Tribal Solutions to On-Reservation Environmental Offenses: Jurisdictional Parameters, Cultural Considerations, and Recommendations

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TRIBAL SOLUTIONS TO ON-RESERVATION ENVIRONMENTAL OFFENSES: JURISDICTIONAL PARAMETERS, CULTURAL CONSIDERATIONS, AND RECOMMENDATIONS

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I. Introduction

In 1991, U.S. Sen. John McCain (R-Ariz.), a member of the Senate Select Committee on Indian Affairs, introduced the Indian Tribal Government Waste Management Act (ITGWMA) in the Senate. The bill proposed to inventory all waste sites on tribal land, establish a program for technical assistance to tribes, require the Secretary of the Interior's approval for all waste contracts, and investigate a proposed waste company's past dumping record. In essence, the bill would have supplanted the role of tribal governments.

That same year, California State Assemblyman Steve Peace (D-Rancho San Diego) proposed legislation which would have subjected Indian reservations within California to state and local environmental laws. Like ITGWMA, the "Peace Bill" would have displaced tribal governments' role in regulating the reservation environment. The federal government and native peoples strongly opposed the Peace Bill, and as a result, the bill was softened. The amended bill, signed into law in 1991, provides that Indian tribes, the state, and local communities may form "cooperative agreements," wherein Indian tribes promise compliance with state and local environmental regulatory standards in exchange for technical assistance. Notably, upon entering a cooperative agreement, tribes must waive their sovereign immunity.

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2. Id. §§ 6(c)(e), 7(d).
6. Id. § 25198.7(b). The statute states:
(b) The cooperative agreement shall require that the tribe waive its sovereign immunity from any action brought by the state in any court otherwise having

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ITGWMA and the Peace Bill represent the proverbial handwriting on the wall. These bills were designed to address the widely held perception, often fostered by the media, that native lands are being targeted for waste facilities with alarming frequency and that many tribal governments are unable or unwilling to regulate the reservation environment. If this perception of ineptitude continues without contradiction, federal or state governments eventually will feel the need to pass legislation to remedy the "problem."

In an article in the University of Colorado Law Review, Kevin Gover and Jana Walker address the negative image portrayed in the media and criticize the paternalistic belief that tribes are unable to consider and regulate commercial waste projects. In support of their position, they describe the Campo Band of Mission Indians' proactive approach to siting a commercial solid waste landfill and recycling facility near San Diego, California. The Band informed and educated the native community, developed an environmental regulatory infrastructure, solicited companies, required that the applicant company pay for the Band's financial advisors, lawyers, and solid waste industry consultants, and ultimately negotiated a favorable contract. Upon close examination, the Band's comprehensive and aggressive efforts are clearly inconsistent with the negative image portrayed by the media.

Does this mean that all concerns about tribal environmental matters are illegitimate? No, because not all tribes have been as successful as the Band.

jurisdiction over the subject matter, and that the state shall waive its sovereign immunity from any action brought by the tribe, in any court otherwise having jurisdiction over the subject matter, to enforce the terms of the cooperative agreement.

Id. (emphasis added).


9. Id. at 936-42.

10. Id. at 937-40.

11. An incident involving the Los Coyotes Band of Mission Indians of California demonstrates the potential health, environmental, and economic harms duplicative commercial operators pose. In 1990, the Los Coyotes Tribal Chairman was allegedly tricked into signing a 500-acre landfill agreement with Chambers Corp. of Pittsburgh, Pennsylvania. The tribal Chairman was allegedly told that he was authorizing preliminary environmental landfill testing, not signing a contract. The company's deceptive tactics with the tribal government was not all that the Los Coyotes suffered. The terms of the forty-one page contract were "unconscionable," exploiting the economically disadvantaged tribe and endangering their safety and environment.
Moreover, tribal-authorized commercial operators are not the greatest threat to the reservation environment. As Gover and Walker recognize:

To set the record straight, the bigger problem is not that the waste industry is beating a path to the tribal door. Rather, it is the unauthorized and illegal dumping occurring on reservations. For most Indian communities the problem of open dumping on tribal lands is of much greater concern than the remote prospect that a commercial waste disposal facility may be sited on a reservation. 12

This article addresses the "bigger problem" of illegal operators who exploit the reservation environment and community, and it cautions that unless tribal governments deal with these operators adequately, federal or state governments will seek to regulate the operators. With these aims, part II identifies the illegal operators and describes their activities. Part III examines tribal, federal, and state jurisdiction issues which impact the parameters of tribal regulation of illegal operators, and which highlight the risk of state justification for on-reservation authority. Traditional native law and cultural dynamics are the focus of part IV. Lastly, part V provides recommendations for tribal environmental regulation.

II. Illegal Operators: Who Are They?

This article will address two classes of illegal operators, "midnight dumpers" and "native entrepreneurs." "Midnight dumpers" acquired their name by secreting waste on the reservation without tribal authorization. "Native entrepreneur" is the term for tribal members who operate waste facilities without tribal permission for their own personal gain or convenience. 13 Both midnight dumpers and native entrepreneurs pose serious threats to tribal health and safety, and, as will be discussed in part III, tribal sovereignty. They have been known to dump very toxic materials, such as asbestos and pesticides, in Indian country. 14 Thus, the environment...
is adversely impacted, and the community is unaware of the potential hazards.

Midnight dumping appears to be a fairly widespread and recurrent problem. For example, the Gila River Reservation of Arizona averages seventeen serious clandestine dumpings a year. To combat this problem on the Onondaga Reservation within New York, an individual tribal member polices the reservation. The solution for many Native American governments, however, may not be this simple. Land holdings often are vast and relatively unpopulated. It would be impossible for only one person to police all the lands; the problem exceeds the means of benevolent vigilantes. Tribes should take affirmative steps to prevent clandestine dumping operations instead of relying on the goodwill of community volunteers. In response to the problem of midnight dumpers, the Environmental Protection Agency (EPA) has earmarked $30,000 to train Native Americans to handle hazardous materials. Although this training is important, it is does not address the root of the problem, which is illegal dumping itself. To combat this form of illegal dumping, midnight dumpers must be persuaded that the risks and costs of being caught outweigh the financial benefits.

Native entrepreneurs who operate without tribal permission or tribal, federal, or state oversight also must be dissuaded from continuing their illegal practices. These parties often operate without sufficient understanding of the risks associated with incoming wastes, and as a result are unable to adequately self-regulate. Graphically illustrating an entrepreneur's failure to appreciate the magnitude of his decision to accept waste, an Onondaga tribal member took $50 in exchange for dumping lead-filled sandblasting waste material which otherwise would have cost the company $25,000.

