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# Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development

Joel H. Mack\*

Gwyn Goodson Timms\*\*

## I. INTRODUCTION

The question of who has the right to govern and control Indian country has remained unresolved in American jurisprudence for over two hundred years. Unfortunately, the answers have constantly fluctuated, leaving uncertainty in the area of tribal jurisdiction. The crux of the problem is that three distinct governmental entities claim jurisdiction over Indian lands. The federal government claims jurisdiction over Indian country as the dominant sovereign throughout the United States.<sup>1</sup> The states where the land is situated claim jurisdiction because Indian lands are not extra-territorial and thus states believe that the land should be regulated by state and other local governments.<sup>2</sup> Indian tribes claim jurisdiction based on their inherent sover-

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1. *Johnson v. M'Intosh*, 21 U.S. 543, 544 (1823). In *Johnson*, the Supreme Court addressed the issue of title to Indian lands. The Court concluded that the right of alienation of Indian lands was dependent upon the laws of the United States government. *Id.* at 565. As a dominant sovereign, the United States claims power to govern the Indian tribes through the Indian Commerce Clause, which grants Congress the power to regulate commerce with the Indian tribes, and the Treaty Power, which grants Congress the exclusive power to enter into treaties. Robert Laurence, *The Indian Commerce Clause*, 23 ARIZ. L. REV. 203, 224 (1981).

2. Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation*

eign powers to regulate Indian persons and lands as native nations.<sup>3</sup>

Jurisdictional disputes rarely arise between the Indian tribes and the federal government because it is a well settled principle that the federal government has the power to govern the Indian tribes.<sup>4</sup> However, jurisdictional issues often arise between the states and the Indian tribes.<sup>5</sup> The earliest decisions of the Supreme Court suggested that the Indian reservations were wholly separate from the states and the states' jurisdiction.<sup>6</sup> Subsequent decisions by the Court have eroded this principle, however, and no clear standard has emerged to replace it.<sup>7</sup>

Several distinct areas of law are impacted by jurisdictional disputes between states and tribes. Some of the most frequently litigated areas include environmental matters, gaming regulations, and fish and game issues.<sup>8</sup> Many problems arise in these areas, however, because prece-

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*Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 600 (1989). According to one commentator, "[T]he proposition that federal law recognizes the sovereignty of Indian governments over Indian lands and over those who pass over Indian lands was still considered controversial, if not subversive" in Arizona just fifteen years ago. Eric N. Dahlston, *Indian Law*, 29 ARIZ. ATT'Y, July 1993, at 13.

3. Royster & Fausett, *supra* note 2, at 593. In *Worcester v. Georgia*, Chief Justice Marshall characterized the native nations as "distinct, independent political communities." 31 U.S. 515, 559-60 (1832). The Court in *Worcester*, however, found that the federal government has the right to govern the Native Nations. *Id.* at 593.

4. *Worcester*, 31 U.S. at 559-62 (finding a Georgia statute inapplicable where a missionary entered the Cherokee Nation with the permission of the federal and tribal governments, but in violation of a Georgia statute); see also Jana L. Walker & Kevin Gover, *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, NAT. RESOURCES J., 6 Feb. 1992, at 5 (stating that the first step in determining jurisdiction over Indian tribes is to inquire as to whether the federal "statutes apply to Indians, Indian tribes, and the Indian lands").

5. "The Question of the proper scope of state jurisdiction over Indian affairs has been a topic of dispute for nearly a century and a half." Patrick E. Hacker et al., Comment, *State Jurisdiction Over Indian Land Use: An Interpretation of the 'Encumbrance' Savings Clause of Public Law 280*, 9 LAND & WATER L. REV. 421 (1974); see also Steven M. Christenson, Note, *Regulatory Jurisdiction over Non-Indian Hazardous Waste in Indian Country*, 72 IOWA L. REV. 1091 (1987).

6. *Worcester*, 31 U.S. at 557.

7. "[T]here is no rigid rule by which to resolve the question of whether a particular state law may be applied to an Indian reservation or to tribal members." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). In *White Mountain Apache Tribe*, the Supreme Court found that state taxes affecting logging on an Indian reservation are preempted by federal law. *Id.* at 138. However, the Court weighed numerous issues in reaching this decision. *Id.*

8. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (state attempted to regulate gaming enterprises on Indian reservation); *Washington v. Environmental Protection Agency*, 752 F.2d 1465, 1470 (9th Cir. 1985) (state attempted to impose environmental laws on tribe); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977) (state attempted to apply state fishery conservation measures

dents regarding tribal/state jurisdiction in one of these areas often have little or no applicability in another area.<sup>9</sup> Because the law concerning tribal/state jurisdiction is extremely subject-matter specific, it lends little guidance to states or tribes in determining who has authority to regulate Indian lands.

Litigation concerning Indian lands has exploded in the past twenty years.<sup>10</sup> Many of the cases have attempted to decipher jurisdiction among Native American tribes and the states.<sup>11</sup> The result is a loss to both parties. The tribes and states have expended precious resources on continuous litigation. Industries, uncertain of what laws apply to tribes, have shied away from developing business on reservations. The relationship between the tribes and states has been strained, causing both parties to jealously guard jurisdiction over areas that affect the other. Consequently, it is in the best interests of the tribes and states to direct time and money toward durable solutions to the underlying problems.<sup>12</sup> States and tribes should look to a forum other than the courtroom to address their disagreements and reach solutions that benefit both parties' objectives.

One possible solution to the problem of uncertainty and litigation is a

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against tribe).

9. Although courts may rely on dicta of previously decided cases, each case is generally so fact specific that the courts reach differing, and often contradictory, results. Compare *Rice v. Rehner*, 463 U.S. 713 (1983) (state could require a tribal member to obtain a state liquor license) with *Cabazon Band of Mission Indians*, 480 U.S. at 220 (Court limited *Rice* to its facts and found that state could not regulate gaming enterprises on an Indian reservation).

10. Since 1970, the Supreme Court has issued more Indian law decisions than it has decisions in the fields of consumer law and antitrust law combined. Peter W. Sly, *EPA and Indian Reservations: Justice Stevens' Factual Approach*, 20 ENVTL. L. REP. 10429, 10430 (1990).

11. See, e.g., *Brendale v. Confederated Tribes and Bands of Yakima Indian Nations*, 492 U.S. 408 (1989) (finding that tribe lacked jurisdiction to zone certain Indian lands); *Annis v. Dewey County Bank*, 335 F. Supp. 133 (S.D. 1971) (holding that state lacked jurisdiction to enforce a judgement on an Indian reservation); *Agua Caliente Band of Mission Indians v. City of Palm Springs*, 347 F. Supp. 42 (C.D. Cal. 1972) (finding that city has jurisdiction to impose zoning regulations on Indian lands).

12. Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 412. Wilkinson primarily addresses the controversy concerning the fact that the Wisconsin Fish and Game laws do not apply to the Chippewa Bands. Wilkinson concludes that, while time and money are spent litigating this issue, attention is diverted from more important issues, such as fish stocking programs, habitat protection, and polluted water. *Id.*

cooperative agreement between an Indian tribe and a state. Cooperative agreements between an Indian tribe and a state focus on substantive issues with the purpose of solving a particular problem affecting the states and the Indian tribes.<sup>13</sup> Generally, the tribe and state agree to ignore jurisdictional issues for purposes of the agreement.<sup>14</sup> Thus, cooperative agreements are able to frame the issues that need to be addressed and limit the continual jurisdictional disputes that lead to litigation. Furthermore, if conflicts do arise, litigation will be more focused on substantive issues rather than jurisdictional issues.

Problems may still arise, however, from cooperative agreements. Poorly drafted cooperative agreements, and the legislation that authorizes them, run the risk of being invalidated by federal law.<sup>15</sup> Further, courts may be unable to enforce an agreement if sovereign immunity has not been properly waived by the tribes and states.<sup>16</sup> Finally, even if an agreement is otherwise enforceable, if the court lacks specificity and objective guidance, it may be unable to enforce the agreement once a breach occurs.<sup>17</sup>

This Article identifies the problems that can arise when drafting cooperative agreements and their enabling statutes and discusses strategies and methods to avoid these problems. Part II of this Article discusses briefly the law regarding state jurisdiction over Indian country.<sup>18</sup> This Part explores the tests that courts apply to determine the validity of state asserted jurisdiction over tribes. Part II also discusses some of the most important cases on tribal/state jurisdiction that outline the framework within which cooperative agreements may operate.

Part III of this Article examines what motivates states and tribes to

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13. Craighton Goepple, Note, *Solutions for Uneasy Neighbors: Regulating the Reservation Environment after Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 65 WASH. L. REV. 417, 434 (1989). Goepple discusses the uncertainty caused by *Brendale* in the area of tribal jurisdiction and suggests that cooperative agreements are one of the only viable alternatives available to states and tribes. *Id.* at 434.

14. For example, the Cooperative Agreement between the Campo Environmental Protection Agency and the State of California states that one of its purposes is to "minimize the potential for jurisdictional disputes between [the band's environmental agency] and the State Agencies." However, it also states that "[n]othing in this Agreement shall limit or expand, or be construed to limit or expand the jurisdiction of the State Agencies, the Band" or the band's environmental agency. See Appendix A.

15. See *infra* notes 35-37 and accompanying text.

16. See *infra* notes 81-87 and accompanying text.

17. See *infra* text accompanying note 154.

18. See *infra* notes 23-50 and accompanying text.

enter into cooperative agreements.<sup>19</sup> This Part also discusses the various uses for cooperative agreements and addresses a few preliminary steps that states and tribes must take prior to entering into cooperative agreements.

Part IV addresses enabling statutes.<sup>20</sup> It suggests that both states and tribes pass enabling statutes prior to entering into cooperative agreements and discusses what these statutes should include. This Part also discusses several of the larger tribes' enabling statutes and the requirements for drafting such statutes. In addition, Part IV discusses in some depth Assembly Bill 240, a recently-adopted California enabling statute for certain types of projects, and compares and contrasts a handful of other state enabling statutes.

Part V discusses how a cooperative agreement should be drafted and what remedies are available to parties upon a breach of the cooperative agreement.<sup>21</sup> It suggests specific sections that should be considered for inclusion in cooperative agreements and explores the availability of court-formulated remedies and contract remedies.

Finally, Part VI discusses the issue of subject matter jurisdiction.<sup>22</sup> This section discusses the courts in which parties may enforce cooperative agreements.

## II. OVERVIEW OF TRIBAL/STATE JURISDICTION

Because Indian reservations are within the geographic boundaries of states, states generally perceive Indian reservations as lying within their own jurisdictional boundaries.<sup>23</sup> The early Supreme Court decisions regarding tribal/state jurisdiction clearly held that state laws had no effect in Indian country.<sup>24</sup> However, courts have since carved out

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19. See *infra* notes 51-118 and accompanying text.

20. See *infra* notes 119-154 and accompanying text.

21. See *infra* notes 155-174 and accompanying text.

22. See *infra* notes 175-206 and accompanying text.

23. Royster & Fausett, *supra* note 2, at 600. The authors go on to state that this belief arises as a result of the states' ethnocentric views and their inability to perceive native nations as sovereign governments. The authors assert that states perceive native nations as equivalent to municipalities, thus granting tribes some self-government, but otherwise subjecting them to state authority. *Id.* at 613.

24. "The Cherokee nation . . . is a distinct community . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress." *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

exceptions to this clear-cut standard. Currently, the ability of a state to assert jurisdiction over Indian lands depends on two related issues.<sup>25</sup> The first issue is whether state action infringes on tribal sovereignty.<sup>26</sup> The second issue is whether state authority is preempted by federal law.<sup>27</sup>

To resolve tribal/state jurisdictional disputes, courts now focus primarily on traditional federal preemption with inherent sovereignty serving as a "backdrop."<sup>28</sup> Under this preemption analysis, courts balance the interests involved and recognize state authority if it does not interfere with federal or tribal interests, unless the state interests are sufficient to justify the intrusion.<sup>29</sup> Unfortunately, this balancing test is very subject-matter specific. For example, a case that defines jurisdiction between tribes and states in the area of cigarette taxes is generally inapplicable in the area of hunting licenses. The result is that no coherent body of law exists regarding tribal/state jurisdiction.

#### A. Tribal Interests

The starting point in the preemption test is a determination of the tribal interests involved. Courts have recognized a tribe's interest in protecting its inherent sovereignty ever since Chief Justice Marshall

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25. In *White Mountain Apache Tribe v. Bracker*, the Court described the two tests as "independent but related barriers" to state jurisdiction. 448 U.S. 136, 142 (1979); see also *Boisclair v. Superior Court*, 801 P.2d 305 (Cal. 1990) (finding that state court lacked jurisdiction to determine whether a road was owned by an Indian tribe).

26. *Williams v. Lee*, 358 U.S. 217, 220 (1959) (finding that a civil suit by a non-Indian against an Indian is governed by tribal law where the cause of action arose on the Indian reservation).

27. *White Mountain Apache Tribe*, 448 U.S. at 143. The Court in *White Mountain Apache Tribe* found that state law was preempted by federal law. *Id.* at 145-53. One commentator noted that the preemption test gives the states greater power to exercise jurisdiction over tribes because "the preemption question assumes that the states have the power unless the federal government has preempted it. John Marshall, it seems certain, would have said that the states lacked power in Indian country unless Congress had affirmatively granted it." William C. Canby, *Tribal Court, Federal Court, State Court. A Jurisdictional Primer*, 29 ARIZ. ATT'Y, July 1993, at 24.

28. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989) (upholding a state severance tax on the on-reservation production of oil and gas by non-Indians by finding that tribal independence alone is not enough to invalidate a state law).

29. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). After weighing the economic interests of the tribe against the state interests, the Court in *Cabazon* found that the state had no right to regulate bingo and poker on the Cabazon reservation. The Court found that the Cabazon tribe had no natural resources and that gaming enterprises presented the sole source of revenue for the tribal government. *Id.* at 218-19. The Court concluded that the state interest's in crime prevention is outweighed by the tribe's economic interest. *Id.* at 221-22.

characterized tribes as "distinct, independent political communities" with inherent attributes of sovereignty.<sup>30</sup> However, courts are more willing to preempt state asserted authority if the tribe has traditionally exercised authority in the area.<sup>31</sup> The Supreme Court has recognized a tribal interest in encouraging economic development on Indian reservations.<sup>32</sup> Thus, to the extent state regulation impedes economic development, preemption is more likely. Tribes are also interested in protecting their lands from abuse by the states. The Ninth Circuit recognized that tribes have a legitimate fear that states will use Indian reservations as a "dumping grounds" for off-reservation hazardous wastes if states, rather than the tribes, control the reservations' hazardous waste regulations.<sup>33</sup>

One factor that can weigh against a tribe in determining whether an interest is "legitimate" is the amount of resources available to a tribe to regulate its lands. Tribes often lack resources to implement a complex regulatory scheme. States, on the other hand, are generally better funded and have a twenty year head start on the tribes in regulating such areas.<sup>34</sup>

#### B. Federal Interests

Tribal interests and federal interests often overlap because of the federal trust responsibility that the federal government holds with respect to tribes.<sup>35</sup> Consequently, the federal government is interested

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30. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

31. *Compare Rice v. Rehner*, 463 U.S. 713 (1983) (holding that the state could require a tribal member to obtain a state liquor license because tradition has not recognized inherent sovereignty by Indians over liquor regulations) with *Cabazon Band of Mission Indians*, 480 U.S. at 220 (limiting *Rice* to its facts and looking instead at current federal Indian policy to determine whether a tribe has authority to regulate an area).

32. *Cabazon Band of Mission Indians*, 480 U.S. at 217 n.21.

33. *Washington v. Environmental Protection Agency*, 752 F.2d 1465, 1470 (9th Cir. 1985) (finding that the Resource Conservation and Recovery Act does not authorize states to regulate Indians on Indian lands, regardless of state fears that Indian lands will become dumping grounds).

34. *Walker & Gover*, *supra* note 4, at 78.

35. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (invalidating Georgia's attempts to enforce Georgia laws on the Cherokee Nation, including a law that would distribute the Cherokee Nation's land among the people of Georgia). The Ninth Circuit stated, "The Federal government has long been recognized to hold . . . a trust status towards the Indian—a status accompanied by fiduciary obligations." *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038



in protecting Indian lands from intrusion by state regulation and abuse and in furthering economic development on Indian land.<sup>36</sup>

Furthermore, the federal government is interested in the uniform enforcement of certain regulations, such as environmental regulations, to ensure nationwide protection.<sup>37</sup> To accomplish this, the federal government is interested in ensuring that neither state laws nor tribal laws conflict with any of the federal government's laws.

