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### Environmental Regulation on Indian Reservations

B. Kevin Gover

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ENVIRONMENTAL REGULATION ON INDIAN RESERVATIONS

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NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY

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ENVIRONMENTAL REGULATION ON  
INDIAN RESERVATIONS

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**JURISDICTION**

Federal environmental regulatory laws generally require the Environmental Protection Agency ("EPA") to establish standards for various sources of pollution, enforce the standards through a permitting system, and, where a state so requests, delegate primary enforcement authority to the state. In general, no person or activity is beyond the reach of federal environmental statutes or outside the jurisdiction of the state in which the person conducts his activity.

Special rules apply, however, when the regulated person is an Indian or Indian tribe or the regulated activity takes place on an Indian reservation. This Section will discuss relevant case law pertaining to the applicability of federal law to Indians, Indian tribes, and Indian lands, the authority of tribal governments to enforce regulatory laws against persons within their territory, and the scope of state jurisdiction to enforce environmental laws on Indian reservations.

**I. Applicability of Federal Environmental Laws to Indians and Indian Lands**

The initial question is whether federal environmental regulatory statutes apply to Indians, Indian tribes, and Indian lands. The following authorities establish and apply the analysis to be used to resolve issues regarding the applicability of general federal laws to Indians.

A. Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960)

1. Facts: The State of New York applied to the Federal Power Commission ("FPC") for a license to construct a power project that would require flooding of lands owned by the Tuscarora Indian Nation. The Nation intervened in the administrative proceedings claiming that the State lacked authority to acquire tribal lands for the project. The FPC issued an order granting the license. The Tribe appealed to the D.C. Circuit Court of Appeals, resulting in a remand to the FPC. After a second order from the FPC, the D.C. Circuit instructed the FPC to amend the license to exclude the power of the State to condemn lands belonging to the Tuscarora Indian Nation.
2. Held: Lands owned in fee by the Tuscarora Indian Nation were subject to condemnation by a licensee under authority granted by the Federal Power Act.

3. Analysis:

- (a) The Court first held that, because the Tuscaroras owned their reservation in fee simple, the lands at issue were not "reservation" lands under the Federal Power Act. Thus, the FPC was not constrained by 16 U.S.C. § 797(e), which required that, before a license could be issued, the FPC must find that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired . . . ."
- (b) The Court next considered the issue of whether the condemnation authority contained in the Federal Power Act applied to Indian lands:

"The Tuscarora Indian Nation relies heavily upon Elk v. Wilkins, 112 U.S. 94. It is true that in that case the Court . . . said: 'Under the constitution of the United States, as originally established . . . General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.' . . . However that may have been, 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." 362 U.S. at 115-16.

- (c) The Court relied heavily on a series of cases holding that Indians generally are subject to federal tax laws. E.g., Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418; Choteau v. Burnet, 283 U.S. 691 (1931).
- (d) "The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission, and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. . . . It neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians - 'tribal lands embraced within Indian reservations.' . . . The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians. . . . Section 21 of the Act, by broad general terms, authorized the licensee to condemn 'the lands or property of others necessary to the construction, maintenance or operation of any' licensed project. That section does not exclude lands or property owned by Indians, and, upon the authority of the cases cited, we must hold

that it applies to these lands owned in fee simple by the  
Tuscarora Indian Nation." 362 U.S. at 118.

B. Donovan v. Navajo Forest Products Industries, 692 F.2d 709 (10th Cir. 1982)

1. Facts: The Department of Labor, after inspecting the facilities of Navajo Forest Products Industries ("NFPI"), issued a citation to NFPI under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 et seq. NFPI contested the citation. Although NFPI conceded that it fell within OSHA's definition of "employer," it contended that the Secretary lacked jurisdiction over Indian tribal enterprises on tribal land. Article II of the Navajo Treaty of June 1, 1868, 15 Stat. 667, provides that "no person . . . except such officers . . . of the government . . . as may be authorized to enter upon Indian reservations in discharge of duties imposed by law" may enter the Reservation. The Occupational Safety and Health Review Commission adopted the conclusion of an Administrative Law Judge that the Secretary lacked jurisdiction. The Secretary petitioned for review to the Tenth Circuit Court of Appeals.

2. Held: "Both the ALJ and the Commission . . . concluded, notwithstanding the Secretary's strong reliance on Federal Power Commission v. Tuscarora Indian Nation, . . . that OSHA did not apply to NFPI because there exists no legislative intent in OSHA or its legislative history to abrogate the treaty entered into between the United States government and the Navajo Indian Tribe; thus, to apply OSHA to NFPI would violate the Navajo Treaty. We agree." 692 F.2d at 710.

3. Analysis:

(a) The Secretary relied heavily on the Tuscarora language concerning the application of general federal statutes to Indians. The court distinguished Tuscarora:

"Tuscarora did not, however, involve an Indian treaty. Therein lies the distinguishing feature between the case at bar and the Tuscarora line of cases, which stand for the rule that under statutes of general application Indians are treated as any other person, unless Congress expressly excepts them therefrom. . . . The Tuscarora rule does not apply to Indians if the application of the general statute would be in derogation of the Indians' treaty rights." 692 F.2d at 711.

C. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985)

1. Facts: A compliance officer from the Occupational Safety and Health Administration inspected the Farm, issued citations, and proposed a fine. The Farm challenged the citations, relying on

Navajo Forest Products. The Review Commission vacated the citations, and the Secretary appealed to the Ninth Circuit Court of Appeals.

2. Held: Application of the Occupational Safety and Health Act does not abridge treaty rights or exclusive rights of Indian self-government.

3. Analysis:

(a) The court distinguished Navajo Forest Products as follows:

"In this case, however, there is no treaty between the Coeur d'Alene Tribe and the United States government. Nor can the Farm point to any document to which the United States is a signatory that specifically guarantees the Tribe's right to exclude non-Indians. . . . Thus, the Farm cannot avail itself of the 'treaty rights exception' [to the rule that federal statutes of general application apply to Indians and Indian tribes]." 751 F.2d at 1117.

(b) The Tribe also relied on United States v. Farris, 624 F.2d 890 (9th Cir. 1980), arguing that because the application of OSHA would affect "exclusive rights of self-government in purely intramural matters," the statute must expressly indicate that it is to be applied to tribes. The court responded:

"The Farm's argument proves far too much. To accept it would bring within the embrace of "tribal self-government" all tribal business and commercial activity. . . . [I]f the right to conduct commercial enterprises free of federal regulation is an aspect of tribal self-government, so too, it would seem, is the right to run a tribal enterprise free of the potentially ruinous burden of federal taxes. Yet our cases make clear that federal taxes apply to reservation activities even without a 'clear' expression of congressional intent. . . . We believe that the tribal self-government exception is designated to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes. 751 F.2d at 1116.

D. Blue Legs v. United States Environmental Protection Agency, 668 F.Supp. 1329 (D.S.D. 1987)

1. Facts: The Oglala Sioux Tribe operated several solid waste disposal sites on lands owned by the Tribe within the Pine Ridge Reservation. Each of the sites was operated as an "open dump," despite the prohibition on such dumps in the Resource Conservation and Recovery Act. See 42 U.S.C. § 6945. Plaintiffs



brought suit under RCRA's citizens suit provision, 42 U.S.C. § 6972, against the Tribe, the BIA, the IHS, and the EPA for violations of RCRA.