Native entrepreneurs are especially problematic since there is no meaningful policing of their operations. As with cigarettes, gasoline, and gambling, entrepreneurs are taking advantage of an enforcement loophole. Environmental regulatory enforcement is not undertaken by states because they have not established jurisdiction. Tribal environmental controls do not exist or are more lenient on tribal members. Federal laws often go unenforced. Because entrepreneurs take advantage of enforcement

reservations in California is a growing problem.”).

16. Id.
17. Id.
18. Arguably, native entrepreneurs are not acting illegally if there are no tribal environmental ordinances or any federal laws covering the activity. Illegal or not, bringing noxious and sometimes deadly substances onto a reservation is potentially harmful and the tribe should regulate the activity.
20. See infra part III.C.
loopholes, other tribal members become frustrated and occasionally take vigilante action. At a 1992 conference sponsored by the Native American Indian Alliance at the State University of New York at Buffalo, "Dumping on Native American Lands," a native woman told of her participation in an organized effort to keep waste haulers off the reservation at gunpoint. These regulatory loopholes need to be addressed by tribal governments before intra-tribal political disputes rage, native people and environment suffer further, or the federal or state government take control.

III. Jurisdictional Quagmire

Jurisdictional disputes among tribal, federal, and state governments are common in all areas of federal Indian law. The hottest debates, however, usually are between state and tribal governments. There is no uniform rule about which of these two governments has authority, and therefore, a particularized inquiry is required in every context, from cigarette taxation to environmental regulation. As such, jurisdictional questions are complicated and lack high predictability. Despite the inherent imprecision, jurisdictional analysis is a prerequisite to recommending tribal response to illegal operators because state jurisdiction impacts the parameters of tribal authority. Furthermore, such analysis demonstrates that state jurisdiction is more likely if tribal governments fail to regulate on-reservation illegal operators.

Unlike state environmental jurisdiction questions, federal jurisdiction is predictable. In short, the federal government’s authority is preeminent over both tribal and state claims of authority. The current federal policy of encouraging Indian self-determination, however, is inconsistent with the on-reservation exercise of federal power. This contradiction must be explored because it influences the allowable scope of tribal environmental programs which address illegal dumping operations.

It is self-evident that a tribe’s authority over Indians and non-Indians frames its regulation of native entrepreneurs and midnight dumpers. Indeed, it is just this authority that this article urges tribes to take advantage of to curb illegal dumping.

A. Tribal Authority

Tribal power to protect the reservation environment is rooted in inherent tribal sovereignty, not in delegation of authority from the United States. Indeed, treaties and federal statutes are not a source of tribal authority, but a limit thereon. Stated in the converse, Native American governments

23. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 122 (Rennard Strickland et al.)
retain all power not taken away by treaty, federal statute, or the courts. As an extension of this principle, native governments retain authority over members unless divested by the federal government.

Tribal governments also possess civil jurisdiction over non-Indians who are on the reservation, subject only to a few exceptions. The U.S. Supreme Court announced the test in National Farmers Union Insurance v. Crow Tribe:

The existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Significantly, the Court also provided: "We believe that examination [of tribal court jurisdiction] should be conducted in the first instance in the Tribal Court itself." Further bolstering tribal court authority, the Court held that exhaustion of tribal court remedies is required before tribal court jurisdiction questions may be entertained by a federal court.

Iowa Mutual Insurance v. LaPlante strengthens tribal court civil authority even further. There, the U.S. Supreme Court stated that federal courts could only review tribal court determinations of jurisdiction, not substantive issues: "Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised by the LaPlante's bad-faith claim and

eds., 1982) [hereinafter COHEN]; see also United States v. Wheeler, 435 U.S. 313, 322 (1978) ("The powers of Indian tribes are, in general, inherent powers of a limited sovereignty which have never been extinguished") (quoting COHEN, supra, at 122).


Because tribal governments retain all power that is not divested, federal grants of authority to tribes are only necessary when the tribe was previously divested of authority. Nevertheless, the federal government has granted pollution control authority to tribal governments over tribal environmental matters. See David F. Coursen, Tribes as States: Indian Tribal Authority To Regulate and Enforce Federal Environmental Laws and Regulations, [23 News & Analysis] Envtl. L. Rep. (Envtl. L. Inst.) 10,579, 10,586-87 (1993). Furthermore, the U.S. Supreme Court has upheld federal delegation of authority to Indian tribes. See United States v. Mazurie, 419 U.S. 544 (1975) (holding that Congress may delegate to Indian tribes the regulatory power over distribution of alcohol).

27. Id. at 855-56 (footnote omitted).
28. Id. at 856.
29. Id. at 856-57.
resolved in the Tribal Courts.\textsuperscript{431} Together, these cases create a strong grounding for civil authority over non-Indians. "[A]ll agree that \textit{National Farmers Union} and \textit{Iowa Mutual} will make it harder to challenge tribal court authority."\textsuperscript{432}

A limited exception to tribal civil authority over non-Indians was created by \textit{Montana v. United States}.\textsuperscript{33} The U.S. Supreme Court held that the Crow Tribe of Montana could not regulate hunting within reservation boundaries by nonmembers on land owned by the nonmembers in fee simple.\textsuperscript{44} The Court reasoned: "[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."\textsuperscript{1155} Furthermore, the Court was influenced by the tribe's past acquiescence to the State's "near exclusive" regulation of hunting and fishing on fee land.\textsuperscript{45} The Court, however, did not find that there was lack of tribal authority over non-Indians in all instances: "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."\textsuperscript{437} Following from this, the Court pronounced two exceptions to the presumption against tribal authority:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect upon the political integrity, the economic security, or the health and welfare of the tribe.\textsuperscript{438}

Environmental and resource concerns have generally satisfied this second exception in lower court decisions.\textsuperscript{39} For example, the Ninth Circuit Court

31. \textit{Id.} at 19.
34. \textit{Id.}
35. \textit{Id.} at 564.
36. \textit{Id.} at 566.
37. \textit{Id.} at 565.
38. \textit{Id.} at 565-66 (citations omitted).
of Appeals in *Cardin v. De La Cruz* held that tribal building, health, and safety codes applied to non-Indians on non-Indian owned fee land because, inter alia, tribal health and safety were otherwise at risk. Furthermore, if tribal governments have jurisdiction over non-Indians on fee land who threaten tribal health and safety, then surely tribal governments have jurisdiction over non-Indians on non-fee lands who threaten tribal health and safety.

In contrast to tribal civil authority, tribal criminal authority over non-Indians was obviated by the U.S. Supreme Court in 1978. In *Oliphant v. Suquamish Indian Tribe*, the Court held that tribal governments do not have criminal jurisdiction over non-Indians. Suffering a further diminishment of the power to deter and punish non-Indian (and Indian) activities that harm tribal health and environment, the Indian Civil Rights Act of 1968 (ICRA) placed a limit of six months imprisonment or $1000 (since increased to one year and $5000) on tribal penalties or punishments for any one offense.

