Council Of Energy Resource Tribes

One Thousand Connecticut Avenue, N.W.
Suite 610 • Washington, D. C. 20036
(202) 466-7702

Executive Committee:

Peter MacDonald
Chairman
Navajo

Floyd Correa
Vice-Chairman
Pueblo of Laguna

Leonard Atole
Secretary
Jicarilla Apache

Allan Rowland
Treasurer
Northern Cheyenne

Leonard Burch
Executive Member
Southern Ute

Forrest Horn
Executive Member
Crow

Wilfred Scott
Executive Member
Nez Perce

Board Members:

Acoma Pueblo
Blackfeet
Cheyenne River Sioux
Chippewa-Cree
Colville
Fort Belknap
Fort Berthold
Fort Hall
Fort Peck
Hopi
Jemez Pueblo
Santa Ana Pueblo
Spokane
Uintah-Ouray
Ute Mountain
Wind River
Yakima
Zia

Executive Director:

Ed Gabriel

DOCKET NUMBER
PROPOSED RULE PR-30 et al (12)
(44FR50012)

October 23, 1979

DOCKETED USNRC
NOV 5 1979
Office of the Secretary Docketing & Service Section

Mr. Samuel J. Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

POOR ORIGINAL

Dear Mr. Chilk:

The Council of Energy Resource Tribes (CERT) is pleased to submit the following comments on the Nuclear Regulatory Commission's (NRC) proposed rulemaking for "Criteria Relating to Uranium Mill Tailings and Construction of Major Plants" (44 F. R. 50015).

The Indian tribes that are involved in uranium production and processing fully support the types of controls instituted by the "Uranium Mill Tailings Control Act of 1978." As you know, the Navajo Tribe has suffered the consequences of improper waste management at four abandonded mill sites on their reservation. Likewise, the Western Nuclear Inc. currently is operating a mill using uranium, land, and other resources owned by the Spokane Indian Tribe in Wellpinit, Washington. These and other tribes realize that their approval of a lease for a uranium mill represents an irrevocable commitment of lands which are held in trust for the long-term benefit of their people. The provisions in the 1978 law provide the tribe with some assurance that they can develop their resources without jeopardizing the health and safety of their people or the value of their property.

In their present form, however, neither the existing nor proposed regulations address the unique jurisdictional issues regarding the licensing of mills on Indian lands, especially in agreement states. This ambiguity must be resolved to ensure tribes that the laws will be implemented effectively on their lands. The current policy was adopted informally in the 1950's by the AEC staff in favor of state licensing authority. This position lacked any legal analysis by the Commission, and is contrary to an extensive body of law regarding the regulation of activities on Indian reservations, particularly when it involves tribal lands or other trust resources.

CERT believes that this issue merits a formal decision by the Commission. We have prepared a legal memorandum explaining the canons of Indian law that apply to the regulation of uranium milling activities. This analysis supports two conclusions:

7912060 075

1510 006

M-25

- the authority to license uranium mills on Indian lands should remain with the NRC rather than an agreement state; and

- the regulations regarding funds for long-term surveillance should specify that charges levied on activities on Indian lands should be paid to the United States in trust for the tribes.

Finally, CERT feels that these policies should be incorporated into the NRC's regulations to provide guidance to the Commission staff, states, licensees, and tribes as they implement this new program. Therefore, CERT's legal memorandum includes recommended regulatory language to implement the changes.

Thank you for your attention to this important matter. If we can be of further assistance, please contact Ellen Brown, Director, Office of Policy Analysis at the above address.

Sincerely,

Edward Gabriel
Executive Director

Enclosure

POOR ORIGINAL

1510 007

COMMENTS ON NUCLEAR REGULATORY COMMISSION PROPOSED RULES RELATING TO URANIUM MILL TAILINGS AND CONSTRUCTION OF MAJOR PLANTS

I. INTRODUCTION

On August 24, 1979, the Nuclear Regulatory Commission proposed amendments to 10 C.F.R. Parts 40 and 150 to implement the requirements of the Uranium Mill Tailings Radiation Control Act of 1978. Although many of the proposed amendments seem suitable, concern has been expressed by Indian tribes that the proposed regulations do not implement Congressional policies with respect to Indian tribes and fail to effectuate the clear Congressional purpose in the Uranium Mill Tailings Radiation Control Act of 1978 that Indian lands shall be separately dealt with by the Nuclear Regulatory Commission. Part II of these comments suggests amendments of proposed change #12 and of the existing 10 C.F.R. § 150.10 to remedy that omission. Part III of these comments sets out the reasons for our pro-proposed amendments, in light of the statutory framework and legislative history. Parts IV and V discuss federal Indian law decisions and analyses of analogous federal statutes supporting our proposed amendment of 10 C.F.R. § 150.10.

