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TRIBAL WATER QUALITY REGULATION

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Federal environmental regulatory laws generally require the Environmental Protection Agency (EPA), to establish standards for various sources of pollution, enforce standards through a permitting system, and, where a state so requests, delegate primary enforcement authority to the state. In general, no person or activity is beyond the reach of federal environmental statutes or outside the jurisdiction of the state in which the person conducts his activity. However, special rules apply when the regulated person is an Indian or Indian tribe or the regulated activity takes place within Indian country. This paper will discuss the applicability of federal water quality laws to Indians and Indian country and the scope of tribal and state authority to enforce water quality laws within Indian country.

Applicability of Federal Environmental Laws to Indians and Indian Lands

Indian tribes have been characterized as "domestic dependent nations"[2] that possess all powers of government that have not been explicitly removed by the United States or held inconsistent with a tribe's status as a domestic dependent nation.[3] Based on this unique political status, Congress has full plenary power to legislate with respect to Indians and Indian tribes.[4] Thus, the initial inquiry is whether federal water quality statutes apply to Indians, Indian tribes, and Indian lands.

Congressional power to include Indians and tribes within the scope of federal statutes is unquestionable.[5] However, whether a specific feder-

al statute applies to Indians and tribes depends on the intent of Congress.[6] General federal laws apply within Indian country and are enforceable against Indians and Indian tribes where the statute expressly mentions Indians and tribes.[7] In most instances interpretative questions arise when federal laws do not specifically refer to Indians and tribes, but instead appear to apply across the board to all persons or property.[8] In resolving these questions, the United States Supreme Court generally requires that Congress' intent to invade tribal rights and authority be clearly expressed in the legislative history, or the surrounding circumstances, or by the existence of a statutory scheme requiring national or uniform application.[9] Special considerations are triggered when the subject of the enactment involves treaty rights and areas traditionally left to tribal self-government.[10]

Federal environmental regulatory laws require uniform application to be effective. Both the Clean Air Act[11] and the Resource Conservation and Recovery Act (RCRA)[12] have been held to apply to Indian lands. No case in which a tribe has successfully challenged the application of federal environmental laws to its lands has been reported.

The federal courts have consistently held that the RCRA applies to Indian lands and may be enforced against Indian tribes.[13] In *Blue Legs v. United States Environmental Protection Agency*,[14] the Oglala Sioux Tribe operated several solid waste disposal sites on lands owned by the Tribe within the Pine Ridge Reservation. Each of the sites was operated as an "open dump," despite the prohibition on such dumps in the RCRA.[15] The court noted that the citizen suit provision[16] could be invoked for proceedings against "persons engaged in the act of open dumping." The term "person" is defined by the RCRA as including a "municipality,"[17] which in turn is defined to include "an Indian tribe."[18] The court concluded that these provisions and definitions indicate that Congress intended to include Indian tribes as regulated entities under the RCRA.[19] The Court ruled that federal jurisdiction existed to enforce the prohibition of open dumps against the tribe. Additionally, the court held that the tribe has the responsibility, stemming from its inherent sovereignty, to regulate, operate, and maintain solid waste facilities on the Reservation.[20]

The same result would be expected under federal water quality laws. The enforcement provisions of the Clean Water Act apply to "persons."[21] "Person" is defined to include "municipalities."[22] "Municipality" is defined to include "an Indian tribe."[23] The reasoning of the *Blue Legs*[24] and *Washington Department of Ecology*[25] cases yields the conclusion that the Act applies to Indian tribes.[26] Similarly, under the Safe Drinking Water Act, national primary drinking water regulations apply to all "public water systems."[27] A "supplier of water" is "any person who owns or operates a public water system."[28] "Person" is defined to include a "municipality,"[29] and "municipality" is defined to include an "Indian tribe."[30] Again, *Blue Legs*[31] and *Washington Department of Ecology*[32] would indicate that tribes are subject to the Act.

Tribal Authority to Enforce Environmental Laws

The likely result of litigation concerning the applicability of federal water quality laws to Indians, Indian tribes, and Indian lands is that the laws will be held to apply. Moreover, virtually no question exists that Congress can expressly require the application of such laws to Indians and Indian lands.[33]

Given that federal environmental laws either do apply to Indian lands, or can be made to apply, the issue becomes one of determining which government—federal, tribal or state—should enforce those laws within Indian country. Before that issue may be resolved and policy established, the scope of tribal jurisdiction must be determined. No doubt exists as to the power of tribes to enforce tribal laws against members. The key inquiry is whether tribes may enforce their laws against nonmembers.

