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THE IMPACT OF THE UNFUNDED MANDATES REFORM ACT OF 1995 ON TRIBAL GOVERNMENTS

*Eileen M. Luna**

The creation of federal mandates, i.e., legislation that requires mandatory action or imposes regulations on a subordinate government, has long been a flash point among state and local governments. Many states have resisted the imposition or strengthening of federal regulations particularly if those mandates are not accompanied by funding adequate for their implementation. In direct response to the rise in concern regarding "states-rights," the 104th Congress passed the Unfunded Mandates Reform Act of 1995 (UMRA) with the expressed mission:

[T]o curb the practice of imposing unfunded Federal mandates on states and local governments; to strengthen the partnership between the Federal Government and State, local and tribal governments; to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate funding, in a manner that may displace other essential governmental priorities; and to ensure that the Federal Government pays the costs incurred by those governments in complying with certain requirements under Federal statutes and regulations, and for other purposes.¹

Ironically, at the time congressional hearings were held, not one Indian advocacy organization or tribal government made a presentation, either for or against passage.² This lack of attention to the impact of the Act on Indian tribal governments continues to date. Out of almost fifty articles that discuss various aspects of the Unfunded Mandates Reform Act of 1995, none were found which discussed the impact on tribal governments.³

Examples of recent federal legislation carrying with them unfunded mandates include bills which have reduced air and water pollution,⁴

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1. Pub. L. No. 104-4, 109 Stat. 48, 48 (codified at 2 U.S.C. §§ 1501-1571 (Supp. II 1996)).

2. This information was obtained through a legislative history analysis of the Unfunded Mandates Reform Act of 1995 conducted by the author.

3. An exhaustive search of print media references to the effect of the Unfunded Mandates Reform Act of 1995 revealed to the author that nobody was considering this impact.

4. Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994); Clean Water Act, 33 U.S.C. § 1377 (1994).

expanded occupational safety and health coverage,⁵ created "motor voter" rights,⁶ imposed gun control standards requiring background checks on gun buyers⁷ and protected the environment from the impact of asbestos⁸ and hazardous waste.⁹ These purposes may seem admirable and important, however, the costs of mandate implementation have been points of contention between state, local, and federal governments. Tribal governments as well, with their already stretched budgets and (usually) limited economic development and taxing opportunities, are potentially even more adversely affected when Congress passes legislation imposing unfunded mandates in Indian country. The struggles for control over imposed unfunded mandates culminated in the passage of the Unfunded Mandates Reform Act of 1995 (UMRA), a cornerstone of the Republican "Contract with America" in 1994.¹⁰

The Congressional Budget Office (CBO) has defined an Intergovernmental Mandate that is subject to UMRA as follows:

An intergovernmental mandate is defined as any provision in legislation, statute, or regulation that (1) would impose an enforceable duty upon state, local, or tribal governments, except when it is a condition of federal assistance or a duty arising from participation in a voluntary federal program; or (2) would reduce or eliminate the amount of authorization of appropriations for federal financial assistance for the purpose of complying with previously imposed duties. Legislation, statutes, or regulations that relate to duties arising from participation in voluntary programs may be considered intergovernmental mandates under a number of circumstances if those provisions were to increase the stringency of conditions of assistance or place caps on or decrease federal funding and if the state, local, or tribal governments lacked authority under the program to amend their financial or programmatic responsibilities to continue providing required services, and if the program is one under which more

5. Occupational Health and Safety Act, 29 U.S.C. §§ 651-678 (1994).

6. Governor Pete Wilson of California stated that the "California Motor Voter program will be ready to go on Jan. 1, 1995, but it won't go anywhere unless the federal government pays for the mandate they have imposed." Thomas Atwood & Chris West, *Home Rule: How States are Fighting Unfunded Federal Mandates* at para. 35 (visited Nov. 18, 1997) <<http://www.heritage.org/heritage/library/>>.

7. Violent Crime Control and Law Enforcement Act (Brady Bill) of 1994, Pub. L. No. 104-294, 18 U.S.C. § 921 (1994).

8. Toxic Substances Control Act, 15 U.S.C. §§ 2601-2671 (1994).

9. 42 U.S.C. §§ 9601-9657 (1994).

10. Timothy J. Conlon et al., *Deregulating Federalism? The Politics of Mandate Reform in the 104th Congress*, 25 *PUBLIUS: J. OF FEDERALISM*, Summer 1995, at 23, 30-31 [hereinafter Conlon, *Deregulating Federalism*].

than \$500 million is given to state and local governments under permanent authority.¹¹

UMRA specifically establishes a process for "meaningful and timely input (by state, local and tribal governments) in the development of regulatory proposals containing significant Federal intergovernmental mandates."¹² Under Section 401 of UMRA, however, no right exists for judicial review or appeal regarding "any estimate, analysis, statement, description or report . . . [as to] any compliance or noncompliance with the provisions of [the] Act [nor as to] any determination concerning the applicability of the provisions of this Act"¹³

The *Wall Street Journal*¹⁴ cited a report by the Advisory Commission on Intergovernmental Relations (ACIR) that more than 100 new mandates were imposed on state governments by the federal government during the Reagan-Bush years, compared with approximately sixteen during the 1940s.¹⁵ By August 1996, during the first year of implementation of UMRA, the CBO reviewed a total of 592 bills, of which sixty-two were found to contain mandates.¹⁶ Of this number, eleven were found to contain mandates that were estimated to exceed the threshold of \$50 million or more, which is the amount that triggers the exercise of UMRA¹⁷.

With the passage of UMRA, Congress took a new approach, thereby positively impacting Indian country if utilized properly. The idea that the federal government might decide to constrain its plenary power to pass legislation binding the state, local, and tribal governments is one that Indian legal experts and tribal advocates can use to fair advantage. Although plenary power is ostensibly exclusive and absolute, it is not unlimited. As is asserted in one of the leading Indian law casebooks:

Although no exercise of Congressional power over Indian matters has been set aside, the Supreme Court has said it will review such actions to assure that they are rationally tied to the fulfillment of Congress' unique obligation toward Indians. To the extent that

11. Congressional Budget Office, *Implications for Providing Cost Estimates Under the Unfunded Mandates Reform Act of 1995* at para. 8 (visited Jan. 20, 1997) <<http://gopher.cbo.gov:7100/0/reports/online/safewater/ascii/chapt6.tx>> (on file with the *American Indian Law Review*).

12. 2 U.S.C. § 1534(a) (Supp. II 1996).

13. *Id.* § 1571(b)(1).

14. Matthew Reese, *The Mandate Millstone*, WALL ST. J., Aug. 18, 1993, at A10.

15. *Id.*

16. Larry Jones, *Has the Mandate Madness Stopped?*, COUNTY NEWS (Nat'l Ass'n of Counties), Sept. 16, 1996, at para. 3 (visited Nov. 18, 1997) <<http://www.naco.org/archive/cnews/96-09-16/mandates.htm#ll>> [hereinafter Jones].

17. *Id.*

Congress has not limited or terminated Indian rights, however, the courts will scrupulously enforce them.¹⁸

Where, as here, Congress has recognized the need for restraint and has passed legislation requiring Congress to carefully consider the exercise of its plenary power and the impact of such action, such legislation can serve as a message to courts that the exercise of any such power is suspect. Tribal governments may use it as a platform to challenge new legislative assertions of power detrimental to the wishes and/or tribal interests, thereby raising fundamental issues about congressional exercise of plenary power.

The purpose of this article is to provide: (1) an understanding of the Unfunded Mandates Reform Act of 1995 and the uses to which it can be put to advance the sovereignty of Indian nations and reduce the opportunity for the exercise of federal plenary power, (2) an overview of federal laws presently affecting tribal governments and how these could trigger UMRA, and (3) recommendations that could increase the positive benefits of UMRA for tribal governments. Although this legislation is new and relatively untested and arises out of a conservative "state's rights" perspective, tribal governments can use the language of the Act to their advantage in their legislative dealings with federal, state, and local governments.

I. The Legislative History of the Unfunded Mandates Reform Act

A. "States Rights" and Mandate Reform

Recent dissatisfaction with the federal authority to impose requirements on the states and local governments dates back to the early 1980s. Even though Ronald Reagan spoke out against them, unfunded mandates increased significantly during his eight years in the White House.¹⁹ This concern reached a peak during the 103rd Congress when more than thirty mandate reform bills were proposed.²⁰ The leadership of both Houses refused to allow a vote on either the Community Regulatory Relief Act (Senate Bill which would have absolutely forbidden any federal mandate without the provision of full federal funding, or the Federal Mandate Relief Act of 1993 (House Bill 140), a somewhat less restrictive bill, even though these were ultimately co-sponsored by a majority of Senate and House members.²¹ Congress also failed to pass less restrictive bills similar to UMRA negotiated by Sen. Dirk Kempthorne (R.-Idaho) and Sen. John Glenn (D.-Ohio), or another, House Bill 5128, sponsored by Rep. John Conyers (D.-Mich.) and Rep. William F. Clinger (R.-Penn.).²²

18. DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW* 4-5 (3d ed. 1993).

19. See Conlan, *Deregulating Federalism*, *supra* note 10, at 24.

20. *Id.* at 28.

