SOUTH DAKOTA LAW REVIEW

INDIAN LAW SYMPOSIUM

VOLUME 36 ISSUE 2

TRIBAL-STATE DISPUTE RESOLUTION: RECENT ATTEMPTS

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Conflicts between states and Indian tribes have existed for as long as states have existed, and such conflicts are often bitter and prolonged. Progressing from bloody conflicts on the battlefields to equally important battles before the United States Supreme Court, dispute resolution between states and tribes has traditionally been adversarial, discouraging co-operation between the governments and deepening their mutual dislike and mistrust. As a result, tribal and state governments not only have dissipated their resources in battle, but also, ironically, have missed numerous opportunities to combine their forces in pursuit of their many common ambitions. Time and money are lost, worthy and attainable goals are unmet, and Indian and non-Indian citizens suffer the inefficiencies and ineffectiveness of the adversarial relationship.

The tribes fought on the battlefields until their ability to make war was decimated, and then made the courts their battlefield, where they met with a greater degree of success. As the United States Supreme Court grows increasingly willing to revisit its prior Indian law doctrine, thereby creating even greater uncertainty than existed previously in this complex area of law, both tribes and states have shown increased interest in moving their battlefield—this time to the bargaining table. The subjects of negotiation range from the familiar land use, water rights, and hunting and fishing rights issues to more contemporary matters involving taxation and environmental regulation. Given the critical and politically sensitive nature of many of the negotiations, as well as the centuries of antagonism between the tribal and state governments, it is unreasonable to expect negotiations always to be fruitful. The wonder, to paraphrase a well-known adage, is that they occur at all.

The purpose of this paper is to describe the parameters of several recent tribal-state negotiations, some successful, some not, and some still unresolved. While the issues and ultimate results may have little in common, they exemplify the emerging trend that sees the tribes and states reluctantly but increasingly coming to the table to work jointly on more efficient and effective resolutions of their disputes.

I. GROSS RECEIPTS TAX NEGOTIATIONS BETWEEN NEW MEXICO AND THE PUEBLOS OF POJOAQUE AND SANTA CLARA

The United States Supreme Court has characterized an Indian tribe's power to tax as an "essential attribute of Indian sovereignty" necessary for

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self-government and territorial management.[1] Clearly an Indian tribe may tax the activities and property of its members; its power to tax non-Indians on the reservations, however, is open to dispute in many respects. The Supreme Court has made clear that non-Indians are subject to tribal power when their activities occur on Indian land. In *Montana v. United States*,[2] the United States Supreme Court set forth principles that guide courts in determining the extent of tribal civil regulatory and tax authority over non-Indians within reservation boundaries. Although the *Montana* ruling limited the scope of tribal jurisdiction over non-Indians, the Court stated clearly that tribes do retain inherent sovereign power to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements."[3] Additionally, the Court held that tribes also may retain inherent civil jurisdiction over non-Indians on fee lands within the reservation when the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[4]

Clearly then, the tribes may tax non-Indians on reservations in a broad range of circumstances. The ability to reach this community often is critical to the viability of tribal tax programs, since poverty-stricken Indian populations are not a viable tax base. A critical practical limitation on tribal tax powers, however, is the possibility that a state is taxing the same persons, property, or activities that a tribe seeks to tax. The United States Supreme Court has repeatedly struck down state attempts to tax Indians on their reservations. Finally, in the 1987 decision in *California v. Cabazon Band of Mission Indians*,[5] the Court adopted a *per se* rule exempting tribes and tribal members from state taxes where the property or activity being taxed was located or occurred on reservations, absent express congressional consent.

On the other hand, no *per se* rule prohibits state taxation of non-Indians in Indian country. While many courts appear to presume that states may tax these non-Indians, a state may not tax activities pre-empted by federal law. The Indian Trader Statutes,[6] for example, apply to retail transactions on reservations and may be the basis for an argument that pervasive federal regulation prohibits state taxation of all retail sales on a reservation.[7]

The Pueblo of Pojoaque and the Pueblo of Santa Clara are federally recognized tribes[8] in New Mexico. Both imposed gross receipts taxes[9] on all sales

1. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).
2. 450 U.S. 544 (1981).
3. *Id.* at 565-66.
4. *Id.*
5. 480 U.S. 202 (1987).
6. 25 U.S.C. §§ 261-264 (1988).
7. *See, e.g.*, Central Machinery Co. v. Arizona State Tax Comm., 448 U.S. 160 (1980); Warren Trading Post Co. v. Arizona Tax Comm., 380 U.S. 685 (1965).
8. *See* 53 Fed. Reg. 52,831 (1988).
9. Pueblo of Pojoaque Tax Ordinance (effective Sept. 28, 1988); Pueblo of Santa Clara Tax Ordinance (effective Jan. 3, 1987).

occurring within the exterior boundaries of their respective reservations. Both have non-Indian lessees of tribal lands and non-Indian owners of fee lands within their boundaries. The State of New Mexico also imposes a gross receipts tax on all sales occurring in New Mexico. New Mexico does not tax reservation sales to Indians but does tax all sales to non-Indians. As a result, the non-Indian businesses on fee land and leased tribal land within the reservations are subject to double taxation. Obviously, retail merchants having a fixed additional business cost of four percent to six percent find it difficult to compete with their off-reservation counterparts. Thus, as long as the double tax burden exists, the Pueblos face a difficult choice of foregoing needed tax revenues or possibly forcing retail merchants to relocate from the reservation.

The double tax burden, however, also creates pressure on New Mexico, as only non-Indians are subject to the dual tax burden. Those non-Indians have a limited ability to apply pressure to the leadership of the Pueblos since they cannot vote in Pueblo elections, but they do have the ability to pressure state politicians. Moreover, because they work and, sometimes, live on the reservations, they also frequently are aware of the paucity of state services to tribal communities. The dual tax burden threatening the viability of their enterprises encouraged them to pressure state officials to take action to reduce that tax burden.

Although litigation was an obvious means by which to decide the unresolved issues regarding dual jurisdiction, the Supreme Court decision in *Cotton Petroleum v. State of New Mexico*[10] discouraged such litigation. Moreover, litigation is expensive and unsure, and usually results in hardened positions and the application of broad and general rules of law that do not take into account the particular circumstances of the parties. Negotiation, on the other hand, provides the advantage of flexibility and allows the parties to develop creative solutions to particular problems. Pojoaque and Santa Clara therefore concluded that negotiating a tax agreement with New Mexico was a preferable and viable means of achieving their tribal jurisdictional objectives.

The Pueblos had two critical sources of bargaining power. First, they possessed powers of taxation beyond those that had been exercised to date. Second, New Mexico was probably taxing transactions beyond its legitimate authority. The Pueblos wished to apply this leverage effectively to increase their tax revenues without creating huge tax burdens that would discourage needed economic development on the reservations. With this in mind, the two Pueblos developed a strategy intended to create the strongest argument in support of their tribal power. First, they structured their tax programs to assure that non-Indians paying the tax would receive certain types of governmental services from the Pueblo on the same basis as Indian taxpayers. Second, since *Montana* allows tribal taxation of non-Indians who enter consensual relationships with the tribe or its members through commercial activities, the two

10. 490 U.S. 163 (1989). The Court held in *Cotton* that federal law did not pre-empt the state's imposition of severance taxes on the same on-reservation oil and gas production by non-Indian lessees that was subject to tribal severance tax.