In summary, tribal governments have civil authority over on-reservation environmental matters. Under notions of inherent sovereignty, tribal governments have jurisdiction over their members, including native entrepreneurs. As well, non-Indian midnight dumpers are within tribal civil jurisdiction based upon notions of *National Farmers Union* and *Montana*. Tribal criminal authority over non-Indians and their ability to penalize have been stifled by *Oliphant* and ICRA.

**B. Federal Authority**

Congress asserts authority to unilaterally enact laws affecting native people, lands, and governments. This is referred to as the "federal plenary

3025 (W.D. Wash. 1982) (upholding tribal sewer hook-up requirements).
40. 671 F.2d 363 (9th Cir. 1981), cert. denied, 459 U.S. 967 (1982).
41. Id. at 366.
44. See McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973). The basis for federal authority in Indian country is the dual fictions of discovery and conquest. Judith V. Royster & Rory S. Faussett, *Control of the Reservation Environment: Tribal Primacy Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 585 (1989). These concepts were formulated in the early nineteenth century by Chief Justice Marshall in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), a case finding that native lands can only be alienated to the United States government. Justice Marshall rationalized that by the theory of discovery, the absolute title to land goes to the "discoverer," the United States. *Id.* at 587. Indians only retain occupancy rights. *Id.* at 574. Next, Marshall reasoned that the United States conquered the Indians nations, and therefore, the United States preempted any other party when the Indian nations chose to alienate their land. *Id.* at 591. Expanding on these notions of superiority, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) relegated Indian nations to the status of "domestic dependent nations." *Id.* at 17. Thus, the United States went from discovering nation to superior sovereign, gaining more and more authority over Indian nations. Royster & Faussett, *supra*, at 581. From this perceived super-ordinate sovereignty came the perceived right of the federal government to
This doctrine of absolute power, which includes even the power to abolish an Indian tribe's recognized existence, has been justified as a constitutionally confirmed right. As a facet of this power, federal environmental laws and regulations specifically enacted to affect native peoples or lands are applicable in Indian country. For example, the Resource Conservation and Recovery Act (RCRA) is applicable to native lands and may be enforced against Indian tribes as determined by Blue Legs v. EPA. Blue Legs subjected the Oglala Sioux Tribe to a RCRA citizen suit because the statute allows suit to be brought against a "municipality," which includes an "Indian tribe." Congress specifically included Indian tribes within RCRA's purview, and thus, native governments are bound by it.

At one time, general federal laws were without force in Indian country. By 1960, however, Federal Power Commission v. Tuscarora Indian Nation found that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." This case concerned an application by the State of New

regulate within reservation boundaries. Id. at 587.

45. See Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (finding congressional power to abrogate a treaty). "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to control by the judicial department of the government." Id.

46. Rice v. Rehner, 463 U.S. 713, 719 (1983) ([The sovereignty of Indian tribes] exists only at the sufferance of Congress and is subject to complete defeasance.) (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)) (emphasis in Rice); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

47. See United States v. Kagama, 118 U.S. 375 (1886) (finding congressional power to require crimes such as murder be heard by federal tribunal). However, commentators question this justification and pose that it is just an exertion of a stronger nation's raw power over a weaker nation. See Royster & Faussett, supra note 44, at 587 n.13 (citing United States v. Kagama, 118 U.S. 375, 384-85 (1886)).


49. 42 U.S.C.A. §§ 6901-6992k (West 1986) (Clean Water Act); 42 U.S.C.A. 300f(10) (West 1991) (SDWA). Following the holding of Blue Legs, these statute would also be applicable in Indian country. See Jana L. Walker & B. Kevin Gover, Tribal Civil Regulatory Jurisdiction to Enforce Environmental Laws, in ROCKY MOUNTAIN MINERAL LAW FOUND., MINERAL DEVELOPMENT ON INDIAN LANDS 14-1, 14-11 (1991) (stating that Clean Water Act and SDWA are applicable). In fact, the SDWA has been held applicable to native lands. Phillips Petroleum Co. v. EPA, 803 F.2d 545 (10th Cir. 1986).

York to the Federal Power Commission for a licenses to flood fee simple lands of the Tuscarora Indian Nation. A license was granted according to the Federal Power Act. The Court reasoned, in part, that the Federal Power Act was a "complete and comprehensive plan" and therefore should apply within native lands. From this decision emerged the Tuscarora rule, which provides that federal statutes of general applicability also apply within native territorial boundaries. To satisfy the Tuscarora rule, the federal law must evidence a statutory scheme requiring national or uniform application, or the legislative history or surrounding circumstances must clearly reflect congressional intent to invade tribal rights and authority. As is relevant to tribal environmental regulation, the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) does not specifically include tribal peoples or land within its purview. However, under Tuscarora, this general environmental law is likely applicable within Indian country because it requires national and uniform application.

Despite broad federal authority over on-reservation environmental matters, federal power is restrained internally. The 1984 EPA Indian policy effectively called for this restraint. The purpose of the policy is to promote tribal self-government. Although not strictly binding on the federal government, this policy has played a role in guarding tribal sovereignty.

In sum, several federal environmental statutes and regulations have been amended to include native lands and peoples, yet some still do not. Those which do are applicable in Indian country under the plenary power doctrine, and those which do not are probably applicable under the Tuscarora rule. Thus, the federal government has jurisdiction over midnight dumpers' and native entrepreneurs' activities which fall within the scope of these federal


While the Tuscarora rule is harsh, it is softened by interpreting federal general laws to conform with treaties. See United States v. Dion, 476 U.S. 734 (1986). Given this restriction, occasionally general federal laws are inapplicable on native lands. See, e.g., Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709 (10th Cir., 1982) (holding the Occupational Safety and Health Act of 1970 not applicable to native business because there was no clear legislative intent to abrogate the treaty with the Navajo Tribe). However, exceptions are few and "there is relatively unquestioning acceptance that most general federal laws apply in Indian country." Royster & Faussett, supra note 44, at 592.

60. Cf. Walker & Gover, supra note 52, at 14-10.
61. See generally Eric D. Eberhard, Environmental Protection Agency Indian Policy and Recent Legislative Developments, in ROCKY MOUNTAIN MINERAL LAW FOUND., MINERAL DEVELOPMENT ON INDIAN LANDS 15-5 to 15-9, 15-25 to 15-28 (1989) (discussing the EPA policy and providing a copy of the policy in full).
62. Id. at 15-5.
63. See infra part III.C.
environmental laws. The federal government, however, may be restrained from exerting its authority because of the current federal policy favoring Indian self-determination. Tribal governments should exert their power of self-determination and firmly establish their role in regulating the reservation environment during a period of federal restraint. Federal Indian policy has changed drastically and rapidly in the past and has been exceedingly intrusive on tribal government (e.g., the Allotment Act period). If the federal government perceives that tribal governments are inadequately addressing environmentally hazardous activities, its reluctance to exert federal authority might pass, and so might bills like ITGWMA.