Tribes retain sovereign authority to regulate activities within their territory, and this power extends to non-Indian activities on fee lands within reservations when those activities affect or threaten important tribal interests. In *United States v. Mazurie*,[34] the United States Supreme Court addressed the question of whether Congress may properly delegate its regulatory authority to tribes. The Court relied on the Indian Commerce Clause[35] and the "recognized relation of tribal Indians to the federal government" in upholding

Congress' power to do so.[36] The Tenth Circuit had characterized the tribal government as a"private, voluntary organization, which is obviously not a governmental agency," but the Supreme Court disagreed:

> [Previous decisions of the Court] surely establish that Indian tribes within "Indian country" are a good deal more than "private, voluntary organizations," and they thus undermine the rationale of the Court of Appeals' decision. These same cases, in addition, make clear that when Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life.[37] (Citations omitted.)

The seminal case of *Montana v. United States*,[38] sets forth principles which guide courts in determining the extent of tribal civil regulatory authority over non-Indians within reservation boundaries. In 1974, the Crow Tribe enacted an ordinance prohibiting hunting and fishing within the Crow Reservation by non-members of the Tribe. The United States Supreme Court held that neither the Crow treaties nor inherent tribal sovereignty empowered the Crows to regulate non-Indian hunting and fishing on fee-patented land within the Reservation. In rejecting the Crows' argument, the Court distinguished between tribal authority over Indians and tribal authority over non-Indians. Relying on *United States v. Wheeler*,[39] the Court held that:

> [E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is consistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt [the ordinance prohibiting non-Indian hunting and fishing]."[40](Citations omitted.)

Despite the sweeping nature of the foregoing proposition, the Court then used equally broad language to describe the scope of jurisdiction over non-Indians retained by the tribes:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[41] (Citations omitted.)

Several subsequent cases interpreting *Montana*, have upheld tribal civil regulatory jurisdiction on fee lands over non-Indians in the context of tribal health and safety regulations[42] and land use zoning.[43]

Last year, the United States Supreme Court rendered its decision in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*,[44] striking down tribal authority to zone fee lands owned by non-members within one portion of the reservation, and upholding tribal zoning authority over all land located within another portion of the reservation. The Justices wrote three opinions, with no majority agreeing on the rationale for either holding. The effect of *Brendale* on tribal civil regulatory jurisdiction remains uncertain.

The courts have not yet resolved definitively the scope of tribal authority to enforce federal environmental statutes. Because, however, tribes may lawfully be delegated federal authority, the

tribes and the EPA have developed a variety of schemes by which tribal interests are protected through federal regulation.

In *Nance v. Environmental Protection Agency*,[45] the Ninth Circuit affirmed the EPA's approval of the Northern Cheyenne Tribe's redesignation of its reservation and held that the action of the EPA was not arbitrary or capricious.[46] Several petitioners argued that the delegation of redesignation authority to tribes violated the Clean Air Act on the theory that Section 107(a) delegated the responsibility to the states "for assuring air quality within the entire geographic area comprising the state."[47] The court rejected that argument and concluded that:

> [W]ithin the present context of reciprocal impact of air quality standards on land use, the states and Indian tribes occupying federal reservations stand on substantially equal footing. The effect of the regulations was to grant the Indian tribes the same degree of autonomy to determine the quality of their air as was granted to the states. We cannot find compelling indications that the EPA's interpretation of the Clean Air Act was wrong. Nor can we say that the Clean Air Act constitutes a clear expression of Congressional intent to subordinate the tribes to state decision making.[48]

The petitioners also charged that the delegation of redesignation authority to the Tribe was unconstitutional. The petitioners attempted to distinguish *Mazurie*[49] on the grounds that here tribal authority to redesignate could result in effects off the reservation. Addressing this argument, the court stated:

> Certainly the exercise of sovereignty by the Northern Cheyenne Tribe will have extraterritorial effect. But another element must be considered, namely the effect of the land use outside the reservation on the reservation itself. This case involves the "dumping" of pollutants from land outside the reservation onto the reservation. Just as a tribe has the authority to prevent the entrance of nonmembers onto the reservation, a tribe may exercise control, in conjunction with the EPA, over the entrance of pollutants onto the reservation.[50] (Citations omitted.)

