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Fashioning a Comprehensive Environmental Review Code for Tribal Governments: Institutions and Processes

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FASHIONING A COMPREHENSIVE ENVIRONMENTAL REVIEW CODE FOR TRIBAL GOVERNMENTS: INSTITUTIONS AND PROCESSES

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Introduction

This article explores the idea of using tribal sovereignty to establish a comprehensive environmental review process for development proposals that would affect the environment of Indian country. In the context of actions proposed by federal government agencies, the process established under the National Environmental Policy Act (NEPA) has become the basic model for comprehensive environmental review. NEPA requires the responsible federal agency to prepare an environmental impact statement (EIS) prior to taking any "major Federal action significantly affecting the quality of the human environment."[1] This requirement has been implemented through regulations issued by the President's Council on Environmental Quality (CEQ).[2] Among other things, the CEQ regulations establish a screening process to help federal agencies determine which proposed actions require an EIS and which require a less detailed environmental assessment (EA).[3] Quite a number of states

1. 42 U.S.C. § 4332(2)(C) (1994).
2. 40 C.F.R. pts. 1500–08 (1996).
3. 40 C.F.R. § 1507.3 (1996). *See generally* DANIEL R. MANDELKER, NEPA LAW AND

have established review procedures similar to the federal NEPA process under state laws that are commonly known as "little NEPAs" or "mini-NEPAs."[4]

The enactment and implementation of tribal "mini-NEPAs" could yield a variety of benefits for tribal governments and for the people who live and do business in Indian country. This article examines a number of issues raised by the development and implementation of a tribal mini-NEPA. (Other generic terms could be used to describe a tribal mini-NEPA. For example, a commonly used term for a state mini-NEPA is "state environmental policy act" or "SEPA." Applying this term to a tribal mini-NEPA yields "tribal environmental policy act" or "TEPA."[5]). In 1993, one of the authors drafted a model tribal mini-NEPA, which is captioned a "Model Tribal Environmental Review Code."[6] At several points the article refers to the text of that draft, although the article also considers other approaches. With more than 500 federally recognized Indian tribes (including Alaska Native villages), one model surely cannot serve the needs of all. Moreover, many tribes already have established some kind of environmental review process, although, to the authors' knowledge, no one has attempted to compile and analyze tribal laws on this subject (which would be a challenging task). This article seeks to raise the visibility of the basic concept of using tribal law to establish NEPA-like review processes and to highlight some of the issues that should be considered by tribal officials and attorneys who are considering the enactment of such a law.

I. Reasons for Enacting a Tribal Mini-NEPA

The enactment of a tribal mini-NEPA may serve a variety of purposes. Before enacting such legislation though, tribal officials should have a clear understanding of just what they hope to accomplish. They should try to reach consensus among themselves on which legislative purposes are most important

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LITIGATION § 2.07 (2d ed., 1992 & annual updates).

4. *See generally* MANDELKER, *supra* note 3, § 12.01.

5. One of the authors is involved in a project being carried out by the Tulalip Tribes of Washington, with financial assistance from the Environmental Protection Agency, to develop guidance documents for tribes considering the enactment of a tribal mini-NEPA. The Tulalip Tribes have chosen to use the term "TEPA," calling its project the Model TEPA Project. This project is a collaborative effort that aims to provide tribes throughout the United States (including Alaska) with guidance in developing and adopting tribal environmental review codes. The Project also addresses tribal participation in NEPA. The first phase of the Project (scoping and assessment) is underway, with the entire Project scheduled for completion in the fall of 1998. The Project Coordinator is Gillian Mittelstaedt, who can be contacted through the Tulalip Tribes at (206) 338-2151.

6. Dean B. Suagee, *A Model Tribal Environmental Code* (visited Mar. 27, 1997) <http://www.law.und.nodak.edu/telp/modelcode.html> (presented at the National Tribal Environmental Council First Annual Conference, Albuquerque, N.M., Nov. 14–18, 1993) [hereinafter *Model Tribal Code*].

and which are secondary. If they do this, their understanding of legislative purposes can inform their choices among options. This section of the article discusses some of the objectives that might be accomplished through the enactment of a tribal mini-NEPA.

A. Controlling "Development" Within the Reservation

By establishing an environmental review process, a tribal government could assert control over a broad range of activities that may cause adverse environmental and cultural impacts within its reservation or other lands under its jurisdiction. The environmental review of projects could become a proactive exploration of alternative ways of achieving the objectives of a proposal rather than a reactive exercise in trying to control the environmental, socioeconomic, and cultural damage that a project would cause. The most appropriate mix of mechanisms to exercise such control will vary from tribe to tribe and should reflect the tribe's cultural values and practices. A key factor in determining the mix of mechanisms is the extent to which a tribe has managed to retain (or regain) ownership of its lands. In light of recent United States Supreme Court decisions, a tribe's environmental regulatory authority is most firmly grounded when it seeks to regulate activities on lands that are owned either by the tribe or tribal members in trust (or subject to a federal restraint on alienation). For tribes that retain all or most of their reservation lands in tribal trust status, a formal process may not be needed to control "development." Nevertheless, a NEPA-like review process may be useful particularly where the functions of tribal government are carried out by many different subdivisions, where tribal enterprises operate with relative autonomy, or where tribal members are regarded as being subject to few limits under tribal law in developing their possessory land holdings.

Tribal authority over the activities of nonmembers on lands within reservation boundaries but owned in fee by nonmembers is most firmly grounded in contexts in which Congress has delegated authority to tribes[7] or has otherwise recognized that retained inherent tribal sovereignty covers the kind of conduct to be regulated.[8] In the absence of delegation or affirmative

7. *E.g.*, United States v. Mazurie, 419 U.S. 544 (1975) (upholding delegation of authority from Congress to a tribe to control sale of alcoholic beverages on fee lands within reservation boundaries).

8. *E.g.*, 25 U.S.C. § 1301(2), (3), (4) (1994) (recognizing and affirming tribal criminal jurisdiction over all Indians, reversing Duro v. Reina, 495 U.S. 676 (1990)); *see* Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992); *see also* Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 182-84, 206-06 (1996) (discussing two statutes in which Congress has recognized tribal authority over all lands within reservation boundaries, including fee lands, the National Historic Preservation Act, 16 U.S.C. §§ 470 to 470x-6 (1994), and the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 to 3013 (1994)).

recognition, tribal authority may exist under either of the two prongs of the so-called *Montana* test: (1) where nonmembers "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; and (2) where "the conduct of non-Indians on fee lands . . . threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."[9] This article does not devote much attention to *Montana* and subsequent cases, which have been addressed in a substantial body of literature.[10] Rather, this article simply notes that the assertion and exercise of tribal authority over non-Indians on fee lands must be informed by an awareness of this body of law.

B. Coordinating Environmental Review Requirements

NEPA is but one federal environmental review requirement. There are numerous other federal environmental review and consultation requirements that are concerned with particular kinds of resources or aspects of the natural world. If an EIS is prepared for a proposed federal action, the CEQ regulations mandate that the EIS also should address compliance with any other federal environmental laws that apply to the proposed action.[11] Similarly, if an EA is required, the EA should at least identify any other federal requirements that would apply. Thus, if a federal action is required as part of a development in Indian country, the NEPA process can be used to identify any other federal laws, as well as tribal and state laws, that apply. How well NEPA works in achieving coordination depends on many things, including which federal agencies are involved and how effectively they carry out their NEPA responsibilities.

By enacting a tribal mini-NEPA, the tribal government can put a tribal agency in charge of coordinating the environmental review and consultation requirements established by various laws. Such a tribal little NEPA would serve as a comprehensive or blanket environmental review process. For the regulated public, the main benefit of such coordination is that requirements are identified early so that compliance (or avoidance through alternatives) can be factored into the schedule. The regulated public seeks what might be called "one-stop shopping" for permits and other clearances. Although this may be an elusive objective for a complex project subject to the regulatory authority of different agencies, a mini-NEPA can achieve coordination at least. A major benefit for the governmental entity exercising regulatory authority is that

9. Montana v. United States, 450 U.S. 544, 565-66 (1981).

10. *E.g.*, Joseph William Singer, *Sovereignty and Property*, 86 NW. U.L. REV. 1 (1991); Mary Beth West, *Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal Jurisdiction*, 17 AM. INDIAN L. REV. 71 (1992); N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivisim of the Supreme Court in Indian Law*, 84 CAL L. REV. 1573 (1996).