2. Held: "The Court finds that it has jurisdiction to enforce the provisions of the RCRA concerning the prohibition of open dumps against the Oglala Sioux Tribe. OST has the responsibility to regulate, operate, and maintain the dumps on the Reservation. This responsibility stems from the inherent sovereignty which Indian tribes possess." 668 F.Supp. at 1337.

3. Analysis:

(a) Section 6945 provides that the citizens suit provision could be invoked for proceedings against "persons engaged in the act of open dumping." The term "person" is defined by the statute to include "municipality," 42 U.S.C. § 6903(15). "Municipality," in turn, is defined to include "an Indian tribe. . . ." 42 U.S.C. § 6903(13). Thus, concluded the court, Indian tribes are regulated entities under RCRA. 668 F.Supp. at 1337-38. See also Washington Department of Ecology v. United States Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985) at p.14, supra.

(b) "The Washington case established, and this Court agrees, that Indian tribes are regulated entities under RCRA. If the tribes are regulated entities, then they should be subject to citizens suit [under § 6972]." 668 F.Supp. at 1338.

E. F. Cohen, Handbook of Federal Indian Law (1982 ed.) 282-83:

"The power of Congress to include Indians and tribes within the scope of a federal statute is beyond doubt in most situations. Whether a general federal statute applies to Indians or tribes thus depends on the intent of Congress. The intended coverage of statutes specifically pertaining to Indians is generally clear; by their terms these laws are either territorially confined to Indian country or are topically applicable only to Indians, tribes, the Indian Service, or Indian property. Most federal laws pertain to other legal fields, however, and many of these appear to apply to all persons, property, or groups throughout the United States. Examples are general federal tax laws, legislation regulating business activities, environmental laws, civil rights laws, and labor relations regulations. Application to Indians and Indian tribes of federal laws not specifically referring to Indians raises a number of interpretive questions.

. . . .

"When a general federal statute conflicts with a particular Indian right under a treaty or another statute, the Court has applied three

rules of construction. Two of these rules are generally applicable in all judicial review of statutes: repeals by implication are not favored, and specific laws prevail over more general ones. The third rule is unique to Indian affairs: ambiguities or doubts in statutes must be construed in favor of the Indians. These rules require that congressional intent to override particular Indian rights be clear.

"When retained tribal sovereignty in Indian country is not invaded and no other particular Indian right is infringed, individual Indians and their property are normally subject to the same federal laws as other persons. Most general federal statutes using the term 'persons' to define their scope include private groups such as corporations and associations; however, an intent to include Indian tribes within such definitions must be clearly shown since tribes are 'unique aggregations' and exercise governmental powers.

"When this rule of clear statement is applicable, it does not require that a federal statute mention Indians or tribes by its terms. The requisite intent may be found in the legislative history and surrounding circumstances, or when the congressional purpose or the statutory scheme clearly requires a national or uniform application." (footnotes omitted).

#### F. Specific Federal Environmental Statutes

##### 1. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991i

Two federal courts have held that RCRA applies to Indian lands and may be enforced against Indian tribes. See Washington Department of Ecology v. United States Protection Agency, 752 F.2d 1465 (9th Cir. 1985) (see also p. 14, supra); Blue Legs v. United States Environmental Protection Agency, 668 F.Supp. 1329 (D.S.D. 1987) (see also p. 4, supra).

##### 2. Clean Air Act, 42 U.S.C. §§ 7401-7642

- (a) The enforcement provisions of the Clean Air Act, e.g., § 7411(e), § 7412(c), applies to "owners," "operators," and "persons." However, none of these terms specifically include Indian tribes. See § 7411(a), § 7412(a), § 7602(e). Thus, at least some doubt exists that tribes are subject to the Act.
- (b) The Clean Air Act is a law as to which "the congressional purpose of the statutory scheme clearly requires a national or uniform application." F. Cohen, Handbook of Federal Indian Law (1982 ed.) at 283 and authorities cited therein. Thus, the Act likely would be held to apply to Indian tribes.

3. Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y

The prohibitions of FIFRA generally apply to any "person." E.g., § 136a(a), § 136e(a). The definition of "person," however, does not specifically include Indian tribes. See § 136(s). Thus, as is true of the Clean Air Act, at least some doubt exists as to its applicability to Indian tribes.

4. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387

The enforcement provisions of the Clean Water Act, e.g., § 1311(a), apply to "persons." "Person" is defined to include "municipalities." § 1362(5). "Municipality" is defined to include an Indian tribe. § 1362(4). The reasoning of the Washington Department of Ecology and Blue Legs cases yields the conclusion that the Act applies to Indian tribes.

5. Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-10

National primary drinking water regulations apply to all "public water systems." See § 300g. A "supplier of water" is "any person who owns or operates a public water system." § 300f(5). "Person" is defined to include a "municipality," § 300f(12), and "municipality" is defined to include an "Indian Tribe." § 300f(10). Blue Legs and Washington Department of Ecology would indicate that tribes are subject to the Act.

#### G. Summary

1. General federal laws apply on Indian lands and are enforceable against Indians and Indian tribes where the statute mentions Indians. Even where Indians are not mentioned, a federal statute will be held to apply if it is of a nature that requires uniform application to effect its purposes.
2. If application of a federal statute to Indians or tribes will result in an abrogation of rights reserved by treaty, courts will require a clear indication that Congress was aware of the statute's impact on treaty rights before it will be held to apply. E.g., United States v. Dion, 476 U.S. 734 (1986).
3. Federal environmental regulatory laws require uniform application to be effective. Both the Clean Air Act and RCRA have been held to apply to Indian lands. While RCRA literally includes tribes within the class of persons against whom the statute may be enforced, the Clean Air Act does not. No case in which a tribe has successfully challenged the application of federal environmental laws to it has been reported.

## II. Tribal Authority to Enforce Environmental Laws

The likely result of litigation concerning the applicability of federal environmental laws to Indians, Indian tribes, and Indian lands is that the laws will be held to apply. Moreover, virtually no doubt exists that Congress can require the application of such laws to Indians and Indian lands.

Given that federal environmental laws either do apply or can be made to apply to Indian lands, the issue becomes one of determining which government--federal, tribal, or state--should enforce those laws. Before that issue may be resolved and policy established, the scope of tribal jurisdiction must be determined. No doubt exists as to the power of tribes to enforce their laws against their members. The key question is whether tribes may enforce their laws against non-members. This Section discusses the emerging case law on the application of tribal civil regulatory laws to non-Indians.

### A. United States v. Mazurie, 419 U.S. 544 (1975)

1. Facts: The Mazuries were non-Indians who operated a bar on non-Indian land within the Wind River Indian Reservation. The bar was located on the outskirts of Fort Washakie, an unincorporated community where both the BIA Agency and tribal government offices were located. Enacted in 1953, 18 U.S.C. § 1161 authorizes tribes to regulate the introduction of liquor into Indian country so long as state law is not violated. The Shoshone and Arapahoe Tribes of the Wind River Indian Reservation enacted an ordinance pursuant to this authority requiring retail liquor outlets within Indian country to obtain both tribal and state licenses. The Mazuries applied for a tribal license, but the application was denied. The Mazuries then operated the bar without a tribal license until federal officials seized their stock of alcohol and initiated criminal proceedings. The Mazuries were convicted in District Court, but the Tenth Circuit Court of Appeals reversed, holding, inter alia, that 18 U.S.C. § 1161 unlawfully delegated federal power to tribal governments. The United States petitioned for certiorari.
2. Held: Congress has the power to control sales of alcoholic beverages on fee-patented land within the boundaries of an Indian reservation and may delegate that power to a tribal governing body.
3. Analysis:
  - (a) The Court relied on the Indian Commerce Clause, Art. I, § 8 of the Constitution and the "recognized relation of tribal Indians to the federal government" in upholding Congress' power to regulate liquor in Indian country. See 419 U.S. at 553-57.