C. State Authority

States have limited jurisdiction within Indian country, but the extent of that jurisdiction is not firmly established. State jurisdiction is dependent upon a particularized factual inquiry into each new regulatory issue raised. State authority is determined by the application of a two-part test, the "infringement/preemption" test. As the U.S. Supreme Court, in White Mountain Apache Tribe v. Bracker, states:

[C]ongressional authority and the "semi-dependent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal laws. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them."

The Supreme Court has demonstrated a preference for the first leg of this test, stating in McClanahan v. Arizona State Tax Commission, "[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state
jurisdiction and toward reliance on federal pre-emption. Therefore, emphasis is placed on whether state actions have been preempted by federal law.

States are preempted from regulating native activities which Congress has already explicitly regulated. As relevant here, Congress has deemed that Indian tribes (meeting certain minimum standards) be treated as states in approximately half the federal pollution control acts. The Clean Water Act, Surface Mining Control and Reclamation Act (SMCRA), the Safe Drinking Water Act (SDWA), and the Superfund Amendments and Reauthorization Act (SARA) provide that tribes be treated as states, albeit many of the tribal grants have restrictions. In addition, the Clean Air Act and FIFRA delegate primary authority over limited programs to tribes. Because Congress has explicitly granted authority to tribes, state jurisdiction within Indian country is expressly preempted by Congress.

States can be preempted by operation of federal law even if a federal statute or treaty does not explicitly regulate the same activity. Where there is no explicit congressional directive, the Supreme Court considers several factors to determine state authority on reservations. The Court balances tribal, federal, and state interests in regulating the activity, assessing the burdens and interests of each party. Also, the Court may regard traditional notions of native sovereignty, the federal policy of promoting tribal sovereignty, self-

70. Id. at 172; see also Rice v. Rehener, 463 U.S. 713, 718 (1983) ("We have...employed a pre-emption analysis that is informed by historical notions of tribal sovereignty, rather than determined by them.").

71. See Royster & Faussett, supra note 44, at 619. Until 1986, federal environmental statutes did not delegate authority to tribal governments to act as states. See Gover & Walker, supra note 8, at 934. Because Indian tribes were not explicitly included or excluded, federal law did not expressly preempted state authority within native territorial boundaries. As such, states could argue for jurisdiction.

79. The Clean Air Act delegates authority to redesignate air shed quality, 42 U.S.C.A. § 7474(c) (West 1983), and FIFRA allows tribes to enter a cooperative agreement with the EPA to enforce the Act, 7 U.S.C.A. § 136u(a) (West 1980).
81. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) ("We have thus rejected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required."); see also Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965).
82. Bracker, 448 U.S. at 145; McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172
sufficiency, and economic development,\(^{63}\) as well as the native nation's historical role in controlling the activity.\(^{64}\) Because some factors of the "infringement/preemption" test are case specific, a universal outcome cannot be predicted.\(^{65}\) Here, identification and weighing of general federal, tribal, and state interests, and analysis of tribes' historical tribal roles in regulating the reservation environment will be conducted.\(^{66}\)

Federal interests in pollution control within Indian country include ensuring satisfaction of minimal federal pollution standards, preventing tribal lands from becoming state dumping grounds,\(^{67}\) and promoting tribal sovereignty

\(^{(1973)}\) ("The Indian sovereignty doctrine . . . provides a backdrop against which the applicable treaties and federal statute must be read.").

83. \textit{Bracker}, 448 U.S. at 143-44 ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.").

84. \textit{Rice v. Rehener}, 463 U.S. 713, 722 (1983) (" Tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians.").

85. An interesting debate has raged over RCRA, a federal pollution control statute in which Congress has failed to designate any authority to tribal nations explicitly: Does RCRA preempt state authority over on-reservation activities that are within the normal purview of RCRA? In 1980, the EPA announced that states lacked authority to regulate waste on native lands unless they could prove otherwise. \textit{Royster & Faussett, supra} note 44, at 630-31. The State of Washington tried to assert authority, but the EPA rejected it, and Washington brought suit. \textit{Id.} at 631-32. In \textit{Washington Dep't of Ecology v. EPA}, 752 F.2d 1465 (9th Cir. 1985), the U.S. Ninth Circuit Court of Appeals held that the EPA's refusal to allow state authority was proper. \textit{Id.} at 1467. Their rationale was based on principles of administrative law supported by interpretation of federal Indian law, wherein the Court concluded that the EPA's decision was not arbitrary and capricious. \textit{Washington Dep't of Ecology} is distinguishable because it was an administrative review, and it only considered Indians, not non-Indians, on reservations. See Leslie Allen, \textit{Who Should Control Hazardous Waste on Native American Lands? Looking Beyond Washington Department of Ecology v. EPA}, 14 \textit{ECOLOGY L.Q.} 69 (1987).


86. The above factors used in the "infringement/preemption" test represent the Supreme Court's typical rationale in determinations of a state's power to regulate native activities. However, the test is not mechanical or predictable. "[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." \textit{White Mountain Apache Tribe v. Bracker}, 488 U.S. 136, 142 (1980). Thus, analysis of state authority within Indian country can only be informed by past court decisions; the outcome cannot be predicted with certainty.

87. Counterpart to some state health and safety laws are statewide hazardous waste siting provisions. See, \textit{e.g.}, \textit{N.Y. ENVTL. CONSERV. LAW} §§ 27-1101 to 27-1115 (McKinney 1984 & Supp. 1994). Under these siting provisions, an area is targeted according to arbitrary standards, and a waste facility can be sited in that chosen locale, regardless of community opposition or
and self-sufficiency.88 Native interests include tribal health and welfare, control over tribal environment and development, responsiveness to tribal priorities, protection from off-reservation spillover, and prevention of tribal lands from becoming state dumping grounds.89 Against these federal and tribal interests, state protectionist and economic interests must be balanced. State interests include the prevention of pollution spillovers and concern about tribal economic advantage from less stringent (or lack of) tribal standards.90 For example, leniency in, or lack of, tribal environmental regulation would substantially strengthen a state’s claim that its constituents’ health and safety are at risk from on-reservation pollution spillovers.

This balancing test is to be completed against a backdrop of traditional notions of sovereignty, making state authority less likely. Also weighing against state authority is the federal policy to encourage tribal self-determination, economic independence, and sovereignty.91 The next factor in the "infringement/preemption" test, however, cannot be favorably predicted. A tribe’s traditional role in regulating the activity is not conclusively established by all tribal groups. Indeed, a purpose of this article is to encourage wide establishment of tribal regulation of illegal operator’s activities. Arguably, tribes without environmental protection mechanisms do not have a traditional role in regulating the reservation environment. It may be suggested, however, that even absent formalized written environmental laws, tribes have cultural norms guiding their interaction with nature, and that these demonstrate a traditional role in regulating the environment.