21. *Id.*

22. *Id.*

The change in the fortunes of mandate reform came about with the congressional elections of 1994. With the election of the 104th Congress, legislators were swept in who were wedded to the "Contract with America," of which the UMRA was a cornerstone.²³ To underscore the priority of mandate reform for the new Republican majority, Sen. Bob Dole (R.-Kan.), Senate Majority Leader, designated the Kempthorne-Glenn bill as Senate Bill 1, thus ensuring that the Senate would hear this bill first during that legislative session.

The inclusion of "tribal governments" in the language of UMRA was apparently an offshoot of an Indian nations' movement to assert the rights of self-determination and self-government during the 1980s.²⁴ During this decade tribes began to take charge of their own resources and economic development. By the mid-1980s fifty-two tribes began to emphasize mineral production from tribal land.²⁵ Other tribes emphasized development in agriculture or sustainable resources.²⁶ Tribes also began to move politically. Tribes held voter registration drives, significantly increasing the number of Indian voters.²⁷ The National Congress of American Indians formed a tribal political action committee to fight cutbacks in federal spending and to influence local and federal elections.²⁸ This growth in tribal budgets and political involvement, coupled with President Clinton's 1994 Executive Order, served to place tribal governments on more equal footing with state and local governments.²⁹ Given President Clinton's recent explicit recognition of tribal government status, it is reasonable to speculate how tribal protests against legislation that imposes federal mandates without financial compensation can

23. *Id.*

24. CENTER FOR WORLD INDIGENOUS STUDIES, INDIAN SELF-GOVERNMENT PROCESS EVALUATION REPORT (1996) [hereinafter INDIAN SELF GOVERNMENT PROCESS EVALUATION REPORT]. This report emphasizes the results of the move during the 1980s toward tribal self-government. Although it notes that there has been considerable success toward economic and social development, the 33 Indian governments which have undertaken and completed compacts of self-government with the United States between 1990 and 1995 have had less success in political development. The report states: "[I]f Indian nations have weaker tribal governments then they are more likely to experience state government attempts to take control over Indian people and lands." *Id.* at 3 (quoting Milner Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 76 (1987)). In order to offset this concern, the 1994 Executive Order directs that tribal governments be treated equally with states, and that self-governance be both encouraged and supported.

25. STEPHEN CORNELL, *THE RETURN OF THE NATIVE* 199 (1988).

26. *Id.* at 199-200.

27. *Id.* at 167.

28. Karen MacPherson, *Indians Nationwide Plan Stronger Voting Drives*, SANTA FE NEW MEXICAN, Mar. 8, 1996, available in LEXIS, News Library, Newmex File.

29. William Jefferson Clinton, *Government to Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies* (visited Nov. 18, 1997) <http://www.codetalk.fed.us/g_to_g.html>.

also serve to challenge the assertion of federal plenary power against tribal interests.

The stated purposes of the UMRA are: (1) the strengthening of "partnership" between the federal and state, local, and tribal governments; (2) the end of unwarranted imposition of federal mandates on the various governments without concomitant provision of adequate funding; (3) the notification to Congress of the possible extent of such fiscal impact on the various governments prior to a vote on the proposed legislation; and (4) the development of a process designed to obtain the input from the affected governments regarding the legislation.³⁰ These purposes read like a "states rights" argument for tribal governments to use when adversely affected by federal legislation.

B. Process

The UMRA establishes a mechanism whereby Congress receives information regarding the fiscal implications of legislation prior to its passage.³¹ Whenever requested by a member of Congress, or at the point where a proposed bill passes out of committee, the CBO is required by the Act to prepare a cost-estimation report.³² If the CBO determines that the bill contains unfunded mandates with estimated direct costs of over \$50 million annually, members of Congress may trigger a "point of order."³³

If a federal regulation is estimated to cost \$100 million to state or local governments combined, or the private sector, federal agencies must explain the costs, expected benefits and the economic implications of the regulations prior to congressional consideration. If a point of order is raised, the sponsor of the bill must obtain funding to pay for the implementation of the procedures mandated by the legislation or win a majority vote of both houses of Congress to waive the requirement and, thus, enact the legislation without federal funding.³⁴ This, then, ensures that a majority of Congress is either willing to underwrite the cost of the implementation of the mandate, or considers the costs of the mandate to be properly the business of state, local or tribal governments.

UMRA establishes a second set of regulations on Congress. The Advisory Commission on Intergovernmental Affairs (ACIA) is charged by the Act³⁵ with identifying and reviewing existing mandates. ACIA then makes recommendations to the President and Congress in order to allow

30. See 2 U.S.C. § 1501 (Supp. II 1996).

31. *Id.* § 658(b).

32. *Id.*

33. U.S. SENATE DEMOCRATIC POLICY COMM., S-1: THE UNFUNDED MANDATE REFORM ACT OF 1995, at 1 (1995).

34. Jones, *supra* note 16, at para. 8.

35. 2 U.S.C. § 1551(a) (Supp. II 1996).

flexibility for state, local and tribal governments and facilitates compliance with those "unnecessarily rigid" or "complex" federal mandates, and eliminates or temporarily suspends those "duplicative, obsolete or lacking in practical utility" mandates and those mandates "not vital to the public health and safety and which compound the fiscal difficulties faced by those governments."³⁶

C. "Indian Country Rights" and Mandate Reform

Tribal governments should view UMRA as a beneficial tool. In many ways it supports a "states rights" for tribes. The Act generally requires funding of federal mandates creating an undue hardship on tribes. Given limited resources, many, if not most, tribal governments may find it difficult to fund any federal requirements, particularly as tribes take on more responsibilities through self-governance. Where applicable, the Act will ensure that the financial burden resulting from the passage of federal mandates will not "break the bank."

One problem with the legislation is that the \$50 and \$100 million amounts are cumulative.³⁷ Where an unfunded mandate affects any state, local or tribal government, the total impact is considered. Where, however, the legislation specifically affects only tribal governments, the possible fiscal impact is considered as to those entities only. Given the small land base of Indian nations and the limited number of functions that most undertake without full federal funding, if the pending legislation affects only tribal governments, the Indian nations will almost never attain the \$50 million threshold. This limits the benefits to tribal governments that were intended to result from the exercise of UMRA and makes it significantly less likely that UMRA will affect the legislation.

A recent example of the operation of UMRA as it relates to Indian country occurred with a bill which sought to expand the regulation of boxing matches, known as House Bill 4167.³⁸ This bill requires that any Indian nation seeking to hold a professional boxing match held within its reservation must conduct the match under regulations and safety standards at least as restrictive as those most recently certified and published by the Association of Boxing Commissions or as the applicable standards and requirements of a state in which the reservation is located.³⁹ This legislation would impact the tribes by requiring the costly addition of tribal staff charged with the development and monitoring of additional, restrictive regulations. The Congressional Budget Office found that the Professional

36. *Id.* §1532(a)(3).

37. *See generally id.* § 658.

38. Professional Boxing Safety Act of 1996 (H.R. 4167), Pub. L. No. 104-272, 110 Stat. 3309 (codified at 15 U.S.C.A. §§ 6301-6313 (West Supp. 1997)).

39. *Id.* § 6312(b).

Boxing Safety Act of 1996 (House Bill 4167) created an unfunded mandate on tribal governments, although Congress knew that the estimated cost did not exceed the \$50 million threshold which could trigger a point of order.⁴⁰ The Act was passed and became law on October 21, 1996, without the additional federal funding necessary to help the tribes meet the costs of implementation.⁴¹

II. Problems with Implementation of UMRA in Indian Country

An unfunded mandate is the federal requirement of a state, local or tribal government to do something for which they are not reimbursed by the federal government. The imposition of an unfunded mandate has serious consequences for any subordinate government. State and local governments protect their sovereign powers and often challenge the requirements imposed on them by the federal government. The recent logging preclusions and requirement of land trades to protect old growth trees in Alaska and Northern California are examples of the exercise of federal power against, in some instances, the wishes of some state officials and the resultant struggles of the states to resist or control restraints on the exercise of their sovereign authority.⁴²

Where the states differ from tribal governments, however, is that the states have absolute control over their fiscal resources. They have the power to levy property and other taxes, to enter into contracts, to sell or transfer their lands, and to invest their monies as they see fit. Tribal governments are in a different, and more difficult, situation.

One of the most serious concerns regarding federal mandates as they relate to tribal governments is that these governments are not legally empowered to enter into contract agreements affecting an interest in their lands without the approval of the Secretary of the Bureau of Indian Affairs.⁴³ Tribal governments cannot transfer an interest in their own land without specific legislative authorization.⁴⁴ Further, often tribal governments do not collect or control their own income. Instead, payments for leases, mineral rights, contracts and other economic endeavors, as well as allocations of trust funds, are controlled and parceled out by the Bureau of Indian Affairs.⁴⁵

Many tribal governments obtain most of their funds from, and are held accountable for their expenditures to, the Bureau of Indian Affairs Trust

40. See *supra* note 33.

41. Professional Boxing Safety Act of 1996, Pub. L. No. 104-272, 1996 U.S.C.A.N. (110 Stat.) 3309.

42. Eugene Linden et al., *Of Jobs, Profits and Forests*, TIME, Oct. 14, 1996, at 66-68.

43. See GETCHES ET AL., *supra* note 18, at 627.

44. *Id.*

45. *Id.* at 23-24, 627-28.

