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## COMMENT

# CONTROLLING BLUE SKIES IN INDIAN COUNTRY: WHO IS THE AIR QUALITY POSSE — TRIBES OR STATES? THE APPLICABILITY OF THE CLEAN AIR ACT IN INDIAN COUNTRY AND ON OKLAHOMA TRIBAL LANDS

Julie M. Reding\*

### *Introduction*

When the issue of controlling pollution on Indian reservations<sup>1</sup> arises, native nations, the federal government, and individual states all assert governing interests. As a result, perplexing issues of federal law, native self-determination, and state autonomy arise.<sup>2</sup>

Congress enacted environmental laws to protect and enhance human health and environmental integrity. However, in doing so Congress failed to consider and neglected to mention tribes and the role they would play in regulating the environment on tribal lands. This oversight affected nearly a million people residing on over fifty-six million acres of land comprising 281 reservations.<sup>3</sup> From this omission emerged the legal issue of who should regulate environmental protection on Indian lands.

Until enactment of the Clean Air Act Amendments of 1990 (the 1990 Amendments),<sup>4</sup> it was unclear as to who — tribes or states —

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1. The word “reservation” will be used interchangeably with the terms “tribal land” and “Indian country.” The author, however, acknowledges and discusses the legal distinctions between the terms. See *infra* text accompanying notes 174-76.

2. Judith V. Royster & Rory Snowarrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581 (1989).

3. Donald R. Wharton, Implementation of the EPA’s Indian Policy and Tribal Amendments to Federal Environmental Laws, Paper Presented at Fourth Annual Natural Resources Management and Environmental Enforcement on Indian Lands, Albuquerque, N.M., at 7-1, 7-2 (Feb. 21, 1992) (on file with author) (citing U.S. DEP’T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, AMERICAN INDIANS TODAY — ANSWERS TO YOUR QUESTIONS 9 (1991)).

4. Pub. L. No. 101-549, 101 Stat. 2399 (codified at 42 U.S.C. §§ 7401-7671q (Supp. II 1990)).

had the jurisdictional authority to administer air quality protection programs on tribal lands. After all, the language of the Clean Air Act (CAA or the Act)<sup>5</sup> explicitly provided that “[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . .”<sup>6</sup> In 1977, Congress amended the CAA, authorizing tribes to redesignate their reservations for air quality purposes.<sup>7</sup> However, Congress neglected to address the issue of who would be vested with the authority to enforce such air quality standards.

In 1990, Congress broke its silence with regard to environmental regulation on tribal lands and again amended the CAA.<sup>8</sup> Congress sought to improve air quality on Indian lands “in a manner consistent with the EPA Indian Policy[9] and the ‘overall Federal position in support of Tribal self-government and the government-to-government relations between Federal and Tribal governments.’”<sup>10</sup> The Act’s amendment constitutes an “express delegation of power to Indian tribes to administer and enforce the [CAA] in Indian lands.”<sup>11</sup>

This comment has five sections which provide a brief overview and history of the implementation and application of the CAA on Indian lands. Section I traces and discusses the CAA’s origin and its progeny, beginning with its silent, then explicit, treatment of tribal nations. Section II discusses the recent legislative developments regarding treatment of tribes as states in the CAA. Environmental jurisdiction on tribal lands, including “checkerboard” land, is addressed in section III. This section reviews the importance of tribal self-determination and self-government as they relate to the environmental aspects of the tribal land base and discusses the relationship between tribes and the Environmental Protection Agency (EPA).

Next, section IV evaluates the applicability of the CAA to tribal lands in Oklahoma, including the State’s argument for its own assertion of environmental regulatory authority on tribal lands. Finally, section V concludes with the author’s view that although tribes and states have legitimate interests in effective control of Indian reservation pollution sources, tribes are the entities better situated to regulate the tribal environment.

5. 42 U.S.C. §§ 7401-7642 (1988), amended by 42 U.S.C. §§ 7401-7671q (Supp. II 1990).

6. 42 U.S.C. § 7407(a) (1988).

7. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. §§ 7401-7626 (1988)).

8. Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7401-7671q (Supp. II 1990)).

9. OFFICE OF EPA ADM’R, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984) [hereinafter EPA INDIAN POLICY].

10. S. REP. No. 228, 101st Cong., 1st Sess. 79 (1989) [hereinafter SENATE REPORT] (citing EPA INDIAN POLICY, *supra* note 9).

11. *Id.*

*I. The Clean Air Act: Regulatory Limbo*

The first version of the CAA was passed by Congress in 1963.<sup>12</sup> The CAA authorized federal authorities to expand their research efforts,<sup>13</sup> empowering them to make grants to state air pollution control agencies and in limited circumstances to directly intervene to abate interstate pollution.<sup>14</sup> In 1965, amendments to the CAA<sup>15</sup> resulted in federal authority to control motor vehicle emissions.<sup>16</sup>

The focus, however, shifted somewhat in the Air Quality Act of 1967 (the 1967 Act).<sup>17</sup> When Congress realized the substantial threat posed by stationary sources of air pollution, it sought to regulate those point sources. Although the new version reiterated the earlier Act's premise that primary responsibility for the prevention and control of air pollution at its source remain with the states and local governments, the federal government's role was increased by according federal authorities certain powers of supervision and enforcement.<sup>18</sup> Still, the states normally determined what air quality standards they would meet and the period of time in which they would do so.<sup>19</sup>

By 1970, states had made little progress in reaching the prescribed federal air quality standards. Congress reacted to the states' inadequate planning and non-implementation of the 1967 Act by amending the CAA again in 1970.<sup>20</sup> The Clean Air Amendments of 1970 (the 1970 Amendments)<sup>21</sup> increased the federal authority and responsibility to decrease air pollution, although these amendments explicitly reserved to the states the primary responsibility for assuring air quality within the state.<sup>22</sup> However, the 1970 Amendments no longer gave states the

12. Act of Dec. 17, 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. §§ 7401-7642 (1988)).

13. In the mid-1950s Congress began looking at the issue of air pollution; in 1955, Congress authorized the Surgeon General to study air pollution. See Air Pollution Control Act of 1955, Pub. L. No. 84-145, 69 Stat. 322. In 1960 Congress directed the Surgeon General to focus his attention on health hazards caused by motor vehicle emissions. ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW 292 (3rd ed. 1991).

14. FINDLEY & FARBER, *supra* note 13, at 292.

15. Act of Oct. 20, 1965, Pub. L. No. 89-272, 79 Stat. 992 (codified as amended at 42 U.S.C. §§ 7401-7642 (1988)).

16. *Id.* The amendments required that later models of cars have catalytic converters and that states have automobile emission standards.

17. Pub. L. No. 90-148, 81 Stat. 485 (codified as amended at 42 U.S.C. §§ 1857-1871 (1988)).

18. FINDLEY & FARBER, *supra* note 13, at 293-94.

19. *Id.* at 293.

20. *Id.*

21. Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 1857b-1857h (1988)).

22. 1970 Amendments § 110, 84 Stat. at 1680 (codified as amended at 42 U.S.C. § 7410 (1988 & Supp. II 1990)).

option of how and when they would comply with the CAA. Instead, the law required states to attain particular air quality standards specified by the EPA within a specified period of time.<sup>23</sup>

The concept of the CAA is national in scope; its goal is that all "ambient"<sup>24</sup> air be clean. The 1970 Amendments directed the EPA to formulate national ambient air quality standards (NAAQSs)<sup>25</sup> to protect the public from targeted air pollutants.<sup>26</sup> The restructured Act incorporated the idea of "attainment." An attainment area is a designated area which has attained specific emission standards, i.e., NAAQSs, for a designated pollutant.<sup>27</sup> The attainment concept is the basic principle governing state implementation plans (SIPs).<sup>28</sup>

Congress directed the EPA to publish proposed regulations describing NAAQSs.<sup>29</sup> There was then a period of ninety days provided for comments on the proposed standards. After this period, the EPA was required to promulgate its proposed standards through regulations.<sup>30</sup> The standards were of two types: "primary" standards, based on criteria allowing an "adequate margin of safety . . . to protect public health,"<sup>31</sup> and "secondary" standards, aimed at protecting the "public welfare from any known or anticipated adverse effects associated with the presence of such air pollutants in the ambient air."<sup>32</sup>

Within nine months of the enactment of the EPA's minimum requirements, states were directed to submit to the EPA their own plans aimed at implementing and maintaining such standards within their boundaries.<sup>33</sup> Such a plan is referred to as a state implementation plan, i.e., a SIP. The EPA would then approve or disapprove a state's plan. The EPA is directed to approve any state plan that will attain the standards set in NAAQSs.<sup>34</sup> If a state plan failed to meet federally

23. FINDLEY & FARBER, *supra* note 13, at 292; *see also* 42 U.S.C. § 7410 (1988 & Supp. II 1990).

24. "Ambient" is the statute's term for the outdoor air used by the general public. FINDLEY & FARBER, *supra* note 13, at 293.

25. The NAAQSs are air emission standards deemed acceptable by Congress. *See* 42 U.S.C. § 7409 (1988 & Supp. II 1990).

26. *Id.* §§ 7408-7409.

