimited, has been subjected to the whims and vagaries of Congress. In this century, legislative policy on Indian self-government has vacillated wildly.[36] In the early fifties, Congress abandoned its previous goal of strengthening and encouraging tribal self-government embodied in the 1934 Wheeler-Howard Reorganization Act.[37] Congress had then decided to subject the Indians within the territorial limits of the United States to the same laws and entitle them to the same privileges and responsibilities as other citizens of the United States as rapidly as possible.[38] Public Law 280 was enacted during this era,[39] delegating civil and criminal jurisdiction to certain states, followed by the infamous termination bills[40] whose objective was to end federal recognition of whole tribes and amalgamate their members into the general populace.

The unmitigated disaster of the termination policy on Indian economic, social, and spiritual welfare, coupled with the emergence of articulate Indian demands for self-determination, has caused a rapid return of federal policy toward encouragement of Indian self-government. Federal supervision of the previously terminated Menominee Tribe has been restored[41] and it has been recognized by the President that termination is not an acceptable method of dealing with American Indians.[42] States may no longer assume jurisdiction over Indian tribes without their consent[43] and retrocession of

31. 426 U.S. at 384 n.10.
32. *Id.* at 383.
33. *Id.* at 384.
34. See text & notes 60-67 *infra*.
35. 426 U.S. at 388 n.14. See text & notes 41-46 *infra*.
36. *See* Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445, 455-63 (1970).
37. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified in scattered sections of 25 U.S.C.).
38. H.R. Res. 108, 83rd Cong., 1st Sess., 99 CONG. REC. 9968 (1953).
39. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified, as amended, in scattered sections of 18, 28 U.S.C.). The apparently wide scope of Public Law 280 was recently limited severely by the Supreme Court. *See* text & notes 29-35 *supra*.
40. *See, e.g.*, Act of Aug. 23, 1954, ch. 831, 68 Stat. 768 (codified at 25 U.S.C. § 721 (1970)); Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (codified at 25 U.S.C. § 564 (1970)); Act of Aug. 13, 1954, ch. 733, 68 Stat. 724 (codified at 25 U.S.C. § 691 (1970)).
41. Act of Dec. 22, 1973, Pub. L. No. 93-197, § 2, 87 Stat. 770 (codified at 25 U.S.C. §§ 903-903f (Supp. V 1975)).
42. H.R. REP. No. 1420, 93rd Cong., 2d Sess. 2 (1974) *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7000, 7001.
43. Act of Apr. 11, 1968, Pub. L. No. 90-284, § 401-02, 82 Stat. 78 (codified at 25 U.S.C. §§ 1321-1322 (1970)).

previously acquired state civil jurisdiction has been authorized[44] and acted upon in several instances.[45] Further, Congress has issued a ringing endorsement of Indian self-government in the Indian Self-Determination and Education Assistance Act of 1973:

> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.[46]

While the exercise of national power on Indian reservations has not always had a salutary effect on Indian self-determination, the unique federal status of Indians which gives rise to the trusteeship relationship has at least kept alive Native Americans' desires not to be totally amalgamated into the American melting pot. Unfortunately, overprotective federal regulation is often a byproduct of this relationship. Federal power, then, is a mixed blessing for Indians. On the other hand, the exercise of state power on the reservations is an unqualified disaster in terms of Indian self-government. Thus, any state attempt to encroach on Indian sovereignty has been passionately and universally resisted by Indians. They recognize, as does the Supreme Court, that almost invariably the exercise of state jurisdiction "would infringe on the right of the Indians to govern themselves."[47]

If meaningful Indian self-government is really to be this country's goal, a way must be found to provide federal protection without paternalism; at the same time, the role of the states in Indian country must be kept to a minimum. Too often clashes over regulatory jurisdiction in Indian country have been settled in the courts, rather than in the halls of Congress: Most federal statutes are silent about their effect on Indian lands.[48] This is an

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44. Act of Apr. 11, 1968, Pub. L. No. 90-284, § 403, 82 Stat. 79 (codified at 25 U.S.C. § 1323 (1970)).

45. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 549 & n.229 (1976) (stating that five states have already retroceded all or part of their Public Law 280 jurisdiction). *See also* Omaha Tribe of Nebraska v. Village of Walthill, 334 F. Supp. 823 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973).

46. Pub. L. No. 93-638, § 3(b), 88 Stat. 2203 (codified at 25 U.S.C. § 450(a) (Supp. V 1975)).

47. Williams v. Lee, 358 U.S. 217, 223 (1959). *See also* Bryan v. Itasca County, 426 U.S. 373, 388 n.14 (1976) (acknowledging the "devastating impact" state regulatory control has on tribal governments). Similarly, in McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), the Court reaffirmed its oft repeated observation that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Id.* at 168 (quoting Rice v. Olson, 324 U.S. 786, 789 (1945)).

48. Of course, if Congress specifically targets Indians with a statute, it may exert unlimited authority, up to and including extinguishing the existence of a tribe. *See* text & notes 11-12 *supra*. Furthermore, there is no question that Congress may delegate its powers over Indians to the states by an explicit statute. *See* Anderson v. Gladden, 293 F.2d 463, 468 (9th Cir. 1961). However, most federal regulatory statutes make no specific reference to Indians or Indian country. Thus, the disputes in this area are not over whether Congress has the power to regulate Indians, but whether it intended to exercise that power by a particular statute.

entirely unsatisfactory way to deal with the problem. It drains a huge amount of funds from tribes that can ill afford high legal fees; the process leads to obscure and often conflicting results in the courts, and it constitutes a dishonorable abnegation of the federal government's recognized obligation to protect the Indians' right to live life their own way. This Article will now begin to examine some of the principle areas of conflict concerning regulatory authority and propose some legislative solutions.

APPLICABILITY OF GENERAL FEDERAL REGULATORY STATUTES IN INDIAN COUNTRY

There is an oft quoted dictum in *Elk v. Wilkins*[49] to the effect that "[g]eneral acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[50] The courts, however, have never rejected an attempted assertion of federal authority over an Indian reservation on the basis of the *Elk* dictum. On the contrary, the decisions have been uniform that general federal regulatory statutes do apply on reservations. For example, in *Navajo Tribe v. NLRB*,[51] the D.C. Circuit held, over the objection of the Tribe, that the National Labor Relations Act[52] must be applied to businesses on the Navajo Reservation. The court found that the Act embodied "a national labor policy superseding the local policies of the States and the Indian tribes."[53]

Thus, it is relatively clear that general federal regulatory legislation applies in Indian country, at least in the absence of conflicting treaty provisions. Treaties are the "supreme law of the land" under the Constitu-

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There have been some encouraging developments in recent years: Congress has tended more and more to recognize legitimate Indian rights and needs and to authorize special treatment for them. *See* Marine Mammal Protection Act of 1972, § 101, 16 U.S.C. § 1371 (Supp. V 1975) (exempts Native Americans of the Northwest from prohibitions on the taking of marine mammals when the animals are used for subsistence or native crafts); Equal Employment Opportunity Act of 1972, § 2(2)(b), 42 U.S.C. § 2000e(b)(1) (Supp. V 1975) (exempting Indian tribes).

49. 112 U.S. 94 (1884).

50. *Id.* at 100. The Court made this statement in support of its holding that an Indian was not an American citizen by virtue of being born on a reservation within the territorial limits of the United States. *Id.* at 103. The principle of nonapplicability of general congressional legislation to Indians was cited to illustrate how Indian tribes had been treated by the government as a separate people. The Court cited many of its cases in support of the proposition, *id.* at 100, but not one involved a holding to that effect. Indeed, one case, The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620 (1871), holds precisely the opposite.

51. 288 F.2d 162 (D.C. Cir.), *cert. denied*, 366 U.S. 928 (1961).