Division.⁴⁶ Therefore, in light of revelations of the serious mismanagement and loss of over \$2.6 billion in tribal trust funds by the BIA,⁴⁷ many in Indian country feel that any mandate is unfunded as, even if funding attaches, there is a significant danger that any reimbursement money may never reach the affected tribal governments.

The issue of control is one that also negatively affects tribal governments. For many programs, including housing, law enforcement and others, the control over provision of the service, and the nature of the service provided, is in the hands of federal agencies and the Bureau of Indian Affairs.⁴⁸ Tribal governments are allowed varying levels of input but rarely control all essential elements.⁴⁹ They often are not even consulted as to how something should be done, let alone whether it should be done.⁵⁰ This lack of control may cause a complication when dealing with compliance under the UMRA as the mandate may apply to government of the Indian nation, while the power to control the provision or type of service may rest with the BIA or other federal agencies.

Other issues affecting Indian country and coloring the perspective of Indians in dealing with federal, state and local governments are dealt with specifically in the following sections. However there is one over-riding perspective that permeates Indian country. Many in Indian country feel that other governments, be they federal or state, have little or no business telling another government what to do.⁵¹ There is a resistance, in particular, to incursions of state or local authority into decisions made by the Indian nation, or as to self-government issues.⁵² The Indian nations may find it difficult to accept the imposition of any mandate, but particularly one which is unfunded.

In order to explore the impact of the Act, this article proceeds in segments, related to specific bodies of federal law and issues of state authority in Indian country. The first section is a brief historical overview and discussion of the concept of tribal sovereignty, and how the concept is impacted by the function of federal and state law. Those federal laws that

46. *Id.* at 24-26.

47. See U.S. General Accounting Office, Report to the Committee on Indian Affairs, U.S. Senate: BIA's Tribal Trust Fund Account Reconciliation Results at 3 (May 19, 1996) (GAO/AIMD-96-63); U.S. General Accounting Office, Report to the Committee on Indian Affairs: DOI's Efforts to Reconcile Indian Tribal Fund Accounts and Implement Improvements at 2 (June 11, 1996) (GAO/T-AIMD-96-104).

48. See GETCHES ET AL., *supra* note 18, at 16-20.

49. For more on the subject of congressional plenary power, see *id.* at 324-34.

50. *Id.* at 325.

51. See Larry Kinley, *Principles for Negotiating a Self Government Agreement*, in INDIAN SELF GOVERNMENT PROCESS EVALUATION REPORT, *supra* note 24, at 11-13.

52. GETCHES ET AL., *supra* note 18, at 453-58.

most often affect Indian country, and how they apply to tribal governments are then discussed, particularly in light of the imposition of mandates.

III. The Concept of Tribal Sovereignty

When Indian nations first began to deal with the federal government they were sovereign.⁵³ They exercised independent authority to govern themselves, and no other nation was depended upon to legitimate their acts of government. After colonization of the continent, Indian nations accepted certain limitations on such sovereignty and significant losses of land and resources in exchange for treaty agreements. These treaty agreements and subsequent legal decisions interpreting them protected the Indian nations' rights of self-government and the understanding that the powers exercised by tribal governments were inherent to sovereigns, not something that had been granted to them by the Constitution.

In what is more commonly referred to as the "Marshall Trilogy," the U.S. Supreme Court decided three cases in the early 1800s establishing a number of principles that remain the basis for the federal-tribal relationship. These principles are the following:

(1) The federal government has "plenary power" over Indian matters. This means that federal treaties and statutes prevail over state law.⁵⁴

(2) The status of Indian nations was established as "dependent sovereign nations" to the federal government. Thus, Indian nations cannot enter into agreements with other countries, nor can they alienate their lands except to the federal government.⁵⁵

(3) Treaties between Indian nations and the federal government were interpreted to establish that Indian nations retained the right to self-government within the territories reserved to them, without constraint by any other entities, including state governments.⁵⁶

(4) Certain "Canons of Construction" were established for the interpretation of treaties with Indian nations. These Canons provided that when construing the treaties they were interpreted as understood by the Indians. Ambiguities within treaties or statutes were interpreted in the Indians' favor. Treaties and federal Indian laws were interpreted liberally and they were to favor retained tribal self-government, rather than state or federal authority.⁵⁷

53. For more on sovereignty, see generally GETCHES ET AL., *supra* note 18; WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (2d ed. 1988); and ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* (3d ed. 1991).

54. GETCHES ET AL., *supra* note 18, at 122-55.

55. CANBY, *supra* note 53, at 68.

56. *Id.* at 109.

57. GETCHES ET AL., *supra* note 18, at 155-66.

(5) The protection of land, guaranteed in the treaties, was later extended to the right to use and develop the resources of the land for the economic self-interest of Indian nations.⁵⁸

During the early years of the twentieth century the Supreme Court began to allow more incursions of federal power into Indian country, thus endangering the internal sovereignty of Indian nations.⁵⁹ Prior to a number of court decisions in the 1930s and 1940s, the Supreme Court had held to the concept that general federal laws, like state laws, were not applicable to Indians within Indian country. This changed significantly with the Supreme Court ruling in *Federal Power Commission v. Tuscarora Indian Nation*,⁶⁰ wherein the Court held that absent a treaty or federal statute to the contrary, federal laws of general applicability apply also to Indians and tribal governments.

This assertion of the federal government's power has been moderated slightly since *Tuscarora*. The Court should interpret the general applicable statutes, treaties, and subsequent legislation so that the treaties are not abrogated, unless a clear congressional intent is established.⁶¹

The law has been recently settled as to the sovereign status of Alaska Native villages. Unlike most federally-recognized tribal governments in the United States, the Villages do not have territorial integrity as reservations.⁶² They are instead owned by village corporations in fee simple. The Alaska Native Claims Settlement Act (ANSCA),⁶³ passed in 1971, settled aboriginal land claims and expressly revoked all reservations in Alaska, except the Metlakatla reservation, but did not resolve the legal disputes.⁶⁴

The Alaskan Ninth Circuit District Court held, in *State of Alaska v. Native Village of Venetie Tribal Government*,⁶⁵ that the Native villages were Indian nations. The Court held that the Alaskan Native villages possessed the same sovereign rights as other Indian nations, and were dependent Indian communities.⁶⁶ Congress has also taken this same position by including Alaska Natives in all major Indian legislation since the passage of Alaska Native Claim Settlement Act. It has done so, however, by specifically including Alaska Natives, as distinguished from

58. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 118 (1938), *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 138 (1980).

59. *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Sandoval*, 231 U.S. 28 (1913); *Sioux Tribe v. United States*, 316 U.S. 317 (1942).

60. 362 U.S. 99, 120 (1960).

61. *GETCHES ET AL.*, *supra* note 18, at 346-48.

62. *Id.* at 911-18.

63. 43 U.S.C. §§ 1601-1628 (1994).

64. *GETCHES ET AL.*, *supra* note 18, at 913-17.

65. 101 F.3d 1286 (9th Cir. 1996), *rev'd*, No. 96-1577, 1998 WL 75038 (U.S. Feb. 25, 1998)

66. *Id.* at 1302.

Indians.⁶⁷ The UMRA has also been specifically applied to Alaska Villages in much the same manner.⁶⁸

IV. Historical Overview

The relationships between the federal governments and Indian nations were originally conducted by the Executive Branch of the federal government. The Constitution specifically established that Congress alone had the power to control economic intercourse with Indian nations.⁶⁹ However the Supreme Court, in a number of important cases, began to articulate a series of policies that set the tone and limitations for these relations.

In the last few years a trend for the resolution of judicial Indian issues has changed and Congress has begun to assert authority. Congress' inclusion of tribal governments with states and local governments in the UMRA facilitates utilization to further the development of Indian sovereignty considerably. Congress' insertion of language attesting to the equality and "partnership" status of tribal governments and of the necessity to consider the fiscal impact of considered legislation on them, prior to the passage of such legislation, tempers the exercise of Congress' plenary power, extends the concept of tribal sovereignty and strengthens Indian nations.

The congressional proactive trend recognizing the sovereignty of Indian nations began in response to a series of negative court decisions by the Rehnquist court. This movement became obvious in 1992 when Congress acted to reverse the Supreme Court decision in *Duro v. Reina*,⁷⁰ wherein the Court had ruled that tribal governments do not have jurisdiction over non-member Indians.

