10-1988

Resource Law Notes Newsletter, no. 15, Oct. 1988

University of Colorado Boulder. Natural Resources Law Center

RESOURCE LAW NOTES: THE NEWSLETTER OF THE NATURAL RESOURCES LAW CENTER, no. 15, Oct. 1988 (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law).

Resource Law Notes

The Newsletter of the Natural Resources Law Center
University of Colorado at Boulder • School of Law

Number 15, October 1988

Center Receives Grant from the Ford Foundation

The Ford Foundation has awarded a major grant to the Natural Resources Law Center to conduct a three-year "Western Water Policy Project." The intention of this project is to facilitate discussion of water policy issues facing the western states. A fundamental objective of the project will be to consider whether western water policy serves the present and foreseeable needs of the western states and to examine policy options available to these states.

The project will involve a mix of conferences and workshops specially designed to address selected water policy issues. Papers addressing these issues will be prepared in advance of these meetings and will provide the basis for the discussions at these meetings. These conferences and workshops will be targeted at policy makers, administrators, and others working in, and concerned with, water matters.

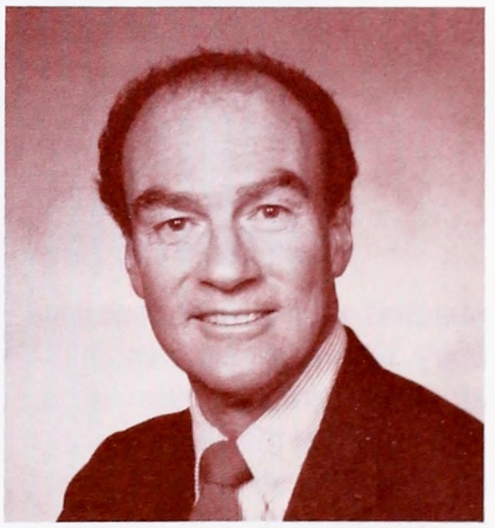
A project steering committee has been established to provide guidance and suggestions on issues to be addressed and individuals who should participate. The members of this steering committee are: **F. Lee Brown**, University of New Mexico; **James E. Butcher**, Boston Consulting Group; **Michael Clinton**, Bockman, Edmiston Engineers; **Harrison C. Dunning**, University of California, Davis; **John Echohawk**, Native American Rights Fund; **Kenneth Fredericks**, Resources for the Future; **Helen Ingram**, University of Arizona; **Steven J. Shupe**, Shupe & Associates; **John E. Thorson**, Doney and Thorson; **Gilbert White**, University of Colorado; and **Zach Willey**, Environmental Defense Fund.

The spring 1988 conference on instream flow laws and policies was held with support from this grant. A book on instream flow laws, based in part on papers from this conference, is now in the works. Publications costs for this book will be covered by this grant as well. Several other publications are expected to result from this project.

For further information, please contact Kathy Taylor or Larry MacDonnell at the Natural Resources Law Center.

Valuable western water is subject of Ford Foundation-supported project. Photo by John Running, courtesy of American Indian Resources Institute.

Kemp Wilson Named First Burlington Northern Fellow



The Center is pleased to announce the appointment of **Kemp Jeff Wilson**, an attorney with the Billings, Montana, law firm of Crowley, Haughey, Hanson, Toole & Dietrich, as the first Burlington Northern Foundation Natural Resource Law Fellow for fall semester 1988.

Wilson will review present philosophies in the administration of oil and gas conservation and recommend legislation in specific areas such as well spacing, compulsory pooling, notice, uncontested applications, and correlative rights.

continued on page 2

Kemp Wilson Named First Burlington Northern Fellow
— *continued from page 1*

Wilson is the author of two articles: "Ownership of Mineral Interests Underlying Inland Bodies of Water and the Effects of Accretion and Erosion," for the Rocky Mountain Mineral Law Foundation Institute (1984); and "A Scrivener's Concerns in the Creation and Transfer of Severed Mineral and Royalty Interests," (with Ruffatto) to be published in the *Public Land Law Review* in 1988. He graduated from the University of Montana School of Law with honors in 1964.

During his semester in residence at the University of Colorado, he will participate in discussions with faculty and students and will produce material which the Center will publish.

This Fellowship is funded by a grant from the Burlington Northern Foundation, which represents the following local companies: Burlington Northern Railroad Company, Glacier Park Company, Meridian Minerals Company, and Meridian Oil, Inc.

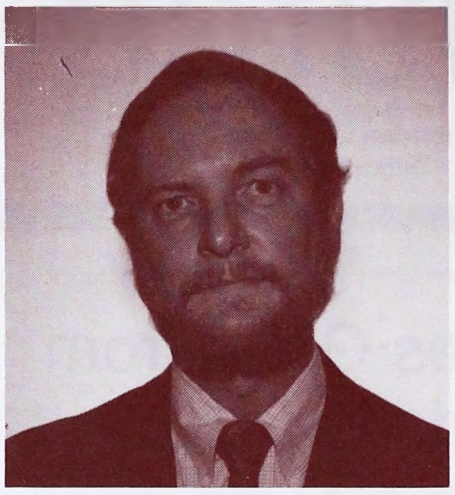
Law School Welcomes new Dean

Gene R. Nichol, Jr. became Dean of the University of Colorado School of Law on July 1, 1988, replacing Acting Dean **Clifford Calhoun**. Nichol came to Colorado from the

Marshall-Wythe School of Law of the College of William & Mary, where he was James Gould Cutler Professor of Law, as well as Director of the Institute of Bill of Rights Law. He has also taught at the University of Florida College of Law (1984-85) and at West Virginia University College of Law (1978-84). He was an Associate with the law firm Ely, Guess & Rudd in Anchorage, Alaska from 1976-78. His J.D. is from the University of Texas School of Law (1976), and B.A. in Philosophy from Oklahoma State University (1973 with highest honors).