52. Pub. L. No. 198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1970 & Supp. V 1975)).

53. 288 F.2d at 164. The court dismissed the *Elk* dictum in a footnote: "The decision of *Elk v. Wilkins*, whatever its present-day significance, certainly does not operate to remove Indians and their property interests from the coverage of a general statute." *Id.* at 164 n.4 (citation omitted). *See also* United States v. White, 508 F.2d 453, 455 (7th Cir. 1974) (stating the "general rule that congressional enactments in terms applying to all persons includes Indians and their property interests"); United States v. Three Winchester 30-30 Caliber Level Action Carbines, 504 F.2d 1288, 1291 (7th Cir. 1974) (holding, in accord with the "well settled" rule, that federal statute making it a crime for a convicted felon to possess a firearm applies to Indians); Head v. Hunter, 141 F.2d 449, 451 (10th Cir. 1944) (finding no intent to except Indians from coverage of federal criminal statute).

tion[54] and are accorded equal dignity with federal statutes.[55] However, since treaties and statutes are of equal force, the later congressional action generally prevails;[56] Congress may by statute unilaterally abrogate earlier Indian treaties.[57] However, the courts have struggled within the confines of this harsh reality to vindicate express and even implied treaty rights whenever possible.[58] As stated by two of the leading commentators: "The unequal bargaining position of the tribes and the recognition of the trust relationship have led to the development of canons of construction designed to rectify the inequality."[59] There has been a long established rule that the courts will require a clear and plain showing of legislative intent to abrogate an Indian treaty.[60]

A stricter test, more favorable to the preservation of treaty rights, has been gaining popularity of late; those rights will not be abrogated unless subsequent legislation contains express language referring to them.[61] Perhaps the most liberal extension of the express abrogation doctrine is found in *United States v. White*,[62] where the question was whether the general statute applying federal enclave laws to Indian country[63] made a federal statute prohibiting the taking of eagles[64] applicable to an Indian on the Red Lake Chippewa Reservation in Minnesota. The treaties by which the reservation was established did not mention hunting and fishing rights, but the court found that such rights must have been implicitly granted.[65] The

54. U.S. CONST. art. VI, cl. 2.
55. *See* Edye v. Robertson, 112 U.S. 580, 599 (1884); Chew Heong v. United States, 112 U.S. 536, 540 (1884).
56. *See* Reid v. Covert, 354 U.S. 1, 18 (1956).
57. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
58. See text accompanying notes 61-67 *infra*.
59. Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CALIF. L. REV. 601, 617 (1975). This Article, the definitive statement in the field, is the source of much of the following discussion on construction of Indian treaty rights.
60. Bryan v. Itasca County, 426 U.S. 373, 393 (1976); United States v. Santa Fe Pac. R.R., 314 U.S. 339, 353 (1941); Bennett County v. United States, 394 F.2d 8, 11-12 (8th Cir. 1968); Wilkinson & Volkman, *supra* note 59, at 623. In *Bryan*, discussed at text & notes 29-35 *supra*, the Court ruled that Congress is not to be presumed to have granted state jurisdiction over Indian reservations by Public Law 280, Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 589 (codified at 28 U.S.C. § 1360 (1970)). 426 U.S. at 390. If the Congress wanted to do so, Justice Brennan ruled, it should have adopted specific language such as that used in the termination statutes. *Id.* at 390; see statutes cited note 40 *supra*.
61. *See, e.g.*, Menominee Tribe v. United States, 391 U.S. 404, 413 (1968); Bennett County v. United States, 394 F.2d 8, 11-12 (8th Cir. 1968); Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1005 (D. Minn. 1971). *See generally* Wilkinson & Volkman, *supra* note 59, at 627-30.
62. 508 F.2d 453 (8th Cir. 1974).
63. 18 U.S.C. § 1152 (1970). The *White* court defined "enclave laws" as "those laws passed by the federal government in the exercise of its police powers over federal property." 508 F.2d at 454.
64. 16 U.S.C. § 668 (1970). The statute is silent as to whether it is meant to apply to Indians on reservations, but a following section specifically exempts the taking of eagles "for the religious purposes of Indian tribes." *Id.* § 668a. It could therefore be argued that the exemption for Indian religious purposes meant that Congress intended to prohibit reservation Indians from taking eagles for other purposes, such as resale. Nonetheless, the court chose to vindicate the implied treaty right.
65. 508 F.2d at 457. *See generally* Wilkinson & Volkman, *supra* note 59, at 617-20.

opinion continued: "To affect those rights . . . , it was incumbent upon Congress to expressly abrogate or modify the spirit of the relationship between the United States and Red Lake Chippewa Indians on their native reservation. We do not believe it has done so."[66] This is a very favorable formulation for Indians; under it Congress may not abrogate rights guaranteed by the letter or the spirit of a treaty without specifically saying so. Implicit treaty rights, such as those vindicated in *White*, are often as important as those expressly guaranteed.[67]

If the courts applied the rationale of *White* liberally and consistently, a long step would be taken toward restoring the honor of a government which has broken its word to a defenseless people too many times. Unfortunately, all courts do not share the Eighth Circuit's perception of justice. One line of cases has permitted the expropriation of lands granted by treaties to Indians on the authority of general statutes that did not even mention those treaties. One of the most agonizing of these cases for Indian people was the Kinzua Dam case, *Seneca Nation of Indians v. Brucker*,[68] in which the court held it was not unlawful for the Army Corps of Engineers to build a dam that would cause flooding of nearly the entire Seneca Reservation. The district court found that Congress had sufficiently manifested its intent to obliterate the reservation by appropriating money for the dam.[69] A few years later, an even more disturbing opinion was rendered regarding the same project.[70] The Corps of Engineers moved to condemn a portion of the remaining Seneca lands for a freeway, as part of the overall Kinzua Dam project. Once again, there was a judicial holding that any existing treaty rights could be obliterated, this time without any manifestation of congressional intent, on the theory that the Corps exercised "delegated administrative discretion."[71]

In two other cases involving similar fact patterns, the courts split on whether a general congressional approval of a river development project was sufficient to overcome Indian treaty rights. In *United States v. 687.30 Acres of Land*,[72] the Nebraska District Court cited five congressional acts approving a series of dams in the Missouri basin to show that Congress had

66. 508 F.2d at 457-58.

67. For example, in the arid Western States, where water is often more precious than gold, Indians depend on implicit "*Winters* rights" to waters which have not been specifically granted by treaty. Such rights were first recognized in Winters v. United States, 207 U.S. 564 (1908), more recently reaffirmed and extended in Arizona v. California, 373 U.S. 546 (1963). Hunting and fishing rights have also been found implicitly included in a treaty by the Supreme Court. Menominee Tribe v. United States, 391 U.S. 404, 406 (1968).

68. 162 F. Supp. 580 (D.D.C.), *aff'd*, 262 F.2d 27 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 909 (1959).

69. *Id.* at 582. The court relied on legislative history which indicated that Congress had been made aware that Indian lands would be inundated by the project. *Id.*

70. Seneca Nation of Indians v. Brucker, 338 F.2d 55 (2d Cir. 1964), *cert. denied*, 380 U.S. 952 (1965).

71. *Id.* at 56. The Second Circuit, however, cited no authority for the assertion that Congress had even considered the construction of a highway. *See* Wilkinson & Volkman, *supra* note 59, at 643.

72. 319 F. Supp. 128 (D. Neb. 1970), *appeal dismissed*, 451 F.2d 667 (8th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972).

intended to delegate its power to condemn Winnebago Indian lands to the Corps of Engineers in order to complete a project.[73] On the other hand, in *United States v. 2,005.32 Acres of Land*,[74] the South Dakota District Court construed many of the same statutory provisions, but reached the opposite conclusion concerning their effect on treaty lands of the Standing Rock Sioux. The court reasoned that although Congress might have been aware that Indian lands would have to be taken for the project, a showing of congressional knowledge was not itself sufficient to defeat a treaty right.[75] The court held that the terms of a treaty "stand as the highest expressions of the law regarding Indian land until Congress states to the contrary. The Indians are entitled to depend on the fulfillment of the terms of the treaty until the Congress clearly indicates otherwise by legislation."[76]

It should appear obvious, then, that case-by-base judicial application of obscure, abstract principles is an unreliable way to decide such important questions. As we have seen, the courts often reach differing results on similar facts. It is unfair to individual Indians and tribes to continually force them to incur the expenses of litigation and, in cases such as *United States v. White*,[77] to expose them to possible imprisonment in order to assert their treaty rights.