- (b) The Court of Appeals had characterized the tribal government as a "private, voluntary organization, which is obviously not a governmental agency" in striking down the delegation of authority contained in 18 U.S.C. § 1161. The Supreme Court responded as follows:

"This Court has recognized limits on the authority of Congress to delegate its legislative power. . . . Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. . . . Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . .; they are 'a separate people' possessing 'the power of regulating their internal and social relations.' . . .

"[Previous decisions of the Court] surely establish that Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations,' and they thus undermine the rationale of the Court of Appeals' decision. These same cases, in addition, make clear that when Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter. We need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26. It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce . . . with the Indian tribes.'" 419 U.S. at 556-57.

B. Montana v. United States, 450 U.S. 544 (1981)

1. Facts: In 1974, the Crow Tribe enacted an ordinance prohibiting hunting and fishing within the Crow Reservation by anyone not a member of the Tribe. The Tribe's interest in enacting the ordinance seemed to involve primarily sports fishing and duck hunting on the Big Horn River. The United States filed suit on behalf of the Tribe to quiet title to the bed of the Big Horn in the United States as trustee for the Tribe and for a declaratory judgment establishing that the Tribe and the United States have exclusive jurisdiction to regulate hunting and fishing on the Reservation. The District Court denied the requested relief. The Ninth Circuit Court of Appeals reversed, holding that the United States retained title to the bed of the Big Horn in trust for the benefit of the Tribe, and that the Tribe could regulate hunting and fishing within the Reservation by non-Indians, except

that it could not prohibit hunting and fishing on fee lands by non-member owners of those lands. The State of Montana requested certiorari.

2. Held: Title to the bed of the Big Horn River passed to the State of Montana upon the granting of statehood. Neither the Crow treaties nor the inherent sovereignty of the Crows empowered the Tribe to regulate non-Indian hunting and fishing on fee-patented land.

3. Analysis:

(a) Because the United States generally holds lands under navigable waters in trust for future states, a strong presumption exists against their conveyance to others. The Crow treaties did not overcome the presumption against conveyance. 450 U.S. at 550-57.

(b) Although the 1868 Treaty with the Crows arguably conferred upon the Tribe authority to control hunting and fishing on lands set aside for the Tribe, that authority extended only to lands on which the Tribe exercises "undisturbed use and occupation" and cannot apply to lands subsequently alienated and held in fee by non-Indians pursuant to the allotment acts. 450 U.S. at 557-63.

(c) In rejecting the Crows' argument for tribal jurisdiction over non-Indian hunting and fishing on fee lands, the Court distinguished between tribal authority over Indians and tribal authority over non-Indians. Relying on United States v. Wheeler, 435 U.S. 313 (1978), the Court held that:

"[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. . . . Since regulation of hunting and fishing by non-members of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt [the ordinance prohibiting non-Indian hunting and fishing]." 450 U.S. at 564.

(d) Next discussing the decision in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), the Court seemed to further limit the authority of tribes over non-Indians:

"Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign

powers of an Indian tribe do not extend to the activities of non-members of the tribe." 450 U.S. at 565.

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

"To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-66.

- (f) The Court concluded that the Crow hunting and fishing regulations did not meet these criteria and therefore were invalid. 450 U.S. at 566-67.

C. Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981)

1. Facts: Section 107(a), 42 U.S.C. § 7407(a), of the Clean Air Act allows states to designate air quality regions. Prior to 1977, no provision of the statute provided similar authority for tribes. In 1974, EPA promulgated regulations favoring the redesignation of air quality regions, including a provision by which a tribal government could redesignate its reservation. The Northern Cheyenne Tribe proposed in 1976 to have its reservation redesignated as Class I, under which very little deterioration of air quality is allowed. After conducting the required studies and hearings, the Tribe submitted its formal proposal on March 7, 1977. EPA formally approved the redesignation by publication in the Federal Register on August 5, 1977, one day after the Clean Air Act Amendment of 1977 were passed by Congress, but before the Amendments were signed into law.
2. Held: "EPA's action was not arbitrary or capricious and, therefore, [we] affirm the Agency's approval of the Northern Cheyenne Tribe's redesignation of its reservation from Class II to Class I air quality standards." 645 F.2d at 704.

3. Analysis:

(a) Procedural Issues: The court first resolved a series of challenges based on the procedures used to approve the redesignation. The court held that:

- (i) The decision to redesignate was not arbitrary and capricious for failing to consider the impact on strip mining, even though the Amendments signed into law two days after the redesignation became effective raised the possibility that strip mining could be subjected to permit requirements, and the redesignation would result in stricter requirements being imposed.
- (ii) EPA had "good cause" under 5 U.S.C. § 553(d) to make the redesignation effective immediately rather than after the usual thirty-day period, even though EPA's clear motive was to bring the redesignation into effect prior to the enactment of the amendments.
- (iii) EPA met the requirement of its regulations that actions affecting Indian trust lands be approved by the Department of the Interior.
- (iv) EPA fulfilled its trust responsibility to the Crow Tribe by considering adequately the impact of the redesignation on the development of coal owned by the Crow Tribe.
- (v) The Analysis Document prepared by the Northern Cheyenne Tribe was sufficient and complied with EPA regulations.

(b) Tribal Jurisdiction: Several petitioners argued that the delegation of redesignation authority to tribes violated the Clean Air Act on the theory that § 107(a) delegated the responsibility to the states "for assuring air quality within the entire geographic area comprising the state." 645 F.2d at 713. The court responded as follows:

"The Indian Tribes have traditionally been regarded as possessing important attributes of sovereignty, and the power of the states to regulate Indians and Indian lands has been sharply curtailed. . . . As this Court stated in Santa Rose Band of Indians [v. Kings County], 532 F.2d 655, 658 (9th Cir, 1975)], 'we have little doubt that Congress assumed and intended that states had no power to regulate the Indian use or governance of the reservation provided, except as Congress chose to grant that power.' . . . And it is well recognized that 'Indian tribes possess an inherent sovereignty except where it has been specifically



taken away from them by treaty or Act of Congress.'" 645 F.2d at 713 (some citations omitted).

- (c) Rules of Statutory Interpretation: "Agency interpretations of federal statutes are entitled to great weight. . . . 'The construction of a statute by those charged with its execution should be followed unless there are compelling indications that is wrong.' . . . Moreover, tribal sovereignty provides 'a backdrop against which . . . applicable treaties and statutes must be read.' . . .