### C. State Interests

The state is interested in protecting its citizens from problems that originate on the reservation. Pollution, for example, cannot always be contained within jurisdictional boundaries. Consequently, states fear that if they are unable to enforce state statutes on Indian reservations, land under the control and jurisdiction of the state may be damaged and citizens off the reservation may be adversely affected.<sup>38</sup>

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(1977). The court in *Agua Caliente Band of Indians v. City of Palm Springs* discussed the history of the trust relationship in California. 347 F. Supp. 42, 46 (C.D. Cal. 1972). That court stated that "[u]pon receiving disturbing reports of the abusive treatment which the Indians were receiving from the Whiteman and the widespread destitution and misery which were apparent among their numbers, Congress enacted the General Allotment Act of 1887 and the Mission Indian Relief Act of 1891," which set aside land for the Indians to be held in trust by the federal government. *Id.* (footnotes omitted).

36. In 1970, the executive branch promoted a policy of Indian self-determination. In 1975, the legislative branch furthered this policy by enacting the Indian Self-Determination Act, which specifies ways that tribes may take control or share control of their governments. In 1983, the Reagan administration adopted a new Indian policy acknowledging the governmental status of Indian tribes. In response, the EPA issued a policy statement concerning Native Americans in 1984. It states:

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. In keeping with the principle of Indian Self-government, the agency will view Tribal Governments as the appropriate non-federal parties for making decisions and carrying out program responsibilities affecting Indian reservations.

Sly, *supra* note 10, at 10434.

In 1967, the Economic Administration designated economic development on Indian reservations a priority. Ultimately, authority over economic development on reservations was shifted to the Bureau of Indian Affairs, where it currently remains.

37. *Washington*, 752 F.2d at 1469.

38. Currently, Indian reservations are required to comply with most federal environmental regulations. Thus, states with regulations equivalent to the federal regulation should experience no spillover problems originating on the reservation, assuming adequate federal enforcement. However, for states that have adopted state environmental regulations that are stricter than the federal regulations, spillover effects may take the form of more lenient regulation on the reservation rather than the absence of regulation. Some tribes, however, have adopted environmental laws even

The state has an additional interest in protecting its treasuries from economic loss. States collect taxes and charge licensing fees on individuals and businesses within their boundaries and fear losing this ability to Indian reservations.<sup>39</sup> However, the courts have offered differing opinions as to whether taxes and licensing fees can be levied upon Indians and non-Indians within reservations. The Supreme Court in *Cotton Petroleum Corp. v. New Mexico*<sup>40</sup> found that although a state-levied tax may marginally affect certain aspects of on-reservation oil and gas production, these effects are too insubstantial to preempt a state from taxing non-Indian oil and gas production on Indian reservations.<sup>41</sup> However, states have been expressly barred from taxing Indians in Indian country.<sup>42</sup>

Further, in areas where states have been granted authority over Indian reservations by Congress, state asserted jurisdiction is clearly not preempted.<sup>43</sup> Public Law 280 is an example of Congressionally-granted state authority.<sup>44</sup> It was enacted to grant certain states specific types of civil and criminal authority over tribes.<sup>45</sup> The courts, however, have interpreted Public Law 280 very narrowly and refused to expand

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more stringent than the state alternative. For example, the Campo Band of Mission Indians used California standards as its baseline, but in many respects toughened those standards. Kevin Gover & Jana L. Walker, *Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country*, 63 U. COLO. L. REV. 933, 939 (1992). Additionally, some state environmental programs fill in the gaps of more limited federal programs. Thus, the gap areas may not be covered on Indian reservations. Richard A. Du Bey et al., *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 ENVTL. L. 449, 472 (1988).

39. Du Bey, *supra* note 38, at 481.

40. 490 U.S. 163 (1989).

41. *Id.* at 187 (holding that the state of New Mexico may impose severance taxes on oil and gas produced on the reservation by non-Indians, even though it was already taxed by the tribe).

42. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 181 (1973) (holding that an Arizona state income tax was unlawful as applied to a reservation Indian whose income was derived solely from reservation sources).

43. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

44. *See* Pub. L. 280, 67 Stat. 588 (1953).

45. *Id.* Public Law 280 created several "mandatory" states, where the state was required to exercise certain types of civil and criminal authority. *Id.* "Optional" states were also created, where the state could choose to exercise certain types of civil and criminal authority. *Id.* In 1968, Congress revised the Act regarding "optional" states to require tribal consent before states could act to assume jurisdiction. States that had already assumed jurisdiction, however, were allowed to retain it.

the authority to include any general regulatory authority over Indian tribes.<sup>46</sup>

States have an additional interest in protecting non-tribal members who live on reservations. This issue commonly arises on reservations that have a "checkerboard pattern" of land ownership.<sup>47</sup> The Supreme Court expanded state jurisdiction over non-Indians on Indian reservations in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*.<sup>48</sup> A divided Court held that the Indian tribe lacked authority to zone non-Indian fee lands in the area of the reservation open to the public.<sup>49</sup> However, the tribe did have authority to regulate non-Indian lands in the areas closed to the general public if to do otherwise would endanger economically important areas of the reservation and threaten spiritual and cultural values.<sup>50</sup>

The *Brendale* opinion has further confused state jurisdiction over tribal lands because the opinion is not a majority opinion and the Court makes no claim that it is changing the law regarding tribal jurisdiction over fee lands in general. However, *Brendale* does suggest that courts will be willing to give added weight to the states' interests if the land in question is owned or occupied by non-Indians.

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46. Cabazon Band of Mission Indians, 480 U.S. at 208.

47. Under the Dawes Act, many reservations were divided into allotments for individual Native Americans. 25 U.S.C.A. §§ 331-334 (West 1983 & Supp. 1993). Congress passed the Dawes Act to promote assimilation of Native Americans into society and to destroy tribal governments. General Allotment Act, ch. 119, 24 Stat. 338-91 (1887). Subsequent to the Act, many Native Americans sold their land to non-Indians. On some reservations, lands are held in trust by the federal government for tribal members, and fee lands are held by non-members. In addition, federal public land and state and county land are located on many reservations. Thus, many reservations have a "checkerboard pattern" of land ownership.

48. 492 U.S. 408 (1989). The reservation at issue in *Brendale* is an excellent example of land ownership on reservations reflecting the "checkerboard pattern." See *id.* at 415. Approximately 80% of the reservation was held in trust for the Yakima Tribe. *Id.* The remaining 20% was owned in fee by both Native Americans and non-Indian owners. *Id.* Additionally, the reservation was divided into a closed area, in which the general public was prohibited, and an open area, in which the general public was allowed. *Id.* Thus, the issue of who may zone these various areas of the reservation was confusing at best.

49. *Id.* at 422.

50. *Id.* at 444. Justice White, joined by Justices Rehnquist, Scalia, and Kennedy, stated that tribes should have no regulatory authority over non-members anywhere on the reservation unless the conduct threatens the "political integrity, the economic security or the health or welfare of the tribe." *Id.* at 428. Justices Blackmun, Brennan, and Marshall generally supported tribal territorial jurisdiction over the entire reservation. *Id.* at 448 (Blackmun, J., dissenting). Justices Stevens and O'Connor distinguished between the closed and open area, whereby tribes have sole authority to regulate land use on reservations, except when the interests of non-members predominate. *Id.* at 438-39.

In summary, the current judicial framework provides little guidance to parties seeking to determine the validity of state asserted jurisdiction over Indian territory because it is subject matter specific. Thus, unless the disputes among states and tribes are strictly limited to those specific disputes previously determined by courts, no precedent exists upon which parties can reasonably rely. Almost every case presents new and different issues, and the existing precedents do little to help the parties predict how a court will rule.

### III. COOPERATIVE AGREEMENTS

#### A. *Purpose of Cooperative Agreements*

A cooperative agreement is an intergovernmental contract between an Indian tribe and a state that settles or avoids jurisdictional disputes and determines certain substantive matters.<sup>51</sup> By settling or otherwise avoiding jurisdictional disputes, parties are generally more willing to bargain and find a solution to the underlying substantive issues. Moreover, these agreements should be enforceable in court if properly drafted and if consistent with enabling legislation and constitutional principles. However, because there is very little case law addressing cooperative agreements between tribes and states, it is unclear whether these agreements will be enforceable as contracts.<sup>52</sup> Although this Article treats cooperative agreements as contracts and approaches cooperative agreements from the perspective of best ensuring their enforceability, it would be a mistake to view them simply as legal contracts. Cooperative agreements are more akin to treaties or compacts, in that they form political policies between two governmental entities, and thereby serve several important purposes for Indian tribes and states without regard to enforceability.

#### 1. Limit Litigation

States and tribes need to consider alternatives to litigation because neither party is assured of victory when litigating jurisdictional issues. Winners and losers end up spending scarce resources to litigate an

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51. Regis Pecos & Cheryl Fairbanks, *Inter Governmental Relations—A New Era for Resolving Tribal-State Disputes*, Feb. 1991, at 17.

52. See *infra* note 79 and accompanying text. Tribal-state cooperative agreements are the "vanguard of modern Indian policy." Wilkinson, *supra* note 12, at 413.

issue that brings neither side closer to a solution of the underlying problems.<sup>53</sup> However, litigation is likely to continue absent some form of forced negotiation. Afraid of losing their jurisdiction, states and tribes are generally unwilling to cooperate with each other. Cooperative agreements set aside issues of jurisdiction and allow parties to focus on substantive issues. The multitude of distinct issues that arise in tribal/state disputes cannot be encompassed within a bright line rule as evidenced by the incoherence in the case law.<sup>54</sup> However, by their very nature, cooperative agreements allow tribes and states to address and solve particularized problems as they arise. Finally, cooperation rather than litigation should reduce intergovernmental tensions.<sup>55</sup>

## 2. Compromise of Competing State and Tribal Interests

The interests of states and Indian tribes often conflict. Many states and tribes have consequently adopted adversarial roles as each seeks to protect its own needs.<sup>56</sup> Cooperative agreements enable states and tribes to reach a compromise between competing state and tribal interests.

Cooperative agreements, by their very nature as intergovernmental agreements, enhance tribal sovereignty. Rather than allowing the federal or state governments to decide what interests are important to Native Americans, cooperative agreements allow Native Americans to define their interests and pursue them in negotiations while giving states some voice in the governing of tribal land.<sup>57</sup> By using cooperative agreements, rather than unilaterally asserting state jurisdiction, states recognize that tribes have jurisdiction over their lands and have inherent sovereignty. “[S]uch cooperation requires as a foundation a

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53. Pecos & Fairbanks, *supra* note 51, at 17. Pecos and Fairbanks assert that there are several options for resolving tribal state disputes such as legislation, cooperative agreements, and the development of tribal-state protocol. *Id.*

54. Bradley Nye, Comment, *Where do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest*, 67 WASH. L. REV. 175 (1992). Nye addresses the case law concerning the hunting rights of Native Americans and concludes that the current case law is complicated and inconsistent, creating jurisdictional uncertainties that “create fodder for further litigation.” *Id.* at 176.

55. Wilkinson, *supra* note 12, at 413. “[I]n the making of good public policy, cooperation is an end in itself. It reduces stresses of all kinds. It heals and builds community.” *Id.*

56. Pecos & Fairbanks, *supra* note 51, at 1. Historically, states and tribes have adopted adversarial roles because of states’ initial need for land and currently because of states’ need for development and/or protection of natural resources.

57. Goepple, *supra* note 13, at 433.

certain respect for the other side as a government and a certain tolerance for differing views and different political determinations."<sup>58</sup>

States and tribes can also negotiate agreements regarding the state's interest in revenues from taxes and licenses on Indian reservations that are satisfactory to both parties.<sup>59</sup> The case law regarding whether states can levy charges on persons and businesses within Indian territory is relatively unclear.<sup>60</sup> Thus, both parties have an incentive to negotiate and come to a mutual agreement in this uncertain area.

### 3. Share Expertise

Cooperative agreements allow each side to share resources and limit expenses by reducing administrative and service costs.<sup>61</sup> Because most tribal resources are far more limited than state resources, cooperation is imperative for tribes. Intergovernmental cooperation should also be facilitated by the fact that tribes have expanded their administrative structures since the late 1970's and, thus, have resources to offer the states.<sup>62</sup> By pooling resources and information, states and tribes can maximize limited funds. Additionally, tribal/state management agreements are attractive candidates for federal funding.<sup>63</sup>

58. Laurence, *Governmental Power In and Around Indian Country: An Essay Containing Both a Primer for Newcomers and Some Suggestions for Reform-Minded Old-timers*, 3 INDIAN L. J. 45 (1990).

59. States may be willing to forego taxes and fees levied on reservations altogether if both parties are communicating and cooperating. For example, the State of New Mexico passed a joint house memorial requesting a remedy to the *Cotton Petroleum* ruling, citing the federal policy of Indian self-determination and the negative economic consequences of that ruling. *Pecos & Fairbanks*, *supra* note 51, at 14.

60. The *Cotton Petroleum* Court validated a state severance tax on industry located on an Indian reservation. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989). However, most courts have invalidated state taxation of the reservation. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) (invalidating the State of Montana's taxes on an Indian tribe's royalty interests under oil and gas leases issued to non-Indian lessees).

61. Goepple, *supra* note 13, at 433. Goepple asserts that tribes will benefit greatly by acting in concert with the more sophisticated state governments because tribes will develop the technical and managerial skills necessary to realize their goal of self-government. *Id.*

62. Wilkinson, *supra* note 12, at 405. States may now work with more formal tribal bodies, which often have substantial staffs and expertise to rely upon, especially in the management of natural resources. *Id.*

63. See *id.* at 412. For example, Congress appropriated \$300,000 to fund an independent assessment of the status of Wisconsin fishery resources to be conducted

#### 4. Create Certainty and Facilitate Economic Development

The current jurisdictional uncertainty surrounding Indian reservations scares away potential economic development. After *Cotton Petroleum*, some businesses may fear that, by locating on a reservation, they may face double taxation by both the states and the tribes, resulting in a greater tax burden than if the business were located off the reservation. Additionally, some businesses would fear that they may comply with all of the reservation regulations only to find that they are in violation of applicable state regulations. This potential deterrence of business contradicts the federal policy of encouraging economic development on Indian reservations.<sup>64</sup> A clearer definition of applicable laws will encourage business investment.

#### 5. Fill the Regulatory Gaps

Ambiguities in jurisdictional authority can create regulatory gaps because neither the tribe nor the state is sure whether it has the authority to regulate certain areas. Where authority is unclear, intergovernmental agreements<sup>65</sup> can fill these gaps. As discussed previously, no area is less clear than that of non-Indians within tribal reservations.<sup>66</sup> In the wake of *Brendale*,<sup>67</sup> neither states nor Indian tribes are certain who has the authority to regulate fee lands and non-Indians on tribal lands.<sup>68</sup> The arrangements between states and tribes that worked in the isolation of reservations in the 1900's often do not work today.<sup>69</sup> The jurisdictional difficulties created by the commingling of Indians and

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jointly by the federal, state, and tribal governments. *Id.* at 412 n.194.

64. See *supra* note 36. Economic development on Indian reservations is spearheaded by the Bureau of Indian Affairs. *Id.*

65. Wilkinson, *supra* note 12, at 410. See also James B. Reed & Mara A. Cohen, *Jurisdiction Over Nuclear Waste Transportation on Indian Tribal Lands: State-Tribal Relationships*, NCSL, Vol. 16, No. 4, STATE LEGISLATIVE REPORT at 5 (1991). For example, the Wisconsin Department of Natural Resources entered into a cooperative agreement with the Menominee Tribe to fill in the regulatory gaps relating to hazardous and solid waste management. Prior to the agreement, state officials were unsure of their proper role; therefore, they were hesitant to work with Indian tribes, even when asked to help. State workers who responded to a Menominee hazardous waste spill did not know if their insurance covered them while working outside the state's jurisdiction.

66. See *supra* notes 48-50 and accompanying text.

67. 492 U.S. 408 (1989).