27. 42 U.S.C. § 7501(2) (1988 & Supp. II 1990).

28. A SIP is a strategy developed by a state to demonstrate how it intends to attain the NAAQSs in its nonattainment (polluted) area(s). *See infra* note 63 and text accompanying notes 33-34.

29. 42 U.S.C. § 7409(a) (1988).

30. *Id.*

31. *Id.* § 7409(b)(1).

32. *Id.* § 7409(b)(2).

33. *Id.* § 7410(a)(1). The deadline was extended from nine months to "within 3 years (or such shorter period as the Administrator may prescribe) . . ." 42 U.S.C. § 7410(a)(1) (Supp. II 1990).

34. 42 U.S.C. § 7410(k)(3) (1988 & Supp. II 1990). Such approval is contingent upon the proposed SIP meeting the federally mandated minimum criteria established and outlined in 42 U.S.C. § 7410. *Id.*

mandated requirements, the federal government would implement its own plan for the state.

Unfortunately, this process proved to be more difficult than anticipated. The CAA is premised on a per-specific-pollutant basis for regulation purposes. In other words, "each air pollutant" must be identified; then the EPA makes a determination of how much pollutant a company or business may or may not emit. The CAA is a technology-forcing statute, which means if a polluter does not have the technology or equipment to meet the EPA's "adequate margin of safety" (the primary standard) when emitting pollutants, then the EPA can order an entity to cease its operations. This in effect forces an entity to purchase or create technology which would allow it to operate in a manner that complies with the federally mandated standards.

In 1971, the EPA identified and set standards for the regulation of only six pollutants. Congress has further mandated the EPA to regulate nearly 200 additional pollutants.<sup>35</sup> The EPA, however, was limited by insufficient information regarding scientific uncertainties about the health effects.<sup>36</sup> Moreover, Congress charged the EPA with designing feasible plans of controlling air pollution without eliminating economic growth.<sup>37</sup> The deadlines set by the 1970 Amendments proved unattainable. Congress responded by extending the deadlines to govern areas of the country not meeting the standards (nonattainment areas) and by passing the Clean Air Act Amendments of 1977 (the 1977 Amendments).<sup>38</sup> While extending the deadlines for attaining air quality standards, Congress added new provisions designed to prevent significant deterioration (PSD requirements) of air quality in areas already having clean air.

The CAA provides that areas of land, with regard to the air quality standards, are to be designated into one of three classes.<sup>39</sup> The PSD requirement is contingent upon the particular classification of air. A class I designation is the most stringent of the three classifications. Class I protects pristine air quality and permits very little deterioration of air quality. Class II permits some air quality deterioration, and class III tolerates even more deterioration, although air quality may not fall below national standards in any class.<sup>40</sup>

35. 42 U.S.C. § 7412(b)(1) (Supp. II 1990).

36. FINDLEY & FARBER, *supra* note 13, at 294.

37. *Id.*

38. Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. §§ 7401-7626 (1988)). Congress continues to extend the attainment deadline for nonattainment areas. See 42 U.S.C. § 7502 (Supp. II 1990).

39. 42 U.S.C. § 7472 (1988 & Supp. II 1990); see also 42 U.S.C. § 7474 (1988 & Supp. II 1990). Until the 1977 Amendments, the Act was silent as to who (tribes or states) would have authority to designate air quality standards for areas within reservation boundaries.

40. 42 U.S.C. § 7473 (1988).

Prior to 1977, no provision of the CAA delegated any authority to Indians.<sup>41</sup> In fact, none of the provisions specifically included or addressed Indian land or tribes.<sup>42</sup> The 1977 Amendments authorized tribes to redesignate their reservations for air quality purposes.<sup>43</sup> The amendments, however, were silent as to what role tribal governments would play in enforcing such regulations.

## II. Recent Legislative Developments: Tribes as Regulators

Federal environmental regulatory laws generally require nationally uniform application. The 1977 Amendments provided Indian tribes with the authority to redesignate air quality classifications on Indian land,<sup>44</sup> giving tribes the authority to upgrade their lands from a class II designation, which permits some deterioration of air quality, to the most stringent class I designation, which permits almost no deterioration of pristine air quality. However, Congress failed to address what role tribal governments would play in air quality planning or enforcing air quality programs on tribal lands.

The Senate report on the 1990 Amendments explains that amendment is "necessary to ensure that tribes will be allowed to participate fully in programs established by the Act as they take affirmative measures to manage, regulate, and protect air quality."<sup>45</sup> The report further explicates that the 1990 Amendments are intended to provide Indian tribes the same opportunity to assume primary planning, implementation, and enforcement responsibilities for CAA programs that they

41. See, e.g., Act of Dec. 17, 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. §§ 7401-7642 (1988)).

42. The CAA applies to "owner[s] or operator[s]." 42 U.S.C. § 7412(a)(5) (1988). The Act provides that "[t]he term 'owner or operator' means any person who owns, leases, operates, controls, or supervises a stationary source." *Id.* At one time, there was concern as to whether the CAA would apply to Indian lands since the Act did not specifically include Indian tribes. See Jana L. Walker & B. Kevin Gover, Tribal Civil Regulatory Jurisdiction to Enforce Environmental Laws (unpublished manuscript) (on file with author). The 1990 Amendments allay this concern by specifically addressing the effects of the CAA on tribal governments and what role tribes may play in enforcing the Act's provisions.

43. 42 U.S.C. § 7474(c) (1988); see also *Nance v. EPA*, 645 F.2d 701 (9th Cir.), cert. denied, 454 U.S. 1081 (1981) (holding that tribes were subject to the provisions of the CAA and authorizing tribes to redesignate their reservation lands with different air quality standards). While *Nance* was pending in the Ninth Circuit Court of Appeals, Congress amended the CAA, expressly permitting tribal governments to redesignate air quality standards on reservation lands. See Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 164(c), 91 Stat. 685, 733 (codified as amended at 42 U.S.C. § 7474(e) (1988 & Supp. II 1990)).

44. SENATE REPORT, *supra* note 10, at 79 (citing 1977 Amendments, 91 Stat. at 733).

45. *Id.*

have been accorded under the Safe Drinking Water Act (SDWA)<sup>46</sup> and the Clean Water Act (CWA).<sup>47</sup> Under the SDWA and CWA, Indian tribes were delegated the power to administer and enforce the respective programs.<sup>48</sup>

### A. Tribal Implementation Plans

As mentioned previously in section I, the CAA requires states to submit their SIPs to the EPA for approval or disapproval.<sup>49</sup> If a state satisfies the statutory requirements,<sup>50</sup> the EPA must approve its plan.<sup>51</sup>

Until the 1990 Amendments were passed, the CAA was silent in regard to tribal implementation plans (TIPs). Presently, if a tribe submits a TIP to the EPA Administrator, the EPA shall review the plan in accordance with the provisions for review set forth for state plans.<sup>52</sup> However, TIPs are subject not only to state standards of review but also to further statutory requirements as the EPA Administrator deems appropriate.<sup>53</sup>

The 1990 Amendments direct that the EPA Administrator “may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval.”<sup>54</sup> This allows the EPA Administrator to use broad discretion in determining what criteria TIPs must satisfy before tribes may implement their air quality control plans. The latest word is from the former EPA Administrator William K. Reilly, who stated the EPA’s position as one which encourages tribal management of environmental programs, thus formalizing the EPA’s role in strengthening tribal management of

46. Safe Drinking Water Act, 42 U.S.C. § 300j-11 (1988 & Supp. II 1990). The tribal amendments authorize the EPA to treat Indian tribes as states and to delegate to tribes the primary enforcement responsibility for public water systems and underground injection control.

47. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. II 1990) (commonly referred to as the Clean Water Act); see also SENATE REPORT, *supra* note 9, at 79.

48. 42 U.S.C. § 300j-11 (1988); *id.* § 1377.

49. 42 U.S.C. § 7410 (1988 & Supp. II 1990).

50. Requirements for state implementation plans for national primary and secondary ambient air quality standards are found at 42 U.S.C. § 7410 (1988 & Supp. II 1990).

51. *Id.*

52. 42 U.S.C. § 7410(o) (Supp. II 1990).

53. 42 U.S.C. § 7601(d)(3) (Supp. II 1990). This section of the statute reserves much administrative authority to the EPA Administrator. It empowers the Administrator to promulgate regulations (distinct from SIPs) which establish the elements of TIPs and procedures for approval or disapproval of TIPs. The Act lays out further the foundational requirements for treating tribes as states. See *infra* text accompanying notes 57-60.

54. 42 U.S.C. § 7601(d)(3) (Supp. II 1990).



reservation environments.<sup>55</sup>

### B. Tribes As States

Current congressional and executive policies favor tribal self-determination.<sup>56</sup> Accordingly, the EPA policies reflect, in the environmental arena, this commitment to tribal self-government.

