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State of Rhode Island Environmental Regulatory Jurisdiction Over Native American Lands

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STATE OF RHODE ISLAND ENVIRONMENTAL
REGULATORY JURISDICTION OVER NATIVE
AMERICAN LANDS

BY

DENISE L. DESAUTELS

A RESEARCH PROJECT SUBMITTED IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS
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1992

MASTER OF COMMUNITY PLANNING
AND AREA DEVELOPMENT
RESEARCH PROJECT
OF
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ABSTRACT

This masters research project will assess the jurisdiction and impact of state environmental regulations upon the recently created Narragansett Tribe of Indians Reservation located in Charlestown, Rhode Island. Native American lands held in federal trust are generally immune to state civil jurisdiction; specifically, state environmental regulatory law. State and local governments are often faced with difficult environmental management problems created by the inapplicability of various state and local regulatory jurisdictions. Do State of Rhode Island environmental regulations such as ISDS, solid waste disposal permitting, soil erosion ordinances, and state wetland permitting, etc. apply to Native American reservation lands within its borders? Does the State of Rhode Island have a regulatory role in the use and development of Indian reservations within its borders? Which entity has greater regulatory authority, the State or Tribe?

This paper will examine the policy issue and legal implications of the applicability of State land use regulatory jurisdiction over the Narragansett Tribe of Indians Reservation and any future "Indian lands" within Rhode Island. To what extent has Native American sovereignty over reservation lands been eroded or expanded by case law and state and federal statutory law? In addition, how does the changing legal status impact policy issues?

Today's "Indian lands" or Native American Reservations are immune to certain state civil and administrative law jurisdiction as provided by federal treaty and statute. Absent statutory proviso,

state jurisdiction is interpreted by the judicial system based upon subject matter and geographic jurisdiction. Most Indian lands held in either fee simple or federal trust are subject to a checkerboard pattern of jurisdiction (federal, state and tribal) which may create a void of environmental regulation with the absence of state regulatory power.

The purpose of this research project is to review federal and state policy, legislation, statutory law and case law to determine the applicability of state environmental regulations upon the Narragansett Tribe of Indians Reservation; in particular, the recently acquired conservation land conveyed through agreement with the State of Rhode Island. In addition, the applicability of municipal regulations (i.e., zoning, etc.) will be addressed. The analysis of the various applicable laws as well as the preconditions and agreements entered into by the State of Rhode Island and the Narragansett Tribe of Indians will define the appropriate federal, state and tribal environmental regulatory jurisdiction. Finally, the paper will discuss the future role of state regulatory police power and its application upon any additional future reservation land.

ACKNOWLEDGMENTS

I would like to thank my several ancestors of Native American descent.

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CHAPTER I HISTORICAL ANALYSIS

1.1 INTRODUCTION

The history of Native Americans in North America following the arrival of Europeans has been one of adaptation. American Indians, unable to lead an isolated existence, were confronted with assimilation or removal. Today's extant sovereign tribal lands are being targeted for solid and toxic waste disposal and other environmentally undesirable uses which present greater siting difficulties within the states. This trend has been exacerbated by inapplicable state and local environmental regulatory law, and, in certain circumstances, poor tribal economic conditions and employment bases which create the need for the income and jobs these facilities produce.

Historically, reservations are generally governed by tribal law and applicable federal statutes. Recent federal case and statutory law have altered the sovereignty of Indian lands and created the absence or application of state and local regulatory law.

Analysis of the evolving legal status of Native American "Indian lands" or reservations requires a review of federal Native American policy beginning with early treaties, agreements and the United States Constitution to present day federal programs, statutes and policies. Special attention should be focused upon tribal administration and intent in order to project the future regulatory posture of such lands. Today's renewed social consciousness has had an impact upon state and federal policy governing tribal lands. Self-determination legislation has

bolstered Indian affairs, administration and self-government. In addition, revitalized tribal associations have strengthened Indian culture, constitutions and federal lobbying efforts.

This paper addresses state environmental jurisdiction over "Indian lands" in the State of Rhode Island. "Indian lands" are those lands under tribal ownership, individual Indian ownership or federal trust. "Indians" are defined as North American aboriginals distinguished by race. Adoption into a tribe does not have legal bearing. In addition, Indians must maintain tribal relations to be considered a member. 25 U.S.C. §479 defines Indians as follows:

"For the purpose of federal statutory provisions relating to the protection of Indians and conservation of resources, the term has been declared to include all persons of Indian decent who are members of any recognized Indian tribe under federal jurisdiction, and the *descendants of those members who resided within the boundaries of any reservation on June 1, 1934*, and all other persons of one-half or more Indian blood."

[Emphasis added]

In addition, federal statutes state that Indian heritage is transferred through the father unless the mother has maintained strong tribal relations and the father has relinquished control. This is not an impermissible racial classification as it is provided for in Article 1, Section 8 Clause 3 of the United States Constitution which authorizes Congress to regulate commerce with the Indian

Tribes. United States v. Antelope, 430 U.S. 641, 97 S.Ct. 1395 (1977).

1.2 HISTORY

A North American Native American policy was first developed by, the early Spanish explorers of what is today the southeastern United States. The Emperor of Spain, a Catholic, sought the advice of Francisco de Vitoria, a theologian, as to the rights Spain was to claim in the New World. Vitoria responded that the natives were the true owners of the land and that the Spanish were unable to claim title through discovery. This policy was further bolstered by the lack of a just war to legitimize conquest. Thereafter, Europeans dealt with Indians by treaty and this respect for Native Americans was initially maintained by United States treaty making policy and provided for an early peaceful and orderly transfer of land ownership.

Negotiation among federal and state governments and members of Indian tribes, Indians and non-Indians residing on Indian lands is dependent upon federal statutes and treaties. "The tribes, through in certain respects regarded as possessing the attributes of nationality, are held to be not foreign, but domestic dependent nations or communities." 41 Am.Jur.2d §63 p.836 The status and extent of tribal sovereignty has been altered by the passage of federal statutes declaring the existence or non-existence and jurisdictional limitations of the various Indian nations. Generally, however, "Indian tribes are, of course, not states; they have a status higher than that of states." 41

Am.Jur.2d 63 p.837 Tribal domination with federal supervision is attributable to the lack of intent or provision for state jurisdiction in the early federal statutes. "They [Indian Nations] are subordinate and dependent nations, possessed of all powers of such, and limited only to the extent that they have been expressly required to surrender their powers by the superior sovereign, the United States." 41 Am.Jur.2d §63 p.837 However, American Indian Nations are unrecognized by the international community and are not considered sovereign nations as they were not defined as such by the United States Constitution.

The self-government of the American Indian tribes includes tribal courts which have the power to make all laws and regulations for the government and protection of their persons and property consistent with federal law. These are exclusive tribal affairs. "To a considerable extent, the jurisdiction of these courts is exclusive as to matters involving tribal affairs, in suits against Indians arising out of matters on the reservations and in the prosecution of violations of criminal regulations established by the tribe." 41 Am.Jur.2d §63 p.839

To adequately examine the current federal and state regulatory power, the changing federal Indian policy must be addressed. Federal Indian policy reflects the early European ethnocentric beliefs and the United States' eventual acceptance and desire for assimilation and regulation of Native Americans and their lands.