68. See *supra* notes 48-50 and accompanying text.

69. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 380-81 (1982 ed.) (pointing out the need for a new and different approach in light of the fact that reservations are more integrated in modern society).

non-Indians on reservations require individualized solutions that can be reached through the use of cooperative agreements.

### B. Use of Cooperative Agreements

Cooperative agreements between tribes and states were pioneered for use in the area of Indian gaming. The catalyst for these agreements occurred when various Indian reservations established gaming enterprises that often conflicted with state prohibitions on gambling. In response, states attempted to assert jurisdiction over Indian reservations and ban these gaming practices.<sup>70</sup> To resolve these disputes, the federal government enacted the Indian Gaming Regulatory Act,<sup>71</sup> which explicitly authorized the use of cooperative agreements between the states and Indian tribes.

Recently, cooperative agreements have been used to address a broad range of land management issues, especially environmental regulations. Because of the potential spillover problems associated with pollution, states are increasingly concerned with imposing environmental regulations on Indian reservations. States, however, are likely preempted from asserting jurisdiction over Indian tribes in environmental areas because of the extensive federal environmental statutes that either retain jurisdictional power for the federal government or specifically grant jurisdiction to tribes.<sup>72</sup> Consequently, states are more willing to cooperate with Indian tribes in the area of environmental regulation.

The use of cooperative agreements to address environmental regulation of Indian reservations has varied depending on the individualized problem faced by the tribe and state. Cooperative agreements have been entered into to control air pollution on reservations.<sup>73</sup>

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70. *California v. Cabazon Band of Mission Indians*, 480 U.S. at 202, 204-06 (1987).

71. 25 U.S.C. § 2710 (1988). Section 2710 provides, in pertinent part, that any "State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribes but such compact shall take effect only when notice of approval by the Secretary or such compact has been published by the Secretary in the Federal Register." *Id.*

72. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1377(a) (1988) (granting authority over the Indian tribes to the federal administrator); Clean Air Act, 42 U.S.C. § 7601(d) (1990) (providing that Indian tribes shall be treated as states); Safe Drinking Water Act, 42 U.S.C. § 300j-11 (1988) (providing that Indian tribes shall be treated as states); CERCLA, 42 U.S.C. § 9601-9675 (1988) (granting authority over the Indian tribes to the federal administrator).

73. *See* Air Quality Memorandum of Agreement (Jan. 1989). This cooperative agree-



Several cooperative agreements have also been entered into to control hazardous and solid waste problems occurring on reservations.<sup>74</sup> One cooperative agreement sets up an emergency response plan to be jointly administered by the state and tribe.<sup>75</sup>

### C. *Necessary Steps Prior to Drafting Cooperative Agreements*

#### 1. Recognizing the Sovereign Authority of Tribes

In order for cooperative agreements to succeed, states must recognize the sovereign authority of the tribes.<sup>76</sup> By entering into such agreements from a perspective of respect and acknowledgement, states affirm the possibility of government to government relationships. Absent such recognition, the state and its agencies will come to the negotiating table with the expectation that the tribe, like a municipality, should willingly accept the saddle of state jurisdiction. Consequently, negotiations will likely break down and no agreement will be reached. To avoid this, several states have issued proclamations recognizing inherent tribal sovereignty.<sup>77</sup> Other states have recognized tribal

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ment between the state of Idaho and the Shoshone Brannock tribes splits authority among fee and trust lands and the state agrees to provide technical and professional assistance to the tribes.

74. See Cooperative Agreement Between the Campo Environmental Protection Agency and the State of California, 1991 Cal. A.B. 3287 (Dec. 1992). This Agreement sets up a joint regulation system over waste management facilities. *Id.* The cooperative agreement between the Menominee tribe, the EPA, and the Wisconsin Department of Natural Resources pledges to create joint environmental programs in the area of hazardous and solid waste and water protection.

75. See Reed & Cohen, *supra* note 65, at 5 (citing "Memorandum of Understanding" (July 1989)). This cooperative agreement is between the North Carolina Emergency Response Commission and the Eastern Band of Cherokee. It delegates the duty of drafting the policy for the program to the tribes and the duty of establishing the technical areas to the state.

76. Wilkinson, *supra* note 12, at 411-13. Wilkinson further states that we should recognize tribal sovereignty and a tribe's right to control its land because this right is "organic and grew out of a context that has dignity and deserves to be honored. This [right] transcends the pervasive principle of our legal system that promises ought to be kept." *Id.* at 413.

77. See Wilkinson, *supra* note 12, at 411 (citing the Centennial Accord Between the Federally Recognized Indian Tribes in Washington State and the State of Washington, signed Aug. 4, 1989 and the Executive Order by Governor Michael Sullivan of Wyoming recognizing and respecting the sovereignty of the Shoshone and Arapaho Tribes, Exec. Order No. 1989-4 (Apr. 5, 1989)).

sovereignty in the language of the enabling statute<sup>78</sup> or the cooperative agreement itself.<sup>79</sup>

A more concrete reason for states to formally recognize tribal sovereignty is to ensure that courts interpret a cooperative agreement as a furtherance of federal interests. The federal government has proclaimed an interest in furthering tribal sovereignty and self-government.<sup>80</sup> Thus, a cooperative agreement is less likely to be successfully challenged as preempted by federal law and legislation if it formally recognizes that the agreement establishes and furthers an important federal policy.

## 2. Waiver of Sovereign Immunity

Both tribes and states should be willing to waive their sovereign immunity for any legal actions stemming from their cooperative agreements. Indian tribes generally enjoy sovereign immunity from lawsuits similar to other governmental entities.<sup>81</sup> Additionally, tribal sovereign immunity has not been eroded with exceptions and waivers to the same extent as state sovereign immunity. However, tribal sovereign immunity can be waived, and Congress has the authority to abolish a tribe's sovereign immunity.<sup>82</sup> Less settled is the extent to

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78. See, e.g., Okla. Stat. tit. 74, § 1221 (1988) (providing that "[t]he State of Oklahoma acknowledges federal recognition of Indian tribes recognized by the Department of Interior, Bureau of Indian Affairs").

79. See, e.g., Cooperative Agreement Between the Campo Environmental Protection Agency and the State of California, 1991 Cal. A.B. 3287 (Dec. 1992) (stating "the Campo Band of Mission Indians . . . is a sovereign Indian tribal government recognized as such by the Secretary of the Interior of the United States of America . . .").

80. See *supra* note 36.

81. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (declining to review action brought by female member of tribe seeking an injunction against enforcement of tribal ordinance denying tribal membership to children of female members who married outside of tribe because suits against tribe are barred by its sovereign immunity); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977) (state could not bring action for declaratory judgment regarding exemption of tribe from applicability of state fishery conservation measures because of tribal sovereign immunity); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940) (overturning credit judgment against tribe because of tribal sovereign immunity).

82. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). However, courts will not imply a waiver. Congress must clearly express a desire to waive a tribe's sovereign immunity.

which tribes may waive their immunity absent specific authorization from Congress.<sup>83</sup> According to the United States Code, title 25, section 81, tribes cannot contractually waive their immunity in matters affecting trust property without secretarial or Congressional consent.<sup>84</sup> However, the Attorney General has held that section 81 does not apply to contracts with the "Government."<sup>85</sup>

Perhaps the most effective way to bypass a tribe's sovereign immunity is for a state to enter into cooperative agreements with a specific agency or corporation of the tribe that has waived its sovereign immunity with respect to the cooperative agreement.<sup>86</sup> The tribe as a whole may still maintain its sovereign immunity, yet the state can sue the authorized agency or corporation for breach of the cooperative agreement. Congress has expressly provided for tribal corporations and enabled these corporations to waive their sovereign immunity as long as the waiver is clear and explicit.<sup>87</sup>

It should be noted that tribes may limit their waiver of sovereign immunity only to the party with whom the tribe is entering into the cooperative agreement. Thus, tribes remain immune to third party suits

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83. COHEN, *supra* note 69, at 325.

84. 25 U.S.C. § 81 (1982).

85. 18 Op. Att'y Gen'l 181, 183 (1885). This opinion addresses the issue of whether a Native American can serve as a postmaster. It held that "[i]n general contracts with Indians, not citizens of the United States, can only be made under certain statutory restrictions and regulations . . . which, however, are designed for the protection of such Indians in their dealings with other persons, and appear to have no application to transactions with the Government." *Id.* The ruling is, however, ambiguous as to whether the term "Government" includes state governments.

86. Most courts have found that tribal corporations have sovereign immunity as well. *See, e.g.,* White Mountain Apache Tribe v. Shelley, 480 P.2d 654 (Ariz. 1971) (tribal corporation immune from suit); S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community, 674 P.2d 1376 (Ariz. Ct. App. 1983) (finding that tribal corporation retains sovereign immunity of the tribal government as a subordinate economic organization); Graves v. White Mountain Apache Tribe, 570 P.2d 803 (Ariz. Ct. App. 1977) (finding not for-profit tribal corporation to be immune from suit). *But see* Dixon v. Picopa Construction Co., 772 P.2d 1104 (Ariz. 1989) (holding that a tribal organization managed by a board separate from the tribal government was not entitled to sovereign immunity).

87. 25 U.S.C. § 477 (1934); Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp. 1127 (D. Ala. 1978) (holding that as long as waiver is clear and explicit, an Indian corporation may waive its sovereign immunity). The court in *Kenai Oil & Gas, Inc. v. Department of Interior* found that language in the corporate charter that the corporation could "sue and be sued" waives the immunity to which the corporation might otherwise be entitled. 522 F. Supp. 521 (C.D. Utah 1981), *aff'd*, 671 F.2d 383 (10th Cir. 1982). However, at least one court has restricted the waiver of an Indian corporation's sovereign immunity to corporate conduct and prohibited waivers of sovereign immunity for governmental conduct. *Gold v. Confederated Tribes of Warm Springs Indian Reservation*, 478 F. Supp. 190 (D. Or. 1979).

in connection with the cooperative agreement, yet are liable to the state or governmental entity with whom they contracted under the cooperative agreement.

### 3. Keeping Cooperative Agreements Sufficiently Narrow

Courts are more likely to invalidate cooperative agreements that are overly broad. Courts have routinely held that states generally lack jurisdiction to regulate Indian reservation activity unless granted such authority by the federal government.<sup>88</sup> Cooperative agreements that are far reaching and appear to be general regulatory schemes are more likely to be struck down than those that are sufficiently tailored to address a specific problem. Accordingly, prior to drafting a cooperative agreement, the tribe and state should enunciate what problem the agreement is attempting to solve and tailor the agreement to that specific problem.

### 4. Obtaining the Necessary Consent

Both the state and the tribe should consent to be bound by cooperative agreements prior to entering into them. States can accomplish this by enacting enabling statutes that grant power to certain agencies or political heads to enter into agreements with Indian tribes. Tribes have several means by which they can meet the consent requirement. Some tribes have extensive tribal codes requiring them to pass an enabling statute, similar to a state statute, authorizing the tribe, an agency of the tribe, or a tribal corporation to enter into cooperative agreements. Other tribes require far less formal authorization in the form of a grant from the tribe's General Council. State enabling statutes and tribal authorization are discussed in detail below.<sup>89</sup>

It is unclear whether federal consent is necessary prior to entering into cooperative agreements. Native tribes, as domestic dependent nations, are a part of the United States and fall under the jurisdiction of the federal government.<sup>90</sup> As discussed previously, states cannot

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88. *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981) (holding that a state statute restricting bingo was unenforceable against the tribe and that Indians and non-Indians may play bingo on the reservation), *cert. denied*, 455 U.S. 1020 (1982).

89. See text accompanying *infra* notes 119-154.

90. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (refusing to enjoin an act of

generally assert jurisdiction over tribes when jurisdiction is federally preempted. However, because tribal sovereignty serves as a “backdrop” to the federal preemption test, courts should find that tribal/state cooperative agreements are not preempted unless they directly conflict with federal law. Cooperative agreements do not involve the forcible imposition of state laws on Indian tribes. Rather, cooperative agreements present the unique case of tribes acquiescing to some form of state authority or review.<sup>91</sup> The interests of the tribes and the states align in favor of cooperative agreements, as does the federal interest in furthering tribal interests. Consequently, the tribal sovereignty issue is generally moot.<sup>92</sup> However, courts should still apply a traditional preemption test and evaluate whether the area has been preempted by federal law. Thus, narrowly drafted cooperative agreements are less likely to be invalidated by courts.

*a. Constitutional preemption*

Federal power over Indian tribes is derived from several sections of the Constitution. Cooperative agreements must be careful not to conflict with any of these sections.

*i. Supremacy clause*

Article VI, section 2 states that the Constitution and the laws of the United States are the supreme law of the land.<sup>93</sup> State regulation of Indian land may not interfere with federal legislation.<sup>94</sup> Federal legisla-

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Congress that disposed of the tribal property of the Kiowa, Comanche, and Apache Indians because of each tribes' dependence on the United States government); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

91. Felix Cohen states that the primary reason states are prohibited from exercising jurisdiction over Indian Country is because of tribal sovereignty, where state law may “be duplicative of, and often antithetical to, tribal sovereignty.” Consequently, once this issue is eliminated, the case for invalidation is greatly diminished. COHEN, *supra* note 69, at 270.

92. The court in *Oglala Sioux Tribe v. South Dakota* found that if the balance of state, federal, and tribal interests so require, the “backdrop” of tribal sovereignty may be given considerably less weight. 770 F.2d 730 (8th Cir. 1985), *cert. denied*, 474 U.S. 1091 (1986).

93. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, § 2.

94. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 509-11 (2d ed. 1988); Laurence, *supra* note 1, at 232 (“[S]tate regulation of Indian reservation activity may not run afoul of express federal legislation, nor may it interfere with the operation of

tion applies to Indian land if it expressly includes Indian tribes or if the nature of the legislation or the underlying Congressional purpose requires uniform application.<sup>95</sup> The Supreme Court has routinely held that federal legislation preempts state jurisdiction over Indian land.<sup>96</sup> Consequently, cooperative agreements should expressly state that nothing in the agreement is meant to supersede or conflict with federal law. Additionally, it is recommended that the agreement provide for severance of any part of the agreement that is preempted by federal law, without affecting the validity of the agreement as a whole.

## ii. Treaty clause

The Constitution prevents states from entering into treaties with Indian tribes. Article II, section 2 grants the President power to enter into treaties with foreign nations and the Indian tribes.<sup>97</sup> Article I, section 10 prohibits states from entering into such treaties.<sup>98</sup> However, it is unlikely that courts will find that cooperative agreements are preempted by the treaty power as long as the agreements recognize the supremacy of federal laws and do not purport to be treaties. Furthermore, the federal power to enter into new treaties with tribes was abolished in 1871.<sup>99</sup> Thus, federal law prohibits construing a contract with an Indian tribe after 1871 to be a treaty. Consequently, there is no treaty right upon which to infringe.<sup>100</sup> Thus, courts should construe a

federal law in a field that Congress has 'occupied.'").

95. Walker & Gover, *supra* note 4, at 6. However, certain exceptions exist. Laws that touch exclusive rights of self-governance in purely intramural matters or abrogate rights guaranteed by treaties are generally inapplicable to Indian tribes absent an express declaration by Congress. *Id.* at 10.

96. *Kennerly v. District Court* 400 U.S. 423 (1971) (refusing to grant state court jurisdiction over tribe or tribal members, even where tribe adopted a tribal ordinance that permitted concurrent state and tribal jurisdiction over tribe); *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965) (invalidating state sales tax on an Indian reservation because state tax could not be imposed consistently with federal statutes applicable to the reservation).

97. "[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur . . . ." U.S. CONST. art. II, § 2.

98. "No State shall enter into any Treaty, Alliance or Confederation . . . ." U.S. CONST. art. I, § 10.

99. 25 U.S.C. § 71 (1871).

