

HOBBS, STRAUS, DEAN & WALKER, LLP

ATTORNEYS AT LAW

2120 L STREET N.W. • SUITE 700 • WASHINGTON, DC 20037

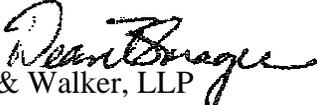
TEL: 202.822.8282 • FAX: 202.296.8834

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April 29, 2006
Filed by E-Mail

To: David Meyer
U.S. Department of Energy

Bob Middleton
U.S. Department of Interior

From: Dean B. Suagee 
Hobbs, Straus, Dean & Walker, LLP
Attorneys for
Manzanita Band of Mission Indians
St. Regis Mohawk Tribe
Three Affiliated Tribes

Subject: Section 1813 Energy Rights-of-Way Study: Comments to follow-up on the discussion in the national scoping meeting regarding implications for tribal self-determination and sovereignty interests

This memorandum is submitted on behalf of the above listed tribes to clarify and supplement the discussion that took place at the national scoping meeting in Denver on March 7-8, 2006, on the relationship of e tribal self-determination and sovereignty interests to energy rights-of-way on tribal lands. The basic points, discussed in detail below are as follows:

- (1) There are responsibilities associated with tribal sovereignty that tribal governments are expected to fulfill with respect to rights-of-way over tribal lands;
- (2) A body of federal statutory law recognizes that tribes possess sovereign powers within their reservations in the general subject matters of environmental protection and cultural resources management;
- (3) Despite the broad Congressional recognition of tribal sovereignty, Court decisions in recent years have made it difficult for tribal governments to effectively exercise regulatory jurisdiction within rights-of-way and to levy taxes to support their governmental operations; and
- (4) Congress should continue to affirm tribal sovereign powers within rights of way on tribal lands for the purpose of protecting tribal environment and cultural resources.

Court decisions discussed below impede the ability of tribes to fulfill the responsibilities of sovereignty by applying the judicially created doctrine that Indian tribes can be implicitly divested of aspects of their inherent sovereign rights. In the subject matters of environmental protection and cultural resources management, however, there is a body of federal law recognizing tribal sovereignty on tribal trust lands for the protection of the environment and cultural resources.

The dilemma faced by tribes is that Federal financial assistance programs for protection of tribal environmental and cultural resources are woefully insufficient. Given these deficiencies, we think that the Congress should expressly affirm that tribes have the sovereign power to levy taxes to support programs to carry out these important governmental responsibilities. Further, Congress should make it clear that the federal policy supporting tribal self-determination preempts any taxing authority that states might assert over conduct or property taxed by a tribal government.

1. Tribal governments are expected to fulfill certain responsibilities of sovereignty with respect to rights-of-way over tribal lands.

Tribes need to have the ability to exercise their sovereign authority to regulate rights of way that cross their reservations. Four sets of responsibilities of tribal governments include responsibilities to: (1) tribal members and other people who live or do business within Indian reservations; (2) future generations; (3) the graves of ancestors and other kinds of sacred places; and (4) the nonhuman living things that make up the biological communities of Indian reservations.

Energy extraction and transportation facilities have risks associated with them that require governments to have the capacity to respond. Many reservations are remote from other responders. Accidents happen. Natural gas and petroleum products are flammable and toxic when released into the environment. During the scoping meeting in Denver, one tribal leader spoke of an incident in which a pipeline exploded. Another tribal leader spoke of a pipeline that had numerous leaks. There are also risks associated with electric powerlines, such as the possibility of breaking in severe weather, causing risks to people and animals. Construction of new facilities has environmental impacts, which may include loss of wildlife habitat, filling of wetlands, pollution of water bodies, and damage to grave sites and archaeological resources. Maintenance of energy facilities within rights-of-way can also present environmental and cultural resource issues, such as impacts associated with maintenance of access roads or the use of herbicides.