The 1990 Amendments direct the EPA to treat Indian tribes as states.<sup>57</sup> The amendments provide that such treatment shall be granted only if an Indian tribe has a governing body<sup>58</sup> with the power to carry out substantial governmental duties, governing tribal functions pertaining to air resource protection and management within the exterior boundaries of the reservation, and is reasonably "capable" of complying with the purposes and regulations of the CAA.<sup>59</sup> The amendments further require that a tribe be federally recognized.<sup>60</sup>

"Capable" is a key word in the Act's provision.<sup>61</sup> To be reasonably "capable" means that a tribe has demonstrated both an economic and a technical ability to administer air quality protection programs.<sup>62</sup> Once the tribe's economic ability is demonstrated, the EPA will focus on its technical ability.<sup>63</sup> In finding economic ability, the EPA considers funds that are available to tribes on a regular basis, a tribe's own financial condition or its ability to raise money. Such funds are necessary to provide a payroll for employees to operate and maintain a TIP. Once these threshold requirements are satisfied, a tribe will be

55. Memorandum from William K. Reilly, EPA Administrator, to Assistant Administrators, General Counsel, Inspector General, Regional Administrators, Associate Administrators, and Staff Office Directors (July 10, 1991) (on file with author) [hereinafter Reilly Memorandum of July 10, 1991].

56. Telephone Interview with Mark Chandler, Director of Indian Affairs, EPA Region 6C (Mar. 5, 1993). According to Chandler, his and other EPA offices have received notification that President Clinton intends to encourage and promote tribal self-determination. *Id.* It is interesting to note that while congressional and executive policies favor tribal sovereignty, judicial decisions are having the opposite effect. *See infra* cases and text accompanying notes 131-70.

57. 42 U.S.C. § 7601(d) (Supp. II 1990).

58. 42 U.S.C. § 7601(d)(2)(A) (Supp. II 1990). The tribe must be federally recognized. SENATE REPORT, *supra* note 10, at 78-79.

59. 42 U.S.C. § 7601(d)(2)(B), (C) (Supp. II 1990).

60. *Id.* § 7602(r). This section defines "Indian tribe" as "any Indian tribe, band, nation or other organized group or community, including any Alaska Native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *Id.*

61. Telephone Interview with Mark Chandler, Director of Indian Affairs, EPA Region 6C (Nov. 18, 1991) [hereinafter Chandler Interview of Nov. 18, 1991].

62. *Id.*

63. *Id.* This comment does not explicate in detail projected technological requirements. Such requirements would inherently be limited by and dependent upon economic capabilities and further adapted to a particular operator's business and its polluting activities.

eligible to obtain regulatory authority, along with the obligation of enforcing environmental regulations. However, the grant of environmental regulatory and enforcement authority is further subject to the EPA Administrator's discretion.<sup>64</sup>

One reason for requiring a tribe to exhibit economic capability is that the ability to compensate personnel to operate, maintain, and enforce environmental regulations better ensures that the objectives of environmental laws — protecting and enhancing human health and environmental integrity — will be achieved. If the EPA patterns tribal "capability" after criteria that states must incorporate in SIPs, the "capability" threshold would require a demonstrated ability that tribes have adequate funding, personnel, and authority under tribal laws to carry out an implementation plan.<sup>65</sup>

To supplement the "adequate funding" prerequisite, tribes must request "set aside" funds from the EPA just as they must request funds from the Justice Department for tribal police.<sup>66</sup> The 1990 Amendments authorize the EPA to provide tribes grant and contract assistance.<sup>67</sup> Because "set asides" are not granted on an annual basis to every tribe, and because there are more tribes than there are adequate "set aside" funds, preference would probably be given to a tribe that has already demonstrated its economic ability.<sup>68</sup>

Tribes lacking sufficient tribal or federal funds to develop an economic infrastructure might require potential project developers to fund various anticipated TIP costs, which could include costs associated with developing of an air quality code for owners and operators, air quality regulations, construction and operating permits (especially if a new facility is involved). To further facilitate development of an

64. 42 U.S.C. § 7601 (Supp. II 1990).

65. 42 U.S.C. § 7410(a)(2)(E) (1988 & Supp. II 1990). The Act provides that each SIP shall

require the owner or operator of each major stationary source to pay to the permitting authority [the Tribe in this instance] . . . a fee sufficient to cover . . . (i) the reasonable costs of reviewing and acting upon any application for such a permit, and . . . (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other cost associated with any enforcement action . . .).

*Id.* § 7410(a)(2)(L).

66. Chandler Interview of Nov. 18, 1991, *supra* note 61.

67. 42 U.S.C. § 7601(d)(2)(C)(5) (Supp. II 1990).

68. Realizing that tribes are twenty years junior to state environmental programs and that the implementation of most state programs were supplemented with federal funds, Congress passed the Indian Environmental Assistance Program Act of 1992. The Act aims to help tribes formulate and execute environmental programs on tribal lands. *See* Indian Environmental General Assistance Program Act of 1992, Pub. L. No. 102-497, 106 Stat. 3258 (to be codified at 42 U.S.C. § 4368(b)). *See infra* text accompanying notes 86-87.

economic infrastructure, tribes might assess fees for reviewing permit applications, including costs for allowing a tribe to hire its own environmental expert(s) and legal counsel. A permit application might require that a proposed budget and payroll be included and a guarantee that a percentage of jobs be held by tribal members. Tribes might require that potential project developers be willing to help establish technical education programs encouraging tribal members to pursue degrees in the fields of engineering, math, and science, in an attempt to mitigate tribal reliance on outside technical support.<sup>69</sup>

Whatever means are chosen, tribes must look to regulations promulgated by the EPA Administrator that specify conditions in which it is appropriate to treat Indian tribes as states for regulatory purposes.<sup>70</sup> Congress directed the EPA to publish these regulations by May 15, 1992, eighteen months after the 1990 Amendments.<sup>71</sup> The EPA is presently working on these. The proposed regulations will, in effect, be the mechanics of the Act as they will provide guidance to the tribes in the formulation of their environmental programs.

### C. *Economic Incentive Programs*

On February 23, 1993, the EPA published proposed rules for economic incentive programs (EIPs) for mobile and stationary sources in nonattainment<sup>72</sup> areas.<sup>73</sup> The EIP rules are aimed at assisting states and tribal governments in meeting air quality management goals.<sup>74</sup>

The proposed programs allow for flexible approaches in formulating less costly control strategies which include providing incentives for the development and implementation of innovative emissions reductions technology.<sup>75</sup> The rules for EIPs may be adopted by authorized governing bodies, "including States, local governments, and Indian governing bodies (henceforth State)."<sup>76</sup>

69. See *infra* text accompanying notes 86-87.

70. 42 U.S.C. § 7601(d)(2) (Supp. II 1990). The 1990 Amendments directed the EPA Administrator to promulgate regulations within 18 months of the November 15, 1990, effective date of the amendments.

71. Telephone Interview with Mark Chandler, Director of Indian Affairs, EPA Region 6C (Oct. 21, 1991).

72. Areas that have not demonstrated emission reductions sufficient to timely attain the primary NAAQSs.

73. 50 Fed. Reg. 11,110 (1993). The notice called for comment(s) regarding the proposed rules and posted a date for a public hearing.

74. The proposed programs allow for flexible approaches in formulating less costly control strategies which include providing incentives for the development and implementation of innovative emissions reductions technology.

75. *Id.*

76. *Id.* "Indian governing body" is defined as a "governing body of any tribe, band, or group of Indians subject to the jurisdiction of the U.S. and recognized by the U.S. as possessing power of self-government." *Id.* at 11,126.

These proposed regulations identify key provisions which must be included in the formulation of environmental programs.<sup>77</sup> Tribes must look to the EPA's specified criteria for guidance when formulating environmental programs.

### III. *Environmental Jurisdiction on Tribal Lands*

When the issue of controlling pollution on Indian land arises, tribal governments and individual states assert governing interests. Tribal governments insist they should determine the future quality of reservation environments while states claim their right to regulate environmental programs on reservations located in the state or at least the non-Indians who live or conduct business within reservation boundaries.<sup>78</sup> Both tribes and states claim a vital interest in ensuring that reservation pollution sources are regulated properly and managed; however, they differ on what means to employ in doing so.<sup>79</sup>

The former EPA Administrator, William K. Reilly, prepared and circulated a memorandum formalizing the EPA's role in strengthening tribal governments' management of environmental programs on reservations.<sup>80</sup> While the EPA recognizes that both tribes and states have an interest in controlling and regulating pollution sources on Indian lands, the EPA encourages tribal management of environmental programs on tribal lands.<sup>81</sup> The EPA situates itself in a position consistent with and complementary to the framework of federal Indian policy goals<sup>82</sup>

77. 50 Fed. Reg. 11,110 (1993). The following elements will generally be included in program designs: clearly defined purpose and goal(s), rationally related incentive mechanism to accomplish the goals, clearly defined scope identifying affected sources, and assurances that the program will not interfere with any other requirements of the CAA. *Id.*

78. Reilly Memorandum of July 10, 1991, *supra* note 55, at 1-2.

79. *Id.*

80. Memorandum from William K. Reilly, EPA Administrator, to Assistant Administrators, Associate Administrators, Regional Administrators, General Counsel and Inspector Counsel (Feb. 7, 1990) (on file with author).