100. From 1871 forward, the federal government has entered into bilateral agreements with tribes that have been given supremacy status over conflicting state laws.

cooperative agreement to be no more than a contract that recognizes federal supremacy.

iii. Indian commerce clause

Article 1, section 8 gives Congress the authority to regulate commerce with foreign nations and Indian tribes.<sup>101</sup> Because Congress abolished treaty making, many courts now refer to the Indian Commerce Clause as the primary constitutional provision that supports federal preemption of state laws concerning tribes.<sup>102</sup> Unlike the "regular" Commerce Clause, commerce with Indian tribes need not be "interstate" in order for the Indian Commerce Clause to apply.<sup>103</sup> The Indian Commerce Clause typically invalidates state law that is federally preempted or interferes with the sovereignty of Indian tribes.<sup>104</sup> However, the Indian Commerce Clause is not exclusive; the federal government may delegate the power to regulate commerce among the Indian tribes to the states.<sup>105</sup> As a general proposition, cooperative agreements stating that nothing in the agreement is meant to supersede federal law and that sections conflicting with federal law will be severed should not be preempted by the Indian Commerce Clause.

iv. Compact clause

Article I, section 10 of the Constitution prohibits states from entering into "any Agreement or Compact with another State or with a Foreign power" without the consent of Congress.<sup>106</sup> A court may choose to interpret the Compact Clause to include agreements among states and Indian tribes.<sup>107</sup> However, courts have interpreted the Compact Clause narrowly and found that consent is required only for agreements that affect political power or the influence of the states or encroach upon

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Antoine v. Washington, 420 U.S. 194 (1975) (invalidating application of state fish and game laws to tribal members because such laws conflicted with an agreement executed between the Executive Branch of the Federal government and the Indian tribe, which provided that the tribe would have the right to hunt and fish).

101. "The Congress shall have the Power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8.

102. COHEN, *supra* note 69, at 208.

103. *Id.*

104. *See supra* notes 26-27.

105. *See* Pub. L. 28, 67 Stat. 588 (1953).

106. U.S. CONST. art. I, § 10.

107. "When the federal guardianship over tribes is . . . considered, it is doubtful that states and tribes have general authority to make compacts absent congressional consent." COHEN, *supra* note 69, at 381.

the exercise of authority of those states.<sup>108</sup> A court may find that neither states nor tribes are actually being granted jurisdiction over the other if cooperative agreements are narrowly and properly drawn. A court may instead find that each side is merely allocating governmental responsibilities or sharing responsibility solely for the purpose of the cooperative agreement.

The language of the Compact Clause does not specifically include Indian tribes, and it has never been applied to any tribal/state contracts or agreements.<sup>109</sup> A strong argument can be made that the Compact Clause does not apply to Indian tribes because the federal government does not recognize the tribes as sovereign foreign powers, but as lesser domestic dependent nations within the jurisdiction of the United States. Additionally, tribes no longer rank as states in terms of the Compact Clause.<sup>110</sup> While states cannot unilaterally assert even limited jurisdiction over other states, the Supreme Court has indicated that states may be able to assert limited jurisdiction over tribes. Consequently, the Compact Clause is likely inapplicable to contracts between tribes and states.

*b. Statutory*

There is no federal statute or regulation that specifically addresses Congressional consent to cooperative agreements among tribes and states in general. However, several statutes may be interpreted to apply to tribal/state cooperative agreements.

*i. 25 U.S.C. § 81-85*

Federal approval is generally required for contracts with Indians or tribes for money, things of value, services related to lands, or claims under laws or treaties of the United States.<sup>111</sup> Furthermore, contracts

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108. *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (finding that Compact Clause did not apply to a Multistate Tax Compact because it did not increase political power); *New Hampshire v. Maine*, 426 U.S. 363 (1976) (interstate agreement regarding boundary did not require congressional consent).

109. COHEN, *supra* note 69, at 381.

110. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (invalidating New Mexico's fish and game laws as applied to tribes, but stating in dicta that tribes no longer have the sovereignty initially granted them in *Worcester v. Georgia*, 31 U.S. 515 (1832)).

111. 25 U.S.C. § 81 (1871). Section 81 prohibits all agreements between any person



relating to property in the hands of the United States are invalid unless the United States has previously consented to their making.<sup>112</sup> These statutes likely apply to Indian lands held in trust by the United States, and they may apply to cooperative agreements that govern land, such as certain environmental and land use agreements. However, if cooperative agreements are narrowly drawn so that they affect regulatory structures only, a court may find that "land" is not affected. Thus, such cooperative agreements should not be governed by these statutes.

Additionally, this chapter was enacted to protect Indians in the trust of the federal government.<sup>113</sup> Accordingly, a court may choose not to invalidate cooperative agreements that are entered into voluntarily and in good faith by Indian tribes in light of current federal policy to further tribal self-government.

Furthermore, the Attorney General found that sections 81 through 84 did not apply to contracts between Indian tribes and the "Government."<sup>114</sup> Although section 85 was enacted after the Attorney General's opinion, it is not inconsistent with the opinion and should also be construed as inapplicable to contracts between the Government and tribes. The Attorney General Opinion, however, is rather dated<sup>115</sup> and is ambiguous as to whether state governments are included within the term "the Government."

ii. 25 U.S.C. § 476

The Indian Reorganization Act vested authority in tribes to negotiate with federal, state, and local governments. If cooperative agreements are challenged, the parties may assert that this provision grants federal consent to intergovernmental agreements between tribes and states. While no court has considered section 476 as a grant of federal consent for cooperative agreements, the bare power to "negotiate" without a

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with any tribe of Indians or individual Indians not citizens of the United States "for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States . . ." unless such contract complies with the requirements of Section 81. *Id.*

112. 25 U.S.C. § 85 (1913). This section prohibits contracts "with any Indian, where such contract relates to the tribal funds or property in the hands of the United States." *Id.*

113. *Whirlwind v. Von der Ahe*, 67 Mo. App. 628 (1896), (permitting action based on attempt to enforce contract, regardless of federal statutes, where tribal Indian entered into an employment contract with the Great Wild West Show).

114. 18 Op. Att'y Gen'l 181 (1885); *see supra* note 85.

115. The Attorney General opinion was written in 1885.

concomitant power to agree confers little authority on the tribes. Therefore, although it would be a case of first impression, section 476 may be construed as a general consent to such agreements to the extent they are not preempted by other federal requirements.<sup>116</sup>

### iii. Federal environmental statutes

Congress recently recognized the role of tribal governments and amended four of the major environmental laws administered by the EPA so that tribes are treated as states.<sup>117</sup> While the Clean Water Act specifically acknowledges and authorizes cooperative agreements between tribes and states for the implementation of the requirements of the Act, such agreements are subject to the review and approval of the Administrator.<sup>118</sup> The consequences of failing to have a cooperative agreement approved are unclear, but courts are likely to interpret the section to protect Indian tribes by prohibiting the state from enforcing the agreement against the tribe without its approval or from engaging in unfair practices. Parties entering into cooperative agreements should be aware that, in certain circumstances, federal administrative review may be required.

In summary, narrowly drafted cooperative agreements between Indian tribes and states likely do not require federal consent. The federal policies to promote tribal sovereignty and economic development mandate that tribes be allowed to consent to limited state jurisdiction or regulation. If, however, a court finds that federal consent is required prior to entering cooperative agreements, the parties could argue that 25 U.S.C. § 476 has already granted this consent.

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116. *See, e.g.*, 25 U.S.C. § 81.

117. Clean Water Act, 33 U.S.C. § 1377(a) (1988); Clean Air Act, 42 U.S.C. § 7601(d) (1990); Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-12 (1986); CERCLA, 42 U.S.C.A. § 9601-75 (1988). EPA's Indian Policy makes clear EPA's view that all federal environmental regulations apply to the Indian reservations.

118. 33 U.S.C. § 1377(d) (1988). Section 1377(d) provides that "an Indian tribe and the State or States in which the lands of such tribe are located may enter into a cooperative agreement, subject to the review and approval of the Administrator, to jointly plan and administer the requirements of this chapter." *Id.*

#### IV. TRIBAL AND STATE ENABLING STATUTES

##### A. Tribal Statutory Consent

Tribal authorization is necessary prior to entering into a cooperative agreement. However, tribes vary in their organization and law<sup>119</sup> because Federal approval of tribal codes and ordinances is not required.<sup>120</sup> Some tribes, such as the Navajo Nation, have a detailed process by which such enabling resolutions are adopted.<sup>121</sup> Other tribes may require less formal approval from the General Council. State enabling statutes should authorize cooperative agreements only as permitted by the organization documents or enabling laws of the tribal government.

Because each tribe's requirements for authorization vary, this Article does not purport to discuss enabling authorization for every tribe. However, this Article will address several of the Indian nations' current enabling legislation, as well as the general principles that should be considered for inclusion in all enabling legislation.

##### 1. Representative Tribal Enabling Legislation

###### a. Navajo

The Navajo Tribal Code grants power to the Intergovernmental Relations Committee to approve intergovernmental agreements between the Navajo Nation and states.<sup>122</sup> This section likely applies to cooperative agreements between tribes and states. However, a more detailed resolution specifically authorizing cooperative agreements is recommended, including therein some of the general sections discussed below.

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119. Tribal law varies from tribe to tribe and can take the form of tribal legislative enactments, administrative procedures, or customs. COHEN, *supra note* 69, at 1.

120. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597 (9th Cir. 1984) (finding that tribe was not required to submit taxing ordinances to Secretary of Interior for approval in action by mineral lessee against Indian tribe to invalidate certain taxes imposed upon lessee by tribe).

121. *Tracy v. Superior Court*, 810 P.2d 1030, 1036 (Ariz. 1991) ("[T]ribes, such as the Navajo, chose not to incorporate under the [Indian Reorganization Act] but, rather, to strengthen their sovereign status and develop their own political system . . . . The Navajo Nation has developed an extensive tribal code that is bound and supplemented."); Navajo Trib. Code tit. 2, §§ 165-174.

122. Navajo Trib. Code tit. 2, § 824 ("The committee shall have the . . . power necessary and proper to recommend . . . final approval of any intergovernmental agreement between the Navajo Nation and any federal state or regional authority.").

Proposed Navajo resolutions must comply with the following procedures:

- (1) The resolution must be drafted by the department making the request.
- (2) The preliminary draft must be reviewed and signed by the appropriate authorities.
- (3) The draft must shortly thereafter be submitted to the Legislative Secretary.
- (4) The Review Staff must then review the resolution and supporting documents and place the resolution on the Agenda of the Tribal Council.
- (5) The Advisory Committee must then accept the resolution and make recommendations to the Tribal Council.
- (6) The resolution must be signed by either the Chairman, Vice Chairman, the Executive Secretary, or the Chairman pro tempore of the Tribal Council.<sup>123</sup>

*b. Cheyenne River Sioux*

The Cheyenne River Sioux have specifically enabled cooperative agreements for the purposes of mutual assistance and definition of responsibilities in the law enforcement area.<sup>124</sup> The Chairman of the Tribal Council is authorized, with the approval of the Tribal Council, to enter into these agreements. This statute may serve as a forerunner to future enabling statutes that solve other specific problems between the Cheyenne River Sioux and the state.

*c. Blackfeet*

The Constitution for the Blackfeet Tribe provides the Tribal Council with the power to negotiate with the federal, state, and local governments on behalf of the tribe.<sup>125</sup> Although this constitutional language

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123. Navajo Tribal Code title 2, sections 165-174 set out the requirements for Navajo resolutions.

124. Cheyenne River Sioux Trib. Code tit. 9, § 2. "The chairman of the Tribal Council is authorized, with the approval of the Tribal Council, to enter into cooperative arrangements and agreements with Federal and state law-enforcement agencies for purposes of mutual assistance and definition of responsibilities." *Id.*

125. BLACKFEET CONST. art. VI (1)(a). "The council of the Blackfeet Reservation shall [have the power] . . . to negotiate with the Federal, State and local governments on

may be adequate to enable cooperative agreements, a more specific statute would be preferable. An enabling statute could be based on the authority granted in the Blackfeet Constitution, yet should be expanded to include some of the specific sections discussed below.

## 2. Sections to be Included in Tribal Enabling Statutes

When drafting a tribal enabling statute, a tribe should state which entity will have the authority to negotiate cooperative agreements with states.<sup>126</sup> The process for approval of cooperative agreements should also be discussed in this section. Some tribes may require the approval of the General Council prior to entering into a cooperative agreement. Other tribes may attempt to limit the cooperative agreement's applicability to one agency and, thus, require agency approval only.

Additionally, tribal authorization should include a waiver of sovereign immunity for purposes of the cooperative agreement.<sup>127</sup> If, however, the legislation authorizes only one tribal agency or tribal corporation to enter into cooperative agreements, only that agency or corporation should waive its sovereign immunity. As discussed previously, the tribe may wish to waive its sovereign immunity against the governmental entity with whom the tribe is entering into the cooperative agreement, yet still retain its immunity against third parties bringing suit based on the cooperative agreement.

The tribal authorization should specify that the tribe is not expanding state jurisdiction over Indian territory, but only agreeing to set aside any jurisdictional issues and cooperate with the intent of solving a problem. Such measures should better facilitate the adoption of cooperative agreements.

The breadth of a tribal enabling statute should depend upon the individual situation of the tribe. Some tribes may intend to enter into a cooperative agreement to solve a very specific and isolated problem. Therefore, the tribe may choose to enact a very specific tribal enabling statute that strictly defines the framework for cooperative agreements. Other tribes may intend to use cooperative agreements as a solution to a variety of continually evolving problems with the state. Consequently, the tribal enabling statute should be relatively general, stating only who

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behalf of the tribe." *Id.*

126. This is important to ensure that a state does not negotiate with an unauthorized member of the tribe and waste time and resources.

127. *See supra* text accompanying notes 81-87. In addition, such a waiver may also limit the form of dispute resolution (e.g., to arbitration), the parties that benefit from the waiver, and other matters. Both parties should anticipate the need for and scope of tribal asset protection in such waivers.

has the authority to enter into cooperative agreements and what steps need to be taken to enter into a properly authorized agreement.

### B. State Statutory Consent

Various state agencies, departments, or officials will be entering into cooperative agreements with the tribes. Consequently, the state should authorize these agencies to enter into cooperative agreements, as well as provide guidance to the agencies to allow for consistency in the various cooperative agreements.<sup>128</sup> In one of the few cases to address cooperative agreements between tribes and states, the Kansas Supreme Court invalidated a cooperative agreement between the Governor of Kansas and the Kickapoo Nation.<sup>129</sup> The Kansas Supreme Court stated that cooperative agreements are legislative in nature and concluded that the Governor has no power to enter into such agreements on behalf of the state absent either (1) an enabling statute appropriately delegating power to the Governor to enter into such agreements or (2) legislative approval of the agreements.<sup>130</sup>

#### 1. Sections to be Included in State Enabling Statutes

As discussed under tribal enabling statutes, state statutes should specify who has the authority to negotiate cooperative agreements with Indian tribes. Narrowly-tailored enabling statutes should designate the official, such as a department head, who can enter into an agreement. Enabling statutes that are more general should state what steps need to

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128. At least 16 state legislatures have provided authority to local governments and state agencies to enter into agreements with the tribes for a variety of purposes, including concurrent exercise of jurisdiction. Reed & Cohen, *supra* note 65, at 6. Included within these sixteen states are Arizona (ARIZ. REV. STAT. ANN. § 27-515 (1991)), California (CAL. HEALTH & SAFETY CODE § 25198.2 (West 1991 & Supp. 1992)), Idaho (IDAHO CODE § 87-4002 (1989)), Montana (MONT. CODE ANN. § 18-11-103 (1991)), Nebraska (NEB. REV. STAT. §§ 13-1501 to -1509 (1991)), New Mexico (N.M. STAT. ANN. § 74-4B-4 (Michie 1993)), North Dakota (N.D. CENT. CODE § 54-40.2.02 (1989 & Supp. 1991)), Oklahoma (OKLA. STAT. ANN. tit. 74, § 1221 (West 1991)), Washington (WASH. REV. CODE ANN. § 47.20.710 (West 1986)), and Wisconsin (WIS. STAT. ANN. § 160.36 (West 1989)).

129. *Kansas v. Finney*, 836 P.2d 1169 (Kan. 1992) (invalidating an agreement between the state of Kansas and the Kickapoo Nation that authorized casino gambling on the Kickapoo Indian Reservation and provided for monitoring of such gambling by the state of Kansas under the Indian Gaming Regulatory Act).

130. *Id.*

be taken to ratify an agreement. Most states with general enabling statutes require approval of cooperative agreements by a particular official or committee.<sup>131</sup>

Enabling statutes should include a standard for agencies to apply when negotiating with tribes. State agencies should be legally obligated to negotiate in good faith. The Indian Gaming Regulatory Act requires states to negotiate cooperative agreements with Indian tribes in good faith.<sup>132</sup> Because this is one of the only federal statutes that expressly permits tribal/state cooperative agreements, one may infer a federal requirement of, or at least a preference for, good faith negotiations. A good faith standard will ensure that the state comes to the bargaining table ready to cooperate with the tribe. Additionally, a state should be able to argue that it is not restricting tribal sovereignty if the state can show that it entered into an agreement in good faith and that it did not coerce or negotiate with the Indian tribe unscrupulously.