"First, the tribes are independent entities

with inherent power of self-government. Second, the independence of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes. Third, the power to deal with and regulate the tribes is wholly federal; the states are excluded unless Congress delegates powers to them. *Fourth, the federal government has a responsibility for the protection of the tribes and their properties, including protection from encroachment by the states and their citizens.*"

(Canby 1981:2)

[Emphasis added]

Jurisdictional disputes arise with the imbalance of tribal, state and federal jurisdiction. Generally, tribal law is recognized by the federal government if the tribe or tribal member is a federally recognized tribe. Enrollment in the tribe is not always a prerequisite.

Federal Indian policy has fluctuated with the changing theories of assimilation and nonassimilation of native peoples. The Colonial period focused upon nonassimilation as tribes were dealt with as foreign sovereigns in nature and safeguarded from the French and other colonists by the British. Article I, Section 8, Clause 3 of the United States Constitution provided Congress with the power to "regulate commerce with foreign nations, and among the several States, *and with the Indian tribes.*" This authorized the President to negotiate treaties with the Indians, if provided with senate consent. Although Native Americans were never officially "conquered," it is apparent that the United States Indian policy reflect the nation's attempt to satisfy private sector economic demands at the expense of the aboriginal people. The

United States, acting through its Secretary of the Interior, is the guardian of "Indian wards." Board of Commissioners v. United States, 139 F.2d 248 (1943 CA10 Okla.), cert.den. 321 S.Ct. 846. A federal policy of separatism with federally controlled interaction began with the passage of the Trade and Intercourse Act from 1790 through 1834.

Early case law demonstrates the tribes emergence as separate nations to this point. Johnson v. McIntosh, 30 U.S. (5 Pet.) (1831) established Indian lands as a state although not considered a foreign entity. "Meanwhile, they are in a state of pupillage; their relation to the United States resembles that of a ward to his guardian." 30 U.S. (5 Pet.) (1831) at 17. Thus, the Supreme Court established Indian tribes as "domestic dependent nations." Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) provides state exclusion from power over Indian affairs. "Manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, over which their authority is exclusive..." 31 U.S. (6 Pet.) at 557.

The removal of Indians from the states was initiated by President Thomas Jefferson. The Jefferson administration began plans to move all Native Americans out of the Louisiana Purchase. This policy was later accomplished by President Andrew Jackson. If voluntary removal was not successfully negotiated, all Native Americans were subject to exodus from the states through the Indian Removal Act of May 28, 1830. This resulted in the movement of all tribes west of the Mississippi River.

Indian policy making was transferred from the War Department to the Department of the Interior in 1849 with the forced movement of a large number of tribes from the southeast to lands west of the Mississippi River. Federal authority to create and govern Indian reservations is contained in Article IV, Section 3, Clause 2 of the United States Constitution which provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations *respecting the Territory or other Property belonging to the United States*; and nothing in this Constitution shall be so construed as to Prejudice any claims of the United States, or of any particular State." Federal policy stemming from the interpretation of the clause supports Indian submission to the United States.

Although Indian country would not initially be included in an organizing territory, where there is a treaty with the tribe that it shall not be included, and that the territorial governments would have not jurisdiction over the lands held by treaty, Langforth v. Monteith, 102 U.S. 145 (1880), this would change only six years later. In Buttz v. Northern Pacific Railroad, 119 U.S. 55, 7 S.Ct. 100 (1886), the Court held that the manner, time, and conditions of extinguishing Indian right of occupancy to land are matters "exclusively" for the government.

From 1850 through 1887 federal policy focused upon the restriction of Native Americans to reservations. Federal statute 25 U.S.C.A. §71 (1871) no longer recognized Indian tribes or lands as independent nations with which treaties could be made.

Subsequently, reservations were created by statute or executive order.

Indian policy shifted toward assimilation with the federal government's belief that individual Indian ownership of land would aid in the "civilization" of the tribes. Following passage of the General Allotment Act of 1887 or Dawes Act, 24 Stat. 388, reservation land was allotted to individual Indians for farming and homesteading with the "surplus" land being sold to non-Indians. This allotted land was considered in federal trust for the following twenty-five (25) years. The goal of this program was to bring Indians into non-Indian culture and at this time citizenship was granted to Native Americans. For the first time, 8 U.S.C.A. 1401(a)(2) passed in 1924 provided citizenship to all Indians born in the United States. Allotment of tribal lands resulted in the overall reduction of Indian lands from 138 million acres in 1887 to 48 million acres in 1934 while failing to improve conditions. The Burke Act, 34 Stat. 182 provided a patent in fee (a certificate like a deed vesting legal ownership) before the expiration of the trust period. This Act maintained individual Indian ownership of formerly tribal lands. The termination of the allotment practice was accomplished through the enactment of the Indian Reorganization Act of 1934, commonly referred to as the Wheeler-Howard Act, 25 U.S.C.A. §461, et seq. This policy was developed following the devastating effect of allotment on tribal lands. This law extended indefinitely the trust status of Indian lands and tribal ownership was restored to surplus lands.

The New Deal also benefitted Native Americans. Based upon the Merian Report, the Indian Reorganization Act, 25 U.S.C. §461 (1934) was passed which brought reform to federal government impacting Indian lands. This legislation (together with the Indian Citizenship Act of 1924, 8 U.S.C.A. §1401 (a)(2) ended the practice of allotment.; thereby, increasing the rights of Native Americans. This legislation prevented the alienation (transfer) of Indian lands or shares in tribal corporations to others than to the tribe. This allowed Indian tribes to organize for their common welfare, adopt federally approved constitutions and by-laws as well as authorize tribal councils to negotiate with federal, state and local governments. The decrease of federal power through the Department of the Interior and Office of Indian Affairs decentralized federal power and increased reservation self-government.

Following World War II, Indian policy was again neglected. In 1947 federal spending was greatly curtailed, aiding in the decline of the Indian renaissance. The 1948 Hoover Commission reviewed all government programs and made cost cutting recommendations through the reorganization of the federal government. At this time, responsibility for Indian affairs was transferred to the individual states.

Federal Native American policy shifted to a policy of termination through the House Concurrent Resolution 108, 67 Stat. B 132 in 1953. Such termination law resulted in the termination of tribal recognition. Thereafter, Indians and Indian lands were subject to state law and were no longer held in federal trust. This

policy further devastated Indian culture by promoting the relocation of Indians to major urban areas. Expanded state jurisdiction was enacted with the passage of Public Law 280, 67 Stat. 588 (1953), as amended, 18 U.S.C. §§1161-62, 25 U.S.C. § 1360 (1953). Public Law 280 extended state civil and criminal jurisdiction to Indian country in California, Nebraska, Minnesota (with exception), Oregon (with exception) and Wisconsin. Alaska was added in 1958.