81. *Id.* at 2.

82. The EPA's Indian policy is premised on tribal self-determination, as set forth by former Presidents Nixon, Reagan, and Bush, and now President Clinton, as federal policy. *See generally* EPA INDIAN POLICY, *supra* note 9. The referenced document sets forth the principles guiding the EPA in dealing with tribal governments and environmental management on Indian reservations. It provides, in pertinent part, that the EPA will do the following: work with tribal governments on a one-to-one ("government-to-government") basis recognizing tribal governments as the primary parties in establishing environmental policies, programs, and standards for reservations; affirmatively encourage and assist tribes in assuming regulatory and environmental program management responsibilities for reservation lands; consider tribal interests and concerns whenever EPA actions or decisions "may affect reservations environments"; and incorporate Indian policy goals into its planning and management activities, which include its budget and regulation development processes. *Id.*

and federal Indian law.<sup>83</sup> The EPA further maintains that “[t]ribal governments are the appropriate non-federal party for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace.”<sup>84</sup>

Consistent with Indian policy, the EPA’s 1991 appropriations provided then-Administrator William K. Reilly with authority “to make grants to ‘[f]ederally recognized Indian tribes’ . . . for the development of multimedia environmental programs.”<sup>85</sup> Federally recognized Indian tribes and consortia are eligible to receive multimedia assistance agreements.<sup>86</sup> The grants assist tribes in developing environmental program infrastructures, environmental codes, and the capacity to perform inspections, monitoring, planning, assessment, and corrective actions.<sup>87</sup>

### A. Tribal Authority

In the 1990 Amendments, Congress expressly recognized the role of tribal governments. Clearly, tribal governments may act lawfully under their police power to protect the health and welfare of the reservation population.<sup>88</sup> The authority to regulate pollution programs on tribal lands provides a means by which Indian tribes may exercise their own governmental powers and thus strengthen the fabric of tribal government.<sup>89</sup> This notion clearly corresponds with the federal Indian policy

83. Reilly Memorandum of July 10, 1991, *supra* note 55, at 3. In determining jurisdictional matters over reservation pollution sources, the EPA will apply applicable treaties, statutes, federal Indian law, and federal law as found in the U.S. Constitution. *Id.*

84. *Id.*

85. 42 U.S.C. § 7601(d) (Supp. II 1990); *see also* Kathy Biggs, *Multimedia Assistance Agreements for Indian Tribes*, U.S. EPA NATIVE AMERICAN NETWORK, Summer/Fall 1991, at 4. *See generally* 42 U.S.C. § 7601(d) (Supp. II 1990).

86. Indian Environmental General Assistance Program Act of 1992, Pub. L. No. 102-497, § 502, 106 Stat. 3258, 3259-60.

87. *Id.* The bill provides for tribes and tribal consortia through grants enabling tribes to plan, develop, and establish the capability to implement environmental programs on Indian lands. 106 Stat. at 3259. The EPA Administrator has been directed to promulgate the application procedures to receive the grants for tribal governments or intertribal consortium. *Id.*

88. Richard A. Du Bey et al., *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 ENVTL. L. REV. 449, 453 (1989). Congress expressly has recognized tribal governmental roles under three laws that EPA administers: (1) Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1235(k) (1988); (2) Federal Water Pollution Control Act, 33 U.S.C. § 1377(a) (1988) (commonly referred to as the Clean Water Act); and (3) Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9626 (1988).

89. Du Bey et al., *supra* note 88, at 453.

statement published by then-President Ronald Reagan on January 24, 1983.<sup>90</sup> The federal Indian policy statement supports: the primary role of tribal governments in matters affecting American Indian reservations, the EPA's general policy statements<sup>91</sup> recognizing the importance of tribal governments in matters affecting American Indian reservations, and Congress' express consent to EPA-administered management programs recognizing tribal governments as the independent authority for reservation affairs.

In most instances, inherent tribal sovereignty sufficiently supports tribal exercises of regulatory authority.<sup>92</sup> Sovereignty generally protects tribal self-government or the control mechanisms of internal relations.<sup>93</sup> For example, tribes retain inherent power to determine tribal membership, punish tribal offenders, and regulate domestic relations among members.<sup>94</sup> Regarding the activities of nonmembers who enter consensual relationships with a tribe or its members, through contracts, commercial dealings, leases, or other arrangements, tribes remain sovereign in deciding whether to regulate through taxation, licensing, or other means.<sup>95</sup> When the conduct of non-Indians on fee lands within a reservation "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of [a] tribe," the tribe retains inherent power to exercise civil authority over such conduct.<sup>96</sup> Only in

90. President's Indian Policy Statement, 19 WEEKLY COMP. PRES. DOC. 98 (Jan. 28, 1983). President Nixon, as early as 1970, promoted a policy of Indian self-determination. The policy recognized the unique relationship between the federal government and tribal governments, which further acknowledged the government's trust responsibility in enabling Indians to maintain their cultural, social, and political identities as they adopted systems to improve their social and economic well being. Indian Affairs: The President's Message to the Congress, 6 WEEKLY COMP. PRES. DOC. 894 (July 8, 1970).

91. EPA INDIAN POLICY, *supra* note 9. In 1980 the EPA already had developed an Indian policy that emphasized tribal self-determination and the need for tribal roles in environmental programs; however, the major thrust of support did not come until 1983. Du Bey, et al., *supra* note 88, at 451 n.1.

92. Du Bey et al., *supra* note 88, at 596.

93. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 409 (1989); *Montana v. United States*, 450 U.S. 544, 564 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980). Self-government has been described by the United States Supreme Court as the highest and best use of all among the arts of civilized life. According to Justice Matthews, self-government for Indians includes "the regulation by themselves of their own domestic affairs, [and] the maintenance of order and peace among their own members by the administration of their own laws and customs." *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883).

94. *Montana v. United States*, 450 U.S. at 565 (holding that a tribe has no authority to regulate hunting and fishing activities of non-tribal members on fee lands within the reservation).

95. *Id.*

96. *Id.* at 565-66.

circumstances where such sovereignty has been divested is specific delegation necessary.<sup>97</sup> Nothing, however, can prevent the federal government from granting or delegating its authority to native governments because the federal government derives its power from the United States Constitution, which states that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”<sup>98</sup>

### *B. Relations Between Tribal Governments and the EPA*

Congress amended the CAA in 1990 with the idea of supporting tribal self-government.<sup>99</sup> In doing so, Congress expressly delegated to tribal governments the administrative and enforcement power of regulating ambient air quality and standards on tribal lands.<sup>100</sup> However, this delegation of regulatory power to tribes is conditional. Tribes must satisfy specific requirements and jump through the proper administrative hoops before they will be granted tribes-as-states authority in regulating and enforcing the CAA upon their own lands.

A tribe first must seek an agency determination that it has a governing body carrying out substantial duties and powers, that the functions to be exercised by the tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation, and that it is reasonably “capable” of carrying out regulatory functions consistent with the CAA. The EPA Administrator’s finding of tribal “capability”<sup>101</sup> is the condition precedent for allowing a tribe to implement its air quality programs.

The overall policy of the EPA is to treat tribes as states whenever possible where tribes exercise their prerogative to develop and implement environmental programs. Active tribal participation in environmental protection programs will enable tribal members to develop technical and administrative expertise complementary to the current policy of tribal self-government.<sup>102</sup>

### *C. Tribal Role in the Protection and Regulation of the Reservation Environment*

Tribal programs provide tribes with the means to mitigate adverse environmental impacts associated with any proposed economic devel-

97. *Id.*

98. U.S. CONST. art. I., § 8, cl. 3.

99. SENATE REPORT, *supra* note 10, at 79.

100. *Id.*

101. *See* discussion *infra* part II(B).

102. Du Bey et al., *supra* note 88, at 471.

opment on tribal land.<sup>103</sup> Tribal programs would encourage economic development, while ensuring that a proposed project could be consistent with the tribal goal of maintaining a healthful local and global environment.<sup>104</sup> It is at the local level, the Indian reservation, where the most concerned and informed unitary management would take place, because local governing would be more responsive to individual tribal needs. Furthermore, governing at the tribal level is potentially more hospitable to unique tribal situations and solutions, and takes more fully into account tribal interests. It is the most logical level to situate management when determining the environmental needs of the tribal community. More informed tribal input into tribal air regulatory programs would better facilitate compliance with such programs and better carry out the intentions and purpose of the CAA.

#### *D. Determining Jurisdiction Over Pollution Sources Within the Exterior Boundaries of a Reservation*

Before determining which government — federal, tribal, or state — should enforce the laws within Indian country, these entities must delineate the scope of tribal jurisdiction. The EPA authorization of management over the reservation environment will be granted only where a tribal or state government can demonstrate adequate jurisdiction over pollution sources throughout the reservation.<sup>105</sup> While tribes may exercise the power to enforce tribal laws against tribal members,<sup>106</sup> it is uncertain whether this power extends to non-tribal members on Indian lands.

