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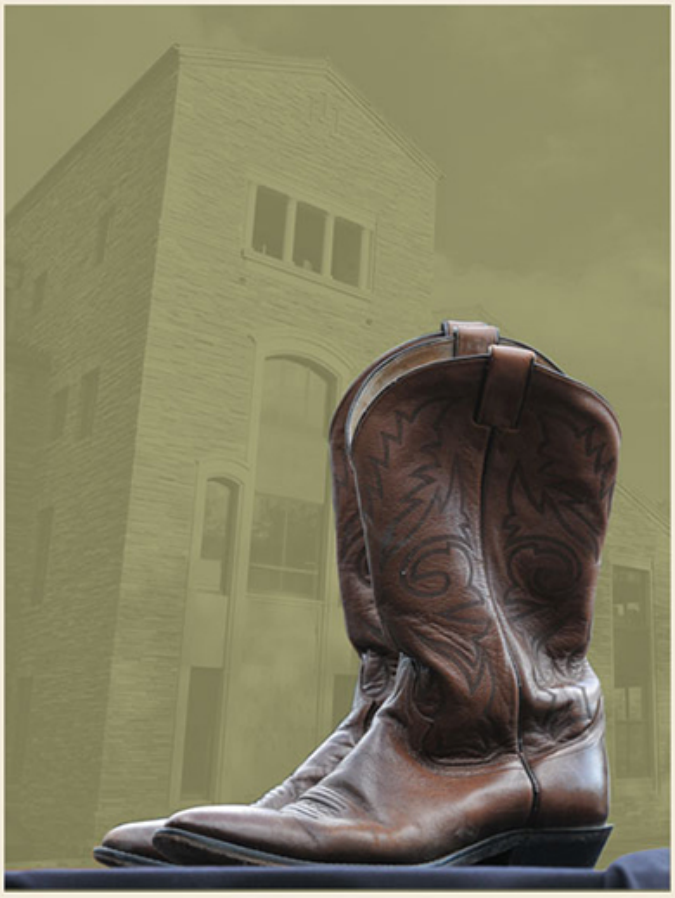

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NEGOTIATED SOVEREIGNTY: INTERGOVERNMENTAL AGREEMENTS WITH AMERICAN INDIAN TRIBES AS MODELS FOR EXPANDING SELF-GOVERNMENT

David H. Getches*

Constitutional issues related to First Nations sovereignty have dominated Aboriginal affairs in Canada for a considerable period. The constitutional entrenchment of Aboriginal self-government has, however, received a setback with the recent failure of the Charlottetown Accord in October of 1992. Nonetheless, day-to-day issues must be accommodated, even while this more fundamental constitutional question remains unresolved. This paper illustrates the American experience with negotiated intergovernmental agreements between tribes and individual states. These agreements have, for example, resolved jurisdictional disputes over taxation, solid waste disposal, and law enforcement between state governments and tribal authorities. The author suggests that these intergovernmental agreements in the United States provide a useful model to resolve lingering issues, effect practical solutions and expand First Nations self-government in Canada.

Les questions constitutionnelles relatives à la souveraineté des premières nations dominent les affaires autochtones canadiennes depuis fort longtemps. L'enchâssement de l'autonomie gouvernementale des autochtones dans la constitution a subi un revers avec l'échec de l'Accord de Chartottetown en octobre 1992. Il faut cependant continuer à traiter des problèmes quotidiens. Cet article examine l'expérience américaine relative aux accords intergouvernementaux négociés entre les tribus et les États membres. Ces accords ont par exemple permis de résoudre les conflits de compétence en matière de taxation, d'élimination des déchets solides, et de maintien de l'ordre public entre les autorités de l'État et les autorités tribales. L'auteur estime que les accords intergouvernementaux américains fournissent un modèle utile à la résolution des problèmes évoqués ci-dessus, à la mise en œuvre de solutions pratiques et à l'expansion de l'autonomie gouvernementale des premières nations au Canada.

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I. Introduction

In the United States, intergovernmental agreements close the gap between concepts of sovereignty and the necessities of governance. They are used to give practical meaning to broad legal principles, to effectuate court decisions and legislative delegations of authority, and to clarify ambiguous laws. In some cases, agreements resolve disputes that would otherwise be mired in costly, protracted, and sometimes inconclusive litigation.

Intergovernmental agreements have become a device of necessity for United States Indian tribes and their neighbouring governments. The necessity stems from the legal complexity of the field of Indian law and policy and the diversified land tenure situation on Indian reservations. Recent litigation and assertions of sovereignty by revitalized tribal governments have forced lingering issues to be resolved with practical solutions.

Case law, treaties, and statutes have created a bizarre jurisdictional arrangement. The question of which government has responsibility over an infraction on any Indian reservation may turn on the ownership of the land where it occurs, the race of the victim, the race and tribal affiliation of the actor, and a determination of whether the law controlling the behaviour is "prohibitory" or not. Jurisdiction to impose civil regulations entails extensive and imprecise case-by-case analysis of the relative interests of the state, federal and tribal governments. The fact that much, and in some cases most, land on Indian reservations is owned by non-Indians compounds the problem. The situation creates bewildering challenges to tribal and state officials charged with administering justice and performing governmental responsibilities. Thus, current policies ostensibly respecting Indian self-determination and the tribes' governmental status are frustrated.

Intergovernmental relations with United States Indian tribes are further defined by federal and state statutes enabling tribes to assume and exercise powers of self-government, on proclamations of state governors acknowledging a government-to-government relationship with tribes, and

on a mutual desire to arrange the conduct of governmental affairs between states and tribes. In the first half of 1992, state legislatures in the United States considered 291 bills involving state relations with Native Americans, of which, some 106 were enacted. Included among those that were passed were authorizations for cooperative agreements between state agencies and tribes in a variety of policy areas such as law enforcement, hazardous and solid waste disposal, allocation of tax revenues, economic development, and allocation of water rights.[1]

Because the day-to-day problems of governance in the context of federal Indian law have become increasingly difficult, the governments involved are turning less to the courts and to Congress and more to the negotiating table. In the United States, the use of intergovernmental agreements to give meaning to tribal sovereignty is a relatively recent phenomenon. It has been successful as far as it has gone, though its potential has not been fully realized. Much of the future of tribal relations lies with states and local governments in the United States, however, and therefore the practical meaning of tribal sovereignty will be written in intergovernmental agreements. These agreements can be superior to litigation or to the unilateral decisions of one sovereign's legislative body.

The thesis of this article is that the United States experience demonstrates promise for intergovernmental agreements with tribes that may be transferable to Canada. In the United States, intergovernmental agreements with tribes have been used as remedial measures to cope with murky or unworkable doctrines. In Canada, doctrine remains essentially undeveloped. The United States' experience with intergovernmental agreements —both successes and failures— can be relevant as Canadian governments seek to clarify the self-governing powers of First Nations.

Native peoples in the United States and Canada are similar statistically[2]

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[1] J. Reed, *1992 State Legislation Relating to Native Americans*, State Legislative Report, National Conference of State Legislatures 1 (1992) [forthcoming].

[2]

	Canada	United States
Native/Indian Population:	2,000,000(1992)	1,960,996 (1990)
Tribes and Bands:	633	497

and in their economic, social, and health concerns.[3] However Indian policies in the two countries have followed different traditions.[4] While United States' policy has vacillated between assimilation and isolation, Canada has pursued the unwavering policy of assimilation.[5] There is less interaction by Aboriginal people with non-Indians than in the United States, however. This is because of the relative isolation of many reserves and the smaller numbers of non-Indians living within those reserves. Consequently, Aboriginal people are, on balance, less assimilated in Canada than in the United States.

United States law early recognized tribal sovereignty, but has varied its definition through statutes and treaties that reflect the policies of their respective eras. Tribes governing their territories have come into frequent conflict with state and local governments. By contrast, "the centralization of Indian management has created a much clearer doctrine of Province/tribe relationships in Canada than has evolved in the United

Reservation Population:	309,000 (1990)	1,001,441
Birthrate:	2x Canada's	2x United States'
Funding to Reservations:	$3.5 billion	$3.5 billion
Per Capita Expenditures:	$11,264	$3,495
Treaties in Force:	11	370

Canadian data compiled from M.S. Serrill, "Struggling to be Themselves" *Time*, 9 November 1992 at 52; R.H. Bartlett, *The Indian Act of Canada* 2d ed. (Saskatoon: University of Saskatchewan Native Law Centre, 1988); "Something New Under Canada's Frozen North" *The Economist*, 4 January 1992 at 33; L. Belsit, "Canada's Native Uprising" *The Christian Science Monitor*, 18 October 1990 at 10-11; and S. O'Brien, "The Medicine Line: A Border Dividing Tribal Sovereignty, Economies, and Families" (1984) 53 Fordham L. Rev. 315 at 341. (A total of 67 treaties were entered into with Indians in what is now Canada between 1680 and 1929. See R.W. Johnson, "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 Wash. L. Rev. 643 at 666, n. 110, of which 11 remain in force.)

Data for the United States compiled from Indian Service Population and Labour Force Estimates (Bureau of Indian Affairs, Jan. 1991), and relate BIA "Fact Sheets;" and from Belsit and O'Brien, *supra*.

3 *Ibid.*

4 Johnson, *supra* note 2.

5 Bartlett, *supra* note 2 at 23.

States."[6] In short, Canada's *Indian Act* leaves most governance of Aboriginal people to provincial law and standards.[7] Since the mid-19th century, Aboriginal governments have been supplanted by organizations under the close supervision of government agents; most self-governing authority was suspended.[8] Band councils are constituted in this framework. They have power to make by-laws in a realm similar to the law-making of a rural municipality. Though the powers are subject to being disallowed by the Minister of Indian Affairs, their full limits, under a supportive Minister, have not been fully tested.

A 1983 Canadian government report recommended entrenchment of Indian rights, including self-government, in the Constitution.[9] The report anticipated negotiation of agreements with First Nations to spell out their jurisdiction over a variety of subjects. The agreements were to implement proposed national legislation to be enacted even before a constitutional amendment was adopted. The legislation would remove provincial authority over broad subject matter on reserves. The legislation was not passed because activity since the report has largely concentrated on pursuing an amendment to the *Constitution Act.*

Whether or not Canadians ultimately choose to entrench the sovereignty of the First Nations in the Constitution, they face immediate pressure to define the extent and effect of Indian sovereignty. Because the constitutional recognition of inherent tribal sovereignty was proposed only

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6 R.N. Clinton, "The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs" (1989) 69 B.U. L. Rev. 329 at 386.

7 Bartlett, *supra* note 2, is a leading source on the *Indian Act.* The 1876 Act consolidated prior Indian laws. (See S.C. 1876, c. 18.) The assimilation policy reflected in the Act traces to the *Civilization of Indian Tribes Act* Prov. C.S. 1857, c. 26. The *Indian Act* has been amended and appears in its present form at R.S.C. 1985, c. I-5.