The shift in emphasis from the courts to Congress follows an historic period of federal court decisions favorable to Indians. This chain of rulings began in 1959 and continued for over 30 years. They included a number of resounding tribal victories against state incursions into Indian country, including:

- The determination that the Navajo Tribal Court had exclusive jurisdiction over the collection of a debt owed by Indians to a non-Indian

67. For example, see 2 U.S.C. § 658(13) (Supp. II 1996).

68. *Id.*

The term "tribal government" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601 et seq.) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their special status as Indians.

Id.

69. U.S. CONST. art. 1, § 8, cl. 3.

70. 495 U.S. 676, 681 (1990).

merchant on the reservation.⁷¹

- The invalidation of state income taxes levied on the earnings of an Indian employed on her reservation.⁷²

- The upholding of the non-Indian convictions for selling liquor in Indian country without tribal permission.⁷³

- The invalidation of state fees that interfered with tribal regulation and income from non-Indian hunting and fishing.⁷⁴

These and other tribal victories set the groundwork, thus strengthening the legal framework as it relates to the sovereignty of Indian nations. Part of this framework includes court deference to congressional intent in resolving jurisdictional conflicts between tribal governments and states, a concept which was first introduced in the 1973 *McClanahan* decision. This deference reinforces the primacy of Congress and of federal laws and legislation in respect to Indian country and the federal preemption of state laws relating to tribal governments.

At this point in history Congress has moved to a more conservative stance, which may make it more difficult for tribal governments to receive necessary funding for services. However, the "states rights" movement, supported by the more conservative Congress, has increased momentum. It is often thought that the best way to advance a concept is to link it to a "moving train," i.e. an idea that has momentum of its own. The movement for "states rights" may serve as the vehicle for tribal governments. UMRA is a direct result of the conservative movement for "states rights." As such, many may look upon UMRA with skepticism. However, it is possible, through the assertion of the powers set forth in UMRA, coupled with the Indian Self-Determination and Education Assistance Act of 1976⁷⁵ to advance tribal interests and influence, continue the development of tribal governments, and erode the exercise and perhaps the concept of federal plenary power.

V. Indian Country Today

There are 327 Indian nations and 223 Alaskan Native organizations that the United States recognizes officially.⁷⁶ There are approximately 129 Indian nations in various stages of the federal-recognition process.⁷⁷ Many

71. *Williams v. Lee*, 358 U.S. 217, 223 (1959).

72. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 181 (1973).

73. *United States v. Mazurie*, 419 U.S. 544, 558 (1975).

74. *Mescalero Apache Tribe v. New Mexico*, 462 U.S. 324, 344 (1983).

75. Pub. L. No. 93-638, 88 Stat. 2203 (codified and amended at 25 U.S.C. §§ 450-450n, 458-458hh (1994)).

76. For a complete list of federally-recognized tribes, see generally VERONICA E. VELARDE TILLER, U.S. DEP'T OF COMMERCE, *AMERICAN INDIAN RESERVATIONS AND TRUST AREAS* (1996).

77. GETCHES ET AL., *supra* note 18, at 12.

more Indian nations are state-recognized,⁷⁸ or unrecognized,⁷⁹ with California alone having more than forty-six unrecognized Indian nations.⁸⁰

This issue of recognition is critical for our analysis of the impact of UMRA in Indian country, as only federally-recognized Indian nations are legally considered "tribal governments" for the purpose of UMRA by the federal government, and thus as participants in the established "partnership."⁸¹ Unfortunately this leaves state-recognized or unrecognized tribal governments powerless to use UMRA to protest federal mandates that might affect them negatively.

VI. Issues of State-Tribal Relationships

In the discussion that follows I have attempted to delineate the powers possessed by state governments as they relate to Indian country within their borders. It is necessary to consider those situations where states have power

78. State recognized tribes include the following: In Alabama, the Mowa Band of Choctaws of SW Alabama, Echota Cherokee, Cherokee of SE Alabama, MaChis Lower Creek, Star Clan-Muscogee Creek, and Cherokee of NE Alabama; in Connecticut, the Golden Hill Paugussett, Paucatuck Eastern Pequot and the Schaghticoke; in Georgia, the Tama; in Louisiana, the Caddo, Choctaw-Apache of Ebarb, Clifton Choctaw, Louisiana Choctaw, and United Houma Nation; in Massachusetts, the Hassanamisco; in Missouri, the Northern Cherokee and the Chickamauga Cherokee; in North Carolina, the Coharie, Haliwa-Saponi, Lumbee, Meherrin and Waccamaw-Siouan' in New Jersey, the Rankokus; in New York, the Poospatuck and Shinnecock; and in Virginia, the Mattaponi and the Pamunkey. See GEORGE RUSSELL, *AMERICAN INDIAN RESERVATION ROSTER* 20 (1996) (on file with the *American Indian Law Review*).

79. Non-recognized tribes include, e.g., in Arkansas, the Ouachita; in Colorado, the Munsee Thames River Delaware; in Georgia, the Cane Break Band of Eastern Cherokees; in Connecticut, the Nipmuc; in Indiana, the Upper Kiskopo Band of the Shawnee; in Idaho, the Delawares of Idaho; in Kansas, the Delaware-Muncie Tribe; in Maine, the Aroostook Band of Micmacs; in Michigan, the Consolidated Bahwetig Ojibwas & Mackinacs; in Minnesota, NI-MI-WIN Ojibways; in Massachusetts, the Mashpee, Wampanoag, and Narragansett; in Maryland, the Piscataway; in New Hampshire, the Abenaki; in New Mexico, the Cononcito Band of Navajos; in Mississippi, the Grand Village Natchez Indian Tribe; and in Tennessee, the Etowah Cherokee. See *List of Unrecognized Tribes in California* (visited Oct. 20, 1997) <<http://sorrel.humboldt.edu/~nasp/unroc.html>> (on file with the *American Indian Law Review*).

80. California unrecognized tribes include the following: Alexander Valley Mishewal Wappo, Amah Mutsum Band of Mission Indians, American Indian Council of Mariposa, Antelope Valley Paiute Tribe, California Indian Council/Lulapin, Chilula Tribe, Chimariko, Chukchansi Yokotch Tribe, Chukchansi Yokotch of Mariposa, Chumash Council of Bakersfield, Coastal Band of Chumash, Coastanoan Rumsen Carmel Tribe, Coastanoan Band of Carmel Mission Indians, Coastancan, Ohlone, Mutsun-Rumsen, Dunlap Band of Mono Indians, Esselen Nation, Esselen Tribe of Monterey County, Federated Coast Miwok, Federation of Coast Miwok, Gabrielino/Tongva Tribal Council, Indian Canyon Nation, Juaneno Band of Mission Indians, Kern Valley Indian Community, Chumash, Miwok, Mono Lake Indian Community, Muwekma Ohlone Tribe, Nor-el-Muk, North Fork Band of Mono Indians, Oak Brook Chumash, Salinan, San Luis Rey Band, Shasta Nation, Tolowa Nation, Tongva Nation, Traditional Choinumni Tribe, Tsnungwe Council, United Maidu Nation, Washoe/Paiute of Antelope Valley, Wintoon Indians, Wintu Tribe, Wintu of Shasta/Toyon, Wukchumni Council, and Yokayo Tribe of Indians. *Id.*

81. See *supra* note 52.

within, or in regard to, Indian country when considering the impact of the UMRA. Where states have such authority, unfunded mandates imposed on the states by the federal government could result in the state's assertion of those mandates on tribal governments within those states' boundaries.

Historically the relationships between the tribal governments and the various states have been tense. The states have often sought to assert authority into those Indian lands which lie within state boundaries, and over those persons, Indian and non-Indian who reside in, or do business with, Indian country.⁸² These attempts at the unilateral assertion of state power have been generally resisted by the Indian nations and found illegitimate by the Courts. They continue however, and often serve as the basis for Supreme Court opinions.

A. State Taxation of Indian Lands

The general rule has been that states could not tax tribal trust lands within a reservation boundary. This was re-affirmed in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*,⁸³ wherein the Court held that if a tribe places land in trust with the federal government, thus making the land inalienable or prohibited by federal law from being conveyed, then the property is not subject to ad valorem taxes. This ruling ensured that if an Indian nation built a casino on land that had been placed in trust, the state or local units of government would not receive property tax revenue from the casino. Economic activities carried on outside Indian country are not tax exempt, unless such activity is guaranteed in a treaty, such as with hunting, fishing or gathering rights reserved on lands ceded by the tribal governments.

Yakima was cited in a more recent case, *Saginaw Chippewa Indian Tribe v. State of Michigan*,⁸⁴ wherein the Chippewa stopped paying taxes on Indian-owned lands and portions of land owned by the Nation which was located within the reservation. The local government brought suit and the U.S. district court held that where the land was alienable, having marketable title and conveyable without federal restrictions (held "in fee") the state could tax such land, irrespective of whether it was inside a reservation.⁸⁵

A process exists for tribal governments to purchase land and then to have it placed in trust by the federal government.⁸⁶ This process was recently amended by the Bureau of Indian Affairs⁸⁷ following the decision in *South*

82. For example, see *Williams v. Lee*, 358 U.S. 217 (1959).

83. 502 U.S. 249, 270 (1992).