In many ways, the concerns that tribal governments have regarding the risks and impacts associated with energy rights-of-way are similar to the concerns of other levels of government. All Americans have a right to expect their institutions of government to control risks to public health and safety and to have the capability to respond when accidents happen. In some ways, though, the concerns of tribal officials are different from other governments. Some kinds of natural resources are uniquely important for tribal cultural traditions. Some archaeological sites are important in tribal religious beliefs; some are the graves of ancestors.

2. Federal statutes consistently recognize tribal authority for environmental protection and cultural resources management on tribal lands, including trust lands within rights-of-way.

In the scoping meeting, there was discussion of several federal environmental and cultural resources statutes in which Congress has affirmed that tribal governments possess sovereign authority with respect to these subject matters. Some of the statutes speak in terms of tribal authority within reservation boundaries and others refer to trust lands. None expressly carves out an exception for trust lands over which rights-of-way have been granted.

In the context of federal environmental statutes, the Environmental Protection Agency (EPA) has a long-standing policy of recognizing the sovereign authority of tribal governments, including a policy statement adopted in 1984. While EPA's recognition of tribal sovereignty largely pre-dates the enactment of express tribal provisions in federal statutes, many statutory provisions have since been enacted that provide evidence of congressional affirmation of tribal sovereignty in a particular subject matter. In statutes administered by EPA, the approach taken by Congress has generally been to authorize EPA to treat tribes as states, an approach that is sometimes referred to as "TAS." The major federal environmental regulatory statutes are carried out through an approach often called "environmental federalism," in which the federal EPA performs some roles and the states perform others.¹ While some federal roles can be delegated to the states, the subject matter of environmental protection is generally understood to be within scope of the sovereign powers of the states. While state programs within the framework of the federal laws generally require EPA approval, in the exercise of their sovereignty, states can establish programs that are more stringent than required by federal law or that regulate pollutants or activities that are not covered by federal requirements. Statutory language authorizing EPA to treat tribes like states demonstrates a congressional understanding that, like states, environmental protection is a subject that is within the scope of inherent tribal sovereignty. Some of the key statutes are listed below.

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, commonly known as "Superfund"), 42 U.S.C. §§9601 – 9675. CERCLA Section 126 provides that the "governing body of an Indian tribe shall be afforded substantially the same treatment as a State" with respect to several listed provisions of the Act. 42 U.S.C. §9626. CERCLA section 104 authorizes cooperative agreements with states and tribes to carry out hazardous substance response actions. 42 U.S.C. § 9604. *See also* regulations codified at 40 C.F.R. §§300.505(a), 300.515(b). CERCLA section 107(f), which deals with natural resources damages (cases involving injury to, destruction of, or loss of natural resources), authorizes tribes to act as trustees for natural resources "belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation." 42 U.S.C. §9607. *See also* 40 C.F.R. §300.610; 43 C.F.R. part 11 (natural resource damage assessments). On its face, the statutory

¹ *See generally* Robert v. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995).

language applies to tribal trust land and makes no exception for rights of way. The term “natural resources” includes “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources.” 42 U.S.C. §9601(16). When a right-of-way is granted over tribal land, the tribe is the beneficial owner of such natural resources. Regulations issued by the Bureau of Indian Affairs governing rights-of-way on trust lands expressly provide that the Indian landowners retain the right to continue to use their land “for any purpose not inconsistent with the primary purpose for which the right-of-way is granted.” 25 C.F.R. §169.5(k). Accordingly, if a pipeline or other energy facility within a right-of-way on trust land causes environmental contamination subject to CERCLA, the tribe could assume a governmental role in environmental restoration.

Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. 11001 – 11050. EPCRA was enacted as title III of the Superfund Amendments and Reauthorization Act (SARA) of 1986. Pub. L. No. 99-499, title III, 100 Stat. 1705, 1728. EPCRA does not include any express references to tribes, but, given that EPCRA was enacted as title III of SARA, and SARA was the act which directed EPA to afford tribes “substantially the same treatment” as states, EPA included provisions in its implementing regulations treating tribes like states. 40 C.F.R. parts 355, 370, 372. *See also* 55 Fed. Reg. 30632, 30640-42 (July 26, 1990). Pursuant to these regulations, tribes are, like states, responsible for establishing emergency response commissions, and for receiving reports from the owners or operators of facilities that are subject to the reporting requirements of this act relating to hazardous and toxic chemicals. The regulations adopt a definition of “Indian country” that includes all lands within the boundaries of any Indian reservation, expressly including “rights-of-way running through the reservation.” 40 C.F.R. §§355.20, 370.2, 372.3.