II. SUGGESTED MODIFICATION OF PROPOSED AMENDMENTS TO 10 C.F.R. - PARTS 40 AND 150

Proposed change #12 adds Appendix A to Part 40, Section II of that Appendix A, entitled Financial Criteria, Criterion 10 should be amended as follows:

> A charge of $250,000 to cover the costs of long-term surveillance shall be paid by each mill operator to the general treasury of the United States or to an appropriate state agency prior to the termination of a uranium or thorium mill license. Charges paid in respect of uranium or thorium mills operating in whole or in part within the boundaries of an Indian reservation shall be paid to the United States in trust for the tribe or tribes of such reservation, to be used for the purpose of conducting long-term surveillance of such lands. If site surveillance requirements at a particular site are determined . . . (balance of Criterion 10 unchanged).

1510 008

The present 10 C.F.R. § 150.10 should be amended by deleting the period at the end of the section and adding the following language:

> . . . or to persons within the boundaries of any Indian reservation. Furthermore, no state agreement with the Commission or the Atomic Energy Commission under Subsection 274(b) of the Act shall apply to persons with the boundaries of any Indian reservation.

III. STATUTORY BASIS FOR PROPOSED AMENDMENTS

Our proposed amendments are necessary to deal with the special class of activities subject to the Atomic Energy Act of 1954, as amended, which occur on Indian reservations -- land set aside for the exclusive use and occupancy of members of self-governing Indian tribes.

The first change deals with long-term surveillance funds. Title II, § 202(b) (8) of the Uranium Mill Tailings Radiation Control Act of 1978, codified at 42 U.S.C. § 2113(b) (8), in providing for long-term custody of nuclear byproduct material disposal sites, made special provision for Indian tribal or individual trust or restricted lands. Title to such land is not transferred to the United States but is retained by the Tribe. The Act provides that "the licensee shall be required to enter into such arrangements with the Commission as may be appropriate to assure the long-term maintenance and monitoring of such lands by the United States." Since the statute envisions that nuclear byproducts materials will remain on the Indian reservations indefinitely, the Commission should specifically require earmarking of funds obtained from uranium or thorium mill licensees so that these funds will in fact be available to finance the long-term maintenance and monitoring of tribal lands.

The proposed modification to 10 C.F.R. § 150.10 is necessary to clarify the relations among the Nuclear Regulatory Commission, Agreement States, and nuclear licensees with respect to activities conducted on Indian reservations. The regulations should make it clear that the NRC, rather than the Agreement State, is the appropriate licensing body. The need for this clarification appears in the legislative history of Title II of the Uranium Mill Tailings Radiation Control Act of 1978. On June 26, 1978, the Chairman of the Nuclear Regulatory Commission testified regarding the then-proposed bill as follows:

> Another potential difficulty arising from H.R. 13382 came up in our discussion with the Department of the Interior. This involves the handling of mill

1510 009

tailings on Indian lands. As you know, there are mill sites located on the Navajo Nation lands in Arizona and New Mexico. Both states are agreement states under § 274 of the Atomic Energy Act. The bill's new definition of byproduct material would not only extend NRC regulatory authority over mill tailings, but would also clarify agreement state authority in this area.

Concern was expressed about whether the rights of self-governing Indian tribes would be affected by this change in § 274. In this context, the Commission would view Indian lands as federally owned lands if legal title were held in trust by the United States, or such lands were subject to a restraint on alienation imposed by the United States.

H.R. 13382 should not affect the legal relationship of self-governing Indian tribes to the United States or the several states. Licensable activities by self-governing tribes are subject to NRC licensing and regulatory authority rather than that of the agreement states. It would be desirable to clarify this fact in the bill's legislative history.