State Authority to Enforce Environmental Laws in Indian Country

As noted above, primary enforcement responsibility may be delegated to states under most federal environmental regulatory statutes. In developing these statutory schemes, Congress failed to consider the regulatory authority of tribal governments and the limited nature of state authority on Indian reservations. Before a state may assume primary enforcement responsibilities for federal environmental laws on reservations, the state must demonstrate to EPA's satisfaction that the state has jurisdiction.

Recognition of tribal sovereignty does not serve as a complete barrier to the assertion of state authority in Indian country. Recent cases indicate that courts are increasing their reliance on preemption as a method for resolving jurisdictional questions involving tribes and states. Under principles of preemption, state regulatory laws cannot be applied to Indian reservations if their application will interfere with the achievement of the policy goals underlying federal laws relating to Indians. Where tribal and federal interests are adequately protected and the state has a strong regulatory interest, state laws can be applied to Indian reservations, at least as to non-Indian activities on fee lands.

The United State Supreme Court recently articulated the preemption analysis in *California v. Cabazon Band of Mission Indians*,[51] to decide the issue of state regulatory jurisdiction within reservation boundaries. The Court held that "[s]tate regulation would impermissibly infringe on tribal government. . . ."[52]

The tribes urged that, in the absence of express congressional consent, states cannot apply their regulatory laws to Indians on Indian reservations. The Court disagreed and set forth the following preemption analysis:

> Our cases, however, have not established an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent. . . .
>
> Decision in this case turns on whether state authority is pre-empted by the operation of federal law; and "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.[53] (Citations omitted.)

In identifying the federal and tribal interests involved, the Court found that the federal government had pursued a policy of promoting tribal bingo enterprises through loans and other financial assistance and through federal regulation of tribal bingo management contracts. The Court noted that the bingo games were the only sources of revenue for the two tribal governments, and that the tribes therefore possessed a substantial interest in the bingo activities.[54] California asserted the need to prevent the infiltration of organized crime in the tribal games as its sole interest in regulating the bingo enterprises. However, because California presented no evidence of such infiltration, the Court ruled that this concern was insufficient to "escape the pre-emptive force of federal and tribal interests."[55]

The courts also thus far have prohibited the application of state environmental laws to Indian reservations. *State of Washington Department of Ecology v. United States Environmental Protection Agency*,[56] addresses the issue of whether a federal environmental statute conveys authority to a state over tribal lands. Section 3006 of the RCRA[57] authorizes states to establish hazardous waste management programs "in lieu of" the federal program administered by the EPA that otherwise would apply. The State of Washington submitted an application to the EPA to assume primary enforcement responsibility for the RCRA, including enforcement on Indian lands within the state. The EPA approved Washington's primacy application "except as to Indian lands,"[58] and retained to itself jurisdiction to operate the program "on Indian lands in the State of Washington."[59] Washington petitioned the Ninth Circuit Court of Appeals for review of the decision, and the Ninth Circuit held that the Regional Administrator of the EPA properly refused to approve the State program as applied to Indian lands.

The court examined the statutory language and legislative history of the RCRA, and found the RCRA ambiguous as to whether states could regulate hazardous wastes on Indian reservations. Although tribes were defined as being among those "persons" to whom the enforcement provisions of the RCRA applied, the statute was silent as to the authority of states to enforce their hazardous waste regulations against Indian tribes or individuals on Indian land.[60] Additionally, the court found nothing in the legislative history on the issue of state regulatory jurisdiction on reservations. The court ruled that the EPA reasonably interpreted the RCRA as not granting "state jurisdiction over the activities of Indians in Indian country."[61]

The court stated that "[s]tates are generally precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it."[62] Additionally, the court noted that federal retention of authority over Indian lands is consistent with the United State's trust responsibility to tribes.[63] The court stated:

> The federal government has a policy of encouraging tribal self-government in environmental matters. That policy has been reflected in several environmental statutes that give Indian tribes a measure of control over policy making or program administration or both. . . . The policies and practices of EPA also reflect the federal commitment to tribal self-regulation in environmental matters.[64]