Pueblos identified the extent of their dealings with non-Indian businesses on their reservations.[11]

The Pueblos then faced the problem of implementing their tax laws and laying claim to the tax revenues already flowing to the state without thereby creating an oppressive tax burden on the merchant-taxpayers. The Pueblos devised a law whereby credits against tribal taxes would be afforded to taxpayers to the extent that they had paid New Mexico's taxes, provided that the taxpayers complied with several conditions. The taxpayers were required to apply for and pursue a refund from New Mexico for gross receipts taxes paid to the state in an amount equal to the gross receipts tax due to the Pueblo for the same period or periods, and to assign the right to such refunds to the Pueblos. The taxpayers were also required to apply to the Bureau of Indian Affairs (BIA) for a license to sell on the reservation under the Indian Trader Statutes.[12] Finally, the taxpayers were required to comply with all requests for documentation of their compliance. This scheme allowed the tribes to meet two important objectives: (1) they avoided a double tax on reservation vendors; and (2) they preserved their claim to the taxes collected by the state.

Both Pueblos met individually and publicly with their taxpayers to explain their tax strategies and to enlist the taxpayers' support. Negotiations with the state proceeded, spurred by the deluge of applications for refunds filed by numerous agitated taxpayers attempting to comply with the tribal conditions for receiving a tax credit. The Pueblos and New Mexico first discussed their mutual needs for confidentiality and for the exchange of taxpayer information. An agreement on these issues was signed, and the gross receipts tax information exchange began on all businesses located within the exterior boundaries of the Pueblos.

Once the final information is collected and analyzed, the tribes and the state will address how to minimize the burden caused by two different taxing schemes. Because the Pueblos are small communities with limited resources available for collecting, monitoring, and enforcing their tax laws, they are interested in negotiating an arrangement whereby New Mexico would administer a unified tax program (combining tribal, state, and local taxes). In consideration for these collections services, the Pueblos indicated a willingness

11. The Pueblos also sought information concerning: (1) the amount of Pueblo land under lease to non-Indians and the activities occurring on those lands; (2) the degree to which tribally-owned and tribal member-owned retail enterprises do business with non-Indians; and (3) the number and amounts of retail transactions with non-Indian sellers that involve the Pueblo and its members.

12. 25 U.S.C. §§ 261-264; *see also Warren Trading Post Co.*, 380 U.S. 685; *Central Machinery Co.*, 448 U.S. 160. To strengthen their claim that the state taxes were pre-empted by the Indian trader statutes, the Pueblos sought to require all vendors to obtain such licenses. The primary problem was that the taxpayers were worried about the effect of getting an Indian trader license since many of the regulations were outdated and unnecessary. In an attempt to resolve this concern, the two tribes discussed with the BIA staff the possibility of contracting under the Self-Determination Act to administer the Indian trader laws on the Reservation. The Governors of the Pueblos sent letters to the BIA asking that the self-determination contract for real property services be amended to include administration of the Indian trader statutes. If the Pueblos were administering the Indian trader laws, they could grant waivers of the unnecessary regulations and would be able to assure the taxpayers that their businesses would not be affected significantly by obtaining Indian trader licenses. The request to contract the Indian trader program has been referred to BIA headquarters for review.

to accept reduced tax revenue. Both the Pueblos and New Mexico representatives agree that, if this proposal is to work, the state and tribal tax laws must be substantially similar. After lengthy discussions and tax code reviews, the tribes prepared regulations that would render their tax laws substantially identical to New Mexico's for all pertinent purposes.

The Pueblos are currently awaiting the requested tax information and the state's comments on the proposed regulations. The crucial negotiations will soon begin concerning the division of tax revenues and the administration of the state-tribal tax programs. The final agreement, if it is achieved, will require approval by the two Tribal Councils and the New Mexico Department of Taxation and Revenue. New Mexico has authorized agreements between tribal and state agencies in its Joint Powers Agreement Act.[13] Although the Department clearly has the authority, it is unlikely to enter into an agreement without the blessing of New Mexico's Governor and Attorney General. The results of the recent state elections lead the tribes to believe that the new administration is likely to approve the ultimate agreement.

The negotiations in this example are driven not only by political and legal considerations, but also by the need for the development of sound policy in an untidy area of law. Taxation by both sovereigns does neither any good when the effect is to hamstring once-thriving businesses and discourage the formation of new businesses in economically-depressed areas. Thus, promoting a broad commercial tax base is as clearly in the state's interest as it is in the Pueblos' interests. Given the ambiguity in current law regarding the legality of dual taxation of reservation retailers, both the Pueblos and the state have concluded that the opportunity to work together is far more attractive than the expense and uncertainty of litigation. The factual circumstances are hardly unique and undoubtedly are repeated in many states and reservations. We expect, therefore, that negotiated settlements of dual taxation issues will become more common in the next few years.

II. NEGOTIATIONS BETWEEN THE CAMPO BAND OF MISSION INDIANS AND THE STATE OF CALIFORNIA ON ENVIRONMENTAL REGULATION

The Campo Band of Mission Indians (Campo or the Band) is a federally recognized Indian tribe[14] located east of San Diego. Several years ago, the Campo General Council considered a variety of economic development schemes and determined that a solid waste project consisting of a sanitary landfill, recycling facility, and composting facility was ideally suited to their needs and to the geography of the reservation. Campo sought financial, legal, and technical advice in developing the solid waste project. The Band also set out to develop its own environmental regulatory agency, and to develop the laws and regulations necessary to insure that the solid waste project would not

13. N.M. STAT. ANN. §§ 11-1-1—7 (1983 & Supp. 1988).
14. *See* 53 Fed. Reg. 52,830 (1988).

adversely affect the environment. In order to establish the most effective regulatory system possible, the Band established the Campo Environmental Protection Agency (CEPA) and authorized it to enter into agreements with public and private agencies to assist in the enforcement of the Band's solid waste laws. CEPA has exercised that authority by retaining private legal and scientific consultants who are experts on environmental regulation.

The federal courts have consistently held that the Resource Conservation and Recovery Act (RCRA), the federal law governing solid and hazardous waste facilities, applies to Indian lands and may be enforced against Indian tribes.[15] In *Blue Legs v. United States Environmental Protection Agency*,[16] the Oglala Sioux Tribe operated several solid waste disposal sites on tribal lands within the Pine Ridge Reservation. Each of the sites was operated as an "open dump," despite the prohibition of such dumps in RCRA.[17] The court noted that the citizen suit provision could be invoked for proceedings against "persons engaged in the act of open dumping."[18] The term "person" is defined by RCRA as including a municipality,[19] which in turn is defined to include "an Indian tribe."[20] The court concluded that these provisions and definitions indicate that Congress intended to include Indian tribes as regulated entities under RCRA and that federal jurisdiction existed to enforce the prohibition of open dumps against the Tribe.[21]

An analysis of the definitions contained in the other major federal environmental laws indicates a high probability that they, too, would be held to apply to tribes. The enforcement provisions of the Clean Water Act[22] apply to "persons,"[23] defined to include "municipalities,"[24] which is in turn defined to include an Indian tribe.[25] The Safe Drinking Water Act[26] and the national primary drinking water regulations apply to all public water systems.[27] A "supplier of water" is "any person who owns or operates a public water system;"[28] "person" is defined to include a "municipality,"[29] and "municipality"

15. Washington, Dep't of Ecology v. United States Envtl. Protection Agency, 752 F.2d 1465 (9th Cir. 1985); Blue Legs v. United States Envtl. Protection Agency, 668 F. Supp. 1329 (D.S.D. 1987), *aff'd*, Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989), *later proceeding*, Blue Legs v. United States Envtl. Protection Agency, 732 F. Supp. 81 (D.S.D. 1990).