As Dean, Nichol will also serve on the faculty Natural Resources Law Committee.

Economics Professor to Conduct Research For Center, 1988-89



Professor **Raymond Prince**, who is a Visiting Professor of Economics with the University of Colorado Institute of Behavioral Science, will be a Research Fellow with the Center for the academic year 1988-89, studying "the feasibility of a socially optimal pattern of use of resources with complex intra and inter-temporal externalities where the role of government is largely limited to defining and enforcing property rights."

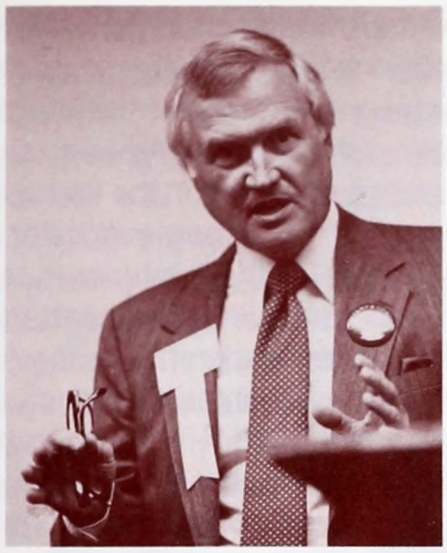
Prince will teach a reduced load in Economics, while conducting research for the Center. He plans a Law School presentation on "Using Economic Concepts to Define the Roles of the Public and Private Sectors in Natural Resources Management." Prince is on leave from James Madison University in Virginia. His PhD in Economics is from the University of North Carolina-Chapel Hill (1971).

June Conferences Address Water Quality, Indian Resource Development

In June 1988 the Center hosted two natural resources law conferences which attracted between them well over 200 registrants. *Water Quality Control: Integrating Beneficial Use and Environmental Protection* (June 1-3) considered issues related to the Clean Water Act, to groundwater quality, to quality/quantity relationships, and to land management and nonpoint source pollution. The 26 speakers and respondents represented 10 states and the District of Columbia, and included spokespeople from industry, government, public interest groups, academics, and the private bar. Attendees came from 21 states plus D.C.

Natural Resource Development in Indian Country (June 8-10) featured a large number of Native American speakers as well as others with extensive experience in matters related to tribal management of natural resources. There were 26 attendees from tribal governments. Every Western state, including Alaska and Hawaii, was represented. Debate was often lively over the evolving roles tribes are playing in managing their own resources, especially in the light of historical restraints to their autonomy. Other topics included mineral development on Indian lands and the issues surrounding the marketing of Indian water.

Notebooks and audiotapes from both conferences are available (see list of Center publications in this issue).



Gary Cargill, Regional Forester, U.S. Forest Service, addresses Water Quality conference on water and multiple use management.

Christine Olsenius of the Freshwater Foundation discusses soil erosion, agrichemicals and water quality.

John McMahon of Weyerhaeuser Co. illustrates timber harvesting on private lands under the Washington Timber-Wildlife-Fish Agreement.

Water Quality conference participants.

Steve Reynolds, New Mexico State Engineer (left), Robert Pelcyger, attorney with Fredericks & Pelcyger in Boulder (center), and Myron Holburt from the Metropolitan Water District of Southern California (right), discuss the marketing of Indian water.

Professor Robert A. Williams, University of Arizona College of Law, Tucson, outlines the historical policy of federal restraints in Indian country.

Indian law conference participant.

Memorial to Charles J. Meyers

A. Dan Tarlock*

Colorado and the natural resources profession lost one of its leading scholars and practitioners this summer. Charles Jarvis Meyers died peacefully in his sleep on July 17, 1988. For such a vigorous and contrary person, it was an uncharacteristic exit. The only good thing about his death is that it may have saved him from a possible life which he would have hated. Charlie was suffering from throat cancer; he underwent major surgery in February. He came through the surgery well, but his vocal cords were damaged and the prognosis for a complete recovery was uncertain. He would not have done well as a semi-invalid, so his family and friends can take some small comfort in the fact that he was spared this possible indignity.

Charlie's loss will be felt deeply and widely, and the loss is an especially sad one for the Natural Resources Law Center and the law school. He left a devoted family who miss him intensely and a wide circle of colleagues, students, professional associates and others who will miss him almost as much. Charlie combined a penetrating mind, which illuminated every subject he addressed from oil and gas to opera, with a zest for life that dazzled and awed all of those who were fortunate enough to know him and to work with him. He capped a distinguished career as a legal educator at Texas, Columbia and Stanford with an equally distinguished, although shorter, tenure as a natural resource partner with the Denver office of Gibson, Dunn & Crutcher. No single tribute can capture all of the different facets of his exceptional career and personality. For those associated with the Center who knew him only briefly or by reputation, I want to emphasize the substantial legacy that he left to the Natural Resources Law Center and the law school during his relatively short association with it.

Charlie's death is an especially hard loss to the Natural Resources Law Center and the law school generally because he gave a great deal of his intellectual energy and educational insight and would have given much more in the future. Charlie was an original member of the Center's Advisory Board and an active and enthusiastic participant on the board and in its programs. He was an early and strong supporter of Dean **Betsy Levin's** efforts to establish the Center as the source of high quality research and continuing education that it has become. In recognition of his leadership in the formative years of the Center, he was appointed Chairman for a two year term starting in January 1988. He had a tough act to follow, but he would have been a worthy successor to **Clyde Martz** and **Ray Moses**. **Larry MacDonnell** and all associated with the Center would have benefited from his leadership and wisdom. His comments were always concise, right on point and often blunt. Sadly but characteristically, he resigned the chairmanship when his cancer was discovered. Charlie never did anything half-way. He either gave his all or did not participate in an organization.