11. 40 C.F.R. § 1502.25(a) (1996).

regulated entities are less tempted to try to get away with noncompliance. Another benefit is that perceptions by the public that a tribal regulatory agency is doing an effective job may lead to broad-based public support for the agency and its mission.

C. Empowering the Affected Public

A NEPA-like review process could serve to empower the reservation populace, Indian and non-Indian, by providing a structure through which interested individuals and groups could become involved in tribal decision-making processes. A little NEPA can empower the regulated public — the people who seek to carry out development activities that the tribal government seeks to control — by setting up a process with clearly prescribed procedures and standards for decision making, a "transparent" set of rules to let persons in the regulated public know what they must do to get to a governmental decision point and to give such persons a reasonable basis for predicting the outcome of such decisions.

In these ways, the environmental review process can be more than just an assertion of tribal governmental authority — it can be a mechanism for making tribal government more accountable. The concept of sovereignty embodies not only power but also responsibility. For tribal governments, this means not only responsibility toward past, present, and future generations of tribal members, but also toward nonmembers, both Indian and non-Indian, who reside within reservation boundaries. Tribal sovereignty also may mean responsibility toward culturally important plant and animal populations and sacred places. Two key concepts in carrying out such responsibilities are due process and public participation: due process for persons whose property and liberty interests are affected by tribal agency decisions; and public participation in rulemaking and other policy development conducted by tribal agencies.[12]

D. Optimizing a Tribal Role in Federal Environmental Law

Most federal environmental laws enacted over the past quarter century forge a partnership between the federal government and the states. Under these federal statutes, states have substantial responsibilities and may take on additional "delegable" responsibilities if they so choose.[13] States assume the additional responsibilities to avoid direct control by the federal Environmental

12. *See* DEAN B. SUAGEE & JOHN P. LOWNDES, DUE PROCESS AND PUBLIC PARTICIPATION IN TRIBAL ENVIRONMENTAL PROGRAMS (presented at, and included in the course materials of, the Federal Bar Association 21st Annual Indian Law Conference, Albuquerque, New Mexico, Apr. 11-12, 1996). A somewhat expanded and updated version of this paper was presented at, and published in the proceedings of, Sovereignty Symposium X, Tulsa, Oklahoma, June 9-11, 1997.

13. *See generally* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995).

Protection Agency (EPA). Federal laws generally do not preempt state laws, but do establish an overall framework, along with some minimum requirements for state environmental protection programs. States may establish requirements that are more stringent, and they may enact laws to cover subjects not covered by the federal laws. Thus, citizens can take their environmental concerns to the federal or the state sovereign or both.

For the most part, federal environmental laws enacted in the 1970s included few specific references to Indian tribes or Indian lands. Congress did not demonstrate much awareness of, or concern for, reservation environments, and tribes generally had more pressing concerns. This was, after all, the early years of the self-determination era in federal Indian policy,[14] and many tribal governments were engaged in taking control of basic governmental programs like health care, education, and social services. In 1984, the EPA adopted a "Policy for the Administration of Environmental Programs on Indian Reservations,"[15] in which it recognized tribal governments as sovereign entities which are "the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations."[16] In recent years, Congress has amended many of the federal laws in ways that are generally consistent with the EPA's 1984 policy — in essence ratifying the EPA's policy. These laws now provide that tribes, if they choose, may assume roles similar to the roles performed by states.[17] In response to the mandates of these amended statutes, the EPA has issued numerous amendments to its regulations to establish procedures for tribes to be treated as states for a wide variety of purposes.

These changes in the federal laws present tribal governments with an historic opportunity and an enormous challenge. Obviously, tribes that

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14. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 180–206 (Rennard Strickland et al. eds., 1982) (discussing the self-determination era). The Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93–638, 88 Stat. 2206 (1975) (codified as amended at 25 U.S.C. §§ 13a, 450–450n, 455–458e (1994)), the statute establishing a framework for tribal governments taking over programs that would otherwise be administered by the Bureau of Indian Affairs or Indian Health Service, had not even been enacted when several of the major federal environmental statutes became law.

15. EPA, EPA Policy Statement for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984).

16. *Id.*

17. Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j–11(a)(1) (1994) (treating tribes as states for certain purposes); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, also known as Superfund), 42 U.S.C. § 9626 (1994) (treating tribes substantially the same as states for certain purposes); Clean Water Act (CWA), 33 U.S.C. § 1377(a) (1994) (treating tribes as states for certain purposes); Clean Air Act (CAA), 42 U.S.C. § 7601(d) (1994) (treating tribes as states for certain purposes). *See generally* David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Law and Regulations*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,579 (1993).

succeed in fashioning effective environmental regulatory programs will be better able to preserve the quality of their reservation environments for the benefit of present and future generations of tribal members and to protect and restore the natural environments that sustain tribal cultures. Perhaps as important in the context of American democracy, effective tribal programs will serve a broad range of public interests that extend well beyond reservation boundaries. Since important public interests are involved, it is not surprising that EPA regulations require tribes that are treated as states to provide meaningful opportunities for public involvement.[18]

But how should tribal governments go about building effective programs? The enactment of a tribal law that establishes a NEPA-like environmental review process can help tribal officials determine their environmental priorities. If a tribal mini-NEPA provides for a comprehensive or "blanket" environmental review requirement for proposed development activities on lands under tribal jurisdiction, and if the tribal process requires that all applicable federal, tribal and state requirements be met before clearance can be given under the tribal mini-NEPA, then tribal officials will have a reasonable degree of confidence that applicable requirements are being met for any given project. Tribal agency officials and staff will also gain experience with the practices of federal agencies in carrying out their regulatory programs. Such experience should be useful in deciding whether tribal interests would be better served by taking over delegable programs, by letting federal agencies continue to run them, or by entering into cooperative agreements with state agencies.

II. Options for Developing an Environmental Review Process

Once tribal officials and legal staff have decided to establish an environmental review process, several different approaches exist. The options include: (a) making the federal NEPA process serve tribal purposes; (b) developing a tribal little NEPA based on a state little NEPA; (c) developing a comprehensive land use regulatory program, perhaps based on a state statute; (d) using a model tribal code such as the Model Tribal Environmental Review Code,[19] adapting it for the particular circumstances of the tribe; and (e) establishing a review process that is less than comprehensive, a process that focuses on aspects of the environment that are particularly important to the tribe.

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18. *See* 40 C.F.R. § 25 (1996). In particular, 40 C.F.R. § 25.10 establishes minimal requirements for rule making by states, including tribes treated as states, although these requirements do not preempt the requirements of a state administrative procedure act, if one exists. *See generally* Suagee & Lowndes, *supra* note 12.

19. *Model Tribal Code*, *supra* note 6.

A. Making the Federal NEPA Serve Tribal Purposes

One approach to establish a blanket tribal environmental review process is to make the existing federal NEPA process work to serve tribal interests. Many kinds of activities that cause environmental impacts in Indian country involve some kind of federal agency action. If a federal action is a prerequisite for or an indispensable aspect of an activity that causes environmental impacts (such as federal permitting of a nonfederal entity), the responsible federal agency must comply with the review process established under NEPA.[20]

Since NEPA applies to a variety of actions in Indian country that cause environmental impacts, tribes can serve their interests in having an effective environmental review process by becoming actively involved in, and asserting control over, the federal NEPA process within their reservations.[21] Two key methods of ensuring involvement are to have tribal staff prepare and review NEPA documents and for tribal officials to wait for NEPA documents to be prepared and reviewed before making decisions on proposed actions. Another key step that tribes can take is to enact tribal laws that expressly require the preparation of an EA when any federal agency is considering a proposed action that may affect important tribal interests. For agencies within the Department of the Interior, including the Bureau of Indian Affairs (BIA), the Department's procedures for implementing the CEQ's NEPA regulations expressly require preparation of an EA prior to any proposed federal action that would violate a tribal law.[22] Thus, it would be quite simple to make Interior agencies, including the BIA, prepare EAs before they take or approve actions that may adversely affect important tribal interests by enacting a tribal law requiring an EA for certain kinds of actions, although, practically speaking, litigation may sometimes be necessary to force federal agencies to comply.