16. 668 F. Supp. 1329 (D.S.D. 1987).

17. *See* 42 U.S.C. § 6945 (1988).

18. The citizens suit provision of RCRA, at 42 U.S.C. § 6972, combined with the open dumping prohibition of RCRA, creates a federal cause of action that allows citizens and states to seek judicial relief from federal courts. *Blue Legs*, 668 F. Supp. at 1335-36.

19. 42 U.S.C. § 6903(15) (1988).

20. 42 U.S.C. § 6903(13).

21. *Blue Legs*, 668 F. Supp. at 1337. The court also relied heavily on the decision in *Washington, Dep't of Ecology v. United States Envtl. Protection Agency*, which established that Indian tribes are regulated entities under RCRA. The court reasoned that as such, tribes should also be subject to the citizen suit provision of RCRA. *Id.* (citing *Washington, Dep't of Ecology*, 752 F.2d at 1465, 1472).

22. Clean Water Act, 33 U.S.C. §§ 1251-1376 (1988) (previously known as the Federal Water Pollution Control Act).

23. *See, e.g.*, 33 U.S.C. § 1311(a).

24. 33 U.S.C. § 1362(5).

25. 33 U.S.C. § 1362(4).

26. Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j (1988).

27. *See generally* 42 U.S.C. § 300g.

28. 42 U.S.C. § 300f(5).

is defined to include an "Indian tribe."[30] The reasoning of the courts in *Blue Legs* and *Washington, Department of Ecology* yields the conclusion that the Clean Water Act and the Safe Drinking Water Act apply to Indian tribes. By way of contrast, the enforcement provisions of the Clean Air Act[31] apply to "owners," "operators," and "persons,"[32] and none of these terms specifically include Indian tribes.[33] However, the Clean Air Act is a law to which "the congressional purpose of the statutory scheme clearly requires a national or uniform application."[34] Thus, the Act likely would be held to apply to Indian tribes.

The likely result of litigation concerning the applicability of federal environmental laws to Indians and tribes is that the laws will be held to apply. Moreover, virtually no question exists that Congress can expressly require the application of such laws to Indians and Indian lands.[35] Given that federal environmental laws either do apply to Indian lands, or can be made to apply, the issue becomes one of determining which government—federal, tribal or state—should enforce those laws within Indian country.

Primary enforcement responsibility may be delegated to states under most federal environmental regulatory statutes. In developing these statutory schemes, Congress failed to consider the regulatory authority of tribal governments and the limited nature of state authority on Indian reservations. Before assuming primary enforcement responsibility for federal environmental laws on reservations, a state must demonstrate to the United States Environmental Protection Agency's (EPA) satisfaction that the state has jurisdiction. Under principles of preemption, however, state regulatory laws cannot be applied to Indian reservations if their application will interfere with the achievement of the policy goals underlying federal laws relating to Indians.

The courts thus far have prohibited the application of state environmental laws to Indian lands. *Washington, Department of Ecology*[36] addresses the issue of whether a federal environmental statute conveys authority to a state over tribal lands. Section 3006 of RCRA[37] authorizes states to establish hazardous waste management programs "in lieu of" the federal program administered by the EPA that otherwise would apply. The State of Washington submitted an application to the EPA to assume primacy for RCRA, including enforcement on Indian lands within the state. The EPA approved Washington's application "except as to Indian lands,"[38] for which lands the EPA re-

29. 42 U.S.C. § 300f(12).
30. 42 U.S.C. § 300f(10).
31. Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988).
32. *See, e.g.*, 42 U.S.C. §§ 7411(e), 7412(c).
33. *See* 42 U.S.C. §§ 7411(a), 7412(a), 7602(e).
34. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 283 (1982 ed.).
35. *See* Lone Wolf v. Hitchcock, 187 U.S. 533 (1903). Congress' plenary power to legislate with respect to Indians and Indian tribes is subject, however, to guardianship and constitutional limits. United States v. Sioux Nation, 448 U.S. 371, 415 (1980).
36. 752 F.2d 1465.
37. Resource Conservation and Recovery Act, 42 U.S.C. § 6926 (1988).
38. *See* 48 Fed. Reg. 34,954 (1983).

tained jurisdiction to operate the program.[39] Washington petitioned the Ninth Circuit Court of Appeals for review of the decision to exclude Indian lands from the state program. Subsequently, the Ninth Circuit held that the Regional Administrator of the EPA properly refused to approve the state program as applied to Indians on Indian lands.[40]

The court noted that "[s]tates are generally precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it,"[41] and that federal retention of authority over Indian lands must be consistent with the United State's trust responsibility to tribes.[42] The court stated:

> The federal government has a policy of encouraging tribal self-government in environmental matters. That policy has been reflected in several environmental statutes that give Indian tribes a measure of control over policy making or program administration or both. . . . The policies and practices of EPA also reflect the federal commitment to tribal self-regulation in environmental matters.[43]

In declining to subordinate tribes to state authority, the court further stated:

> [T]he tribal interest in managing the reservation environment and the federal policy of encouraging tribes to assume or at least share in management responsibility are controlling. We cannot say that RCRA clearly evinces a Congressional purpose to revise federal Indian policy or diminish the independence of Indian tribes . . . .[44]

As noted above, the Band has set out to establish its own environmental regulatory system to complement the federal laws governing the project. Each component of the project will be subject to two independent reviews of the environmental impacts arising from the project. First, the Band has agreed that BIA approval of the leases and subleases are major federal actions requiring the preparation of an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act.[45] The BIA will serve as the lead agency in the EIS process. Second, prior to construction of each component of the project, the operator must obtain a permit to construct and operate the facility from CEPA.

The project will be regulated by CEPA under tribal law. The Band enacted the Campo Solid Waste Management Code of 1990, which established a regulatory system to control the activities at the project. CEPA has developed comprehensive solid waste regulations establishing detailed standards for the

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39. 48 Fed. Reg. at 34,957.

40. However, the *Washington* court declined to address the issue of whether the state could apply it to non-Indians in Indian country. The court noted that the state program presented by Washington proposed that it would apply to the activities of all persons, Indians and non-Indians, on Indian lands. Because the program did not propose to reach only non-Indians in Indian country, the court was limited to review only the program Washington presented. *Washington, Dep't of Ecology*, 752 F.2d at 1468.

41. *Id.* at 1469-70.

42. *Id.* at 1470.

43. *Id.* at 1471 (citations omitted).

44. *Id.* at 1472 (citations omitted).

45. 42 U.S.C. §§ 4321-4370a (1988).

operation of the facilities. CEPA regulations are stricter than the regulations of the EPA concerning such facilities, including the regulations proposed by the EPA in August, 1988, for the siting and operation of sanitary landfills. Further, the standards established in the regulations are at least as strict as the California standards that would apply if the facilities were located off the reservation.

Because of the comprehensive federal and tribal environmental review and regulatory systems, the Band asserts that state law is pre-empted and state agencies have no jurisdiction over the development or operation of the project. This has inevitably resulted in fear on the part of local "NIMBY" (Not In My Back Yard) groups who enlisted the support of local state legislators to fight the project as unsafe.[46] However, in an effort to minimize these fears and to maximize its limited technical resources, CEPA has been negotiating with state and local agencies to allow their officials access to the project site and to all information relating to the environmental integrity of the project.