Since the legal question of abrogation of Indian treaties is premised on a supposed search for congressional intent, the Congress should eliminate all doubt by codifying its often expressed desire to preserve Indian treaty rights. Appropriate language might read:

> No right or privilege granted or reserved to any individual Indian or any Indian tribe, group, band, or community by any treaty, Executive order, or congressionally ratified agreement shall be deemed to be abridged, abrogated, modified, amended, or repealed by any subsequent act of Congress unless such act refers specifically to such treaty, Executive order, or agreement, and to the specific right or privilege to be affected.
>
> No federal statute shall be construed so as to imply a delegation of congressional authority to abridge, abrogate, modify, amend, or repeal any right or privilege granted or reserved to an individual Indian or any Indian tribe, group, band or community by a treaty, Executive order, or congressionally ratified agreement unless such statute refers specifically to such treaty, Executive order, or agreement, and to the specific right or privilege to be affected.

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73. *Id.* at 133.
74. 160 F. Supp. 193 (D.S.D.), *vacated as moot sub nom.* United States v. Sioux Indians of Standing Rock Reservation, 259 F.2d 271 (8th Cir. 1958).
75. *Id.* at 196-97.
76. *Id.*
77. 508 F.2d 453 (8th Cir. 1974); *see* text & notes 62-66 *supra*.

APPLICABILITY OF STATUTES GOVERNING FEDERAL AGENCIES

In recent years, there has been an accelerating tendency for Congress to exercise close statutory supervision over federal regulatory agencies. The legislature has perceived a need to open up the day-to-day decisionmaking process of the bureaucracy to input from the public, and to prevent administrators from cloaking their actions in impenetrable secrecy.[78] While it is indisputable that this trend is a boon to the general public, its effect on Indian self-determination has been far from salutary. Since the role of federal agencies in Indian affairs is so pervasive,[79] the recent enactments have often provided a means for outsiders to delay and sometimes halt projects and activities desired by Indian tribal governments. This section examines the effect of two such statutes and suggests remedial legislation.

The Administrative Procedure Act

The Administrative Procedure Act [APA][80] is a detailed procedural code which governs the operations of federal regulatory agencies. The purpose of the APA is to impose procedural safeguards against bureaucratic abuses of the vast powers that have been accumulated by federal agencies.[81] The APA may impinge upon tribal sovereignty in two ways: First, it may be invoked against federal agencies, such as the Department of the Interior, when they are required to approve an Indian project under their supervisory, fiduciary authority. This problem is especially crucial with respect to application of the Freedom of Information Act [FOIA].[82] Second, it may be asserted that Indian tribes themselves are federal agencies and thereby subject to the APA procedural requirements for adjudications and rulemaking.

The Freedom of Information Act

One key portion of the APA, the FOIA,[83] imposes rigid procedural requirements on each federal "agency" in regard to the disclosure of its records.[84] Widespread application of the FOIA to Indian records can prove

78. The House Report on one of the statutes discussed in this section, the Freedom of Information Act, 5 U.S.C. § 552 (Supp. V 1975), notes an extreme example: The Navy had refused to release a telephone directory to the public because it was "information relating to the internal management of the Navy." *See* H.R. REP. No. 1497, 89th Cong., 2d Sess. 5, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 2418, 2422. Cases interpreting the Act have clearly indicated that the congressional purpose was to make the decisions of governmental agencies more accessible to the public. *E.g.*, Department of the Air Force v. Rose, 425 U.S. 352, 360-61, (1976); Adm'r, Fed. Aviation Administration v. Robertson, 422 U.S. 255, 261-62 (1975); Vaughn v. Rosen, 523 F.2d 1136, 1142 (D.C. Cir. 1975); Freuhauf Corp. v. IRS, 522 F.2d 284, 288 (6th Cir. 1975).

79. *See* 25 U.S.C. § 1 (1970); text & note 1 *supra*.

80. 5 U.S.C. §§ 551-559 (1970).

81. H.R. REP. No. 1980, 79th Cong., 2d Sess. 7-16, *reprinted in* [1946] U.S. CODE CONG. & AD. NEWS 1195, 1196.

82. 5 U.S.C. § 552 (Supp. V 1975).

83. *Id.*

84. *Id.* § 552(a)(3) requires each agency, upon receipt of a proper request for records, to

disastrous in a number of ways. For example, potential competitors of Indian tribal enterprises can learn about Indians' methods, plans, and ideas, while keeping their own activities to themselves. Internal tribal political matters can be spread on the public record. Intimate details about individual Indians' personal lives could be publicized. In general, Indian tribes may be handicapped in their battle to run their own lives, free from the meddling and prying of outsiders.[85]

Of course, the application of the FOIA to Indian tribal records depends partly upon whether the Bureau of Indian Affairs [BIA], when acting as a trustee in Indian matters, is an "agency" for the purposes of the APA. The BIA would appear to be covered under section 551 of the Act, which defines "agency" to include "each authority of the Government of the United States whether or not it is within or subject to review by another agency."[86] The presumption in favor of governmental disclosure under the FOIA[87] may be an important factor leading to the conclusion that the Act applies to the BIA. One court has adopted a very expansive definition, holding that the APA applies to "every department, board, commission, division, or other organizational unit in the executive branch."[88] The claim could be made, however, that the BIA acts in a separate, nongovernmental capacity when dealing with Indians, and hence is not an "authority of the Government." The basis for this argument is the special relationship the BIA has with the Indian tribes, as trustee for the people and their lands. Several federal

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"make the records promptly available to any person." If the administrative agency declines to turn over the requested records, it must notify the applicant of its refusal within 10 days, stating the reasons for its decision. Any administrative appeal of the agency decision must be determined within 20 days. *Id.* § 552(a)(6)(A). Thereafter the applicant may seek a de novo determination in district court. *Id.* § 552(a)(4)(B).

85. A few recent examples should illustrate the scope of the problem:

1. A legal services attorney representing people who claimed they were eligible for membership in the Colville Tribe was given access to the entire membership roll of the Tribe. The roll contained intimate personal data on thousands of residents of the reservation, such as the identity of parents, legitimacy of birth, racial origin, divorce, financial information, and criminal, medical, and mental health records. The Bureau of Indian Affairs felt compelled under the FOIA to disclose the information. Wash. Post, May 20, 1976, § A, at 7, col. 7.

2. An attorney representation contract of the Agua Caliente Band was ordered disclosed to a news service. Letter from Royston C. Hughes, Assistant Secretary of the Interior for Program Development & Budget, to Will Thorne (Mar. 18, 1975) (on file in the *Arizona Law Review* office).

3. The Bureau of Indian Affairs released its files concerning a gravel mining operation on the Navajo Reservation. Letter from Stanley E. Doremus, Deputy Assistant Secretary for Program Development & Budget, to Tim Vollman (Oct. 17, 1975) (on file in the *Arizona Law Review* office).

4. The Bureau of Indian Affairs refused to give out copies of an agreement between the Seneca Nation and a private firm doing business on the reservation. Letter from Mitchell Melich, Interior Dep't Solicitor, to Hogan & Hartson (Sept. 24, 1971) (on file in the *Arizona Law Review* office).

5. The New Mexico State Engineer was refused technical information on water resources on three New Mexico reservations. Letter from Royston C. Hughes, Assistant Secretary for Program Development & Budget, to S.E. Reynolds (Aug. 22, 1975) (on file in the *Arizona Law Review* office).

86. 5 U.S.C. § 551 (1970).

87. *See* Consumers Union of United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 806 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971). *See generally* cases cited note 78 *supra*.

88. Soucie v. David, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

courts, in construing other federal statutes, have given conclusive weight to the trusteeship role of the BIA in Indian affairs,[89] consistent with this argument.