Hearings on H.R. 13383, H.R. 12938, H.R. 12535 and H.R. 13049 before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 95th Cong., 2d SESS., SER. 95-30, (1978). (emphasis added)

In adopting the Atomic Energy Act of 1954, Congress found that the processing and use of source, byproduct and special nuclear material must be regulated in the nation's interest. 42 U.S.C. § 2012(c). One of the primary purposes of federal law regarding development and control of atomic energy is to provide for "a program for government control of the possession, use and production of atomic energy and special nuclear material, whether owned by the government or others . . ." 42 U.S.C. § 2013(c). In so doing, Congress intended to preempt state control of activities in matters relating to protection against radiation hazards. Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd 405 U.S. 1035 (1972); Van Dissel v. Jersey Central Power & Light Co., 377 A. 2d 1244 (N.J. Super. 1977); see also Marshall v. Consumers Power Co., 237 N.W. 2d 266 (Mich. App. 1975). In short, Congress has clearly stated its intention to completely preempt the Nuclear Energy field except insofar as Congress has redelegated its authority to the states.

1510 010

§ 274 of the Atomic Energy Act of 1954, 42 U.S.C. § 2021, creates a limited program of cooperation with the states. This section, as amended by the Uranium Mill Tailings Radiation Control Act of 1978, empowers the Nuclear Regulatory Commission to make agreements with states authorizing the states to exercise certain limited regulatory powers with respect to byproduct materials, source materials, and special nuclear materials (in quantities not sufficent to form a critical mass). Both by statute and by regulation (see 10 C.F.R. Parts 30, 40, 50 and 70), the overriding supervisory power of the NRC is maintained. Thus, even in Agreement States, the NRC has continued to exercise licensing power over activitives by federal agencies or in areas of exclusive federal jurisdiction, such as military reservations. Amendment of the regulations as proposed above would bring activities within Indian reservations clearly into this category, i.e., areas of exclusive jurisdiction. This result is required under federal law because, as the United States Supreme Court said in Bryan v. Itasca County, 426 U.S. 373, 48 L.Ed. 2d 710, 723

> Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [an] immunity and allow states to treat Indians as part of the general community.

In the nuclear energy field, far from expressing a purpose to allow Agreement States to treat Indian reservations as part of the general community, Congress has explicitly made special provision for the protection and regulation of Indian lands in the Uranium Mill Tailings Radiation Control Act of 1978. The regulations in 10 C.F.R. § 150.10 should be amended to avoid the possibility of interference by Agreement States with the exercise of this exclusive federal regulatory authority.

IV. STATE JURISDICTION OVER NUCLEAR ENERGY ACTIVITIES ON INDIAN RESERVATIONS, AREAS TRADITIONALLY CONFINED TO FEDERAL AUTHORITY, SHOULD NOT BE EXTENDED UNLESS CONGRESS EXPLICITLY SO PROVIDES.

A. Origins of the Unique Relationship Between Congress and Self-Governing Indian Tribes. Article I, Section 8 of the Constitution provides that Congress shall have the power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes." The history behind the explicit provision for Indian tribes strongly indicates that the clause was intended to nationalize political and economic relations with the Indian tribes and preempt state authority over those relations. This clause of the Constitution was drafted in response to concern over certain

1510 011

language in the Ar icles of Confederation, which granted Congress the "sole and exclusive right and power of regulating trade and managing all affairs with the Indians not members of any of the states," but provided that "the legislative rights of any state within its limits not be infringed or violated." The proviso had been interpreted by several states to sanction their own independent regulation of relations with tribal governments. The competing assertions of state authority over Indian affairs caused a serious deterioration of relations with the Indian tribes during 1786 and 1787, leading to recommendations by Secretary of War Knox, and a committe of e Continental Congress, that complete and undivided federal control over the political and economic relations with the tribes be established. See Committee Report, 43 Journals of Congress 454 et seq. (August 3, 1787). The incorporation of the word "tribes" nto the Indian commerce clause, coupled with the repeated reference to the "independent tribes" in the committee report, indicates that the Indian commerce clause negates any power in the state to determine, independent of federal authority, the relations with self-governing Indian tribes.

The rule limiting extensions of state jurisdiction into Indian country was clearly stated in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), a case which has become the cornerstone of modern Indian law. In Worcester the Court declared unconstitutional certain Georgia state laws which attempted to govern conduct on the Cherokee reservation. Chief Justice John Marshall stated:

> [t]he Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, 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. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States. 31 U.S. 515, 559 (1832).