Additionally, an objective standard for negotiations, if possible, should be included within the statutory language.<sup>133</sup> The state may prohibit cooperative agreements if the subject matter falls below the state standards for licensing or permitting. Such a standard assures that cooperative agreements will be uniform and that the various state agencies will treat the tribes similarly.

An enabling statute should also specify that it does not authorize cooperative agreements that conflict with or are preempted by federal law. This will establish boundaries for agencies and tribes in negotiating agreements by prohibiting agreements that conflict with applicable federal legislation.

Enabling statutes should mention jurisdictional issues and agree to ignore these issues in the framework of the cooperative agreements. The legislation should specify that it is not an attempt to expand or limit the jurisdiction of a state over tribal lands.<sup>134</sup>

Depending on the needs of the state, an enabling statute can be

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131. See e.g., MONT. CODE ANN. § 18-11-1105 (1991) (requiring Attorney General to approve); N.D. CENT. CODE § 54-40.2-04 (1989 & Supp. 1991) (requiring governor to approve agreement); OKLA. STAT. ANN. tit. 74, § 1222 (West 1992) (requiring approval of a committee made up of five Senate members and five House of Representative members).

132. 25 U.S.C. § 2710(d)(3)A (1988) (requiring states to "negotiate with the Indian tribe in good faith to enter into . . . a [tribal/state] compact").

133. Specific enabling statutes will be more amenable to objective standards. General statutes will likely be able to include only a good faith standard because a more concrete standard would likely be inapplicable to all areas.

134. MONT. CODE ANN. § 18-11-110 (1981) (stating that cooperative agreements between the state and Indian tribes may not affect the underlying jurisdiction of any party unless expressly authorized by Congress).

drafted narrowly to deal with a specific problem between the tribe and the state or drafted broadly to authorize negotiation of cooperative agreements. However, narrower statutes present the need for multiple legislation, unless the problem to be solved by the cooperative agreement is an isolated issue. A problem occurs when new issues arise between tribes and states, whereby legislation addressing these issues will have to be enacted to authorize cooperative agreements. This could deter cooperative agreements in new or unusual areas.

The state should waive its sovereign immunity for purposes of the cooperative agreement.<sup>135</sup> The enabling statute should include language that the state consents to sue and be sued in courts of competent jurisdiction.

## 2. California Assembly Bill 240

The State of California recently passed legislation, entitled Assembly Bill 240 (A.B. 240), that authorizes the California Environmental Protection Agency to enter into an agreement with Indian tribes concerning waste disposal facilities on reservations.<sup>136</sup> The impetus for A.B. 240 occurred when the Campo Band of Mission Indians began developing a solid waste project on the Campo Indian reservation.<sup>137</sup> Neighbors of the reservation opposed the project and influenced state legislators to introduce a bill that would have made it illegal to transport waste to the Campo Reservation.<sup>138</sup> Although the state's interest in protecting itself from potential spillover pollution conflicted with the tribe's interests in self-governance and economic development, the state, the tribes sponsoring waste projects, and environmental

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135. See *supra* text accompanying notes 81-87.

136. Codified at CAL. HEALTH & SAFETY CODE §§ 25198.1-25198.1-9 (West 1991) and CAL. PUB. RES. CODE §§ 44201-44210 (West Supp. 1993). Joel Mack, the co-author of this Article, Taylor Miller (of Miller, Karp & Grattan), and Kevin Gover (of Gover, Stetson & Williams) were among those extensively involved in the negotiation of A.B. 240.

137. Walker & Gover, *supra* note 4, at 58. Initially, A.B. 240 would have made the transportation of waste to the Campo Reservation illegal. The second version of A.B. 240 would have required all persons to receive a permit prior to transporting any waste to the Campo Reservation. The third version of A.B. 240 is the version that is codified at CAL. HEALTH & SAFETY CODE §§ 25198.1-9 (West 1991) and CAL. PUB. RES. CODE § 44201-44210 (West Supp. 1993).

138. Walker & Gover, *supra* note 4, at 58.



groups were able to reach an acceptable compromise through A.B. 240 and the ensuing cooperative agreement.<sup>139</sup>

One of the most important sections of the statute establishes a standard by which cooperative agreements must be governed.<sup>140</sup> A.B. 240 requires any facility to meet the "functional equivalent" of the state licensing requirements.<sup>141</sup> Because federal environmental regulations apply on Indian reservations, an analysis of the differences between California regulations and federal regulations was necessary to determine what extra regulations cooperative agreements would require. The statute lists several California environmental statutory sections explicitly and states that "[a]ny other provision of state environmental . . . laws and regulations germane to the hazardous waste facility" must also be "matched."<sup>142</sup>

Further, the statute not only enables the parties to negotiate disputes rather than litigate them, it also shifts the focus away from the jurisdictional questions.<sup>143</sup> By essentially agreeing to ignore jurisdictional problems, the parties are able to concentrate on ensuring that waste facilities on Indian reservations are as environmentally sound as facilities built elsewhere in the state. Other topics covered in the statute also decrease the likelihood of litigation. For example, the tribe is made eligible for technical assistance from state agencies.<sup>144</sup> Each cooperative agreement must provide for exchange of information between the tribe and the agencies concerning the site and monitoring data.<sup>145</sup>

### 3. Comparison of Statutes

Idaho's enabling statute authorizes any public agency or the state of

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139. In August 1991, Assemblyman Steven Peace, the representatives of the Campo and La Posta tribes (which included co-author Joel Mack), the Sierra Club, and the Planning and Conservation League negotiated and drafted the final version of A.B. 240 in a marathon 20-hour Conference Committee hearing session that was open to the public. A.B. 240 was revised and approved the following day.

140. CAL. HEALTH & SAFETY CODE § 25198.3(e) (West 1991).

141. *Id.*

142. *Id.* § 25198.3(e)(5). The functionally equivalent provisions of tribal or federal permits and the cooperative agreement "shall collectively be deemed to constitute permits issued under state law for all purposes of enforcing state law." *Id.* § 25198.6(c).

143. *Id.* § 25198.6(a).

144. The tribe will be obligated to provide compensation to the agencies for any assistance provided. *Id.* § 25198.4(b).

145. *Id.* § 25198.4(c). Section 25198.4(c) requires each cooperative agreement to "provide for the sharing of appropriate data and other information between any tribal regulatory body, any federal agency, the owner or operator, and applicable state agencies." *Id.*

Idaho to enter into agreements with the Indian tribes for the transfer of property and for joint exercise of power.<sup>146</sup> However, the statute gives very little guidance to state agencies, includes no standards for negotiation, and, other than a sentence prohibiting cooperative agreements that are prohibited by federal law, fails to limit the boundaries of cooperative agreements.<sup>147</sup>

In contrast, the Montana statute specifies with far greater detail the contents of cooperative agreements, including duration, purpose, administration, and termination of agreements.<sup>148</sup> As a result, several states have patterned their enabling statutes after the Montana statute.<sup>149</sup> Additionally, the Montana statute safeguards itself from challenges of unlawful delegation of jurisdiction by stating that the statute does not permit such delegation.<sup>150</sup> Further, the Montana statute enables states and tribes to avoid the issue of federal consent by requiring a cooperative agreement to be filed with the Bureau of Indian Affairs.<sup>151</sup> If the Bureau of Indian Affairs receives a copy of an agreement and fails to object to it, a court may find that the federal government impliedly consented to the agreement. It is unclear, however, whether such consent is needed. Further, it is uncertain whether merely filing an agreement with the Bureau of Indian Affairs would be tantamount to

146. IDAHO CODE § 67-4002 (1984). "Any public agency . . . or the State of Idaho or any of its political subdivisions may enter into agreements with Indian tribes . . . for the transfer of real and personal property and for joint concurrent exercise of powers . . . ." *Id.*

147. *Id.*

148. MONT. CODE ANN. § 18-11-104 (1991). The Montana statute require a cooperative agreement to specify the following:

- (1) its duration;
- (2) the precise organization, composition, and nature of any separate legal entity created thereby;
- (3) the purpose of the agreement;
- (4) the manner of financing the agreement and establishing and maintaining a budget therefor;
- (5) the method to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination;
- (6) provision for administering the agreement, which may include creation of a joint board responsible for such administration;
- (7) the manner of acquiring, holding, and disposing of real and personal property used in the agreement; . . .
- (9) any other necessary and proper matters.

*Id.*

149. *See, e.g.*, N.D. CENT. CODE § 54-40.2.02 (1984); NEB. REV. STAT. §§ 13-1501 to-1509 (1984).

150. MONT. CODE ANN. § 18-11-110 (1991).

151. *Id.* § 18-11-107.

consent or waiver. Although the Montana statute is very specific about the requirements for cooperative agreements, it fails to address one very important aspect—the framework for negotiations. Neither state agencies nor the attorney general, who ultimately approves the cooperative agreements under the Montana statute, are given guidance as to whether a tribe should be held to the same standard as a state agency or whether the state must negotiate with the tribe in good faith.

North Dakota's enabling statute is similar to the Montana statute. One departure from the Montana statute, however, is that North Dakota requires an opportunity for public notice and hearing prior to the approval of all cooperative agreements by the governor.<sup>152</sup> This has the potential to weaken tribal interests by allowing citizens to protest the agreements and put pressure on the governor before an agreement can be approved.<sup>153</sup> The governor, an elected official subject to the approval of public opinion, may be unduly influenced by the public sentiment among some of the more vocal state citizens.<sup>154</sup>

## V. TERMS AND REMEDIES

Numerous tribal/state jurisdictional agreements have been reached on various issues, including law enforcement, taxation, child custody matters, fire protection, zoning, and motor vehicle registration.<sup>155</sup> Thus, the potential uses for cooperative agreements are extremely broad. General contract principles apply to cooperative agreements and they should be kept in mind when drafting these agreements. However,

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152. N.D. CENT. CODE § 54-40.2-03.2 (1984). If the North Dakota state agency receives a request for a public hearing, "the state agency shall hold a public hearing prior to the submission of the agreement to the governor at which any persons interested in the agreement may be heard." *Id.*

153. Unfortunately, racism plays a crucial factor in many protests against projects or dealings with tribal lands. Many citizens are quick to protest any developments that benefit Indian tribes, regardless of the merits of the development. For example, in the state of Wisconsin, a beer labeled "Treaty Beer" was put on the market and became the best-selling brand in some stores and bars in Northern Wisconsin. The proceeds from sales of "Treaty Beer" are used to oppose Chippewa Treaty rights, which are perceived by some as granting special and unfair rights to the Chippewa Indians. Wilkinson, *supra* note 12, at 376. Equally harmful is the paternalistic attitude towards Indians taken by many opposed to development on Indian reservations. Such persons often believe that Indians are noble savages who "are just not smart enough to develop or regulate [their lands] responsibly. This Indian stereotype is insulting to say the least, and it smacks of the same arrogance that led fifteenth-century Europeans to conclude that they had 'discovered' America." Gover & Walker, *supra* note 38, at 942.

154. This form of enabling statute may present the same state constitutional flaw discovered in the Kansas statute. See *Kansas v. Finney*, 836 P.2d 1169 (Kan. 1992).

155. Wilkinson, *supra* note 12, at 404.

drafters must remember the unique problems associated with tribal/state cooperative agreements. Attached to this Article for reference is an example of a recently negotiated cooperative agreement under A.B. 240.<sup>156</sup> This section addresses several important terms that should be considered for inclusion within most cooperative agreements. Additionally, this section addresses the remedies available to the contracting parties.

#### A. Terms

##### 1. Limit the Scope of the Cooperative Agreement

A cooperative agreement should not only identify the problem that the agreement is attempting to solve, but also limit its application to this area.<sup>157</sup> A cooperative agreement should also specify the geographic areas to which the agreement applies to avoid confusion. For example, the agreement should state whether it applies to all land within the reservation boundaries or only to land owned by non-Indians within the reservation boundaries.

##### 2. Policy Rationales

To give a court guidance if future litigation should ensue, the cooperative agreement should include the underlying policy reasons for its creation, such as to better develop economic opportunities on the reservation, to protect tribal sovereignty, to foster tribal state relations, or to protect state citizens from any harmful spillover problems from the reservation.<sup>158</sup> Thus, if litigated, a court will have some guidance as to how to enforce the cooperative agreement in the manner the parties

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156. The attached Cooperative Agreement was negotiated and drafted by Taylor Miller, of Miller, Karp & Grattan, representing the Campo Environmental Protection Agency, and legal representatives of various California state agencies.

157. For example, the cooperative agreement between the Campo Environmental Protection Agency and the State of California lays out several very specific purposes: to regulate solid waste facilities on the reservation; to establish a system of consultation and cooperation between the parties in order to comprehensively regulate solid waste facilities on the reservation; to share technical and professional expertise; to establish and maintain effective communication between the parties for the regulation of solid waste facilities on the reservation; and to minimize the potential for jurisdictional disputes between the parties. Cooperative Agreement between the Campo Environmental Protection Agency and the State of California, 6 (1991).

158. See, e.g., *id.*

intended. Additionally, if an agreement is challenged as preempted by federal law, the agreement itself enunciates several federal interests regarding the Indian tribes.

### 3. Jurisdiction

As discussed in Section IV,<sup>159</sup> the cooperative agreement should specify that it is not an attempt to expand or limit the jurisdiction of a state or tribe.

### 4. Severability Clause

The cooperative agreement, like most contracts, should include a severability clause. Thus, if any section of the cooperative agreement is invalidated, the cooperative agreement as a whole is not invalidated.

### 5. Waiver of Sovereign Immunity by both the Tribe and State

As discussed in Section III<sup>160</sup> and Section IV,<sup>161</sup> both the tribe and the state should specifically waive their sovereign immunity against each other for actions based on the cooperative agreement. Absent such a waiver, the cooperative agreement might be unenforceable.<sup>162</sup>

### 6. Termination Date

The cooperative agreement may include a termination date or it may be indefinite. However, an indefinite agreement should include a process by which one party can cancel the agreement upon either breach by the other party or upon written notice. Most states require a minimum notice period of six months, but limit the maximum notice period to five years.<sup>163</sup> By including a termination clause, a cooperative agreement is more similar to a contract than a permanent grant of authority, thereby reducing the risk of preemption or unconstitutionality.

## B. Remedies

Because cooperative agreements between tribes and states are a recent development and have not been the subject of litigation, it is

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159. See *supra* text accompanying note 129.

160. See *supra* text accompanying notes 81-86.

161. See *supra* text accompanying notes 126 and 134.

162. See *supra* text accompanying notes 81-86.

163. See, e.g., MONT. CODE ANN. § 18-11-108 (1991).

unclear what remedies, if any, are available under these agreements. However, if cooperative agreements have been properly enabled by both the state and tribal governments, courts would be more likely to enforce the agreements and apply one of the remedies discussed below.

### 1. Contract Remedies

Because a court could construe a particular cooperative agreement as an enforceable contract, each side should anticipate the possibility of an action for breach of contract.<sup>164</sup> However, because of the limited precedent, it is difficult to determine the remedies available to each party. If otherwise legally cognizable, a state may be able to sue for environmental damages based on a tribe's breach of environmental standards.<sup>165</sup> On the other hand, a tribe may be able to sue for damages based on a state agency's failure to bargain in good faith.<sup>166</sup>

### 2. Equitable Remedies

Additionally, if a contract is enforceable, a court could impose equitable remedies.<sup>167</sup> If the parties have begun negotiations, but one of the parties hinders the ability to reach an agreement, a court may order the parties to enter into an agreement within a specified time period.<sup>168</sup> If the parties are unable to reach an agreement within the specified period, the court may appoint a mediator to draft a binding

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164. See, e.g., CAL. HEALTH & SAFETY CODE § 25198.5 (West 1991) ("The failure of a party to a cooperative agreement to meet the requirements of this section shall be determined to be an actionable breach of the cooperative agreement.").

165. See, e.g., *id.* § 25198.5(e) (party not denied legally available remedies for breach of hazardous waste agreement because the party entered into a cooperative agreement).