Oil Pollution Act (OPA), 33 U.S.C. §§2701 – 2761. Under OPA, Indian tribes are authorized to act as trustees for natural resources damages. 33 U.S.C. §2706. Liability for such damages is to “any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such Indian tribe.” 33 U.S.C. §2706(a)(3). The term “natural resources” is defined much the same as in CERCLA. 33 U.S.C. §2701(2). If environmental contamination subject to OPA occurs on a right-of-way on tribal land, the tribe is thus recognized as having governmental authority to respond.

Clean Air Act (CAA), 42 U.S.C. §§7401 – 7671q. Amendments enacted in 1990 authorize EPA to treat tribes like states, including the approval of tribal implementation plans (TIPs). 42 U.S.C. §§7410(o), 7601(d). EPA has interpreted the 1990 Amendments as a delegation of federal power to tribes to regulate all sources of air pollutions within reservation boundaries. *See* 63 Fed. Reg. 7254 (Feb. 12, 1998), final rule adopting revisions in 40 C.F.R. parts 9, 35, 50, 81, and adding a new part 49. EPA’s interpretation of this aspect of TAS for the Clean Air Act has been upheld by a federal Court of Appeals. *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied sub nom. Michigan v. EPA*, 532 U.S. 970 (2001). The 1990 Amendments also added a new title V “operating permits” program. States are required to adopt operating permit programs, and tribes are authorized to do so. In the absence of an approved tribal program, the federal operating permit program applies to all sources within Indian country. 64 Fed. Reg. 8247 (Feb. 19, 1999) (codified in various sections of 40 C.F.R. part 71).

Clean Water Act (CWA), 33 U.S.C. §§1251 – 1387. Amendments enacted in 1987 added a new section 518 to the CWA, authorizing EPA to treat tribes like states. 33 U.S.C. §1377. EPA has issued several rulemaking documents implementing section 518. *E.g.*, 56 Fed. Reg. 64876 (Dec. 12, 1991) (treatment of tribes as states for the Water Quality Standards (WQS) program, codified in various sections of 40 C.F.R. part 131); 58 Fed. Reg. 67966 (Dec. 22, 1993) (treatment of tribes as states for the National Pollutant Discharge Elimination System (NPDES) permit program and related programs, codified in various sections of 40 C.F.R. parts 122, 123, 124, and 501). As implemented by EPA, a tribe seeking TAS to regulate sources of water pollution on fee lands within its reservation is required to make a showing that it possesses inherent sovereignty over the subject matter pursuant to the second exception to the general proposition in *Montana v. United States*, 450 U.S. 544 (1981)(discussed in later in this memorandum). EPA decisions approving tribes for treatment as a state for the Clean Water Act have been upheld by federal appeals courts in three different circuits. *Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997); *Montana v. U.S. EPA*, 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921; *Wisconsin v. U.S. EPA*, 266 F.3d 741 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002). The *Montana* case involved tribal authority over all persons and all lands and waters within the reservation of the Confederated Salish and Kootenai Tribes, where about half the land is not held Indian trust status. In the *Wisconsin* case, in rejecting a claim by the state that the tribe lacked authority to regulate a navigable river because the state claimed to own the river bed, the court ruled that ownership of the submerged land was not relevant for the purpose of determining the scope of the tribe's regulatory jurisdiction.