8 R. Bartlett, "*Indian Act of Canada*" (1978) 27 Buff. L. Rev. 591 at 594-603.

9 Canada, House of Commons, The Special Committee on Indian Self-Government in Canada, "Indian Self-Government in Canada: Report of the Special Committee" (Ottawa: Queen's Printer, 12 October, 1983) (Chair: K. Penner) at 44.

in general terms,[10] it would have had little practical meaning without further interpretation by the courts, by Parliament, or by mutual agreements. Thus, a constitutional amendment may have given a moral and political boost to Native sovereignty, but it would not have resolved issues of implementation. Further legislation or negotiated agreements would be required in any event. The recent decision of Canadian citizens not to pursue a proposed constitutional revision that included recognition of First Nations' sovereignty[11] leaves First Nations and their neighbours no less in need of practical approaches to governance. An obvious approach would be to renew efforts to pass federal legislation curtailing provincial jurisdiction over reserves and enabling First Nations to assume it.[12] However, some agreements with the federal and provincial governments recognizing tribal authority over matters now within the authority of each may be possible even without national legislation.[13]

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[10] The referendum on which Canadians voted in November, 1992 was based on the Charlottetown Accord (Consensus Report on the Constitution, August 28, 1992), a 20 page document covering a variety of issues. At least one-third of the 60 items addressed in the Accord related directly to aboriginal peoples. Items 41-44 elaborate on the "inherent right of self-government." In addition to constitutional entrenchment of an explicit recognition of this right, the proposal would have delayed judicial interpretation of the provision for five years. Item 45-46 committed all governments to negotiate agreements implementing the right of self-government, "including issues of jurisdiction, lands and resources, and economic and fiscal arrangements."

[11] See C. Trueheart, "Leaders Face Fallout From Canada Vote; Quebec Questions Left Unresolved," *Washington Post* (28 October, 1992) A18.

[12] There is growing recognition that the most effective approach to fuller sovereignty is through "negotiated self-government." See I.B. Cowie, "Future Issues of Jurisdiction and Coordination between Aboriginal and Non-Aboriginal Governments" (Paper No. 13) in *Aboriginal Issues and Constitutional Reform* (Kingston: Institute of Intergovernmental Relations, 1987).

[13] Intergovernmental agreements are an integral element of Canadian federalism and are encompassed within the rubric of "cooperative federalism." See P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1985) at 106-109. For example, one author asserts that the very nature of Canadian federalism requires that regulatory proposals made by the National Energy Board be preceded by intergovernmental agreements with the three major natural gas producing provinces. See D.C. Steckler, "Toward the Integration of Canadian and United States Natural Gas Import Policies" (1990) 25 Land & Water L. Rev.

The conditions may now be right for employing intergovernmental agreements to determine jurisdictional responsibilities between First Nations and Canadian federal and provincial governments. Canada is at a watershed in Aboriginal rights law and First Nations are moving inexorably toward fulfilment of their sovereignty and land rights. Professor Ralph Johnson observes that the Canadian Supreme Court's decisions are tending toward "greater judicial protection of First Nations and Aboriginal rights" which he characterizes as a "remarkable turnaround."[14] Perhaps the most important of all legal developments was the inclusion of s. 35(1) in the 1982 *Constitution Act* by which all "existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed."[15] This effectively "constitutionalized" Aboriginal rights making any involuntary extinguishment unlawful without a constitutional amendment.[16] Professor Johnson discusses the extensive Aboriginal claims to land that are being negotiated in recognition of these Aboriginal rights "in a process with all the earmarks of earlier treaty negotiations."[17] This has resulted in several major recent settlements.

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335 at 369.

14 R.W. Johnson, *supra* note 2 at 643, 675, 718. In Johnson's comparative analysis of Native law in the United States and Canada, he traces a new judicial approach in Canadian aboriginal rights beginning with the 1973 case of *Calder* v. *Attorney General of British Columbia*, [1973] S.C.R. 313, aff.'g (1970) 74 W.W.R. 481 (B.C.), and culminating in *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075. See also M.D. Wells, "Sparrow and Lone Wolf: Honouring Tribal Rights in Canada and the United States (1991) 66 Wash. L. Rev. 1119.

15 *Constitution Act, 1982*, being schedule B of the *Canada Act* 1982 (U.K.), 1982, c. 11, s. 35(1).

16 Johnson, *supra* note 2 at 683.

17 *Ibid.* at 681. See, for example, *The Act Concerning Northern Villages and the Kativik Regional Government of 1978*, discussed by Cowie, *supra* note 12 at 32-34; *The Cree-Naskapi (of Quebec) Act of 1984*, S.C. 1984, c. 18, discussed by Bartlett, *supra* note 2 at 32-35, and by Cowie, *supra* 12 at 30-31; the *Sechelt Indian Band Self-Government Act of 1986*, S.C. 1986, c.27, discussed by Bartlett *supra* at 33-35, and by Cowie, *supra* 12 at 31-32; the Dene/Metis Agreement in Principle, described by J. Keeping, "Dene/Metis Agreement in Principle" (Winter 1989) 25 Resources: The Newsletter of the Canadian Institute of Resources Law 4; the Gwich'in Agreement of 1991, described by L. MacLachlan, "The Gwich'in Final Agreement" (Fall 1991) 36 Resources: The Newsletter of the Canadian

Taken together, recent legal developments create a base for substantial future gains by First Nations.[18] Furthermore, there appears to be momentum building among First Nations to achieve those gains.

The constitutional debate, accompanied by recent legal activity by some First Nations, especially land claims, has raised the consciousness of Indians and non-Indians to the point that they may press for clarification of many questions relating to administration of justice, regulation, education, child welfare, services, and taxation on Indian reserves throughout the country. Presumably, a host of issues were deferred until the constitutional question could be decided.

The constitutional basis for self-government agreements was attractive because it would acknowledge the principle that First Nations retain inherent sovereignty. In the practical world of governance, however, it may be more important to secure the prerogatives of self-government now and defer the theoretical question of how much inherent sovereignty is retained by First Nations. The question need not be specifically answered before government responsibilities now exercised by the federal or provincial governments are turned over to First Nations.[19]

Institute of Resources Law 7; and the Inuit Settlement of 1992, described by Serrill, *supra* note 2 at 52 and in "Canada's Unfinished Business" *The Economist* (14 November 1992) at 48. As Cowie makes clear, these settlements include explicit recognition of indigenous peoples' capacity for self-government, including the authority to enact by-laws pertaining, for example, to zoning and land use, public safety, health and hygiene, taxation, and a variety of other municipal functions.

[18] A less optimistic view of the state of aboriginal law in Canada is expressed in P. Mecklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L. Rev. 82. (He identifies the laws of property, sovereignty, treaties, and the constitution impediments to self-government that must be reformed before true progress can be made).

[19] I understand the argument that delegation of power from another government is inferior to a recognition that those powers reside inherently with First Nations. To be sure, there is a vigorous debate over whether aboriginal sovereignty of First Nations survived European contact, and I respect the view that affirmance of the inherent nature of aboriginal sovereignty should be a fundamental objective of Native people in Canada. See M. Asch, "Aboriginal Self-

If the *Constitution Act* is not amended in the foreseeable future, governments at all levels may find it timely to pursue Aboriginal governance issues through other means. Defining the limits of Aboriginal sovereignty will send them to Parliament, to court, and ultimately to the negotiating table. Negotiation has a potent role in an overall strategy for perfecting First Nations sovereignty. It requires no party to surrender its principles to the other; it enables practical allocations of governing authority over vital issues on which parties are most likely to agree without confronting the largely theoretical issues that separate them.[20]

After a brief discussion of the nature of sovereignty, this paper reviews the development of Indian law in the United States, then surveys examples of the use of cooperative agreements between state or local governments on the one hand and tribal governments on the other. The article concludes with comments on how the device of negotiating intergovernmental agreements can fit into a strategy of pursuing the sovereign rights of Aboriginal people.

The utility of intergovernmental agreements for Canada and its provinces should be at least as great as in the United States. Observations on experiences in the United States are humbly offered in the hope that they may be germane. Both nations strive for good, efficient government as well as moral legitimacy for their policies and laws. It is the quest for

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Government and the Construction of Canadian Constitutional Identity" (1992) 30 Alta L. Rev. 46. Yet I do not believe that explicit acknowledgment of inherency needs to precede the important business of actual governance. At bottom, the best acknowledgment of sovereignty comes through the practice and acceptance of governance. Every agreement vesting a tribal government with specific governing authority is an implicit recognition of its sovereignty. Indeed, a "delegation" of governing authority to other than a sovereign seems anomalous and may be illegal. Congress's delegation of authority over liquor regulation to an Indian tribe was upheld by the United States Supreme Court because the tribe was an independent government, while such delegation to a mere private, voluntary organization would be unlawful. *United States* v. *Mazurie*, 419 U.S. 544 (1975). See also Belsie, *supra* note 2.

20 See R.L. Jamieson, "The Aboriginal Fact: A New Opportunity for Canada" (1991) 25 *Law Society Gazette* 81.

grounding Indian policy in these principles that animated the exploration of how to allocate sovereign power between tribes and neighbouring non-Indian governments. Judging the relevance of the ideas and legal tools discussed in this paper, however, is left to the First Nations themselves and to experts in Canadian law.

II. Defining Sovereignty

Intergovernmental agreements can provide fuller, more precise definitions of the authority of states and tribes by attaching practical meaning to the abstract legal concept of sovereignty. As such, agreements are both alternatives to and a component of other methods of defining sovereignty that historically have included litigation, legislation (and enforcement) by a more powerful government, treaties, and even war. The results of each of these methods — even war —have required further legal interpretation and articulation.

The idea that sovereigns must coexist is not novel. It is especially challenging, though, where Aboriginal peoples have been surrounded and effectively dominated by an immigrant society. Recognition and respect for continuing sovereignty of Aboriginal peoples in this setting depends on legal systems, first, to embody certain fundamental values and, second, to recognize the advantages of self-determination.

The legal traditions of the United States and Canada incorporate ideals of consent and participation. Both countries have struggled with how to achieve the essential unity needed to satisfy the obligations of nationhood while preserving the cultural diversity that gives individuals identity in a large, multi-cultural nation. At times, it is difficult to ensure racial equality without squelching ethnic pride, yet the countries of North America are politically and legally committed to success.

The conundrum of assuring self-determination for Aboriginal people is especially challenging. Its benefits and its moral importance are less understood than comparable issues under the rubric of pluralism. When the question is couched in terms of the rights of tribes as separate sovereigns, it sometimes alienates people reared in a tradition of equal

rights. Sovereignty, however, is the ultimate "civil right." It is the collective authority people concede to a government. The link between cultural integrity as a basic right and achieving a level of self-governance surely has been made in the debates over the appropriate level of independence of ethnically identified Canadian provinces. This has facilitated an understanding of the argument of First Nations for recognition of their self-government.

The fact that Native American cultures have survived with such tenacity is powerful evidence of the distinctiveness of tribal societies. For nearly 500 years, the insistent forces of European culture have pressed in on Native peoples suggesting, coercing, legislating, and mandating change. The remarkable resilience of Indian cultures enabled tribal peoples to maintain their cultural integrity in spite of seemingly insuperable influences to homogenize them with the larger society.

There is a quickening self-determination movement throughout the world. An indigenous independence movement is especially apparent in the Americas. The sophistication, and perhaps the conscience, of the dominant governments of the Americas has grown, easing the repression that historically made self-determination movements fruitless, if not suicidal. The passing of some of the harshest regimes in Latin America has lifted the heel of repression from indigenous groups whose past survival was possible only through isolation. Groups in those countries are now arguing out the components of their legal sovereignty with the national governments that incorporate their territory.