Under P.L. 280, states could assume jurisdiction by statute or state constitutional amendment without the requirement of tribal consent. Certain immunities were left in tact; namely, taxation and hunting and fishing rights. It should be noted that this statute does not possess the legislative intent of conferring general regulatory power within Indian country as decided in Bryan v. Itasca County, 426 U.S. 373 (1976). Congressional enactment of termination legislation and Public Law 280 greatly diminished tribal immunity from state jurisdiction.

The rising social consciousness of the 1960's created a new federal policy of Indian self-determination. The Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. §1301, et seq. created an Indian Bill of Rights and required tribal consent for further state implementation of Public Law 280. The Indian Self-Determination and Education Assistance Act of 1957 aided tribal self-government. Today's federal Indian policies and programs demonstrate a reversal of modern Indian policy and a return to the original theory of limited sovereignty of native populations.

However, it should be noted that Congress has the power to limit, modify or eliminate powers of Indian local self-government.

In 1978, the United States Congress enacted the Federal Acknowledgment of Indian Tribes Act, 25 C.F.R. 54 which provided guidelines for federal recognition. In addition, the Bureau of Indian Affairs issued "procedures for establishing that an American Indian group exists as an Indian tribe."

The evolution of federal Indian policy has shaped the limited encroachment of state regulatory jurisdiction. The return to the belief of non-assimilation and that Native Americans should retain their culture on sovereign land is reflected in recent federal court cases returning "tribal lands" and nurturing tribal economic development generally immune from state taxation and regulation.

Over the past three hundred years, the colonial and federal policies concerning Native Americans and their land have fluctuated based upon the desire for assimilation or isolation of Indians within the United States. Initially, Indian lands were considered sovereign and not subject to regulation. This nonassimilation policy shifted toward removal or assimilation from 1887 to the enactment of the New Deal.

Indian sovereignty was safeguarded from the 1930s until World War II and passage of Public Law 280. The Indian Self-Determination Act of 1968 increased Indian immunity and self-government. However, recent federal legislation has attempted to increase the regulation governing the acquisition of in trust land, especially, if it is non-contiguous to the reservation and/or for

gambling purposes. In addition, this legislation has increased local and state involvement in Indian land use affairs.

1.3 TRIBAL AUTHORITY

Federally recognized Indian tribes have common law sovereign immunity but are governed by the plenary power of Congress in the matters of Indian affairs. Today's tribal governments have constitutions approved by the Bureau of Indian Affairs ("BIA") pursuant to the Indian Reorganization Act; constitutions unrelated to the Act or none at all. This tribal diversity also creates additional jurisdictional conflicts and concerns. The Narragansett Indian Tribe adopted a constitution following the Revolutionary War. The Tribe was incorporated by the State of Rhode Island on December 3, 1934.

Indian lands considered in federal trust today are qualified as such through treaty, bilateral agreements enacted after 1871 (at which time the U.S. provided reunification of formal treaties with tribes), congressional statutes declaration by the United States Department of the Interior and promulgation of executive orders 1855-1919 confirmed by statute.

CHAPTER II INDIAN COUNTRY

2.1 METHODS OF OWNERSHIP

The applicability of state regulatory jurisdiction is also dependent upon the form and method of Indian land ownership. Methods of land ownership include tribal land, allotted land held by individual Indians, fee simple land held by individual Indians, fee simple land held by non-Indians, federal public land and state and county land. The varying definitions of surface and subsurface ownership of land by a tribe, the United States or private entity has created a "checkerboard pattern" of jurisdiction and exacerbated existing regulatory problems. The trust status of Indian lands may be terminated by Congress and cause the fee simple patent to issue. 41 Am.Jur.2d §48.

Federal regulations control the acquisition of tribal land. Code of Federal Regulation Section 151.1 establishes the regulations "...governing the acquisition of land by the United States in trust status for individual Indians and tribes." These federal regulations do not establish state regulatory jurisdiction or provide sovereignty over lands acquired through fee simple status. In addition, these regulations define and limit "Indian reservation" to "...that area of land over which the tribe is recognized by the United States as having governmental jurisdiction..."

Lands not held in trust or restricted status may be acquired for trust status only through an act of Congress. The applicable regulations establish that subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may

be acquired for a tribe in trust status under the following conditions.

"(1) When the the property is located within the exterior boundaries of the tribe's reservation or adjacent hereto, or within a tribal consolidation area; or (2) when the tribe already owns an interest in the land, or (3) *when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.*"

CFR Section 151.3
[Emphasis added.]

Section 151.10 provides the factors to be considered in evaluating requests for the acquisition of land in trust status. The fulfillment of this criteria will establish trust status and prohibit state regulatory jurisdiction, where inapplicable. This regulatory law has recently been advertised for adoption and promulgation.

25 CFR Part 151 Off Reservation Land Acquisitions for Indian Tribes was proposed as an amendment on July 19, 1990. This amendment announces new federal policy concerning the *"placement of lands in trust status for Indian tribes when such lands are located outside of and noncontiguous to a tribe's existing reservation boundaries."* The Secretary of the Interior is authorized to accept land in trust status and certain regulations have been promulgated to assist in the decision-making procedure. The requests are reviewed on a case by case basis *"...using the following factors found in 25 CFR 151.10: Statutory authority, need, purpose, amount of trust land currently owned, impact of removing land from local government tax rolls, potential*

land use and zoning conflicts and the impact on Bureau of Indian Affairs services." This amendment is in response to the increase in number of requests for acquisition of land, in trust, outside of and noncontiguous to the reservation mainly for the purpose of economic development, namely, gaming facilities. Local governments are concerned over the loss of regulatory control as well as removal of property from the municipal tax rolls.

The proposed amendment and additional regulations will establish that the existing criteria listed in Section 151.10 will be applicable only to lands located within or contiguous to the tribe's reservation. The more strenuous review required in Section 151.1 is applicable to all non-contiguous land. The purpose of Section 151.10(d) is to ensure that proposed trust property "...be free of hazardous and toxic substances before title is accepted by the Secretary." The additional regulations provide "... several criteria and requirements, in addition to applicable criteria found in Section 151.10 to assist the Secretary in reviewing requests for the acquisition of tribal lands in trust when such lands are located outside of and noncontiguous to the tribe's reservation." Therefore, stricter criteria will be used for the acquisition of trust land non-contiguous to the existing reservation to provide state involvement in environmental management and to assess the impact of potential land use and zoning conflicts.

Moreover, the proposed regulation will require additional criteria for review of lands located outside and noncontiguous to the reservation and are acquired for gaming purposes. These additions consist of the requirement that the lands be free of

hazardous materials and be located within the state with some exceptions for the latter. "However, all other things being equal, the greater the distance of the land proposed to be taken in trust from the tribe's current or former reservation or trust land, the greater the justification required to take the land in trust."