Charlie's major specialties were oil and gas and water law and he shared his expertise generously with the Center and the law school. Charlie's major piece of scholarship is the treatise that he did with his mentor, **Howard Williams**. Williams and Meyers on Oil and Gas remains the leading treatise; many practitioners start (and often end) their research with this superb treatise. He was also a co-author of the leading oil and gas casebook, Williams, Maxwell and Meyers, Oil and Gas. This partnership remained intact through four editions. For the fifth and most recent addition, **Judge Stephen F. Williams**, formerly a member of the Colorado law faculty and a continuing active member of the Center's Advisory Board, became a co-author in recognition of his strong oil and gas and energy policy scholarship.

Charlie's water law expertise was equally, if not more shared with the Center and the law school. Charlie was introduced to water law when he was appointed to be Judge **Simon Rifkind's** law clerk in *Arizona v. California*. He continued to write and practice in this area to the time of his death. His most important contributions are his analysis of the law of the Colorado River, his work for the National Water Commission and his water law casebook. After he entered practice,

continued on page 5

---

* A. Dan Tarlock is Professor of Law, Chicago Kent College of Law, Illinois Institute of Technology. He is co-author (with Charles J. Meyers, James N. Corbridge, Jr., and David H. Getches), of *Water Resources Management*, 3rd ed., 1988. He is a former member of the Natural Resources Law Center Advisory Board.

Memorial to Charles J. Meyers — *continued from page 4*

Charlie was appointed special master in *Texas v. New Mexico*, and one of the last letters that he wrote was to Justice White announcing his intention to proceed with the damages portion of the trial. Charlie's opinions have broken new ground in the law of interstate allocation. The common theme of free alienability of water runs throughout all of his work, and his work will be a major reference for the debates stimulated by the ongoing shifts in the allocation of western water.

Charlie established a strong professional relationship with the law school faculty and the Center in this area. In 1983 Professor **David Getches** collaborated with him on an updated analysis of the evolving law of the Colorado River for a major conference commemorating the negotiation of the 1922 Colorado River compact. David and **Jim Corbridge**, now Chancellor Corbridge, joined Charlie and me for the third edition of *Water Resources Management* (1988). Most of the work was done by David and Jim, and I am happy to report that Charlie was most pleased with the new edition. In 1987, Charlie was a distinguished natural resources visitor at the law school, to the delight of the students and faculty. Charlie was also an active participant in the Center's summer programs. He had strong opinions on many subjects and was not reluctant to argue them. One of the highlights of the 1987 water law program was his debate with **Ralph Johnson** about the public trust doctrine.

I know that all of us associated with the Center mourn Charlie's death and feel a deep sense of loss. Despite the fact that he left such a rich legacy of scholarship and personal involvement, his untimely death cheated the Center and the profession of his leadership and scholarship. But most of all, all of us who were associated with him will miss his wit, charm and ability to define complex issues in a way that never failed to produce a new insight. He was a great man and lawyer.

The Governmental Context for Natural Resource Development in Indian Country*

Susan M. Williams, Gover, Stetson & Williams, Albuquerque

No doubt any longer exists that the major force in the development of Indian natural resources will be the tribal government. That government both owns natural resources and regulates their development.

Against an historical, legal and political backdrop, this presentation focuses on the issues facing modern tribal governments in their quest, responsibly and comprehensively, to manage the development of reservation resources.

Overview

From the earliest years of the Republic, Indian tribes were recognized as "distinct, independent, political communities," *Worcester v. Georgia*, 6 Pet. 515, 559 (1832) and, as such, qualified to exercise powers of government, not by virtue of any delegation from the federal government, but rather, by reason of tribes' original inherent sovereignty. Consistent with this doctrine, until recently, courts reviewing the nature of Indian tribal powers adhered to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all of the powers of any sovereign state; (2) Conquest of the tribes by the United States rendered tribes subject to the legislative power of the United States and, in so doing, terminated the external powers of sovereignty of the tribes, such as the power to enter into treaties with foreign nations. The loss of external sovereignty, however, did not affect the internal sovereignty of the tribes, that is the powers of local government; (3) Tribal powers may be qualified by treaties and by express legislation of Congress, but except where expressly qualified, the full powers of internal sovereignty remained vested in the Indian tribes and their duly constituted organs of government.

...the major force in the development of Indian natural resources will be the tribal government.

Over the years Congress has vacillated widely in its legislation on Indian matters ranging from termination of the political existence of certain Indian tribes to efforts to support the strengthening of tribal governments. But, importantly, until the 1950's, Congress did not derogate the sovereign powers of Indian tribes. In the 1950's, however, Congress enacted legislation authorizing state authority over Indian reservations in such areas as education, and health and welfare. In addition, Congress enacted Public Law 280, which curtailed federal responsibilities on certain Indian reservations by transferring criminal and civil adjudicatory jurisdiction over Indian Country from the federal government to the states. Other states were given the option of assuming jurisdiction over reservations on their own. Because of long-standing and continuing tension between states and tribes, these federal policies proved extremely detrimental to tribal

* This article was originally prepared for the June 1988 NRLC conference, "Natural Resource Development in Indian Country."

interests.