The United States, where a modicum of inherent self-government of tribes has always been recognized as the legal norm, has never settled what self-government really means in terms of practical applications like mineral severance taxes, land use zoning, pollution regulation, or adoptions of children. Typically, these questions have been addressed in a jealous tug-of-war for control of jurisdictional turf. They arise in the contexts of emotionally or politically charged facts of a specific case. Legal principles are announced and later tortured.

In its healthiest incarnation, the debate over tribal sovereignty will be resolved by determining an arrangement that produces effective governance. That requires looking at whom and what are to be governed. Which entity can make the most effective judgments about control of particular people, land, and resources? Which entity will make and enforce laws that will have the respect and allegiance of the people subject to them? What resolution is most compatible with the moral and legal traditions of the affected peoples? The famous legal scholar, Karl Llewellyn, together with anthropologist E. Adamson Hoebel wrote in their landmark study, *The Cheyenne Way*:[21]

> The success of any legal system depends upon its acceptance by the people to whom it applies. Insofar as the system is an integrated part of the web of social norms developed within a society's culture ... it will be accepted as a part of the habit-conduct patterns of the social heritage of the people. The eternally primary functions of law in any society being to close any breach which has opened between grievance-bearers, and meanwhile to restrain individuals from the breach of certain norms of either initial conduct or adjustment which are deemed of vital importance by the society concerned, it follows in the main that the fewer the demands that are made upon the law, the greater good for the society.

Ideally, then, the governmental decisions and activities that cut deepest into the fibre of Indian culture should be left to Indian self-government. Tribes have much to gain or lose in the allocation of recognized sovereign powers. For instance, the future of their societies may depend on issues like how freely Indian children can be adopted by families far away from the reservation, or a tribe's ability to provide basic government services may rise or fall on whether they can tax a coal mine on their reservation. So too it is with other jurisdictional issues concerning control of water, lands, fish and wildlife. Indian religion is profoundly implicated in many of these decisions as well. The transcendent spiritual significance of land and nature is affected by every mine and every dam, every barrel of toxic waste laid in the ground, and every ton of SO_2 poured into the atmosphere.

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[21] K. Llewellyn & E. Hoebel, *The Cheyenne Way: Conflict and Case law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941) at 239.

Beyond legal, political, and economic concerns in allocating sovereign prerogatives to tribes, the dominant society may be obliged to heed moral forces that eschew crippling or exterminating another people's life-ways, culture, health and religion. There is a benefit for all peoples, non-Indian as well as Indian, in allowing Indian cultures to thrive. Just as we are coming to appreciate that our biological survival is linked to maintaining the diversity of species, we are learning that our cultural health may be strengthened by sustaining cultural diversity. As a California state court judge observed in one Indian case: "The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty."[22]

III. A History of Intergovernmental Tensions

United States' Indian policy is characterized by a three-way tension among the federal government, the several states, and the tribes. Historical roots of the tension predate the United States Constitution. The complicated jurisdictional situation in United States Indian law traces to early judicial rationalizations used to explain the relationship of the tribes to the United States government. Statutes, hundreds of treaties, and a host of judicial decisions are based on a special relationship between tribes and the federal government. These laws and decisions appear inconsistent with one another but tend to track vacillations of public policy in the dominant society.

The law has weaved together principles from threads spun by particular cases or particular eras. Indian policy has, indeed, been schizophrenic, sometimes pursuing assimilation of Indians, at other times favouring their isolation. The first reservations effectively spared Indians from the melting pot in a nation of immigrants, but other aspects of Indian policy, including the establishment of later reservations, were designed to stir Indians into the melting pot, assimilating them with the rest of the population.

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[22] *People* v. *Woody*, 61 Cal. 2d 716; 40 Cal. Rptr. 69; 394 P.2d 813 (1964).

The allocation of authority over Indian affairs as between the states and the national government was contentious from the start. After declaring independence from England, the thirteen colonies organized under the Article of Confederation. Under Article IX, the Congress had primary authority over Indian affairs so long as it did not impinge upon or violate the "legislative right of any state within its own limits."[23]

One of the compromises that made possible the adoption of the United States Constitution was resolution of this issue in favour of federal supremacy. The Constitution of 1789 included a "commerce clause" giving Congress exclusive authority to "regulate Commerce with foreign Nations and among the several states and *with the Indian tribes.*"[24] Since another provision of the Constitution makes that instrument the supreme law of the land, any state laws inconsistent with federal statutes, treaties or the Constitution itself are overridden.[25]

The Constitution with its commerce clause assigned full responsibility to Congress for the governance of Indian affairs. United States representatives negotiated treaties with tribes and set boundaries for reservations. The federal government was to prevent violation of those boundaries by non-Indians. The states continued to resist and generally resent what they considered to be an incursion of federal authority into their territory whenever federal control of Indian affairs seemed in conflict with state goals. Often those goals were as simple and base as owning and controlling lands possessed by the Indians. For states to take possession or control of Indian lands without the participation of the federal government was contrary to the general idea of the commerce clause of the

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[23] D. Getches & C. Wilkinson, *Federal Indian Law*, 2d ed. (1986) at 36. For a full text of the Articles of Confederation see C.C. Tansill, *Documents Illustrative of the Formation of the Union of American States* (Washington D.C.: Government Printing, 1927) at 27-37.

[24] U.S. Const. art. I, § 8, cl. 3 [emphasis added].

[25] U.S. Const. art. VI, cl. 2.

Constitution (one of only two mentions of Indians in the entire document[26]). Even more specifically, state meddling in Indian affairs also contradicted one of the earliest federal statutes. The *Trade and Intercourse Act of 1790* demanded federal approval of the transfer of Indian land to non-Indians and put other restrictions on trading with Indians.[27]

Conflicts over the integrity of Indian country as against state control in the face of an apparently supreme federal power was typified by the early attempts of the state of Georgia to exert authority over the lands and resources of the Cherokees. Three famous cases decided by the United States Supreme Court left no doubt about the primacy of federal law in Indian affairs, at least as a legal formality. Two of the cases dealt with attempts of Georgia to extend its laws over Cherokee territory. Another declared invalid land titles that had been obtained directly from Indian tribes without the participation of the United States government. The three cases, in opinions by Chief Justice John Marshall known as the "Marshall Trilogy," create the foundation of American Indian law.[28] These early opinions of the Supreme Court defined the three-way relationship among the federal government, the states, and the tribes but the decisions were to

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[26] The other provision is art. I, §2, cl. 3, which apportions legislative representation and direct tenation among the states by population but excludes "Indians not taxed." Because of subsequent legal developments, this phrase is essentially an anachronism. See F. Cohen, *Handbook of Federal Indian Law*, 1982 ed. (Charlottesville, Va.: Bobs-Merrill, 1982) at 388-389.

[27] F. Cohen, *supra* note 26 at 110.

[28] *Johnson* v. *MacIntosh*, 21 U.S. (8 Wheat.) 543 (1823), explored the origins of "Indian title" to land, defined the nature of that title, and reaffirmed the requirement of federal participation in Indian title transfers. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), denied the Cherokee Nation's ability to bring suit in the courts of the United States as a *foreign* nation because it had become a "domestic dependent nation" a government dependent on the United States. In *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court affirmed the tribe's sovereignty, defining it as being extraterritorial to the state, and holding that the laws of Georgia could have "no force" there, because to allow them would conflict with the superior federal authority and therefore be "repugnant to the Constitution, laws and treaties of the United States."

mean more in terms of their long-term wisdom than their immediate practical effect.

President Andrew Jackson refused to enforce the decision in *Worcester* v. *Georgia*, the most important of the three cases.[29] Instead, Jackson acceded to Georgia's desire to expel the Cherokees from their land and to relocate them to different territory hundreds of miles away in what is now Oklahoma. This removal policy marked the zenith of the isolationist approach in Indian affairs. It represented a political concession to the original states and, particularly as non-Indians were claiming most of the lands and resources, a genuine inability to protect reservations from outsiders.

Federal courts generally proclaim their adherence to the principles in *Worcester*. There has certainly been some erosion and several departures from the arrangement of sovereignties in that case but, as the Supreme Court has reiterated, "the basic policy of *Worcester* has remained."[30] Nevertheless, conflict has swirled around that basic policy. There is a continuing dialectic between the Marshallian view and what Professor Richard Collins calls the "Francisco Pizarro view" (after the vicious conquistador who destroyed the Inca empire in the course of conquering Peru) represented historically by Andrew Jackson's refusal to enforce the Court-recognized dignity and autonomy of the Indian tribes.

The *Worcester* decision has been applied in a long line of cases that: 1) impose strict limits on the governmental authority of states within Indian reservations; 2) recognize broad federal authority in Indian affairs; 3) assert commensurate federal responsibility for Indians; and 4) preserve a realm of Indian tribal sovereignty.[31] However, tensions persist.

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[29] See J.C. Burke, *The Cherokee Cases, A Study in Law, Politics, and Morality* (1969) 21 Stan. L. Rev. 500.

[30] *Williams* v. *Lee*, 358 U.S. 217, (1959).

[31] *Worcester* is one of the most cited of all U.S. Supreme cases, more so than all but three pre-Civil War decisions. Getches & Wilkinson, *supra* note 23 at 51.

The Supreme Court originally invoked Congress's legislative authority under the commerce clause primarily to reinforce the exclusion of state authority over Indians in enclaves where tribes were sovereign. As conflicts with states became more frequent and a diminishing tribal land base was increasingly threatened, Indian dependence on the federal government grew. Several cases coupled the federal constitutional power over Indian affairs with the apparent dependence of the tribes and read into it expansive congressional powers. The Court said in 1886: "From [the Indians'] very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises a duty of protection, and with it the power."[32]

Once asserted, the great power of the federal government was not always beneficially used for Indians. The plenary power of Congress was used to uphold federal legislation limiting tribal sovereignty by making certain crimes punishable in federal court,[33] and eventually by allowing Congress to abrogate unilaterally Indian treaties with the United States.[34] By using federal legislation to curtail tribal sovereignty and to reduce tribal land holdings, Congress increased the dependence of tribes. If greater dependence gave rise to greater power, each exercise of power provided the basis for even more power. Nevertheless, tribal governments survived with substantial prerogatives intact.

Exercises of state power have continually come into conflict with tribal self-government, calling into play early doctrines. In case after case, states and municipal governments as subdivisions of the states, have stretched to assert their governmental authority over Indians and their territory. Repeatedly, courts have been called upon to adjust tribal-state relations, usually laying down limits on state criminal jurisdiction, state taxing power, state regulatory authority, and state court jurisdiction in Indian

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32 *United States* v. *Kagama*, 118 U.S. (1886) at 384.

33 *Ibid.* (upholding the Major Crimes Act, 18 U.S.C. § 1153).

34 *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

country. Indians, in turn, have resisted. One early decision characterized state-tribal relations as follows:[35]

> These Indian Tribes are wards of the nation... they owe no allegiance to the States, and receive from them no protection. Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies.

A series of modern cases in the United States Supreme Court have reiterated the basic principles of the Marshall Trilogy, whittling away at them in a few situations, particularly where non-Indians are involved. The modern cases, when taken as a whole, are largely respectful of Indian self-government.[36]

As Indian tribes won successive victories insulating their reservations from state authority, they began enacting their own legislation to deal with taxation and regulatory issues as well as criminal jurisdiction. They sometimes imposed these laws over all people and property within their reservations. Individual non-Indians and companies owned by non-Indians located on reservations resisted the imposition of tribal jurisdiction. Non-Indian complaints about tribal jurisdiction fell on increasingly sympathetic ears in the Supreme Court, which often seized on the land tenure situation on many reservations as a reason to curb the exercise of tribal power.