166. The Indian Gaming Regulatory Act permits an Indian tribe to file an action against a state for failure to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(A)(i) (Supp. 1993). The Act further places the burden of proof on the State to prove that it negotiated in good faith. *Id.* § 2710(d)(7)(B)(ii).

167. See, e.g., CAL. HEALTH & SAFETY CODE § 25198.7. This section states that:

[The] cooperative agreement shall provide that the state or tribe may bring an appropriate civil action in a court of competent jurisdiction to enforce the terms of the cooperative agreement as a contract, and shall not limit the availability to either party of any remedy at law or in equity otherwise available under California law.

*Id.*

168. See, e.g., 25 U.S.C. § 2710(d)(7)(B)(iv).

cooperative agreement.<sup>169</sup> A court could also enjoin a state or tribe from certain action.<sup>170</sup> Additionally, a court could order specific performance if the cooperative agreement is sufficiently detailed.<sup>171</sup> However, the cooperative agreement must be specific enough for a court to enforce it in a manner consistent with the parties' intentions.<sup>172</sup>

### 3. Remedies Specified in the Contract

The cooperative agreement may specify remedial action for possible disputes or agreement breaches. A cooperative agreement may require that the contracting parties meet to discuss the dispute prior to taking any legal action. A cooperative agreement may require arbitration to resolve disputes. Arbitration would reduce the costs associated with litigation and expedite the result. Additionally, a cooperative agreement may include a liquidated damages clause. However, because cooperative agreements are contracts, these clauses cannot be punitive in nature.<sup>173</sup> Thus, fines for non-compliance, often used by states to ensure environmental compliance,<sup>174</sup> would likely be unenforceable in a cooperative agreement. Cooperative agreements may also include an automatic cancellation clause upon a breach by either party.

## VI. SUBJECT MATTER JURISDICTION

Parties to cooperative agreements should consider where they may enforce the agreements. Tribes and states do not confer subject matter jurisdiction upon a court by waiving their sovereign immunity, unless that court would otherwise have jurisdiction over the suit. Rather, waiving sovereign immunity generally nullifies a party's ability to use sovereign immunity as a defense.<sup>175</sup> Furthermore, parties to cooperative agreements should determine which choice of law is in their mutual best interests and implement the agreement in a manner that best ensures such choice of law.

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169. *See, e.g., id.* § 2710(d)(7)(B)(iii) (providing that a court may order an agreement to be reached within 60 days).

170. *See, e.g., id.* § 2710(d)(7)(B)(ii) (district courts may enjoin any gaming activity conducted in violation of a cooperative agreement).

171. *See, e.g.,* Duke v. Wheatley, 580 So. 2d 1267, 1274 (Miss. 1991).

172. *Id.*

173. *See, e.g.,* City of Rye v. Public Serv. Mut. Ins. Co., 315 N.E.2d 456 (N.Y. 1974) (invalidating a liquidated damages clause of \$200 per day for delays in the completion of a building complex because the damages were punitive in nature).

174. *See, e.g.,* 42 U.S.C. § 6961(i) (1992); FLA. STAT. ANN. § 403.085 (West 1992).

175. Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 670-71 (8th Cir. 1986) (barring suit where contractor sued tribal housing authority for breach of contract absent waiver of sovereign immunity).

A. *Federal Jurisdiction*1. *Federal Question*

It is a common assumption that federal courts have jurisdiction over most disputes involving Native Americans or tribes. United States Code, title 28, section 1362 grants federal district courts original jurisdiction over civil actions brought by an Indian tribe arising under the Constitution, laws, or treaties of the United States.<sup>176</sup> Nonetheless, a federal question must exist for a district court to have jurisdiction.<sup>177</sup> Federal courts do not have jurisdiction merely because a Native American is a party or because a suit concerns property or contracts of Native Americans.<sup>178</sup> “[A] Native American has no greater right than any other litigant to utilize federal courts.”<sup>179</sup>

If the tribe or other involved litigant has no access to tribal courts and the state clearly lacks jurisdiction, courts are more willing to find a federal question. For example, the court in *Richardson v. Malone*<sup>180</sup> found that a contract concerning property within Indian country elicited a federal question because of the unique federal statutory scheme dealing with Indian lands.<sup>181</sup> Congress has established an expansive network of laws addressing Indian country. This network evidences that “Congress did not intend there to be a vacuum, where no law held sway.”<sup>182</sup> Thus, in the absence of tribal or state jurisdiction, the court in *Richardson* found that a residue of federal common law applied to the contract between the parties to the suit.<sup>183</sup> What is unclear is whether *Richardson* will be interpreted to apply to all cases in which neither tribes nor states have subject matter jurisdiction, or whether

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176. 28 U.S.C. § 1362 (1982).

177. *See id.*

178. *Martinez v. Southern Ute Tribe of So. Ute Reservation*, 249 F.2d 915 (10th Cir. 1957) (holding that an alleged wrongful denial of membership in tribe did not automatically confer jurisdiction), *cert. denied*, 356 U.S. 960 (1958).

179. *Richardson v. Malone*, 762 F. Supp. 1463, 1467 (N.D. Okla. 1991) (non-Indian plaintiff brought breach of contract action against Indian defendant seeking foreclosure on a security interest in property located in Indian country).

180. 762 F. Supp. 1463 (N.D. Okla. 1991).

181. *Id.* at 1467-68.

182. *Id.*

183. *Id.*



*Richardson* will be interpreted more narrowly to apply only to those cases involving contracts for property located in Indian country.<sup>184</sup>

Courts will likely find that cooperative agreements controlled by federal statutes invoke a federal question. For example, the Indian Gaming Regulatory Act enables and encourages tribes and states to enter into cooperative agreements to determine gaming laws on reservations. A cooperative agreement drafted under the auspices of such a law presents a federal question. However, for the myriad of other cooperative agreements, courts are unlikely to find that a federal question exists, unless the parties successfully argue that *Richardson* is applicable to the facts at issue.

## 2. Diversity Jurisdiction

Federal courts may attempt to assert jurisdiction over cooperative agreements if diversity exists between the parties to the agreement. Native Americans are not, however, foreign citizens for purposes of diversity jurisdiction. Rather, they are residents of the state in which they reside.<sup>185</sup> Furthermore, an Indian tribe is not a citizen of any state and cannot be sued in federal court on the grounds of diversity jurisdiction.<sup>186</sup> Courts have determined that to allow an Indian tribe to be dragged into federal court under diversity jurisdiction is antithetical to the notion of inherent tribal sovereignty.<sup>187</sup> Courts have, however, found that tribal agencies can be sued in federal court under diversity jurisdiction if (1) federal jurisdiction would not infringe on tribal self-government and (2) the agency is incorporated or located in a state diverse from the other party.<sup>188</sup>

The parties to a cooperative agreement will almost always be residents of the same state because the purpose of cooperative agreements is to solve local problems between state governments and the tribes that reside within them. Thus, federal courts will seldom rely on

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184. Conversely, if a tribe has established a tribal court with jurisdiction over the cooperative agreement, both state and federal courts may lack subject matter jurisdiction. See *infra* nn.200-01 and accompanying text.

185. *Richardson*, 762 F. Supp. at 1466.

186. *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974) (holding lack of citizenship as part of the court's reasoning for dismissing an action by a tribe against the state tax commissioner due to Eleventh Amendment considerations).

187. *Id.*

188. *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.* 797 F.2d at 668, 673 (8th Cir. 1986). However, if the tribal agency is a state chartered corporation, it should be treated as any other corporation. COHEN, *supra* note 69, at 355-56.

diversity of citizenship in establishing subject matter jurisdiction over cooperative agreements.

*B. State Jurisdiction*

The argument for state subject matter jurisdiction over cooperative agreements is strongest where application of Public Law 280 is proper.<sup>189</sup> In 1953, Congress enacted Public Law 280 to grant certain states jurisdiction as to both criminal and civil matters.<sup>190</sup> Public Law 280 initially granted only six states such jurisdiction: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.<sup>191</sup>

Although Public Law 280 appears to impart a broad jurisdictional grant, Congress created a specific exception from state jurisdiction for the alienation, encumbrance, or taxation of real property held by an Indian or Indian tribe.<sup>192</sup> Courts have interpreted this exception to

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189. 28 U.S.C. § 1360 (1993). Public Law 280 provides that Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin

shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country [designated to be governed by Public Law 280] to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the state . . . .

*Id.*

190. *Id.* Congress enacted Public Law 280 at a time when Congress thought it best to assimilate Indians as ordinary citizens. Indian organizations, however, adamantly opposed Public Law 280 because they feared state jurisdiction, preferring instead federal jurisdiction because of the federal government's trust responsibility. *Boisclair v. Superior Court*, 801 P.2d 305, 310-11 (Cal. 1990).

191. 28 U.S.C. § 1360(a) (1984). Public Law 280 excepts certain reservations from the blanket of state jurisdiction. *Id.*

192. *Id.* § 1360(b) (1984). This section provides that Public Law 280 does not authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

*Id.*

include such state regulation of Indian lands as zoning.<sup>193</sup> Additionally, laws such as Public Law 280 should be liberally construed in favor of the Indians.<sup>194</sup> On this basis, cooperative agreements governing Indian land may also be deemed exempt from state jurisdiction under Public Law 280.

In 1968, Congress amended Public Law 280 to allow additional states to assert jurisdiction over Indian tribes.<sup>195</sup> The 1968 amendment requires that any state asserting jurisdiction under the 1968 amendment to Public Law 280 actively assert such jurisdiction and obtain the tribe's consent to jurisdiction.<sup>196</sup> In keeping with the current federal policy of strengthening tribal self-government, courts often refuse to interpret Public Law 280 in favor of states' jurisdiction over tribes.<sup>197</sup> Hence, courts have granted states jurisdiction over tribes only where the state and the tribe have strictly complied with the requirements of Public Law 280 and its amendments.<sup>198</sup>

States not covered by Public Law 280 may still assert subject matter jurisdiction under certain circumstances. First, tribal law may grant jurisdiction to the state.<sup>199</sup> Second, if the cause of action or some material event occurs outside Indian country, then states generally may assert jurisdiction over the action.<sup>200</sup> Third, in cases where the cause of action occurs primarily in Indian country and involves an Indian plaintiff and a non-Indian defendant, the state likely has concurrent jurisdiction with the tribal courts.<sup>201</sup> Conversely, in cases where the

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193. See *Boisclair*, 801 P.2d at 311 (citing *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975)).

194. *Id.* at 312 (citing *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976)).

195. 25 U.S.C. § 1322 (1968).

196. A state can assert jurisdiction over a tribe only by enacting a statute that enables it to do so. The tribe must consent to state jurisdiction by a majority vote of all of the enrolled tribal members in the affected area of Indian country. *Kennerly v. District Court*, 400 U.S. 423 (1971) (holding that unilateral action by tribe adopting state jurisdiction is insufficient to vest state with jurisdiction absent affirmative legislative action by state).

197. *Estate of Johnson*, 178 Cal. Rptr. 823 (Cal. Ct. App. 1981) (concluding that Public Law 280 does not confer the right to impose inheritance tax on reservation Indians), *cert. denied*, 459 U.S. 828 (1982).

198. *Annis v. Dewey County Bank*, 335 F. Supp. 133 (D.S.D. 1971) (finding that approval of security agreement by tribal council not sufficient to grant jurisdiction to enforce a creditor's judgment on the reservation).

199. *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 673 (8th Cir. 1986).

200. *Canby*, *supra* note 27, at 36. "Outside of Indian country, the Indian is the same as everyone else in the eyes of the law." *Id.*

201. COHEN, *supra* note 69, at 342. Because many tribal codes mirror the provisions of the Bureau of Indian Affairs Code of Courts of Indian Offenses, 25 C.F.R. § 11.22

cause of action occurs primarily in Indian country and involves a non-Indian plaintiff and an Indian defendant, the tribal court has exclusive jurisdiction absent a grant of jurisdiction by the tribe to state courts.<sup>202</sup> Finally, states are likely to have some jurisdiction over cases arising on either small unorganized reservations or allotments outside reservations with no form of tribal self-government.<sup>203</sup> Federal jurisdiction, however, may be more appropriate in such a case.<sup>204</sup>

### C. Tribal Jurisdiction

In addition to the types of jurisdiction discussed above, tribal courts have "inherent power to exercise civil jurisdiction over non-Indians in disputes affecting the interests of Indians that are based upon events occurring on a reservation."<sup>205</sup> Tribal codes often state whether jurisdiction in certain matters is retained by the tribe or granted to the state. In the *Weeks* case, the pertinent section of the Oglala Sioux Tribal Code specifically retained jurisdiction of all suits involving a defendant who is a member of a tribe within the tribal court's jurisdiction.<sup>206</sup>

### D. Determining Jurisdiction

In determining which court will have jurisdiction, the parties to cooperative agreements should first consider the possibility of a federal question or diversity of citizenship. If neither exists, then the parties should attempt to determine whether a court is more likely to find tribal or state jurisdiction. If the state is a Public Law 280 state, a court would be more likely to grant subject matter jurisdiction to the state. However, absent application of Public Law 280, it is difficult to predict which court will assert subject matter jurisdiction. Under these circumstances the parties to the cooperative agreement may agree that one court best safeguards both parties' interests. Thus, the parties may tailor the negotiations and the drafting of the cooperative agreements to

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(1979), which imposes jurisdiction only over actions against Indian defendants, many tribes have not authorized their courts to entertain civil cases against non-Indian defendants. *Id.*

202. *Id.*

203. *Id.* at 350.

204. *See supra* notes 180-84 and accompanying text.

205. *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 673 (8th Cir. 1986).

206. *Id.*

best ensure that the agreement will be governed by a particular jurisdiction. Such attempts may include the following measures: (1) conducting all negotiations regarding the cooperative agreement in the location of the chosen jurisdiction; (2) ensuring that actions required under the cooperative agreement take place in the location of the chosen jurisdiction to the extent possible; for example, the parties may require that the tribe or agency report only to the state headquarters rather than sending state officials to the Indian reservation; (3) including a choice of law provision in the cooperative agreement. Recognition of choice of law provisions is very fact specific and enforcement of the cooperative agreement in the desired jurisdiction cannot be guaranteed. However, parties may have a better chance of enforcing their cooperative agreements in a particular jurisdiction if they consider subject matter jurisdiction at the beginning of the negotiation and drafting of the cooperative agreement.

## VII. CONCLUSION

The last century has seen substantial conflict between states and Indian tribes over jurisdiction. Flexible solutions beyond litigation are needed so that both parties may move forward with certainty and efficiency. One solution is the utilization of tribal/state cooperative agreements. The states and tribes are in the best position to know their own needs and to decide what they are willing to concede in order to fulfill those needs. Compromise through negotiated agreements between two sovereign governmental entities will ensure maximization of benefits to both parties. However, states and tribes must carefully draft cooperative agreements and enabling statutes to avoid the pitfalls of invalidation. This Article has set forth numerous pitfalls and has suggested ways to circumvent them. By entering into properly drafted cooperative agreements, states and tribes will be able to move into the twenty-first century in a spirit of cooperation and compromise.