The question whether an Indian tribe would be subject to the FOIA is somewhat obscure. Courts which have considered the question are not in agreement.[90] The Supreme Court has never faced this precise question, but in an analogous area, has twice rejected the claim that tribes are exempt from state taxation because of their status as federal instrumentalities. In *Mescalero Apache Tribe v. Jones*,[91] the Court held that an Indian tribal enterprise conducted off the reservation was subject to a state gross receipts tax. Justice White's opinion for the majority rejected the contention that the tribe was a "federal instrumentality" and therefore shielded from state taxation.[92] In *Moe v. Confederated Salish & Kootenai Tribes*,[93] the tribes and some of their members sued in federal court to restrain state officials from imposing a sales tax within their reservation. The state maintained the action was barred since federal courts were forbidden to enjoin state tax collection if an adequate remedy exists in state court.[94] In a previous case,[95] the Court had held that this prohibition did not deprive the United States of its right "to protect itself and its instrumentalities from unconstitutional state exactions."[96] The district court in *Moe* had concluded that the excep-

89. *See* Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1972).

90. *Compare* Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971) (Indian tribe not a federal instrumentality for due process purposes), *and* United States v. Kills Plenty, 466 F.2d 240, 243 n.3 (8th Cir. 1972) (dictum that tribal court is not a federal authority for application of doctrine of collateral estoppel), *with* United States v. Wheeler, 545 F.2d 1255, 1258 (9th Cir. 1976) (tribal court is a federal entity for purposes of double jeopardy clause; later federal prosecution held barred), *and* Colliflower v. Garland, 342 F.2d 369, 379 (9th Cir. 1965) (tribal court is a federal agency for purposes of federal habeas corpus jurisdiction). *See also* Seneca Constitutional Rights Organization v. George, 348 F. Supp. 51, 56 (W.D.N.Y. 1972).

The *Colliflower* case may be limited to its facts, since it dealt with a Court of Indian Offenses which, unlike other tribal court systems, is organized and funded directly by the federal government and is partially staffed by federal employees. *See* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1349-50 (1969). One commentator maintains that *all* tribal courts should be treated as federal instrumentalities, for purposes of applying due process requirements, by analogy to Supreme Court cases which ruled that private activity, such as political primaries, become an "integral part" of a state function. *See* Note, *Indian Tribal Courts and Due Process: A Different Standard?*, 49 IND. L.J. 721, 727 (1974).

It should be noted that the *Groundhog, Wheeler,* and *Colliflower* cases dealt with the question whether an Indian tribe is a federal instrumentality in order to decide whether constitutional limitations on the federal government's powers apply against the tribe. In the present context, however, the "instrumentality" question is at issue in order to determine whether statutes designed to control the federal bureaucracy should also bind Indians and Indian tribes. The courts are understandably eager to extend constitutional protections in borderline cases, and therefore have been willing to define federal instrumentality broadly to accomplish that end. But that meritorious policy plays no part in deciding the issue at hand. Thus, neither *Groundhog, Wheeler,* nor *Colliflower* really shed much light on the applicability to the tribes of statutes controlling regulatory agencies.

91. 411 U.S. 145 (1973).

92. *Id.* at 150.

93. 425 U.S. 463 (1976).

94. *See* 28 U.S.C. § 1341 (1970).

95. Department of Employment v. United States, 385 U.S. 355 (1966).

96. *Id.* at 358.

tion to the prohibitory federal statute for federal instrumentalities could be extended to "persons or entities [such as the plaintiffs] in which the United States has a *real and significant interest*."[97] The Supreme Court disagreed, holding that the instrumentality doctrine no longer had any vitality and could not serve as a means to evade the bar of section 1341.[98]

In view of the Supreme Court's repudiation of attempts to class Indian tribes with federal instrumentalities on two recent occasions, an argument that tribes are federal agencies, to which the FOIA should apply, appears to have little merit. Nonetheless, it has been reported that the Interior Department has taken the position that tribes are subject to the Act.[99] Apparently, the Department's Solicitor recently demanded that the Colville Tribe turn over to him evidence it had been gathering for a water rights suit in which the Department takes an adverse position to that of the tribe.[100] Because of the persistence of the argument that records held by the tribes, or the government as trustee, are within the scope of the FOIA, the results of judicial challenges have often turned on whether the particular documents sought to be disclosed fall within one of the statutory exemptions to the Act. There are problems, however, when Indians attempt to halt disclosure this way: The party resisting disclosure has the burden of showing that an exemption applies,[101] and the exemptions are narrowly construed by the courts.[102]

Three of the nine statutory exemptions are particularly relevant to Indian matters. First, section 552(b)(4) exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[103] In order to invoke this exemption, it must be shown that disclosure would impair the government's future ability to obtain necessary information or substantially harm the competitive position of the person from whom the information was obtained.[104] The Department of the Interior has taken apparently inconsistent positions with respect to the application of the confidentiality exception to materials submitted to the BIA by Indian tribes. In one instance, the Department overrode the objections of the Navajo Tribe and disclosed its files on a gravel mining operation being

97. Confederated Salish & Kootenai Tribes v. Moe, 392 F. Supp. 1297, 1303 (D. Mont. 1974) (emphasis added), *aff'd*, 425 U.S. 463 (1976).
98. 425 U.S. at 471-72. However, the Court ruled that the tribes could invoke federal jurisdiction under another statute, 28 U.S.C. § 1362 (1970), which has the effect of removing the bar of section 1341 from claims by tribes which could have been prosecuted for them by the federal government, acting as trustee. *Id.* at 474-75.
99. See text & note 100 *infra*.
100. Address by Bill Veeder, Affiliated Tribes of Northwest Indians Special Executive Session, Spokane, Wash. (Jan. 8, 1976) (summary on file in the *Arizona Law Review* office).
101. Washington Research Project, Inc. v. Dep't of Health, Educ. & Welfare, 504 F.2d 238, 244 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Title Guar. Co. v. NLRB, 407 F. Supp. 498, 504 (S.D.N.Y. 1975), *rev'd on other grounds*, 534 F.2d 484 (2d Cir. 1976).
102. *See* Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1976); Montrose Chem. Corp. v. Train, 491 F.2d 63, 66 (D.C. Cir. 1974).
103. 5 U.S.C. § 552(b)(4) (1970).
104. National Parks Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

carried on under a tribal permit.[105] On an earlier occasion, however, the Department had refused to make public an agreement between the Seneca Nation and a private manufacturer doing business on the reservation on the grounds that the material had been submitted by the tribe in confidence and that it would be a breach of the agency's fiduciary obligation to release the documents without the consent of the tribe.[106]

Another statutory exemption that often pertains to Indian records is section 552(b)(5), which excuses disclosure for the following: "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[107] This exemption also has been narrowly construed. It has been held applicable only if the records contain an exchange of ideas between agencies or among personnel of a single agency, or deal with policymaking.[108] The courts have looked to the liberal disclosure provisions of the discovery rules governing practice in the federal courts[109] as the standard for determining whether information should be made public.[110] Material that would be privileged, and therefore not subject to discovery in civil litigation does fall within the exemption. For example, the Interior Department refused to provide the New Mexico State Engineer with data on Indian water resources in one instance because the material constituted work product prepared in anticipation of litigation and was therefore not discoverable.[111]

The third exemption to the FOIA that is likely to be of importance in regard to Indian tribes is section 552(b)(9). This provision exempts from disclosure requirements "geological or geophysical information and data, including maps, concerning wells."[112] This provision is quite clear in its language, and will provide adequate protection of data relating to oil, gas, and perhaps water deposits. The literal language of the Act does leave room

105. Letter from Stanley E. Doremus, *supra* note 85.

106. Letter from Mitchell Melich, *supra* note 85. The federal government stands in the role of a trustee in its dealings with the Indians and the high standards applicable to a fiduciary generally are applied. *See* Morton v. Ruiz, 415 U.S. 199, 236 (1974); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). See text & notes 140-45 *infra*.

107. 5 U.S.C. § 552(b)(5) (1970).