United States Environmental Protection Agency Indian Policy

The jurisdictional rules applicable to Indian country leave the EPA unable to pursue its usual practice of delegating primary enforcement responsibility to states where Indian reservations are concerned. Moreover, until recently, none of the major federal regulatory statutes provided for delegation to tribal governments. In short, the EPA was forced to develop special rules and practices concerning environmental regulation on Indian reservations. To address these special circumstances, in November 1984, the EPA issued the EPA Policy for the Administration of Environmental Programs on Indian Reservations (The "Indian Policy").[65] The stated purpose of the Indian Policy is "to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal self-government' and government-to-government' relations between Federal and Tribal Governments" and to improve the "environmental quality on reservation lands."[66]

The Indian Policy clearly assumes that tribal governments should be the primary decision-makers on environmental matters arising on Indian Reservations:

> The keynote of this effort [to protect human health and the environment] will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservations lands.[67]

The Indian Policy appears to contemplate that unitary regulatory systems governing both Indians and non-Indians are to be developed, as indicated by the constant references to "Indian reservations" rather than "Indian lands." To the extent it reflects official congressional policy toward tribal governments, the Indian Policy may have the effect of preempting state regulatory authority as to the matters to which the policy is directed.

The EPA's prior policy of working with tribal governments, even in the absence of explicit statutory authority, was specifically approved by the Ninth Circuit in *Nance*[68] and *Washington Department of Ecology*.[69] In line with this prior practice, the Indian Policy states that the EPA will assist interested tribes in developing programs and in assuming regulatory environmental management over reservations. This assistance will include making grants to tribes similar to those currently available to state governments.

Finally, with respect to jurisdictional issues, the Indian Policy states that, until tribes assume full responsibility for delegable programs, the EPA will retain responsibility for reservations unless the state has received an express grant of jurisdiction from Congress. The Indian Policy also makes clear the EPA's view that all federal environmental regulatory statutes apply to Indian reservations and are enforceable against Indians and even Indian tribes. The Indian Policy acknowledges that impediments to tribal assumption of delegable programs exist in the language of present procedures, regulations, and statutes and states that EPA will work to remove such impediments.

The Indian Amendments to Federal Water Quality Laws

As described above, federal environmental regulatory statutes as initially conceived did not provide for the delegation of primary enforcement responsibility to Indian tribes. In 1985, representatives of tribal governments began working with Congress to develop amendments to the Safe Drinking Water Act and Federal Water Pollution Control Act to specifically authorize such delegations.

The Safe Drinking Water Act was amended in 1986 to allow tribes to be treated as states for its programs. 42 U.S.C. Section 300j-11 now provides that tribes may obtain primary enforcement responsibility for public water systems and for underground injection control if:

- the tribe is federally recognized and has a governing body carrying out substantial governmental duties and powers;
- the functions to be exercised by the tribe are within its jurisdiction; and

- the tribe is reasonably expected to be capable of carrying out the functions to be exercised in a manner consistent with all the terms and purposes of the Act and all applicable regulations.

Proposed regulations for tribal enforcement of National Primary Drinking Water and Underground Injection Control Standards were published on July 27, 1987;[70] final rules were published in the Federal Register on September 26, 1988.[71] These regulations establish a three-step process by which tribes may assume primary responsibility for enforcement of the Public Water System and Underground Injection Control programs, requiring that they:

- obtain designation for "treatment as a State;"
- apply for a grant to develop a program; and
- receive primacy.

Following the amendment to the Safe Drinking Water Act, the Clean Water Act[72] was amended to allow tribes to be treated as states for certain purposes, provided that:

- the Indian tribe has a governing body carrying out substantial governmental duties and powers;
- the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or is otherwise within the borders of an Indian reservation; and
- the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.[73]

Under the amendments, tribes may be treated as states for purposes of, *inter alia*, the following:

- grants for pollution control programs under Section 1256;
- grants for construction of treatment works under Section 1281-1299;
- water quality standards and implementation plans under Section 1313;
- enforcement of standards under Section 1319;
- clean lake programs under Section 1324;
- certification of National Pollutant Discharge Elimination System ("NPDES") permits under Section 1341;
- issuance of NPDES permits under Section 1342; and
- issuance of permits for dredged or fill material under Section 1344.