"The conclusion can be drawn, therefore, that within the present context of reciprocal impact of air quality standards on land use, the states and Indian tribes occupying federal reservations stand on substantially equal footing. The effect of the regulations was to grant the Indian tribes the same degree of autonomy to determine the quality of their air as was granted to the states. We cannot find compelling indications that the EPA's interpretation of the Clean Air Act was wrong. Nor can we say that the Clean Air Act constitutes a clear expression of Congressional intent to subordinate the tribes to state decisionmaking." 645 F.2d at 714.

- (d) Constitutionality of delegation: The petitioners charged that the delegation of redesignation authority to the Tribe was unconstitutional. They attempted to distinguish Mazurie on the grounds that the authority to redesignate could result in effects off the reservation. After quoting Mazurie, the court stated that:

"Certainly the exercise of sovereignty by the Northern Cheyenne Tribe will have extraterritorial effect. But another element must be considered, namely the effect of the land use outside the reservation on the reservation itself. This case involves the 'dumping' of pollutants from land outside the reservation onto the reservation. Just as a tribe has the authority to prevent the entrance of non-members onto the reservation . . . , a tribe may exercise control, in conjunction with the EPA, over the entrance of pollutants onto the reservation. We do not, however, decide whether the Indians would possess independent authority to maintain their air quality. 'It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority.' . . .

"We note further that while the Clean Air Act permits delegation of redesignation authority to the Indian tribes, the EPA maintains certain checks on the exercise of that authority. EPA regulations require approval of a proposed reclassification by the EPA Administrator; the tribes must

prepare a report discussing the social, environmental, and economic effects of the redesignation; a public hearing must be held on the Report; and consultation is required with states and tribes that border the reservation of the tribe proposing the redesignation." 645 F.2d at 715.

D. Cases Interpreting Montana

1. Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1981): The court upheld the Quinault Nation's application of tribal health and safety regulations to a non-Indian operating a grocery store on fee lands. The court observed that the store owner engaged in voluntary commercial dealings with the Tribe, and that the store owner's conduct threatened the health and welfare of the Tribe.

2. Knight v. Shoshone and Arapahoe Tribes, 670 F.2d 900 (10th Cir. 1981): The Tribes enacted a zoning ordinance and applied it to prohibit a non-Indian from subdividing and selling fee land for a residential development. The court held:

"The absence of any land use control over lands within the Reservation and the interest of the Tribes in preserving and protecting their homeland from exploitation justifies the zoning code. The fact that the code applies to and affects non-Indians who cannot participate in tribal government is immaterial. . . . The activities of the Developers directly affect Tribal and allotted lands." 670 F.2d at 903.

3. Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987): The Yakima Nation enacted a zoning ordinance and applied it to fee lands within the Reservation. The court upheld the ordinance as applied in the "closed" area of the Reservation, where the vast majority of the land was owned by the Tribe. The court remanded for further fact-finding the issues in the case relating to the part of the Reservation where the majority of the population was non-Indian.

E. Summary

1. Tribes retain sovereign authority to regulate activities within their territory. This power extends to non-Indian activities on fee lands within reservations when those activities affect or threaten important tribal interests.
2. The courts have not yet resolved definitively the scope of tribal authority to enforce federal environmental statutes. Because, however, tribes may lawfully be delegated federal authority, the tribes and EPA have developed a variety of schemes by which tribal interests are protected through federal regulation.

### III. State Authority to Enforce Environmental Laws on Indian Reservations

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

#### A. California v. Cabazon Band of Mission Indians, 107 S.Ct. 1083 (1987)

1. Facts: Two tribes conducted bingo games on their reservations that were open to the public and played predominately by non-Indians from outside the reservations. California law allowed bingo games to be conducted by charitable organizations, but prohibited prizes in excess of \$250. The games conducted by the two tribes paid much higher jackpots. California insisted that the tribes bring their games into compliance with state law. The tribes sued in federal district court for declaratory and injunctive relief.
2. Held: "We conclude that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them. State regulation would impermissibly infringe on tribal government . . . ." 107 S.Ct. at 1095.
3. Analysis:
  - (a) The Court first held that neither Public Law 280, 18 U.S.C. § 1162, 28 U.S.C. § 1360, nor the Organized Crime Control Act, 18 U.S.C. § 1955, authorized states to apply their regulatory laws governing gambling to Indian tribes on their reservations. 107 S.Ct. at 1087-91.
  - (b) The tribes urged that, in the absence of express congressional consent, states cannot apply their regulatory laws to Indians on Indian reservations. The Court disagreed:

"Our cases, however, have not established an inflexible per se rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent  
. . . .

"Decision in this case turns on whether state authority is pre-empted by the operation of federal law; and '[s]tate

jurisdiction is pre-empted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.' . . . The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." 107 S.Ct. at 1091-92.

- (c) The Court found that the federal government had pursued a policy of promoting tribal bingo enterprises through loans and other financial assistance and through its regulation of tribal bingo management contracts. The Court also noted that the bingo games were the only sources of revenue for the two tribal governments. The State asserted an interest in preventing infiltration by organized crime, but could present no evidence of such infiltration at the two bingo games under scrutiny.

B. State of Washington Department of Ecology v. United States Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985)

1. Facts: Section 3006, 42 U.S.C. § 6926, of the Resource Conservation and Recovery Act ("RCRA") authorizes states to establish hazardous waste management programs "in lieu of" the federal program administered by EPA that would otherwise apply. The State of Washington submitted an application to EPA to assume primary enforcement responsibility for RCRA, including enforcement on Indian lands within the State. EPA approved Washington's primacy application "except as to Indian lands." See 48 Fed. Reg. 34954 (1983). EPA retained to itself jurisdiction to operate the program "on Indian lands in the State of Washington." Id. at 34957. Washington petitioned the Ninth Circuit Court of Appeals for review of the decision to exclude Indian lands from the State program.
2. Held: The Regional Administrator properly refused to approve the State program as applied to Indians on Indian lands. The court declined to address the issue of whether the State could apply its program to non-Indians in Indian country.
3. Analysis:
  - (a) "When a statute is silent or unclear as to a particular issue, we must defer to the reasonable interpretation of the agency responsible for administering the statute." 752 F.2d at 1469.

The court found RCRA to be ambiguous as to whether states could regulate on Indian reservations. Although tribes were defined as being among those "persons" to whom the

enforcement provisions of RCRA applied, the statute was silent as to the authority of states to enforce their hazardous waste regulations against Indian tribes or individuals on Indian land.

(b) "EPA reasonably has interpreted RCRA not to grant state jurisdiction over the activities of Indians in Indian country." 752 F.2d at 1469.

(i) "States are generally precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it." 752 F.2d at 1469-70.

(ii) Federal retention of authority is consistent with the United States' trust responsibility to tribes.

(c) "The federal government has a policy of encouraging tribal self-government in environmental matters. That policy has been reflected in several environmental statutes that give Indian tribes a measure of control over policymaking or program administration or both. . . . The policies and practices of EPA also reflect the federal commitment to tribal self-regulation in environmental matters." 752 F.2d at 1471.

-- The court cited both the President's Statement of January 24, 1983 on Indian Policy and the December 19, 1980 EPA Policy for Program Implementation on Indian Lands.

-- The court cited Nance's approval of EPA's efforts to promote tribal self-government in environmental matters.

(d) "In the case at bar, . . . the tribal interest in managing the reservation environment and the federal policy of encouraging tribes to assume or at least share in management responsibility are controlling. We cannot say that RCRA clearly evinces a Congressional purpose to revise federal Indian policy or diminish the independence of Indian tribes.