Many reservations exhibit mixed tribal member and non-tribal member residency and ownership patterns. Mixed ownership patterns on Indian lands is the result of inconsistent federal Indian policies, which called for the alienation of reservation lands.<sup>107</sup>

In 1887, Congress passed the General Allotment Act,<sup>108</sup> which resulted in non-Indian ownership of land within the reservation boundaries.

103. *Id.*

104. *Id.*

105. Reilly Memorandum of July 10, 1991, *supra* note 55, at 3.

106. *Ex parte* Crowe Dog, 109 U.S. 556, 568 (1883).

107. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 127-38, 471-99, 612-21 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN]. The types of land ownership within reservations include: land held in trust by the federal government for the tribe or individual tribal member; land owned in fee by a tribe or individual tribal member; and, land owned in fee by a non-tribal member which includes non-Indians. Mickale Carter, *Regulatory Jurisdiction on Indian Reservations in Montana*, 5 PUB. LAND L. REV. 147, 155 (1984).

108. General Allotment Act of 1887, ch. 119, § 1162, 24 Stat. 388, 389-91 (codified as amended at 25 U.S.C. § 331 (1988 & Supp. II 1990)) (also known as the Dawes Act).



Pursuant to the Act, the government divided land within reservation boundaries into small plots; ownership was allotted to individual tribal members. After twenty-five years, fee simple title vested in the individual tribal member.<sup>109</sup> As a result of this policy, the land Indians lost or sold was no longer held under trust status.<sup>110</sup> The Act reflected the federal government's policy of eliminating and assimilating tribal lands. The Act was intended to assimilate Indians into "civilization" and consequently destroy tribal communities. The result of this policy was a decline in the total amount of Indian land ownership from 138 million acres in 1887 to 48 million acres in 1934.<sup>111</sup>

The passage in 1934 of the Indian Reorganization Act<sup>112</sup> ended the policy of allotment and placed all of the unsold surplus land in trust for the benefit of the tribe.<sup>113</sup> The Act extended trust status indefinitely to trust lands within the reservation.<sup>114</sup>

By the 1930s, allotment ceased, but the General Allotment Act's legacy remains. Reservations are now characterized by a "checkerboard" pattern of ownership. The federal government holds land in trust as a whole for the tribe or for an individual member. The land may also be owned by either tribal members or non-tribal members in "fee" title.<sup>115</sup>

Congress has plenary authority to regulate Indian lands. The Commerce Clause confers authority on Congress to regulate commerce with foreign nations, among the several states, and with the Indian tribes.<sup>116</sup> In 1953, Congress enacted Public Law 280,<sup>117</sup> which created a method allowing states to assume unilateral civil and criminal jurisdiction over activities on reservations. However, the 1968 Indian Civil Rights Act<sup>118</sup> curtailed this practice by allowing state assumption of jurisdiction only where a majority vote of enrolled tribal members consented to such adjudicatory jurisdiction.<sup>119</sup> Thus, states may assume concurrent jurisdiction over reservations only with tribal consent.

109. Carter, *supra* note 107, at 155.

110. *Id.*

111. *Id.* (citing COHEN, *supra* note 107, at 138).

112. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1988 & Supp. II. 1990)) (also known as the Wheeler-Howard Act).

113. Carter, *supra* note 107, at 154.

114. *Id.*

115. *Id.*

116. U.S. CONST. art. I, § 8, cl. 3.

117. 13 U.S.C. § 1162 (1988). In Pub. L. No. 280, Congress granted six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) civil and criminal jurisdiction over Indian reservations within the state's boundaries. Other states were given the option to acquire similar jurisdiction.

118. See 25 U.S.C. §§ 1301-1303 (1988).

119. Carter, *supra* note 107, at 157.

*E. Checkerboard Jurisdiction: Transboundary Problems Arising from Inconsistent Standards and Enforcement Activities*

*International Paper Co. v. Oullette*<sup>120</sup> demonstrated the United States Supreme Court's unwillingness to allow a state to extend unilaterally its environmental standards within the external boundaries of a neighboring state.<sup>121</sup> In *Oullette*, the defendant operated a pulp and paper mill on the New York side of Lake Champlain. The defendant's discharge pipe ran from the mill through the water toward Vermont, ending just before the state line that divides the lake. The plaintiffs filed suit seeking compensatory and punitive damages and an injunction requiring the defendant to restructure part of its water treatment system. Holding that Vermont nuisance law was preempted by the Clean Water Act (CWA),<sup>122</sup> the Supreme Court concluded that the CWA precludes a court from applying the law of an affected state, such as a downstream state, against an out-of-state source.<sup>123</sup> The Court reasoned that if such actions were permitted, liabilities would attach even though the source had complied fully with its state and federal permit obligations.<sup>124</sup> The Court further reasoned that such a decision would "allow Vermont to do indirectly what [it] could not do directly — regulate the conduct of out-of-state sources."<sup>125</sup>

When a comprehensive federal program such as the CAA expressly directs that tribes be treated as states, the Indian Commerce Clause serves as a barrier to state regulation of the reservation environment, just as the Commerce Clause disallows one state to extend its jurisdiction over a neighboring state.<sup>126</sup> The Indian Commerce Clause analysis, not the traditional interstate commerce clause analysis, is to be applied when state action seeks to limit tribal activity.<sup>127</sup> The Supreme Court has stated that the Indian Commerce Clause serves as a shield, protecting Indian tribes from state and local interference.<sup>128</sup> Through this power, the

120. 479 U.S. 481 (1987).

121. *Id.* at 489; see also *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990), *rev'd sub nom. Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992) (holding a state's downstream direct participation in deciding whether the EPA can grant a permit is limited; however, the EPA is afforded deference and may consider or require a point source (upstream state) to comply with a downstream state's water quality standards).

122. See Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. II 1990) (commonly referred to as the Clean Water Act). The CWA is a pollution control strategy which focuses on the pollution sources and attempts to determine the proper level of pollution those sources may discharge (effluent). This strategy applies to varying categories of pollution sources (i.e., paper mills, water treatment facilities, chemical plants).

123. *Ouelette*, 479 U.S. at 490-91.

124. *Id.* at 494.

125. *Id.*

126. Du Bey et al., *supra* note 88, at 466-67 n.81.

127. *Id.*

128. *Id.* (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153-54 (1982)).

federal government and its agencies can preempt state intrusion into federal and tribal environmental regulatory programs on Indian reservations.<sup>129</sup>

Native American nations assert regulatory authority over non-Indians both on Indian-owned land and on land patented in fee to non-tribal members in Indian country.<sup>130</sup> In *Montana v. United States*,<sup>131</sup> the Court held that a tribe may retain inherent powers to exercise civil jurisdiction over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the tribe's political integrity, economic security, or health and welfare.<sup>132</sup>

In *Montana*, the Crow Tribe claimed jurisdiction to regulate non-Indian fishing and hunting on non-Indian land. Ruling that the Tribe lacked this jurisdiction, the Court held that the Tribe had lost its regulatory interest because the Tribe had acquiesced to the State's regulation of such activities.<sup>133</sup> The Court stressed that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express congressional delegation."<sup>134</sup> The *Montana* Court did note that there are situations in which a tribe may regulate non-tribal members: if non-tribal members live on native owned land, tribal authority is exclusive of state action, at least where state interests are not implicated.<sup>135</sup> Additionally, a tribe may retain regulatory control over non-tribal members if their activity "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>136</sup>

In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,<sup>137</sup> the Court addressed the issue of "checkerboard" jurisdiction. The *Brendale* Court held that "unless an express congressional delegation of tribal power to the contrary" exists, tribes do not have regulatory power over "open" lands held in fee by non-Indians.<sup>138</sup>

In *Brendale*, the Tribe's zoning ordinance applied to all lands within the reservation owned by Indians or non-Indians, while the county's zoning ordinance applied to all lands within its borders except land held in trust. About eighty percent of the reservation land was held in trust by the United States for the Tribe or its individual members, and the

129. Du Bey et al., *supra* note 88, at 466-67 n.81.

130. Royster & Fausett, *supra* note 2, at 597.

131. 450 U.S. 544 (1981).

132. *Montana v. United States*, 450 U.S. at 566.

133. *Id.*

134. *Id.* at 564.

135. *Id.* at 566.

136. *Id.* at 565-66.

137. 492 U.S. 408 (1989).

138. *Id.* at 410.

remaining twenty percent was owned in fee by Indian or non-Indian owners.<sup>139</sup> Most of the fee land was located in three towns but the remainder was scattered throughout the rest of the reservation in a “checkerboard” pattern. The reservation has been divided into two parts: “open area,” which is land open to the general public, and “closed area,” which is land restricted or closed to the general public.

The Yakima County Planning Department issued zoning permits to Brendale and Wilkinson, owners of fee land in the closed and open areas respectively. The county permits authorized land development in ways not permitted by the Tribe’s ordinance. The Indian tribe sought declaratory relief and injunctions upholding its right to impose its zoning and land-use laws on fee land owned by non-Indians within the reservation.