Non-Indian ownership and population of reservation land trace to now-discredited policies that were designed to eliminate the reservation system and tribal governments. Near the turn of the century, reservation lands held by the tribes were carved up into allotments—parcels of 160 or 320 acres

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35 *United States* v. *Kagama*, *supra* note 32 at 383-84.

36 The jurisprudence of modern Indian law is masterfully traced by C.F. Wilkinson in *American Indians, Time and the Law: Native Societies in a Modern Constitional Democracy* (New Haven: Yale University Press, 1987). The "modern era" described by Professor Wilkinson began in the 1960s. The Court's solicitude for tribes and their governments, however, seems to have waned with changes in Court membership. Cases since the early 1980s have shown at best confusion and at worst retreat from precedent, suggesting that the modern era has ended.

that were conveyed to individual Indians.[37] The government then believed it was appropriate to convert Indians, who in many cases lived off the land as hunters, into farmers. By making pastoral people of them and confining them to smaller tracts, there would be surplus land that could be distributed as homesteads to non-Indians. Today, on many Indian reservations there are large non-Indian populations as a result of government homestead programs that opened "surplus" lands on the reservations to non-Indians. On some reservations, most of the land is owned by non-Indians.

Furthermore, after a period during which the allotments were held in "trust" for the Indians by the government, those lands became alienable by the Indians. Allotted lands were then transferred to non-Indians by individual Indians who were inveigled to sell or whose lands were taken from them for unpaid taxes or debts. Although the *Allotment Act* was repealed in 1934 as a part of the *Indian Reorganization Act*, it accounts for about 100 million acres changing hands from Indians to non-Indians.[38]

Land tenure on reservations is in a checkerboard pattern. Non-Indian owned parcels are scattered among Indian lands. Many non-Indian owners consider it unfair or improper to subject them to laws made by the Indian tribes. Responding to their concerns, the modern United States Supreme Court has denied Indian tribes the authority to arrest and punish non-Indians who commit crimes within the reservation.[39] In a remarkable recent decision, that precedent was extended even to non-member Indians.[40] Thus, tribes also now lack jurisdiction to arrest, try, and punish Indians who are members of another tribe for crimes they commit

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37 See D.S. Otis, *The Dawes Act and the Allotment of Indian Lands* ed. by F.P. Prucha (Norman: University of Oklahoma Press, 1973).

38 See Hearings on H.R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess. 16-18 (1934). Commissioner of Indian Affairs John Collier concluded that over 90 million acres were lost to Indians between 1887 and 1934 owing to Allotment Act programs and policies. He contends that the lands lost were the best, resulting in a loss of 80 percent of the land value belonging to Indians in 1887.

39 *Oliphant* v. *Suquamish Indian Tribes*, 435 U.S. 191 (1978).

40 *Duro* v. *Reina*, 495 U.S. 676 (1990).

on reservations. Thousands of Indians are on reservations other than their own as a result of intermarriage, employment opportunities, or intertribal ceremonial, social, and business activities. Under the decision, they would be subject to state laws for most crimes. Because Congress long ago enacted special laws making all Indians (not just tribal members) subject to federal laws concerning certain crimes on the reservation,[41] these non-member Indians would be subject to federal jurisdiction for major crimes and crimes against non-Indian but would escape prosecution for crimes against other Indians.[42] Congress quickly acted to mend this tear in the jurisdictional fabric by restoring the tribal jurisdiction over non-members that the Court had removed.[43]

The spread of non-Indian landholdings on reservations has created complications in the area of civil regulatory jurisdiction. The complexity of the jurisdictional scheme over Indian country in the United States arises from the Court's struggle with the application of what it has called "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members."[44] Those two barriers are: 1) preemption (the supremacy of federal law in Indian affairs over state law); and 2) tribal self-government (where it would cause interference with tribal sovereignty, application of state laws is precluded).

The preemption analysis is informed by tribal sovereignty notions because federal laws are often vague or silent on jurisdiction. Thus, a treaty that creates an Indian reservation is considered a federal law intended to secure a traditionally self-governing enclave against intrusions

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41 *Major Crimes Act*, 18 U.S.C. § 1153; *Indian Country Crimes Act*, 18 U.S.C. § 1152.

42 *The Indian Country Crimes Act* specifically excepts crimes by one Indian against another. In absence of federal legislation, crimes among Indians are solely within tribal jurisdiction. Ex Parte *Crow Dog*, 109 U.S. 556 (1883). *Duro* v. *Reina*, *supra* note 40 found tribes lacked this jurisdiction over non-member Indians.

43 A temporary measure was hastily enacted to restore tribal jurisdiction over non-member Indians. Public Law 101-511, 104 Stat. 1892 (Nov. 5, 1990). It was made permanent in 1991. Public Law 102-137, 105 Stat. 646 (Oct. 28, 1991).

44 *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, (1980) at 142.

by states. As to Indians, then, reservation status may end the inquiry: state jurisdiction is excluded.[45]

Reservation status alone is not sufficient to bar application of state law to non-Indians since "self-government" is not automatically involved. Instead, the courts make a "particularized inquiry" into the relative interests of the respective governments. The question is whether, on balance, tribal self-government would be infringed by the imposition of state law.[46] Because federal interests are considered, the court asks whether the imposition of state law offends some federal law or policy with respect to Indians. If so, the latter interests may tilt the scales against applying state law to non-Indians on a reservation. In a number of cases this analysis has barred state taxation and regulation of non-Indians based largely on various federal Indian policies. In one case, state taxes on a non-Indian company with whom a tribe had contracted to carry out logging operations in the tribal forest were precluded.[47] The Court found that the federal government had enacted a regulatory scheme concerning harvesting and sale of tribal timber which gave it a strong interest while the state's interest was merely in raising revenue. The Court was also influenced by the fact that the economic burden of the taxes would fall on the tribe giving it an interest in resisting the taxes.

The other side of the jurisdictional coin is the ambit of tribal jurisdiction. To the extent state jurisdiction is precluded, tribal jurisdiction should be able to flourish, though the Court has not reasoned that tribal jurisdiction applies wherever state jurisdiction does not. Several recent challenges were incited as reinvigorated tribal governments imposed their regulations over non-Indians on the reservation. The Supreme Court has recognized the sovereign authority of tribes, holding that tribes generally can regulate or tax non-Indian activity on Indian-owned reservation lands

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45 See *McClanahan* v. *Arizona Tax Comm'n*, 411 U.S. 164 (1973) at 172.

46 *White Mountain Apache Tribe* v. *Bracker*, *supra* note 44 at 145.

47 *Ibid.* at 150. See also *Central Machiner Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Ramah Navajo Sch. Bd.* v. *Bureau of Revenue of New Mexico*, 458 U.S. 408 (1989).

(owned by a tribe or an individual Indian).[48] The imposition of a tribal tax, however, may or may not preclude a state tax on the same subject. The outcome depends on a consideration of governmental interests and at times both sets of laws may apply.[49]

In cases when a non-Indian is on land owned in fee by a non-Indian, the Court has developed a special test for tribal jurisdiction. It holds that the tribe has no regulatory authority unless it can show that these non-members have entered into "consensual relations with the tribe or its members, through commercial dealing, contracts, leases or other arrangements," or if it can demonstrate that the exercise of "civil authority over the conduct of non-Indians on fee lands within its reservation... threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[50] Needless to say, this latter Supreme Court test (the so-called "*Montana* test") for when tribal civil jurisdiction can be applied to non-Indians adds another level of uncertainty calling for case-by-case litigation. Indeed, there has been considerable litigation, but the Supreme Court has yet to find the *Montana* test satisfied sufficiently to allow tribal jurisdiction except where contractual or consensual relations were involved.[51]

The difficulties of applying the special laws concerning Indian jurisdiction in the United States should be apparent from this brief review. Congress has legislated piecemeal and the Court has elaborated law that leaves little certainty, especially where non-Indian activity or property is involved.

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48 *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *New Mexico* v. *Mescalero Apache Tribe* 462 U.S. 324 (1983).

49 *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

50 *Montana* v. *United States*, 450 U S. 544 (1981) at 565-66.

51 See e.g., *Merrion* v. *Jicarilla Apache Tribe*, *supra* note 48; *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195 (1985).

A complex, and at times bizarre, set of rules has emerged leading some scholars to call Indian criminal jurisdiction a "maze"[52] and a "crazy-quilt."[53] Consider the consequences. Indians on a reservation are subject to federal law when they commit a major crime or a crime against a non-Indian. They are subject to tribal law in other cases. Non-Indians are subject to federal law only when the crime is against an Indian and otherwise are subject to state law. An Indian who is not a member of the tribe of a particular reservation is subject to federal law for major crimes, state law if the victim is a non-Indian, but escapes criminal prosecution if the victim is a member of the tribe whose reservation it is.

The civil area is more complicated. The complications have grown out of a judicial concern for the presence of large numbers of non-Indians and non-Indian property within reservations. In the area of regulation and taxation, tribes control activities and property of Indians. However, in the case of non-Indian activities and property, the outcome depends on a variety of factors. Because the Court has demanded a "particularized inquiry" and a balancing of tribal, state, and federal interests, there is uncertainty that can only be resolved on a case-by-case basis in absence of some negotiated arrangement. Thus, courts have held that tribes can tax oil production by non-Indians on reservation land, but the tribe cannot restrict non-members fishing on fee land within the reservation. States cannot tax gasoline sold to a non-Indian timber contractor who works on tribal land and whose trucks use state highways, but states can tax the sale of cigarettes to non-Indians by an Indian-owned store on the reservation and so may the tribe.

The legal morass created by Indian jurisdiction decisions has reached the point of the ridiculous. Particularly absurd results were reached in the Supreme Court's decision in a recent case involving land use regulation on

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[52] R.N. Clinton, "Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze" (1977) 18 Ariz. L. Rev. 503.

[53] T. Vollmann, "Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict" (1974) 22 U Kan. L. Rev. 387, n.1.

the Yakima Reservation in the state of Washington.[54] A divided Court decided that state and local zoning laws applied to non-Indian lands on one part of the reservation while tribal zoning laws applied to non-Indian lands on another part of the reservation. To be effective, zoning schemes must extend over an area of sufficient size and contiguity. The consistency and comprehensiveness needed for successful land use planning and regulation is defeated if regulatory authority depends on the ownership of particular parcels of property. The situation becomes even more unworkable when the rule is different for different parts of the reservation. In the *Yakima* case, there were three different opinions, no one of which had a majority of the Court's members signing it. The result does not seem consistent with the Court's own precedents in the field.

Neither tribes nor states gain much satisfaction from decisions like the one in the Yakima land use case. That case portends that litigation before today's Court is likely to produce further confusion. Tests and principles are announced only to be followed with exceptions or another rule. Even the "rules" tend to require case-by-case analysis of each situation, and this requires a look at highly variable demographic facts produced by a mix of past policies and historical accidents. Fulfilment of present goals of reservation and neighbouring communities is rarely achieved by the superimposition of legal rules, especially rules as incoherent as those that have emerged in the area of Indian country jurisdiction. The resulting uncertainty leaves tribes, state governments, and local governments to act at their peril, not knowing whether assertions of jurisdiction will be upheld or not.