National Historic Preservation Act (NHPA), 16 U.S.C. 470 – 470x-6. NHPA section 101(d)(2), enacted as part of the 1992 Amendments, provides that, with respect to “tribal lands,” a tribe may assume the responsibilities under the act that would otherwise be performed by the State Historic Preservation Officer (SHPO). 16 U.S.C. §470a(d)(2). For NHPA purposes, the term “tribal lands” is defined in the statute to include “all lands within the boundaries of any Indian reservation.” 16 U.S.C. §470w(14).² *See also* 36 C.F.R. part 800. As such, NHPA recognizes tribal authority over historic properties within reservation boundaries, regardless of land ownership status.

Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§3001 – 3013. The graves protection provisions of NAGPRA apply to Native American human remains, funerary objects, and other kinds of “cultural items” located on or within federal land and “tribal land.” For NAGPRA purposes, the term “tribal lands” is defined in the statute to include “all lands within the boundaries of any Indian reservation.” 25 U.S.C. §3001(15). As such, NAGPRA recognizes tribal authority over Native American graves and funerary objects within reservation boundaries, regardless of land ownership status. Other provisions of NAGPRA recognize that the control of tribal cultural property is within the scope of inherent tribal

² The statutory definition of “tribal lands” for purposes of NHPA is substantially different from the definition of the same term in section 305 of the Energy Policy Act of 2005, which, as codified at 25 U.S.C. §2601(12), is defined as “any land or interests in land owned by an Indian tribe, title to which is held in trust by the United States, or is subject to a restriction on alienation under the laws of the United States.”

sovereignty. 25 U.S.C. §3001(3)(D), (13) (definitions of terms “cultural patrimony” and “right of possession” with reference to tribal law).

3. Court decisions in recent years have made it difficult for tribal governments to effectively exercise regulatory jurisdiction within rights-of-way and to levy taxes to support their governmental operations.

Recent court decisions suggest that tribes have less authority over rights-of-way than they do over other reservation lands. The legal requirement for tribal consent to the grant or renewal of a right-of-way over tribal land is, as a practical matter, the only legal method a tribe can use to bargain for consent to the exercise of its sovereign authority and for sufficient compensation so that it can fulfill its sovereign responsibilities within rights-of-way on tribal lands. The consent requirement should not only be maintained but also should be strengthened to affirm tribal sovereignty for environmental protection and resource management within trust lands that are subject to a right-of-way.

It is a long-standing principle of federal Indian law that Indian tribes possess inherent sovereignty. *See generally* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 204-220 (2005 ed.). Tribal sovereignty is “inherent” in that it exists in the tribe itself and pre-dates the U.S. Constitution; inherent tribal sovereignty does not derive from the federal government. A tribe can exercise sovereign powers that are delegated to it from the federal government, but such powers are in addition to its inherent sovereign powers. Under federal statutes such as those discussed in the preceding section of this memorandum, the federal government often provides tribes with financial assistance to develop and administer programs, but the amount of funding that is available is generally not enough. States that operate federally-assisted environmental programs typically use tax revenues to supplement the federal funds they receive.

With respect to lands held in trust for a tribe or subject to a federal restriction on alienation, the doctrine of inherent tribal sovereignty supports the proposition that a tribe has sovereign authority to regulate conduct on such lands to protect tribal health, safety and welfare, and that a tribe has corresponding power to levy taxes to support its specific governmental operations. Recent court decisions cast some doubt on this proposition.

In the scoping meeting, a lawyer representing the Navajo Nation suggested that the section 1813 report to Congress could recommend that Congress enact legislation that would, in effect, overturn the U.S. Supreme Court’s decision in *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989). Other tribal attorneys noted that the Ninth Circuit Court of Appeals has decided several cases in recent years in which it has held that a right-of-way on trust land is the legal equivalent of fee land for jurisdictional purposes, and it was noted that those cases rely on the Supreme Court’s decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). During the discussion on the second day of the meeting, I offered some explanatory comments on the relevant case law. The memorandum puts in writing the points I made in the meeting, with citations and a little elaboration.