B. State Environmental Policy Acts

Fifteen states and the District of Columbia have enacted environmental policy acts modeled on NEPA.[23] Such state statutes are often called "little NEPAs" or "mini-NEPAs."[24] These statutes vary somewhat from state to

20. 42 U.S.C. §§ 4321–4347 (1994). *See generally* Dean B. Suagee, *The Application of the National Environmental Policy Act to "Development" in Indian Country*, 16 AM. INDIAN L. REV. 377 (1991). The Bureau of Indian Affairs recently revised its procedures for compliance with NEPA. Bureau of Indian Affairs, National Environmental Policy Act: Implementing Procedures (516 DM 6, Appendix 4), 61 Fed. Reg. 67,845 (Dec. 24, 1996).

21. *See* Suagee, *supra* note 20, at 426–27.

22. U.S. Dep't of the Interior, 516 Departmental Manual 2, app. 2, § 2.10; *see* Suagee, *supra* note 20, at 398 n.79.

23. *See generally* MANDELKER, *supra* note 3, § 12.01.

24. *See id.*

state but generally require state agencies, and in some states local government agencies as well, to prepare or oversee the preparation of environmental impacts statements on proposed actions that may significantly affect the environment. This article does not examine state little NEPAs in detail to see what kind of models they would make for tribes. This article notes, however, that state little NEPAs exist in a context of state environmental and land use regulatory laws, and in a context of governmental institutions that have been created through the state's sovereignty, and much of this context may not be very relevant to Indian country. On the other hand, if a tribe's reservation is located in a state that has a little NEPA and if the tribe and reservation residents do business with environmental consultants and with architectural-engineering firms that are familiar with the process created by the state's little NEPA, using the state statute as a model may be the best approach. This would seem to be particularly appropriate guidance where the tribe's main legislative purpose is to simplify and coordinate environmental review requirements and where many of the people who will be covered by the tribe's system are already familiar with the state's system. In deciding whether to use a state little NEPA as a model, tribal officials should consider, of course, whether people who have experience with the state little NEPA believe it to be an effective law.

C. State Land Use Control Law

Typically political subdivisions of states carry out land use regulation, such as zoning ordinances, pursuant to state enabling legislation. Many tribes have enacted zoning ordinances, but the Supreme Court's decision in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*[25] renders tribal authority to zone fee lands subject to challenge. Some states have taken a less common approach to land use control by enacting statewide or regional land use codes. One such state statute is Vermont's Act 250,[26] enacted in 1970 and one of the earliest statewide land use laws in the nation. Act 250 was enacted in response to "development" pressures on small communities that lacked planning and regulatory capabilities and is administered through a bottom-up process, open to citizen participation, that puts the decision-making power in the hands of the affected communities. A major concern of the Act is to allow citizens to make sure that proposed development fits the culture and character of the affected community. This article discusses certain aspects of Act 250.

25. 492 U.S. 408 (1989). For a critique of this decision, see Singer, *supra* note 10, at 6-7.

26. VT. STAT. ANN. tit. 10, §§ 6001-6108 (1993 & Supp. 1996). *See generally* RICHARD OLIVER BROOKS, TOWARD COMMUNITY SUSTAINABILITY: VERMONT'S ACT 250 (1996).

D. A Model Tribal Little NEPA

The Model Tribal Environmental Review Code is one approach to developing a mini-NEPA for tribes.[27] This model draws on the federal NEPA and on the Model Land Development Code,[28] which was published by the American Law Institute (ALI) in 1976. The ALI's Model Code was the culmination of a fifteen-year effort to remake state zoning and subdivision laws, which were regarded as flawed and outdated mechanisms for exercising governmental police power to control land use in the interests of public health, safety and welfare.[29] Although the ALI Model Code has not been widely adopted by the states to date, it represents a major improvement over traditional zoning and subdivision laws. Two key features of the ALI Model Code made it particularly useful as a model for fashioning a model tribal mini-NEPA: (1) the governmental institutions charged with carrying out the law; and (2) the permit process that the law uses as a mechanism to control development. Parts III and IV explore these two ideas.

E. A Review Process with Limited Scope

For a variety of reasons, a tribal legislature may not want to establish a comprehensive environmental review process. A tribe may not have enough money and staff to administer a blanket review process; tribal officials may be more concerned about some kinds of environmental impacts than others. For such reasons, a tribal legislature might consider enacting a review process with a more limited scope, focused on specific kinds of resources, such as water quality, wildlife habitat, or traditional cultural properties. Over time a tribe might establish several different limited scope review processes. Each such process may serve a tribe's interests well, but tribal officials may find it challenging to ensure that such processes complement, and do not conflict with, each other.

III. Institutions for Carrying Out a Tribal "Little NEPA"

For an environmental review process to be effective, one or more governmental agencies must be charged with responsibilities for carrying out the law. While this may seem self-evident, it is nevertheless a matter of critical importance. The authors believe that, if a tribe really wants to create an effective environmental review process, it must either create a new governmental institution or add responsibilities to an existing governmental institution, or do both. Assuming that most tribes have real limits on their

27. *Model Tribal Code, supra* note 6.

28. MODEL LAND DEV. CODE (1976) (complete text adopted by the ALI at Washington, D.C., May 21, 1975, and reporter's commentary).

29. *Id.* at ix–x.

human and financial resources, how can a tribe do this? In this part we consider some of the options. This part also discusses the issue of why a tribal legislative body should consider delegating to an agency of tribal government the decision-making authority for environmental review of specific proposals.

A. Assigning Responsibilities

In enacting a tribal little NEPA, one of the key issues that a tribal legislative body should consider is how to assign responsibilities among its governmental subdivisions. At one end of the spectrum, a little NEPA can make each governmental subdivision responsible for analyzing the environmental impacts of the actions that it takes. At the other end, a single agency can be charged with all of the responsibility.

1. Universal Responsibility

Under the federal NEPA, each federal agency has been charged with the responsibility to analyze the environmental impacts of its proposed actions and to use these analyses in making its decisions. (When agencies respond to externally initiated proposals, the applicants generally bear the cost of preparing the analyses with agencies responsible for their content.) In giving every agency this mandate, Congress sought to make agencies develop the capacity to integrate environmental concerns into their planning and decision making; congressional sponsors hoped that this would push agencies in the direction of making decisions that cause fewer adverse affects on the environment. In choosing to make all agencies responsible, Congress also chose not to set up any one agency with the power to second guess or veto agency decisions (at least not based on NEPA).[30] Congress has given EPA a mandate to comment on the EISs prepared by other federal agencies,[31] and the CEQ regulations provide for any agency with jurisdiction by law or special expertise to comment on EISs prepared by other agencies and to participate in the preparation of EISs as cooperating agencies.[32] No agency, however, has a mandate to force any other agency to fulfill its NEPA responsibilities. Rather, the principal mechanism for forcing an agency to fulfill its NEPA responsibilities has been for private parties, or nonfederal agencies, to file lawsuits in federal court. The state little NEPAs generally take a similar approach, making each state agency responsible for assessing the environmental impacts of its actions.[33]

30. The CEQ regulations do provide a rarely used process through which one agency can refer a decision pending before another agency for which an EIS has been prepared to the office of the President for resolution. 40 C.F.R. pt. 1504.1, 1504.2, 1504.3 (1996).

31. Clean Air Act § 309, 42 U.S.C. § 7609 (1994).

32. 40 C.F.R. §§ 1501.6, 1503.2 (1996).