The proposed regulations on the development and implementation of water quality standards under the Clean Water Act were published on September 22, 1989.[74] Several important issues remain regarding the details of the state-tribal dispute mechanism, the arbitrary acceptance of state water quality standards on reservations in the absence of tribal standards, and the burdensome and vague application process for tribes. The proposed rule for treatment of tribes as states for the Dredge and Fill Permit Program was published on November 29, 1989.[75]

The Nature and Scope of Tribal Environmental Programs

While the passage of the "Indian Amendments" to the federal water quality laws permits and encourages tribal governments to become involved in the development, operation, and control of tribal water quality programs, not all of the twenty-two tribal governments in New Mexico can be expected to initiate such programs. However, the tribal environmental regulatory programs that do develop in the 1990s will present a mixed bag of blessings and curses. Tribal laws are, after all, just more laws, providing both the desired certainty and loathed restrictions characteristic of all laws. And tribal enforcement requires learning yet another set of procedures to follow in yet another new, and somewhat idiosyncratic, jurisdiction.

Each tribe—like each state—will approach the development and management of its environmental program in an individual way, intended to meet the

concerns and address the realities of its reservation resources and the needs of its residents and those doing business on the reservation. Persons who have experienced the development and implementation of several tribal tax programs may recognize the process and will understand that a large, wealthy tribe will be more likely to have a relatively sophisticated existing administrative infrastructure while a small, poor tribe may have to adopt a more basic approach.

One of the difficulties of dealing with tribal water quality programs is that they are likely to represent quite a spectrum of procedures, personalities, policies, and predictability, thus placing new learning requirements on persons under tribal jurisdiction, for while the tribes, like the states, follow the federal mandate, the implementation strategies are as diverse as the governments themselves, and the myriad of jurisdictional differences should keep things lively for the remainder of the century.

Becoming familiar with the programs themselves is just the beginning. Often appeals from administrative decisions are made to the tribal council or are in tribal court, thus requiring the regulated community to become familiar with strange new local customs and practices, from admission through final appeal. For example, every tribal court system has its own rules regarding who can practice before it, and under what circumstances; yet the number of attorneys who overlook the necessity and courtesy of checking into such rules is greater than one might hope. Though the councils and courts are themselves changing to accommodate the increasing contact with and challenges of non-Indians, careless attorneys may very well find themselves dealing with rules, decisions, attitudes, and customs for which they are unprepared. Most of these peculiarities are similar to those an attorney reasonably could expect in any unfamiliar jurisdiction, but some will be specific to tribes in general. For example, though state water codes often establish separate divisions to manage ground and surface water, tribal water codes are more likely specifically to recognize and accommodate the interrelation not only of ground and surface water, but also of water, the land, and the air.

Such differences in positions have the potential to frustrate industry's attempts to negotiate and participate within a tribal framework. Anyone within a tribe's jurisdiction should develop at least a passing knowledge of and respect for the various tribal positions on environmental issues that affect the reservation land, air, water, and wildlife. A tribal position may often be grounded in religion, oblivious to—or at least unswayed by—the financial concerns motivating many. Users and developers of natural resources may heartily disagree with traditional resource-based environmentalists who seek to ensure that resources are used wisely and with an eye to the future, but both approaches are themselves contrasted with the concept of deep ecology that does not recognize the earth, its habitats, its minerals and forests, as "resources" of any kind, only to be used, however wisely. The philosophy of deep ecology, similar to many tribal traditions that honor and respect nature and the earth, requires learning to "think like a mountain." As educator Robert Aitken Roshi says "[w]hen one thinks like a mountain, one also thinks like the black bear, so that honey dribbles down your fur as you catch the bus to work."[76] Thinking like a mountain can be expected to contrast with thinking like a coal miner or an oil man, and it will be easier to clash over the nature and scope of tribal water quality regulation and enforcement if these profound differences in perspective are not recognized and reconciled. While "green" thinking or "mountain" thinking may be a part of the future of off-reservation development, it is likely to be an integral part of the present for on-reservation development.