COOPERATIVE AGREEMENT BETWEEN THE CAMPO  
ENVIRONMENTAL PROTECTION AGENCY AND  
THE STATE OF CALIFORNIA

[PURSUANT TO THE PROVISIONS OF CHAPTER 805  
OF THE STATUTES OF 1991 (AB 240)]

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## AGREEMENT

THIS AGREEMENT is entered into in duplicate this 10th day of December, 1992 by and between the CAMPO ENVIRONMENTAL PROTECTION AGENCY ("CEPA"), an agency of the Campo Band of Mission Indians, a federally-recognized Indian tribal government, whose address is 1779 Campo Truck Trail, Campo, California 91906; and the State of California, by and through the California Environmental Protection Agency, whose address is 555 Capitol Mall, Suite 235, Sacramento, California 95814, with reference to the following:

### RECITALS

**WHEREAS**, the Campo Band of Mission Indians (the "Band") is a sovereign Indian tribal government, recognized as such by the Secretary of the Interior of the United States of America, and identified on page 52830 of Number 250 of Volume 53 (December 29, 1988) of the Federal Register, and

**WHEREAS**, the Band is attempting to promote its powers of self-government and to achieve economic independence through the establishment and operation of several business enterprises on the Campo Indian Reservation ("Reservation"); and

**WHEREAS**, the Campo General Council, the governing body of the Band, has authorized the development of a non-hazardous solid waste project on the Reservation, including a solid waste sanitary landfill, a composting facility, and a recycling facility; and

**WHEREAS**, the Campo General Council has established the Campo Environmental Protection Agency ("CEPA") for the purpose of regulating environmental quality on the Reservation; and

**WHEREAS**, the Campo Band of Mission Indians Solid Waste Management Code of 1990 (the "Solid Waste Code") directs CEPA to regulate solid waste handling and disposal on the Reservation for the protection of air, water, and land from pollution and nuisance and for the protection of public health; and

**WHEREAS**, the Solid Waste Code authorizes CEPA to enter into contracts to carry out its responsibilities; and

**WHEREAS**, an adequate system of regulation is necessary to improve and protect environmental quality on the Reservation and to protect the health, safety, and welfare of the residents and businesses of the Reservation and of southeastern San Diego County; and

**WHEREAS**, the State of California has a comprehensive program for the regulation of solid waste handling and disposal; and

**WHEREAS**, the state program is implemented and enforced in part by the California Environmental Protection Agency: ("Cal/EPA"); California Integrated Waste Management Board ("CIWMB"); the State Water Resources Control Board ("SWRCB"); the California Regional Water Quality Control Board, San Diego Region ("Regional Board"); the Air Resources Board ("ARB"); and the San Diego County Air Pollution Control District ("San Diego APCD") (collectively, the "State Agencies"); and

**WHEREAS**, CEPA finds that the State Agencies have the technical expertise to assist in enforcing CEPA's standards for solid waste handling and disposal, and CEPA wishes to enter into agreements with the State Agencies to obtain such assistance; and

**WHEREAS**, the State Agencies may determine that they have sufficient expert staff to provide the appropriate level of assistance to CEPA for specific tasks, and the State Agencies wish to enter into a general agreement with CEPA to provide such assistance where feasible and mutually agreed by future specific memoranda of agreement; and

**WHEREAS**, the California Legislature enacted legislation, Assembly Bill 240, Chapter 805, Statutes of 1991 ("Chapter 805") signed by the Governor on October 10, 1991, authorizing the Secretary of Cal/EPA ("the Secretary") to enter into cooperative agreements with Indian tribes concerning the regulation of Solid Waste Facilities; and

**WHEREAS**, CEPA submitted on March 9, 1992 a written request to the Secretary to convene negotiations concerning a cooperative agreement as authorized by Chapter 805; and

**WHEREAS**, CEPA submitted a draft cooperative agreement to the Secretary on March 9, 1992; and

**WHEREAS**, the Secretary, on July 30, 1992, provided public notice of his proposed action to enter into a cooperative agreement and of the findings and determinations that are required by Chapter 805; and

**WHEREAS**, a public hearing concerning the Secretary's proposed action was held on August 24, 1992, at Alpine, California; and

**WHEREAS**, the proposal being considered by CEPA concerning Solid Waste Facilities within the boundaries of the Reservation is described in Appendix A to this Agreement; and



**WHEREAS**, the State Agencies have completed the determinations required by Chapter 805, including determinations that the system of regulation established by CEPA for the facilities described in Appendix A meets the requirements of functional equivalency with certain state standards; and

**WHEREAS**, the Secretary has determined to enter into a cooperative agreement, as set forth herein;

**NOW, THEREFORE**, in consideration of the Recitals hereinabove mentioned and of the terms, conditions, covenants, and warranties hereinafter mentioned to be kept, honored, and performed by the parties, it is hereby agreed as follows:

### **TERMS AND CONDITIONS**

#### **Section I. Definitions**

Unless otherwise expressly stated, the following terms used in this Agreement shall have the following meanings:

- A. "Agreement" shall mean this Agreement between CEPA and the State.
- B. "ARB" shall mean the Air Resources Board of the State of California.
- C. "Band" shall mean the Campo Band of Mission Indians, an Indian tribe recognized by the Secretary of the Interior of the United States of America.
- D. "Cal/EPA" shall mean the California Environmental Protection Agency.
- E. "Campo General Council" shall mean the governing body of the Campo Band of Mission Indians.
- F. "CEPA" shall mean the Campo Environmental Protection Agency, a governmental agency of the Band.
- G. "CEPA Permit" shall mean a permit proposed or issued by CEPA authorizing and establishing conditions concerning the construction and operation of a solid waste project pursuant to the Solid Waste Regulations.
- H. "CIWMB" shall mean the California Integrated Waste Management Board.
- I. "Composting" shall mean the controlled biological decomposition of organic wastes that are source separated from the municipal solid waste stream, or which are separated at a centralized facility. "Compost" includes vegetable, yard, and wood wastes that are not hazardous waste.
- J. "EPA" shall mean the United States Environmental Protection Agency.

K. "Hazardous waste" shall mean any substance, material, smoke, gas, particulate matter, or combination thereof that:

(1) because of its quantity, concentration, or physical, chemical, or infectious characteristics (defined in the Solid Waste Regulations as "infectious waste"), may either cause or significantly contribute to an increase in mortality or serious irreversible or incapacitating illness, or pose a substantial present or potential hazard to human health, living organisms, or the environment when improperly treated, stored, transported, disposed of, or otherwise handled;

(2) is defined to be hazardous or toxic by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 or the Resource Conservation and Recovery Act of 1976, as either Act may be amended from time to time, and by any regulations promulgated thereunder, including but not limited to any substance, material, smoke, gas, particulate matter, or combination thereof containing asbestos or polychlorinated biphenyls ("PCBs"); or

(3) is hazardous, toxic, ignitable, reactive, or corrosive and that is defined and regulated as such by CEPA, the State of California, or the United States of America.

L. "Hazardous material" includes but is not limited to any hazardous material as defined in Chapter 6.95 of Division 20 of the California Health & Safety Code (commencing with section 25500) and any substance, material, smoke, gas, particulate matter, or combination thereof that is toxic, ignitable, reactive, corrosive, an irritant, a strong sensitizer, or which generates pressure through decomposition, heat, or other means, if it may cause substantial personal injury, serious illness, or harm to humans, domestic animals, or wildlife, during or as a proximate result of its disposal. The terms "toxic," "corrosive," "flammable," "irritant," and "strong sensitizer" shall be given the same meaning as in the California Hazardous Substances Act (Chapter 13 commencing with Section 28740 of Division 22 of the Health and Safety Code).

M. "Recycling Facility" shall mean the facility for recycling, including all appurtenant structures and equipment, including without limitation all access roads, all necessary utilities, all necessary water wells, and all modifications and additions to and replacements of each, to be constructed, operated or installed on the Reservation.

N. "Regional Board" shall mean the California Regional Water Quality Control Board, San Diego Region.

O. "Reservation" shall mean the Campo Indian Reservation.

P. "San Diego APCD" shall mean the San Diego County Air Pollution Control District.

Q. "Solid waste" shall mean all putrescible and nonputrescible solid, semisolid, and liquid waste, including, but not limited to, garbage, trash, refuse, paper, rubbish, ashes, industrial waste, construction and demolition waste, abandoned vehicles and parts thereof, discarded home and industrial appliances, manure, vegetable or animal solid and semisolid wastes; other discarded solid, liquid, and semisolid wastes from a wastewater treatment plant, water supply treatment plant, or air pollution control facility, or other discarded gaseous material resulting from industrial, commercial, mining, or agricultural operations, or community activities; and not including solid or dissolved material in domestic sewage, solid or dissolved material in irrigation return flows, or industrial discharges that are point sources subject to permits under 33 U.S.C. § 1342, sources, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 et seq., and not including hazardous material, as defined hereinabove.

R. "Solid Waste Code" shall mean the Campo Band of Mission Indians Solid Waste Management Code of 1990.

S. "Solid Waste Facilities" shall mean the facilities described in Appendix A.

T. "Solid Waste Regulations" shall mean the Solid Waste Regulations promulgated by CEPA pursuant to the Solid Waste Code.

U. "State Agencies" shall mean Cal/EPA, the ARB, San Diego, APCD, CIWMB, SWRCB, and the Regional Board or any of them individually or in combination.

V. "SWRCB" shall mean the State Water Resources Control Board.

W. "Technical Assistance Memorandum of Agreement" or "TAMA" shall mean an agreement between CEPA and a State Agency concerning assistance from and the involvement of a State Agency in the design, establishment, and implementation of a permit system as further provided in Section X of this Agreement and in agreements executed pursuant to Chapter 805 of the California Statutes of 1991.

## **Section II. Purpose and Scope of Agreement**

A. This Agreement is entered into for the following purposes:

(1) Promptly and effectively to regulate Solid Waste Facilities on the Reservation, the operation and regulation of which facilities are of great concern to both CEPA and the State Agencies due to the potential impact on the public health, safety, and welfare.

(2) To establish a system of consultation and cooperation between CEPA and the State Agencies comprehensively to regulate Solid Waste Facilities on the Reservation.

(3) To share technical and professional expertise among CEPA and the State Agencies.

(4) To establish and maintain effective communication between CEPA and the State Agencies regarding the regulation of Solid Waste Facilities on the Reservation.

(5) To minimize the potential for jurisdictional disputes between CEPA and the State Agencies.

(6) To meet the requirements of Chapter 805.

B. This Agreement encompasses the regulation on the Reservation of the Solid Waste Facilities described in Appendix A.

C. The parties to this Agreement expressly recognize that the parties are each empowered to enforce their respective laws, rules, and regulations against persons within their respective jurisdictions.

### Section III. Jurisdiction

Nothing in this Agreement shall limit or expand, or be construed to limit or expand, the jurisdiction of the State Agencies, the Band or CEPA with respect to the Solid Waste Facilities, including but not limited to the enforcement powers and procedures available to the State or the Band with respect to those facilities to the extent not preempted by federal law, including but not limited to powers and procedures contained in state or tribal statutes or regulations.

### Section IV. Functional Equivalency

A. The Solid Waste Facilities will be regulated in accordance with the design, permitting, construction, siting, operation, monitoring, inspection, closure, postclosure, liability, enforcement, and other regulatory provisions applicable to a Solid Waste Facility, or which relate to any environmental consequences that may be caused by facility construction or operation, which provisions are set forth in the Solid Waste Code and Solid Waste Regulations and as such Code and Regulations may be amended from time to time after the execution of this Agreement. The Solid Waste Code and Solid Waste Regulations are incorporated by reference herein and will have the same force and effect with respect to this Agreement as though fully set forth. In the

event definitions of terms in the Solid Waste Code and Solid Waste Regulations conflict with those set forth in Section I of this Agreement, the definitions of this Agreement shall control for purposes of interpreting this Agreement.

B. The State Agencies have determined that the Solid Waste Code and Solid Waste Regulations are functionally equivalent to provisions of the following State laws and regulations which are germane to the type of Solid Waste Facility proposed for construction and operation on the Reservation as set forth in Appendix A:

(1) Article 4 (commencing with Section 13260) of Chapter 4, Chapter 5 (commencing with Section 13300), and Chapter 5.5 (commencing with Section 13370) of Division 7 of the Water Code.

(2) Chapter 3 (commencing with Section 41700), Chapter 4 (commencing with Section 42300), and Chapter 5 (commencing with Section 42700), Part 4, and Part 6 (commencing with Section 44300) of Division 26 of the State Health and Safety Code.

(3) Division 30 of the State Public Resources Code.

(4) All germane regulations adopted pursuant to the statutes specified in this section.

C. The Cal/EPA has determined that the Solid Waste Code and Solid Waste Regulations are functionally equivalent to other provisions of State environmental, public health, and safety laws and regulations germane to the Solid Waste Facilities, including applicable provisions contained in the following: Article 10.5 (Management of Lead Acid Batteries) (commencing with Section 25215), Article 10.6 (Management of Small Household Batteries) (commencing with Section 25216), and Article 13 (Management of Used Oil) (commencing with Section 25250) of Chapter 6.5 of Division 20 of the Health and Safety Code.

D. CEPA will incorporate standards and requirements germane to the protection of the environment, public health, and safety and consistent with the State laws and regulations listed in Paragraphs B and C, as such provisions may be amended from time to time if those standards and requirements meet both of the following requirements:

(1) The standards and requirements do not discriminate against a tribe which has executed a cooperative agreement, or a lessee or contractor of such a tribe, and are applicable to, and are not more stringent than, other State standards and requirements applicable to similar or analogous facilities or operations outside the Reservation.

(2) Adequate notice and opportunity for comment on the incorporation of new and amended standards or requirements is provided to CEPA to facilitate any physical or operational changes in the facility in accordance with State law.

E. Except for emergency regulations, notice of any proposed amendments of the Solid Waste Code or Solid Waste Regulations shall be given to the State Agencies at least forty-five (45) days prior to their adoption. CEPA shall provide public notice of such proposed adoption, in accordance with applicable tribal laws and regulations. Except for emergency regulations, such notice shall normally include a 30-day period for public comment. The State Agencies shall determine whether such amendments affect their prior determination that the Solid Waste Code and Solid Waste Regulations are functionally equivalent to applicable State regulations. If a State Agency does not respond within such forty-five (45) day period to CEPA's notice, such proposed amendments shall be deemed not to affect the State Agency's determination that the Solid Waste Code and Solid Waste Regulations are functionally equivalent as provided above.

F. Cal/EPA or CEPA, as appropriate, shall provide at least 30 days' public notice of proposed amendments to the Cooperative Agreement.

G. To facilitate participation by CEPA in rule-making proceedings, and otherwise to review matters concerning the operation of this Agreement, the State Agencies shall periodically meet with CEPA informally to review regulatory and technical trends, upcoming regulatory or legislative proceedings, operation of the Solid Waste Facilities, and other relevant matters.

#### Section V. Completeness of Application

CEPA shall transmit a copy of any application for a Solid Waste Facility Permit or any applicable federal permit to each of the State Agencies. CEPA and the State Agencies may mutually agree in writing that certain portions of an application or certain types of applications which are not germane to regulations established and enforced by that agency, need not be so transmitted. The State Agencies shall provide detailed comments regarding the completeness of the application within thirty (30) days after receiving any copies of applications filed for tribal and applicable federal

permits with respect to the deficiencies, if any, of the application with respect to the State standards identified in Section III, Paragraphs B and C. The failure of any of the State Agencies to provide those comments within that period shall be deemed a finding of completeness of the respective applications.

#### **Section VI. Permit Review**

A. CEPA shall transmit a copy of a draft of any CEPA Permit and any applicable federal permit to each of the State Agencies prior to final issuance of the permit. CEPA and the State Agencies may mutually agree in writing that certain portions of a permit or certain types of permit applications which are not germane to regulations established and enforced by that agency need not be so transmitted. The State Agencies shall review any draft tribal permit and any applicable federal permit to determine, based on existing policies, practices, and precedents, whether it contains conditions sufficient to:

(1) Meet the germane functionally equivalent standards as provided in Section IV of this Agreement.

(2) Provide not less than the level of protection for public health, safety, and the environment that would have been achieved if that State Agency had issued the permit.

(3) Implement all feasible mitigation measures. For purposes of this paragraph, "feasible" has the same meaning as in California Public Resources Code Sections 21001, 21002.1, and 21004, and any regulations adopted pursuant thereto.

B. The State Agencies shall provide comments within seventy-five (75) days of receipt of the draft permit. If a State Agency does not provide such comments, the permit conditions shall be deemed sufficient to meet the conditions of Subparagraphs (1), (2), and (3) of Paragraph A of this Section.

C. Permits issued by CEPA shall meet the conditions of Subparagraphs (1), (2), and (3) of Paragraph A of this Section.

D. Within ten days of issuance of a final CEPA Permit or applicable federal permit, a copy of that permit shall be provided to Cal/EPA.

#### **Section VII. Enforcement**

A. Compliance with the standards established in the Solid Waste Regulations will be enforced by CEPA through various means, including but not limited to inspections, notices, and orders. At least ten days before issuing an enforcement order which is not for an emergency, within five days after issuing an enforcement order for an emergency, or within fifteen days after discovering a violation of a Solid Waste Regulation, or term or condition of a CEPA or applicable federal permit for the Solid

Waste Facility, which is likely to result in an enforcement action, CEPA will advise the appropriate State Agency of the violation or proposed action.

B. To the extent authorized by law, the State may exercise its enforcement powers over the Solid waste Facilities, subject to all of the following requirements:

(1) A violation or threatened violation of any CEPA standard or requirement or any condition set forth in this Agreement or any permit for the facility has occurred or is occurring. For purposes of this paragraph, "threatened violation" means a condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources.