Much of the Off Reservation Land Acquisition regulation deals with economic development, feasibility and need. However, the proposed Section 151.11 (d) provides that "*The tribe will adopt standards and safeguards comparable to all local ordinances including, but not limited to, fire safety, building codes, health codes, and zoning requirements.*" Although state environmental regulatory jurisdiction would not be extended to additional land acquired in trust status, comparable Indian regulations would be implemented in compliance with this federal regulation. Furthermore, if the acquisition is opposed by state or local governments, "or if the state and local governments raise concerns, then the tribe must consult with them and attempt to resolve any conflicts including, but not limited to, issues concerning taxation, zoning and jurisdiction." This requirement will further involve local and state governments in the environmental regulation of Indian lands.

In summary, the application of state regulatory jurisdiction is generally dependent upon the form and method of land ownership. Indian lands held in fee simple are subject to all state civil jurisdiction. However, lands held in federal trust are not with exceptions. Although state regulatory authority has not been applied to federal in trust land, without Congressional and tribal

consent, recent federal regulations governing the acquisition of in trust land have increased the involvement of state regulatory authorities, prior to the land's acquisition, by reviewing the acquisition's impact upon "potential land use and zoning conflicts" and requiring acquired off-reservation land be governed by tribal regulations adopting standards comparable to local ordinances.

2.1 DEFINITION OF INDIAN LAND

Until the late 1800s, state jurisdiction was not an issue as reservations were generally established in territories. In addition, the population of reservations was almost exclusively Native American. The isolation of reservations was permanently altered by the allotment policy and influx of non-Indian settlers.

State jurisdiction was initially implemented by McBratney v. United States (1882) which upheld state court jurisdiction over the murder trial of a non-Indian accused of murdering a non-Indian. The Indian Country Crimes Act specifies federal jurisdiction. However, the Supreme Court interpreted this situation differently; thereby, creating a precedent. The Supreme Court chose to direct that "absent a highly explicit federal statute to the contrary, state law prevails over tribal and federal laws in regard to an activity that occurs in Indian Country and that is not directly involved with legitimate tribal concerns." (Wilkinson 1987:88) This is a direct result of the increase of non-Indians residing or working within Indian Country.

Indian Country immunity was initiated by the 1763 Royal Proclamation of King George III which set aside the "Indian Country" reserving the country for Indians and prohibiting land transactions and entry by Europeans. The area was described as "all the Lands and Territories lying to the Westward of the Sources of the rivers which fall into the Sea from the West and North West." (Wilkinson 1987: 94) In addition, in 1758, the colonial Pennsylvania government promised the prohibition of white settlers into the Ohio Valley. Indian lands were further defined in the Trade and Intercourse Act of 1884 which defined Indian Country as "(1) all lands west of the Mississippi River, outside of the states of Louisiana and Missouri and the Territory of Arkansas, and (2) any lands east of the Mississippi, not within any state, the Indian title to which had not been extinguished." (Wilkinson: 1987 p.90) This definition was later repealed by the Revised Statutes passed in 1874.

A definition of Indian country was absent in policy and law making until 1948 with the passage of the 18 U.S.C. §1151 which "provides that all lands, however created, are Indian country for the purpose of criminal prosecutions. Trust allotments and dependent Indian communities are also Indian Country under the statute." Indian country is defined as "...all land within the limits of any Indian reservation under the jurisdiction of the Federal Government, notwithstanding the issuance of any patent, and including rights of way running through the reservation. 41 Am.Jur.2d §55 p.861. This includes land held in fee simple by a non-Indian within the reservation. In 1946, President Truman

signed into law the Indian Claims Commission Act to address land claims.

State civil jurisdiction was expanded in certain states with the passage of Public Law 280 in 1953. The result of this federal legislation was to impact negatively upon Indian self-determination and extend state jurisdiction over offenses committed by or against Indians in the Indian country. The implementation of Public 280 has been limited to California, Minnesota, Nebraska, Oregon, Wisconsin and Alaska.

The Civil Rights Act of 1968 is federal legislation requires Indian consent be given to states to increase state civil jurisdiction through Public Law 280. The Civil Rights Act ended the application of P.L. 280 jurisdiction without tribal consent.

2.3 ORIGIN OF RESERVATION

Following passage of the Federal Acknowledgement of Indian Tribes Act, 25 C.F.R. 54, the Narragansett Indian Tribe petitioned the federal government for recognition as a tribe and succeeded with the passage of Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island on February 2, 1983, Federal Register 48:6177-78. The Tribe was successful in establishing fulfillment of the criteria required pursuant to 25 CFR 83.7.

This document acknowledges that the modern Narragansett Indian Tribe is descendent of the Ninantic and Narragansett Indian Tribes with a known history since 1614. The Tribe was dealt with

as an independent nation by England and the Rhode Island colony after 1622. Following the tribe's defeat in the King Phillip's War of 1675, The Rhode Island colony placed the tribe under "...a form of guardianship..." in 1709. This relationship continued until 1880 at which time the State of Rhode Island enacted a "detrribalization" act and limited the tribe's property to two acres surrounding its church.

The tribal members continued to unite under the Narragansett Indian Church and in 1934 a new formal organization occurred which was incorporated by the State of Rhode Island. The proposed findings that the Narragansett Indian Tribe exists as an Indian tribe was published in the Federal Register on August 13, 1982. During the mandated comment period, no statements were received denying the maintenance of tribal relations and the federal acknowledgement was formally instituted and published in the Federal Register February 10, 1983. Prior to the Tribe's formal federal recognition, land claim litigation and settlement negotiation and agreements were conducted through the auspices of a public corporation enacted by the Rhode Island Legislature entitled the Narragansett Indian Land Management Corporation. Following federal recognition, the settlement lands were conveyed to the Tribe from the public corporation and the corporation was terminated.

2.4 CASE LAW

The United States Congress is empowered to "... assume full control over Indian tribes and their affairs, to prescribe the courts

in which all controversies to which an Indian may be a party shall be submitted, to determine who are the citizens of a tribe, to allot and distribute the tribal lands and funds among them, and to terminate the tribal government. However, general acts of Congress do not apply to Indians unless the acts are so expressed as to manifest clearly an intention to include them." 41 Am.Jur.2d §51, p.859. Many jurisdictional disputes involve the promotion and/or protection of economic interests of various parties. The federal, state and local governments as well as private citizens and businesses are impacted by regulations, or the lack of them, controlling environmental management and natural resource exploitation. In addition, disputes concerning taxation also play a part in state management problems.

State's must recognize the federal government's claim to dominant authority. However, state governments can turn to three grounds for asserting state regulatory authority: "(1) specific congressional grant of authority over Indians and/or Indian lands; (2) Public Law 280; and (3) regulatory authority in public health and specific administration grants of authority." (The Council of State Governments 1977: 8). In the construction of federal legislation, questionable language shall be in favor of Indians. 41 Am.Jur.2d §54.

Early case law set the development pattern of future negotiations with the Indians and federal Indian policy. Respect for Native American land ownership was initiated by Supreme Court decisions. The following is a brief synopsis of the important

United States Supreme Court decisions which have impacted Native American immunity to state jurisdiction.

In Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). Chief Justice John Marshall adopted, with amendment, the Vitoria theory of Indian ownership. He wrote that European discovery gave title to land recognized by other European countries. "It was a title that gave exclusive right to extinguish the Indian's title, which became, a matter by European assertions. " Marshall's definition, in effect, traded a vested property right for a recognized political right of quasi sovereignty for the tribes". (Wilkinson 1987:83)

In Cherokee National v. Georgia, 30 U.S. (5 Pet.) I (1831), Marshall, in effect, made new law declaring Indian nations as "domestic dependent nations." This declaration was impaired by the termination of American treaty making power with the Indians in 1871.

Initially, Indian sovereignty was upheld in Langford v. Monleith, 102 U.S. 145 (1880) which held that Indian occupied land was not to be included in organizing territories. However, federal jurisdiction to pass legislation over Indians in United States territories was extended by United States v. McGowan, 302 U.S. 535, 58 S.Ct. 286 (1938) which held that the federal government has authority to enact regulations and protective laws over Indians. United States v. Wheeler, 435 U.S. 313, 948 S.Ct. 1079 (1978) found that Congress has plenary authority to legislate for Indian tribes in all manners. The sovereignty Indian

tribes retain exists only by the grant of Congress and is subject to federal government supremacy.

In the 1975 decision, DeCourteau v. District County Court, the definition of Indian country contained in U.S.C. §1151 for crimes "...generally applies as a to questions of civil jurisdiction." This expansive definition was reaffirmed in White Mountain Apache Tribe v. Bracher, 448 U.S. 136, 100 S.Ct. 2578 (1980) and Ramah Navajo School Board v. Bureau of Revenue. The court asked the question why separate jurisdictional boundaries existed for civil and criminal crimes. The court devised the reasoning that Indian immunity is territorial based.

White Mountain Apache Tribe v. Bracher, 448 U.S. 136, 100 S.Ct. 2578 (1980) provided a two part test to determine state jurisdiction. The two barriers are as follows:

(1) "First the exercise of such authority may be preempted by federal law..." Second, it may not unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." (Wilkinson 1987: 93) The first guideline applies to subject matter and federal statute areas of regulation. The second guideline deals with geographic issues. "Geographical preemption may deny state authority in subject matter areas not addressed explicitly by any federal treaty or statute dealing with Indian policy; the many examples include civil court jurisdiction, taxation, zoning, environmental regulations and health and safety laws." (Wilkinson 1987:93) Federal policy and federal law are presumed to provide protection and promotion of Indian self-determination. The first preemption is the regulatory field covered by federal

statutes such as "commerce, criminal jurisdiction, health and education, and resource management." (Wilkinson 1987:93)

Generally, the Court has found it easier to employ the subject matter jurisdiction due to the explicit language of federal statutory law and the vagueness and ambiguity of "Indian country" definitions contained within treaties. The federal preemption in Indian country has been developed through all areas of law, not exclusively federal statutory. It may be implied and is generally strongest in those matters involving strictly Indians. Federal statutes are historically construed as providing federal preemption based upon "special trust relationships with tribes, the policy of promoting tribal self-government in Indian country, and the long standing federalization of Indian policy..." (Wilkinson 1987:95)

An emerging fourth principal is state preemption of activities outside reservations "unless there is an express federal statutory provision to the contrary." (Wilkinson 1987:95) Federal powers have been reserved for reservation activities. General preemption law applies for those circumstances/instances of the Indian country.

Tribal sovereignty was further upheld in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), especially the doctrine of general exclusive of Indian reservations from the operation of state law. Other doctrines still in force include, "...the existence of tribal sovereignty before contact with Europeans, the continuing existence of self-governing statutes after alliance with the United States, tribal reserved rights [and] the rules of construction for

Indian treaties and statutes". Worcester succeeds in upholding tribal sovereignty and denying state jurisdiction.

State law is generally preempted in instances involving Indian country resources. This includes products derived from reservation and fish and wildlife resources. This has prohibited taxation of Indian revenue making events, i.e, timber lumbering, mining, bingo and tourism. Subject matter areas have been interpreted to prohibit state assertion of jurisdiction. The immunity granted reservations is greater than that imposed upon federal lands regarding taxation. This is in cooperation with the trust status of Indian country with the federal government.

The federal supremacy clause and subject matter preemption are the main reasoning behind jurisdictional decisions. This preemption is only used if no subject matter statute or treaty law is in effect at the time the reservation was created. The federal government holds the land in trust and can terminate the relationship. The United States did not utilize the doctrine of conquest, and, for the most part, negotiated treaties with the various tribes. This created a situation in which the government respected the sovereignty of Indian governments and extended common law immunity to reservations. The federal government's goal was to clear Indian title from future state lands by limiting Indian claims to federally recognized reservation lands.

United States treaty making power was terminated in 1871. The early treaties were followed by bi-lateral agreements and eventually executive orders in order to create reservations. This

process maintained autonomy among federal territories and, ultimately, statehood.

A treaty between the United States and an Indian tribe is "essentially a contract between two sovereign nations." (Wilkinson 1987:102) Sovereign powers not specifically delegated to the federal government are reserved for the state pursuant to the Tenth Amendment to the Constitution. "The treaty and treaty substitutes reserve to tribes sovereign powers expressly or implied relinquished to the United States." (Wilkinson 1987:102) State police powers are constitutionally established; tribal power stems from treaties unimpeded by constitutional constraints.

Jurisdictional disputes, generally springing from economic concerns, involve the applicability of federal or state jurisdiction. The federal government's dominant authority can be pierced based upon a congressional grant of authority, the application of Public Law 280 and specific administrative grants of authority.

Early United States Supreme Court decisions protected Indian sovereignty and developed a two part test to determine state jurisdiction: federal subject matter and geographic preemptions. This test generally prohibits the application of state jurisdiction in the involvement of environmental regulation and resource management.

There exists no Rhode Island case law addressing any issue of Native American sovereignty or immunity to state and/or local regulatory power. However, a recent Connecticut case could prove applicable. Schaghticoke Indians of Kent v. Potter, 587 A.2d 139 (Conn. 1991) raised the question as to whether federal

preemption applied to land determined to be "Indian country" and, upon acknowledgment of the tribe's existence, whether there is tribal retention of sovereignty and whether or not the Department of Environmental Protection had infringed upon tribal self-government. The case addressed the authority of the State of Connecticut through the actions of the Department of Environmental Protection to manage tribal lands. The Court held that "As to the courts of this state [Connecticut], they may exercise civil jurisdiction over lawsuits involving Indian tribes to the extent that our state courts exercised such jurisdiction prior to the enactment of Public Law 83-280 in 1953 and to the extent that the exercise of such jurisdiction does not interfere with tribal self-government," 587 A.2d 139 (Conn. 1991).

In the present instance, the State of Rhode Island had not exercised civil jurisdiction over the Indian Tribe prior to 1953 except to pass legislation creating the initial reservation in 1934. In addition, there is no case law indicating the absence or question of the application or inapplicability of state jurisdiction. Therefore, state civil jurisdiction over the Narragansett Indian Tribe Reservation held in federal trust [this does not include the 1800 acres acquired through the litigation settlement agreement] would appear unlikely.