Considering all the facets of the test together — each party’s interests, traditional notions of sovereignty, federal policy, and the tribe’s historical role in the activity — it is uncertain how a court would conclude in every case. Federal policy and tribal health concerns do not favor state jurisdiction. But, absence of tribal environmental regulation makes state health arguments stronger and, since the tribe’s historical role is a factor of the test itself, state jurisdiction is more likely. Thus, it is possible that a state could gain regulatory authority, particularly if tribal and federal enforcement is absent.92

89. Id. at 650-52.
90. Id. at 652-53.
92. See Murakami, supra note 14, at 557-58 (stating that California could have jurisdiction to prosecute Indian or non-Indian midnight dumpers). The location of the regulated activity and the party also greatly impacts jurisdictional questions. See Montana v. United States, 450 U.S.
D. Jurisdictional Overview

Based upon notions of inherent sovereignty, tribal governments have authority over members, and over non-Indians based upon notions from National Farmers Union and Montana. Thus, tribal governments have authority over native entrepreneurs and midnight dumpers. Furthermore, tribal authority is supported by the federal policy of Indian self-determination. Despite their authority, there is evidence that native governments have a problem with illegal dumping. Many tribal governments have failed to stop the illegal activity, which threatens tribal environment and community.

Federal environmental statutes are applicable under either plenary power rationale (i.e., when the statute expressly regards Indian tribes or lands) or under the Tuscarora rule (i.e., when the statute is intended to be of uniform national application). The federal policy promoting self-determination, however, contradicts this power. This inconsistency may account for the EPA's lack of regulatory enforcement of federal pollution laws.

State authority, in contrast to tribal and federal authority, is uncertain. Although in many cases state authority is expressly preempted by federal pollution control laws, in the absence of such federal law, state authority could be exerted. If a tribal government and the federal government are lenient in environmental enforcement, state authority over tribal lands is more likely. Thus, the existence of state authority is dependent upon the degree of the federal or tribal authority exerted.

As applied to the problem of on-reservation illegal operators, tribal governments need to exert the authority they possess, or they may lose it to the states. Furthermore, a degree of authority has already been lost to the federal government in theory because federal environmental laws have been enacted which apply on native lands. As long as the federal laws, however, are unenforced, tribal governments have a window to create and enforce their own laws which fit their needs and philosophies. If the federal government finds that tribal schemes meets federal environmental concerns, albeit through different means, the federal government is unlikely to change its present position of inaction.


93. See supra part III.A.
94. See supra part III.B.
95. See Allen, supra note 85, at 74, 110 n.249; see also Bill Lambrecht, Indians Say EPA Not Doing Enough, ST. LOUIS POST-DISPATCH, Nov. 18, 1991, at 8A ("[T]he EPA's failure in Indian country precipitated an uprising within the agency.").
IV. Traditional Law and Custom and Cultural Dynamics

As complex jurisdictional considerations affect tribal response to native entrepreneurs and midnight dumpers, so do numerous internal tribal considerations. Tribal governments must balance wishes for retaining an independent identity, honoring past traditions, adapting to present needs, and resisting subsumption into Euro-America. To meet these aims, traditional ways and philosophies should be respected and expounded upon, transforming the old ways into the new. Cultural stasis is not recommended. Cultures are dynamic, and to survive they must change along with their technological, social, economic, and ecological environments. Change, however, should not equate with adopting Euro-American methods and philosophies wholesale. Native governments are unique, possessing their own strengths and weaknesses. To adopt Euro-American methods and philosophies wholesale would be to deny their strengths and uniqueness. Tribal governments, ideally, could build off their traditional strengths and adjust for their weaknesses.

In *People of the Deer*, author Farley Mowat tells of Kakumee, an Iñupiat Eskimo, who left his isolated village camp and returned with goods from white traders, materialism, and plague. Kakumee was "The Breaker of Law." Immediately upon his return, he violated, first, "a law as old as life" that a man shared what he had with his neighbors, and, second, the law that one does not strike another in anger. In a frenzied attempt to prevent his brother from walking off with a rifle, Kakumee struck his brother with an axe. He then declared that all the goods were his and threatened the life of anyone who argued otherwise. Kakumee terrorized his people from that day forward, stealing their children, women, food, and weapons. His people considered him a "madman" and feared him, never rebuking him or trying to stop his evil ways.

The plague Kakumee returned with decimated his people, yet Kakumee was seemingly immune. When his starving people approached him for food or return of a rifle that he had stolen, Kakumee would turn them away or shoot them. His people were a quickly dying race, yet Kakumee was never in want. However, Kakumee was as empty as were his possessions and greed. After visiting Kakumee's tents and seeing hoards of rusted and useless white men's goods that Kakumee had spent his life voraciously accumulating, Mowat writes: "I was appalled, for it was not simply the

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97. Id. at 186.
98. Id. at 189.
99. Id.
100. Id. at 192-93.
material wealth of one man I saw, but the wealth of a race, piled there to decay and to pass into dust that one's man passion might be well fed.\textsuperscript{101}

Like Kakumee, avaricious midnight dumpers and native entrepreneurs threaten tribal health and cultural existence by making foreign government on-reservation authority more likely. Many reservation communities experience desperate economic conditions, making members susceptible to the lure of money from exploiting weak federal and tribal environmental enforcement. It is especially problematic that almost an entire native group could adhere to its traditional laws and bypass this temptation, yet one avaricious illegal operator could destroy reservation environment and health, as well as threaten tribal sovereignty.

Greed is a strong and pervasive force in today's society. However, greed and materialism were foreign to many native peoples pre-contact. It follows that these characteristics would not be addressed as strongly by traditional native law and custom as they may need to be addressed today. Many native cultures have changed and, as is natural, continue to change as their people change. The law which guides these people must keep pace with these changes in order to protect those who abide by it willfully.

\textbf{V. Recommendations}

For several reasons native entrepreneurs and midnight dumpers are a problem for many native governments. First, tribes often have little or no leverage with the illegal operators, particularly if tribes do not have an environmental regulatory infrastructure with adequate enforcement mechanisms. Second, reservation communities generally experience desperate economic conditions and lack the funds and personnel for a meaningful regulatory program.\textsuperscript{102} Finally, some reservations have small populations and large land holdings so that illegal activities are easily hidden from the reservation community.\textsuperscript{103} A solution to illegal dumping must, therefore, address the absence of proactive institutions, the lack of financial resources and personnel, and the practicalities of reservation life.