Similarly, in United States v. Kagama, 118 U.S. 375 (1886), the United States Supreme Court discussed the autonomous status of Reservations, noting that they were thus far not brought under the laws of the states within whose limits they were located. The court explained that "because of the local ill feeling, the people of the states where (the tribes) are found are often their deadliest enemies". 118 U.S. 375, 385.

1510 012

To make it clear that states were to be generally excluded from the special relation between the federal government and Indian reservations, Congress inserted language in the Enabling Acts under which most of the western states were admitted to the Union. Section 4 of the Act which admitted Washington, Montana and the Dakotas provided:

> that the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to . . . all lands lying within said limits owned or held by an Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, . . . said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . "

Act of February 22, 1889, Ch. 180 S.4, 25 Stat. 676. The Acts admitting Utah, Oklahoma, Arizona and New Mexico contain virtually identical disclaimers.

B. Modern Federal Case Law Mandates the Conclusion That General Delegations of Authority to States do Not Extend to Acts Within the Boundaries of Indian Reservations. Over the past twenty years, in a series of cases involving the jurisdiction of state civil courts, state power over trade, state taxing power, state power over crimes, and the continuing vitality of Indian treaty rights, the United States Supreme Court has repeatedly refused to sanction state power over activities within the boundaries of Indian reservations, in the absence of explicit and unambiguous Congressional authorization for such power. In Williams v. Lee, 358 U.S. 217 (1959) the court dealt with the claim that Arizona state courts could adjudicate civil controversies arising between Indians and non-Indians on the Navajo Indian reservation. The court noted that "Congress has . . . acted consistently upon the assumption that the states have no power to regulate the affairs of Indians upon a reservation." 358 U.S. 217, 220. A treaty between the United States and the Navajo nation had "set apart", for the Navajos' permanent home, a portion of what had been their native country. Implicit in the treaty, the court found, was an exclusion of state civil jurisdiction.

Similarly, in Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965), the Supreme Court struck down a state tax on the sale and income of a non-Indian company doing business on the Navajo Indian Reservation. The court noted that even before the treaty with the Navajos in 1868, the federal government had long followed a policy in statutes and treaties of leaving reservations free from state interference. In this case, the "regulations and

1510 013

the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U.S. 685, 690. A similar result was reached in McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), another on-reservation tax decision. The court stated, at 411 U.S. 168:

> [T]he principles governing the resolution of this question are not new. On the contrary, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history". Rice v. Olson, 324 U.S. 786, 789 (1945). This policy was first articulated by this court 141 years ago [by] Mr. Chief Justice Marshall [in] Worcester v. Georgia, 6 Pet. 515, 557 (1832)."

The Court pointed out that nothing in the treaty between the Navajo nation and the United States explicitly stated that the Navajos were to be set free from state law or exempt from state taxes. Nevertheless, the Court concluded:

> [I]t is circumstances such as these which have lead this court in interpreting Indian treaties, to adopt the general rule that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent on its protection and good faith." Carpenter v. Shaw, 280 U.S. 363, 367 (1930). When this canon of construction is taken together with the tradition of Indian independence described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. 411 U.S. 164, 174-75 (1973).

On several occasions in recent years the Supreme Court has analyzed Congressional enactments delegating certain powers to the states to determine whether they authorize state control over on-reservation activities. Invariably, the canon of construction that treaties and statutes regarding Indians are not to be interpreted to their prejudice has been applied. In Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968), the court construed a 1954 Congressional statute which

1510 014

by its terms was to provide for orderly termination of federal supervision over property and members of the tribe. The Act provided that:

> The laws of the several states shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

The issue in Menominee was whether the language authorizing application of state law permitted state regulation of hunting and fishing within the boundaries of the former Menominee Indian reservation. The court, finding no "explicit statement" in the legislation subjecting treaty hunting and fishing rights to state regulation, refused to authorize state control. The court stated "we decline to construe the termination act as a backhanded way of abrogating the hunting and fishing rights of these Indians . . . The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." 391 U.S. 404, 412-13. A similar analysis has been applied in a series of cases construing Congressional statutes and agreements ceding reservation lands to the United States and opening those lands to non-Indian settlement and ownership. In determining whether such enactments have disestablished the affected portions of Indian reservations, thus subjecting activities in those areas to full state jurisdiction, the court has required "that the Congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." Mattz v. Arnett, 412 U.S. 481, 505 (1973), quoted in De Coteau v. District County Court, 420 U.S. 425 (1975).