The Campo Band offered to the relevant California environmental agencies an agreement under which the state agencies would have access to all the information that they would otherwise have if the project were located off the Campo Reservation. Under the proposed agreement, CEPA would gain access to the expertise of the state's staff, and neither party would concede the jurisdiction issue.

The proposed agreement encompasses the regulation of solid waste facilities on the Campo Reservation, and the parties are each empowered to enforce their respective laws, rules, and regulations against persons within their respective jurisdictions. Nothing in the proposed agreement would change any existing governmental jurisdiction of CEPA, the state agencies, or the United States or any of its agencies.

Under the agreement, the California agencies that would have jurisdiction over the project if it were located off the Reservation would agree to perform numerous services for CEPA. The state agencies would assist CEPA in the permit application process; permit preparation; facility inspections and records maintenance; complaints and investigations; enforcement plan preparation; enforcement of solid waste collection; transportation and storage standards; and compliance hearings. CEPA would pay the state agencies for these services as well as the expenses of necessary equipment, materials, and travel for staff of the state agencies.

A cooperative agreement between the Band and the State would have many significant benefits, including the avoidance of an expensive and undoubtedly contentious contest over jurisdiction. Moreover, the tribe and state

46. Legislation was introduced in the California legislature in 1990 and again in 1991 to make it illegal for anyone to deliver waste to a tribal landfill unless the landfill had been permitted by California. Despite the fact that the legislature's attorneys determined that such legislation was pre-empted by federal law, the bill was passed in August, 1990. Because of its unconstitutional reach, however, the Governor vetoed the bill shortly thereafter. The 1991 version is awaiting action in the state legislature.

are fitting partners in environmental regulation. Pollution does not respect political boundaries, and neither tribes nor states can regulate environmental quality on a regional basis without the cooperation of the other. Rather than engage in the winner-take-all game of litigation, the Band proposed a cooperative arrangement that allows both parties to protect their legitimate interests.

Neither a tribe nor a state is going to concede readily that it lacks jurisdiction or that the other has jurisdiction; it makes little sense to negotiate on an issue upon which an agreement will never be reached. Further, it is extremely doubtful that either tribes or states have the power to confer jurisdiction over Indian country on the other. No one doubts, however, that a person conducting activities on a reservation requiring environmental regulation is subject to the jurisdiction of one or the other. It should not matter whether a joint tribal-state regulatory program is exercising state power or tribal power at any given moment.[47]

Another benefit of state-tribal agreements is that they acknowledge that the states have something the tribes do not: the resources, experience, and expertise acquired in regulating environmental quality to date. Through an agreement, a tribe might simply retain a state environmental agency to serve as its "consultant" in technical matters arising in the enforcement of tribal environmental laws. Given the limited resources of most tribes, the ability to call upon state resources and expertise would be a valuable asset to any tribal regulatory program.

A third advantage to state-tribal agreements is that they acknowledge that the tribes have something that the states do not: jurisdiction over Indian lands. As noted above, an environmental regulatory program cannot be effective if it cannot be applied on a regional basis. A state with an exemplary program could fail in its efforts to protect the environment if it cannot control pollution originating on Indian lands which affects lands outside the reservations. Indeed, the states should be anxious to see strong and effective tribal regulatory programs develop, since such programs work to guarantee that state environmental quality goals are met on a regional basis.

III. WATER RIGHTS AND TAX NEGOTIATIONS BETWEEN WYOMING AND THE WIND RIVER TRIBES

In 1988, the Wyoming Supreme Court affirmed the award to the Shoshone and Arapaho Tribes (Wind River Tribes) of approximately half of the water on the Wind River Reservation, recognizing the Tribes' water right as having the earliest priority date in the state.[48] Under principles of water rights

47. The Shoshone-Bannock Tribes of the Fort Hall Reservation and the State of Idaho recently entered into an agreement concerning air quality matters under which the tribes enforce air quality standards on Indian lands, and the state enforces the standards on fee lands on the reservation. Neither government conceded that it lacked jurisdiction over the lands that the other was regulating; they simply chose not to fight over jurisdiction. Rather, they proceeded together to ensure that both would regulate air quality, and as a result are now adequately protecting their mutual interest in protecting the air resources of the entire region.

48. *In re* General Adjudication of All Rights to Use Water in Big Horn River Sys., 753 P.2d 76

allocation, holders of earlier priority dates get their senior water rights satisfied first and fully in times of shortage. Over half of the award to the Tribes was for "future use." The award in essence represented water the Tribes never used previously. Junior priority water users long had been using this water for farming lands in agricultural projects subsidized heavily by the United States. Suddenly, the junior non-Indian users faced the prospect that they would not have the right to use water to which they had become accustomed. The Wyoming decision was appealed to the United States Supreme Court. However, a Supreme Court resolution of the dispute was at least one year away. The 1989 summer likely would be characterized by tension and perhaps violence between Indians and non-Indians.

Meanwhile, in 1986, the Wind River Tribes had increased their oil and gas production tax. The total amount of the tribal tax remained very low compared to the amount of similar state and local taxes. The Wind River Tribes wanted to raise the tribal tax to a more productive level, but knew that even a small increase was economically risky since the unique combination of federal, state, and tribal taxes increased the costs of conducting business on Indian reservations. A challenge to a similar state tax in New Mexico was pending in the United States Supreme Court as the summer of 1989 approached. Also pending was a decision from a Wyoming state court regarding whether non-Indians who bought Indian lands should enjoy senior Indian water rights.

Against this backdrop, a state representative acting on behalf of a myriad of non-Indian water users approached the Wind River Tribes to see if an interim solution to the water controversies could be reached. The Wind River Tribes identified the state oil and gas severance tax as their principal concern, as they wanted to generate greater tribal tax revenues but did not wish to impose a higher total tax burden on non-Indian oil and gas producers on the reservation. For its part, Wyoming wanted the Wind River Tribes to share the burden of the looming water shortage in the 1989 summer irrigation season.

No disputed facts existed. Indeed, all parties agreed that the existing water delivery systems on the reservation should be improved to diminish wasteful water losses. Intensive negotiations spanned approximately five weeks and led to a comprehensive interim agreement covering a one-year period. The result was that Wyoming reduced its severance tax on oil and gas produced on the reservation, thereby allowing the Wind River Tribes to raise their tax in a corresponding amount without increasing the total tax burden. For their part, the Wind River Tribes agreed to share their valuable senior water rights.

In the resulting Tribal-State Interim Settlement, the Wind River Tribes and Wyoming reached the following agreement. Within the six federal irriga-

(Wyo. 1988), *aff'd by split decision*, 492 U.S. 406 (1989), *reh'g denied*, — U.S. —, 110 S. Ct. 28 (1989), *cert. denied*, — U.S. —, 109 S. Ct. 3265 (1989).

tion projects on the reservation, water was to be allocated in accordance with the principle of equally shared surpluses and shortages, in a manner that reflects traditional rotation practices for each such project. Outside of the above projects, water would be allocated in accordance with historical priority dates attached to the lands outside of such projects. The Wind River Tribes and Wyoming, in coordination with the BIA, would cooperate in jointly monitoring and managing water allocations on the reservation.