(2) The violation or violations have been brought to the attention of CEPA through written notice from Cal/EPA. The notice shall identify the specific violation or threatened violation which is occurring or has occurred and a specific corrective or enforcement action or range of actions, including sufficient penalties. The notice shall include a specific and reasonable schedule in which to take appropriate corrective or enforcement action.

(3) CEPA, after receiving such notice, has failed to take the action or actions or to take other reasonable action to abate or correct the violation or threatened violation within a reasonable time.

C. Nothing in this Section provides or shall be interpreted to provide any jurisdiction or regulatory authority to the State Agencies or CEPA that the State Agencies or CEPA would not have in the absence of this Agreement. CEPA does not, for itself or on behalf of the Band, concede jurisdiction or waive any defenses it may have to assertion of jurisdiction by the State Agencies or the State of jurisdiction. The State Agencies do not concede jurisdiction or waive any defenses they may have to assertion of jurisdiction by CEPA or the Band.

#### Section VIII. Disputes

A. CEPA, Cal/EPA, and appropriate State Agencies agree to meet and confer if a dispute arises between the parties regarding the performance of any party under the terms of this Agreement.

B. A State Agency unsatisfied with the resolution of a dispute may, at its option, use the procedures for adjudication set forth in the Solid Waste Code and Solid Waste Regulations.



C. After having in good faith met and conferred with CEPA, the State may, to the extent authorized by law, file an appropriate civil action in a court of competent jurisdiction to enforce the terms of this Agreement as a contract. Such action shall not limit the availability to either party of any remedy at law or in equity otherwise available.

**Section IX. Sovereign Immunity**

**A. CEPA Waiver.**

(1) CEPA hereby waives any right of sovereign immunity it may enjoy to the extent necessary to allow, and for the express and only purpose of allowing, the State to exercise and enforce its rights under the terms of this Agreement, and CEPA consents to suit by the State for any and all such controversies and claims in any court otherwise having jurisdiction over the subject matter. The State acknowledges that the provisions of this Subsection constitute a partial waiver of CEPA's immunity from suit. The waiver of sovereign immunity contained herein shall be effective only to the extent necessary for the State to enforce its rights and remedies under this Agreement, and it is expressly understood and agreed by the parties that the waiver of sovereign immunity contained herein shall extend only to the State. CEPA expressly refuses to waive its sovereign immunity as to any action brought by any party other than the State, including but not limited to actions by third-party beneficiaries, if any, of this Agreement.

(2) The parties understand and agree that nothing in this Agreement is intended, nor shall it be construed, to waive the sovereign immunity of the Band or to create a liability or obligation on the part of the Band. In addition, the parties understand and agree that CEPA may not:

(a) Expressly or impliedly enter into agreements of any kind on behalf of the Band.

(b) Pledge the credit of the Band.

(c) Dispose of, pledge, or otherwise encumber real or personal property of the Band.

(d) Secure loans or incur indebtedness requiring any obligation, contribution, or guarantee on the part of the Band.

(e) Waive any right of, or release any obligation owed to, the Band.

(f) Waive any other rights, privileges, or immunities of the Band.

(3) CEPA appoints Kevin Gover, Esq., with an office on the date hereof at Gover, Stetson & Williams, P.C., 2501 Rio Grande Boulevard, N.W., Albuquerque, New Mexico 87104 ("CEPA's Process Agent") as its agent to receive, on behalf of it and its property, service and copies of the summons of the complaint and any other process that may be served in any action or proceeding. Such service may be made by mailing or delivering a copy of such process to CEPA in care of CEPA's Process Agent at the above address. CEPA shall notify the State of any substitution of or replacement for CEPA's Process Agent in writing and in accordance with this Agreement.

B. State Waiver.

(1) The State hereby waives any right of sovereign immunity it may enjoy to the extent necessary to allow, and for the express and only purpose of allowing, CEPA to exercise and enforce its rights under the terms of this Agreement, and the State consents to suit by CEPA for any and all such controversies and claims in any court otherwise having jurisdiction over the subject matter. CEPA acknowledges that the provisions of this Subsection constitute a partial waiver of the State's immunity from suit. The waiver of sovereign immunity contained herein shall be effective only to the extent necessary for CEPA to enforce its rights and remedies under this Agreement, and it is expressly understood and agreed by all parties that the waiver of sovereign immunity contained herein shall extend only to CEPA.

(2) The State appoints the Assistant Secretary for Law Enforcement and Counsel, with an office on the date hereof at the California Environmental Protection Agency, 555 Capitol Mall, Sacramento, California 95814 ("the State's Process Agent") as its agent to receive, on behalf of it and its property, service and copies of the summons of the complaint and any other process that may be served in any action or proceeding. Such service may be made by mailing or delivering a copy of such process to the State in care of the State's Process Agent at the State's Process Agent's above address. The State shall notify CEPA of any substitution of or replacement for the State's Process Agent. Such notice shall be in writing and shall be given in accordance with this Agreement.

Section X. Data; Time Schedules: Access

A. CEPA and the State Agencies shall provide each other and appropriate State Agencies with all monitoring data collected with respect to the Solid Waste Facility, inspection reports, correspondence, emission source testing data, draft and final

permits, notices of violations, consent orders, abatement orders, compliance schedules, and other public documents relating to the regulation of the Solid Waste Facilities. To the extent authorized by Chapter 805, the State Agencies shall not release to any person information received pursuant to this Agreement and that is privileged, proprietary, or trade secret information.

B. The parties to this Agreement may mutually agree in writing to modify time periods for actions required by this Agreement or Chapter 805, except the time periods provided for public notice, review, and comment by Chapter 805 shall not be eliminated or reduced.

C. CEPA shall provide for reasonable access by State Agency personnel to the Reservation to assist with permit application review, inspection, and monitoring of the operation of the Solid Waste Facilities. Any State Agency wishing to enter the Reservation shall first provide notice to CEPA in writing or by telephone. Only State Agency employees or other governmental employees or contractors authorized by a State Agency shall be permitted to enter the Reservation. CEPA may require that such personnel be accompanied by a designated representative.

D. The State Agencies shall also provide for reasonable access for purposes of permit application review and inspection, to the extent the State Agencies can provide that access, by CEPA personnel to transfer stations or similar facilities located outside of the Reservation and handling waste to be transferred to the Reservation. Any permit issued or approved by a State Agency for a solid waste facility, from which solid waste is or may be transferred to the Reservation, shall contain a requirement to allow reasonable access by CEPA to such facilities for the same purposes as State Agency personnel may enter the Reservation as provided by Paragraph C of this Section.

#### **Section XI. Technical Assistance**

A. CEPA shall be eligible for technical assistance, to the extent feasible, from the State Agencies for the design, establishment, and implementation of a permit system, cooperative monitoring programs, tribal enforcement system, and implementation of any other regulatory requirement. State Agencies may provide such assistance in accordance with this Agreement as specifically agreed to in Technical Assistance Memoranda of Agreement ("TAMA").

B. In consideration of the services to be provided by the State Agencies, CEPA shall pay the State Agencies for the above services at the rate mutually agreed to in a TAMA. Expenses for necessary equipment, materials, and travel for staff of the State Agencies shall be reimbursed by CEPA. Payment for services and reimbursement for expenses shall not exceed the amount as provided in the applicable TAMA in any given year. CEPA shall not be obligated for any payments or reimbursements beyond such amount except as mutually agreed in writing in advance.

**Section XII. Term of Agreement**

This Agreement shall remain in effect until terminated by CEPA or the State. No termination of this Agreement shall occur unless the terminating party has established, after following the dispute resolution procedures established herein, that one of the parties or a State Agency has breached a material condition of this Agreement.

**Section XIII. Delay or Omission; Remedies**

Except as expressly provided in this Agreement, no delay or omission to exercise any right, power, or remedy accruing under this Agreement shall impair such right, power, or remedy, nor shall it be construed to be a waiver of or acquiescence in a breach of or default under this Agreement. The parties specifically and affirmatively agree not to construe the conduct, statements, delay, or omission of any other party as altering in any way the Parties' agreements as defined in this Agreement. Any waiver, permit, or approval of any breach of or default under this Agreement must be in writing, and, because the language of this Section was negotiated and intended by the parties to be binding and is not a mere recital, the parties hereby agree that they will not raise waiver or estoppel as affirmative defenses so as to limit or negate the clear language and intent of this Agreement. All remedies, either under this Agreement, by law, or otherwise afforded to any party shall be cumulative, not alternative.

**Section XIV. Notice**

Any notices, payments, demands, or communications required or permitted under this Agreement shall be in writing and shall be deemed to have sufficiently been given if personally served on or delivered by commercial courier, or sent certified or registered mail, return receipt requested and postage prepaid, and addressed to the other party at the addresses indicated on the first page of this Agreement, or at such other address as any party shall hereafter furnish the other in writing. If mailed, such notice shall be deemed to have been made on the third (3rd) day after posting, or on the date actually received, whichever occurs first. If sent by a commercial courier that guarantees next day delivery, such notice shall be deemed to have been made on the first (1st) business day after delivery to the courier, with fee paid and next day delivery designated.

#### **Section XV. Severability**

If any provision in this Agreement shall be held invalid or unenforceable by a court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision of this Agreement, and the affected parties shall negotiate in good faith to amend this Agreement to effectuate fully their intent as embodied in this Agreement.

#### **Section XVI. Entire Agreement; Modification**

There is no agreement or promise on the part of any party to do or omit to do any act or thing not herein mentioned. All prior agreements between or among the parties, in any combination, whether oral or written, confidential or public, express or implied, are hereby expressly superseded and replaced in full by this Agreement, which constitutes the entire agreement between the parties and may not be effectively amended, changed, modified, or altered without the written consent of both parties. Notwithstanding the preceding sentence, TAMA may be amended upon mutual agreement of CEPA and one or more of the State Agencies.

#### **Section XVII. Headings**

The headings to the various sections of this Agreement are inserted only for convenience of reference and are not intended, nor shall they be construed, to modify, define, limit, or expand the intent of the parties.

#### **Section XVIII. Consents: Reasonableness; Good Faith**

The parties agree to cooperate fully with each other and to act reasonably, in good faith, and in a timely manner in all matters hereunder so that each of them may obtain the benefits to which they are entitled hereunder and for which they have negotiated. All parties agree to negotiate in good faith and without delay as to all matters requiring negotiation. No party shall unreasonably deny, withhold, or delay any consent or approval required or contemplated for any action or transaction proposed to be taken or made hereunder, except as otherwise provided herein.

#### **Section XIX. Gender; Number**

Any noun or pronoun used herein shall refer to any gender and to any number as the context requires or permits.

IN WITNESS WHEREOF, this Agreement is executed on behalf of the Band by CEPA, acting by and through its Chairman pursuant to Resolution No. \_\_\_\_\_ authorizing such execution and by the State of California, acting by and through the Secretary of Cal/EPA pursuant to authority provided by Chapter 805.

CAMPO ENVIRONMENTAL PROTECTION AGENCY

By:     [Signed]      
Michael Connolly, Chairman

Dated: 12/10/92

By:     [Signed]      
James Strock, Secretary, California  
Environmental Protection Agency

Dated: 12/10/92

## APPENDIX

### Solid Waste Facilities Description

The facility is an integrated solid waste management project which will include a sanitary landfill and a materials recovery (recycling) facility.

The facilities and ancillary facilities are proposed to be located on a 600-acre site within a 1,150 lease area in the Southeastern section of the reservation (Proposed Site). The landfill portion of the proposed project would require a total of approximately 400 acres. Two other sites have been identified as possible alternatives. They are a 210 acre canyon site in the central portion of the reservation (Site 1), and a 150-acre canyon site in the southwestern corner of the reservation (Site 2).

The proposed Solid Waste Facility is classified as a Class III landfill pursuant to the CEPA Solid Waste Management Regulations (Title V, Section 505.23) and the California Code of Regulations ("CCR", Title 23, Division 3, Chapter 15). Wastewater sewage or water treatment sludge may be accepted if it meets certain standards. Infectious waste, asbestos, petroleum or its byproducts, polychlorinated biphenyls, and other hazardous or toxic wastes would not be accepted for disposal treatment or recycling.

The capacity of the Proposed Site and Site 1 is estimated to be 40 million cubic yards (or about 28 million tons). Alternative Site 2 has a lifetime capacity of approximately 45 million cubic yards (or 31.5 million tons).

An engineered double liner system and leachate collection system would underlie the disposal area. Landfill gas control would be accomplished by drilling gas monitoring wells and conducting monthly gas detection checks. When the gas reaches extractable levels, extraction wells would be operated to collect the landfill gas (primarily carbon dioxide and methane) from the landfill. The gas would be flared on-site using multiple flares constructed as the cell development proceeds.

The Proposed Site and Site 1 would be designed to accept waste either by rail or truck. Site 2 would probably be limited to truck access due to rail line construction limitations.

The proposed Materials Recovery Facility (MRF) would house the recycling activities and would provide temporary storage for recovered materials prior to shipment to markets. The MRF would be located adjacent to the landfill and would occupy approximately 10 acres.

CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY APPROVES  
COOPERATIVE AGREEMENT WITH  
CAMPO ENVIRONMENTAL PROTECTION AGENCY

December 10, 1992

For further information contact:  
James Lee (916) 324-9670

(Sacramento) - Today, California's Secretary for Environmental Protection, James M. Strock, approved the Cooperative Agreement with the Campo Environmental Protection Agency (CEPA). Representing the Campo Band of Mission Indians, the Director of CEPA, Michael Connolly, joined Secretary Strock in signing the Agreement today. This Agreement was developed and adopted pursuant to the requirements of Assembly Bill 240 (Chapter 805, Statutes of 1991), authored by Assemblyman Steve Peace and signed by Governor Wilson in August of 1991. The Cooperative Agreement defines the requirements for the construction and operation of the proposed solid waste recycling and disposal facility on the Campo Reservation, in San Diego County.

"We are pleased to join with Mr. Connolly today in signing this Cooperative Agreement," stated Secretary Strock. "The Agreement, like the legislation authorizing it, represents the fruit of lengthy and productive negotiations. The results have been positive for Cal/EPA, because CEPA has adopted stringent standards for the design, construction and operation of the proposed facility. These standards are at least as protective, and in some cases more so, than those in effect throughout California."

"To complement these tough standards, we expect CEPA to be diligent in enforcing them," continued Strock. "Mr. Connolly has assembled a well-trained team at CEPA, and I have confidence that he and his staff are prepared for the task. However, we stand ready to step in, should Cal/EPA action be required to prevent environmental contamination problems."

"This Cooperative Agreement sets a national precedent for cooperative relations between States and Indian Tribes," emphasized Strock. "We are creating today a model of environmental partnership between States and Tribes that we anticipate will greatly reduce the potential for litigation, and prevent the conflicts that have occurred between Tribes and States in the past."

CEPA initially submitted the proposed Cooperative Agreement to Cal/EPA on March 21, 1992, thereby beginning the formal review, comment and decision period. After a series of negotiations between Cal/EPA and CEPA, Secretary Strock released for public review and comment the proposed Cooperative Agreement with CEPA on July 21, 1992. A public hearing on the proposed Agreement was held on



August 24, 1992, at the Community Center in Alpine, California. The public comment period closed on October 19, 1992. A response to comments was prepared by Cal/EPA and was also released today.

A Cal/EPA team reviewed the proposed cooperative agreement and found that it meets the requirements of Chapter 805. Cal/EPA and its constituent units - the State Water Resources Control Board, the Integrated Waste Management Board and the Air Resources Board - reviewed the CEPA system for regulation of the proposed solid waste recycling and disposal facility on the Campo Indian Reservation. This review established that the Campo Environmental Policy Act of 1990, the Solid Waste Management Code of 1990, and the Campo Environmental Protection Agency Regulations, taken together, meet the requirements of the legislation and are functionally equivalent to the state laws and regulations, as required.

Cal/EPA and its constituent units found that the CEPA regulatory system is very closely patterned after the California regulatory system for solid waste recycling and disposal facilities. Cal/EPA and its constituent units have also found that the CEPA system will provide at least as much protection of public health and safety and the environment as does the California statutory and regulatory system. As a result, Cal/EPA and its constituent units determined that there are no material differences between the State laws and regulations and the proposed Tribal functionally equivalent provisions.