84. 106 F.3d 130 (6th Cir. 1997).

85. *Saginaw Chippewa Indian Tribe of Michigan v. Michigan*, 882 F. Supp 659, 669 (E.D. Mich. 1995).

86. 25 C.F.R. § 151.3 (1997).

87. Office of Tribal Justice, U.S. Dep't of Justice, *Secretary's Authority to Take Indian Lands into Trust*, NATION TO NATION, Aug. 1996, at 8 [hereinafter *Secretary's Authority to Take Indian*

Dakota v. United States Department of Interior,⁸⁸ wherein the court found that the trust land designation powers given to the Secretary of the Interior were an excessive delegation of authority, in that there was no formal opportunity for an affected city to be involved in the process.⁸⁹ In response the BIA issued new rules on April 24, 1996, allowing for a thirty-day notification period, following publication in either a local newspaper or the *Federal Register*, of the intent to place a parcel of land into trust,⁹⁰ unless the acquisition of such parcel has been mandated by legislation.⁹¹ This then allows a state, local or city government to provide written comments as to potential impacts of the proposed acquisition on regulatory jurisdiction, real property taxes and special assessments.⁹² Once such trust status is determined, the Federal Quiet Title Act⁹³ prohibits further judicial review.⁹⁴

In regard to Indian-owned "in fee" land the issue is not settled. The Ninth Circuit held in *Confederated Tribes & Bands of the Yakima Indian Nation v. County of Yakima*⁹⁵ that the General Allotment Act authorized state taxation of land owned individually "in fee" by Indians, which was within Indian country. This case contradicts the rulings in previous cases and thus the law, at present is unsettled.⁹⁶

Any congressional action which results from a study presently being conducted by the BIA as to the process by which Indian land is placed into trust could trigger UMRA. UMRA could bar the costs of notification to local governments as an unfunded mandate, and those which result from any delay in the trust process, if the costs exceed the statutory minimum.⁹⁷ Thus it is essential to closely monitor any changes in these regulations and their implementation in Indian country.

B. State Taxation of Income

Income earned from employment on a reservation by the members of tribal governments residing on the reservation is exempt from state taxes under the ruling in *McClanahan v. Arizona State Tax Commission*.⁹⁸ The

Lands into Trust].

88. 69 F.3d 878 (1996).

89. Doug Peterson, *Localities May Have Window to Ask for Court Hearing in Tribal Land Matters*, NATION'S CITIES WKLY., May 13, 1996, at 6.

90. See *Secretary's Authority to Take Indian Lands into Trust*, *supra* note 87.

91. 25 C.F.R. §§ 151.10, 151.11 (1997).

92. *Id.*

93. Pub. L. No. 92-562, 86 Stat. 1176 (codified at 28 U.S.C. §§ 2409(a)-(g) (1994)).

94. See 25 C.F.R. § 151.12 (1997).

95. 903 F.2d 1207, 1211 (9th Cir. 1990).

96. See, e.g., *Bryan v. Itaska Co.* 426 U.S. 373 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

97. 2 U.S.C. § 658(b) (1994).

98. 411 U.S. 164, 152 (1973).

U.S. Supreme Court recently cited *McClanahan* in *Oklahoma Tax Commission v. Chickasaw Nation*,⁹⁹ and distinguished their ruling in that case.

Prior to the *Chickasaw* case, state income taxes were not paid on income from tribal employment. However, in the *Chickasaw* case the court ruled on two questions. On the first, whether the state of Oklahoma could impose its motor fuels excise tax upon fuel sold by Chickasaw Nation retail stores on trust land, the Court held that such a tax was unenforceable if its legal incidence fell on an Indian nation or its members for sales made within Indian country.¹⁰⁰ However on the second issue, the Court held that Oklahoma could tax the income (including wages from tribal employment) of all persons, Indian or non-Indian, residing outside Indian country.¹⁰¹

Any congressional legislation which mandates the establishment of a tribal tax collection process, the promulgation of acceptable regulations, and the incurring of costs which result from the collection and transmission of these taxes creates a mandate for tribal governments. The tribal governments could use UMRA to contest these new responsibilities.¹⁰²

C. State Sales Taxes Within Indian Country

The courts have generally held, as in *Chickasaw*, that states could not levy state sales tax on members of tribal governments in Indian country. However, in *Washington v. Confederated Tribes of the Colville Indian Reservation*¹⁰³, the Court held that a state could impose its cigarette and sales tax made on sales to non-member Indians in Indian country, so long as these taxes: (1) did not interfere with the right of the Indian nation to self-government, and (2) had not been preempted through regulation by the federal government.

The federal preemption caveat does not require an express congressional declaration of intent to pre-empt state authority. Rather it is a common sense standard applied by the courts in conjunction with traditional notions of sovereignty and self-development.¹⁰⁴ Where, however, the taxes fall squarely on the non-Indian in Indian country, without interfering with the rights of the Indian nation to self-government or self-regulation, the courts

99. 515 U.S. 450 (1995).

100. *Id.* at 463.

101. *Id.* at 464.

102. 2 U.S.C. § 1501(2) (Supp. II 1996).

103. 447 U.S. 134, 164 (1980).

104. For examples of the exercise of federal preemption, see *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Montana v. Blackfeet Indian Tribe*, 471 U.S. 759 (1985); *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 1985 (1993).

have held that they were allowable.¹⁰⁵

Any new congressional legislation which creates new requirements for tribal governments may require funding through the action of UMRA. The Act may also bar the promulgation of regulations or procedures, the hiring of personnel to handle the collection and transmission of tax monies, or the meeting of other requirements if they exceed the amounts set by UMRA for implementation of the Act.¹⁰⁶

D. Tribal Taxation

Tribal governments have the right to tax non-Indian business activities conducted in Indian country, as well as non-Indians, as individuals.¹⁰⁷ They may tax non-Indian purchasers even if the purchase is also taxed by the state. Thus, in the area of taxation, any mandate considered by Congress that applies to state and local governments may also apply to tribal governments. This, then, should trigger a consideration of the applicability of the UMRA.

E. Indian Gaming

Prior to the U.S. Supreme Court decision in *Seminole Tribe of Florida v. Florida*,¹⁰⁸ the Indian Gaming Regulatory Act required that a tribe, which wished to implement casino gambling at a tribally controlled location, must: (1) negotiate with the state; (2) if agreement was not reached, the tribe could sue the state in federal court and this court could provide for further tribal state negotiation; (3) if agreement were not reached within this sixty day period the state and tribe would each be required to submit their "last best offer" to a court-appointed mediator who would choose between the two proposals; (4) if a state refused to agree with the mediator's decision within sixty days of its announcement; then (5) the Secretary of Interior could determine the conditions under which Casino (class III) gambling was authorized to be conducted on the Indian land.¹⁰⁹

In this most recent Seminole decision, the tribe wished to initiate Class III gaming on its reservation in Florida. Under IGRA rules they initiated the negotiation process but the state of Florida refused to negotiate a compact. The tribe then sued the state under IGRA. The Seminole Court held that the federal government had no authority under the Eleventh Amendment to the Constitution to subject the states to suit in the courts.¹¹⁰ The Supreme

105. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 464 (1995).

106. 2 U.S.C. § 1514(a) (1994).

107. *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 164 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1981).

108. 116 S. Ct. 1144 (1996).

109. Doug Peterson, *Interior Department Requests Comments on Indian Gaming Compacts*, NATION'S CITIES WKLY., May 13, 1996 (on file with the *American Indian Law Review*).

110. *Seminole*, 116 S. Ct. at 1119.

Court did, however, leave IGRA intact, and also reaffirmed the Indian Commerce Clause of the Constitution confirming that the states "have been divested of virtually all authority over Indian commerce and Indian tribes."¹¹¹ As a result of this decision, the BIA will have to promulgate new rules for the approval of Indian gaming. IGRA specifically establishes that the Secretary of the Interior has the authority to create compacts where negotiations have not been successfully concluded between a state and a tribe.¹¹² The Department of the Interior established a comment period (which ended July 1, 1996) in order to solicit input as to the substance of the new rules.¹¹³ One should watch this issue as it is unclear what approach the BIA will take regarding Indian gaming. In any case, any mandates related to gaming, considered by Congress, are subject to the considerations of the UMRA, and any affected tribe or tribal governments under an imposition because of any regulations or requirements should challenge the proposed mandates if they carry any costs of implementation or compliance.

VII. Federal Taxation in Indian Country

The federal government is legally able to impose taxes within Indian country.¹¹⁴ Although a tribe may have little say in whether or how much money is collected, any possible financial burden incurred as a result of complying with any new regulation could function as the basis of a point of order pursuant to the UMRA.