In regard to taxes, Wyoming agreed to reduce its severance tax on oil and gas production on the reservation from six percent to one and one-half percent. The Wind River Tribes increased the rate of their severance tax on oil and gas production on the reservation by a corresponding amount. The effective tribal tax rate was four percent; the amended tribal rate was not to exceed eight and one-half percent. The Wind River Tribes agreed not to seek to enjoin or otherwise hinder the collection of any remaining state or county taxes on oil and gas production on the reservation, but were free to participate *amici curiae* in any refund proceedings involving taxpayers on the reservation.

Wyoming agreed to provide $1 million in grant funds for rehabilitation and expansion of existing water delivery systems within the reservation. In consultation with the State Engineer, the Wind River Tribes were to define, develop budgets for, and prioritize the projects to be supported by these grant funds. As each such project was initiated, Wyoming would disburse funds to the Wind River Tribes up to the total amount in accordance with the budgets and priorities for the defined projects. In the future, the Wind River Tribes will return to Wyoming any funds not spent in accordance with the above budgets and priorities.

The Wind River Tribes, in consultation with the BIA, were to establish a fund and procedures for compensating Indian water users for possible losses arising from the agreement to share water shortages. Wyoming agreed to provide $2 million in cash to the Wind River Tribes for use in this compensation fund, and any amount not allocated to the fund could be expended for such other purposes as the Wind River Tribes chose.

Wyoming also agreed to provide $300,000 to fund a reconnaissance study of potential water storage sites on the reservation and a study of improvements needed for the rehabilitation and expansion of water delivery systems on the reservation. If the Wind River Tribes were able to arrange alternative funding in whole or in part for these studies, or if the cost of these studies turned out to be less than $300,000, the remaining amount committed by Wyoming for these studies would be added to the funds available for use in rehabilitating and expanding the existing water delivery systems on the reservation.

Finally, the Wind River Tribes and Wyoming agreed to negotiate in good faith to reach a long-term settlement of the tax and water issues on the reservation. If the Wind River Tribes and Wyoming were to reach a long-term agreement regarding the tax and water issues on the reservation, the Governor was to support any legislation needed to implement the terms of such agree-

ment, including significant funding for rehabilitation of water delivery systems and pre-construction engineering studies for water storage sites. The Wind River Tribes and Wyoming agreed to cooperate in seeking federal funding to offset these costs.

While the agreement was in effect, two United States Supreme Court decisions came down and upset the balance reached in the Interim Settlement. In April, 1989, the Supreme Court issued its decision in *Cotton Petroleum Corp. v. State of New Mexico*,[49] ruling that New Mexico's taxes as applied to non-Indian mineral producers on the Jicarilla Apache Reservation were not preempted under the Indian Mineral Leasing Act of 1938. The Court's decision appeared quite broad and left little room for similar challenge. A few months later, the United States Supreme Court issued its decision in the *Wind River* case. By a four vote tie, with one Justice not voting, the Court upheld the Wyoming Supreme Court award to the Wind River Tribes.[50] Finally, in February, 1990, the Wyoming Supreme Court heard arguments that only a small number of the non-Indian purchasers of Indian land could claim the senior tribal water rights.[51]

Because of a fear of water shortages and possible injury to non-Indian farmers, Wyoming continued to negotiate with the Wind River Tribes. However, the *Cotton* decision made Wyoming unwilling to negotiate seriously on taxes, because no barrier seemed to exist to state taxation of non-Indians on Indian land. Similarly, the two water decisions made the Wind River Tribes less willing to compromise the water issues since they were awarded vast amounts of water with senior rights. Wyoming's and the Tribes' respective successes in the tax and water areas had caused each side to become more entrenched in their positions. In the new negotiations, Wyoming was led by its State Water Engineer, who had served as an expert witness for Wyoming in its unsuccessful litigation against the Wind River Tribes; non-Indian farmers also were added to the state team as a consultant committee. No one on the Wyoming negotiating team was familiar with tribal law, and a federal negotiating team was requested and met with the parties several times to attempt a resolution.

The Wind River Tribes insisted on a careful assessment of water shortages and needs. Wyoming claimed that the need for facts was a mere pretense to permit delay. Soon, the parties realized that disagreements as to the core issues would probably prevent any agreement to address the approaching summer of 1990. The discussions turned to the possibility of another one year agreement. This put the primary burden on non-Indian farmers, as they faced the primary risk of water shortages until a long term solution was negotiated. Some non-Indians urged that the Tribes could not

49. 490 U.S. 163 (1989).

50. *In re General Adjudication*, 753 P.2d 76.

51. In November, 1990, the issue of which non-Indian purchasers of Indian land could claim senior water rights was finally resolved in the non-Indian purchasers' favor. *In re* General Adjudication of All Rights to Use Water in the Big Horn River Sys., 803 P.2d 61 (Wyo. 1990).

use all the water, and therefore no interim settlement was necessary. Under pressure from non-Indian irrigators, Wyoming urged strongly that water in 1990 should be treated as it was in 1989, with the Indians sharing their water rights with the non-Indian users. The leadership of the Wind River Tribes, meanwhile, was under pressure from tribal members not to compromise the rights they had won in over a decade of litigation, and to put their water to use to alleviate the reservation's extraordinary eighty percent unemployment rate.

In order to address the long-term decline in reservation fisheries, the Tribes in April, 1990, dedicated a significant portion of their previously unused water to instream flows for fisheries, aesthetics, recreation, and other benefits. Wyoming and the non-Indian irrigators refused to acknowledge the dedication, and the Wind River Tribes filed suit, asking the state court for appropriate orders. A special master heard arguments and recommended to the Wyoming district court that the dedication be deemed lawful. On March 11, 1991, the Wyoming district court ruled that the Tribes could dedicate their reserved water rights to instream flows. In a comprehensive ruling, the court also decided that the Tribes have jurisdiction over administration of all water on the Wind River Reservation.[52] The court's decision may result in further litigation to the Wyoming Supreme Court and possibly the United States Supreme Court.

A negotiated agreement conceivably could have guaranteed non-Indian irrigators access to water during dry seasons, while the Tribes could have been assured of state assistance in monitoring and enforcing proper use of reserved water rights. The Tribes might have gained other valuable concessions such as state tax abatement, economic development funds, or other inter-governmental agreements. Instead, costs continue to mount as the parties proceed with this lengthy litigation.

IV. THE AUTOMOTIVE FUEL AND CIGARETTE TAX AGREEMENT BETWEEN THE SENECA NATION AND NEW YORK

In *Herzog Bros. Trucking, Inc. v. State Tax Commission*,[53] the New York Court of Appeals held that the federal Indian Trader Statutes[54] pre-empted state fuel and sales taxes imposed on out-of-state distributors of motor fuel who distributed to Indian retailers on reservations. The court reasoned that the state taxes fell upon persons who met the definition of an "Indian trader" under the Indian Trader Statutes,[55] and that Congress has pre-empted the field of regulating trade with Indians on reservations. The case was appealed to the Supreme Court of the United States. While the case was pending, the

52. Judgment and Decree, *In re* General Adjudication of All Rights to Use Water in the Big Horn River Sys., No. 4993 (5th Jud. Dist. Wyo. Mar. 11, 1991).

53. 508 N.E.2d 914 (N.Y. 1987), *vacated*, 487 U.S. 1212 (1988), *aff'd on remand*, 533 N.E.2d 255 (N.Y. 1988).