33. MANDELKER, *supra* note 3, § 12.01.

Under universal responsibility, no one agency has supervisory authority which may cause compliance problems. In the Indian country context, such problems might render the tribal code totally ineffective unless the tribal legislature expressly authorizes lawsuits against tribal agencies. Another drawback to the universal approach for some tribal governments, particularly smaller ones, is that it might be counterproductive to require all tribal government agencies to develop the capacity to produce environmental documents.

2. Centralized Responsibility

An alternative to universal responsibility is for a single agency to be charged with preparing (or overseeing contracts for the preparation of) environmental documents. If a tribal agency is given such responsibility without sufficient resources, however, the resultant inability to produce environmental documents in a timely way may lead to a pattern of noncompliance. To avoid this problem tribal legislation could assign responsibility to each tribal agency but also provide for the transfer of program funds to the tribal agency that has the capacity to produce environmental documents (or the detailing of staff from the environmental agency to the program agency).

3. Oversight Authority

A tribal little NEPA could feature a combination of universal and centralized responsibility, in which each agency has responsibilities but one agency has oversight authority. The Model Tribal Environmental Review Code does this, by imposing responsibility on each tribal agency to prepare environmental assessments for its actions (or ensure that environmental documents are prepared for externally initiated proposals subject to its approval) and by setting up an Environmental Review Commission with authority to issue or deny permits after reviewing the environmental documents.[34]

Vermont's Act 250 can be seen as an example of universal responsibility with oversight authority. Although Vermont does not have a little NEPA, Act 250 makes a permit from the appropriate District Environmental Commission a requirement for any construction project proposed by a state agency or municipal government that involves more than ten acres.[35] Thus each such governmental subdivision must comply with the substantive and procedural requirements for obtaining a permit from a distinct governmental agency.

34. *Model Tribal Code, supra* note 6, §§ 501, 503, 504, 505, 703.

35. VT. STAT. ANN. tit. 10, § 6081 (1993 & Supp. 1996).

B. Different Kinds of Agencies

Most tribal governments conduct their business through an assortment of governmental institutions or agencies. For purposes of fashioning a tribal little NEPA, these agencies can be divided into two basic categories, which we refer to as administrative agencies and independent regulatory agencies. For purposes of this article, what distinguishes administrative agencies from independent regulatory agencies is that head personnel of administrative agencies are more or less directly accountable to elected officials, while the way in which independent regulatory agencies are set up is intended to ensure that decisions are made free of political influence.

1. Administrative Agencies

Administrative agencies go by a variety of names, such as departments, divisions and offices. In most tribal governments, as in the federal government and the states, administrative agencies are organized hierarchically, e.g., the head of a department exercises supervision over the heads of several divisions and offices. In the context of federal and state governments, administrative agencies are typically accountable to the executive branch of government, while in many tribes, executive and legislative functions are combined in a single governing body. A tribal little NEPA can assign responsibilities to administrative agencies using either of the three approaches outlined above: universal or centralized responsibility, or universal responsibility with one agency assigned oversight authority.

2. Independent Regulatory Agencies

The creation of an independent regulatory agency is a common way for a legislative body to vest an agency with decision-making authority that is protected from influence by elected officials. A legislative body might want to do this for reasons relating to fairness and due process. For example, issuing a permit for one proposal may mean denying a permit for another, and fairness suggests that the choice should not be based on factors such as which applicant has stronger connections to elected officials. Moreover, American jurisprudence regards an unbiased decision maker to be an essential aspect of due process in adjudication by administrative agencies.[36] A tribal legislature might want to use this approach to provide neutrality for situations in which a tribal

36. 2 KENNETH CULP DAVIS & RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE 43-61, 67-91 (3d ed., 1994). Creating an independent agency is not the only way to ensure an unbiased decision maker. Another approach is for administrative agencies to use administrative law judges to render recommended decisions.

administrative agency is required to obtain a permit from another tribal agency.[37]

Typically, an independent regulatory agency is comprised of a board of commissioners who are appointed by the chief executive, in some cases subject to confirmation by the legislature. Commissioners are typically appointed for fixed terms of office, and the expiration dates are often staggered in order to avoid simultaneous turnover of a majority of the positions. Independent agencies are not, of course, completely free of political influence: legislative bodies can assert control by reducing their budgets or changing the laws they administer; executive branch agencies may decline to give them support in enforcing their decisions.

The Model Tribal Environmental Review Code features an independent regulatory agency, called an Environmental Review Commission (ERC), comprised of three commissioners.[38] Vermont's Act 250 features nine independent District Environmental Commissions, with Commissioners appointed by the Governor.[39] A Tribal ERC could be set up in a variety of ways. Commissioners might be appointed or elected. The heads of certain tribal departments and possibly certain elected officials might be called to serve an ERC. (Although it might compromise the independence of an ERC to have Department heads serve as commissioners, this approach might yield benefits that would make such a compromise acceptable. For example, if a tribe has an established practice of bringing relevant department heads together to review NEPA documents for proposed federal actions, creating an ERC as an new institution may disrupt the existing process, which may have been working pretty well. In such cases, a tribal little NEPA might simply formalize the existing process, or it might use the existing process as a transitional phase in building an ERC.) There is no magic number of commissioners: three might be right for a small tribe, while a larger number might be preferable for a larger tribe. If the ERC decides matters by majority vote, an odd number might be preferable, but an ERC might decide matters by consensus.

Service on the commission would entail reviewing documents and attending periodic meetings, perhaps monthly depending on the work load. It may be possible to fund such a commission on a shoestring, if respected members of the community are willing to serve on a volunteer basis or for

37. EPA has expressed some concern over how to assure impartiality in such situations. *E.g.*, 53 Fed. Reg. 37,401 (1988) (discussing regulatory independence in the context of the Safe Drinking Water Act); 56 Fed. Reg. 64,876 (1991) (discussing regulatory independence in the context of water quality standards under section 303 and certification requirements under section 401 of the Clean Water Act).

38. *Model Tribal Code, supra* note 6, § 301.

39. VT. STAT. ANN. tit. 10, § 6021 (1993 & Supp. 1996).

modest compensation. Tribal college faculty might be willing to serve. Tribal members who serve on university faculties or hold similar positions in off-reservation communities might be called. In some cases it may be desirable to consider respected non-Indians as commissioners or to serve in some advisory capacity.

3. Layers of Responsibility and Oversight

A tribal legislature can use administrative agencies and independent regulatory agencies in a variety of combinations to create layers of responsibility and oversight authority. If the tribal legislation establishes an Environmental Review Commission (ERC) with authority to issue permits for development (as provided in the Model Tribal Environmental Review Code), any tribal administrative agency that proposes to carry out (or approve) a development activity would have to obtain a permit from the ERC, but before issuing a permit the ERC may be required to consult with various tribal agencies, and with federal and state agencies. Consultation might be required with such tribal entities as: (a) tribal administrative agencies with expertise in natural resources, wildlife and environmental matters; (b) separate independent commissions that may have been given jurisdiction over matters such as cultural heritage resources and sacred places; or (c) relevant committees of the tribal legislature. For large reservations it may be desirable for the ERC itself to involve more than one level of review, such as by having local level commissions decide most matters with a right of appeal to a reservation wide commission.

The options are virtually limitless, and choices should be made based on a tribe's needs and priorities. If a tribal legislature chooses to assign review authority to a variety of entities, an ERC can perform the crucial role of making sure that all applicable consultations and clearances have been accomplished before a project is permitted to be carried out.

C. Delegating Authority

If a tribal little NEPA features an ERC, the tribal legislature must delegate sufficient authority to the ERC to enable it to carry out its responsibilities. Many tribal legislators are reluctant to delegate authority, but if a little NEPA is going to work the tribal legislature cannot retain all authority to itself, even if a tribal little NEPA uses administrative agencies rather than an independent regulatory agency.