CHAPTER III ENABLING LEGISLATION

3.1 FEDERAL LEGISLATION

As discussed earlier, Indian lands are generally governed by federal statutory and tribal law. Several federal statutes significantly impact upon the formation and governance of Indian lands. However, several federal acts have authorized the federal government to consent to state jurisdiction Indian country. "It is within the power of Congress to provide that the laws of a *state* shall extend over and apply to Indian country." 41 Am.Jur.2d §63 First, 25 U.S.C. §468 promulgated on June 18, 1934 provides that federal statutes impacting reservation land do not relate to holdings "...upon the public domain outside the geographic boundaries of any Indian reservation now existing or established hereafter." Furthermore, the statute addressing assumption by state of civil jurisdiction [this Act also provides for state assumption of criminal jurisdiction] provides for such, with the consent of the tribe, "...to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State." 25 U.S.C.S. §1322(b).

Tribal sovereignty is federally protected to a certain degree; subsection (b) addresses this immunity. This statute prohibits alienation, encumbrance, taxation and prohibits inappropriate state jurisdiction: "[Nothing]...shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the

ownership or right to possession of such property or any interest therein." Finally, subsection (d) provides that "Any tribal ordinance or custom...[adopted in the exercise of its authority]...shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section." This 1968 legislation provided federal consent for the transfer of its civil jurisdiction to the states, with tribal consent, to Indian lands held in trust.

28 U.S.C. §360, enacted following passage of P.L. 280 in 1953, provided that Congress could grant certain states general civil jurisdiction over Indian lands. In 1975, the Narragansett Indian Tribe filed civil litigation in the United States District Court for the District of Rhode Island in an effort to regain former tribal lands. The Tribe wanted return of thirty (30) square acres of land which had not been deeded to the State on March 28, 1709. This amounted to 3,500 acres in addition to the six mile tract which had remained in tribal possession. Prior to conclusion of the litigation, the State of Rhode Island and Narragansett Indian Tribe reached an agreement which was approved on February 28, 1978. The ultimate settlement process required the passage of federal legislation. On September 30, 1978, the federal Rhode Island Indians Claims Settlement was enacted. 25 U.S.C. §1701 addressed the litigation pending in Rhode Island federal district court concerning claims for private and public land located in Charlestown, Rhode Island. This legislation was enacted, in part, to remove clouds upon real estate in the town. 25 U.S.C. §1702

defines "private settlement lands" as nine hundred (900) acres to be acquired by the Secretary of the Interior from private landowners. "Public settlement lands" are to be conveyed by the State of Rhode Island.

Most importantly, 25 U.S.C. §178 addresses the applicability of state law. "Except as otherwise provided in this Act [25 U.S.C. §1701 et seq.], the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." This federal legislation enacted as a part of the settlement process established complete state civil and criminal jurisdiction over the newly acquired reservation lands in perpetuity.

This joint agreement memorandum established the eventual conveyance of nine hundred (900) acres from the State to the tribe under certain circumstances. The memorandum contained nineteen (19) points; the relevant points are as follows:

1. A public corporation entitled the Narragansett Indian Land Management Corporation would be established to acquire, manage and hold the lands in question until their conveyance to the Tribe following federal recognition acknowledging the Tribe's existence.

2. The State of Rhode Island would convey nine hundred (900) acres to the Narragansett Indian Tribe.

3. An additional nine hundred (900) acres will be acquired by the Tribe through its purchase at fair market value. No private property shall be conveyed without the owners' consent.

4. The federal government would provide the funding needed to acquire the privately owned property not to exceed 3.5 million dollars.

5. Litigation will be filed to clear all clouds of real estate titles and eliminate all Indian claims.

6. A special federal restriction would prevent alienation of the settlement lands. This restriction would not prevent the Corporation or Tribe from granting easements or the state's taking of such property through the exercise of police power and eminent domain.

7. All settlement lands would not be subject to property taxes.

8. The nine hundred acres of settlement land of former state land contributed to the Tribe shall remain in conservation in perpetuity.

9. *All laws of the State of Rhode Island shall be in full force and effect upon the Settlement Lands.*

10. A land use plan must be prepared for the Settlement Lands and accepted by both the Narragansett Indian Land Management Corporation or Tribe and Town of Charlestown Town Council.

11. The state land surrounding Deep Pond would be contributed to the Tribe under the condition that the state continue to receive benefits under the Pittman-Robertson Act and the Dingell-Johnson Act.

12. Implementation of these provisions was contingent upon the determination by the Department of the Interior that the Indians have a credible claim to the lands involved.

13. The Tribe agreed to dismiss the lawsuits pending against all defendants involved, upon passage of federal legislation which would eliminate title problems.

The settlement of the Narragansett Indian claims also required the passage of federal legislation discussed above and referred to as the "Rhode Island Indian Claims Settlement Act." This federal legislation provides that following transfer of the settlement lands to the Narragansett Indian Land Management Corporation, other claims by the Corporation will be extinguished. The Act also establishes that all future claims regarding lands or waters will be made against the Corporation during its existence. Actions attacking the constitutionality of the federal legislation were barred one hundred eighty (180) days after its passage on September 30, 1978.

In addition, the U.S. Treasury established a fund referred to as the "Rhode Island Indian Claims Settlement Fund" to pay the expenses incurred through the conveyance of land and related expenses. To allow for the granting of easements, etc. a special federal restriction of alienation was enacted.

Total immunity from state regulation is prohibited by the taxation of revenues produced from the settlement lands and the application of income tax exemption only to taxes incurred during the original property sale of claim lands. Most importantly, all settlement lands are subject to the civil and criminal jurisdiction

of the State of Rhode Island and the provisions of this federal legislation shall prevail over all applicable federal laws if a conflict should arise.

In general, federal law preempts state jurisdiction. However, it is within the power of the United States Congress to grant such jurisdiction to the states. Public Law 280 provided for this transfer without Indian consent. Later legislation required the consent of the impacted tribe.

In the present case, federal jurisdiction was transferred to the state with the enactment of additional legislation rather than through the use of 28 U.S.C. §1360 or 25 U.S.C. §1322. As part of the settlement process of the federal litigation and with approval of the Tribe, federal and state legislation were enacted to provide total state jurisdiction in all civil and criminal matters with the exception of taxation.

3.2 STATE LEGISLATION

Current state legislation directed toward the regulation of Indian lands is entitled Narragansett Indian Land Management Corporation, R.I. Gen. Laws §§37-18-1 - 15. This legislation was enacted following settlement of the federal litigation filed by the Narragansett Indian Tribe in order to regain title to ancient tribal lands. This litigation was dismissed following the signing of a settlement agreement by the State of Rhode Island and Narragansett Indian Tribe.