Another difficulty in dealing with tribal programs may very well be the imposition of heavy costs or impact fees on the business interests. When state governments were launching their environmental programs in the 1970s, federal funding was plentiful. Today, tribes face the ordeal of starting up tribal programs under Gramm-Rudman restrictions; they must compete with dozens of other tribes and with the states for the limited funds; and the tribal resources themselves are often scant. As a result, many tribes must start their demanding environmental programs with inadequate start-up funding.

Tribes were not originally eligible for the billions of dollars distributed to the states over the past twenty years to develop their regulatory programs. Now, while state programs have matured

and require only maintenance funding, tribal programs are in their vulnerable embryonic stages, sadly handicapped by the lack of funding. Although all the major federal environmental laws are expected soon to authorize tribes to assume primacy, much remains to be done in the development and implementation of federal policies and regulations if the tribal programs are to be useful and effective. New incentives are needed to take into account the fact that tribal environmental concerns have been largely ignored throughout the history of EPA. This failure to recognize and meet the needs of fledgling tribal programs threatens the promise of the EPA Indian policy and the tribal amendments to the statutes. Prior to the emergence of tribal environmental programs, EPA claimed sole responsibility to enforce federal environmental laws on the reservations. The experience of many tribes, however, is that EPA failed to meet that responsibility. The EPA now is asking the tribes to address the legacy of its neglect of reservation environments but refuses to make available resources adequate to the task.

Tribes faced with the desire to regulate the use of their water and land, but without the requisite dollars, may seek to fund their environmental programs with tax revenues obtained from on-reservation businesses such as minerals production, particularly if the business activities are those requiring regulation. Tribes may also seek to fund their programs with permitting fees obtained, for example, from a company desiring an exclusive right to landfill on the reservation. And they may seek to fund their programs by requiring interested developers to pay the costs of setting up the infrastructure and procedures under which the developers propose to proceed. Because natural resource and land developers ultimately must go where the natural resources and land are, and because the developers have found it cost effective to pay for the opportunity to use tribal resources, the tribes have been relatively successful in pursuing these rather creative but obligatory financing schemes.

Despite the difficulties in adjustment and the start-up costs, the specter of functioning under tribal water quality programs is not thoroughly dismal, and the advantages may far outweigh the disadvantages. Tribal programs are smaller, and being smaller, are more flexible and responsive than cumbersome state programs could ever hope to be. The tribal procedures, from permitting to appealing, are generally faster, more efficient, and substantially simpler than the analogous state or federal procedures. And because tribal programs are in their genesis, they are often relatively unformed and receptive to outside suggestions and change. Opportunities exist for the non-Indian public to have a significant impact not only on the substance of the laws but also on their subsequent interpretation and application.

Normally, a tribe wishing to exercise increased control over particular aspects of its tribal environment will create a tribal environmental quality and protection agency under the aegis of its general governmental powers. The powers of such a tribal agency may be broad enough to encompass various interrelated areas, or may be tailored to address the specific environmental concern sought to be controlled. In the latter case, the agency may be run by one person with contract access to experts and consultants. Larger environmental quality agencies may be made up of several individual environmental departments, each with its own experts and consultants.

Conclusion: The Need for Tribal-State Cooperation

Although federal environmental laws, as originally enacted, failed to address the regulatory authority of tribal governments and the limited nature of state authority in Indian country, the current view of Congress, the courts, and the EPA is that states do not have jurisdiction to enforce environmental laws on reservations. With respect to the recently amended statutes that allow tribes to assume responsibility for delegable programs, state authority over Indian country is effectively foreclosed. In accordance with the objectives set forth in the EPA Indian Policy,[7] presumably other federal environmental laws will be amended to expressly provide for the delegation of primary enforcement responsibility to Indian tribes. Disputes between states and tribes are bound to erupt as the tribes develop their programs.

One possible solution to such controversies between tribes and states over jurisdiction issues is to resolve them by negotiation. Certainly this is the preferred method for a variety of reasons, not the least of which are the costs and uncertainty of

litigation. Moreover, the tribes and state are fitting partners in environmental regulation. Pollution does not respect political boundaries, and neither tribes nor states can regulate environmental quality on a regional basis without the cooperation of the other.