IV. Intergovernmental Agreements With U.S. Indian Tribes

Negotiated arrangements among governments concerning jurisdiction and the provision of government services on Indian reservations can give certainty and avoid the necessity of litigation. Thus, they have become especially attractive to all levels of government in the United States. Not

[54] *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

only do all parties save litigation costs, but they can tailor the results to fit practical needs. The results of "successful" litigation typically provide rules applicable to the particular case. However, even in an individual case, the announced "rules" may not create a workable jurisdictional scheme. The court decision may have to be followed by negotiations to develop a practical way to apply (or avoid) the rules.

Another reason for pursuing intergovernmental agreements is that recent federal legislation calls for tribes and states to negotiate the allocation of certain governing authority between them. For instance, the *Indian Child Welfare Act of 1978*[55] vests tribes with primary jurisdiction over children of its members in adoption, foster care, and custody proceedings. It grants authority to states and tribes to negotiate agreements or compacts concerning jurisdiction over Indian child welfare proceedings.[56] The *Indian Gaming Regulatory Act of 1988*[57] requires states to negotiate compacts with tribes concerning the regulation of gaming activities on Indian reservations.[58] More than 20 tribes and eight states have negotiated gaming compacts under the Act. Negotiations are underway in other states.[59]

A 1953 law allows Indian tribes to regulate the introduction of liquor into Indian country so long as they have the approval of the Secretary of Interior and state laws are not violated.[60] The stipulation that state laws not be violated has led to conflict and litigation over the shared responsibilities of state and tribal governments in regulating liquor sales in Indian country.[61] Surely this area is ripe for negotiation though the statute does not specifically authorize state-tribal agreements.

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55 25 U.S.C. §§ 1901-1963.

56 25 U.S.C. § 1919.

57 25 U.S.C. §§ 2701-2721.

58 25 U.S.C. § 2710(d)(2)(D)(iii)(I)(3)(A).

59 Governor (of New Mexico) Bruce King, Testimony before the U.S. Senate Select Committee on Indian Affairs, March 18, 1992.

60 18 U.S.C. § 1154; see *United States* v. *Mazurie*, *supra* note 19.

61 *Rice* v. *Rehner*, 463 U.S. 713 (1983).

The federal government also now routinely delegates some of its authority and functions in providing services to tribes through contracts. Under the *Indian Self-Determination and Education Assistance Act of 1975*,[62] tribes regularly contract to conduct programs and provide service within their own reservations that were formerly carried out by the Bureau of Indian Affairs. There are now many Indian-controlled schools on reservations as well as tribal agencies performing a variety of services.

Functions like road maintenance and education often interface with state and local government activities. Agreements for sharing responsibilities with these governments can lead to greater efficiency and better services. Such agreements are rare, however, and are not apparently encouraged by the Bureau of Indian Affairs.

Neither federal permission nor federal approval is generally required for interjurisdictional agreements. There are some circumstances, however, where federal participation is necessary. If more than one state is involved, the United States Constitution may require congressional approval. Congress must consent to interstate compacts even if the United States is not itself a party.[63] The federal government also must participate in any contractual arrangement that attempts to alienate Indian property or other Indian rights that are generally subject to restraints on alienation. Absent a statute delegating approval authority to the Secretary of Interior, congressional approval is necessary for any such agreement.[64]

Though federal sanction is not strictly necessary, Congress has considered a "Tribal-State Compact Act," that would give statutory authority and encouragement to states and tribes to enter into voluntary interjurisdictional arrangements.[65] The subject matter of the proposed

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62 25 U.S.C. §§ 450a-450n.

63 U.S. Const. art. I, § 10, cl. 3.

64 See *Trade and Intercourse Act*, 25 U.S.C. § 177; see also statutes granting contractual approval authority, 25 U.S.C. § 71.

65 On several occasions bills were introduced for such an Act. See legislative history summarized in 1977-78 Congressional Index, 95th Congress (CCH) S. 2502, §§ 14,261 and 20,515; 1979-80 Congressional Index, 96th Congress (CCH)

legislation included enforcement or application of civil, criminal or regulatory laws within the respective jurisdictions of the parties, allocation or determination of governmental jurisdiction by subject matter or geographic area, concurrent jurisdiction between states and tribes, and procedures for the transfer of individual court cases between state and tribal courts.[66] In addition to enabling allocation of jurisdiction between tribes and states, the Act would have exempted parties from any limiting effects of *Public Law 280* (a federal law that gives some states certain jurisdiction over criminal and civil adjudications in Indian country).[67] The bill provided that tribal members (not just the tribal council) must vote to approve any agreement extending for more than five years. It also encouraged the creation of local planning and monitoring boards to oversee agreements and to promote their more effective use. Federal funds would have been authorized to encourage and facilitate agreements that would ultimately save federal money.

Although the proposed Tribal-State Compact Act was favoured by the Department of Interior and the Department of Justice, it was not enacted. One reason for the Act's defeat was a perception by tribes that it was a vehicle for state encroachment on tribal sovereignty.[68] Senator Slade Gorton of Washington and some states also objected because the bill would not have provided for the consent of non-Indians living on reservations but only required Indian approval. Philip S. Deloira, director of the Indian Law Center at the University of New Mexico School of Law, believes that the tribes were fortunate that the Act did not pass into law

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S. 1181, §§ 14,201 and 20,505; 1981-82 Congressional Index, 97th Congress (CCH) S. 563, §§ 14,171 and 21,005.

66 See S. 563, *supra* note 65 § 101.

67 18 U.S.C. § 1162(a) (criminal jurisdiction); 28 U.S.C. § 1360(a) (civil jurisdiction). See generally, C.E. Goldberg, "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians" (1975) 22 U.C.L.A. L. Rev. 535.

68 See testimony of James F. Canan, reprinted in *Mutual Agreements and Compacts Respecting Jurisdiction and Governmental Operations: Hearing Before the Select Committee on Indian Affairs*, U.S. Sen., 97th Cong., 1st Sess., May 11, 1981.

because it would have imposed procedural limitations on the exercise of tribal sovereignty.[69]

Several states have enacted enabling legislation for negotiation and execution of agreements with tribes. Absent some particular aspect of state law that would make such legislation necessary, states appear to have the power to negotiate such agreements whether or not they are specifically authorized by state legislation. Nevertheless, the enactment of such legislation tends to encourage cooperation by a variety of state government agencies that otherwise might be recalcitrant or reluctant to negotiate.

States that have passed enabling acts for state-tribal cooperative agreements have produced generally positive results. The Montana act is simply a policy statement encouraging cooperation between the state and tribes.[70] Nevertheless, in the opinion of lawyers working on Indian reservations in that state, it has been useful in several situations.[71] In one case, there was a dispute over the ownership of state-owned section of land located within the boundaries of the Flathead Indian Reservation of the Salish and Kootenai Tribes. An agreement negotiated between the state and the tribes provides for joint state and tribal licensing of off-reservation use of the water without either party relinquishing its claims. In another case, the tribes reached an agreement with the state fish and game department recognizing tribal jurisdiction over hunting on trust lands and Indian-owned allotments within the reservation and state jurisdiction over hunting on non-Indian owned allotments within the reservation. The state also agreed to pay all revenue derived from on-reservation license fees and fines to the tribe to support a reservation-wide wildlife management program.

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69 Interview with Philip S. Deloria, March, 1992.

70 Mont. Code Ann. § 18-11-101.

71 Interview with John Carter, Attorney, Legal Services Office of the Flathead Indian Reservation, March, 1992.

The Nebraska State-*Tribal Cooperative Agreements Act of 1989* is similar to the Montana law but specifically authorizes state agencies to perform any service or activity of any other public agency or of the tribal governments entering into the compact.[72] The Nebraska statute was motivated by the refusal of state officials to place incorrigible delinquents and chronic mental health patients from Indian reservations into state facilities on the grounds that they lacked authority to provide such services with other sovereign entities.[73]

Though its implementation has been stalled in some respects because of disputes over interpretation of statutory language, the Nebraska Act has been useful in some circumstances. For instance, the state social services agency has reached agreements with the Winnebago and Omaha Tribes to make payments to them under Title IV of the *Federal Social Security Act*[74] (providing for child abuse and foster care programs).[75] The state Game and Parks Department has also reached agreement with the Nebraska tribes on allocating hunting and fishing regulatory responsibilities and recognizing tribal regulations on trust lands. In return, the tribes recognize state regulation on non-Indian fee lands. The Winnebago and Omaha Tribes have joined in an agreement among several northeast Nebraska counties for the general operation of a juvenile holding facility.

72. Neb. Rev. Stat. § 13-1501.

73. Interview with James Botsford, Esq., former Director, Legal Aid Society, Walthill, Nebraska March, 1992.

74. 42 U.S.C. § 601-687 (West 1991).

75. Interview with Deborah Brownyard, Esq., Director, Legal Aid Society, Walthill, Nebraska, March, 1992.

State-tribal cooperation has also been encouraged by proclamations of governors of some states, announcing that the state would deal with Indian tribes directly on a government-to-government basis.[76] The Governors of Arizona, New Mexico and Utah, along with the President of the Navajo Nation which has lands in each of the three states, recently co-signed a "Statement on Government to Government Policy."[77]

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76. Wisconsin was one of the first to promote tribal state cooperation by Wis. Executive Order #31 (13 October 1983). Washington Governor Booth Gardner signed the "Centennial Accord" of 1989. South Dakota announced a "Year of Reconciliation" by Executive Proclamation in 1990. Oregon recognized intergovernmental relationships between tribes and states by executive proclamation on April 10, 1990. See F. Pommersheim, "Tribal-State Relations: Hope for the Future?" (1991) 36 S.D. L. Rev. 239 at 262-65 and 265 n. 181.

77. Statement of Government-To-Government Policy Navajo Nation, Arizona, New Mexico and Utah:

> There are mutual issues which face the parties hereto concerning both Navajo and non-Navajo citizens living within Navajo Nation and State jurisdictions, and the parties recognize and agree that a procedure setting out a cooperative joint effort shall be coordinated to address these mutual issues; and
>
> The Navajo People are citizens of the Navajo Nation as well as the State of Arizona, the State of Utah, or the State of New Mexico and possess all the privileges and rights afforded citizens of these States, are entitled to the same services and benefits afforded by these states to their citizens, consistent with law; and
>
> Because of the sovereign status of the Navajo Nation and its geographical location in three (3) states, the States and the Navajo Nation have taken adverse positions over issues such as taxation, water rights, state services to the Navajo people, and where the extent of jurisdiction of the parties are not clearly or judicially defined; and
>
> Coordination and cooperation between the parties will improve the delivery of services to all people within the respective jurisdictions.
>
> It is hereby agreed by the President of the Navajo Nation, The Governor of the State of Arizona, the Governor of the State of New Mexico and the Governor of the State of Utah that:

The subject matter of tribal intergovernmental agreements is wide-ranging. A 1981 survey by the Commission on State-Tribal Relations documented such agreements in thirty topical areas. Some of the most active areas for such agreements were: wildlife management, environmental protection, education, social services, taxation and law