The settlement agreement entered into between the State of Rhode Island and Narragansett Indian Tribe resulted in the

eventual conveyance of nine hundred (900) acres of state property to the Tribe following completion of certain conditions discussed in the following. The main purpose of this legislation was to establish a corporation with which the state government could negotiate and enter agreements and contracts. This legislation is commonly referred to as the "Narragansett Indian Land Management Corporation Act" ("NILMC"). Within this Act, "Indians" are defined as "...those descendants of the individuals named on the list established pursuant to the Acts of 1880, Chapter 800, Section 4. "

The establishment of this public corporation also authoritatively established state regulatory control during its existence through the drafting and acceptance of a land use plan by the State of Rhode Department of Statewide Planning. Section 37-18-2 defines "land use plan" as a plan drafted by the Rhode Island Division of Statewide Planning with acceptance by the Town of Charlestown and the Narragansett Indian Land Management Corporation. In addition, the federal recognition required by this legislation is the formal acknowledgement of the Narragansett Indian Tribe pursuant to 25 U.S.C. §1707 and Code of Federal Regulations, Part 83.

R.I. Gen. Laws §37-18-3 establishes the Narragansett Indian land management corporation for the "...purposes of acquiring, managing and purchasing real property as provided in Section 37-18-6(d) until the Tribe's formal recognition by the federal government. In addition, R.I. Gen. Laws Section 37-18-4 states that its purpose is to manage and hold real estate acquired

pursuant to this chapter for the benefit of of the descendents of those individuals of Indian ancestry set forth in the list established pursuant to Public Laws 1880, Chapter 800, Section 4. The NILMC was a public corporation established with a distinct legal existence from the State of Rhode Island. However, R.I. Gen. Laws §37-18-3(c) mandates that if the corporation shall cease to conduct its business, "...all its duties, purposes, rights, and properties shall pass to and be vested in the state and the lands be held in trust for the Indians, as defined in this chapter, subject to the provisions of Sections 37-18-12 and 37-18-13.

The enactment of this legislation and establishment of the Corporation further introduced state regulatory control into the regulation and development of the reservation conservation land. R.I. Gen. Laws §37-18-5 Board of Directors mandates that the corporation shall consist of nine directors "...two (2) of whom shall be appointed by the governor (one of whom shall be the director of the department of environmental management or its successor agency or department and who shall serve as nonvoting director and who shall not serve as chairperson), one of whom shall be appointed jointly by the speaker of the house of representatives, and by the majority lead of the senate, and one of whom shall be appointed by the town council. It is interesting to note that no board member shall benefit from any project undertaken unless s/he is a member of the tribe as established by Public Laws 1880, ch. 800 Section 4. Corporation meetings are open to the public and records a matter of public record with two exceptions. An established exception is any discussion relating to the acquisition

of real property "...wherein public information would be detrimental to the interest of the corporation." In this instance, interest refers to those of the Tribe and the Rhode Island Department of Environmental Management.

The Corporation's powers and duties are established in §37-18-6. Subsection (d) "To purchase, take, receive, lease, or otherwise acquire from any person, firm, corporation, municipality, the federal government, or state, by grant, purchase, lease, or gift, or to obtain options for the acquisition of any personal property and the real property situated in the town and defined as the "settlement lands" in that "joint memorandum of understanding concerning settlement of the Rhode Island Indian land claims" dated February 28, 1978, and related to the lawsuits entitled Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management, and Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al., C.A. Nos. 75-0005, 75-0006 (U.S.D. R.I.), improved or unimproved, and interests in the land less than the fee thereof; and to own, hold, clear, improve, develop, and rehabilitate the same subject to the restrictions set forth in Sections 37-18-7 and 37-18-10. Furthermore, subsection (e) "To make and execute agreements of lease, mortgages, construction contracts, and other contracts and instruments necessary to convenient in the exercise of the powers and functions of the corporation granted by this chapter; provided, however, that any liabilities incurred shall be payable solely from the revenues of the corporation."

As discussed earlier, the recently acquired settlement lands appear subject to state regulatory jurisdiction with the corporation's establishment. R.I. Gen. Laws §37-18-(k) mandates that the corporation will enter agreements with the Town of Charlestown to pay annual sums in lieu of taxes in respect to property owned by the corporation within the municipality. This is taken further with subsection (m)(1) authorizing the corporation to grant or convey "(whether voluntarily or involuntarily, including any eminent domain or condemnation proceedings) easements for public or private purposes." The State's involvement, through the sitting of state representatives on the corporation's board of directors, shall be limited in the area of land conveyances to those authorized in subsection (m) which consists of voluntary condemnation of easements and other rights of ways for the state and Providence Boy's Club.

R.I. Gen. Laws §37-18-7 addresses the State's transfer of property to the Tribe pursuant to the settlement agreement. Subsection to §§37-18-12 and 13, and following adoption of a land use plan accepted by the town and the corporation, the governor is directed to convey to the corporation in fee simple all right, title and interest to nine hundred (900) acres of real estate within the Town of Charlestown, including "(1) The Indian Cedar swamp management areas; (2) Indian Burial Hill; and (3) The state land around Deep Pond; (b) Provided, however, that the state shall retain control of and public access shall be guaranteed to an adequate fishing area within the said state land around Deep Pond, and provided, further, that the governor is only authorized,

empowered, and directed to transfer, assign, and convey to the corporation the real estate which is located around Deep Pond upon the governor's making a finding that the required and appropriate federal approval of the transfer has been obtained so that the transfer will not affect, in any adverse manner, any benefits received by the state under the Pittman Robertson Act [16 U.S.C. §§669-669i] and the Dingell Johnson Act [16 U.S.C. §§777-777k].

Subsection (c) establishing an easement and right to pass by foot and vehicle (45') strip between Kings Factory Road and Watchaug Pond to be used for the parking of automobiles and launching of boats. Most importantly, subsection (d) directs that the real estate conveyed by the state to the corporation "...shall be held in perpetuity for conservation purposes and shall not be improved or development by the corporation."

Regulatory control by the State of Rhode Island over the conservation land conveyed to the tribe pursuant to the settlement agreement is further defined in R.I. Gen. Laws §37-18-8 which provides that the Corporation shall make rules and regulations regarding "fish and game conservation" of the corporation property with consultation provided by the Director of the Department of Environmental Management. The Tribe's taxation immunity is safeguarded in Section 37-18-9 which provides that the Corporation shall not pay any taxes levied by the Town of Charlestown. However, it shall make payments in lieu of taxes with respect to "income producing" projects and for "police, fire, sanitation, health protection, and municipal services

provided by the town to the real estate held by the corporation in the town." The amount shall be agreed upon by the Town of Charlestown and the Corporation.

R.I. Gen. Laws §37-18-10 provides establishment of a land use plan for corporation land prepared by the Office of State Planning within the Department of Administration. Seventy-five (75%) of corporation land "shall not be improved or developed and shall be held in perpetuity for conservation purposes, and the real property to be held in perpetuity for conservation purposes shall be delineated in the land use plan." This plan shall be mutually acceptable to the Corporation and Town. Charlestown's zoning ordinance, amended to comply with the plan, shall be applicable to corporation real estate. The zoning ordinance cannot be further amended concerning tribal property without the corporation's consent. Moreover, the zoning ordinance shall not be amended to affect the land designed in the land use plan for conservation purposes.