From the 1960's to the present, Congress abandoned the policy of permitting state jurisdiction over reservations in favor of a policy of strengthening tribal governments. In 1968, Congress enacted the Indian Civil Rights Act which imposed constitutional-type limitations on the exercise of tribal sovereign powers. Congress authorized only tribal forums, however, to hear claims under the Indian Civil Rights Act, except for habeus corpus claims which are authorized to be heard in the federal courts. In 1974, the Indian Self-Determination and Education Assistance Act was enacted to authorize tribes to contract with the Interior and Health & Human Services Secretaries to operate federal programs for their reservations. In the 1980's, amendments to the Internal Revenue Code and to the Nation's air and water quality protection programs authorize treatment of tribes as states for purposes of these laws which authorize tax benefits and federal grants for governments. In short, in the last few years, Congress has given tribal governments critically needed recognition and financial assistance.

Courts, in contrast, have rendered decisions in recent years which depart from the *Worcester v. Georgia* mandate that tribes be treated as sovereigns with powers exclusive as against states with respect to reservation affairs. These decisions have struck directly at the heart of tribes' internal sovereign powers, by seizing from tribes the jurisdiction to prosecute and convict non-Indians on their reservations, and jurisdiction over non-Indians on fee lands within their reservations, except where the non-Indians' conduct threatens the political or economic integrity, or health and welfare of the tribe. The courts have employed the theory that powers of

These decisions have struck directly at the heart of tribes' internal sovereign powers...

criminal jurisdiction and jurisdiction over non-members on fee lands are inconsistent with tribes' dependent status. Importantly, however, in the application of these rules, the courts have found only in one instance that tribal powers exercised over non-Indians on fee lands within the reservations are inconsistent with tribes' dependent status. The decisions also have struck indirectly at the heart of tribes' internal sovereign powers, in upholding state jurisdiction over reservation matters in certain instances.

In the most recent decision regarding the scope of state jurisdiction over Indian lands, the U.S. Supreme Court has made clear that only in the area of state taxation does a per se rule exist that states lack jurisdiction over Indians on their reservations, absent congressional consent. With respect to all other state jurisdictional exercises over Indians and non-Indians in Indian territory, the courts will employ the federal doctrines of preemption and infringement upon tribal self-government against the backdrop of tribal sovereignty to determine whether sufficient state interests are at stake to outweigh the federal interests at stake. In thus opening the door, to some extent, to state jurisdiction on reservations, the courts cavalierly and perhaps unwittingly have fanned historic and deeply-felt tensions between states and tribes at a time when great diplomacy and cooperation between states and tribes are critical to the protection of natural resources, the environment and the interest of citizens on and near the reservations. But, more importantly, the courts have abandoned the framers' intent embodied in Article 1 Section 8 of the U.S. Constitution that the federal government functions as the paramount authority over Indian affairs, and not states, and that Congress and not the courts derive the delicate balance between federal and tribal interests on the one hand, and state interests on the other hand, with respect to activities on Indian reservations. And, ultimately, that balance ought best to be derived by the tribes and the states pursuant to intergovernmental agreements. Any other approach necessarily will have the effect of destroying meaningful tribal governments.

...ultimately, that balance ought best to be derived by the tribes and the state pursuant to intergovernmental agreements.

With respect to federal authority over reservations, courts have held that Congress has "plenary power" over Indian tribes, pursuant to the trust responsibility doctrine discussed in another presentation and under Article 1 Section 8 of the U.S. Constitution. While in the early years, plenary power was held to be virtually an unreviewable power, in more recent decisions, courts have made clear that the plenary power means Congress has paramount authority over tribes, but that authority must be exercised consistent with Congress' unique obligations to Indian tribes. Federal courts, in contrast, have limited authority over disputes involving Indian tribes. The U.S. Supreme Court has held, for example, that federal courts must defer to tribal courts to determine the scope of tribal jurisdiction under federal and tribal law. The Court also has held that challenges to the exercise of tribal jurisdiction must be heard in tribal and not federal forums.

Tribal Sovereign Powers

— Statutes

In the late 1800's, Congress executed a number of treaties with Indian tribes, which treaties approved cessions of vast Indian land areas in exchange for federal promises of education and welfare programs for Indians and exclusively tribal territories in the United States. Soon after the close of the treaty period in the late 1800's, however, Congress enacted the General Allotment Act of 1887, (25 U.S.C. 331, *et. seq.*) pursuant to which tribal lands were distributed to the adult members of the tribes, which members were authorized to

sell their land after a certain period. The goal of the Act was to transform Indian societies into farming and industrial economies. Vast portions of Indian lands remaining after distribution were deemed to be "surplus" and open to non-Indian settlement. During this period approximately two-thirds of the tribal land base was lost to sales of the surplus lands, tax sales and sales of the individually owned tribal lands.

The Act, importantly, did not attack tribal sovereign powers. In 1934, Congress enacted the Indian Reorganization Act, (25 U.S.C. 461, *et. seq.*) which authorized a procedure for tribes to enact constitutions for their tribal governments, and recognized tribes as appropriate vehicles for implementing federal Indian policies. This Act was the first congressional recognition of the right of Indian people to maintain distinct, political communities.

In the 1950's, however, Congress reversed its policy of the strengthening of tribal governments by enacting legislation which authorized the termination of the political existence of certain tribes, and the assimilation of individual Indians into state society. In 1955, Congress enacted Public Law 280, (18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360, 1360 note) which curtailed federal responsibilities on certain Indian reservations by transferring criminal and civil adjudicatory jurisdiction over Indian Country from the federal government to the states. Some states were given the option of assuming jurisdiction over reservation areas on their own. Not until 1968, however, was a requirement imposed of tribal consent to the acquisition of such jurisdiction. In other 1950's legislation Congress transferred certain responsibilities to states for the health and education of Indians (25 U.S.C. § 231).