54. 25 U.S.C. §§ 261-264.

55. The court noted that the term "trader" has been construed "to apply to any person introducing goods, or trading, in Indian country or on an Indian reservation." *Herzog Bros.*, 508 N.E.2d at 919 n.3.

Supreme Court invited the Solicitor General to express the views of the United States on the case.

The Solicitor General took the view that the New York Court of Appeals had read the Indian Trader Statutes too broadly. The Solicitor General's position was that the Indian Trader Statutes do not pre-empt the state taxes as applied to retail sales of fuel by Indians to non-Indians. According to the Solicitor General, because the state conceded that the taxes could not be collected on retail sales to Indians on reservations, the precollection requirement was unduly burdensome and therefore was pre-empted by the Indian Trader Statutes as it is applied to sales to Indians.

At the same time, however, the Solicitor General believed that the precollection of the state taxes on sales to non-Indians had been approved in the Supreme Court's decisions in *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*[56] and *Washington v. Confederated Tribes of Colville Indian Reservation*.[57] The Solicitor General then noted that the State of New York had issued new proposed regulations for the precollection of taxes that provided some accommodation for the fact that the State could not collect the tax on retail sales to Indians. Under those circumstances, the Solicitor General suggested that the Court vacate the decision of the New York Court of Appeals and remand for further consideration in light of the new regulations. The United States Supreme Court vacated the judgment and remanded the case for further consideration.[58]

On August 20, 1988, the Council of the Seneca Nation of Indians (Seneca), a federally recognized Indian tribe[59] located in the State of New York, authorized the Seneca Nation Working Tax Committee to pursue discussions with New York concerning the exercise of both state and tribal jurisdiction over commerce in regard to cigarettes and gasoline and diesel motor fuel on the Seneca reservation. In concluding that a cooperative agreement was in everyone's best interests, the state and Seneca identified the following common concerns: (1) the interest of both Seneca and New York in avoiding double taxation of automotive fuel and cigarettes, (2) the need to address the regulatory inefficiency that results from both governments regulating commerce without regard to the other, and (3) the need to protect their respective sovereign economic interests.[60]

Seneca and the New York Department of Taxation and Finance (Depart-

56. 425 U.S. 463 (1976).

57. 447 U.S. 134 (1979).

58. State Tax Comm'n of New York v. Herzog Bros. Trucking, Inc., 487 U.S. 1212 (1988) (The Court granted certiorari, vacated judgment, and remanded the case for further consideration in light of proposed regulations.). Significantly, perhaps, the Court did exactly what the Solicitor General suggested. While it cannot be assumed that the Court necessarily agreed with the Solicitor General's analysis of the pre-emption issue, the fact that the Solicitor General's recommended course of action was followed by the Court creates concern that the Court did, in fact, agree with the Solicitor General's opinion.

59. *See* 53 Fed. Reg. 52,831 (1988).

60. Automotive Fuel and Cigarette Tax Agreement, January 3, 1989, Seneca Nation of Indians-New York State Department of Taxation and Finance, at 1-2.

ment) ultimately executed a tax agreement on January 3, 1989, subject to some conditions precedent.[61] To be effective, the agreement required authorizing legislation by New York and Seneca[62] to be submitted to the legislative bodies for consideration and approval by January 1, 1989.[63] The agreement required New York to amend its tax laws to prohibit application of its tax on petroleum and cigarettes sold on the reservation,[64] to authorize collection of the tribal tax in lieu of the state tax,[65] and to grant an allowance against the state tax for tribal tax paid on automotive fuel sales.[66] Similarly, Seneca was required to amend its tax code to provide that the tribal fuel tax be three cents per gallon less than the state fuel tax,[67] and that the tribal cigarette tax be three cents less than the state cigarette tax for each ten cigarettes sold.[68] The state was concerned that Indian businesses, exempt from state taxes and subject only to a nominal tribal tax, enjoyed an unfair advantage over competing off-reservation businesses. Seneca, presumably, was interested both in tax revenues and in preserving at least some competitive advantage for on-reservation businesses in order to spur badly needed economic development. Finally, the agreement required Seneca to amend its tax code to include provisions on record keeping and reporting by transporters, distributors, and retailers.[69]

Ultimately, however, New York failed to enact the special legislation, and some entrepreneurial businesses on the reservation now oppose the agreement. Thus, it is difficult to predict whether the joint administration of state and tribal tax programs will become a reality. Nevertheless, the negotiated agreement offers interesting suggestions and compromises in dealing with dual taxation.

In the agreement, New York expressly recognized that retail sales to Indians on the Seneca Reservation were not subject to state taxes.[70] New York was prepared to agree to refrain from interfering with the rights of wholesalers licensed by Seneca,[71] and Seneca would administer and enforce its taxes and regulations on the reservation.[72]

Article III of the agreement governed dispute resolution and established a Coordination Committee (Committee) consisting of two members appointed by each party to supervise the administration of the agreement, develop written procedures, and collect taxes.[73] Both parties were committed to resolve

61. *Id.*
62. *Id.* at art. I, at 2-4.
63. *Id.* at art. I, ¶ C, at 7.
64. *Id.* at ¶ A(3), at 3.
65. *Id.* at ¶ A(4), at 3-4. Appendix A to the agreement limits the quantity of fuel and cigarettes to which the agreement initially applies.
66. *Id.*
67. *Id.* at ¶ B(1), at 4.
68. *Id.*
69. *Id.* at ¶ B(2)(a) & (b), at 5.
70. *Id.* at ¶ A(2), at 2.
71. *Id.* at art. II, ¶ A(1), at 7.
72. *Id.* at art. II, ¶ A, at 7.
73. *Id.* at art. III, ¶ A, at 8-9.

disputes through the Committee or by negotiation.[74] However, after ninety days of good faith negotiation, either would be free to submit the dispute to binding arbitration.[75] Seneca's sovereign immunity was not waived except as necessary for the enforcement or appeal of an arbitration decision.[76]

Article IV contained an unusual provision called "favored nation status" that states:

> In the event the [Seneca] Nation determines in its sole judgment that the terms resulting from an agreement entered into by the State [of New York] with another Indian nation or tribe, or from any final judgment which results from litigation concerning the taxation and regulation of automotive fuel and cigarette sales are more favorable than the terms of this Agreement, the Nation may opt to supplant the operative terms of this Agreement with the language of the operative terms of such subsequently negotiated agreement or the final judgment upon 90 days notice to the State.[77]

This provision reflects the Seneca leadership's apparent concern over being the first tribe to enter into an agreement with New York. It is politically dangerous for tribal leaders to authorize such agreements, as they become subject to internal political attack for "compromising tribal sovereignty." Worse still is the perception of having been "out-negotiated" by another tribe. By including this "most-favored nation" provision, the Seneca leadership hoped to avoid or at least reduce such internal political attacks.

V. LAND CLAIM SETTLEMENT AGREEMENT BETWEEN THE PUYALLUP TRIBE, WASHINGTON, AND THE UNITED STATES OF AMERICA

In a major triumph of negotiation and perseverance, the Puyallup Tribe of Indians (Puyallup), the United States of America, the State of Washington, local governments in Pierce County, Washington,[78] and certain private property owners[79] signed a compromise agreement on August 27, 1988.[80] This comprehensive resolution of long and bitter disputes between the various governments and communities settled land claims and provided funds for per capita payments, land acquisition, employment and training opportunities for the

74. *Id.*

75. *Id.* at 9. The decision of the arbitration panel may be vacated only by the United States District Court for the Western District of New York on one of the following grounds: (a) the decision was not supported by substantial evidence; (b) the decision was obtained by fraud, corruption, or undue means; (c) the arbitration panel was partial or corrupted; (d) the arbitration panel was guilty of misconduct; (e) the arbitration panel exceeded its authority; or (f) the decision was contrary to law. *Id.* at ¶ C(5), at 12-13.