. . . .

"We therefore conclude that EPA correctly interpreted RCRA in rejecting Washington's application to regulate all hazardous waste-related activities on Indian lands. We recognize the vital interest of the State of Washington in effective hazardous waste management throughout the state, including on Indian lands. The absence of state enforcement power over reservation Indians, however, does not leave a vacuum in which hazardous wastes go unregulated. EPA remains responsible for ensuring that the federal standards

are met on the reservations. Those standards are designed to protect human health and the environment. . . . The state and its citizens will not be without protection." 752 F.2d at 1472.

C. Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981)

1. Facts: The Tribes brought an action against Walton, a non-Indian owner of land within the Colville Reservation, to enjoin him from using surface and ground waters in the No Name Creek Basin. The Basin and Creak were located wholly within the Reservation. The State of Washington intervened, asserting authority to grant water permits on reservation lands. The district court held that the State could regulate water in the basin that was not reserved for Indians under the Winters doctrine.
2. Held: "We hold that the state has no power to regulate water in the No Name System, and the permits issued [to Walton to use water] are of no force and effect." 647 F.2d at 51.
3. Analysis:
  - (a) "State regulatory authority over a tribal reservation may be barred either because it is pre-empted by federal law, or because it unlawfully infringes on the right of reservation Indians to self-government." 647 F.2d at 51.
  - (b) "A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users. The Colvilles' complaint in the district court alleged that the Waltons' appropriations from No Name Creek imperiled the agricultural use of downstream tribal lands and the trout fishery, among other things. . . .  
  
"Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power.  
  
"Although we need not decide whether this power resides exclusively in the tribe or the federal government, or whether it may be exercised by them jointly, its importance forms the backdrop for our consideration of the pre-emption issue." 647 F.2d at 52.
  - (c) "We hold that state regulation of water in the No Name system was preempted by the creation of the Colville Reservation. The geographic facts of this case make resolution of this issue somewhat easier than it otherwise might be. The No Name System is non-navigable and is entirely within the boundaries of the reservation. Although

some of the water passes through lands now in non-Indian ownership, all of those lands are also entirely within the reservation boundaries.

"The Supreme Court has held that water use on a federal reservation is not subject to state regulation absent explicit federal recognition of state authority. Federal Power Commission v. Oregon, 349 U.S. 435 (1955). Thus, in creating the Colville Reservation, the federal government pre-empted state control of the No Name System." 647 F.2d at 52-53.

D. United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)

1. Facts: The United States filed an action to quantify the reserved rights of the Spokane Tribe to water in the Chamokane Basin. The Chamokane Creek originates north of the Reservation and passes through it. The district court ruled that the State could regulate the use of "excess" water, i.e. water not reserved for the use of the Tribe. The Tribe appealed.
2. Held: "[W]e conclude that the State, not the Tribe, has the authority to regulate the use of excess Chamokane Basin waters by non-Indians on non-tribal, i.e., fee, land." 736 F.2d at 1365.
3. Analysis:

- (a) The court first ruled that the Tribe could not assert jurisdiction under the rule in Montana:

"Our review reveals no consensual agreement between the non-Indian water users and the Tribe which would furnish the basis for implication of tribal regulatory authority. We find no conduct which so threatens or has such a 'direct effect on the political integrity, the economic security, or the health or welfare of the Tribe,' as to confer tribal jurisdiction. . . . The water rights adjudication which furnishes the basis for the instant inquiry quantifies and preserves tribal water rights. The district court appointed a federal water master whose responsibility is to administer the available waters in accord with the priorities of all the water rights as adjudicated. . . .

"The tribe is, of course, entitled to utilize its water for any lawful purpose. . . . If the tribe chooses to use water reserved for irrigation in a non-consumptive manner, it does not thereby relinquish any of its water rights to state permittees or subject the exercise of its rights to state regulation. The state may regulate only the use, by non-Indian fee owners, of excess water. Any permits issued by the state would be limited to excess water. If those

permits represent rights that may be empty, so be it." 736 F.2d at 1365.

- (b) The court next distinguished the Walton case:

"In Walton, the stream in question was small, non-navigable, and located entirely within the reservation and, as noted, water use by non-Indians would impact tribal agriculture and fisheries. Thus, even though some portion of the creek was found to be surplus to the tribe's requirement, state regulation of the remaining supply could create jurisdictional confusion and violate tribal sovereignty. In contrast, Chamokane Creek arises outside of the Spokane Indian Reservation and its course, for a good deal of its length, continues outside of that reservation. When the creek comes to the reservation, it forms the eastern boundary, and much of the reservation land with state water rights is immediately adjacent to the creek. The creek then separates from the reservation boundary, flowing into the Spokane River and eventually into the Columbia River and to the Pacific Ocean."

- (c) Finally, the court balanced federal, tribal and state interests to determine whether state law was pre-empted:

"By weighing the competing federal, tribal and state interests involved, it is clear that the state may exercise its regulatory jurisdiction over the use of surplus, non-reserved Chamokane Basin waters by nonmembers on non-Indian fee lands within the Spokane Indian Reservation. Central to our decision is the fact that the interest of the state in exercising its jurisdiction will not infringe on the tribal right to self-government nor impact on the Tribe's economic welfare because those rights have been quantified and will be protected by the federal water master. Additionally, in view of the hydrology and geography of the Chamokane Creek Basin, the State of Washington's interest in developing a comprehensive water program for the allocation of surplus waters weighs heavily in favor of permitting it to extend its regulatory authority to the excess waters, if any, of the Chamokane Basin. State permits issued for any such excess water will be subject to all preexisting rights and those preexisting rights will be protected by the federal court decree and its appointed water master. We do not believe there is any realistic infringement on tribal rights and protected affairs. If there is any intrusion, it is minimal and permissible under all of the circumstances of this case." 736 F.2d at 1366.



E. Summary

1. State regulatory laws cannot be applied to Indian reservations if their application will interfere with the achievement of the policy goals underlying federal laws relating to Indians. Where tribal and federal interests are adequately protected and the state has a strong regulatory interest, however, state laws can be applied to Indian reservations, at least as to non-Indian activities on fee lands.
2. The courts thus far have prohibited the application of state environmental laws to Indian reservations. However, the question of whether such laws may be applied to non-Indians on fee lands remains unresolved.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
INDIAN POLICY

The jurisdictional rules applicable to Indian reservations leave EPA unable to pursue its usual practice of delegating primary enforcement responsibility to states that so request where Indian reservations are concerned. Moreover, until 1986, none of the major federal regulatory statutes provided for delegation to tribal governments. In short, EPA was forced to develop special rules and practices concerning environmental regulation on Indian reservations.

To address these special circumstances, in November, 1984, EPA issued a Policy for the Administration of Environmental Programs on Indian Reservations. That policy is reproduced on the following pages.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
INDIAN POLICY

EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL  
PROGRAMS ON INDIAN RESERVATIONS

INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.



William D. Ruckelshaus



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

NOV 8 1984

OFFICE OF  
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Indian Policy Implementation Guidance

FROM: Alvin L. Alm *Alvin L. Alm*  
Deputy Administrator

TO: Assistant Administrators  
Regional Administrators  
General Counsel

INTRODUCTION

The Administrator has signed the attached EPA Indian Policy. This document sets forth the broad principles that will guide the Agency in its relations with American Indian Tribal Governments and in the administration of EPA programs on Indian reservation lands.