1. Legislative Authority

Congress and the state legislatures typically delegate some of their legislative authority to administrative and independent agencies. These agencies carry out such delegations through the process known as rulemaking, i.e., promulgating "rules" or "regulations" to implement

statutes, adding details and clarifying ambiguities in the process. Federal agencies that engage in rulemaking are subject to the Administrative Procedure Act[40] and the body of federal administrative law, and state agencies are subject to similar state laws.[41] The use of rulemaking by tribal agencies is generally a fairly recent phenomenon and far from a widespread practice. Some tribes have enacted their own administrative procedure acts, but such laws, where they do exist, are generally of recent vintage. Thus to use the concept of rulemaking in a tribal little NEPA may require work on building the framework of tribal administrative law. This may include establishing procedures to provide for community and public involvement when a tribal agency conducts rulemaking.

2. Adjudicatory Authority

When agencies make decisions that affect the interests of individuals on particularized grounds, they are said to engage in adjudication. To do this they must be vested with authority that derives from the legislative body that created them. The term adjudication applies when an environmental agency such as an ERC issues or denies permits for development, and it also applies when such an agency considers appeals from its decisions. As with rulemaking, the practice of delegating adjudicatory authority to tribal agencies is not yet in very widespread use. As tribes become more engaged in administering environmental regulatory programs this practice may become more widely accepted, since it offers a familiar means of providing due process for individuals whose property and liberty interests are affected by tribal government decisions.[42]

For tribal legislators who are reluctant to delegate permitting authority, we suggest a variation: delegate authority to the ERC to issue permits but retain authority to veto permits it grants (or vest the tribal chief executive with veto authority). This would allow elected tribal officials to stop projects that they believe would be detrimental to tribal interests, but would not allow project proponents to ignore the permit process. Of course, the authority of tribal officials to veto a permit is only as sound as the tribe's power to require a permit in the first place. In addition, such a veto provisions should be carefully drafted and exercised in order to withstand due process challenges in tribal court.

D. Administrative and Judicial Review

Administrative adjudication can be fair without being excessively formal.[43] One way to minimize the formality in permitting is to allow

40. 5 U.S.C. §§ 551-570, 701-706 (1994).

41. *See generally* ARTHUR E. BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW (1989).

42. *See* Suagee & Lowndes, *supra* note 12.

43. Davis and Pierce suggest that courts "should acquiesce in any decision-making procedure

affected persons to file administrative appeals in which additional procedural protections are provided. For example, the initial permit decision may be made after the ERC has reviewed the application and has considered the application in a meeting in which tribal agency staff have had the chance to express any concerns they might have and the applicant has had an opportunity to respond. An administrative appeal might be reconsidered at a subsequent meeting after the chance to submit additional information. Another level of appeal might feature a hearing before the tribal equivalent of an administrative law judge.

In the federal NEPA process, judicial review has proven critical making agencies comply. Given tribal sovereign immunity, tribal agencies generally cannot be sued unless authorized by tribal law or federal statute. While some tribal courts have found tribal agencies subject to suits for injunctive relief in the absence of express authorization in tribal legislation,[44] it is preferable to provide expressly for judicial review in tribal court after exhaustion of administrative remedies. The scope of such review can be limited to protect the tribe's interests, and standards can be provided for tribal courts to apply in deciding whether to uphold or set aside decisions made by tribal agencies. In addition, if the tribe is seeking to regulate a kind of activity that may be subject to challenge in federal court, it generally will serve the tribe's interests to take advantage of the doctrine of exhaustion of tribal court remedies and provide the opportunity for the tribal court(s) to decide the scope of tribal jurisdiction prior to federal court review.[45]

IV. Mechanisms and Processes

This part of the article discusses several kinds of mechanisms and processes that could be used in a tribal little NEPA. The most appropriate mix of such mechanisms will vary from tribe to tribe.

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chosen by a legislature or by an agency as long as that procedure seems to represent a reasonable, good faith application of the *Mathews* [*v. Eldridge*] cost-benefit test." DAVIS & PIERCE, *supra* note 36, at 67 (citations omitted).

44. *See generally* Ralph W. Johnson and James M. Madden, *Sovereign Immunity in Indian Tribal Law*, 12 AM. INDIAN L. REV. 153, 163-64 (1984); Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot from the Field*, 21 VT. L. REV. 7, 21-24 (1996).

45. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987); *see* Lynn H. Slade, *Dispute Resolution in Indian Country: Harmoninzing National Farmers Union, Iowa Mutual, and the Abstention Doctrine in the Federal Courts*, 71 N.D. L. REV. 519 (1995); *Commentary: Dispute Resolution in Indian Country: Does Abstention Make the Heart Grow Fonder?*, 71 N.D. L. REV. 541 (edited transcript of symposium discussion).

A. NEPA-Style Environmental Documents

NEPA requires the preparation of an environmental impact statement (EIS) for any federal action that significantly affects the quality of the human environment. The CEQ regulations require the preparation of a less detailed document known as an environmental assessment (EA) for certain categories of actions in order to determine whether an EIS is required for a particular proposed action. If an EA leads to a conclusion by the federal decision maker that the action will not cause significant impacts, that official signs a finding of no significant impact (FONSI), which completes the NEPA process. The CEQ regulations refer to these three kinds of documents — EISs, EAs, and FONSIs — as "environmental documents."[46] These terms, and the concepts they represent, have become so widely used in environmental review processes in the United States that they set the standard. A tribal little NEPA might try to improve on this standard, but this article maintains that it would be advisable to build on these concepts rather than try to fashion something completely different.

1. Environmental Impact Statements

For many kinds of proposed actions within Indian reservations some kinds of federal action is required, such as the approval by the Bureau of Indian Affairs (BIA) of a transaction relating to trust or restricted land. Such an action is subject to NEPA and, if it may cause significant impacts, will require an EIS. The subset of actions that may cause significant impacts but not require a federal action may be relatively small, depending on factors such as how much fee land is located within a reservation and the extent to which the tribe has taken over or otherwise limited the role of the BIA. Since this subset is likely to be small, there may be little point in reinventing the EIS process. Thus the Model Tribal Environmental Review Code simply provides that an EIS will be prepared in accordance with the CEQ regulations.[47] This is not to suggest that the CEQ regulations are perfect. Suggested improvements in the CEQ regulations, however, are beyond the scope of this article.

In the context of actions that require EISs, the principal benefit of a tribal little NEPA might be to clarify the kinds of actions that require EISs and to expedite the decision-making process. The BIA has established a pattern of not requiring EISs unless there is substantial pressure from other agencies or members of Congress, and tribes generally do not push for EISs to be done on proposals that they want to go forward. Like other kinds of actors, tribes often resist having EISs prepared (unless they object

46. 40 C.F.R. § 1508.10 (1996). As defined in this section, the term "environmental document" also includes a Notice of Intent to prepare an environmental impact statement.

47. *Model Tribal Code, supra* note 6, § 706.

to a project and want to delay or stop it). In such cases, an EA may go through several revisions trying to make it support a FONSI and, in the process, taking about as much time as would have been required to prepare an EIS. In part this is because some tribal leaders are not comfortable with public participation in their decision-making processes. Attorneys with a background in environmental law may have become so accustomed to public participation in government agency decision making that they assume others share the assumption that public participation is a good thing. Tribal officials and staff may not share this assumption. Attorneys working with tribes in negotiating the federal NEPA process, or in developing tribal little NEPAs, should devote some attention to articulating the benefits of public participation in order to help tribal officials and staff determine how much public participation is appropriate in particular circumstances. One benefit of public participation that we feel compelled to note is the potential to expand the range of alternatives under consideration.

2. Environmental Assessments

The preparation of EAs has become a common practice under NEPA and under the state little NEPAs, and a tribal little NEPA should make use of this level of environmental documentation. In the CEQ regulations EAs serve to determine whether or not an EIS is required. Although the regulations also encourage EAs to be prepared to aid in planning and decision making, most agencies do not prepare (or require applicants to prepare) them unless required, i.e., unless an action does not fit within a categorical exclusion. The development of detailed mitigation plans in EAs in order to avoid significant environmental impacts has become an accepted practice. Even where the driving force behind such mitigation plans is to avoid the public scrutiny involved in the EIS process, the avoidance of significant environmental impacts serves the purposes of NEPA. In such cases an EA is more than a procedural exercise.