76. *Id.* at ¶ C(6), at 13.

77. *Id.* at art. IV, ¶ A(1), at 13-14.

78. The local governmental parties included the Port of Tacoma, Pierce County, the City of Tacoma, the City of Fife and the City of Puyallup.

79. The private parties included the Union Pacific Railroad Company, Burlington Northern Railroad Company, the Riverbed Owners Committee, and Commencement Bay Tideland Owners Committee, a non-profit corporation.

80. Agreement Between the Puyallup Tribe of Indians and the Local Governments in Pierce County, the State of Washington, the United States of America, and Certain Private Property Owners, August 27, 1988, at 1 [hereinafter Land Claim Settlement Agreement].

tribal members,[81] land development, and small business assistance for the Puyallup.[82] The agreement also resolved long-standing conflicts over state and tribal jurisdiction.[83]

The agreement transferred certain submerged lands in the Puyallup River, purportedly owned by the non-Indian parties, to the United States to be held in trust for the Puyallup.[84] This transfer of submerged lands did not enlarge or diminish the tribal fishing rights,[85] and the lands conveyed were put into trust and granted on-reservation status, subject to particular specified uses.[86] The Port of Tacoma conducted and completed contamination audits for each property transferred,[87] and the United States and Puyallup both agreed not to interfere with the discharge of waste water, storm water, or sanitary water as long as such discharges did not interfere with treaty fishing rights.[88]

Puyallup also received $24 million for an annuity fund and $22 million for a trust fund. The annuity fund provided each tribal member with a per capita payment of approximately $20,000.[89] The income from the trust fund can be used for housing, elderly needs, burial and cemetery maintenance, education and cultural preservation, supplemental health care, day care, and other social services.[90] Funds were also made available to enhance the tribal fisheries.[91]

Fisheries enhancement and preservation were key concerns of the Puyallup, and the agreement addressed this concern in numerous ways. Puyallup and the United States identified biologically and environmentally suitable sites for the tribe's net pen program.[92] The agreement provided Puyallup's approval for Tacoma's construction of several projects in ways that minimized impact on fisheries.[93] Various local governments took a number of actions to achieve the goals of increasing salmon and steelhead production, protecting

81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 3-4.
85. *Id.* at 4.
86. *Id.* at 3. A document was attached to the agreement describing each transfer and the uses that would run with the land. Some described uses include prior easements, restrictions for only agricultural, industrial and commercial uses, and application of air quality control standards set by the Puget Sound Air Pollution Control Agency Board or its successor state or regional agency. Land Claim Settlement Agreement, *supra* note 80, at Technical Document 1, at 1-29.
87. Land Claim Settlement Agreement, *supra* note 80, at 3.
88. *Id.* at 4.
89. *Id.* at 7.
90. *Id.* at 7-8.
91. *Id.* at 8-9 (The state provided funds for improving the fishery in the Puyallup River and Commencement Bay Basins. Tacoma provided funds for fisheries enhancement. The United States purchased the navigation equipment for Commencement Bay.).
92. *Id.* at 9 (Net pens are facilities used for fisheries enhancement.).
93. *Id.* at 9-11 (The construction projects included filling a waterway using dredge material from another construction site, constructing a new pier, filling a slip and expanding a terminal at another pier, and widening and deepening the Blair Waterway navigation channel.).

The Blair Navigation Project was determined to serve a common benefit to the parties. Federal legislation authorizing this project allowed the Tribe to engage in foreign trade, and to widen and deepen the Blair Waterway navigation channel. *Id.* at 17.

fish habitat, providing land and natural resources development, and preventing flood damage.[94] A navigation agreement resolved conflicts between the tribal and commercial fishing industries, establishing vessel traffic lanes, identifying anchor sites for ships, and containing operation and communication procedures.[95] The requirement that the developers comply with certain technical standards to protect the fisheries resources resolved other conflicts.[96] The agreement also required specific job training and placement programs to be directed by the Washington Department of Employment Security, and the Washington Department of Social and Health Services provided funds for the construction of several health related facilities for the tribe.[97] Puyallup is permitted to use the economic development funds for business and commercial ventures, the purchase of land, and small business start-up funds or loans.[98]

Importantly, the agreement resolved major issues regarding tribal-state jurisdiction and police powers. Puyallup's jurisdiction currently extends to existing and future restricted trust lands, including the lands conveyed under the agreement,[99] and Puyallup agreed to refrain from asserting any jurisdictional authority over non-trust land.[100] Washington retains jurisdictional authority over the non-trust lands,[101] and Puyallup retains authority over members and other Indians as provided under the Indian Child Welfare Act.[102] Each government has exclusive jurisdiction to administer and implement environmental laws on its lands[103] and is responsible for the costs of services to its lands.

In the agreement, both Puyallup and the United States agreed to relinquish all claims, subject to a few exceptions, to any land, tidelands, submerged lands, mineral claims, non-fisheries water rights, and all water.[104] Puyallup agreed not to revoke consent to certain rights-of-way through the former riverbed land[105] and not to impose a tax or fee on the holders of rights-of-way for thirty years.[106] The parties consented to suit in the Federal District Court

94. A county wetland management program was developed and implemented. Regulations were developed to preserve streamside vegetation. For the protection of the fisheries, treated sewage discharges were dechlorinated. *Id.* at 12.

95. *Id.* at 13.

96. *Id.* at 14. The agreement provided, for example, that Puyallup would not oppose a project if the developer complied with all the requirements for enhancement of fisheries and mitigation of harm. Detailed requirements were set forth in the Land Settlement Agreement, Technical Document 4.

97. A 20-bed elder care facility, a 20-bed youth substance abuse facility, and a 42-child day care center will be constructed. Tribal members would also receive funds for training in alcoholism counseling, day care, child welfare, mental health and social service management. Land Claim Settlement Agreement, *supra* note 80, at 16.

98. *Id.*

99. *Id.* at 18-19.

100. *Id.* at 19.

101. *Id* at 21.

102. 25 U.S.C. §§ 1901-1963 (1988).

103. Land Claim Settlement Agreement, *supra* note 80, at 20.

104. *Id.* at 28. According to the agreement, one of the exceptions included land confirmed for the Tribe in Puyallup Tribe of Indians v. Port of Tacoma, 525 F. Supp. 65 (W.D. Wash. 1981). *Id.*

105. *Id.* at 29.

106. *Id.* at 30.

Chief Judge of the Federal District Court for the Western District of Washington.[133] The County has the right to seek injunctive relief against Tulalip for trying to institute an additional use without the County's approval.[134] In such instances, Tulalip waives sovereign immunity to a suit in state court.[135] The limited waiver does not apply when the Tribe alleges the defense that treaty rights permit the proposed use.[136] When treaty rights are involved, there is a stay of proceedings in the state court until resolution of the treaty rights issue is made by the federal court.[137]

VII. CONCLUSION

The preceding case studies reflect an array of recent tribal-state negotiations. Success has not always been forthcoming. The importance of these negotiating efforts, however, cannot be sufficiently emphasized. With the growing costs of litigation and the politically sensitive nature of many conflicts, both tribes and states are recognizing that negotiation is the only viable alternative. Indeed, in a decision recently issue by the United States Supreme Court,[138] the Court noted that negotiated agreements may provide states and tribes an appropriate resolution to tax-related conflicts.