Indians, whether working inside or outside of Indian country pay federal income taxes, as do non-Indians working for tribal governments. However some types of Indian-income are not taxed. For example, income earned from allotted trust land, including capital gains, rents and royalties, the sale of crops or minerals, or the sale of livestock grazed on allotted land, is not taxed.¹¹⁵ However, the Internal Revenue Service has deemed that the income of a tribal member from the operation of a shop or service is taxable as the result of labor, rather than coming from the land itself.¹¹⁶ Further if exempt income is reinvested, any income from the reinvestment is taxable.¹¹⁷

However, once allotted land is removed from trust and a fee patent is

111. Rick Hill, *Requesting a Remedy*, INDIAN GAMING, May 1996 at 7.

112. See 25 U.S.C. §§ 2701, 2710 (1994).

113. *Id.*

114. See CANBY, *supra* note 53, at 203.

115. See GETCHES ET AL., *supra* note 18, at 656-57.

116. INTERNAL REVENUE SERV., INDIAN ASSISTANCE HANDBOOK, INCOME TAXATION SECTION, TRIBAL MEMBERS, GENERAL RULES at 11-12 (on file with the *American Indian Law Review*).

117. See 26 C.F.R. § 161-1 (1996); Rev. Rul. 67-284, 1967-2 C.B. 55.

issued to the allottee, income from the land, as well as the land itself, becomes taxable.¹¹⁸ Further, if an Indian leases trust land from his/her tribe, any income derived from activities on the land is taxable.¹¹⁹

VIII. Environmental Regulations on Indian Lands

The Environmental Protection Agency (EPA) has an "Indian policy" which incorporates federal policies of tribal self-determination in its environmental regulation on Indian lands. This policy, which was implemented in November 1984 and re-affirmed in July 1994¹²⁰ directs the EPA to treat Indian nations as states in program implementation. This then strengthens a tribe's position when challenging any unfunded mandates imposed by proposed federal legislation.

Although the Indian policy has benefitted and enhanced the regulatory powers of tribal governments, it has created complications for the regulated community in that they have had to learn to adapt not only to different regulatory standards and procedures but also to different legal systems. It has also increased the potential for conflict and overlap between state, federal and tribal regulations.

Federal power over tribal governments, tribal land, and non-Indians dealing with tribal governments is very broad. If an express federal statute exists, it will control.¹²¹ State powers over tribal activities are generally very narrow. State authority will control only when the federal power has been expressly delegated to the state or when, on balance, the state regulatory interests are significantly stronger than the federal or tribal interests.¹²² The latter is highly subjective, so it is difficult to tell when it will prevail. States interests are strengthened, however, where a "checker-boarded" reservation exists and the rights of non-Indians, who reside upon or own land within the exterior boundaries of a reservation, are at issue.¹²³

Tribal authority generally extends to the protection of members' health and safety through the implementation of zoning and regulatory activities over environmental quality on tribal lands.¹²⁴ Under current case law, a tribe's inherent authority may support tribal regulation of non-Indian activities affecting reservation water quality,¹²⁵ shoreline protection,¹²⁶

118. Rev. Rul. 58-341, 1958-2 C.B. 400 (modified by Rev. Rul. 62-48, 1962-1 C.B. 131).

119. *United States v. Anderson*, 625 F.2d 910 (9th Cir. 1980), *cert. denied* 450 U.S. 920 (1981).

120. 59 Fed. Reg. 38,460, 38,461 (1994).

121. *United States v. Dion*, 476 U.S. 734, 898 (1986).

122. *Judith v. Royster & Rory SnowArrow Fausett, Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 612-13 (1989).

123. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

124. *Montana v. United States*, 450 U.S. 544, 566 (1981).

125. *Id.*

and tribal sewage treatment.¹²⁷

The EPA, through its 1990 and 1994 actions in affirming the powers of tribal governments and in delegating specific powers to them, implemented an "Indian policy" which has significantly limited the role of states in Indian country.¹²⁸ The EPA Indian policy has two major elements: (1) the EPA or tribal governments, rather than states, should implement federal environmental statutes on Indian lands, and (2) where authorized, the EPA will cooperate with and assist tribal governments in developing and implementing tribal programs under federal environmental statutes. This "Indian Policy" is now strengthened through the implementation of UMRA, in that tribal governments are now empowered and protected, as are states, from the imposition of new federal environmental requirements, without provision for adequate funding.

IX. *The Enforcement of Labor Laws on Indian Land*

There is little consistency in the field of labor law and the applicability of labor regulations in Indian country. Much depends upon the particular regulation and the particular court rendering the decision. In general, the Ninth Circuit has held that federal labor laws apply to Indian tribal employers while other Courts have held differently.¹²⁹ Thus, in those jurisdictions where federal labor laws are held to apply to tribes, any mandates included in new federal legislation may trigger UMRA.

It appears that generally applicable federal statutes will apply to reservation Indians unless they conflict with a treaty right or self-governance.¹³⁰ To quote the *Labor Law Journal* on the subject: "A general statute in terms applying to all persons includes Indians and their property interests." Nevertheless, when federal statutes are silent on the issue of applicability to Indian tribal governments, they must give way to tribal ordinances when the federal law: (1) encroaches on exclusive rights of self-governance, (2) abrogates treaty rights, or (3) was intended by Congress not to apply to Indians."¹³¹

Under current law the Occupational Safety and Health Reform Act (OSHA) is optional to states (as well as to tribal governments).¹³² The Act

126. *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 965 (9th Cir. 1982).

127. *Lummi Indian Tribe v. Hallauer*, 9 Indian L. Rep. 3025, 3026 (W.D. Wash. 1982).

128. Lynn H. Slade & Walter E. Stern, Modrall, Sperling, Roehl, Harris & Sisk, P.A., *Environmental Regulations on Indian Lands, A Question of Jurisdiction* (visited Nov. 18, 1997) <<http://www.abanet.org/genpractice/f95regs.html>>.

129. William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. MEM. L. REV. 1365, 1392 (1995).

130. Gerard Morales & Kelly M. Humphrey, *Federal Preemption and Tribal Employment Laws*, 44 LAB. L.J. 565 (1993).

131. *Id.* at 567.

132. 29 U.S.C. § 653(b)(1) (1994).

is silent as to whether Indian tribal governments are exempt from the health and safety standards it establishes. Thus, the Ninth and Tenth Circuits have rendered different conclusions as to whether or not tribal governments are covered under OSHA.¹³³ Pertinent language in OSHA regulations promulgated by the Secretary of Labor expressly adopts the Tuscarora rule. This regulation provides:

The Williams-Steiger Act (OSHA) contains no special provisions with respect to different treatment in the case of Indians. It is well settled that under statutes of general application, such as (OSHA), Indians are treated as any other person, unless Congress expressly provided for special treatment. Therefore, provided they otherwise come within the definition of the term "employer" as interpreted in this part, Indians and Indian tribes, whether on or off reservations, and non-Indians on reservations, will be treated as employers subject to the requirements of the Act.¹³⁴

The Occupational Safety and Health Review Commission found that this language did not cover purely intramural matters of tribal governments.¹³⁵ However, if a state or tribal government chooses to participate, the standards that are set and enforced must achieve the same level of effectiveness as the federal standards.¹³⁶

X. Civil Rights in Indian Country

Prior to the passage of the Indian Civil Rights Act, (ICRA),¹³⁷ the Bill of Rights in the United States Constitution did not apply in Indian country. Now, however, due to ICRA, specific elements of the Bill of Rights apply to tribal constitutions and tribal court decisions and other laws.¹³⁸

133. See generally *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709 (10th Cir. 1982); *United States Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182 (9th Cir. 1991).

134. See *Buffalo & Wadzinski*, *supra* note 129, at 1383.

135. *Secretary of Labor v. Mashantucket Sand & Gravel*, 1994 O.S.H.D. (CCH) P42072, available at 1994 WL 267873 (June 16, 1994).

136. See 29 U.S.C. § 655 (1994).

137. 25 U.S.C. §§ 1301-1326 (1994).

138. These elements of the Bill of Rights which now apply to tribal constitutions and tribal court decisions include: (1) First Amendment rights of free exercise of religion, free speech, freedom of the press, right to assemble and right to petition; (2) Fourth Amendment rights of probable cause and against unreasonable search and seizure; (3) Fifth Amendment rights against double jeopardy; self-incrimination, and unlawful taking; (4) Sixth Amendment rights to a speedy trial, trial by jury (if accused of an offense punishable by imprisonment), to be informed of the charges, compulsory process, and to have defense counsel at own expense (note that this does not include the mandatory services of a public defender); (5) Eighth Amendment rights against excessive bail and cruel and unusual punishment; (6) Fourteenth Amendment rights of equal

The vast majority of claims brought under ICRA are of violation of the guarantees of due process and equal protection. The United States federal courts have been generally respectful of tribal rights of self-determination and self-governance, and have rendered legal decisions that, although recognizing that due process and equal protection require fair treatment, have allowed for tribal decisions to reflect tribal values. This allowance for diversity of law and custom is protected under the language of section 8 of ICRA,¹³⁹ which asserts that no Indian tribe may, in the exercising of its powers of self-government, "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."¹⁴⁰

Those issues that UMRA is most likely to impact are due process and equal protection issues, such as removal from office, election issues, evictions and access to tribal housing, ownership and forfeiture of personal property, access to courts and jury trials, and fair and non-discriminatory employment. Tribal advocates should closely scrutinize any proposed federal legislation in these areas to determine if unfunded mandates are created for the tribal governments. If so, the tribe should challenge pursuant to UMRA.