The *Brendale* Court held the County was entitled to exercise zoning power over fee land within the reservation’s “open area,” provided that the zoning ordinance would have no “demonstrably serious impact” on the Tribe and would not threaten the Tribe’s political integrity, economic security, or health and welfare.<sup>140</sup> The Court reasoned that tribal sovereignty “extends only to what is necessary to protect tribal self-government and is divested to the extent it is inconsistent with a tribe’s dependent status” absent an “express congressional delegation of tribal power to the contrary.”<sup>141</sup>

Applying *Brendale* to the issue of whether tribes can enforce air quality programs over “checkerboard” land,<sup>142</sup> a court would be compelled to find that Congress’ express delegation to tribes under the CAA, coupled with relevant case law,<sup>143</sup> is rather persuasive in upholding a tribe’s assertion of civil-regulatory jurisdiction. Furthermore, allowing states to apply their regulatory laws to Indian reservations would interfere with the policies and goals underlying federal laws relating to Indians along with presidential and the EPA policies. It would allow states to do indirectly what they cannot do directly — regulate and impede tribal sovereignty.

#### F. *Diminishing Emphasis on Tribal Sovereignty*

Historian D’Arcy McNickle has summed up this sovereignty and regulatory morass:

139. *Id.* at 415. This percentage is a breakdown of the approximately 1.3 million acres of reservation land.

140. *Id.* at 409-10. Almost one-half of the land in the “open area” was fee land. *Id.* at 415.

141. *Brendale*, 492 U.S. at 409.

142. This term encompasses reservation land owned in fee by Indians or non-Indians.

143. See cases discussed in text accompanying *infra* notes 149-76.

This is not an Indian problem, as common reference would like to have it, but a white man's problem. The Indians knew what they wanted, which was to be left alone within the boundaries of their ancestral lands. The white man could not allow that, since he wanted the land for himself. This left him with the burden of discovering ways in which the taking of Indian land could be defended as an altruistic act. The burden has remained with him.<sup>144</sup>

Although tribal governments may obtain regulatory authority of the CAA under the *Brendale* requirements and the EPA's expert findings,<sup>145</sup> the *Brendale* decision conflicts with prior Court decisions upholding tribal sovereignty. The *Brendale* decision, in effect, "guarantee[s] that adjoining reservation lands [will] be subject to inconsistent and potentially incompatible zoning policies, and for all practical purposes [will] strip tribes of the power to protect the integrity of trust lands over which they enjoy unquestioned and exclusive authority."<sup>146</sup>

This decision not only conflicts with many of the Court's precedents and 150 years of federal policy, but it also undermines the federal government's commitment to the promotion of tribal autonomy.<sup>147</sup> The *Brendale* holding, which allowed a state county to impose its zoning ordinance on fee land owned by non-Indians within the reservation, has a chilling effect on true tribal self-government; its imposition severs the "self" from the "government." The *Brendale* holding exemplifies the current judicial trend toward decreasing emphasis on tribal self-government in favor of state expansionary interests which invade tribal sovereignty.<sup>148</sup>

In the 1832 case of *Worcester v. Georgia*,<sup>149</sup> the Supreme Court held that Indian nations are considered "distinct independent political communities" and as such the exercise of state jurisdiction on tribal land is barred.<sup>150</sup> However, this doctrine has been modified by congressional

144. D'ARCY McNICKLE, *THEY CAME HERE FIRST: THE EPIC OF THE AMERICAN INDIAN* 279-80 (1975).

145. See Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (1991) (to be codified at 40 C.F.R. § 131). This is part of the preamble to the Indian Water Quality Standards rule, setting forth the line of legal reasoning that the EPA will follow when it is required to evaluate a tribe's assertion of civil regulatory jurisdiction over fee lands within reservation boundaries.

146. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 447 (1989).

147. *Id.* at 447, 461 (Blackmun, J., dissenting).

148. See *supra* note 94 and *infra* note 151.

149. 31 U.S. (6 Pet.) 515 (1832).

150. *Id.* at 559.

enactments such as Public Law 280 and by court cases which carve out exceptions to the "absolute bar" to state jurisdiction.<sup>151</sup>

One commentator has noted the "utter confusion" of the Supreme Court's recent notions of tribal sovereignty in that the Court has been inconsistent with regard to its "rules" shaping Indian law.<sup>152</sup> The Court began by ruling that Indian governments retain only those powers not voluntarily relinquished by Indian governments or expressly taken away by Congress and ended with the bold rulings that Indian governments are implicitly divested of all powers other than those necessary to control tribal internal relations or to protect tribal self-government. Even when exercising the remaining "powers," a tribe can exercise its sovereignty only when conduct threatens or has some direct effect on the political integrity, economic security, or health and welfare of the tribe.<sup>153</sup>

The Supreme Court's concept of how tribal sovereignty should be weighed in the preemption balancing process has been changing in ways that continue to abandon the notion of tribal sovereignty.<sup>154</sup> This trend threatens to undermine the current federal policy of establishing government-to-government relationships and encouraging tribal economic independence and self-government.

In *Montana v. United States*,<sup>155</sup> the Supreme Court set forth the principle that the "exercise of tribal power beyond what is necessary to protect tribal self-government" extends only to lands on which a tribe exercises "undisturbed use and occupation"; furthermore, it cannot apply to lands subsequently alienated and held in fee by non-Indians pursuant to the allotment acts.<sup>156</sup> Thus, tribal members retain only those

151. See, e.g., *United States v. Anderson*, 736 F.2d 1358, 1366 (9th Cir. 1984) (holding that state may regulate surplus water use by non-tribal members on reservation); *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1138 (8th Cir.), cert. denied, 459 U.S. 1070 (1982) (holding that state may enforce fish and game laws against tribal members on reservation). But see *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982) (holding that tribal building, health, and safety regulations apply to non-tribal member owners of grocery stores within the reservations because of consensual commercial relations and because conduct threatened tribal health).

152. Curtis G. Berkey, *Recent Supreme Court Decisions Bring New Confusion to the Law of Indian Sovereignty*, in *RETHINKING INDIAN LAW* 77, 79 (Nat'l Lawyers Guild Comm. on Native Am. Struggles ed., 1982) (stating that recent judicial decisions on Native American sovereignty represent an abandonment of principled decision making).

153. *Id.*

154. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.8 (1973). The Court noted that modern cases "tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." *Id.* at 172; see also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334, 341-43 (1983) (holding that state jurisdiction is preempted if it interferes with federal and tribal interests "unless the state interests at stake are sufficient to justify" it).

155. 450 U.S. 544 (1981) (holding that tribe has no authority to regulate hunting and fishing activities of non-Indians on fee lands within the reservation).

156. *Id.* at 557-64.

powers of self-government that involve relations among tribal members.<sup>157</sup> The *Montana* Court noted that situations may arise where a tribe may regulate non-tribal members, but those exceptions have been limited by subsequent decisions.<sup>158</sup> The Court stated that a tribe may regulate non-tribal members who enter commercial consensual relations with a tribe.<sup>159</sup> In addition, a tribe may retain inherent sovereignty over non-tribal members if their activity “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>160</sup>

In *Rice v. Rehner*,<sup>161</sup> the Supreme Court further curtailed the concept of tribal sovereignty. In *Rice*, the Supreme Court focused the preemption inquiry on the “historical traditions” of tribal sovereignty in the particular area to be regulated.<sup>162</sup> The Court decided that the preemption analysis may be accorded less weight to the “backdrop” of tribal sovereignty if a court finds a governing activity of a tribe to be a nontraditional tribal activity or if a court determines that the “balance of state, federal, and tribal interests so requires.”<sup>163</sup>

*Rice* involved the application of state liquor laws to Indian reservations to control both tribal and non-tribal members. The petitioner contended that the freedom to regulate liquor was “important to Indian self-governance”<sup>164</sup> and that liquor and its regulation afforded the “internal and social relations of tribal life.”<sup>165</sup> The Court afforded “little if any weight to any asserted interest in tribal sovereignty” because the Court found no history of tribal control in the licensing and distribution of alcoholic beverages<sup>166</sup> and because the on-reservation liquor sales would have substantial “spillover” effects on the state regulatory program outside the reservation.<sup>167</sup>

As described above, tribal sovereignty no longer inherently bars state jurisdiction over tribal activity. Under the Supreme Court’s recent de-

157. *Id.* at 565.

158. *See, e.g.,* *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129 (8th Cir.), *cert. denied*, 459 U.S. 1070 (1982) (holding that state may enforce fish and game laws against tribal members on reservation); *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) (holding that state may regulate surplus of water use by non-tribal members on reservation).

159. *Montana v. United States*, 450 U.S. at 565.

160. *Id.* at 565-66; *see also* *United States v. Anderson*, 736 F.2d 1358, 1366 (9th Cir. 1984) (holding that state may regulate surplus water use by non-Native Americans on reservation).

161. 463 U.S. 713 (1983).

162. *Id.* at 719-20.

163. *Id.* (citations omitted).

164. *Id.* at 721.

165. *Id.* (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

166. *Rice v. Rehner*, 463 U.S. 713, 720-25 (1983).