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> The interactions of the State of Arizona, the State of Utah, and the State of New Mexico with the Navajo Nation shall be predicated on a government-to-government relationship.
>
> The relationship will be carried forward in a spirit of cooperation, coordination, communication and goodwill.
>
> The parties hereto agree to meet together on a regular basis to insure that the intent of this Statement is carried out.
>
> Issues of mutual concern to the respective governments shall be addressed through the following structure;
>
> A. Initial contact and negotiations shall be conducted by the appropriate Division or Department of the Navajo Nation and the State;
>
> B. The President and each Governor will designate an individual to their staff with whom the Divisions and Departments will consult as needed;
>
> C. The President and the Governors shall be kept informed of issues of potential conflict by their designated staff person and shall provide such direction as necessary to resolve those conflicts as early as possible;
>
> D. The Attorney General of the Navajo Nation and the Attorneys General of the respective states will consult with one another, prior to the filing of any litigation or adverse claim involving the Navajo Nation and the respective state governments as opposing parties.
>
> The parties hereto shall do all things necessary and proper to inform and direct their respective governments to implement the provisions and intent of this Statement.
>
> Executed, this 6th day of January, 1992.
>
> Bruce King, Governor of New Mexico; Fife Symington, Governor of Arizona; Norman H. Bangerter, Governor of Utah; Peterson Zah, President, The Navajo Nation.

enforcement.[78] A more recent survey documents 99 agreements covering these areas, as well as other jurisdictional and public services issues.[79]

A. Hunting and Fishing

A pioneering intergovernmental agreement was reached between the Leech Lake Band of Chippewa Indians and the State of Minnesota after the tribe won a major court victory affirming its right to hunt, fish and gather wild rice in its reservation. The agreement was incorporated in the court's decree and subsequently ratified by the Minnesota state legislature.[80] In the agreement, the state acknowledged what the court had already said: that the Indians were free of all state regulation while hunting, fishing, trapping or gathering wild rice on the reservation. The tribe agreed to prohibit commercial taking of game, fish, or rice and to adopt a conservation code. The agreement also went farther and covered hunting, fishing and rice gathering by non-Indians.[81] In lieu of a tribal licensing program, the state charged an additional fee imposed by the tribal council to non-tribal members seeking to hunt on the reservation. The special fee was rebated to the tribe for use in the support of resource management. As discussed above, both Montana and Nebraska reached accords on game and fish regulation and the revenue derived from the licensing of those activities. Similar cooperative agreements have been negotiated in other states.[82]

78. Commission on State-Tribal Relations, *State Tribal Agreements: A Comprehensive Study* (1981).

79. Pommersheim, *supra* note 76 at 66.

80. See *Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F. Supp. 1001 (Minn. 1971); Minn. Stat. § 97.431.

81. Getches & Wilkinson, *supra* note 23 at 729.

82. Colorado (Southern Ute and Ute Mountain Ute Tribes); Minnesota (Grand Portage Band of Chippewas); Montana (Fort Belknap Community Council and Fort Peck Indian Tribes); Oregon and Washington (Nez Perce, Confederated Tribes of the Umatilla Reservation, Confederated Tribes of the Warm Springs Reservation, and Confederated Tribes and Bands of the Yakima Indian Nation); South Dakota (Cheyenne River Sioux Tribe); Washington (Hoh and Quinault Tribes, the Nisqually Tribe and the Port Gamble Klallam, Skokomish and Suquamish Tribes); and Wisconsin (Winnebago Tribe). Getches & Wilkinson,

B. Law Enforcement

Where substantial non-Indian communities have grown up within a reservation, the problem of law enforcement can raise practical difficulties and create hostilities that impede effective law enforcement. State, municipal, and tribal authorities are especially interested in the problem of criminal arrest jurisdiction within Indian country. Even reservations with small non-Indian populations may have highways passing through them where traffic law enforcement is a problem.

One device to deal with the problem of overlapping law enforcement jurisdiction is cross-deputization by mutual agreement. This allows the police of either sovereign to arrest both Indians and non-Indians for violating the law of either the tribe or the state. The state of New Mexico has codified the process for cross-deputization.[83] The statute authorizes the chief of the state police to deputize pueblo or tribal officers who meet statutory criteria if the pueblo or the tribe can show proof of sufficient liability and property insurance.

In addition to cross-deputization, state and tribal courts have also reached agreements on subjects such as service of process, full faith and credit for judgments, and extradition from one jurisdiction to another.[84] Some local law enforcement authorities have gained respect for the fairness of tribal courts, but it has taken a long time for many of them to overcome a racist reaction to the idea of Indian justice systems.

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supra note 23 at 730.

83. N.M. Rev. Stat. § 29-1-11. See *Ryder* v. *State*, 648 P.2d 774 (N.M. 1982).

84. O. Olney & D. Getches, *Indian Courts and the Future, Report of the National American Indian Court Judges Association Long Range Planning Project* (Washington: National American Indian Court Judges Association, 1978).

C. Zoning and Land Use Regulation

The Supreme Court's decision in *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation*,[85] concerning zoning authority on the Yakima Reservation is discussed *supra*. The Court decided that there were different allocations of responsibility over zoning in two parts of the same reservation. Applications of the Court's decision is difficult on the Yakima reservation and virtually impossible on others. This creates a strong motivation for counties and their Indian neighbours to reach intergovernmental agreements on land use control. Without collaboration between the two governments, effective comprehensive land and resource use regulation is defeated.

Before *Brendale*, the Swinomish Tribe and Skagit County in Washington were already working toward coordinating land use planning in and around the Swinomish Reservation. On the Reservation 46% of the land is owned by non-Indians and 20% of the Indian trust land is leased to non-Indians for their use.[86] The foundation for the Swinomish-Skagit County cooperative process was a memorandum of understanding signed in 1987 that established a procedural framework to allow subsequent negotiations. The memorandum did not actually allocate jurisdiction; it was essentially an "agreement to agree" in that it was non-binding. Yet, it quelled concerns of both governments with an express disclaimer of any intention to "limit or waive the regulatory authority or jurisdiction of either party."

Agreements about land use can focus on the needs of specific sites. The Tulalip Tribe and San Juan County, Washington have an agreement concerning the use of Barlow Bay on Lopez Island where the tribe purchased four acres for use as a seasonal fishing camp.[87] The tribe, with

85. *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, *supra* note 54.

86. S. Solomon & N. Zaferatos, "Cooperation Between the Swinomish Tribe and Skagit County on Zoning," Proceedings of the Second Annual Western Regional Indian Law Symposium (September 1988) Univ. of Wa. Sch. of Law 175.

87. Gover, Stetson & Williams, P.C. "Tribal-State Dispute Resolution — Recent Attempts" (1991) 36 S.D. L. Rev. 277 at 296.

little land of its own and substantial treaty fishing rights adjudicated by the federal courts, needed the fishing camp so its members could exercise treaty rights. After purchasing the land the tribe applied to the federal government and requested the Bureau of Indian Affairs to accept the land in trust under the *Indian Reorganization Act.*[88] The effect of putting land in trust was to exempt it from taxation by local governments and to make it non-alienable without the agreement of the federal government. It is treated essentially as part of the Indian reservation and therefore no local regulation is applicable. San Juan County objected, fearing inappropriate use of the land by the tribe.

After the tribe and the county began negotiating, the Bureau of Indian Affairs deferred ruling on the application to take land in trust, advising both parties that it would prefer to base the decision on a negotiated agreement. The county finally withdrew its objection to trust status when the tribe agreed to abide by various county regulations and to pay the equivalent of the property taxes that would be lost in consideration of services provided by the county.

D. Environmental Regulation

As with land use, environmental regulation needs to be administered comprehensively. Ideally, it should be based on standards that extend over a large area and not be inhibited by the existence of interlocking or overlapping political boundaries. That is one reason the federal government enacted a system of national environmental statutes. Federal laws concerning air pollution, water pollution, toxic chemicals and disposal of hazardous waste maintain uniform standards throughout all the states. In deference to a strong tradition of federalism in the country, almost all of those statutes provided for the states to administer programs to implement the national standards within their boundaries. This provision for state "primacy" depends on states satisfying certain requirements for program funding and demonstrating competence to administer the laws.

88. See 25 U.S.C. § 465.

Virtually all the federal pollution control acts now provide that Indian tribes are to be treated as states and under most of these laws tribes may assume primacy within their territory.[89] At least one major environmental statute, the *Solid Waste Disposal Act*, does not specifically mention Indian tribes.[90] Nevertheless, commentators have concluded that delegation of authority by the Environmental Protection Agency (EPA) to tribes under the Act would be upheld in court. Analogous cases suggest that result.[91]

In 1991, EPA Administrator, William K. Reilly, announced a policy for implementing tribal primacy under the federal pollution statutes stating that "consistent with the EPA Indian policy and interests of administrative clarity, the Agency will view Indian reservations as single administrative units for regulatory purposes."[92] In accordance with this common sense principle of territorial integrity, EPA has adopted regulations concerning the implementation of water quality standards on Indian reservations.[93] The new regulations indicate that a single government should have jurisdiction over the reservation. Unless and until a tribe applies for and receives approval according to the conditions in the regulations for assuming primacy within the reservation, the EPA will retain regulatory jurisdiction over that geographic area of the state. Once primacy is granted, the tribe will have complete jurisdiction and no portion of the reservation will fall under state jurisdiction. Only if the tribe and the state enter into consensual, cooperative agreements will state environmental

89. E.g., *Clean Water Act*, 33 U.S.C §§ 1251-1377, at 1377(e); *Safe Drinking Water Act*, 42 U.S.C. §§ 300f-300j-26, at 300j-11 (added by 1986 Amendment); *Federal Insecticide, Fungicide and Rodenticide Act*, 7 U.S.C. §§ 136-136y, at 136u; *Clean Air Act*, 42 U.S.C. §§ 7401-7642 at § 7474(c) and (e); *Comprehensive Environmental Response, Compensation, and Liability Act* (Superfund), 42 U S.C. §§ 9601-9657, at § 9626 (added by 1986 Amendment).

90. 42 U.S.C. §§ 6901-6991(i).

91. D. Getches, "Management and Marketing of Indian Water: From Conflict to Pragmatism" (1988) 58 U. Colo. L. Rev. 515 at 535-36; see *Nance* v. *EPA*, 645 F.2d 701 (9th Cir. 1981).

92. U.S. Environmental Protection Agency (EPA), *Federal, Tribal, and State Roles in the Protection and Regulation of Reservation Environments*, signed and distributed by EPA Administrator William Reilly, July 10, 1991.

93. 52 Fed. Reg. 64876 (Dec. 12, 1991).

regulatory authority extend onto the reservation. This provides a special incentive for states to pursue negotiated agreements where their interests are strong.

Prior to the new EPA policy clarifying the government's approach to granting primacy, some agreements had been reached between tribes and states concerning the administration of environmental laws. The Shoshone-Bannock Tribe agreed with the state of Idaho that the tribe would regulate air quality on Indian lands while the state would administer it on fee lands. This agreement avoided a fight but did little to advance the sound administration of the law. Perhaps the EPA policy described above will remedy such problems.

Several areas of environmental regulation are not covered by federal statutes. In these cases, the jurisdictional ambiguities created by federal Indian law loom large, particularly as to non-Indian activities and lands within reservations. One of the most troubling areas is solid waste disposal. The federal *Solid Waste Disposal Act* deals primarily with hazardous wastes. It includes only limited provisions covering ordinary (non-hazardous) waste dumps.

Indian reservations are increasingly targeted as sites for waste disposal. This has heightened interest in negotiated agreements between states and tribes to resolve questions concerning solid waste management. In some cases, tribes seek to use their inherent sovereignty over their reservations to regulate such facilities on the reservation. Under no circumstances can they be forced by state or local governments to locate dumps on their own lands. However, a non-member owning land on the reservation who wants to develop it as a dump could resist and test the extension of tribal land use restrictions. Under the muddled principles of the *Brendale* case,[94] there would be at least an argument that the tribe lacked jurisdiction to prevent or regulate the activity.