The Model Tribal Environmental Review Code makes the preparation of an EA the standard practice for applicants seeking development permits. The basic idea is that tribal officials should routinely ask to see the EA before taking a position on a proposed development that will affect the environment. If tribal staff and external applicants know that EAs will be used in decision making, the EAs that are prepared are more likely to be written as planning and decision-making tools.

The Model Code provides two kinds of exceptions to the EA requirement. The Model Code authorizes the Environmental Review Commission (ERC) to develop a list of categorical exclusions through

rulemaking.[48] This is the same basic concept used in the federal NEPA process to sweep categories of actions out of NEPA review if they generally do not cause significant impacts. Such actions would still require permits. In addition, the Model Code allows the ERC to develop a list of kinds of activities that are considered "low-impact development" which are subject to a simplified review process involving decisions by the ERC Chairman rather than the full Commission and which do not require the preparation of an EA.[49]

B. Permits to Control Development

If a tribal agency is charged with carrying out an environmental review process for development activities, a permit process is one kind of mechanism for performing such duties. NEPA itself does not establish a permit requirement but instead applies to any federal action that may significantly affect the human environment, so NEPA does not provide a model for a permit mechanism. By contrast, the ALI's Model Land Development Code does require a permit for any kind of activity that falls within the statutory definition of "development."

A major advantage of a permit requirement is that it is relatively easy for tribal staff to know if a project is in compliance with the tribal law — either it has been issued a permit or it has not. A permit process is not necessary for a tribe to exercise control over development on tribally owned land, but making such a requirement apply to tribal administrative agencies and tribal business enterprises could facilitate environmental review by tribal officials. For development on individual Indian lands or on fee lands, a permit requirement could function as a critical mechanism, allowing a tribe to assert the full measure of its sovereign authority to protect important tribal interests, including public health and safety and respect for tribal environmental and cultural values.

1. A Comprehensive or "Blanket" Permit

If the main legislative objective for enacting a tribal little NEPA is to control development on the reservation, then a permit requirement that applies to all kinds of development activities, or at least to all kinds of development activities above a certain threshold level, may be the most appropriate way to achieve this objective. The more comprehensive the coverage of a permit requirement, the bigger the blanket, the better the responsible tribal agency can control development. In addition, a blanket permit requirement can help to achieve the other legislative objectives discussed in part I of this article, and may be particularly useful to achieve the objective of coordinating the environmental review of proposed

48. *Id.* § 505(d).
49. *Id.* §§ 201(c), 502.

development activities. Both the Model Tribal Environmental Review Code and Vermont's Act 250 feature a blanket permit requirement.

a) Permitting Under the Model Tribal Code

The Model Tribal Environmental Review Code features a development permit based on the ALI Model Code, which would be issued by a tribal Environmental Review Commission (ERC). Permit decisions are made by the ERC using an informal adjudicatory process. In the Model Tribal Code, the term "development" is broadly defined in the statutory language to include any building operation, any material change in a structure, or any material change in the use or appearance of land.[50] The permit requirement expressly applies to development activities proposed by tribal administrative agencies.[51] A tribe using this Model might expressly exclude certain kinds of development activities that usually have minimal adverse environmental impacts. This Model also provides that the tribal ERC would have authority to issue rules to define a category of "low-impact" development for which the permit process would be a largely ministerial function. It may be advisable to use a time table in making the permit requirement apply, with bigger projects subject to compliance sooner than smaller projects. This would enable the tribal ERC and tribal staff to focus their efforts on projects that really matter while they are learning how to run a permit program.

b) Vermont's Act 250

Vermont Act 250 also uses a permit requirement, which covers: (1) developments involving the construction of housing projects or mobile homes and trailer parks of ten or more units; (2) commercial or industrial development or improvement on a tract of more than one acre in towns without permanent zoning and/or subdivision bylaws and such development on a tract of more than ten acres in towns with such controls; (3) any subdivision of land for sale into ten or more lots created over a continuous period of ten years; (4) any state or municipal construction involving more than ten acres; and (5) all developments above an elevation of 2500 feet.[52]

The original Act contains broad exemptions for farming and forestry practices below 2500 feet and it exempts construction of electrical generating and transmission facilities (which are regulated by the Public Service Board).[53] In 1995, the Vermont legislature added an exemption

50. The definition of "development" is in section 201 of the draft *Model Tribal Code*, *supra* note 6. For further discussion of the definition of "development," see the ALI MODEL LAND DEV. CODE at 16–26. *See also* Suagee, *supra* note 20, at 429–44.

51. *Model Tribal Code*, *supra* note 6, § 501

52. VT. STAT. ANN. tit. 10, § 6021 (1993 & Supp. 1996).

53. *Id.* § 6001(3).

for certain rock mining operations. Many projects escape review under the Act's jurisdictional criteria, and the cumulative effect of such exemptions can be quite significant.

2. Criteria for Permit Decisions

If an agency is vested with authority to issue permits, the legislation giving it such authority should provide standards for the agency to use in making permit decisions. Three ways of doing this are: (a) to set out general policy criteria in the statute; (b) to require the permitting agency to determine whether or not the project would be consistent with an approved land use plan (a plan which may be the responsibility of a different agency to development); and (c) to create a checklist to ensure that the project will comply with all applicable requirements established by other laws and regulations. A little NEPA might use a combination of these ways of providing standards for the permitting agency.

a) General Policy Criteria

Vermont's Act 250 provides an example of a permit requirement in which decision makers must apply general policy criteria. The Act takes a "holistic" approach to development. It combines pollution prevention with resources conservation rather than treating these as separate problems and looks at community stability and economic sustainability. It does not rely on "one size fits all" technical standards, or cookie cutter approaches, but takes a fresh look at each problem to find the most appropriate solution reflecting the latest thinking.

The Act establishes ten general criteria for permit issuance,[54] under which each permit applicant is required to show that the project:

(1) will not result in undue water or air pollution;

(2) has sufficient water for its reasonably foreseeable future needs;

(3) will not cause an unreasonable burden on existing water supply;

(4) will not cause unreasonable erosion or reduction in the ability of the land to hold water;

(5) will not cause unreasonable congestion or unsafe conditions on highways or other transportation facilities;

(6) will not cause an unreasonable burden on the ability of a municipality to provide education services;

(7) will not place an unreasonable burden on the ability of local government to provide governmental services;

(8) will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas;

(9) is in conformance with statewide plans required by Act 250;

54. *Id.* § 6086(a).

(10) is in conformance with any duly adopted local or regional plan or capital program.

These criteria are very general and subjective, and there is no statewide land use plan against which to measure an individual project's compliance with the criteria, or to give guidance on where development should and should not take place. Partly as a result of the general nature of these criteria, the permit-by-permit review process can be lengthy and contentious. In 1989, the legislature passed Act 200, a law spearheaded by Governor Madeleine Kunin, to spur more regional and town planning, but it has been under constant political attack and has had little effect.

b) A Land Use and Development Plan

In conjunction with general criteria, or as an alternative, a tribal little NEPA might require the permitting agency to find that a proposed project would be consistent with an approved tribal land use and development plan. This would be one of the main functions of the ERC under the Model Tribal Environmental Review Code. Such a plan could be similar to a land use plan adopted pursuant to a typical zoning code but might be more flexible. Rather than providing that certain kinds of development can only take place in certain areas, as zoning codes do, the plan might describe the kinds of development that the tribe wants to encourage and provide a set of standards for the ERC to use in determining whether development proposed in an application is consistent with the plan. The plan also might include areas of special tribal concern in which development proposals would be more strictly scrutinized. Recent case law should be taken into account in the development and approval of any such plan to improve the likelihood that it will be sustained if subjected to legal challenge.