This Policy concerns more than one hundred federally-recognized Tribal Governments and the environment of a geographical area that is larger than the combined area of the States of Maryland, New Jersey, Connecticut, Massachusetts, Vermont, New Hampshire and Maine. It is an important sector of the country, and constitutes the remaining lands of America's first stewards of the environment, the American Indian Tribes.

The Policy places a strong emphasis on incorporating Tribal Governments into the operation and management of EPA's delegable programs. This concept is based on the President's Federal Indian Policy published on January 24, 1983 and the analysis, recommendations and Agency input to the EPA Indian Work Group's Discussion Paper, Administration of Environmental Programs on American Indian Reservations (July 1983).

TIMING AND SCOPE

Because of the importance of the reservation environments, we must begin immediately to incorporate the principles of EPA's Indian Policy into the conduct of our everyday business. Our established operating procedures (including long-range budgetary and operational planning activities) have not consistently focused on the proper role of Tribal Governments or the special legal and political problems of program management on Indian lands. As a result, it will require a phased and sustained effort over time to fully implement the principles of the Policy and to take the steps outlined in this Guidance.

Some Regions and Program Offices have already made individual starts along the lines of the Policy and Guidance. I believe that a clear Agency-wide policy will enable all programs to build on these efforts so that, within the limits of our legal and budgetary constraints, the Agency as a whole can make respectable progress in the next year.

As we begin the first year of operations under the Indian Policy, we cannot expect to solve all of the problems we will face in administering programs under the unique legal and political circumstances presented by Indian reservations. We can, however, concentrate on specific priority problems and issues and proceed to address these systematically and carefully in the first year. With this general emphasis, I believe that we can make respectable progress and establish good precedents for working effectively with Tribes. By working within a manageable scope and pace, we can develop a coordinated base which can be expanded, and, as appropriate, accelerated in the second and third years of operations under the Policy.

In addition to routine application of the Policy and this Guidance in the conduct of our everyday business, the first year's implementation effort will emphasize concentrated work on a discrete number of representative problems through cooperative programs or pilot projects. In the Regions, this effort should include the identification and initiation of work on priority Tribal projects. At Headquarters, it should involve the resolution of the legal, policy and procedural problems which hamper our ability to implement the kinds of projects identified by the Regions.

The Indian Work Group (IWG), which is chaired by the Director of the Office of Federal Activities and composed of representatives of key regional and headquarters offices, will facilitate and coordinate these efforts. The IWG will begin immediately to help identify the specific projects which may be ripe for implementation and the problems needing resolution in the first year.

Because we are starting in "mid-stream," the implementation effort will necessarily require some contribution of personnel time and funds. While no one program will be affected in a major fashion, almost all Agency programs are affected to some degree. I do not expect the investment in projects on Indian Lands to cause any serious restriction in the States' funding support or in their ability to function effectively. To preserve the flexibility of each Region and each program, we have not set a target for allocation of FY 85 funds. I am confident, however, that Regions and program offices can, through readjustment of existing resources, demonstrate significant and credible progress in the implementation of EPA's Policy in the next year.



ACTION

Subject to these constraints, Regions and program managers should now initiate actions to implement the principles of the Indian Policy. The eight categories set forth below will direct our initial implementation activities. Further guidance will be provided by the Assistant Administrator for External Affairs as experience indicates a need for such guidance.

1. THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS WILL SERVE AS LEAD AGENCY CLEARINGHOUSE AND COORDINATOR FOR INDIAN POLICY MATTERS.

This responsibility will include coordinating the development of appropriate Agency guidelines pertaining to Indian issues, the implementation of the Indian Policy and this Guidance. In this effort the Assistant Administrator for External Affairs will rely upon the assistance and support of the EPA Indian Work Group.

2. THE INDIAN WORK GROUP (IWG) WILL ASSIST AND SUPPORT THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS IN DEVELOPING AND RECOMMENDING DETAILED GUIDANCE AS NEEDED ON INDIAN POLICY AND IMPLEMENTATION MATTERS. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD DESIGNATE APPROPRIATE REPRESENTATIVES TO THE INDIAN WORK GROUP AND PROVIDE THEM WITH ADEQUATE TIME AND RESOURCES NEEDED TO CARRY OUT THE IWG'S RESPONSIBILITIES UNDER THE DIRECTION OF THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS.

The Indian Work Group, (IWG) chaired by the Director of the Office of Federal Activities, will be an important entity for consolidating the experience and advice of the key Assistant and Regional Administrators on Indian Policy matters. It will perform the following functions: identify specific legal, policy, and procedural impediments to working directly with Tribes on reservation problems; help develop appropriate guidance for overcoming such impediments; recommend opportunities for implementation of appropriate programs or pilot projects; and perform other services in support of Agency managers in implementing the Indian Policy.

The initial task of the IWG will be to develop recommendations and suggest priorities for specific opportunities for program implementation in the first year of operations under the Indian Policy and this Guidance.

To accomplish this, the General Counsel and each Regional and Assistant Administrator must be actively represented on the IWG by a staff member authorized to speak for his or her office. Further, the designated representative(s) should be afforded the time and resources, including travel, needed to provide significant staff support to the work of the IWG.

3. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD UNDERTAKE ACTIVE OUTREACH AND LIAISON WITH TRIBES, PROVIDING ADEQUATE INFORMATION TO ALLOW THEM TO WORK WITH US IN AN INFORMED WAY.

In the first thirteen years of the Agency's existence, we have worked hard to establish working relationships with State Governments, providing background information and sufficient interpretation and explanations to enable them to work effectively with us in the development of cooperative State programs under our various statutes. In a similar manner, EPA managers should try to establish direct, face-to-face contact (preferably on the reservation) with Tribal Government officials. This liaison is essential to understanding Tribal needs, perspectives and priorities. It will also foster Tribal understanding of EPA's programs and procedures needed to deal effectively with us.

4. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD ALLOCATE RESOURCES TO MEET TRIBAL NEEDS, WITHIN THE CONSTRAINTS IMPOSED BY COMPETING PRIORITIES AND BY OUR LEGAL AUTHORITY.

As Tribes move to assume responsibilities similar to those borne by EPA or State Governments, an appropriate block of funds must be set aside to support reservation abatement, control and compliance activities.

Because we want to begin to implement the Indian Policy now, we cannot wait until FY 87 to formally budget for programs on Indian lands. Accordingly, for many programs, funds for initial Indian projects in FY 85 and FY 86 will need to come from resources currently planned for support to EPA-and State-managed programs meeting similar objectives. As I stated earlier, we do not expect to resolve all problems and address all environmental needs on reservations immediately. However, we can make a significant beginning without unduly restricting our ability to fund ongoing programs.

I am asking each Assistant Administrator and Regional Administrator to take measures within his or her discretion and authority to provide sufficient staff time and grant funds to allow the Agency to initiate projects on Indian lands in FY 85 and FY 86 that will constitute a respectable step towards implementation of the Indian Policy.

5. ASSISTANT AND REGIONAL ADMINISTRATORS, WITH LEGAL SUPPORT PROVIDED BY THE GENERAL COUNSEL, SHOULD ASSIST TRIBAL GOVERNMENTS IN PROGRAM DEVELOPMENT AS THEY HAVE DONE FOR THE STATES.