The State assumes regulatory control of the Corporation land by denying Indian use until the land use plan is adopted by the Corporation and accepted by the Town. Finally, the corporation and its authorized activities shall be "subject to all the criminal and civil laws of the state and the town."

The transfer of state land and expiration of the corporation was contingent upon the federal recognition of the Narragansett Indian Tribe. State statutory law provided that upon recognition granted by the federal government pursuant to 25 U.S.C. §1707 and 25 Code of Federal Regulations, Part 83, the Corporation shall

expire in thirty (30) days. Upon termination of the Corporation and the property transference to Tribe, the property will be subject to the same restrictions and conditions set forth in this legislation and shall be subject to the civil and criminal laws of the State of Rhode Island and Town of Charlestown, Rhode Island with the exceptions provided in the legislation, i.e., taxation, etc. The settlement land is to be conveyed in fee simple to the Tribe and held in perpetuity for conservation purposes and "shall not be improved or developed by the Narragansett Tribe of Indians." R.I. Gen. Laws §37-18-14.

State legislation enacted as part of the overall settlement process established a public corporation to serve as an agent of the Tribe until its federal recognition. State regulatory authority is established through the provision of a land use plan by a state planning agency with the approval of the Tribe and the municipality in which the reservation is located.

The State of Rhode Island shall retain control and public access to the land transferred by the State for public recreational activities. Furthermore, these nine hundred (900) acres shall be held as conservation land in perpetuity.

While the reservation is not subject to state taxing powers, the Tribe has agreed to make annual payments to the Town of Charlestown in lieu of taxes for its property located within the Town. The reservation land is also subject to state eminent domain and condemnation proceedings. Of significant importance is the provision that the reservation be subject to local police

power; the reservation will be subject to the Town of Charlestown zoning ordinance.

CHAPTER IV RELATED LEGISLATION

4.1 RELATED FEDERAL LEGISLATION

State environmental regulatory jurisdiction can be imposed through the appropriation of federal funds. 42 U.S.C. §2991 Native American Programs Act of 1974 provides that "The purpose of this title is to promote the goal of economic and social self-sufficiency for American Indians, Hawaiian Natives and Alaska Natives." Section 2991(f) provides that financial assistance for Native American projects require notification to the chief executive officer of the state. Furthermore, (f) provides that the federal government will fund eighty (80%) percent of the costs of "...planning, developing, and implementing programs designed to improve the capability of the governing body of the Indian tribe to regulate environmental quality pursuant to Federal and tribal environmental laws." The Act creates the requirement for state and possibly environmental regulatory involvement in the planning and construction of Indian projects using certain federal funds.

The Act also includes the following purposes: "(a) the training and education of employees responsible for enforcing, or monitoring compliance with, environmental quality laws, (b) the development of tribal laws on environmental quality, and (c) the enforcement and monitoring of environmental quality laws.

4.2 CONCLUSION

A review of federal and Rhode Island legislation as well as United States Supreme Court decisions concludes that generally state civil jurisdiction, which includes state environmental management regulatory authority, is inapplicable to Indian lands held in federal trust. This federal preemption right can be altered through an act of Congress authorizing the transfer of federal jurisdiction to the states. To date, this has been accomplished through the use of Public Law 280 and 25 U.S.C. §1322, assumption by State of Civil Jurisdiction. Neither of these alternatives has been utilized within the State of Rhode Island.

The State of Rhode Island and Narragansett Tribe of Indians came to an agreement during the course of litigation over the "return" of ancient tribal lands. Since the acquisition of this land occurred through an agreement and not the application of case law or federal statute, it poses a different question. Had the Narragansett Tribe "won" the return of former tribal lands, it could have sought federal in trust status for reservation land from the U.S. Secretary of the Interior; thereby, acquiring immunity to State of Rhode Island civil jurisdiction. However, in an effort to achieve a certain degree of success, the Tribe agreed to a settlement with the State of Rhode Island.

The negotiation of a settlement agreement in itself is a new federal policy. Since the increase in Native American self-determination and land claims, the settlement of Indian land claims through negotiation is a policy of involving states; thereby, often resulting in decreased Indian sovereignty. Federal policy

has fluctuated over time, but most recently has involved state regulatory input regarding the acquisition of in trust reservation land. The settlement of Narragansett's claims required the drafting and passage of both state and federal legislation. This participation of state government has resulted in constraints to the development and acquisition of tribal land and increased containment of reservation land in the name of environmental management. Ultimately, this policy may erode tribal sovereignty, self-government and federal preemption. However, it does provide opportunities for successful negotiation where successful litigation appears unlikely or unattainable.

Native American sovereignty has historically been eroded through the annexation of tribal lands to territories and eventually states and the granting of citizenship to Indians. The blurring of immunity guidelines has occurred through increased federal funding and legislation in Indian affairs and decrease of Indian isolation, both locationally and economically.

In the instant case, it is apparent that state environmental regulatory jurisdiction has been implemented through the drafting of a settlement agreement which provides for state jurisdiction over the Narragansett Indian Tribe Reservation in exchange for the transfer from the State to the Tribe of settlement lands to be held in fee simple. Absent this unusual occurrence, state environmental regulatory authority would be greatly diminished and the potential for state environmental management problems greatly increased. These are issues and concerns not apt to dissipate. Increase tribal self-determination

and the increasing success of Indian land claims will increase the need for state and local governments to take an intergovernmental approach to environmental quality management and natural resource exploitation.

Most tribal governments recognize a need for environmental management, but lack the necessary resources and access to needed scientific data and study. A cooperative effort among municipal, state and tribal governments could serve to provide the Indian nations with valuable information and the local governments with a collaborative intergovernmental approach to the correction of environmental management problems. State governments' provision of scientific and technical information may be one means by which to achieve a cooperative approach to achieve improved environmental and natural resource exploitation management.

State governments should take a dispute resolution approach to regulate conflict, not based upon litigation (iffy at best and tragic at worst), but rather a cooperative approach through the enactment of binding agreements between the tribal governments and the state and local governments. Researching of Native American culture should provide common ground upon which consensual solutions concerning environmental management can be drawn.

State government's recognition of Indian self-determination and special Indian status in the application of federal and state environmental laws and regulations should aid in the development of binding agreements among tribal and state and

local governments. The state's assistance in building tribal governmental capacity would be beneficial to the success of this approach.

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25 U.S.C.S. §178

25 U.S.C.S. §461

25 U.S.C.S. §468 Allotments or Holdings Outside of Reservations

25 U.S.C.S. §2201 Indian Land Consolidated

25 U.S.C.S. §1301 Indian Civil Rights Act of 1968

25 U.S.C.S. §1321 Jurisdiction Over Civil and Criminal Actions

25 U.S.C.S. §1322 Assumption by State of Civil Jurisdiction

25 U.S.C.S. §1360 Public Law 280

25 U.S.C.S. §1401

25 U.S.C.S. §1701 Rhode Island Indian Claims Settlement Act of
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25 U.S.C.S. §1702 Narragansett Tribe of Indians

25 U.S.C.S. §1711 Limitation of Actions

28 U.S.C.S. 1360 State Civil Jurisdiction In Actions To Which
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