Under the Model Tribal Code, the plan would not be developed by the ERC but rather by tribal staff in an appropriate administrative agency of tribal government, such as a tribal planning or natural resources department. The ERC, however, would be directed to facilitate public involvement in reviewing the other agency's plan, including for example, holding a hearing on the plan. The ERC would be directed to make recommendations to the tribal governing body regarding the plan. The formal adoption of the plan would be by action of the tribal governing body (in a tribe with separation of powers, the legislature with approval of the executive).

By separating the development of the plan from the consistency determination required for permit issuance, the tribal governing body would maintain direct authority over the underlying policy decisions regarding the kinds of development that would be appropriate for the reservation, while the permit decisions on specific proposals would be insulated from political pressures. In this way the independence of the

permitting agency could be maintained, but the permitting agency's decisions nevertheless would reflect the tribal governing body's policy decisions. (In the option of delegating permit authority to the ERC subject to a veto by the tribal legislature, as discussed earlier in this article, the statutory language of the tribal little NEPA might provide that an allowable basis for the exercise of a legislative veto would be a determination by the legislature that the proposed development would not be consistent with the tribal land use and development plan.) Under the Model Tribal Code tribal administrative agencies would be subject to the permit requirement, and, since administrative due process requires an unbiased decision maker, some degree of independence of the permitting agency is desirable for due process reasons. In any permit application by a tribal agency, the ERC would be required to independently determine whether the proposed action would be consistent with the tribe's land use and development plan, whether the environmental assessment is adequate, and whether the project would result in significant environmental impacts.[55]

c) A Checklist of Other Review Requirements

A third way of providing standards for a permitting agency would be to require a determination that the proposed action would comply with the requirements of all applicable laws and regulations. (NEPA-style documents are supposed to discuss other environmental review and consultation requirements, but NEPA itself does not make compliance with such requirements a precondition of agency action.) Of course, making such a determination can prove anything but easy, involving the interplay of complex legal issues and educated judgment about the likely impacts of proposed actions.[56] If a tribal permitting agency is required to do this, it must have staff that is adequate to the task, and the staff must be authorized to interact with the staff of other government agencies, not just tribal but also federal, state and local.

3. Permits for Specific Kinds of Resources

For a variety of reasons, a tribal legislature may not want to establish a blanket permit requirement. For example, vesting a tribal government agency with permitting authority may run counter to a tribe's cultural values, or a tribe may lack the kind of financial and human resources that would be required to administer and enforce a blanket permit requirement.

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55. *Model Tribal Code*, *supra* note 6, § 703.

56. *See* Michael O'Connell, Permitting Issues Affecting Development of Natural Resources On and Near Indian Reservations (paper presented at, and included in the course materials for, the American Bar Association Section of Natural Resources, Energy and Environmental Law 7th Annual Conference on Natural Resources Development and Environmental Protection on Indian Lands, Seattle, Wash., Oct. 19-20, 1995).

If human and financial resource constraints comprise the main reasons for deciding against a blanket permit, a tribal legislature might consider enacting a permit requirement of limited scope, a permit focused on specific kinds of resources. Possible subjects for a limited scope permit include: discharges into surface waters and/or wetlands; stationary sources of air pollution; municipal solid waste landfills; archaeological resources and the graves of ancestors.

Giving a tribal agency authority to administer a limited scope permit process could be a step toward a blanket permit process. As other subjects become priorities and as resources permit, the tribal legislature could expand the permitting agency's mandate. An agency that issues permits for consumptive uses of water might be given authority to enforce water quality standards; an agency that issues permits for the excavation of archaeological resources might be given a mandate to review proposed actions that would affect historic properties. One drawback to this approach is that, if different agencies are given authority for different limited scope permits, institutional factors may render it difficult to establish a truly comprehensive and coordinated permit process. As agencies become established in carrying out their particular assigned roles, the people who run these agencies may resist attempts to set up a different agency with authority over them.

C. Negotiated Plans

Compliance with applicable environmental review requirements may not be a simple matter of yes or no. For example, under some federal statutes compliance can be negotiated by the project proponent, government agencies, and other interested parties. Negotiation may be particularly appropriate where an agency has authority to require a project proponent to mitigate adverse impacts as a condition of issuing a permit or otherwise giving clearance. This section examines two examples of negotiated mitigation plans under federal law, wetlands mitigation banking under the Clean Water Act and habitat conservation plans under the Endangered Species Act. In both of these examples federal agencies have used agreements to expedite specific projects by broadening the scope of mitigation — if project proponents agree to do mitigation on a broad scale then specific projects can go forward with minimal review. Whether a tribal little NEPA features a permit requirement or just requires that NEPA-style documents be prepared before tribal officials make decisions on proposed actions, tribal lawmakers should consider authorizing tribal agencies to negotiate such agreements, especially if a major objective of tribal lawmakers is not to stop development but rather to ensure that environmental impacts are acceptable.

1. Wetlands Mitigation Banking

Section 404 of the Clean Water Act requires a permit to discharge dredge or fill material into "waters of the United States," a term that includes wetlands.[57] The U.S Army Corps of Engineers (COE) issues section 404 permits but shares authority with the U.S. Environmental Protection Agency (EPA) in the administration of the 404 program. EPA sets substantive standards for permit issuance and retains the authority to veto individual permits. Under a 1990 Memorandum of Agreement (MOA),[58] EPA and COE have defined mitigation requirements for 404 permits. The MOA establishes a goal of "no net loss" of wetland function and values, and institutes a "sequencing" process requiring that permits be analyzed in the following step-wise fashion: (a) *Avoidance*: no permit will be granted if there is a "practicable alternative" to the wetland discharge; (b) *Minimization*: all "appropriate and practicable" steps must be taken to minimize adverse impacts; (c) *Compensatory Mitigation*: unavoidable losses of wetland functions can be compensated by, for example, restoration of degraded wetlands or creation of manmade wetlands.[59]

a) Federal Guidance

The MOA between EPA and COE provides that mitigation banking may be an acceptable form of the compensatory mitigation. In 1995 the COE and EPA, joined by two other federal agencies, issued "Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks" (the Guidance).[60] The Guidance defines wetland mitigation banking as "the restoration, creation, enhancement and, in exceptional circumstances, preservation of wetlands and/or other aquatic resources expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources."[61] Some of the key points contained in the Guidance follow:[62]

(1) Credits can only be used to compensate unavoidable wetland losses.

(2) Banks will be limited to a defined service area, which may be a watershed or political unit of government.

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57. 33 U.S.C. § 1344 (1994); 33 C.F.R. § 328.3(b) (1996); 40 C.F.R. § 230.3(t) (1996).

58. Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990) (on file with the *American Indian Law Review*) [hereinafter Memorandum of Agreement].

59. *Id.*

60. 60 Fed. Reg. 58,605 (1995).

61. Memorandum of Agreement, *supra* note 58.

62. *Id.*

(3) The Mitigation MOA requires on-site mitigation where practical; therefore, to use a bank (which is by definition off-site), a developer must demonstrate that on-site mitigation is not practical.

(4) The Mitigation MOA also requires that mitigation must, where ever practicable, be in kind, meaning that it must replace the same functions as those lost (e.g., water quality for water quality).

(5) Bank sponsors must demonstrate financial capability.

(6) Credits cannot be used until the aquatic functions have been established at the banking site.

(7) Banks must provide for protection of wetlands in perpetuity through appropriate property transfers (e.g., conservation easements).

(8) Banks must monitor for at least five years and take necessary corrective action as problems arise.

b) An Example

A simple example may illustrate how a mitigation bank works. Some entity, it may be a governmental agency, an environmental organization or even a private entrepreneur, decides to establish a mitigation bank. It files a "prospectus" with the COE, setting forth the objectives of the bank, how it will be administered and a lot of information about the physical conditions of the site. If approved, after review by the COE and other agencies, the COE will issue a "banking instrument" and form an Interagency Mitigation Bank Review Team to guide further development of the bank. Credits and debits are the terms used to designate the units of trade. Credits represent the attainment of aquatic functions at a bank; debits represent the loss of aquatic functions at the project site. Credits are debited from a bank when they are used to offset aquatic resource impacts for the purpose of meeting 404 requirements. By purchasing credits from an approved bank, developers can greatly simplify the 404 permit process.

c) Commentary

From an environmental standpoint, the advantage of wetland banks is that they can create larger and more valuable wetlands than the typical postage stamp mitigation project that accompanies 404 permits. On the other hand, the risk is that banking will simply facilitate more development in wetlands. The key may be how firmly the regulatory agencies enforce the avoidance requirement in the permit process. In cases where there is truly no way to avoid wetland impacts, the banking approach is probably an improvement over the current mitigation methodology.