When considering whether the general language of 42 U.S.C. § 2021(b) should now be construed to authorize extension of state authority over activities on Indian reservations, the approach of the United States Supreme Court in Bryan v. Itasca County, 426 U.S. 373 (1976) is very useful. In Bryan, the court concluded that Section 4 of Public Law 83-280, 28 U.S.C. § 1360, did not authorize state taxation of Indian property on reservations, although it provdes that:

> States . . . shall have jurisdiction over civil causes of action . . in the areas of Indian country listed . . . 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 with the state . . .

The court applied the canons of construction, (thus construing the doubtful provisions of Public Law 83-280 in favor of the Indians), and also ruled that Congressional enactments

arising from an assimilationist era cannot now be interpreted without reference to the present federal policy of promoting tribal self-determination and autonomy . The Court stated:

> Present federal policy appears to be returning to a focus on strengthening tribal self-government . . . and the Court of Appeals for the Ninth Circuit has expressed a view that courts "are not obligated in ambiguous circumstances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present Congressional approach to what is, after all, an ongoing relationship." Santa Rosa Band of Indians v. King County, [532 F.2d 655, 662 (9th Cir. 1975)] 426 U.S. at 388 N.14 (1976).

In summary, an examination of federal case law regarding regulation and control of activities on Indian reservations reveals those elements which have always led to the strongest application of federal preemption. The scope of the federal preemption doctrine declared by the Supreme Court varies according to a number of separate factors. See generally, Comment, A Framework for Pre-emption Analysis, 88 Yale L.J. 363 (1968). One important factor is the nature of the national interest in the subject matter. If the field is one which is traditionally national, the court is especially vigilant in striking down state incursions. See Rice v. Santa Fe Elevator Corp, 331 U.S. 218, 230 (1947); Northern States Power v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd 405 U.S. 1035 (1972) (nuclear power); and Pennsylvania v. Nelson, 350 U.S. 497 (1956) (sedition laws). Federal law has typically been found to have "occupied the field" in subject areas which are "traditionally federal," e.g., Hines v. Davidowitz, 312 U.S. 52 (1941) (registration of aliens), or which have been subjected to a comprehensive regulatory scheme, e.g., San Diego Bldg. Trades Counsel v. Garmon, 359 U.S. 236 (1959) (NLRB "a centralized administrative agency" to regulate labor relations). Both of these factors are prominent in Indian law.

V. FEDERAL LEGISLATIVE AND ADMINISTRATIVE POLICIES WIDELY RECOGNIZE THAT INDIAN TRIBES AND RESERVATIONS ARE EXEMPT FROM STATE REGULATORY POWERS.

Nuclear energy issues on Indian reservations arise typically in the context of extraction, refining and production facilities for source material and special nuclear material. Not coincidentally, federal regulation of activities on Indian reservations is especially comprehensive in the field of Indian mineral development.

1510 016

The Non-Intercourse Act, Act of June 30, 1834, 25 U.S.C. § 177, stated expressly the primary power of Congress over Indian land transactions. Under this act, a tribe could not grant mineral development rights on tribal lands without prior Congressional authority. Commencing in 1891, Congress enacted a succession of general statutes authorizing tribes to grant mineral development rights. Act of February 28, 1891, 25 U.S.C. § 397; Act of June 30, 1919, as amended, 25 U.S.C. § 399; Act of May 29, 1924, 25 U.S.C. § 398; Act of April 17, 1926, 25 U.S.C. § 400a; Act of March 3, 1927, 25 U.S.C. §§ 398a - 398e.

This succession of piecemeal federal authorizations of tribal mineral development culminated in the Omnibus Leasing Act of May 11, 1938, 25 U.S.C. §§ 396a - 396f. This act comprehensively authorizes and controls the leasing of tribal lands for mineral development purposes. The Act empowers tribes to enter into mineral leases, subject to the supervisory authority of the Secretary of the Interior. The Secretary is to exercise supervisory authority in two ways: (1) by issuing general regulations covering tribal mineral development; and (2) by exercising approval authority over particular mineral leasing transactions.

Interestingly, the situation is essentially the same with respect to mineral development of trust lands owned by individual Indians. An initial fragmentary pattern of Congressional authorization for such development was superceded by a general authorizing statutue, the Act of May 3, 1909, 25 U.S.C. § 396. As with tribal lands, the Secretary of the Interior is authorized to promulgate generally applicable regulations and to exercise transactional approval power.