In the 1960's, the federal termination policy was reversed by the continuing federal policy of strengthening tribal governments and promoting the development of Indian reservation economies. Through a series of legislative enactments, including the Indian Self-Determination Education Assistance Act of 1974, (25 U.S.C. §§ 450-450n, 455-458c), the Indian Financing Act of 1974, (25 U.S.C. §§ 1451-1453), the Indian Tribal Government Tax Status Act of 1982, (26 U.S.C. § 7871), the Safe Drinking Water Act of 1987 and the Clean Water Act of 1988, Congress has enacted laws which put great force behind these policies. The Self-Determination Act permits tribes to contract with the federal government to operate federal programs for their reservations. The Financing Act authorizes loans, grants and loan guarantees to Indian tribes and tribal organizations for economic development. The Tax Status Act accords to tribes certain federal tax immunities and the authority to issue debt obligations, the interest on which is tax exempt. All of these enactments are critical steppingstones for tribes to enter the modern era of tribal governments. The Water Acts treat tribes as states for purposes of designing and managing federally-subsidized water quality protection programs.

— Judicial Decisions

In *Worcester v. Georgia*, 6 Pet. 515, 559 (1832), the U.S. Supreme Court described Indian tribes as distinct, independent and political communities. In holding that the state of Georgia did not have jurisdiction to regulate non-Indians on the Cherokee reservation, the Court noted, "the Cherokee Nation, then, is a distinct community, occupying its own territory with boundaries accurately described, in which the laws of Georgia can have no force, in 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. The whole intercourse between the United States and this Nation, is, by our constitution and laws, vested in the government of the United States. . ." 6 Pet. at 560-561. Consistent with *Worcester*, in 1872 in *Buster v. Wright*, 135 F. 947 (8th Cir. 1405, *appeal dismissed*, 203 U.S. 599 (1906)), the Supreme Court affirmed the right of tribes to impose taxes upon non-Indians in the tribal territories. In 1934, the Solicitor for the Department of the Interior issued an opinion entitled "The Powers of Indian Tribes," which opinion made clear that Indian tribes have extensive powers over their own territories, including powers over non-Indians who reside or conduct business in those territories. The Solicitor also made clear that tribes possess all of their aboriginal sovereign powers except those removed expressly by Congress. *See*, 55 I.D. 14 (1934).

All of these enactments are critical steppingstones for tribes to enter the modern era of tribal governments.

From 1934 until the late 1970's, however, the courts had little opportunity to opine on the powers of Indian tribes. When they did, the courts departed radically from the *Worcester* doctrine. In 1978, the U.S. Supreme Court ruled that Indian tribes, by virtue of their dependent status, impliedly have lost the power to prosecute and convict non-Indians on their reservations. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). In 1981, the Supreme Court ruled that the tribes may regulate non-Indians on fee lands within their reservations only where the activities of the non-Indians are based on consensual relationships with the tribes or whose conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *See*, *Montana v. United States*, 450 U.S. 544 (1981). Under the Montana test, significantly, courts have upheld extensive tribal powers over non-Indians even on fee lands on the reservations such as the power to impose health regulations. *See*, for example, *Cardin v. DeLaCruz*, 671 F.2d. 363, 9th Cir. (1981) *cert. denied*, 459 U.S. 967 (1982). In 1982, the Supreme Court ruled that tribes have the inherent sovereign power to tax non-Indian oil and gas lessees on the tribal lands. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In sum, the courts have ruled that tribal sovereign powers extend broadly over both Indians and non-Indians on the reservations. Tribal sovereignty, however, is rendered mean-

ingless to the extent that the United States supervises that sovereignty, and if state governments are to exercise competing jurisdiction on the reservations.

State Sovereign Powers

— Congressional Enactments

Congress, as noted above, in the 1950's, enacted legislation which had the effect of authorizing transfers of civil adjudicatory and criminal jurisdiction from the federal government to state governments, and of state authority over certain education and health matters on the reservations. But before and since that time, Congress' policy has been to support the strengthening of tribal governments and development of Indian reservation economies and not to authorize state jurisdiction on the reservations.

— Judicial Decisions

In *Worcester v. Georgia*, the foundation of Indian law, the U.S. Supreme Court held that states have no jurisdiction on Indian reservations. From *Worcester* in 1832 to the 1950's, however, the Court had no opportunity to rule again on the scope of state powers over Indian reservations. In 1958, the U.S. Supreme Court ruled that state courts lack the jurisdiction to adjudicate disputes involving Indian defendants on the reservation, because such jurisdiction would infringe upon tribal self-government in conflict with federal law and policy. *See*, *Williams v. Lee*, 358 U.S. 217, (1959). Importantly, in reaching its decision in *Williams*, the Supreme Court did not rely upon the per se rule articulated in *Worcester*, that is that the states have no jurisdiction on the reservations absent congressional consent. Instead, the Court analyzed the relevant treaties and federal policies to determine that the particular state jurisdiction sought to be exercised is in conflict with federal law.

In 1974, the Supreme Court ruled states lack jurisdiction to tax Indians on their reservations. *See*, *McClanahan v. Arizona State Tax Commission*, 484 F.2d. 221 (1971), *rev'd.* 411 U.S. 164 (1973). Again, in *McClanahan*, the Court did not adopt a per se rule that state jurisdiction does not exist absent congressional consent. Instead, the Court looked to the relevant treaties and laws to determine that state taxation of Indians on reservations was in conflict with the relevant treaty and federal laws.

State jurisdiction over non-Indians is subject to a similar analysis of the governing federal laws and treaty. In *Warren Trading Post v. Arizona State Tax Commission*, 380 U.S. 685 (1965), the Supreme Court ruled invalid state sales taxes imposed on non-Indian traders on reservations on the ground that such taxes are preempted by the pervasive federal laws and regulations governing traders. The Court reasoned that state taxes would interfere with the purpose of the pervasive federal regulation, which is to ensure that Indians are charged fair prices.