167. *Id.* at 724.

decisions, absent clear congressional intent, a court must examine and balance federal, state, and tribal interests to determine whether the "exercise of state authority would violate federal law."<sup>168</sup> When the issue of controlling pollution on tribal lands arises, a state may argue that its ability to coordinate a successful and comprehensive ambient air quality plan depends at least in part on state control of all emission activity within its borders. A state would want to exercise jurisdiction over Native American lands for two reasons: (1) to avoid the bifurcated patchwork system that would otherwise result if the EPA retained control over these lands and (2) to maintain a consistently high level of regulation throughout its borders. States might fear that there would be an incentive for polluters to locate on reservations if they could avoid a state's more stringent standards. This is especially true because tribal land is often isolated and meeting rigorous environmental standards in populated localities is becoming more difficult.

A state could also argue that on-reservation environmental regulations would have substantial "spillover" effects on a state's regulatory program. However, a state "spillover" argument should fail because the legislative history of the CAA provides that an Indian tribe may not assume primary enforcement responsibility for a program under the CAA in a manner less protective of public health than similar state programs.<sup>169</sup> Therefore, the courts should be compelled to find that state interests cannot tip the scale in favor of state regulation and against tribal sovereignty.

As for arguments regarding tribal traditions of regulating the environment, Native American cultures always have had a close and unique relationship with the physical and natural environment. As a result, the people, the oceans, the forests, Father Sky, and Mother Earth are integral components of Indian social, cultural, and spiritual life. Appreciation for the environment is a timeless Native American tradition. A close study of Native American traditions and their reverence for the environment will satisfy a *Rice* test.<sup>170</sup> Moreover, an essential means by which Native Americans will maintain the integrity of tribal lands and self-determination is through environmental regulation.

### *G. Preemption of State Regulatory Authority on Tribal Lands*

States generally lack jurisdiction over Indian lands absent either treaty language<sup>171</sup> granting jurisdiction to states or other consent by Congress.<sup>172</sup>

168. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-45 (1981).

169. SENATE REPORT, *supra* note 10, at 80.

170. See generally Francis E. Ackerman, *A Conflict Over Land*, 8 AM. INDIAN L. REV. 259 (1980) (discussing Native American concepts of land use and ownership and how such concepts are linked to social, cultural, and spiritual significance); Rennard Strickland, "The Ideal of Environment and the Ideal of the Indian," 10 J. AM. INDIAN EDUC. 8 (1970) (same).

171. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1963).

172. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). The



A major doctrine in Indian law is that state jurisdiction cannot be inferred over Indian lands; it must be granted specifically.<sup>173</sup>

"Indian country" encompasses more territory than the term "reservation," which generally refers to land reserved by treaty, statute, or executive order. "Indian country" encompasses land within reservations, dependent Indian communities within United States' borders, and all Indian allotments.<sup>174</sup>

In *United States v. John*,<sup>175</sup> the Court held that trust status created a "reservation" and that the test for determining Indian country status does not turn on whether the land is "trust land" or a "reservation"; rather, the test is whether the area has been "validly set apart for the use of Indians as such, under the superintendence of the Government."<sup>176</sup>

#### H. Concurrent Jurisdiction of the Tribal Environment

The EPA requires uniform minimum environmental standards throughout the United States. These minimum standards serve as the lowest level of environmental quality that tribes must attain or exceed. The current amendments require that a tribe's regulatory requirements match a neighboring state's pollution levels. There is nothing in the CAA that would prevent a tribe from having higher emission levels exceeding those of other tribes or states.

There seems to be growing arguments in support of concurrent jurisdiction on Indian lands.<sup>177</sup> Under its federal responsibility,<sup>178</sup> the EPA

172. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). The only federal statute that grants state regulatory authority over tribes was an act passed in 1947. This mandate gives the Oklahoma Corporation Commission regulatory control over oil and gas activities on the restricted lands of the "Five Civilized Tribes." Act of Aug. 4, 1947, Pub. L. No. 80-336, § 11, 61 Stat. 731, 734.

173. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

174. 18 U.S.C. § 1151 (1988). The term "Indian country" has been defined by Congress for purposes of federal crimes in 18 U.S.C. § 1151 (1988); it is also generally used in civil contexts. See *Decoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

175. 437 U.S. 634 (1978).

176. *Id.* at 648-49.

177. State-tribal cooperation has met with success in regulating pesticide application on reservations. See Leslie Allen, Note, *Who Should Control Hazardous Waste on Native American Lands? Looking Beyond* *Washington Department of Ecology v. EPA*, 14 *Ecology. L.Q.*, 69, 106 n.224 (1987).

178. "[T]he trust relationship is one of the primary cornerstones of Indian law." COHEN, *supra* note 107, at 221. See generally *id.* at 220-28. The concept was first enunciated in *Cherokee Nation v. Georgia*, 31 U.S. (6 Pet.) 515 (1832):

The condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence . . . They may, . . . perhaps, be denominated domestic dependent nations . . . They are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its

is required to foster tribal sovereignty, where possible, in implementations of environmental programs.<sup>179</sup> The states are under no such obligation. Although the EPA encourages joint state-tribal program administration, coerced concurrent jurisdiction, by its very nature, is unworkable. It has the practical effect of nullifying the efforts of both sovereigns where the two establish different permissible emission levels. If a state or tribe refused to negotiate or budge from their respective sovereign position, it is uncertain as to what remedies either could seek if each is shielded by sovereign immunity.

Such concurrent jurisdiction would provide the means to set competing public policies and goals on a collision course should the standards be adverse to each other. Creation of concurrent jurisdiction would provide only illusory justice for Indian governments. Deciding whether to enter into a concurrent jurisdiction agreement with a state is a choice that should be left to individual tribal governments. If tribes are forced to enter into such agreements the effect negates tribal self-governance and determination.

#### IV. *Applicability of EPA Policy in Oklahoma*

Oklahoma has more federally recognized tribes within its exterior borders than any other state in the United States. The agency charged with regulating air pollution for the State of Oklahoma, the Oklahoma Department of Health (DOH), has expressed its intent to regulate or continue regulating<sup>180</sup> environmental activities within the state's borders, including those on "Indian lands."<sup>181</sup>

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kindness and its power [and] appeal to it for relief to their wants . . . .

*Id.* at 516-17.

Several principles have evolved because of the American Indians' status as "wards of the nation." *United States v. Kagama*, 118 U.S. 375, 383 (1886). First, the plenary power of Congress over American Indian affairs must be exercised in accordance with the trust responsibility. That is, Congress must protect generally Native Americans' interests. Second, when administering Native American affairs, executive agencies also are subject to the trust responsibility and must act in accordance with strict fiduciary standards. Finally, the trust responsibility has given rise to canons of construction that treaties and statutes should be read, where possible, to protect American Indians' rights. As the Supreme Court stated, "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

179. See generally Reilly Memorandum of July 10, 1991, *supra* note 55; EPA INDIAN Policy, *supra* note 9.

180. Telephone Interview with Barbara Rausch, Counsel for Okla. Dep't of Health (Nov. 6, 1991) [hereinafter Rausch Interview]. This assumption is based partly on the Cherokee Nation's acquiring a permit from DOH to operate a sanitary landfill.

181. Memorandum from George R. Alexander, Jr., EPA Regional Counsel, EPA Region 6C, to Robert E. Layton, Jr., EPA P.E. Regional Administrator, EPA Region 6A (Aug. 27, 1991) (on file with the author) [hereinafter EPA/Oklahoma Memorandum].

DOH asserts that there are no reservations in Oklahoma.<sup>182</sup> DOH premises its position on the fact that when Oklahoma became a state, it could only do so by terminating all reservations within its boundaries.<sup>183</sup> To buttress its argument, DOH reasons that, because the EPA used the term "reservation" rather than "Indian country" in its policy paper,<sup>184</sup> the EPA's policies regarding tribal governments do not apply in Oklahoma.<sup>185</sup>

According to DOH, state law applies to all lands within its borders, including tribal lands, because there are no reservations.<sup>186</sup> If reservations do exist in Oklahoma, DOH contends that tribal governments could not assert regulatory authority over environmental programs because regulating the environment is not a traditional tribal function. Furthermore, if tribes were granted regulatory power, their environmental plans would have "spillover" effects on the state's environmental programs outside of the tribal lands.<sup>187</sup>

#### A. Oklahoma "Reservations" v. Oklahoma "Indian Country"

Whether there are reservations in Oklahoma and general doctrines of Indian law comprise the legal framework to this matter. The EPA asserts that, absent treaty language or congressional mandate, states generally lack jurisdiction over Indian lands.<sup>188</sup> Furthermore, the EPA cannot abdicate its responsibility to states to administer federal environmental statutes in Indian country absent congressional mandate.<sup>189</sup> There is no congressional mandate or treaty language which DOH can cite granting Oklahoma jurisdiction over tribal land<sup>190</sup> except a 1947 statute, which gives the Oklahoma Corporation Commission regulatory authority over oil and gas activities on the restricted lands of the Five Civilized Tribes.<sup>191</sup> Therefore, the EPA must administer its laws in Indian country.<sup>192</sup>

182. Rausch Interview, *supra* note 180. It is disputed whether the Osage Indians' mineral rights constitute the last vestige of a "reservation" in Oklahoma.