94. *Supra* note 54.

On some reservations the reverse situation has arisen. A tribe, despairing the lack of economic activity, may concede that it will locate a dump within its boundaries or, in some cases, actively seek location of the facility. In these circumstances, local or state governments may object because of the off-reservation effects on neighbouring communities. As in the case of a tribe resisting an unwanted dump on non-Indian land on the reservation, cooperation between the tribal and local governments may be necessary to resolve the issues satisfactorily.

When the Campo Band of Mission Indians decided to allow a solid waste disposal plant to be located on its reservation, state and local authorities objected. The band had concluded that the waste disposal facility would be the most fruitful of the few options it had for economic development. The band proceeded to develop its own environmental regulations and expertise but asserted that it was free of any state regulation. The state was concerned with the political and environmental consequences of failing to exert whatever authority it had. Negotiations between the governments ensued. The tribe maintained its position that only tribal and federal regulations were applicable on the reservation but agreed to prepare environmental impact statements requested by the state and to adopt strict regulations. In addition, the tribe agreed to provide all requested information to the state and to allow full access by state officials to the site. In return, the state agreed to furnish technical assistance but did not abandon its argument that it had jurisdiction over the site. Litigation was avoided and a practical solution was developed under which responsibility for regulation was satisfactorily allocated so that the site would be operated reasonably.[95]

E. Water Rights

Under principles announced by the United States Supreme Court as early as 1908, Indian tribes have extensive rights to use water on their reservations. They are not subject to the state law requirement that water

95. See Western Governors' Ass'n, *Cooperation on Solid Waste Management: Tribes and States* (1991).

must be put to a "beneficial use" in order to establish and maintain a water right. Instead, they are considered to have "reserved" sufficient water to fulfill the purposes of the reservation.[96] States find the presence of such reserved water rights to be disruptive because it creates uncertainty as to how much water has been allocated to the tribes and how much is available for non-Indian uses. Accordingly, the states try to adjudicate the specific quantities of water to which tribes are entitled and then integrate the Indian rights with all other (non-Indian) rights.

A federal law allows for the federal government, otherwise immune from suit, to be joined as a defendant in state adjudications of water rights.[97] The consent has been construed to extend to Indian water rights because they technically are held by the United States in trust for the tribes.[98] Litigation of federal and Indian water rights has proved to be excruciatingly lengthy and expensive. The parties may spend tens of millions of dollars trying to deal with the complex technical problems as well as the legal issues. Only one case, involving rights to water in the Big Horn River on the Wind River Reservation, has gone all the way through the court system and determined quantities of Indian reserved water rights.[99] The decision has not resolved all the problems, however.[100]

Matters not decided in quantification litigation, even when it is brought to a conclusion, may have to be negotiated. In the Big Horn River case, which was adjudicated and appealed to the United States Supreme Court, it was necessary to return to the state trial courts to deal with the question

96. *Winters* v. *United States*, 207 U.S. 564 (1908).

97. 43 U.S.C. § 666.

98. *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976).

99. *In Re General Adjudication of All Rights to Use Water in Big Horn River System*, 753 P.2d 76 (Wyo. 1988), *aff'd by equally divided court*, 492 U.S. 406 (1989).

100. There has also been extensive litigation over whether the tribe could use a portion of its water rights to maintain streamflows for fish and whether state or tribal officials have authority to administer water rights on the reservation.

of whether the state water engineer had authority over non-Indian water administration on the reservation. The lower state court decided that the tribal water officials were responsible for administering water of both Indians and non-Indians on the reservation, subject to court review. That decision was reversed on appeal.[101]

Because water, like wildlife management and land use control, needs to be managed on as unified a basis as possible, it is an area particularly susceptible to negotiated resolution. In the long run, the administrative details of managing water on the Wind River Reservation will have to be settled by agreements of the governments in question.

Many of the negotiated settlements that quantify Indian water rights include components allocating jurisdictional authority over water administration and management. For instance, in the settlement of the water rights of the Fort Peck Reservation Indians with Montana in 1985, the tribe recognized state jurisdiction over rights created under state law and agreed to administer on-reservation rights itself but under federal Department of Interior guidance. In return for these agreements, the state agreed not to object to the tribe's leasing some of its water off the reservation. Tribal water marketing is a means of raising needed revenues; it would potentially have been delayed and frustrated by lengthy litigation of the tribe's legal right to allow off-reservation uses.[102]

Practical water rights issues that the parties might negotiate include whether state or tribal water law will apply, whether state or tribal personnel will administer headgates, provision of technical information, access to lands and water facilities, management of reservoirs and canals,

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101. *In Re General Adjudication of All Rights to use Water in the Big Horn River System*, 835 P. 2d 273 (Wyo. 1992).

102. See J. Thorson, *Resolving Conflicts Through Intergovernmental Agreements: The Pros and Cons of Negotiated Settlements*, Indian Water, Collected Essays 42 (1986); J.A. Folk-Williams, "The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Water Rights" (1988) 28 Nat. Res. J. 63 at 82-86; Mont. Code Ann. § 85-20-201, codifying the Fort Peck-Montana Compact.

allocation of planning responsibilities, and dispute resolution among individual water users.

F. Taxation

Historically, taxation has been one of the most litigated areas of United States Indian law. Recently, cases have focused on tribal jurisdiction over taxation of non-Indians on reservations. As discussed earlier, few areas of the law are more confusing. One thing that is clear is that states and tribes will continue to seize upon their own interpretations of existing law in order to reach revenues from taxable incidents wherever they are found. Given the ambiguity of the law in the jurisdiction area, and the Supreme Court's own invitation to subject each case to a "particularized inquiry" by the judiciary, it is not surprising that the litigation proliferates. Better results may be possible through negotiations.

Though the usual expectation in litigation is a "winner take all" outcome, another possible outcome in tax cases is that both the state and the tribe may be able to impose their taxes on the same subject.[103] This can cause administrative problems for the merchants who are required to collect the taxes, and it can discourage customers who may take their business elsewhere as a result of the economic impact of dual taxation. The problem of dual taxation can become even greater where taxes on a business become a major factor in the decision whether to do business on the reservation.

A lower court has held that, where state taxes would interfere with tribal economic development and autonomy, tribal taxes are exclusive.[104] However, the Supreme Court has held in one recent decision (which could be limited to its circumstances) that severance taxes can be imposed by

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103. See *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Indian Reservation*, 42 U.S. 463 (1976). Cf. *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163 (1989).

104. *Crow Tribe of Indians* v. *Montana*, 819 F.2d 895 (9th Cir. 1987), aff'd, 484 U.S. 997 (1988); *Hoopa Valley Tribe* v. *Nevins*, 881 F. 2d 657 (9th Cir. 1989).

both the state and the tribe.[105] In this milieu, taxing entities may prefer to develop their own joint plans for collection and administration of taxes rather than subjecting questions to judicial decision.

The state of New Mexico and the Pueblos of Santa Clara and Pojoaque have agreed to coordinate collection of gross receipts taxes.[106] The Pueblos exercise their inherent power to tax and regulate a broad range of non-Indian activities on the reservation that are either consensual or that the tribe believes satisfy the test of *Montana* v. *United States* of threatening or harming "the political integrity, economic security, or health or welfare of the tribe."[107] Before the agreement, the state taxed only sales made by non-Indian firms to non-Indians on the reservations while the Pueblos taxed all sales. This is generally allowed under Supreme Court rulings,[108] but results in inconvenience as well as dual taxation of non-Indian sales. The Pueblos wanted a resolution of the sales tax issue. They first raised potential legal problems with a part of the state tax and also argued that they were not exercising the full extent of tribal taxing powers. The Pueblos then required all the affected businesses on the reservation to obtain a federal Indian trader's license. They demanded that merchants pay tribal taxes but offered to offset any state taxes the merchants paid against the tribal tax if the merchants agreed to protest the state tax and to apply for a refund from the state and assign the refund to the tribe. After being deluged by refund requests, the state agreed to negotiate with the tribes. The parties agreed to exchange confidential taxpayer information and establish a basis for equitable apportionment of taxes collected. This opened the way for a unified tax collection system with revenues to be shared by the state and the Pueblos.

105. In *Cotton Petroleum, supra* note 103, a state oil severance tax was found to be specifically authorized by a federal statute, and state interests were relatively substantial.

106. Gover, Stetson & Williams, P.C., *supra* note 87 at 277-81.

107. *Supra* note 50.

108. E.g., *Moe*, *supra* note 103.

In New York, the state and the Seneca Indian Nation reached a complex agreement on gasoline and cigarette tax collection.[109] After an initial victory in the highest state court, the matter proceeded to the United States Supreme Court.[110] In the course of litigation, the tribe and the state negotiated a settlement under which the state would collect the tribal tax on the reservation for the tribe. In return, the tribe agreed to maintain its tax at nearly the same rate as the state. The state's concern was that by undercutting the state tax, the tribe would put itself in a particularly advantageous position relative to off-reservation businesses. The state's interest, then, was less in raising revenue than in preventing the tribe from gaining too great a competitive advantage over non-Indian merchants located off the reservation. The state conceded that it could not impose its taxes on the reservation because they were effectively preempted by tribal taxation. Still, the tribe agreed to minimize "marketing its tax advantage" but gained an agreement that the tribe would receive the benefit of any settlement (from the tribal standpoint) that the state might negotiate with another tribe. The parties were to be subject to binding arbitration of any disputes that arose under the agreement. The entire deal, however, fell apart when the New York legislature failed to approve it because of objections raised by businesses on the reservation.

G. Land Claims

Land claims present an appropriate context for resolving inevitable conflicts beyond simply compensation. A land claims settlement reached by the Puyallup Tribe and the United States included resolution of tough jurisdictional issues.[111] Vestiges of the tribe's ancestral lands were located within the industrial area of the city of Tacoma and extended to submerged lands in Puget Sound. Complex and lengthy negotiations dealt

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109. Gover, Stetson & Williams, P.C. *supra* note 87 at 290-93.

110. *Milhelm Attea & Bros., Inc.* v. *Dep't. of Taxation and Finance of State of New York*, 164 A.D. 2d 300, 564 N.Y.S. 2d. 491 (1990), cert. granted and judgment vacated subnom. *Dep't. of Taxation and Finance of New York* v. *Milhelm Attea & Bros., Inc.*, 112 S. Ct. 926 (1992).

111. *Washington Indian (Puyallup) Land Claims Settlement Act*, Public Law 101-41, 103 Stat. 83 (June 21, 1989), codified at 25 U.S.C. § 1973.

with fishery protection, use of submerged lands, as well as jurisdiction over these lands. The tribe got clear title to certain lands, jurisdiction over trust property, provision of social services, and $46 million in cash. The state of Washington retained jurisdiction over non-trust land and extinguished certain other potential claims.[112]

V. Strategies for Successful Negotiation of Intergovernmental Agreements

The conditions for negotiation must be right.[113] Above all, Indian

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112. Gover, Stetson & Williams, P.C., *supra* note 87 at 293-96.