In the 1980's, the Court on several occasions reviewed state assertions of jurisdiction over Indian reservations. In most of these decisions, the Court held that federal law precluded states from taxing even non-Indians on the reservations. In *White Mountain Apache Tribe v. Bracker*, 488 U.S. 136 (1980), for example, the Court invalidated Arizona's motor carrier license and fuel use taxes as applied to a non-Indian enterprise that had a logging contract with a tribally owned enterprise. The Court declared that where a state asserts authority over non-Indians on a reservation in a fashion that conflicts with federally protected Indian interests, the state jurisdiction must fail unless countervailing state interests are shown. In *White Mountain*, the Court found the federal regulatory scheme governing the harvesting of tribal timber comprehensive and pervasive, and devoted to the maximizing of tribal timber receipts. State taxes, the Court reasoned, would undermine that federal purpose. The Court then analyzed the state interests at stake and found that the state interests were marginal because the state did not provide governmental services on the reservation to the taxpayers. The Court then balanced the state interests against the federal and tribal interests and concluded that the state taxes must be preempted under federal law because the balance tipped in favor of the federal and tribal interests.

In *Washington v. Confederated Colville Tribes*, 100 S. Ct. 2069 (1980), in contrast, the Court held the state may tax non-Indian purchasers of cigarettes from Indian retailers, because no federal pervasive regulations, no federal interests, and no reservation-generated value were at stake. In short, in balance, the state interests were weightier because the Indians essentially were marketing only tax exemptions.

Thus, at least until 1987, the general rules appeared to be that state jurisdiction over non-Indians on a reservation did not exist unless the state could show that it had sufficient interests at stake, such as governmental services provided to the reservation taxpayers, and that competing federal and tribal laws and policies were not endangered. State jurisdiction over Indians on a reservation, in contrast, did not lie in the absence of express federal consent.

In 1987, however, the U.S. Supreme Court rendered a landmark decision that appears to have turned these long-standing rules on their head. In *California v. California Band of Mission Indians*, 107 S. Ct. 1083 (1987), the Court ruled that in the absence of express congressional consent and except for the area of state taxation (where the *Worcester* rule remains applicable), state civil regulatory jurisdiction over even tribes and tribal members on their reservations turns on whether state authority is preempted by operation of federal law or infringes upon the right of self-government. In other words, state jurisdiction over Indians is not per se invalid but will turn on the balance of governmental interests. In *Cabazon*, the Court liberally found strong federal and tribal interests and concluded that the application of California statutes and regulations to tribally-owned bingo enterprises infringed

...state jurisdiction over Indians is not per se invalid but will turn on the balance of governmental interests.

impermissibly on tribal government and, in light of the federal policy of Indian self-determination and tribal economic development, was preempted by federal law. The state, importantly, could point to no services delivered to the tribal bingo enterprises or any other interest. Query how state taxing jurisdiction over Indians is any more detrimental than any other form of state regulatory jurisdiction over Indians on a reservation. A per se rule would appear appropriate for all forms of state civil regulatory jurisdiction over Indians on the reservations.

In 1988, the Supreme Court affirmed without opinion, a 9th Circuit decision holding that the state of Montana could not impose high severance and gross proceeds taxes on coal mined by a non-Indian company on the Crow Reservation. The Court found the taxes impeded production and sales, thereby impairing the congressional objectives of encouraging maximum tribal benefits from the tribal coal and tribal self-government and economic development. Under the balancing test, the state could point to no services or other state interest sufficient to support the tax and accordingly, the Court concluded the taxes must fail because they infringed impermissibly upon the tribe's ability to raise revenues for government and economic development. *See*, *Crow Tribe of Indians v. Montana*, 819, F.2d. 895, 9th Cir. (1987), affirmed *without opinion*, 56 U.S.L.W. 3450, (1988).

At the current time, yet another theory for limiting state jurisdiction over even non-Indians on a reservation, may be tested in the U.S. Supreme Court. In *Cotton Petroleum v. State of New Mexico*, the non-Indian oil and gas lessees in the Jicarilla Apache Reservation have sought review of a New Mexico Court of Appeals decision which holds that the interstate commerce clause does not preclude the State of New Mexico's taxing Cotton's severance of oil and gas from the reservation at a rate of about five times the value of services delivered back to Cotton Petroleum on the reservation. The foundation for the claim is that tribes can be treated as states for purposes of the interstate commerce clause and accordingly, the State of New Mexico and the Jicarilla Apache Tribe must apportion between the two taxes imposed on Cotton Petroleum. The Court has noted probable jurisdiction and has requested briefs on whether tribes can be treated as states for purposes of the interstate commerce clause. Tribes are opposed vigorously to this case on the grounds that the Indian commerce clause, which historically has been a shield against state taxation, is the proper theory of the case. *Cotton* also has claimed in its brief to the Court that Federal preemption grounds exist as a bar to the state tax.