A uniform proactive means of addressing siting and regulation concerns is difficult to recommend because there are variables which differ from Native American group to group. For example, the infrastructure of tribal governments varies widely,\textsuperscript{104} treaties are often unique to specific Native

\textsuperscript{101} \textit{Id.} at 197.


\textsuperscript{103} See Murakami, supra note 14, at 547.

\textsuperscript{104} For example, the Seneca Nation of Indians and the Tonawanda Band of Senecas, although of the same heritage and in close geographic proximity, have very different forms of government. The Seneca Nation of Indians have a constitutional form of government, and
American groups, and parties introducing waste onto Native American land may receive different treatment by tribal governments. One native group's approach to the problems of native entrepreneurs and midnight dumpers will serve only to inform other groups, not provide mechanical solutions. Therefore, a broad array of alternatives will be proposed for consideration so that numerous native groups may find utility in this article. Perhaps the ideas presented below may even spark thought about different approaches to the pervasive problem of illegal dumping.

A. Euro-American-Style Institutions

To address the problems of native entrepreneurs and midnight dumpers, native governments could exert more authority over illegal operators by utilizing an Euro-American-style approach. That is, native governments could create laws to regulate or prohibit such operations, take offenders to tribal court and secure judgments against them, and increase police power over offenders. The relatively recent proliferation of constitutional tribal governments and tribal courts provide a ready framework for such a system. Furthermore, because this is a Euro-American-style approach, it would probably hold legitimacy in the eyes of federal and state governments. This approach, however, could conflict with traditional native methods of addressing deviant behavior and may be rejected by native peoples.

The perspectives of the external governments and the regulated peoples are important to the viability of a tribal regulatory system. The tribal program must be credible to external governments in order to discourage their intrusion, yet the laws must be respected by those it regulates to be effective. Professor Frank Pommersheim argues that a fundamental element of these Euro-American-style institutions, adjudication in tribal courts, is gaining legitimacy in a social, historical, and cultural context.

Tonawanda Band of Senecas have a traditional form of government. COHEN, supra note 23, at 422-23.

105. See 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 3-1074 (AMS ed. 1971) (1904) (providing a compilation of all treaties and agreements between Indian tribes and the United States).

106. See Frank Pommersheim, The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community, 18 N.M. L. Rev. 49, 60 (1988) ("Certainly there are (or have been) identifiable segments of most tribes that refuse to consider tribal courts legitimate. In this regard, many tribal courts are vilified as 'white men's' creations flowing from the IRA and an entire federal history directed to assimilation.")

107. Id. at 59-63. Examples of tribal courts' growing legitimacy are the increase of the law trained Indian people within many systems, tribal and constitutional code revision, the nascent development of traditional and customary law, and the continued recognition of tribal courts by the United States Supreme Court as viable and important forums for resolution of reservation based claims involving both Indians and non-Indians.

Id. at 61 (footnote omitted).
Nevertheless, Pommersheim recognizes that "[t]he process of striving for legitimacy is far from over." Thus, when formulating their response to on-reservation environmental offenders, native governments should consider whether their people would respect such institutions.

Tribal governments should also consider that adoption of Euro-American-style institutions could affect tribal sovereignty. As more traditional ways are replaced by Euro-American ways, tribal governments become less distinguishable from states and municipalities. This impacts both the internal and external perception of native individuality and autonomy. Tribal governments, however, should not reject Euro-American methods for sovereignty reasons alone, particularly when tribes could both protect sovereignty and adopt Euro-American methods for protecting tribal health and environment. Euro-American methods could be molded to unique native needs and philosophies, transforming Euro-American approaches into native approaches.

The Navajo Peacemaker Court epitomizes the concept of melding native tradition and Euro-American-style systems. Navajo tribal judges and bar members actively sought to establish a method for accommodating Navajo common law in their Euro-American-style court system. With extensive efforts, such as conducting studies, forming the nine-member Task Force on Navajo Judiciary, interviewing Navajo judges and bar members, and debating the proposed system, an amalgam of the traditional and the Euro-American was created. Navajo traditional mediation is the core of the new court, and it is supported by a formal system that incorporates Euro-American elements like appealability of decisions to a higher court (the Navajo Court of Appeals). In creating such a system, "the Navajo judges believe they have chosen the correct method of blending Navajo common law into an American-style court system." The Navajo experience demonstrates that tribal schemes to protect reservation health and environment from native entrepreneurs and midnight dumpers could incorporate Euro-American-style institutions without necessarily sacrificing their custom, philosophies, or autonomy.

1. Tribal Legislation

Complex considerations are involved in each phase of adopting a Euro-American-style approach to regulating the reservation environment, from creating laws, to utilizing tribal courts, to stepping up police power.

108. Id. at 62.
110. Id. at 92-99.
111. Id. at 100-01.
112. Id. at 109.
Underlying the creation of environmental law and regulatory institutions are complicated legal issues, ethical considerations, and health concerns. As is true with any environmental regulatory program, these factors should be addressed prior to implementation because informed decision making decreases future dissatisfaction and potential harm.

A native government will need legal and scientific consultants to consider the legal issues and health concerns that are associated with creating environmental laws, as well as resources to compensate these advisors. For governments who have both the financial and human resources necessary, tribal environmental laws could be developed from scratch, or based in part on state or federal laws to meet their unique needs. Using funds provided by a commercial waste company, the Campo Band of Mission Indians, for example, established tribal environmental codes suited to their needs. After consulting legal and scientific advisors, the Band enacted legislation that was in many respects the most stringent and aggressive program in California.

Native governments who lack financial and human resources could cut costs by either adopting state or federal government laws verbatim, or, simply by prohibiting any form of waste disposal operation that is conducted for profit. However, these alternatives are satisfactory if the native government has determined that such approaches are in its environmental, economic, and sovereignty interests.

Alternatively, the tribal governments could utilize traditional common law in their tribal courts to address environmental concerns. As Associate Justice Raymond Austin of the Navajo Nation Supreme Court reports: "Navajo common law is the law of preference of the Courts of the Navajo Nation [including, but not limited to, the Peacemaker Courts]. It is a corpus of law based upon the values and norms of the Navajo people, as expressed in their customs, usages and morals." But he goes on to recognize: "The

113. Gover & Walker, supra note 8, at 938-39; see also Daniel A. Spitzer, Maybe in my Backyard: Strategies for Local Regulation of Private Solid Waste Facilities in New York, 1 BUFF. ENVTL. L.J. 87, 88-95, 117-46 (1993) (discussing strategies for rural communities, who are often impoverished, to address the waste disposal industry's proposals).


15. The Yankton Sioux of Marty, South Dakota, for example, barred all waste companies from siting on their land. Linda Kanamine, Tribes Take on Waste Industry, USA TODAY, June 10, 1991, at 6A.