The Agency has provided extensive staff work and assistance to State Governments over the years in the development of environmental programs and program management capabilities. This assistance has become a routine aspect of Federal/State relations, enabling and expediting the States' assumption of delegable programs under the various EPA statutes. This "front end" investment has promoted cooperation and increased State involvement in the regulatory process.

As the Agency begins to deal with Tribal Governments as partners in reservation environmental programming, we will find a similar need for EPA assistance. Many Regional and program personnel have extensive experience in working with States on program design and development; their expertise should be used to assist Tribal Governments where needed.

6. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD TAKE ACTIVE STEPS TO ALLOW TRIBES TO PROVIDE INFORMED INPUT INTO EPA'S DECISION-MAKING AND PROGRAM MANAGEMENT ACTIVITIES WHICH AFFECT RESERVATION ENVIRONMENTS.

Where EPA manages Federal programs and/or makes decisions relating directly or indirectly to reservation environments, full consideration and weight should be given to the public policies, priorities and concerns of the affected Indian Tribes as expressed through their Tribal Governments. Agency managers should make a special effort to inform Tribes of EPA decisions and activities which can affect their reservations and solicit their input as we have done with State Governments. Where necessary, this should include providing the necessary information, explanation and/or briefings needed to foster the informed participation of Tribal Governments in the Agency's standard-setting and policy-making activities.

7. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD, TO THE MAXIMUM FEASIBLE EXTENT, INCORPORATE TRIBAL CONCERNS, NEEDS AND PREFERENCES INTO EPA'S POLICY DECISIONS AND PROGRAM MANAGEMENT ACTIVITIES AFFECTING RESERVATIONS.

It has been EPA's practice to seek out and accord special consideration to local interests and concerns, within the limits allowed by our statutory mandate and nationally established criteria and standards. Consistent with the Federal and Agency policy to recognize Tribal Governments as the primary voice for expressing public policy on reservations, EPA managers should, within the limits of their flexibility, seek and utilize Tribal input and preferences in those situations where we have traditionally utilized State or local input.

We recognize that conflicts in policy, priority or preference may arise between States and Tribes as it does between neighboring States. As in the case of conflicts between neighboring States, EPA will encourage early communication and cooperation between Tribal and State Governments to avoid and resolve such issues. This is not intended to lend Federal support to any one party in its dealings with the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals often serves the interests of both.

Several of the environmental statutes include a conflict resolution mechanism which enables EPA to use its good offices to balance and resolve the conflict. These procedures can be applied to conflicts between Tribal and State Governments that cannot otherwise be resolved. EPA can play a moderating role by following the conflict resolution principles set by the statute, the Federal trust responsibility and the EPA Indian Policy.

8. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD WORK COOPERATIVELY WITH TRIBAL GOVERNMENTS TO ACHIEVE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS, CONSISTENT WITH THE PRINCIPLE OF INDIAN SELF-GOVERNMENT.

The EPA Indian Policy recognizes Tribal Governments as the key governments having responsibility for matters affecting the health and welfare of the Tribe. Accordingly, where tribally owned or managed facilities do not meet Federally established standards, the Agency will endeavor to work with the Tribal leadership to enable the Tribe to achieve compliance. Where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as we do to noncompliance by the private sector off-reservation.

Actions to enable and ensure compliance by Tribal facilities with Federal statutes and regulations include providing consultation and technical support to Tribal leaders and managers concerning the impacts of noncompliance on Tribal health and the reservation environment and steps needed to achieve such compliance. As appropriate, EPA may also develop compliance agreements with Tribal Governments and work cooperatively with other Federal agencies to assist Tribes in meeting Federal standards.

Because of the unique legal and political status of Indian Tribes in the Federal System, direct EPA actions against Tribal facilities through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion. Regional Administrators proposing to initiate such action should first obtain concurrence from the Assistant Administrator for Enforcement and Compliance Monitoring, who will act in consultation with the Assistant Administrator for External Affairs and the General Counsel. In emergency situations, the Regional Administrator may issue emergency Temporary Restraining Orders, provided that the appropriate procedures set forth in Agency delegations for such actions are followed.

9. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD BEGIN TO FACTOR INDIAN POLICY GOALS INTO THEIR LONG-RANGE PLANNING AND PROGRAM MANAGEMENT ACTIVITIES, INCLUDING BUDGET, OPERATING GUIDANCE, MANAGEMENT ACCOUNTABILITY SYSTEMS AND PERFORMANCE STANDARDS.

In order to carry out the principles of the EPA Indian Policy and work effectively with Tribal Governments on a long-range basis, it will be necessary to institutionalize the Agency's policy goals in the management systems that regulate Agency behavior. Where we have systematically incorporated State needs, concerns and cooperative roles into our budget, Operating Guidance, management accountability systems and performance standards, we must now begin to factor the Agency's Indian Policy goals into these same procedures and activities.

Agency managers should begin to consider Indian reservations and Tribes when conducting routine planning and management activities or carrying out special policy analysis activities. In addition, the IWG, operating under the direction of the Assistant Administrator for External Affairs and with assistance from the Assistant Administrator for Policy, Planning and Evaluation, will identify and recommend specific steps to be taken to ensure that Indian Policy goals are effectively incorporated and institutionalized in the Agency's procedures and operations.

Attachment

## Summary

1. The EPA Indian Policy clearly assumes that tribal governments should be the primary decision-makers on environmental matters arising on Indian reservations. The Policy seems to assume that unitary regulatory systems governing both Indians and non-Indians are to be developed, as indicated by the constant references to "Indian reservations" rather than "Indian lands."
2. The Policy, to the extent that it reflects congressional policy towards tribal governments, may have the effect of pre-empting state regulatory authority as to the matters to which it is directed.
3. EPA's policy of working with tribal governments, even in the absence of explicit statutory authority, was specifically approved by the Ninth Circuit in Nance and Washington Department of Ecology, supra.
4. The Policy makes clear EPA's view that all federal environmental regulatory statutes apply to Indian reservations and are enforceable against Indians and even Indian tribes.

**ENFORCEMENT OF FEDERAL ENVIRONMENTAL  
REGULATORY LAWS ON INDIAN RESERVATIONS**

As described above, federal environmental regulatory statutes as initially conceived did not provide for the delegation of primary enforcement responsibility. In 1985, however, representatives of tribal governments began working with Congress to develop amendments to the Safe Drinking Water Act and Federal Water Pollution Control Act to specifically authorize such delegations. (As noted above, Congress amended the Clean Air Act in 1977 to authorize tribes to redesignate their reservations for air quality purposes. Enforcement authority, however, was not addressed in the 1977 amendments.) Even in the absence of express statutory authority to delegate to Indian governments, EPA has authorized tribes to assume responsibility for environmental decision-making. This Section recites provisions relating to tribal regulation in the five major federal environmental regulatory statutes administered by EPA.

**I. Statutes Amended to Provide for Tribal Regulation**

**A. Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-12**

1. The Safe Drinking Water Act was amended in 1986 to allow tribes to be treated as states for SDWA programs. 42 U.S.C. § 300j-11 now provides as follows:

**"§ 300j-11. Indian tribes**

**"(a) In general**

Subject to the provisions of subsection (b) of this section, the Administrator--

- (1) is authorized to treat Indian Tribes as States under this subchapter,
- (2) may delegate to such Tribes primary enforcement responsibility for public water systems and for underground injection control, and
- (3) may provide such Tribes grant and contract assistance to carry out functions provided by this subchapter.