2. Habitat Conservation Plans for Listed Species

Section 9 of the Endangered Species Act (ESA) prohibits (and makes criminal) the unauthorized "taking" of any animal on the list of threatened

or endangered species.[63] The ESA defines the term "taking" to include "harm" and Department of Interior rules further define "harm" to include habitat modification that actually kills or injures a species by substantially interfering with essential breeding, feeding or sheltering activities. The U.S. Supreme Court recently upheld this aspect of the DOI rules.[64]

Section 10 of the ESA provides a way around the "taking" prohibition by authorizing the issuance of incidental "taking" permits. An incidental "taking" is one that occurs in the course of carrying out an otherwise lawful activity — for example, logging the forest habitat of the Northern Spotted Owl. To get an incidental taking permit, a person must submit a Habitat Conservation Plan (HCP) to the Secretary of Interior (or Commerce for marine species). The HCP must demonstrate that the applicant has done everything possible to minimize the "taking" of the protected species and has offset any loss of habitat that would cause an injury.

The HCP process was added to the ESA in the 1982 amendments.[65] As of August 1996, approximately 200 HCPs were being developed. Since then about 50 HCPs have been approved.[66] More recently, the HCP process has taken on a larger regional scope, incorporating a multispecies approach. Regional HCPs are being developed around Austin, Texas, in the Balcones Canyonlands and in Southern California, home of the California gnatcatcher.[67] These plans are using the latest conservation biology methodologies to come up with plans to insure the viability of species populations on a landscape scale over a long period of time, typically 100 years. With such negotiated plans in place, wildlife agencies have reasonable assurances that the loss of individuals will not threaten the long-term viability of a species, and development projects are permitted to proceed.

V. Enforcement and Dispute Resolution

A tribe must be willing and able to enforce compliance with its little NEPA. This article offers but a few comments on this topic. In order to withstand legal challenge, a tribal permit requirement that applies to fee

63. 16 U.S.C. § 1538 (1994).

64. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).

65. Endangered Species Amendments of 1982, Pub. L. No. 97-304, § 6(1) to (3), (4)(A), 96 Stat. 1411.

66. NATIONAL MARINE FISHERIES SERV., U.S. FISH & WILDLIFE SERV., HABITAT CONSERVATION PLANNING HANDBOOK 1 (1996).

67. J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection*, 44 SW. L.J. 1393, 1413 (1991).

lands should be crafted to protect tribal interests that have been recognized by Congress or that meet the second prong of the *Montana* test.[68] In enacting tribal legislation to establish such a requirement, the tribal legislature may want to focus attention on the tribal interests to be protected, holding hearings and otherwise creating a legislative history to support the tribe's exercise of regulatory power.

A. Enforcement by Tribal Government Agencies

The Model Tribal Environmental Review Code authorizes the Chairperson of the ERC to issue orders to persons alleged to be acting in violation of the Code.[69] The full ERC would conduct an adjudicatory hearing to determine if a violation of the Code has occurred. In any such hearing, the tribe's attorney general, with assistance from the Commission's staff, would present the evidence of a violation. If a violation is found, the ERC could issue an order directing the violator to take corrective action and/or imposing civil penalties. The Model Code also authorizes the assessment of costs against a violator if a tribal administrative agency takes corrective action after the violator's failure to do so.

Obviously, there are other ways in which enforcement can be pursued. Any option will require a commitment of funds and people.

B. Private Actions in Tribal Agencies and Courts

As noted earlier, the fact that private citizens can sue federal agencies has proven to be a critical factor in federal agency compliance with NEPA. The Model Tribal Environmental Review Code does not expressly authorize actions in tribal court against tribal administrative agencies, although tribal courts might interpret the language in the Model Code as authorizing such suits.[70] It might be preferable to make this explicit, and to include appropriate limits on the kinds of relief that tribal courts can order.

Citizen involvement is interwoven throughout Vermont's Act 250. The Act is administered in a "bottom-up" manner through nine District Environmental Commissions, each comprised of three citizens appointed by the Governor. Each District Commission is assigned a Coordinator to help with the permit process. Permit decisions are made through a quasi-judicial hearing process. Affected landowners and other interested parties, including environmental groups, are allowed to intervene, present evidence and argue for or against the project. District Commission decisions can be appealed by any party to the nine-member, gubernatorially appointed

68. Montana v. United States, 450 U.S. 544, 566 (1981). *See* sources cited *supra* note 10.

69. *Model Tribal Code*, *supra* note 6, pt. 8.

70. *Id.* § 805. Any person who is aggrieved by the issuance or denial of a development permit can appeal, as can any person who is the subject of an enforcement order.

Environmental Board, which hears cases *de novo*. Less than five percent of permit decisions are appealed.[71]

C. Alternative Dispute Resolution

In environmental disputes, there are usually more than two sides, and so the use of nonadversarial dispute resolution techniques (often called "alternative dispute resolution" or ADR) may be productive. When fashioning a tribal little NEPA, there are many ways in which ADR could be worked in, at both the administrative adjudication stage and the judicial review stage. ADR techniques can be a way of fashioning "win-win" solutions, and, in doing so, holding down the governmental agency's enforcement costs. Dispute resolution techniques that the larger American society might label ADR are well grounded in many tribal cultures.[72] Where a tribal culture has a tradition of nonadversarial dispute resolution, it may be particularly effective to incorporate such a tradition into a tribal little NEPA.

Conclusion

By enacting a tribal mini-NEPA, a tribe can take an important step toward protecting the reservation environment by pro-actively controlling the adverse impacts of "development." A tribe with a mini-NEPA can ensure that critical questions are asked up front, that an appropriate range of alternatives is dreamed up and analyzed when a development project is under consideration, and that mitigation measures are fashioned before the decision is made to allow a project to be carried out. A mini-NEPA can empower tribal officials and tribal members to shape the way "development" is planned and carried out so that it reinforces and does not jeopardize tribal cultural values and practices.

If these benefits are to be realized, the tribal legislation must be crafted so that it can be carried out, so that it becomes part of the living culture of the tribal community. The tribal agencies and institutions that are assigned responsibilities must have adequate authority and resources to do their jobs. The relationships among agencies and institutions must be worked out so that checks and balances function as intended, and so they do not become either dreaded obstructions or mere paper requirements that are ignored in practice. One way to avoid the possibility of the requirements of a mini-NEPA being ignored is to grant jurisdiction to tribal courts to hear complaints for injunctive relief against tribal agencies. Such a limited waiver of tribal sovereign immunity should be counter-

71. 2 BROOKS, *supra* note 26, at 30.

72. *See, e.g.*, James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983).

balanced by developing the capabilities of tribal agencies to process administrative appeals, and tribal courts to hear appeals from agency decisions, in an expeditious manner so that the requirements of a mini-NEPA do not become obstructions.

More than a quarter century ago, NEPA worked a basic change in the way that federal agencies make decisions that affect the environment — by requiring agencies to prepare documents analyzing the impacts of their decisions and by giving the affected public and other governmental agencies the right to participate in the process through which the analyses are done and the documents written. It was a change for the good. Maybe the time has come for the same kind of change in Indian country, a change that would be brought about through tribal legislation tailored to the specific circumstances of each tribe. By enacting and implementing a tribal little NEPA, tribal leaders can demonstrate their understandings of the principle that sovereignty carries responsibilities, responsibilities for the welfare of all the people who are currently subject to tribal jurisdiction, but not just for them. Also for future generations, for the graves of ancestors, for culturally important plants and animals, and for places in the natural world that tribal people regard as sacred.