108. *See* Environmental Protection Agency v. Mink, 410 U.S. 73 (1973); M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467 (D.D.C. 1972).

109. FED. R. CIV. P. 26-37.

110. *See, e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148-49 (1975); Environmental Protection Agency v. Mink, 410 U.S. 73, 85-86 (1973); Equal Employment Opportunity Comm'n v. Los Alamos Constructors, Inc., 382 F. Supp. 1373, 1379 (D.N.M. 1974).

111. Letter from Royston C. Hughes *supra* note 85. Since the data in this case had been prepared by the United States Geological Survey, which is unquestionably a federal agency, the exemption was clearly applicable; however, if the material had been submitted by a tribe or its consultants, it could be argued that the "interagency memorandum" exemption would be unavailable, whether or not the material was privileged, since a tribe arguably is not itself an agency. See text & notes 90-98 *supra*. Thus, the material would have to be released unless it could be squeezed into another exemption, such as the confidentiality provision. 5 U.S.C. § 552(b)(4) (1970). However, this exemption is available only if competitive loss can be shown. *See* text & note 104 *supra*. A fair degree of legal ingenuity would be required to shoehorn water resource information into this statutory exemption.

112. 5 U.S.C. § 552(b)(9) (1970).

for doubt, however, as to other types of minerals, such as coal, which do not come from wells. A strict construction of the exemption would deny coverage for such mineral deposits. This question has yet to be tested in the courts.

The narrowness of these exemptions and the equivocal position taken by the Department of the Interior, clearly indicate that the FOIA will present problems for many Indian tribes in the near future. Although it would seem equally clear that the APA was not intended to include tribal governments within the definition of a federal agency, the need for express congressional clarification is manifest. Prior to recommending specific legislative amendment, this Article will examine a second area of conflict under the APA.

Rulemaking Under the Administrative Procedure Act

The APA sets out the requirements for rulemaking by federal agencies. An agency must publish in the Federal Register a notice specifying the time, place, and nature of the proposed rulemaking, as well as the statutory authority for and the substance of the proposed rule.[113] The agency must also give interested persons an opportunity to comment in writing, and must incorporate in the rules adopted "a concise general statement of their basis and purpose."[114] In addition, agencies are required to give any "interested person the right to petition for the issuance, amendment, or repeal of a rule."[115]

Any attempt to impose this sort of standard on Indian tribes would result in governmental paralysis on most reservations. Tribal councils, often consisting of people with little formal education, living in remote areas, operating under a tradition of decisionmaking through oral persuasion and consensus, and often without access to the services of sophisticated lawyers to advise them of the punctilious requirements of administrative law, would find it virtually impossible to comply with the law.[116] Outsiders could seize on the inevitable departures from rigorous procedural requirements of section 553 of the APA as a means to seek judicial reversal of a tribal council action that displeased them.[117] While the applicability of the APA to Indian

113. *Id.* § 553(b) (1970).
114. *Id.* § 553(c).
115. *Id.* § 553(e). Other requirements have been imposed on agencies by judicial fiat. *See* Morton v. Ruiz, 415 U.S. 199, 235 (1974) (agency is bound by its own procedural rules, even if exceeding statutory requirements); Associated Indus., Inc. v. United States Dep't of Labor, 487 F.2d 342, 354 (2d Cir. 1973) (agency must offer "reasoned explanation" for its action to form an adequate basis for judicial review).
116. *See generally* Kerr, *Constitutional Rights, Tribal Justice, and the American Indian*, 18 J. Pub. L. 311, 316-18, 330-34 (1969).
117. While Indian tribes generally possess sovereign immunity and cannot be sued without their consent and that of the federal government, *see* Lomayaktewa v. Hathaway, 520 F.2d 1324, 1326 (9th Cir. 1975), the government waives sovereign immunity in APA actions. Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 873 (D.C. Cir. 1970); Estrada v. Ahrens, 296 F.2d 690, 698 (5th Cir. 1961).

Judicial review of rulemaking is available except when precluded by statute or when tribes is dubious at best, the mere possibility that these procedural restrictions could be used in an attempt to hobble tribal government is enough to demand remedial action.[118] In addition, a second major piece of federal legislation presents a similar need for congressional action.

THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act of 1969 [NEPA][119] has had a profound effect on the process by which federal agencies decide to implement or approve projects with environmental impact. NEPA declares a federal policy "to use all practicable means . . . to create and maintain conditions under which man and nature can exist in productive harmony."[120] The Act directs the federal government to strive to achieve six broad goals necessary to achieve a high level of environmental quality.[121] To promote these goals, NEPA requires all federal agencies to consider environmental amenities and values in decisionmaking.[122] This new dimension in the administrative process is enforced by a set of procedures under which agencies must prepare a detailed environmental impact statement setting forth the long and short term environmental effects of a proposed project, as well as alternatives to the proposed action.[123]

NEPA has engendered an enormous amount of litigation in its short history. Most of the disputes have centered around the procedure for preparing and assessing environmental impact statements.[124] These procedural requirements have been declared to be largely inflexible.[125] One court

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agency action is committed to agency discretion by law. 5 U.S.C. § 701(a) (1970). There is a very strong presumption in favor of judicial review. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967). While many tribal council actions could be labeled "discretionary," and therefore unreviewable, purportedly improper applications of legal standards are nonetheless reviewable, as they do not fall within the APA exception for discretionary acts. *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Rochester Tel. Corp. v. United States, 307 U.S. 125, 136 (1939).

118. The APA also imposes exacting procedural standards on federal administrative adjudications. 5 U.S.C. § 554 (1970). However, section 554 applies only to adjudications "required by statute to be determined on the record after opportunity for an agency hearing." *Id.* § 554(a). While some tribal council activities could be classified as adjudications, the author is unaware of any statutory requirement for tribes to meet the standards set out in section 554, so that the APA would not appear to apply. It has been held that the APA provisions for judicial review, *id.* §§ 701-706, do not apply to Indian tribes or the Secretary of the Interior acting as trustee. Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 532-33 (8th Cir. 1967).

119. 42 U.S.C. §§ 4321-4347 (1970).

120. *Id.* § 4331(a).

121. *Id.* § 4331(b).

122. *Id.* § 4332(2)(B).

123. *Id.* § 4332(2)(C).

124. There is a growing trend among courts to review the question of whether an agency decision properly implements the substantive goals contained in NEPA, § 101, 42 U.S.C. § 4331 (1970). *See, e.g.*, Sierra Club v. Froehlke, 486 F.2d 946, 953 (7th Cir. 1973); Conservation Council v. Froehlke, 473 F.2d 664, 665 (4th Cir. 1973) (per curiam); Environmental Defense Fund v. Froehlke, 473 F.2d 346, 356 (8th Cir. 1972); Environmental Defense Fund v. Corps of Eng'rs of the United States Army, 470 F.2d 289, 300 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); Montgomery v. Ellis, 364 F. Supp. 517, 535 (N.D. Ala. 1973); Sierra Club v. Froehlke, 359 F. Supp. 1289, 1332-35 (S.D. Tex. 1973).

125. *See* Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

stated: "They must be complied with to the fullest extent unless there is a clear conflict of *statutory* authority."[126] The courts have taken this mandate seriously, issuing injunctions against a host of projects, large[127] and small,[128] on the basis of noncompliance with NEPA.

The cases have made it clear that NEPA applies not only when projects are constructed and funded by the federal government, but also when the only federal involvement is licensing or approval of some private activity.[129] Since some sort of federal approval or funding is a prerequiste for virtually any Indian project, NEPA is potentially applicable to almost all Indian activities. From the point of view of Indian self-determination, this possibility is highly unattractive. First, it injects a new element into the decision-making process on Indian projects. Not only must the federal trustee determine whether a given project will be beneficial to the Indian wards, it must also conclude that the project will not violate the environmental goals of NEPA.[130] Second, if NEPA applies to Indian projects, outsiders may invoke that statute to obtain a judicial veto over those projects. Third, and most significantly, the will of Indian people as to how their own resources should be used can be thwarted, thus striking a heavy blow at the concept of self-determination.