The likely parameters of such agreements are fairly obvious. First, jurisdiction is simply non-negotiable. No tribe or state is going to concede that it lacks jurisdiction or that the other has jurisdiction; it makes little sense to negotiate on an issue as to which agreement will never be reached. Further, it is extremely doubtful that either tribes or states have the power to confer jurisdiction over Indian country on the other. No one doubts, however, that a person conducting activities on a reservation requiring environmental regulation is subject to the jurisdiction of one or the other; and it should not matter much whether a joint tribal-state regulatory program is exercising state power or tribal power at any given moment.

A second advantage to tribal-state agreements is that they acknowledge that the states have something the tribes don't, which is to say the resources, experience, and expertise acquired in regulating environmental quality to date. Through an agreement, a tribe might simply retain a state environmental agency to serve as its "consultant" in technical matters arising in the enforcement of tribal environmental laws. Particularly given the limited resources of most tribes, the ability to call upon state resources and expertise would be a valuable asset to any tribal regulatory program.

A third advantage to tribal-state agreements is that they acknowledge that the tribes have something that the states do not: jurisdiction over Indian lands. As noted above, an environmental regulatory program cannot be effective if it cannot be applied on a regional basis. A state with an exemplary program could fail in its efforts to protect the environment if it cannot control pollution originating on Indian lands. Indeed, the states should be anxious to see strong and effective tribal regulatory programs develop, since such programs can guarantee that state environmental quality goals are met.

Endnotes

1. Gover, Stetson & Williams, P.C. is an Indian-owned law firm that represents Indian tribes and tribal agencies. The attorneys contributing to this article are Kevin Gover, Catherine Baker Stetson, and Jana L. Walker.
2. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).
3. *See generally, F.S. Cohen, Handbook of Federal Indian Law*, 231 (1982 ed.); *see also, United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
4. *Lone Wolf v. Hitchcock*, 187 U.S. 533 (1903). This power is not absolute, but is subject to guardianship and constitutional limits. *United States v. Sioux Nation*, 448 U.S. 371, 415 (1980).
5. *See supra* note 4.
6. F.S. Cohen, *Handbook of Federal Indian Law*, 282 (1982 ed.).
7. "The intended coverage of statutes specifically pertaining to Indians is generally clear; by their terms these laws are either territorially confined to Indian country or are topically applicable only to Indians, tribes, the Indian Service, or Indian property." F.S. Cohen, *Handbook of Federal Indian Law*, 282 (1982 ed.).
8. Examples of such general federal laws include federal tax laws, environmental laws, civil rights laws, laws regulating business activities and labor relations regulations. F.S. Cohen, *Handbook of Federal Indian Law*, 282 (1982 ed.).
9. *See, e.g.*, F.S. Cohen, *Handbook of Federal Indian Law*, 283 (1982 ed.); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Bryan v. Itasca County*, 426 U.S. 373 (1976).
10. *See, e.g., United States v. Dion*, 476 U.S. 734 (1986).
11. Clean Air Act, 42 U.S.C. Section 7401-7642 (1982).
12. Resource Conservation and Recovery Act, 42 U.S.C. Sections 6901-6991i (1982).
13. *Washington Department of Ecology v. United States Environmental Protection Agency*, 752 F.2d 1465 (9th Cir. 1985); *Blue Legs v. United States Environmental Protection Agency*, 668 F.Supp. 1329 (D.S. Dak. 1987) aff'd sub nom. *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989).