16. Of course the native government would still incur a minimal amount of personnel time and expenses to investigate the appropriateness of such legislation. If the tribe already has legal and scientific personnel on staff, the costs of considering an adoption proposal would be even less. However, the cost would probably be minimal in comparison to compensating legal and scientific consultants.

Courts of the Navajo Nation are among the very few Indian Courts, if not the only Indian legal system, which uses tribal common law to decide cases, and which writes opinions based on that law.\textsuperscript{118} While traditional common law may be under-utilized for adapting the old to the new, it need not remain that way. Formative tribal legal systems could look to the Navajo for guidance in adopting such an approach.

Tribal legislation of any type, including use and recording of traditional common law, is an important step for many native governments to take. A tribe's traditional role is factored into the "preemption/infringement" test which determines whether states have on-reservation authority.\textsuperscript{119} Thus, in acting to protect reservation health and environment, the tribe simultaneously protects its sovereignty.

2. Tribal Courts

After legislation is created or native common law is identified, the waste disposal operator's unauthorized actions must be adjudged by those laws. In Euro-American-style institutions this occurs in courts with an adversarial framework. As with legislation, this approach may be molded to meet tribal needs and philosophies. The Navajo Peacemaker Courts, for example, are not adversarial, but provide mediators, or arbitrators upon request.\textsuperscript{120} Meditation is a more traditional Navajo approach.\textsuperscript{121} The Navajo do provide adversarial courts, however, to deal with matters that cannot be mediated or arbitrated.\textsuperscript{122} This demonstrates that tribal courts are not bound to Euro-American form. What remains a constant, however, is that upon creating or reformulating a tribal court system, internal and external legitimacy and sovereignty should be considerations.

3. Tribal Sanction and Enforcement

After a judgment is secured against an illegal operator, what sanctions may be imposed and how are they to be enforced? The ICRA places a limit on tribal sanctions.\textsuperscript{123} Tribal governments may "in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of $5,000, or both."\textsuperscript{124} Illegal dumping can cause substantial harm to reservation health and environmental costing possibly thousands or millions in clean up and human health costs. The sanction limits of ICRA are not commensurate with these

\begin{itemize}
  \item\textsuperscript{118} Id. at 6.
  \item\textsuperscript{119} See supra part III.C.
  \item\textsuperscript{120} Zion, supra note 109, at 102-03.
  \item\textsuperscript{121} Id.
  \item\textsuperscript{122} Id.
  \item\textsuperscript{123} 25 U.S.C. § 1302 (1988).
  \item\textsuperscript{124} Id. § 1302(7).
\end{itemize}
harm. A solution to this inequity may be drafting tribal legislation which defines an offense as a daily occurrence. Therefore, the fine would accrue $5000 for each day the activity or harm continued. As well, the tribal government could legislate closely related laws so that a violation of the first law would almost guarantee a violation of the second (careful drafting will avoid double jeopardy concerns). With the aid of clever legislation, justice can be done, despite ICRA's intrusive limitations.125

Another problem facing tribal governments is enforcing the tribal court judgment. Illegal operators already act with disregard for tribal authority when they conduct their unauthorized activity. Absent an adequate enforcement mechanism, judgment and sanctions against them alone probably would not be meaningful. Even if the tribe has these mechanisms, they may not be enough. The Seneca Nation of Indians, located in western New York, has a regulatory force, yet there is also a provision in New York law for the enforcement of tribal court judgments.126 While this is done infrequently,127 it provides added incentive for litigants to honor tribal court judgment and to respect the tribal court process. Problems may be inherent with outside assistance, but occasionally exigent circumstances require an extraordinary response.

4. Overview

A Euro-American-style approach to the problems of environmental offenders presents native governments a unique opportunity. Such an approach would likely receive approval from the federal and state governments, and thereby ward off jurisdictional encroachment attempts like

125. This presupposes, of course, that a tribe wishes to draft Euro-American-style environmental legislation. See supra part V.A.I.

126. N.Y. INDIAN LAW § 52 (McKinney 1950). The statute states:

If any party shall fail to comply with, or fulfill the directions or finding of the peacemakers in any matter heard or determined by them in pursuance of law, within the time fixed by such determination, the party in whose favor such determination may be, shall be entitled to recover the amount awarded to him, by such determination with costs, in an action in justice's court before any justice of the peace of the county in which such reservation or part thereof is situated, in which action, a copy of the record of such determination, certified to by said clerk, shall be conclusive evidence of the right of recovery, and of the amount of such recovery, and executions shall be awarded to enforce the collection of the judgment obtained thereon in the same manner and with the like effect as against white persons, and the property and person of the defendant in such action shall be liable to seizure and sale or imprisonment, as in like cases against white persons. In case the action or proceeding is one not within the jurisdiction of justice's courts, the application may be made to a court having jurisdiction of actions of the same nature.

Id.

127. Silverheels v. Maybee, 143 N.Y.S. 655 (Sup. Ct. 1913), is the most recently reported case concerning the enforcement of this provision.
ITGWMA and the Peace Bill. Furthermore, adopting methods to address environmental offenders will establish a "traditional role" in regulating the activity, which courts find influential in determining whether state or tribal jurisdiction controls. A Euro-American-style approach is also attractive because, as demonstrated by the Navajo, traditional native ways and philosophies can be easily incorporated.

Despite these favorable considerations, a Euro-American-style system has potentially negative attributes as well. If this approach is not adapted to native needs and philosophies, it could undermine the individuality of native groups, disregard traditional strengths, create a perception of sacrificed sovereignty, and be ineffective. A general criticism of the Euro-American-style approach is that it is reactive, as opposed to proactive. Based on the inherent structure of the system (which operates in the order of: offense, adjudication, enforcement), many harms will result before they are addressed. Arguably, reactive institutions provide deterrence to potential offenders, but, looking at the number of violators in the federal and state systems, the deterrence value is questionable. The Euro-American-style approach is not a panacea. It can be improved upon. Native governments have the liberty to do so and should-if they contemplate adopting a Euro-American-style approach for dealing with native entrepreneurs and midnight dumpers.

B. Contract for State Assistance

Article 8.6 of the California Health and Safety Code and section 52 of New York Indian Law present an interesting consideration for tribal governments wanting to formulate a meaningful response to the threats posed by midnight dumpers and native entrepreneurs. Tribes could contract for state assistance with environmental programs. California's article 8.6 codified California's offer to assist with tribal hazardous waste facility regulation in exchange for satisfaction of California environmental laws at tribal regulated facilities. New York's section 52 is more limited; New York agrees to enforce Seneca Peacemaker Court judgments.