XI. Domestic Relations

The United States courts have generally held that domestic relations within Indian country falls within the parameters of tribal jurisdiction.¹⁴¹ The United States courts have upheld marriages and divorces when conducted under tribal law, as well as property agreements and probate actions. Thus, tribal advocates should review any proposed legislative changes in these areas which create a financial burden in order to ensure their compliance with the UMRA.

The Indian Child Welfare Act (ICWA)¹⁴² was enacted in 1978, in order to protect tribal interests in the placement and adoption of Indian children. Essentially ICWA empowers tribal governments to influence state court actions regarding the foster care placement, termination of parental rights or pre-adoptive/adoptive placement of a child who is either a member of the tribe or the biological child of a tribal member where the child is also

protection of the laws and due process; and (7) protection against ex post facto laws and bills of attainder. The ICRA does not include (1) protection against the establishment of religion; (2) a guarantee of a republican form of government; (3) a privileges and immunities clause; (4) provisions for the right to vote; (5) a requirement of free counsel for the accused; or (6) the right to a jury in a civil trial. See Indian Civil Rights Act, 25 U.S.C. §§ 1301-1326 (1994).

139. *Id.* §§ 1301-1303.

140. 25 U.S.C. § 1302(8) (1994).

141. See generally CANBY, *supra* note 53, at 153-57.

142. 25 U.S.C. §§ 1901-1963 (1994).

eligible for tribal membership.¹⁴³

During the 104th Congress ICWA became an issue and change was attempted, but defeated.¹⁴⁴ Rep. Susan Molinari (R.-N.Y.) brought House Bill 3286, "Adoption Promotion and Stability Act of 1995," to the floor. This bill would have precluded Indian children from ICWA protection if their parents did not maintain affiliation with their Indian tribe and would have required that the tribes act to assert tribal authority within strict time lines.¹⁴⁵ These changes could easily increase the costs to tribes of asserting jurisdiction over tribal children, as such changes would likely necessitate additional tribal personnel to produce the requisite paperwork within definite time lines. This presents another area where tribes might consider utilizing UMRA.

XII. Regulatory Jurisdiction

In general, tribal governments have exclusive authority to regulate Indian and non-Indian conduct occurring on trust land in Indian country.¹⁴⁶ They may also regulate the conduct of tribal members off reservation, where significant tribal interests are at issue.¹⁴⁷ The United States Supreme Court has also held that tribal governments may regulate the activity of non-Indians in Indian country where: (1) the nonmembers have entered into consensual commercial relationships with the tribe or its members, or where (2) conduct of non-Indians occurs on land which is legally owned by them (in fee), within the reservation boundaries, threatens or directly affects the political integrity, economic security, or health and welfare of the tribe.¹⁴⁸

This is an area where there is potentially a significant amount of legislative activity. Tribal governments have on-reservation authority, to regulate hunting, fishing and gathering rights, over liquor and tobacco sales, to regulate mineral sales subject to the Indian Mineral Development Act of 1982 (IMDA),¹⁴⁹ and the Federal Oil and Gas Royalty Management Act

143. 25 U.S.C. § 1911 (1994).

144. Andrea Foster, *Panel Endorses Adoption Bill*, 55 CONG. Q. 1825, 1874 (1997) (on file with the *American Indian Law Review*).

145. *Id.* Another bill, Senate Bill 569, has been introduced by Sen. John McCain (R.-Ariz.) and endorsed by the Senate Indian Affairs Committee. This bill would require a notification period for tribes of all voluntary adoption proceedings involving children of those tribes. Representative Pryce opposes this legislation, contending that it gives Indian tribes too much authority over the placement of children. Sen. Orrin Hatch (R.-Utah) has indicated that he intends to offer an amendment to Senate Bill 569 that would give primary consideration in voluntary adoptions to the wishes of birth parents over the tribes.

146. *Montana v. United States*, 450 U.S. 544, 557 (1981).

147. See CANBY, *supra* note 53, at 227-28.

148. *Id.*

149. 25 U.S.C. §§ 2101-2108 (1994).

(FORGMA),¹⁵⁰ and to implement oil and gas severance taxes, and property and production taxes under the Indian Tax Status Act of 1982 (ITSA).¹⁵¹ Thus tribal governments should seek to challenge under UMRA any proposed legislation that amends or adds regulations that create a financial burden.

XIII. Criminal Law in Indian Country

In states other than those where Public Law 280¹⁵² applies (discussed below), subject matter jurisdiction of federal, tribal or state courts is usually determined on the basis of two issues: (1) whether the parties involved in the incident are Indians, and (2) whether the incidents giving rise to the complaint took place in Indian country.¹⁵³ For the purpose of this particular analysis, Indian is defined as a person of Indian blood who is recognized as a member of a federally-recognized tribe.¹⁵⁴ Indian country includes 1) all land within the limits of any federal Indian reservation, 2) all dependent Indian communities, and 3) all Indian allotments.¹⁵⁵

A. Criminal Jurisdiction Under Public Law 280

Public Law 280¹⁵⁶ expressly grants concurrent jurisdiction over Indians within Indian country to five mandatory states¹⁵⁷ and allowed other states to take jurisdiction voluntarily,¹⁵⁸ with the consent of the tribal governments. Congress has allowed Public Law 280 states to retrocede the assertion of jurisdiction on a piece-meal basis,¹⁵⁹ so even where it is the law, Public Law 280 does not apply with every tribe within a given state.

Congress did not grant the states regulatory jurisdiction over Indian country under Public Law 280. Language in Public Law 280 specifically precludes the states from taxing the reservations for services, such as law enforcement and access to state courts, rendered pursuant to such

150. 30 U.S.C. §§ 1701-1757 (1994).

151. Indian Governmental Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2608 (1982) (codified at 26 U.S.C. § 7871 (1994)). For more on this subject, see Peter F. Carroll, *The Dawning of a New Era: Tribal Self-Determination in Indian Mineral Production*, 9 PUB. LAND L. REV. 81 (1988).

152. See 18 U.S.C. § 1162 (1994) (criminal jurisdiction); 28 U.S.C. § 1360 (1994) (civil jurisdiction); 25 U.S.C. §§ 1321-1326 (1994) (assumption of criminal and civil jurisdiction).

153. CANBY, *supra* note 53, at 97.

154. *Id.* at 98.

155. *Id.* at 99.

156. 18 U.S.C. § 1162 (1994).

157. California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska.

158. Florida, Idaho, Iowa, Montana, and Washington. The state of Nevada asserted jurisdiction and then retroceded. See CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280*, at 69 (1997).

159. *Id.*

jurisdiction,¹⁶⁰ or from infringing on water rights¹⁶¹ or interfering with, controlling or regulating any rights or privileges related to hunting, fishing or trapping afforded under Federal treaty, agreement, or statute.¹⁶²

Public Law 280 remains a significant factor in Indian country today. The Public Law 280 states include those with extremely high proportions of Indian peoples.¹⁶³ Issues arise regarding jurisdiction all the time, and the creation of any mandates related to criminal or civil procedure in these affected states would undoubtedly affect Indian reservations and tribal areas.

The Major Crimes Act¹⁶⁴ gives federal courts jurisdiction over thirteen violent felonies.¹⁶⁵ The Assimilative Crimes Act¹⁶⁶ and the Organized Crime Control Act¹⁶⁷ have been held to apply to Indian country.¹⁶⁸ These or any other Acts which impose additional responsibilities on tribal governments could be subject to the UMRA.

B. Law Enforcement Issues

Approximately 170 reservations, of the 230 which are federally recognized at present, have law enforcement departments. These departments consist of five types.¹⁶⁹ The types are not mutually exclusive, so more than one type may operate simultaneously within the boundaries of a given reservation.¹⁷⁰

The Bureau of Indian Affairs is involved with two types of law enforcement through the Bureau of Indian Affairs Law Enforcement

160. *Id.* at 86-89.

161. 28 U.S.C. § 1360(b) (1994).

162. GOLDBERG-AMBROSE, *supra* note 158, at 45-124.

163. Public Law 280 states at present are the following: "Mandatory," Alaska, California, Minnesota (except Red Lake), Nebraska, Oregon (except Warm Springs), and Wisconsin. The "Optional" states, which assumed full or partial jurisdiction are Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. *See* GETCHES ET AL., *supra* note 18, at 484.

164. 18 U.S.C. § 1153 (1994).

165. Murder, manslaughter, kidnaping, maiming, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, and robbery are felonies under the Major Crimes Act. *See* 18 U.S.C. § 1153 (1994).

166. 18 U.S.C. § 13 (1994).

167. 18 U.S.C. § 1955 (1994).

168. *See* Williams v. United States, 327 U.S. 711 (1946); United States v. Farris, 624 F.2d 890, 897 (9th Cir. 1980).