These problems are illustrated by two cases in which NEPA was applied to Indian projects. In *Davis v. Morton*,[131] the Tenth Circuit reversed a district court ruling that NEPA was not applicable to the BIA's approval pursuant to a federal statute[132] of a 99 year lease by the Tesuque Pueblo to an outside developer for residential, commercial, and recreational purposes. The lease approval had been challenged by neighboring white landowners and several environmental groups.[133] The Pueblo argued that since the federal role in the project was based on its fiduciary responsibility to Indians, rather than on its ordinary governmental function, the general rule that NEPA applies to federal approvals[134] should not be followed. The Pueblo maintained:

126. *Id.* (emphasis in original). There is an interesting, though undoubtedly unintentional parallel between the judicial requirement that NEPA duties can be waived only by express statutory command and the doctrine that Indian treaty rights may be modified only by express congressional reference. For a discussion of the latter doctrine, see text & notes 60-68 *supra*.

127. *See, e.g.*, Scientists' Inst. for Pub. Information v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973) (involving the entire breeder nuclear reactor program); Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (concerning the offshore oil leasing program); Environmental Defense Fund v. Corps of Eng'rs of the United States Army, 324 F. Supp. 878 (D.D.C. 1971) (Cross-Florida Barge Canal).

128. Prince George's County v. Holloway, 404 F. Supp. 1181 (D.D.C. 1975) (transfer of personnel in an oceanographic program).

129. *See* Greene County Planning Bd. v. Federal Power Comm'n, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972) (licensing of power authority's transmission line); McLean Gardens Residents Ass'n v. National Capital Planning Comm'n, 390 F. Supp. 165 (D.D.C. 1974) (approval of rezoning request).

130. *See* Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

131. 469 F.2d 593 (10th Cir. 1972).

132. 25 U.S.C. § 415 (1970).

133. 469 F.2d at 594.

134. *See* cases cited note 129 *supra*.

> Congress did not intend to enmesh the discretionary execution of these fiduciary duties in the procedural and bureaucratic web that NEPA § 102(2)(C) imposes. To impose this burden on private Indian land places Indians at an economic and competitive disadvantage, and subjects their property to judicial challenge by non-Indian competitors laboring under no such environmental restriction.[135]

The *Davis* court did not accept this contention for two reasons. First, it held that the trust status of Indian lands does not take them out of NEPA's reach, reasoning that since the government holds all of its land in trust for the people of the United States, such a contention would preclude application of NEPA to any federal land.[136] Second, the court ruled that all federal agencies, regardless of the nature of their responsibilities, come under NEPA.[137] Neither of these two bases is very persuasive. First, Indian trust land has a special status, very different from that of the public domain. The courts have often emphasized this distinction in exempting Indian lands from statutes dealing with public lands.[138] Thus, exempting Indian country from the reach of NEPA would not a fortiori mean that public lands could not be covered, contrary to the *Davis* statement. Second, the *Davis* court ignored the judicial trend toward recognizing that the nature of the federal fiduciary responsibility toward the Indian tribes differs markedly from its usual governmental authority.[139]

Two recent cases emphasize this distinction. In both instances, the courts concluded that the Interior Department and the BIA could not apply the usual standards when acting as a trustee if those standards would not advance Indian interests. In *Pyramid Lake Paiute Tribe v. Morton*[140] the Secretary of the Interior faced a conflict between the needs of the Indians and white ranchers served by a project of an Interior subagency, the Bureau of Reclamation. The Secretary had adopted regulations for operation of certain dams, the effect of which was to divert water away from the Pyramid Lake Indian Reservation so it could be used by the ranchers. Pyramid Lake, the Paiutes' main source of economic sustenance in the form of fishing and tourism, was drying up. The Secretary argued that under existing statutes and regulations he was authorized to make a "judgment call" between these two interests.[141] The court ruled, however, that a "judgment call" was

135. 469 F.2d at 597.
136. *Id.*
137. *Id.*
138. *See* Ash Sheep Co. v. United States, 252 U.S. 159, 166 (1920) (Indian lands not subject to sale under the general federal land laws); United States v. Consol. Mines & Smelting Co., 455 F.2d 432, 442 (9th Cir. 1971) (Indian lands not subject to withdrawal under the Pickett Act, 43 U.S.C. § 141 (1910)). *See also* 43 U.S.C. § 1400 (1970) (defining "public lands" for purposes of commission to review public land laws to exclude Indian reservations); text & note 8 *supra*.
139. *See* Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972); text & notes 140-44 *infra*.
140. 354 F. Supp. 252 (D.D.C. 1972).
141. *Id.* at 256.

impermissible: "The burden rested on the Secretary to justify any diversion of water from the Tribe with precision. It was not his function to attempt an accommodation."[142] Furthermore, the court ruled, the Secretary had an affirmative duty to carry out the spirit of his trusteeship: "The Secretary was obliged to formulate a closely developed regulation that would preserve water for the Tribe. He was further obliged to assert his statutory and contractual authority to the fullest extent possible to accomplish this result."[143] On this rationale, the Secretary was ordered to draft new operating criteria for the dams.[144] In another recent case, *Manchester Band of Pomo Indians v. United States*,[145] the court ruled that the BIA had violated its fiduciary duties by investing Indian funds held in trust at unconscionably low interest rates, even though the type of investment used was specifically authorized by statute for general government use.[146]

Despite weaknesses in the opinion *Davis* is clearly the law.[147] Its ramifications are far-reaching and potentially deleterious to Indian interests. It could hobble tribes in their attempts to develop their natural resources, since the preparation of an environmental impact statement sufficient to pass muster under the strict judicial tests imposed by the courts[148] inevitably takes many months, sometimes years, to prepare. Private resource owners, of course, labor under no such restraint. Furthermore, under the "programmatic statement" doctrine of *Scientists' Institute for Public Information v. Atomic Energy Commision*,[149] Indians can find their projects tied to massive regional development plans for NEPA purposes and become caught in the middle, since opponents of the comprehensive development plan may use NEPA to achieve major policy changes.

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142. *Id.*
143. *Id.*
144. After the court had determined that the regulations initially proffered by the Secretary did not adequately protect Pyramid Lake, Judge Gesell asked the Tribe to formulate its own set of proposed regulations, which were later adopted by the court with slight modifications. *See* Pyramid Lake Paiute Tribe v. Morton, Civ. No. 2506-70 (D.D.C. order issued Jan. 11, 1973).
145. 363 F. Supp. 1238 (N.D. Cal. 1973).
146. *Id.* at 1247.
147. *See, e.g.*, Norvell v. Sangre de Cristo Dev. Co., 519 F.2d 370, 375 (10th Cir. 1975); Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 496 F.2d 1017, 1024 (5th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975); Sierra Club v. Department of Interior, 376 F. Supp. 90, 93 (N.D. Cal. 1974).
148. *See, e.g.*, Environmental Defense Fund v. Corps of Eng'rs of the United States Army, 470 F.2d 289, 297-98 (8th Cir. 1972) (stating that more than mechanical compliance with the procedural requirements is necessary; the substantive goals of NEPA must be considered); Natural Resources Defense Council v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972) (reasonable alternatives to a project must be discussed); Akers v. Resor, 339 F. Supp. 1375, 1380 (W.D. Tenn. 1972) (consultation with other agencies required); Natural Resources Defense Council v. Morton, 337 F. Supp. 170, 172 (D.D.C. 1971) (comments of other federal agencies must be included); Environmental Defense Fund v. Hardin, 325 F. Supp. 1401, 1403 (D.D.C. 1971) (adequate research program must be completed); Environmental Defense Fund v. Corps of Eng'rs of the United States Army, 325 F. Supp. 728, 759 (E.D. Ark. 1971) (opponents' views must be included).
149. 481 F.2d 1079 (D.C. Cir. 1973). In *Scientists' Institute*, the court held that the Atomic Energy Commission must issue an overall "programmatic" environmental impact statement on the entire liquid metal fast breeder reactor development program; NEPA could not be satisfied by separate statements for individual plants. *Id.* at 1086-88.