In sum, while the Court has usurped the congressional role deciding the delicate question of whether state jurisdiction should lie on reservations in particular cases, the Court is applying the Federal preemption test employed for this purpose in a liberal fashion in favor of tribes. *Cotton* is a test of whether this trend will continue with the new Court.*

* An alternate barrier to state taxes is a claim that the taxes infringe upon tribal self-government. *See, Williams v. Lee.* The Supreme Court, however, has not decided a case on this ground since *Williams.*

Federal Power

The United States has a trust responsibility in the management of Indian assets, based on the federal ownership of the legal title to Indian lands, and the Indian commerce clause of the U.S. Constitution, and many statutes enacted by Congress articulating the trust responsibility. Congress also has been held by courts to have plenary power over Indian tribes. The scope of federal power and restraints on it are critical questions for tribal governments. In the early days, the courts viewed the plenary power as equivalent to the power of Congress over matters involving foreign states, a power that is virtually unreviewable. In more recent times, however, the courts have held the Congress accountable under the due process clause of the Fifth Amendment to legislate with respect to Indian tribes in a manner that is tied rationally to Congress' unique obligation to Indians. *Delaware Tribal Business Community v. Weeks*, 430 U.S. 73, 83-85 (1977).

In recognition of the federal policy of supporting tribal self-government, the U.S. Supreme Court has held that federal courts must defer to tribal courts to determine the scope of tribal jurisdiction under federal and tribal law. *National Farmers Life Insurance Company v. Crow Tribe*, 471 U.S. 845 (1985). And, moreover, courts have held that the exercise of tribal jurisdiction that is valid under federal and tribal law is not subject to review in the federal courts. *See*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 40 (1978).

In the next few years the increasing tension between the conflicting objectives of more aggressive federal management of trust assets and tribal self-determination may yield a redefinition of the federal role in Indian affairs. Perhaps that role will be execution of the trust so as to equip tribes to manage their own resources.

Building Modern Tribal Government Institutions

Due to the historic wildly fluctuating federal Indian policies—varying from terminating the existence of Indian tribes to supporting the strengthening of tribal governments—modern tribal government institutions, in a real sense, are in infancy. The tribes, as a direct result, face numerous obstacles as they attempt to design modern tribal government institutions and implement the tribes' inherent sovereign powers. Critical during this era is the exercise of sovereign powers so as to preclude the intrusion of unwanted state and other government jurisdiction in tribal reservation matters and to regain the role of tribes as the paramount sovereign on the reservations. In developing government institutions, however, tribes are being careful to design institutions that fit the tribal societies' cultures and limitations, and which have the ability of interacting productively with surrounding governments.

...tribes...face numerous obstacles as they attempt to design modern tribal government institutions...

Obstacles

— Jurisdictional Uncertainties

As this article has shown, tribal powers over the reservations are quite broad, although some uncertainty remains where jurisdiction over non-Indians on fee lands is sought to be exercised. The major source of uncertainty, however, is the specter of competing state jurisdiction, which specter will lessen over time as tribal governments mature and, as a result, tribal services are delivered and tribal regulation supplants state regulation.

...tribal economies are very vulnerable to outside influences...

— Federal Intrusions

Many tribes have no constitutions to confirm delegations of certain inherent sovereign powers by the tribal people to a tribal government. For other tribes, tribal constitutions adopted pursuant to the Indian Reorganization Act, which constitutions were drafted in boiler plate form and promoted by Interior Department officials, are extremely undermining of tribal government. These constitutions typically vest extensive control over tribal government enactments in the Secretary of the Interior and limit the powers of tribes with respect to non-members. None of these limitations were required by the Indian Reorganization Act or other law, and now many tribes must amend tribal constitutions to reflect better the true sovereign status of tribes. Amending such constitutions, however, is a very formidable task.

— Instabilities

Tribes are viewed by many as unstable in light of the rapid turnover in tribal leadership. In part, this rapid turnover is due to the constitutions which have been imposed upon the tribes. In another sense, the tribal people have little appreciation of the need for more stable government. That appreciation, however, is growing. In addition, tribal economies are based largely on federal and tribal government programs. To the extent a private economy exists, it typically is based on one natural resource base or another singular economic activity. Accordingly, tribal economies are very vulnerable to outside influences such as changes in the prices of oil or changes in federal policy. Tribes need to diversify their economies and promote more or non-federally based economies.

— Reconstruction

Few tribes have a private economy on the reservations which provide a needed tax base; federal funds are drying up rapidly. Accordingly, tribes are faced with the twin needs of producing a private economy upon which taxes can be levied to provide essential governmental services and the tribal institutions needed to shepherd the tribal economies.

In structuring modern tribal government institutions, tribes start with virtually nothing. Most tribes have a legislature and a limited executive branch. Increasingly, tribes are adopting their own tribal courts and supplanting so-called code of federal regulations courts, which essentially are federal instrumentalities. On the one hand, starting with nothing means many hills are yet to be climbed; on the other hand, tribes have the unique opportunity of learning from the mistakes of states and local governments in designing modern tribal governmental institutions that address the priority needs of the Indian tribes.

Opportunities

In establishing modern tribal governmental institutions, tribes have the benefit of several recent congressional enactments which provide valuable federal tax benefits for tribal government activities, and that provide tribes with opportunities to obtain valuable federal financing to create enterprises and water quality protection programs on their reservations. *See*, Indian Financing Act of 1974, Indian Tribal Governmental Tax Status Act of 1982, Clean Water Act of 1987, and the Safe Drinking Water Act of 1987. Congress at the present time, moreover, is considering legislation which would provide additional valuable federal tax benefits to economic development activities on Indian reservations and that would provide a federal institution with the ability to lend financing and buy equities to promote tribal economies. *See*, Indian Economic Development Act, 1987, pending, and Indian Finance Development Corporation Act of 1987, pending. Tribes and Indian-owned enterprises also enjoy valuable state and federal tax immunities that make reservation development more attractive.

Conclusion

In designing modern tribal government institutions and in exercising tribes' inherent sovereign powers, tribes increasingly are taking over the responsibilities of governance on the reservations. In addition, tribes increasingly are interested in having something to say about federal supervision of tribal trust assets. The primary objective of tribal governments in the next decade will be to achieve the status as the primary sovereign on the reservations.