In *Cotton Petroleum*, the Supreme Court held that a non-Indian company which had entered into a lease with a tribe, approved by the Secretary of Interior, allowing the company to extract petroleum from tribal trust lands was subject to a state severance tax. This case arose after the Court had held, in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), that a tribal severance tax was a valid exercise of inherent tribal sovereignty which could be enforced against the company. In *Cotton Petroleum*, the basic issue was whether, in light of the valid tribal severance tax, the state severance tax was preempted by operation of federal law. The Court held that the state tax was not preempted. Under the doctrine of federal preemption in Indian law, state taxes and regulatory laws have been held to be preempted in cases such as *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). In *Cotton Petroleum*, the Court said that Congress could render the state tax inapplicable to tribal trust lands, either by express statutory language or by plain implication, but the Court held that Congress had not done so.

Preemption analysis is applied in cases in which a tribe has sovereignty over a subject matter and has enacted its own law, and where there is a federal statute or regulatory framework that supports the tribal law, and the state also asserts jurisdiction. The basic question is whether the state's assertion of state power conflicts with the federal policy in support of tribal self-government.

In *Strate v. A-1 Contractors*, as discussed in the Denver meeting, the Court applied a doctrine that is sometimes called "implicit divestiture." Under the doctrine of implicit divestiture, the Court has held that tribes can lose aspects of their inherent sovereignty by implication, without express language in a treaty or act of Congress.³

In the modern era, the doctrine of implicit divestiture was first applied in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), in which the Court held that Indian tribes have been implicitly divested of criminal jurisdiction over non-Indians.⁴ In *Montana v. United States*, 450 U.S. 544 (1981), the Court applied the doctrine of implicit divestiture to the civil regulatory context in a case involving the assertion of tribal authority over hunting and fishing on fee lands

³ Legal scholars have been quite critical of the Court's use of implicit divestiture to find limits on inherent tribal sovereignty. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L. J. 1 (1999); Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, a Theory that Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90, 96 n. 21 (2002) (citing numerous other articles by law professors).

⁴ Prior to *Oliphant*, the leading treatise on federal Indian law had characterized the principle of inherent tribal sovereignty as follows: (1) tribes originally had the same kinds of powers as other sovereign states; (2) when tribes became subject to the legislative power of the United States, they were divested of their external powers, such as the power to enter into treaties with countries other than the U.S.; and (3) they retained all their powers of self-government except those that were expressly given up in a treaty or taken away by act of Congress. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 123 (1941). Under the doctrine of implicit divestiture, the Court held that tribes can lose aspects of their inherent sovereignty by implication, without express language in a treaty or act of Congress.

(i.e., not trust lands or restricted lands) within a reservation. In *Montana*, the Court announced a “general proposition” that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Id.* at 565. Since the authority of the tribe over trust lands was not at issue in the case, this “general proposition” only applied to non-trust lands. After stating its general proposition, the Court formulated two exceptions, in effect acknowledging that a number of its earlier cases had upheld tribal sovereignty over nonmembers in various contexts other than criminal jurisdiction. As stated in *Montana*, the two exceptions are:

“A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”
Id. at 565-66.

In *Strate*, the Court held that, unlike other reservation lands, a right-of-way on tribal trust land for a public highway was the equivalent of fee land for jurisdictional purposes, and, applying the *Montana* general proposition, held that the tribal court did not have jurisdiction over a tort claim arising out of an accident involving a nonmember of the tribe and a non-Indian company doing business with the tribe. As discussed in the scoping meeting, several federal court decisions after *Strate*, mostly arising in the Ninth Circuit, have found tribes to be divested of tribal powers to tax and to enforce employment rights laws within rights-of-way.⁵

Two recent Supreme Court decisions shed further light on the Court’s application of the *Montana* general proposition and its two exceptions. In *Atkinson v. Shirley*, 532 U.S. 645 (2001), the Court struck down a hotel occupancy tax imposed by the Navajo Nation as applied to a hotel on fee lands within the reservation, ruling that neither exception to the *Montana* proposition applied. In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Court held that a tribal court did not have jurisdiction to hear a tort claim brought by a tribal member against state law enforcement officers arising out of an incident on tribal trust land. The Court applied the *Montana* general proposition even though the case arose on trust land, saying that land ownership is but one factor to consider. *Id.* at 360.