A prime example of this phenomenon can be seen in *Sierra Club v. Morton*,[150] in which a group of environmental organizations invoked NEPA in an attempt to bar all further federal actions relating to coal development in the northern Great Plains region, encompassing northeastern Wyoming, eastern Montana, and the western Dakotas, on environmental grounds. These federal actions included coal leases and approvals of mining plans on federal and Indian lands, rights-of-way over federal lands, and rights to use federally controlled waters.[151] Caught up in the tug-of-war between a coalition of non-Indian ranchers and environmentalists on one side, and government and industry on the other, was the Crow Tribe, which was in the process of renegotiating favorable coal leases for some of its lands.[152] Before mining on the reservation could begin, applicable regulations required further federal approval of the mining plans.[153] The Crows entered the legal fray on the side of government and industry, contending that no environmental impact statement was required by NEPA. In a two to one decision, the D.C. Circuit held that a "programmatic" impact statement for the entire northern Great Plains coal development project, including the Crow leases, was required before any further federal action could be taken.[154] The court of appeals concluded that the government had treated the various required individual permits and approvals as though they were part of an overall development scheme, by preparing regional reports, conducting regional studies, and establishing regional task forces to coordinate efforts to achieve a comprehensive regional development program.[155] If the decision had not been reversed on appeal to the Supreme Court,[156] the Crow Tribe would have been trapped in the maze of NEPA regulations in order to develop coal resources on its lands.

While the issue has not yet been raised, it is inevitable that someone will contend that actions by a tribal council are subject to NEPA. As we have seen, an argument, albeit a weak one, can be made that a tribe is a

150. 514 F.2d 856 (D.C. Cir. 1975), *rev'd sub nom.* Kleppe v. Sierra Club, 427 U.S. 390 (1976).

151. *Id.* at 866.

152. *Id.* at 865. The author, along with other attorneys from the Native American Rights Fund, participated in these negotiations.

153. *Id.* at 866.

154. Technically, the court remanded to the district court to allow the Department of the Interior to make an initial determination as to the "ripeness" of the proposal for the development of the federal lands. *Id.* at 883. In the event the Department found that the proposal was not significantly formalized, no environmental impact statement was required by the decision. *Id.*

155. *Id.* at 875-78. The Supreme Court recently reversed on the ground that the record did not show that the federal government was actually treating the overall development as a unified action of regional scope. Kleppe v. Sierra Club, 427 U.S. 390, 400 (1976).

The programmatic environmental impact statement doctrine of *Scientist's Institute* was used against the Crow Tribe in another context. In Cady v. Morton, 527 F.2d 786 (9th Cir. 1975), environmentalists and neighboring landowners succeeded in overturning federal approval of a mining plan for a single Crow coal lease. The court ruled that an impact statement for the entire leased area should have been prepared. *Id.* at 795.

156. Kleppe v. Sierra Club, 427 U.S. 390 (1976).

federal agency.[157] A court might be persuaded to apply NEPA to an Indian tribe because of the tradition of liberality in applying the Act.[158] If Indian tribes had to comply with NEPA, they would be subject to all the problems posed by the APA,[159] with the additional burden of having to hire scientists to do the exacting work necessary to prepare an adequate environmental impact statement.[160] Remedial legislation to correct the unfortunate result in *Davis v. Morton*[161] and to forestall any claims that NEPA applies to Indian tribes is urgently needed.

LEGISLATIVE PROPOSALS

Senator Peter Domenici of New Mexico submitted a bill in the ninety-fourth Congress to amend the FOIA to exempt "information held by a Federal agency as trustee, regarding the natural resources or other assets of Indian tribes or bands or groups or individual members thereof."[162] This bill, though a step in the right direction, does not go far enough, since it does not prevent disclosure of information other than assets, and it does not resolve the ambiguity concerning tribal governments' status under the APA. To remedy this situation, a more complete solution is needed. The most practical legislative solution would be to exclude Indian tribes and the various federal authorities which function as trustees for the tribes from coverage under the APA. Thus, the APA definition of "agency"[163] should be amended to add two new exclusions to the present eight:

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157. See text & notes 90-100 *supra*.

158. For example, the Tennessee Valley Authority, which is clearly not an agency of the federal government, but a federally supervised corporation, has been held subject to NEPA requirements. *See* Environmental Defense Fund v. Tennessee Valley Auth., 339 F. Supp. 806 (E.D. Tenn. 1972).

159. See text & notes 80-118 *supra*.

160. It should be noted, however, that NEPA is a double-edged sword and Indians have themselves asserted NEPA claims in the courts. *See* Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th Cir. 1973) (unsuccessful attempt to halt federal approvals of various phases of power plant development); Confederated Tribes of the Umatilla Reservation v. Callaway, 8 ENVIR. REP. (BNA) 1985 (D. Ore. 1976) (preliminary injunction granted against work on dam that would flood treaty fishing areas).

161. 469 F.2d 593 (10th Cir. 1972), *discussed at* text & notes 131-47 *supra*.

162. S. 2652, 94th Cong., 1st Sess. § 3 (1975), 121 CONG. REC. S19607 (daily ed. Nov. 11, 1975).

163. 5 U.S.C. § 551(1) (1970) currently provides:

> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—
> (A) the Congress;
> (B) the courts of the United States;
> (C) the governments of the territories or possessions of the United States;
> (D) the government of the District of Columbia;
> or except as to the requirements of section 552 of this title—
> (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
> (F) courts martial and military commissions;
> (G) military authority exercised in the field in time of war or in occupied territory; or
> (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix.

"(I) Federally recognized Indian tribes, bands, groups, or communities;

(J) Agencies acting in a trusteeship capacity concerning the person or property of any Indian individual, tribe, band, group, or community."

A similarly comprehensive change must be made in NEPA. Federal trusteeship actions and tribal governments should be removed from NEPA's operations. This can be accomplished by referring back to the amendment to the APA proposed above. Section 102 of NEPA[164] should be amended to incorporate the definition of "agency" that would thus be contained in section 551 of the APA. However, exemption of Indian projects from NEPA requirements could leave a potentially large vacuum in the exercise of the government's trusteeship obligation. While the concept of Indian self-determination dictates that the ultimate decision on whether an environmentally damaging project should be undertaken on Indian lands must be left to the Indians themselves, the government, acting as trustee, should help them make an informed decision by giving them all the facts on possible environmental consequences. One of the major functions of the environmental impact statement is to present the decisionmaker with all relevant information on environmental effects,[165] in order to ensure "an informed choice."[166]

Indians, like other decisionmakers, should be afforded access to environmental information. Without government funding and expertise, they are unlikely to be able to obtain this kind of information on their own. Resource development companies eager to undertake projects on Indian lands are unlikely to come forth with reliable data on the environmental impact of their proposed projects. While there are scattered instances of statutory or regulatory directives for the government to consider the environmental effects of Indian projects,[167] they have proven totally ineffective. Furthermore, they are designed from a paternalistic point of view—placing constraints on government approval of Indian projects, rather than focusing on aiding the decisionmaking process of the Indian tribes. What is needed is a statutory authorization to supply a NEPA-type statement to Indians without giving outside opponents of a project a method to challenge it. Such a measure would help fulfill the government's duty to protect Indians from the

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164. 42 U.S.C. § 4332 (1970).

165. In Environmental Defense Fund v. Corps of Eng'rs of the United States Army, 325 F. Supp. 749 (E.D. Ark. 1971), a leading case on the subject, the court stated: "At the very least, NEPA is an environmental full disclosure law. . . . The 'detailed statement' required by [NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970)] should, at a minimum, contain such information as will alert [decisionmakers] to all known *possible* environmental consequences of proposed agency action." 325 F. Supp. at 759 (emphasis in original). *See also* Natural Resources Defense Council v. Morton, 458 F.2d 827, 833 (D.C. Cir. 1972); Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

166. Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971).