Pursuant to his statutory authority, the Secretary of the Interior has promulgated extensive regulations covering the creation of mineral development rights on tribal lands (25 C.F.R. Part 171) and individual Indian lands (25 C.F.R. Part 172). In addition, the Secretary has adopted comprehensive environmental regulations covering surface mining and reclamation of all Indian lands (25 C.F.R. Part 177). Furthermore, the Secretarial regulations found at 30 C.F.R. Part 231 set forth detailed operating standards for development activities on tribal and individual Indian lands.

This regulatory pattern establishes a framework of comprehensive Secretarial control over mining, exploration and extraction of Indian minerals, milling, concentrating and processing of production, disposal of tailings, waste and overburden arising from extraction and processing, and reclamation of all affected lands. Part 177 provides for the Secretarial approval of exploration and mining plans embodying detailed operations and reclamation standards

1510 017

over the entire range of development activities. Part 231 sets forth standards governing mining methods, milling and processing activities, and waste disposal, and provides for federal inspections and enforcement orders.

Under the above described statutory and regulatory system, all aspects of nuclear extraction and milling operations on Indian lands are comprehensively regulated by the federal government leaving no room for state regulatory authority under § 274(b) of the Atomic Energy Act of 1954.

Moreover, when Congress has determined to authorize state authority over aspects of Indian mineral development, it has done so in only one limited area -- state taxation of Indian mineral development. 25 U.S.C. § 398 passed in 1924, 25 U.S.C. § 398c passed in 1927, and 25 U.S.C. 396a passed in 1938, each expressly established a limited state authority to tax the proceeds of Indian mineral development. However, the federal statutory and regulatory pattern otherwise contains no authorization of state authority in any other area of Indian mineral activity. Moreover, even the express creation of state taxing jurisdiction is of questionable continuing vitality in light of the lack of such authorization in the subsequent Omnibus Leasing Act of 1938, and the general repealer provision contained in that act.

More generally, congress has explicitly stated the conditions under which states may enter Indian reservations for the purpose of inspection and enforcement of health regulations. 25 U.S.C. § 231 permits such state activities if authorized by the Secretary of Interior and consented to by tribal government. Since neither secretarial authorization of state health enforcement, nor tribal consent, has been obtained on Indian reservations with nuclear projects, the clear conclusion is that only federal and tribal law is applicable in those areas.

Finally, the conclusion that Indian tribes and their reservations should not be subjected to state regulatory power under § 274(b) agreements, is reinforced by a host of recent federal statutes. Here, as elsewhere, Congress has recognized Indian tribes as units of local government and has distinguished them from other subjects of state regulatory power. For example, in 40 U.S.C. § 461, Indian tribes are eligible as local governmental units to received federal assistance to facilitate comprehensive planning for urban and rural development. See also the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 1227(b) (4); the Economic Opportunity Act of 1964, 42 U.S.C. §§ 2790(a) and (c); the Solid Wastes Disposal Act, 42 U.S.C. § 6903(13); the Housing and Urban Development Act of 1965, 42 U.S.C. § 3106(b) the Tribally Controlled Community College Assistance Act of 1978, 25 U.S.C. § 1801 et seq.; the Federal Property

1510 018

and Administrative Services Act, as amended 40 U.S.C. § 483(a) (2); the Federal Water Pollution Prevention and Control Act, 33 U.S.C. § 1251 et seq., 1362(4); and the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. § 3781(b).

Congress' recent enactments distinguishing between tribal and state governmental entities and thus exempting Indian reservations from state regulatory and planning, are entitled to substantial weight. They reinforce the policy of the Uranium Mill Tailings Radiation Control Act of 1978 that Indian reservation lands should be treated differently from non-reservation areas and that careful federal supervision is necessary to ensure that the United States trust responsibility to the tribes is fully carried out. As the United States Supreme Court indicated in Bryan v. Itasca County, supra, such recent Congressional policies may be used in interpreting the language of acts which were passed during an era in which Congress sanctioned termination and assimilation of some Indian tribes. Similarly, the canons of construction for construing ambiguous statutes in favor of tribes, compel adoption of regulations which clearly assert federal control in this area of intense federal interest. The overriding national interest in matters regarding Indian reservations particularly with respect to nuclear projects, leaves no room for state regulatory power.

1510 019