⁵ Ninth Circuit decisions after *Strate* include: *Montana Department of Transportation v. King*, 191 F.3d 1108 (9th Cir. 1999) (tribal employment rights ordinance could not be enforced against state agency); *Burlington Northern Railroad Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 2000) (holding a railroad right-of-way, like one for a public highway, the jurisdictional equivalent of fee land); *Big Horn County Electric Cooperative v. Adams*, 219 F.3d 944 (9th Cir. 2000) (holding a right-of-way for electric lines to be the jurisdictional equivalent of fee land); *Burlington Northern Santa Fe Railroad Co., v. Assiniboine and Sioux Tribes*, 323 F.3d 767 (9th Cir. 2003) (striking down a tribal tax as applied within a railroad right-of-way). In a concurring opinion in the second *Burlington Northern* case, one of the judges suggested that if the tribal tax had been designed to provide funding for emergency preparedness relating to dangerous cargo passing through its reservation, that would have been within the scope of the tribe’s inherent sovereignty. 323 F.3d at 776 (Gould, J., concurring).

In applying the doctrine of implicit divestiture, there are really two basic questions. One is whether the tribe has inherent sovereignty over the subject matter. If the tribe is seeking to exercise authority over non-Indians, particularly on non-trust lands, the answer to this question turns on whether one of the two exceptions to the *Montana* general proposition applies. But there is a second basic question – has Congress spoken on the issue? If Congress has enacted legislation recognizing that tribes possess inherent sovereignty over a subject matter, then implicit divestiture is simply not applicable. Implicit divestiture is only applicable if there are no express sources from which to derive the understanding of Congress. As discussed in section 2 of this memorandum, Congress has enacted legislation recognizing that tribes possess inherent sovereignty in the subject matters of environmental protection and cultural resources management. The cases limiting tribal taxing power, however, have the practical effect of limiting the ability of tribes to carry out environmental and cultural resource programs.

4. Congress has the authority to affirm tribal sovereign powers within rights-of-way on tribal lands and, in effect, to overturn court decisions that impede the ability of tribes to fulfill the responsibilities of sovereignty.

In *United States v. Lara*, 541 U.S. 193 (2004), the Supreme Court held that Congress has the power, under the Constitution, to enact legislation that, in effect, overturned a prior Court decision that had found a specific attribute of inherent tribal sovereignty to have been divested. In *Lara*, the Court upheld a law enacted by Congress in response to the Court's decision in *Duro v. Reina*, 495 U.S. 676 (1990). In *Duro*, the Court had held that tribes had been implicitly divested of criminal jurisdiction over Indians who were members of other tribes, in other words, that a nonmember Indian was like a non-Indian for jurisdictional purposes. The law that Congress passed expressly "recognized and affirmed" that criminal jurisdiction over all Indians is an aspect of the inherent sovereignty of all tribes. 25 U.S.C. §1301(2). In *Lara*, the Court held that Congress could enact legislation "relaxing restrictions on the bounds of inherent tribal authority" that had previously been found to exist through application of implicit divestiture doctrine. The fact that Congress had spoken on the matter was said to make all the difference.

In the subjects of environmental protection and cultural resources management, the statutes discussed in section 2 of this memorandum provide evidence that Congress has assumed that tribes continue to possess inherent sovereignty. As such, implicit divestiture should not apply. Rather, the proper analytical approach to conflicts between tribal and state jurisdiction should be to determine if state authority over non-Indians has been preempted by operation of federal law. As we saw in *Cotton Petroleum*, however, the Court found that if Congress had intended for state authority to be preempted, it had not spoken clearly enough to the issue.

In the context of rights-of-way for energy facilities on tribal trust lands, Congress could make clear that tribes do have inherent sovereign authority to regulate conduct on these lands to protect important tribal and public interest, that tribes have the corresponding authority to levy taxes to support their governmental operations within rights-of-way, and that, in light of the federal policy supporting tribal self-government, state authority for taxation and regulation is preempted.