167. *See* 25 U.S.C. § 415 (1970) (Secretary of Interior must consider environmental impact of proposed leases of Indian lands); 25 C.F.R. § 177.4 (1976) (requiring "technical examination" of application for mining permit or lease for environmental effects).

consequences of development proposals acted upon without adequate information concerning environmental impact. It is therefore proposed that a new section be added at the end of chapter 5 of title 25 of the United States Code, providing:

> § 203. Upon request of any Indian tribe, band, group, community, or individual, any federal agency or instrumentality required to approve any action by such Indian tribe, band, group, community, or individual, shall prepare a detailed statement on the environmental impact of said action, pursuant to the requirements of section 4332(2)(C) of title 42 of the United States Code. Failure to comply with this section shall not give rise to a claim for relief by any person other than the Indian tribe, band, group, community, or individual making the request.

STATUTES DELEGATING FEDERAL AUTHORITY TO THE STATES

As discussed previously,[168] state intervention in Indian country historically has had disastrous results. Consequently, the federal government is now committed to achieving a high level of Indian self-government. Despite this policy, the recently initiated congressional policy of shared federal-state authority for enforcing statutory environmental safeguards could impinge on Indian sovereignty. One statutory scheme presenting such potential problems is the Clean Air Act Amendments of 1970.[169] Exploration of the probable effect of state involvement in implementing this statute within Indian country will highlight the need for new legislation.

Under the Clean Air Act, the Environmental Protection Agency [EPA] is required to set ambient air quality standards to protect public health and safety.[170] The states must then submit to the EPA "a plan which provides for implementation, maintenance and enforcement" of the ambient air quality standards.[171] The implementation plan must include "such . . . measures as may be necessary to insure attainment and maintenance of [the

168. See text & notes 45-47 *supra*.

169. Pub. L. No. 91-604, §§ 1-16, 84 Stat. 1676 (1970) (to be codified as amended at 42 U.S.C. §§ 7401-7418, 7521-7525, 7541-7546, 7550, 7571-7574, 7601-7615, 7641-7642). This Article will use the Clean Air Act as an example of the problems in this area, but the discussion is generally applicable to several similar regulatory statutes. *See, e.g.*, Federal Environmental Pesticide Control Act of 1972, § 4(a) (2), 7 U.S.C. § 136b(a)(2) (Supp. V 1975) (states may submit plans for certifying pesticide applicators); Federal Water Pollution Control Act Amendments of 1972, § 303(a) (2), 33 U.S.C. § 1313(a)(2) (Supp. V 1975) (states may submit water quality standards to the Environmental Protection Agency for approval); *id.* § 402(b), 33 U.S.C. § 1342(b) (states may establish water pollution discharge programs); Safe Drinking Water Act, § 1401(10), 42 U.S.C. § 300f(10) (Supp. IV 1975) (including Indian tribes within definition of "municipalities"); *id.* § 1413, 42 U.S.C. § 300g-2(a) (giving states primary enforcement responsibility). A strip mining bill, after several previous congressional enactments and Presidential vetoes, has become law. It calls for cooperation between the Secretary of the Interior and the states for the regulation of surface coal mining, and the acquisition and reclamation of abandoned mines. *See* 30 U.S.C.A. §§ 1201-1328 (West Supp. 1977).

170. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1679 (to be codified as amended at 42 U.S.C. §§ 7401-7418, 7521-7525, 7541-7546, 7550, 7571-7574, 7601-7615, 7641-7642).

171. *Id.* § 7410(a)(1).

ambient standards], including, but not limited to, land-use and transportation controls."[172] The plan must also contain measures to prevent the construction of certain new pollution sources that might threaten the ambient air quality standards.[173] In addition, the plan must provide evidence that the state has the necessary legal authority to enforce its requirements.[174] The EPA is required to approve a state plan which meets the statutory prerequisites.[175] The Clean Air Act is silent, however, as to the applicability of state implementation plans to Indian lands,[176] but the potential assertion of such jurisdiction poses a significant threat to Indian sovereignty. This could supply a back door method for states to achieve direct control of Indian land use. The courts have consistently resisted attempted state usurpation of this essential governmental function, noting that it is at the core of Indian self-government.[177]

To ensure that general federal regulatory statutes delegating rulemaking or enforcement authority to states are not used as an implied means of extending state jurisdiction over Indians, clarifying legislation should be adopted by adding the following new subparagraph to section 1321 of title 25 of the United States Code, which deals with state assumption of criminal jurisdiction:[178]

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172. *Id.* § 7410(a)(2)(B).
173. *Id.* § 7410(a)(4).
174. *Id.* § 7410(a)(2)(D). *See also* 40 C.F.R. § 51.11 (1976).
175. 42 U.S.C. § 7410(a)(3)(A).
176. The EPA has taken the position that the Clean Air Act neither confers any state jurisdiction over Indian country, nor takes it away. Indian tribal governing bodies have been accorded equal dignity with the states for purposes of classifying lands to prevent deterioration of air quality. *See* 39 Fed. Reg. 42513, 42515 (1974).
177. *See, e.g.*, Soldier v. Carlson, 350 F. Supp. 65, 66 (D.S.D. 1972); Annis v. Dewey County Bank, 335 F. Supp. 133, 135 (D.S.D. 1971); Snohomish County v. Seattle Disposal Co., 70 Wash. 2d 668, 673, 425 P.2d 22, 26-27 (1967), *cert. denied*, 389 U.S. 1016 (1967). *See also* Bryan v. Itasca County, 426 U.S. 373, 375-77 & n.2, 376 (1976).

Arizona has purported to extend its air and water pollution laws to Indian country. ARIZ. REV. STAT. ANN. §§ 36-1801, -1865 (1974). Although these statutes were enacted before Public Law 280 was amended to require tribal consent as a prerequisite to state jurisdiction, 25 U.S.C. § 1322 (1970), the validity of this action is dubious in light of Arizona's "disclaimer" provision in its constitution. *See* Clinton, *supra* note 45, at 566 & nn. 337-39. *Cf.* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 177 & n.17 (1973) (expressing doubt as to the validity of such action).

178. 25 U.S.C. § 1321 (1970) currently provides:

> (a) Consent of United States; force and effect of criminal laws.
>
> The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.
>
> (b) Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing.
>
> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any

(c) No statute of the United States which authorizes or directs states to adopt regulatory standards or means to enforce such standards pursuant to guidelines set down by Congress or any federal agency shall be deemed to extend the force and effect of any state criminal laws to Indian country unless said statute of the United States specifically authorizes such an extension of state criminal jurisdiction to Indian country.

A parallel measure, dealing with civil jurisdiction, would add a new subsection to section 1322 of title 25:[179]

(d) No statute of the United States which authorizes or directs states to adopt regulatory standards or means to enforce such standards pursuant to guidelines set down by Congress or any federal agency shall be deemed to extend the force and effect of any state civil laws to Indian country unless said statute of the United States specifically authorizes such an extension of state civil jurisdiction to Indian country.

CONCLUSION

The legislative proposals suggested in this Article would enable Congress to further its professed goal of true Indian self-determination by ensuring that its regulatory actions are not extended haphazardly to Indian country. When Congress wishes to infringe on Indian self-government, it

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Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

179. *Id.* § 1322 currently provides:

(a) Consent of United States; force and effect of civil laws.

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property.

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto, or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Force and effect of tribal ordinances or customs.

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

should make its intention clear on the record. Its promises concerning Indian self-government could then be balanced against its performance by Indian people. In the long run, however, the only way Congress can effectively prevent the unintended extension of federal power over Indian country is to incorporate an awareness of Indian desires and aspirations into the legislative process on any bill that might affect Indian interests. Congress would then be in a position to acknowledge and deal with those interests explicitly. In doing so, the legislature should call for input from the Indian people to be affected and, to the maximum degree possible, be guided by that input. The only feasible method of fostering true Indian self-determination is to be certain that Indian needs and interests are not obliterated by the juggernaut of federal legislative and administrative power. Constant vigilance is necessary to achieve that end.