General References

1. *Federal Indian Law*, Felix Cohen, (1982 Edition).
2. *Indian Tribes as Governments*, American Indian Lawyer Training Program, AILTP, 1988.
3. "Indian and Tribal Governments," by Professor Fred Harris and Susan Williams, in *New Mexico Government*. University of New Mexico Press.
4. *American Indians, Time and the Law*, Professor Charles Wilkinson.
5. "Avoiding *Santa Clara Pueblo v. Martinez*: the Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act," B. Kevin Gover, Hamline Law Review, vol. 8, Oct. 1985 No. 3.
6. "Decriminalizing Tribal Codes: A Response to Oliphant," 9 Am. Indian L. Rev., 51-81, Wntr '83, Catherine Baker Stetson.

Publications and Materials of the Natural Resources Law Center

For sales within Colorado, please add 6.13% sales tax

Books:

- *Water and the American West: Essays in Honor of Raphael J. Moses*, 1988, David H. Getches, ed., $16
- *Tradition, Innovation and Conflict: Perspectives on Colorado Water Law*, 1987, Lawrence J. MacDonnell, ed., $16

Conference Materials - Notebooks and Audiotapes

- *Water Quality Control: Integrating Beneficial Use and Environmental Protection*, 688 page **notebook** of outlines and materials from 3-day conference, June 1988, $60; **cassette tapes** of speakers' presentations, full 3 days, $150.
- *Natural Resource Development in Indian Country*, 500 page **notebook** of outlines and materials from 3-day conference, June 1988, $60; **cassette tapes** of speakers' presentations, full 3 days, $150.
- *Water as a Public Resource: Emerging Rights and Obligations*, 555 page **notebook** of outlines and materials from 3-day conference, June 1987, $60; **cassette tapes** of speakers' presentations, full 3 days, $150.
- *The Public Lands During the Remainder of 20th Century: Planning, Law and Policy in the Federal Land Agencies*, 535-page **notebook** of outlines and materials from 3-day conference, June 1987, $60; **cassette tapes** of speakers' presentations, full 3 days, $150.
- *External Development Affecting the National Parks: Preserving "The Best Idea We Ever Had,"* 580-page **notebook** of outlines and materials from 2-day conference, Sept. 1986, $40; **cassette tapes** of speakers' presentations, full 2 days, $80.
- *Western Water: Expanding Uses/Finite Supplies*, 406-page **notebook** of outlines and materials from 3-day conference, June 1986, $60; **cassette tapes** of speakers' presentations, full 3 days, $150.
- *Getting a Handle on Hazardous Waste Controls*, 361-page **notebook** of outlines and materials from 2-day conference, June 1986, $50; **cassette tapes** of speakers' presentations, full 2 days, $100.
- *Western Water Law in Transition*, 415-page **notebook** of outlines and materials from 3-day conference, June 1985, $60; **cassette tapes** of speakers' presentations, full 2 days, $150.
- *Public Lands Mineral Leasing: Issues & Directions*, 472-page **notebook** of outlines and materials from 2-day conference, June 1985, $40; **cassette tapes** of speakers' presentations, full 2 days, $100.

NRLC Occasional Papers Series

"The Federal Onshore Oil and Gas Leasing & Reform Act of 1987," Lyle K. Rising, 13 pgs, 1988, $3.

"Issues and Trends in Western Water Marketing," Steven J. Shupe, 12 pgs, 1988, $3.

"*Granite Rock* and the States' Influence Over Federal Land Use," John D. Leshy, Professor of Law, Arizona State University, 22 pgs, 1988, $3.

"Transmountain Water Diversions in Colorado," James S. Lochhead, 25 pgs., 1987, $3.

"Out-of-Basin Water Exports in Colorado," Lawrence J. MacDonnell, 14 pgs., 1987, $3.

"The Future of the National Parks: Recreating the Alliance Between Commerce and Conservation," Professor Robin Winks, Professor of History, Yale University, 23 pgs, 1986, $3.

"A Brief Introduction to Environmental Law in China," Cheng Zheng-Kang, Professor of Law, University of Peking, Beijing, 36 pgs. 1986, $3.

"Regulation of Wastes from the Metals Mining Industry: The Shape of Things to Come," Lawrence J. MacDonnell, 32 pgs. 1986. $3

"Emerging Forces in Western Water Law," Steven J. Shupe, Water Resource Consultant, 21 pgs. 1986. $3.

"The Rights of Communities: A Blank Space in American Law," Joseph L. Sax, 16 pgs. 1984. $3.

Research Reports

"The Endangered Species Act and Water Development Within the South Platte Basin," Lawrence J. MacDonnell, Colorado Water Resources Research Institute (Completion Report 137) 1985. $6.

"Guidelines for Developing Area-of-Origin Compensation," Lawrence J. MacDonnell, Charles W. Howe, James N. Corbridge, Jr., W. Ashley Ahrens, NRLC Research Report Series, 70 pgs. $5.

Natural Resources Law Center Advisory Board

The Natural Resources Law Center

The Natural Resources Law Center was established at the University of Colorado School of Law in the fall of 1981. Building on the strong academic base in natural resources already existing in the Law School and the University, the Center's purpose is to facilitate research, publication, and education related to natural resources law.

For information about the Natural Resources Law Center and its programs, contact:

Lawrence J. MacDonnell, Director
Katherine Taylor, Coordinator
Betty Butler, Secretary
Fleming Law Building, Room 171
Campus Box 401
Boulder, CO 80309-0401
(303) 492-1286

Resource Law Notes
Natural Resources Law Center
University of Colorado
School of Law
Boulder, CO 80309-0401