14. *Blue Legs v. United States Environmental Protection Agency*, 668 F.Supp. 1329 (D.S.Dak. 1987).
15. *See* 42 U.S.C. Section 6945.
16. The citizens suit provision of the RCRA at 42 U.S.C. Section 6972, combined with the open dumping prohibition of the RCRA, creates a federal cause of action that allows citizens and states to seek judicial relief from federal courts. *Blue Legs*, 668 F.Supp. at 1336.
17. 42 U.S.C. Section 6903 (15).
18. 42 U.S.C. Section 6903 (13).
19. *Blue Legs*, 668 F.Supp. 1337. The court also relied heavily on the decision in *State of Washington Department of Ecology v. United States Environmental Protection Agency*, 752 F.2d 1465 (9th Cir. 1985), which established that Indian tribes are regulated entities under the RCRA. The court reasoned that as such, tribes should also be subject to the citizen suit provision of the RCRA. *Id.* at 1338.
20. *Id.* at 1337.
21. *See, e.g.*, 33 U.S.C. Section 1311(a).
22. 33 U.S.C. Section 1362(5).
23. 33 U.S.C. Section 1362(4).
24. *Blue Legs v. United States Environmental Protection Agency*, 668 F.Supp. 1329 (D.S.Dak. 1987).
25. *State of Washington Department of Ecology v. United States Environmental Protection Agency*, 752 F.2d 1465 (9th Cir. 1985).
26. Safe Drinking Water Act, 42 U.S.C. Sections 300f-300j (1982).
27. *See* 42 U.S.C. Section 300g.
28. 42 U.S.C. Section 300f(5).
29. 42 U.S.C. Section 300f(12).
30. 42 U.S.C. Section 300f(10).
31. *Blue Legs v. United States Environmental Protection Agency*, 668 F.Supp. 1329 (D.S.Dak. 1987).
32. *State of Washington Department of Ecology v. United States Environmental Protection Agency*, 752 F.2d 1465 (9th Cir. 1985).
33. *See supra* note 4.
34. *United States v. Mazurie*, 419 U.S. 544 (1975).
35. U.S. Const. art. I, Section 8.
36. *Mazurie*, 419 U.S. at 553-57.
37. *Id.* at 556-57
38. *Montana v. United States*, 450 U.S. 544 (1981).
39. *United States v. Wheeler*, 435 U.S. 313 (1978).
40. *Montana*, 450 U.S. at 564.
41. *Id.* at 565-66.
42. *See Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1981). In *Cardin*, the Ninth Circuit upheld the Quinalt Nation's application of tribal health and safety regulations to a non-Indian operating a grocery store on fee lands. The court observed that the store owner engaged in voluntary commercial dealings with the Tribe, and that the store owner's conduct threatened the health and welfare of the Tribe.
43. In *Knight v. Shoshone and Arapahoe Tribes*, 670 F.2d 900 (10th Cir. 1981), the Tribes enacted a zoning ordinance and applied the ordinance to prohibit a non-Indian from subdividing and selling fee land for a residential development. The court held that the absence of land use control within the reservation, coupled with the tribal interest in protecting their homeland from exploitation, justified the zoning code. Additionally, the court ruled that "[t]he fact that the code applies and affects non-Indians who cannot participate in tribal government is immaterial" because the developers' activities "directly affect Tribal and allotted lands." 670 F.2d at 903.
44. _ U.S. _, 109 S.Ct. 2994 (1989).
45. *Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981), *cert. denied sub nom, Crow Tribe of Indians, Montana v. Environmental Protection Agency*, 454 U.S. 1081 (1981).
46. *Nance*, 645 F.2d at 704.
47. *Id.* at 713.
48. *Id.* at 714.
49. *United States v. Mazurie*, 419 U.S. 544 (1975).
50. *Nance*, 645 F.2d at 715.
51. *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987).
52. *Id.* at 1095.
53. *Id.* at 1091-92.
54. *Id.* at 1092-1094.
55. *Id.* at 1094.
56. *State of Washington Department of Ecology v. United States Environmental Protection Agency*, 752 F.2d 1495 (9th Cir. 1985).
57. Resource Conservation and Recovery Act, 42 U.S.C. Section 6926.
58. *See* 48 Fed. Reg. 34954 (1983).
59. *Id.* at 34957.
60. *Id.* at 1469.
61. *Id.* at 1469.
62. *Id.* at 1469-1470.

63. *Id.* at 1470.
64. *Id.* at 1471.
65. *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, Nov. 8, 1984.
66. *Id.* at 1.
67. *Id.*
68. *Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981).
69. *State of Washington Department of Ecology v. United States Department of Ecology*, 752 F.2d 1465 (9th Cir. 1985).
70. 52 Fed. Reg. 28112 (1987).
71. 53 Fed. Reg. 37396 (1988).
72. Clean Water Act, 33 U.S.C. Sections 1251-1387 (1982) (previously known as the Federal Water Pollution Control Act).
73. 33 U.S.C. Section 1377.
74. 54 Fed Reg. 39098 (1989).
75. 54 Fed. Reg. 49180 (1989).
76. Robert Aitken Roshi, "Gandhi, Dogen, & Deep Ecology," *The Mind of Clover* (San Francisco, Calif: North Point Press, 1984).
77. *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, Nov. 8, 1984.