183. Rausch Interview, *supra* note 180.

184. EPA INDIAN POLICY, *supra* note 9. See *supra* note 82.

185. EPA/Oklahoma Memorandum, *supra* note 181, at 3.

186. Rausch Interview, *supra* note 180.

187. *Id.*

188. EPA/Oklahoma Memorandum, *supra* note 181, at 1 (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 562-63 (1832); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *COHEN*, *supra* note 107, at 259-79).

189. EPA/Oklahoma Memorandum, *supra* note 181, at 4.

190. This does not include any agreements that tribes may have with DOH or Oklahoma relinquishing tribal jurisdiction.

191. Act of Aug. 4, 1947, Pub. L. No. 80-336, § 11, 61 Stat. 731, 735.

192. *Washington Dep't of Ecology v. United States*, 752 F.2d 1465 (9th Cir. 1985); *Phillips Petroleum Co. v. EPA*, 803 F.2d 545 (10th Cir. 1986) (holding that underground injection control program of the Safe Drinking Water Act applies to Indian country); *Blue Legs v. EPA*, 668 F. Supp. 1329 (D.S.D. 1987) (holding that the Resource and Recovery Act applies to Indian country).

The term “Indian country” simply refers to those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest with the federal and tribal governments.<sup>193</sup> In *Ahboah v. Housing Authority of the Kiowa Tribe*,<sup>194</sup> the Oklahoma Supreme Court recognized the existence of Indian country in the state.<sup>195</sup> In *Ahboah*, the Housing Authority of the Kiowa Tribe, a state agency, brought entry and detainer actions against Indian lessees occupying trust allotments. The pivotal issue involved who had regulatory jurisdiction — the state or the tribe. In reaching its decision, the Oklahoma Supreme Court recognized the existence of Indian country, stating:

The touchstone for allocating authority among the various governments has been the concept of “Indian country,” a legal term delineating the territorial boundaries of federal, state and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian country have been matters of federal and tribal concern. Outside Indian country, state jurisdiction has obtained.<sup>196</sup>

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,<sup>197</sup> the Supreme Court concluded that property held by the federal government in trust for the benefit of Indians is “validly set apart” and thus qualifies as a reservation for tribal immunity purposes.<sup>198</sup> In this case, the Tribe owned and operated a convenience store on land held in trust for the Tribe by the federal government. The store never collected Oklahoma’s cigarette tax on sales of cigarettes at the store. Oklahoma assessed the Tribe and demanded back taxes for cigarette sales. The State contended that the land on which cigarettes were sold did not fall under the Tribe’s sovereign immunity because the land was not a formally designated reservation.

In reaching its decision, the Court in *Potawatomi* reiterated the holding of *United States v. John*,<sup>199</sup> which stated that the test for determining Indian country status does not turn on whether the land is “trust land” or a “reservation”; rather, the test is whether the area has been “validly set apart for the use of Indians as such, under the superintendence of the Government.”<sup>200</sup> The Court in *Potawatomi* reaffirmed the doctrine of sovereign immunity, but it did not deprive the

193. *Indian Country U.S.A. v. Oklahoma Tax Comm’n*, 829 F.2d 967, 973 (10th Cir. 1987).

194. 660 P.2d 625 (Okla. 1983).

195. *Id.* at 631.

196. *Id.* at 627.

197. 111 S. Ct. 905 (1991).

198. *Id.* at 910.

199. 437 U.S. 634 (1978).

200. *Id.* at 648-49.

State of a remedy in connection with its right to tax the Tribes's sales of goods to non-tribal members.<sup>201</sup>

In Oklahoma, as well as other states with tribal nations situated within state boundaries,<sup>202</sup> tribal authority should govern the CAA on tribal lands held by both tribal and non-tribal members. This is the most logical legal conclusion because of the following: (1) the tests the Supreme Court has put forth regarding "reservations" and "Indian country;" (2) Congress' express delegation of power to Indian tribes to administer and enforce the CAA on Indian lands; and (3) the tribes' argument that states lack jurisdiction over environmental matters because environmental regulation will affect the health and welfare of tribal members. Any attempt by DOH to strip regulatory power from the Indian tribes will only result in a protracted and burdensome court battle at both tribes' and taxpayers' expense.

### V. Conclusion

Pollution neither knows nor respects sovereign borders. As a result, its cumulative impact affects not only locally situated nations, but the global community as well. Both tribes and states realize that environmental integrity of entire ecosystems depends upon effective control and regulation of pollution sources. Ecosystems cannot be regulated adequately in political isolation.

The Clean Air Act Amendments of 1990 demonstrate Congress' intent of promoting Indian self-government, which encompasses the goal of encouraging tribal self-sufficiency and economic development. The amendments authorize the EPA to treat Indian tribes as states and to provide tribes grant and contract assistance for federal air protection programs.<sup>203</sup> Before a tribe may assume regulatory authority of air protection programs, it must be recognized federally and must demonstrate that it possesses the capability to carry out the functions of the Act which fall within the tribe's jurisdiction.

Tribes may submit implementation plans. Such plans are subject to the EPA Administrator's approval. Upon the approval and execution of a TIP, the plan will apply to all areas within the exterior boundaries

201. *Potawatomi*, 111 S. Ct. at 910. The Court suggested that the State may collect cigarette taxes from wholesalers by seizing unstamped cigarettes or by assessing wholesalers who supplied cigarettes to the stores. *Id.* at 912 (citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 161-62 (1980)).

202. One might apprise the geographic situation as states situated around tribal nations.

203. 42 U.S.C. § 7601(d) (Supp. II 1990); *see also* Indian Environmental General Assistance Program Act of 1992, Pub. L. No. 102-497, 106 Stat. 3258 (to be codified at 42 U.S.C. § 4368(b)).

of a tribe's reservation,<sup>204</sup> "notwithstanding the issuance of any patent," unless the plan itself provides otherwise.<sup>205</sup>

The EPA was charged with publishing its proposed rules as to how it would treat and govern air protection programs set up by tribes. The EPA missed its May 15, 1992, deadline, but the notice inviting public comments regarding the EPA's proposed economic incentive programs (EIPs) has been published in the *Federal Register*.<sup>206</sup> Tribes must be alerted to the EPA's proposed rules, as the rules identify key provisions which must be included in the formulation of environmental programs.

Both tribal and state governments have vested interests in preventing undesirable environmental consequences on tribal lands. Native Americans realized the importance of interdependence when they initially entered into relations with this country's forefathers.<sup>207</sup> Native Americans relied to their detriment upon the agreements and treaties that were made and subsequently breached when those agreements became inconvenient to "civilization." A commentator notes:

First, we essentially said to the Indians, "Don't attack us and in return you may occupy a reservation with federal protection." Then we said, "We'll protect you only if you move from the land we let you occupy." Subsequent to removal we said, "If you want federal protection and assistance, you've got to be like us." Finally, we declared to the Indian, "You don't legally exist anymore."<sup>208</sup>

The manipulative abuses arising from that initial extension of trust are many.

204. Recall that the meaning of the term "reservation," determined in light of statutory law and with reference to case law, is considered to be land formally set apart for the use of Indians, even if the land has not been formally designated as a "reservation." See *supra* text accompanying notes 171-76.

205. 42 U.S.C. § 7410(o) (Supp. II 1990).

206. 50 Fed. Reg. 11,110 (1993). Written comments on the EPA's proposed action must be received on or before April 26, 1993. If there is no request for a public hearing, one will not be held. On or before March 12, 1993, the EPA should have received requests to present oral testimony. *Id.*

207. Much has been written about the unfair bargaining positions of Indian tribes. See, e.g., FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 186-87* (1962); Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth."* — *How Long is That?*, 63 CAL. L. REV. 601, 609 (1975). The Supreme Court recognized that "[t]he Indian nations did not seek out the United States and agree upon an exchange of lands in an arm's length transaction. Rather treaties were imposed upon them and they had no choice but to consent." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970).

208. Michael M. Pacheco, Note, *Finality in Indian Tribunal Decisions: Respecting Our Brothers' Vision*, 16 AM. INDIAN L. REV. 119, 165 (1991).

Native Americans view environmental degradation as another form of destruction on the already dwindling tribal land base. Given the illogical and inconsistent federal policies and court decisions, it is no wonder that tribes regard environmental regulation as an act of tribal self-preservation that cannot be entrusted to other governmental entities.

Self-determination is the rationale for recognizing tribes as the primary entity in determining the future course of tribal and reservation affairs. The 1990 Amendments provide a mechanism through which tribes may continue their social legacy of preserving a part of the tribal land base — the air. Tribal self-governance of the reservation environment takes into account and is potentially more hospitable to unique tribal situations and solutions. If that right is taken away, the social legacy which Native Americans have fought to preserve for hundreds of years will mean nothing to future generations.