Clearly, these case studies reflect that successful negotiations arise out of recognition of common interests by both sides. Without acknowledgement by both the states and the tribes that mutually worthy and attainable goals can be met through compromise, no basis exists for alternative conflict resolution. Tribal-state governmental relations, long a source of tension and mistrust, will only improve through sustained amicable efforts to resolve disputes which otherwise would continue to drain important and often scarce resources.

133. *Id.* at ¶ 11.5, at 12.
134. *Id.* at ¶ 12, at 15.
135. *Id.* at ¶ 12.2, at 16.
136. *Id.* at ¶ 12.2, at 16-17.
137. *Id.* at ¶ 12.2, at 17.
138. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, — U.S. —, 59 U.S.L.W. 4137, 4140 (Feb. 26, 1991).

for the Western District of Washington, Southern Division, and executed a limited waiver of sovereign immunity.[107]

VI. LAND AND FISHING AGREEMENT BETWEEN THE TULALIP TRIBE AND WASHINGTON

The Tulalip Tribe (Tulalip) is a federally recognized tribe[108] in Washington, organized pursuant to the Indian Reorganization Act of 1934. In 1986, Tulalip purchased four acres at the south end of Barlow Bay, Lopez Island, Washington, to establish a seasonal campground to support the tribe's commercial fishing activities.[109] Tulalip initially applied for county permits, but subsequently withdrew the permit applications and applied to the BIA for placement of the fee land into trust status.[110]

Tulalip wanted to avoid state court litigation[111] as it believed that it would receive more favorable treatment for disputes involving use of the purchased land if it were to have access to a federal forum. Since federal courts have exclusive jurisdiction over trust lands, the fee-to-trust application was intended to avoid vexatious litigation by a small Lopez Island group that opposed seasonal camping.[112]

Trust status also divests the state political subdivisions of civil jurisdiction, including land use regulatory authority. San Juan County repeatedly expressed its opposition to the application for the trust status to the BIA as well as Tulalip,[113] apparently out of concern that Tulalip would use the land for some purpose the county determined was inappropriate. The BIA granted preliminary approval of Tulalip's fee to trust application. This decision was subject to final approval by the Director of the Portland Area Office.[114]

The Board of County Commissioners sent a delegation to Washington, D.C., to seek assistance in blocking the fee-to-trust application. The delegation met with BIA officials, including the Assistant Secretary of the Interior for Indian Affairs, and state congressional representatives and congressional staff.[115] By the county's invitation, Tulalip tribal representatives participated in several of the meetings.[116] The Washington congressional delegation,

107. *Id.* at 33. The waiver of sovereign immunity was limited to forms of relief including specific performance of the agreement terms, a court specified remedy when specific performance is not feasible, or consequential damages when the court finds the party intentionally acted to frustrate the purposes of the agreement.

108. *See* 53 Fed. Reg. 52,832 (1988).

109. Report and Recommendation of the Negotiating Team on the Tulalip Tribe's Fee-to-Trust Application, Barlow Bay, Lopez Island, February 14, 1989, at 1 [hereinafter Report]; Summary of Current Status of Tulalip Tribe's Fee-to-Trust Application, Barlow Bay, Lopez Island, August 8, 1988, at 1 [hereinafter Summary].

110. Report, *supra* note 109, at 1; Summary, *supra* note 109, at 1.

111. Report, *supra* note 109, at 2; Summary, *supra* note 109, at 2.

112. Report, *supra* note 109, at 2; Summary, *supra* note 109, at 1-2.

113. Report, *supra* note 109, at 1; Summary, *supra* note 109, at 2.

114. Report, *supra* note 109, at 2; Summary, *supra* note 109, at 1.

115. Report, *supra* note 109, at 2; Summary, *supra* note 109, at 1. The county delegation included the board chairman, the county prosecuting attorney, the county planning director and a Seattle attorney with experience in Indian law.

116. Report, *supra* note 109, at 2; Summary, *supra* note 109, at 2.

choosing not to take sides in the dispute, offered assistance in mediating the controversy.[117]

Two lengthy negotiating sessions resulted in a Memorandum of Understanding (Memorandum) signed by representatives of both sides.[118] The Memorandum required both representatives to recommend certain actions to their respective legislative bodies within 120 days.[119] The BIA agreed to delay final action on the trust application during the 120 day period[120] and informed the parties that the agency was inclined to honor an agreement between Tulalip and the County.[121] On February 8, 1989, Tulalip and the Commissioners entered into a final agreement. For its part, the County would not object to or appeal the trust status application or grant,[122] and would not object to Tulalip's use of the property for fishing, fish processing, development of a fishing camp, ice extraction and generation, or any other use incidental to the exercise of treaty rights.[123]

In consideration of governmental services the county provides to Tulalip, Tulalip first agreed to pay the County an amount equal to the taxes the County would levy against the property were it not in trust status.[124] Tulalip also agreed to bring its tribal land use ordinance into conformity with state and county civil, regulatory, health, zoning, land use and building laws, ordinances, codes, or other regulations.[125] Tulalip finally agreed to seek approval from the County for any other proposed use (additional use).[126] The agreement also provided that, prior to approval of any additional use, the County would conduct the same environmental review as that required under the Washington Environmental Policy Act[127] and the Shoreline Management Act,[128] with Tulalip bearing the cost of the environmental documentation.[129]

Tulalip has the right to appeal the County's denial of an additional use.[130] The parties must first try to mediate the dispute with the help of a "mutually acceptable third party" nominated by the Tribe and approved by the County.[131] If the County does not approve the Tulalip's choice of a mediator, the dispute will proceed to arbitration[132] under an arbitrator selected by the

117. Report, *supra* note 109, at 2; Summary, *supra* note 109, at 2.
118. Report, *supra* note 109, at 2; Summary, *supra* note 109, at 2. The author was not able to obtain a copy of the Memorandum of Understanding. Some of the terms of the Memorandum are contained in the Summary and Report.
119. Report, *supra* note 109, at 2; Summary, *supra* note 109, at 2.
120. Report, *supra* note 109, at 3; Summary, *supra* note 109, at 2.
121. Report, *supra* note 109, at 3; Summary, *supra* note 109, at 2-3.
122. Agreement, February 8, 1989, Tulalip Tribes of Washington-San Juan County, Washington, ¶ 1, at 3.
123. *Id.* at ¶ 4, at 4-5.
124. *Id.* at ¶ 13, at 18.
125. *Id.* at ¶ 9, at 7-8.
126. *Id.* at ¶ 5, at 5-6.
127. WASH. REV. CODE, §§ 43.21C.031 to 43.21C.914 (1990 Supp.).
128. WASH. REV. CODE, §§ 90.58.010 to 90.58.930 (1990 Supp.).
129. Land Claim Settlement Agreement, *supra* note 80, at ¶ 8, at 7.
130. *Id.* at ¶ 11, at 9.
131. *Id.* at ¶ 11.2, at 10.
132. *Id.* at ¶ 11.3, at 11.