According to individual tribal needs, varying degrees of state assistance may be sought by native governments. The less technical and financial resources a tribe has, the more extensive its agreement with the state could be. For example, a tribe may need technical assistance with developing and

128. See supra part III.C.
130. N.Y. INDIAN LAW § 52 (McKinney 1950).
131. See CAL. HEALTH & SAFETY CODE § 25198.3-.6.
132. N.Y. INDIAN LAW § 52 (McKinney 1950). Interestingly, the name of the Seneca Peacemaker Court may be the origin of the name of the Navajo Peacemaker Court. See Zion, supra note 109, at 96.
administering a tribal environmental program, or a tribe may only have problems with enforcement of its program. California and New York's laws provide legislative guidance in both scenarios.

Of course, a state must also be interested in forming an agreement to provide assistance to a tribe. But, as evidenced by the State of Washington's attempt to assert on-reservation environmental authority, states have an interest in obtaining on-reservation authority. This interest, however, also highlights the major drawback with contracting for state assistance. Tribal sovereignty may be sacrificed by acquiescence to any degree of state on-reservation authority, particularly if the agreement provides for waiver of tribal sovereign immunity, as does California's article 8.6.

Arguably, sovereignty does not suffer as much when outside assistance is requested, rather than imposed. Furthermore, states may gain on-reservation authority—or the federal government may be prompted to exert more of its plenary power over the reservation environment—if tribal governments do not remedy reservation environmental problems. Thus, a tribe who is without means to create a regulatory system may merely be preempting another government's seemingly inevitable assertion of authority. By initiating the agreement which allows another government more power, the tribal government can bargain for more favorable terms than otherwise may have been imposed. Furthermore, tribal governments may view this as a necessary, even though extreme, step to protect its people from environmental harms and health threats.

As with all the recommendations suggested in this article, tribal governments should consider if the proposed alternative is compatible with tribal needs and philosophy, as well as being in their long-term interest. With state contracting, this caveat especially applies. Once a state has on-reservation authority of any type, it may be difficult to later divest.

C. Intertribal Agreements

To combat tribal financial and resource deficiencies, tribal governments could pool their expertise and resources. Intertribal cooperative agreements could be created where personnel, equipment, and information are shared among Indian tribes. Environmental advisors and field workers could service the different tribes. Laboratory equipment could be jointly purchased, and lab technicians employed and paid by all involved. Legal advisors may be employed in a similar fashion. This approach would save financial resources by minimizing repetition and spreading the costs, as well as account for trained personnel shortages.

Geographical constraints or traditional antagonistic relations with other tribes may limit the feasibility of intertribal agreements. But, in contrast,

133. Washington Dept of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985).
134. CAL. HEALTH & SAFETY CODE § 25198.7(b).
geography and traditional relations may make intertribal agreements more viable. The Six Nations of the Iroquois is a prime example. There exists a traditional allegiance among the Cayuga, Onondaga, Oneida, Mohawk, Seneca, and Tuscarora Nations. Today, most of these nations are located within New York, albeit widely dispersed throughout New York. These factors provide fodder for the growth of a present-day tribal environmental allegiance of sorts.

While geography may prevent some tribes from sharing resources and personnel, information sharing has few impediments. With the prevalence of faxes and modems (or even use of the mail), tribes could create a network for sharing information. A computer network, a clearinghouse, or even a predesignated mailing chain could provide information concerning known offenders, types of activities, methods of offenders, and successful and unsuccessful tribal responses to environmental offenses. With minimal effort, tribes could find strength in unification against illegal operators.

D. Information Provider and Facilitator

Information is vital to the successful functioning of a tribal regulatory system. The tribal government, for example, must know what is introduced onto the reservation in order to respond with adequate speed and discipline. Furthermore, native communities who know midnight dumping is a regular offense on their land and who appreciate the threat midnight dumpers pose would be alert to this dumping, take it more seriously, and be more apt to notify tribal authorities of suspicious activities. Information about the dangers of unregulated waste disposal operations could also dissuade potential native entrepreneurs and unify a community against native entrepreneurs. However, in the face of the great wealth native entrepreneurs stand to gain, these entrepreneurs may be indifferent to the community's opinion or may isolate themselves from it. Community opinion, nevertheless, may provide the impetus needed for tribal governments to address these offenders in a meaningful manner.

Tribal governments are in a position to provide information to their communities and facilitate the two-way flow of information. They could provide communities with general information about the presence and threat of illegal operators and give specific information about noxious substances,

137. Toni M. Massaro, Shame, Culture, and American Criminal Law, 89 MICH. L. REV. 1880, 1916 (1991) ("[T]hose people who are most likely to defy social norms and risk shaming sanctions, even within close knit groups, are the very rich . . . . The rich can afford to defy the norms because they are insulated by their wealth.").
their effects, and what to do if exposed. In return, communities may provide tribal governments with details about who the illegal operators are, where they are operating, what is being disposed of, and where the waste originated.

Low-cost activities like conferences, presentations, or tribe-sponsored environmental groups are ways to facilitate the needed exchange of information. Of course, a tribal community alone could engage in these activities without the help of the tribal government.138 Tribal governments, however, should take a more active role to ensure that community members are aware that they may encounter noxious substances from illegal dumpings and inform them of what to do if they are exposed. Highlighting this point is the story of Sally Jones, an Indian, who "landed in the hospital with lung damage and rashes after trying to wash out an old barrel."139 The unsuspecting deserve a warning, and surely the illegal operators will not provide it. Tribal governments should fill this role, especially when this exchange of information may have deterrence and policing value that benefits the whole tribe.

VI. Conclusion

Midnight dumpers and native entrepreneurs threaten native health, environment, and sovereignty. Tribal governments presently have the jurisdictional ability to simultaneously rectify the problem of illegal dumpers and create a regulatory system which accommodates tribal needs and philosophies. However, if tribal governments do not exert this authority, it may be lost. Outside authority may eventually impose a regulatory system upon them.

Numerous alternative regulatory approaches are available to tribal governments. Considerations of sovereignty, internal and external legitimacy, and tribal health pervade these alternatives. It matters more that a tribal government undertakes these considerations than which alternative(s) they adopt. Protection of tribal health and environment, as well as long-term satisfaction are more likely if the approach is well-suited to individual tribal concerns.

Kakumee was driven by greed to disobey the unwritten, but well-known, tribal law. His actions were so foreign to his people that they were stupefied into inaction. They did not adapt their traditional approach to prevent his future social deviance, and their culture was lost because of it. The greed of midnight dumpers and native entrepreneurs can irreparably

138. For example, students in the Native American Indian Alliance at the State University of New York at Buffalo organized a three-day conference, "Dumping on Native American Lands," which was held in Buffalo, N.Y., on April 10-11, 1992.

139. Lambrecht, Illegal Dumpers, supra note 14.
harm native groups today. Tribal governments should prevent illegal operators' future social deviance, and thereby protect their people from the present-day Kakumees.