113. There are numerous sources of advice available to potential negotiators of intergovernmental agreements. See e.g., S.B. Goldberg, *Dispute Resolution: Negotiations, Mediation, and Other Processes* (1992); E.F. Lynch, *Negotiation and Settlement* (Rochester: Lawyers Co-operative, 1992); L.L. Teply, *Legal Negotiation in a Nutshell* (St. Paul: West Publishing, 1992). The applicability and utility of these sources vary from case to case, though there are some especially apt observations and suggestions concerning interjurisdictional negotiations. Conditions that tend to lead to a successful conclusion of a negotiated intergovernmental agreement with Indian tribes can be summarized:

1. A mutual sense of urgency
2. An opportunity for mutual gain
3. Uncertain results if the outcome must be litigated
4. Outside force of leadership or a personality who will keep the parties talking

See Thorson, *supra* note 102 at 42-45. Potential obstacles to the success of such negotiations have been identified as:

1. Problems of communication that may be complicated by cultural differences in perception of nonverbal signals;
2. Problems of emotional baggage and residual distrust as to genuine motives of the parties;
3. Interposing strategic bargaining and adversarial winner-takes-all attitudes into the dispute;
4. Existence of a "settlement gap" based on differing good-faith perceptions of facts, the law, technical issues, or possible outcomes of litigation;
5. Circumstances that change during the bargaining process.

See Proceedings, Tribal State Relations: Hope for the Future, Symposium sponsored by the University of South Dakota School of Law (1990).

governments and their non-Indian counterparts must be motivated to solve a problem. Parties can influence conditions that motivate their counterparts. In the United States, negotiations have frequently grown out of litigation or the threat of it. Often the prospect of a long and expensive court battle is enough to bring the parties to the negotiating table. An issue can be precipitated by assertions of tribal jurisdiction in conflict with neighbouring governments, or of state jurisdiction that impacts heavily on a tribe or its individual members.

Even without a ripe conflict, governments may be sufficiently uncomfortable with a confusing regulatory, taxation, or law enforcement regime to seek a negotiated resolution. States, like tribes, are troubled by the unpredictability of Indian law. Although tribes have fared badly in the courts for the last few years, they generally prevailed in cases during the 1960s and 1970s. More than any other factor, the bold and effective assertions of sovereign tribal authority during the last ten or fifteen years built on an episode of supportive court decisions have convinced non-Indian governments to negotiate with tribes as peers.

The recent interest in intergovernmental agreements in the United States, however, is owing to more than the legal and geographic complexities of Indian jurisdiction. There has been a generally heightened level of attention to Native American issues. The National Conference of State Legislatures attributes this to four factors. First, the diminishing judicial protection of Indian interests evidenced by recent decisions of the U.S. Supreme Court has forced the tribes to focus their energies on influencing the political process. Second, the number of Native Americans holding public office is increasing. (There are at least 30 Indian legislators in 13 states.) Third, as discussed earlier, the federal government has explicitly empowered the tribes to receive certain delegations of authority. Fourth, "a growing sense is emerging among enlightened policy-makers that Indian tribes deserve respect as legitimate partners in the governance of America."[114]

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[114] *Supra* note 1.

In Canada, intergovernmental negotiation could be triggered by judicial actions, federal and provincial legislation such as delegations of responsibility to First Nations, land claims settlements, and ad hoc attempts to solve particular problems. As discussed earlier, recent court decisions tend to favour aboriginal rights and First Nations' activism is growing. Committed aboriginal leaders and non-Indian political figures can play vitally important roles in focusing issues and facilitating negotiations that reach practical solutions. Public awareness and information is also an essential component.

First Nations jointly or individually may decide to pursue a strategy of vindicating their aboriginal sovereignty. As they do, negotiation may appropriately emerge as a powerful mechanism.[115] It may be as attractive to non-Native neighbours as it is to the First Nations themselves because of the relative efficiency and certainty that agreed solutions can produce.

Negotiation is not simple or easy, though it can be effective. As in litigation, there are especially serious problems of representation, funding, and enforcement that should be considered. The first two problems must be considered in advance of negotiations. Enforcement is one of the most important issues to be addressed throughout the process.

The parties need to know who represents whom and to trust their own representatives (leaders, attorneys, officials, etc.). In particular, tribes should have their own competent, independent counsel. Although the U.S. government has a fiduciary relationship as "trustee" for Indian tribes and resources, experience has shown that the credibility of an agreement may depend on having counsel separate from the federal attorneys. A resolution favourable to tribes may be unfavourable to the United States because of cost conflict with a federal project or program, or because of

115. A development which Ian Cowie has ably documented and illustrated with a flowchart. See *supra* note 12 at 19.

politics.[116] Independent representation involves the expense of hiring lawyers. It will be fruitless, however, to attempt negotiation of major agreements implementing tribal sovereignty without professional counsel.

Parties should not underestimate the importance of having funds available to conduct and later implement a settlement. Beyond paying for attorneys, there are costs of travel and perhaps hiring a facilitator. Research and expert help may be necessary. Negotiation is usually cheaper than litigation, but it is not without substantial costs.

The actual agreement coming out of a settlement may require considerable funding. Administrative costs and other expenses may be necessary to carry out the terms of the agreement. Virtually all of the one dozen water rights settlements successfully negotiated with Indian tribes in the United States have had an ingredient of substantial federal funding. Monies were made available for construction of water facilities, purchase of water rights administration, and for general economic development needs of Indian tribes.

Because most agreements are sought in order to avoid or end litigation or other contentious confrontations, enforcement issues should be anticipated. In negotiated settlements of litigation like water rights claims, a common way of resolving disputes is for the court to approve the settlement and retain continuing jurisdiction over matters that arise later. Disputes about the terms of an agreement unrelated to pending litigation could lead to a lawsuit and proceed to court just as a contract matter would. Treating the agreement as a contract may be inappropriate, however. First, the parties are themselves sovereigns and the adjudication would presumably be in the courts of one or the other. Second, the rules of construction and the approach taken by a court to an ordinary commercial contract may be different from those that ought to apply to an interjurisdictional arrangement.

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116. Indeed, the United States government has often found itself in a conflict-of-interest situation with Indian tribes. See, e.g., Chambers, "Judicial Enforcement of the Federal Trust Responsibility to Indians" (1975) 27 Stan. L. Rev. 1213.

One method of dealing with enforcement and dispute resolution is to specify in the agreement that such issues will be subject to arbitration or mediation. Binding arbitration was agreed upon by the state of New York and the Seneca Nation in the example discussed earlier. That agreement, however, was never implemented. The use of professional mediators has been rare in formulating Indian-tribal interjurisdictional arrangements and so it is not surprising that they almost never refer enforcement disputes to mediation. The nuances of different dispute resolution techniques are not well understood by governments at all levels.[117] Parties should consider the utility of incorporating these in alternative dispute resolution mechanisms.

To the extent that agreements anticipate and address contingencies, they can avoid most of the need for enforcement. Thus, a goal of negotiation should be to reach a self-executing agreement that resolves predictable problems in advance. Of course it is difficult to do this where new activities, such as taxation, control of environmental pollution, or adjudication of child custody cases will be undertaken by the tribe. The parties may want to consider entering into an interim agreement. After an initial term, during which issues can be identified, the parties can negotiate a modified final agreement based on a review of the original assumptions, facts, and any changed conditions.

Enduring agreements most often result from negotiations based on free and open communications between parties who treat one another as equals. Even "unsuccessful" negotiations may be necessary steps toward creating an atmosphere of respect and free exchange of ideas that becomes the basis for later success in reaching an agreement. The first negotiation may, in time, open the door to other accords. This argues for a strategy that starts with relatively manageable problems and conflicts and escalates later to the more difficult ones as the parties become more confident, competent, and mutually successful in working together as colleagues. Agreeing on an agenda and a ranking of issues to be negotiated is an important first step.

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117. *See* Folk-Williams, *supra* note 102 at 93-95.

VI. Conclusion

The great potential for state-tribal interjurisdictional agreements has not been fully realized in the United States. The number of attempts is large while the number of reported agreements relatively low. Yet, a statistical assessment is not entirely indicative of success. More than ever, state and tribal governments are resorting to negotiation and cooperative agreements. Given the historical bitterness of conflict between states and tribes, not all of which has been confined to the courtroom, it is not surprising that some negotiations and attempts at reaching intergovernmental agreements do not succeed. Perhaps it is more remarkable that so many have been successful.

Canadians may be able to glean lessons from the United States experience. Whether or not Canada moves toward a constitutional declaration of aboriginal sovereignty, interjurisdictional agreements will be useful mechanisms as the First Nations assert their sovereignty more emphatically in the courts, in Parliament, with provinces, and in land claims settlements. Of course if constitutional status is ultimately given to sovereignty of tribes, it will require definition and that can come through negotiation.

In absence of a constitutional sovereignty declaration, Canadian bands may be reluctant to anticipate in negotiation if they must operate under by-laws pursuant to the Indian Act that characterize their status as tantamount to a rural municipality.[118] They will be negotiating with provinces and the national government over issues far more momentous than the concerns of a municipality. Without the constitutional declaration of sovereignty, their dealings could remain subject to the determination by the Minister of Indian Affairs that they have reached a sufficient stage of development to deal with certain matters. Presumably, however, these questions are themselves within the competence of the parties to negotiate and resolve.

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[118] Bartlett, *supra* note 2 at 23.

The Minister may be able to delegate some of his authority to a band.[119]

It is possible that Section 35(1) could be construed to recognize implicitly traditional aboriginal governments and governing powers.[120] This avoids the unseemly and possibly distasteful aspects of other governments "delegating" authority to bands as if they did not already have authority. Though suspended by the *Indian Act*, aboriginal governments arguably have been only inchoate and can be revitalized simply by their beginning to exercise the aboriginal powers. In any event, the existence of theoretical questions need not impede progress in actualizing self-government.

The absence of formal constitutional ratification of the sovereign status of First Nations should not be an obstacle to negotiation of agreements with and by them. An essential purpose of the agreements is, after all, to help define sovereignty. In the United States we are still struggling with the meaning of inherent tribal sovereignty, though it was proclaimed by the Supreme Court 160 years ago. Thus, the United States' version of tribal sovereignty, no matter how venerable and rooted in judicial precedent, does not necessarily create a foundation superior to the opportunity Canada has today for confronting issues of aboriginal self-government through negotiation.

A variety of conditions favour a movement toward intergovernmental agreements with First Nations. Unresolved land claims create political leverage and attract considerable popular attention and support. Canadian courts have shown a recent willingness to entertain and adjudge Indian

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119. Certain authority, e.g. taxation of reserve land interests, can be authorized to bands that have "reached an advanced stage of development." See the *Indian Act* R.S.C. 1970, c. I-6, s. 83(1). Apparently the provision is rarely used. See Bartlett *supra* note 8 at 600.

120. It has been argued that First Nations still retain their aboriginal sovereignty. See House of Commons, *supra* note 9. A bill to broaden the Minister's authority to confer greater authority on bands through negotiations failed. See R. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990) at 162.

claims fairly. Most importantly, the bands have actively participated in negotiations leading to the proposal for constitutional entrenchment of their sovereignty. The bands have informed leaders, available expertise, and the attention of national and provincial politicians as well as the public.

With the shelving of constitutional reform, First Nations are likely to redirect their energies and adopt new strategies to vindicate their sovereignty. Intergovernmental negotiation can play a central role in those strategies. Likewise, Canadian national and provincial governments can pursue negotiated agreements as a source of predictability, efficiency, and equity.