169. The five types of law enforcement programs operating within Indian country are: federal law enforcement under BIA-LES, state law enforcement under Public Law 280, tribal police who are federally funded through the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended in scattered sections of 25 U.S.C. (1994), and the Indian Self-Determination Act Amendments of 1994, 25 U.S.C.A. 450 (West Supp. 1997), and tribal police funded solely from tribal funds.

170. BIA-LES Listing of Reservations Where Major Crimes Act Applies by Area Office and Type of Law Enforcement Program, Revised March 31, 1995.

Services. Where Public Law 280 operates, the states are responsible for law enforcement on the reservation. Throughout the United States, even where Public Law 280 exists, many Indian nations have their own tribal police that they fund and control.¹⁷¹ These tribal police departments often operate on reservations covered by other forms of law enforcement, including BIA, 638 and/or Self-governance funded law enforcement programs. All of this, of course, results in problems of over-lapping jurisdiction and conflicts of law.¹⁷²

Given the attention paid in recent years to the expansion of law enforcement services, this area is one where the creation of unfunded mandates may easily arise. For example, a problem arose recently regarding criminal statistics obtained from the tribal governments which operate 638 and self-governance police departments.¹⁷³ Most tribal governments have not traditionally provided criminal incident statistics to the U.S. Department of Justice as is required of all other law enforcement departments in the United States. Tribal governments have begun to receive federal funding directly from Congress for crime prevention programs¹⁷⁴ and through the Community Oriented Policing Services (COPS) program for the expansion of tribal law enforcement programs.¹⁷⁵ From 1995, funding has included over \$22.4 million for new police services to 128 federally recognized Indian nations, over \$6 million for programs aimed at reducing violence against women, and almost another \$5 million to fund the development of juvenile justice and other community based programs which emphasize crime reduction.¹⁷⁶

When tribal governments accept funding, and contract for the provision of specific law enforcement services, the likelihood increases that federal legislation will change or increase the regulations under which law enforcement operates. In fact, the function and potential impact of UMRA were specifically presented in an article which discussed law enforcement grants to tribal governments.¹⁷⁷

It is essential that any tribe that is awarded such grants monitor them closely for the imposition of any unfunded mandates and challenge them under the Act if appropriate.

171. For example, Sandia Pueblo, Gila River, Salt River, Pascua Yaqui, and Eastern Band of Cherokees have both BIA and Tribal Police, and Mille Lacs Chippewa, Oneida, Hoopa and Sycuan have both Public Law 280 services as well as tribal police.

172. GOLDBERG-AMBROSE, *supra* note 158, at 1-43.

173. June Kress, Presentation at the Annual Tribal Criminal Law Update Symposium, Scottsdale, Ariz. (Sept. 1996).

174. Office of Tribal Justice, U.S. Dep't of Justice, *Grants and Funding*, NATION TO NATION, Aug. 1996, at 10.

175. *Id.*

176. *Id.*

177. *Id.* at 3.

XIV. Conclusion

The Unfunded Mandates Reform Act is a new and significant factor in Indian country. As new laws are developed in the fields of labor, environmental, criminal justice, and taxation, as well as in other realms, UMRA, particularly if aggressively monitored and pursued, may help tribal governments cope with any new mandates and responsibilities. For the proper utilization of UMRA, the following suggestions are recommended:

A. Suggested Amendment to the Unfunded Mandates Reform Act

UMRA is triggered by mandates which have cost estimates in excess of \$50 million. Where proposed legislation affects state, local, and tribal governments, this number is not difficult to reach. However, when legislation is directed only at tribal governments, this figure is astronomically high. As we saw with the Professional Boxing Safety Act of 1996,¹⁷⁸ the likelihood of UMRA being triggered by the fiscal impact on tribal governments alone is extremely remote, regardless of the difficulties faced in implementation.

The budgets of tribal governments are tightly stretched even under normal circumstances. Now, with the recent cutbacks in both services and funding to tribal governments from the Bureau of Indian Affairs, the situation is even more dire. There is no question that the additional costs of implementing new federal mandates could have serious adverse impacts on the provision of critical services to tribal members. Given this, Congress should consider amending UMRA to allow for a lower triggering level for legislation which applies only to tribal governments. This would ensure equity and allow Indian nations to reap the benefits intended by Congress when UMRA was passed.

B. Increased Scrutiny of Legislation

The Unfunded Mandates Reform Act of 1995 is only as useful as Indian nations, Indian law experts, and tribal advocates make it. Indeed, as others who have written on the Act have asserted,¹⁷⁹ the Act has a number of exclusions that allow Congress to avoid the full impact of the legislation. Further, given that congressional moderates and liberals of either party are not enamored of the Bill and its restraints on the enactment of legislation, use of waivers incorporated into the Act could significantly reduce the instances where the Act comes into play.

The retention and use of power is difficult to affect. Indeed, even though this Act was a part of the conservative Republicans' Contract with America,

178. 15 U.S.C.A. §§ 6301-6313 (West Supp. 1997).

179. See Conlon, *Deregulating Federalism*, *supra* note 10, at 38.

the imposition of federal mandates is not limited to liberals. During the Presidency of Ronald Reagan, a number of new federal mandates were imposed, even though he had repeatedly spoken out against them.¹⁸⁰ In fact, by the end of the Reagan-Bush years "the number of major new intergovernmental regulatory provisions . . . surpassed that of any previous decade."¹⁸¹ Thus, anyone who seeks to reduce the authority of the federal government must be constantly vigilant, and not assume that conservative forces will, in fact, guard against the implementation of costly mandated procedures.

C. Concerted Legal Challenges to the Exercise of Federal Power

Through enactment of UMRA, a clear congressional intention becomes evident that Congress should exercise discretion in the use of its plenary power. Although the legislative history of the Act indicates that this legislation was intended to help the states assert their interests, and that tribal governments were an afterthought, Indian nations can use this legislation to argue against the assertion of plenary power, at least as to the imposition of unfunded mandates. However, other applications may exist as well. Tribal advocates should use the "states-rights" rationale, which gave rise to the UMRA, to challenge the assertion of federal plenary power in the courts.

The exercise of plenary power by the federal government has been a sore point for many, if not most, Indian nations since the eighteenth century. Federal plenary power, in its assertion of ultimate authority over Indian peoples and lands, has hampered tribal government development, hindered the development of economic resources and has diminished the capacity of Indian peoples to self-determination.¹⁸² As has been asserted, the congressional plenary power doctrine "perpetuates and extends the racist legacy brought by Columbus to the New World of the use of law as an instrument of racial domination and discrimination against indigenous tribal peoples' rights of self determination."¹⁸³

On some levels, one could view the Unfunded Mandates Reform Act as another "chink in the armor" of plenary power. The federal trend toward self-determination of Indian tribal governments, aided by tribal economic

180. For example, new mandates enacted during the Reagan presidency included "national standards for alcohol consumption, underground storage tanks, and trucking standards; required the removal of asbestos from local schools; and tightened the restrictions of the Clean Air Act and the Safe Drinking Water Act." *Id.* at 25.

181. *Id.* at 25 n.8.

182. Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples,"* 39 U.C.L.A. L. REV. 169, 176-77 (1991).

183. Robert A. Williams, Jr., *Columbus's Legacy: The Rehnquist Courts's Perpetuation of European Cultural Racism Against American Indian Tribes* 39 FED. B. NEWS & J. 358, 358-69 (1992), cited in GETCHES, ET AL., *supra* note 18, at 36.

and political development, has allowed tribes to emerge as partners in the formulation of policy as it relates to Indian country.¹⁸⁴ The enactment of UMRA, with its limitation of federal power to impose requirements and regulations on Indian tribal governments, unless they are fully funded, is another resource for Indian country to use to challenge unbridled assertions of federal power.

One can see in the Unfunded Mandates Reform Act the assertion by Congress that it recognizes the need to constrain the exercise of its plenary power. As has been stated:

The practice of using treaty construction rules in non treaty situations to determine the existence of Indian rights has also been followed with respect to the extinguishment of Indian rights. The courts generally have required express action, or something close to it, in cases dealing with important Indian rights not directly involving treaties.¹⁸⁵

Thus, under the Canons of Construction, the courts could easily determine that, under the "clear statement" test, Congress, through its passage of UMRA, has given clear indication that its exercise of plenary power must be constrained, and apply this analysis in other instances as well. If Congress recognizes the need to temper its powers in this instance, the courts should honor this restraint and strictly adhere to the Canons of Construction as they relate to cases involving Indians and tribal governments.

The question arises, of course, whether such power is truly eroded when such erosion is voluntarily entered into by the sovereign exercising such power. Even though this question may leave us in a quandary, Indian legal experts and tribal advocates may still use UMRA, as enacted, to advance the interests of Indian peoples and tribal governments.

There have been relatively few times when Indian nations have been presented with the opportunity to advance their own self-interests and also diminish the plenary power of the federal government, through the use of federal law. The Unfunded Mandates Reform Act is one such opportunity. How it is used could help determine the course of Indian law and tribal policy for years to come.

184. GETCHES ET AL., *supra* note 18, at 284-85.

185. *Id.* at 345.