**"(b) EPA regulations**

**(1) Specific provisions**

The Administrator shall, within 18 months after June 19, 1986, promulgate final regulations specifying those provisions of this subchapter for which it is appropriate to treat Indian Tribes as States. Such treatment shall be authorized only if:

- (A) the Indian Tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers;
- (B) the functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction; and
- (C) the Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this subchapter and of all applicable regulations.

(2) Provisions where treatment as State inappropriate

For any provision of this subchapter where treatment of Indian Tribes as identical to States is inappropriate, administratively infeasible or otherwise inconsistent with the purposes of this subchapter, the Administrator may include in the regulations promulgated under this section, other means for administering such provisions in a manner that will achieve the purpose of the provision. Nothing in this section shall be construed to allow Indian Tribes to assume or maintain primary enforcement responsibility for public water systems or for underground injection control in a manner less protective of the health of persons than such responsibility may be assumed or maintained by a State. An Indian tribe shall not be required to exercise criminal enforcement jurisdiction for purposes of complying with the preceding sentence."

- 2. Although EPA was directed to promulgate regulations by December 18, 1987, final regulations implementing this provision have not been issued. Proposed regulations for National Primary Drinking Water and Underground Injection Control Standards were published on July 27, 1987. See 52 Fed. Reg. 28112.

B. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387

- 1. The Clean Water Act was amended in 1987 to allow tribes to be treated as states for certain purposes. 42 U.S.C. § 1377 now provides:

§ 1377. Indian tribes

"(a) Policy

Nothing in this section shall be construed to affect the application of section 1251(g) of this title, and all of the



provisions of this section shall be carried out in accordance with the provisions of such section 1251(g) of this title. Indian tribes shall be treated as States for purposes of such section 1251(g) of this title.

**"(b) Assessment of sewage treatment needs; report**

The Administrator, in cooperation with the Director of the Indian Health Service, shall assess the need for sewage treatment works to serve Indian tribes, the degree to which such needs will be met through funds allotted to States under section 1285 of this title and priority lists under section 1296 of this title, and any obstacles which prevent such needs from being met. Not later than one year after February 4, 1987, the Administrator shall submit a report to Congress on the assessment under this subsection, along with recommendations specifying (1) how the Administrator intends to provide assistance to Indian tribes to develop waste treatment management plans and to construct treatment works under this chapter and (2) methods by which the participation in and administration of programs under this chapter by Indian tribes can be maximized.

**"(c) Reservation of funds**

The Administrator shall reserve each fiscal year beginning after September 30, 1986, before allotments to the States under section 1285(e) of this title, one-half of one percent of the sums appropriated under section 1287 of this title. Sums reserved under this subsection shall be available only for grants for the development of water treatment management plans and for the construction of sewage treatment works to serve Indian tribes.

**"(d) Cooperative agreements**

In order to ensure the consistent implementation of the requirements of this chapter, an Indian tribe and the State or States in which the lands of such tribe are located may enter into a cooperative agreement, subject to the review and approval of the Administrator, to jointly plan and administer the requirements of this chapter.

**"(e) Treatment as States**

The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, and 1344 of this title to the degree necessary to carry out the objectives of this section, but only if--

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

Such treatment as a State may include the direct provision of funds reserved under subsection (c) of this section to the governing bodies of Indian tribes, and the determination of priorities by Indian tribes, where not determined by the Administrator in cooperation with the Director of the Indian Health Service. The Administrator, in cooperation with the Director of the Indian Health Service, is authorized to make grants under subchapter II of this chapter in an amount not to exceed 100 percent of the cost of a project. Not later than 18 months after February 4, 1987, the Administrator shall, in consultation with Indian tribes, promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this chapter. The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objectives of this chapter.

**"(f) Grants for nonpoint source programs**

The Administrator shall make grants to an Indian tribe under section 1329 of this title as though such tribe was a State. Not more than one-third of one percent of the amount appropriated for any fiscal year under section 1329 of this

title may be used to make grants under this subsection. In addition to the requirements of section 1329 of this title, an Indian tribe shall be required to meet the requirements of paragraphs (1), (2), and (3) of subsection (d) of this section in order to receive such a grant.

**"(g) Alaska Native organizations**

No provision of this chapter shall be construed to--

- (1) grant, enlarge, or diminish, or in any way affect the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe, traditional Alaska Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 987), over lands or persons in Alaska;
- (2) create or validate any assertion by such organization or any form of governmental authority over lands or persons in Alaska; or
- (3) in any way affect any assertion that Indian country, as defined in section 1151 of Title 18, exists or does not exist in Alaska.

**"(h) Definitions**

For purposes of this section, the term--

- (1) "Federal Indian reservation" means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; and
  - (2) "Indian tribe" means any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation."
2. Under the amendments, tribes may be treated as states for purposes of, inter alia, the following:
- (a) grants for pollution control programs under § 1256;
  - (b) grants for construction of treatment works under §§ 1281-1299;
  - (c) water quality standards and implementation plans under § 1313;

- (d) enforcement of standards under § 1319;
  - (e) clean lakes programs under § 1324;
  - (f) certification of National Pollutant Discharge Elimination System ("NPDES") permits under § 1341;
  - (g) issuance of NPDES permits under § 1342; and
  - (h) issuance of permits for dredged or fill material under § 1344.
3. The amendment requires EPA to issue regulations implementing the new provisions by August 4, 1988. EPA has formed three working groups that have circulated drafts of proposed regulations. No proposed regulations have yet been formally published.

C. Clean Air Act, 42 U.S.C. §§ 7400-7642

1. While the Nance case was pending, Congress amended the Clean Air Act to allow tribes to redesignate their reservations for purposes of determining applicable air quality standards. 42 U.S.C. § 7474 provides in relevant part as follows:

"§ 7474. Area redesignation

"(a) Authority of States to redesignate

Except as otherwise provided under subsection (c) of this section, a State may redesignate such areas as it deems appropriate as class I areas. The following areas may be redesignated only as class I or II

- (1) an area which exceeds ten thousand acres in size and is a national monument, a national primitive area, a national preserve, a national recreation area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore, and
- (2) a national park or national wilderness area established after August 7, 1977, which exceeds ten thousand acres in size.

Any area (other than an area referred to in paragraph (1) or (2) or an area established as class I under the first sentence of section 7472(a) of this title) may be redesignated by the State as class III if--

- (A) such redesignation has been specifically approved by the Governor of the State, after consultation with the appropriate Committees

of the legislature if it is in session or with the leadership of the legislature if it is not in session (unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area so redesignated enact legislation (including for such units of local government resolutions were appropriate) concurring in the State's redesignation;

- (B) such redesignation will not cause, or contribute to, concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and
- (C) such redesignation otherwise meets the requirements of this part.

Subparagraph (A) of this paragraph shall not apply to area redesignations by Indian tribes.

". . .

"(c) Indian reservations

Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respects to the provisions of subsection (e) of this section.

". . .

"(e) Resolution of disputes between States and Indian Tribes

If any State affected by the redesignation of an area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in any State which the Governor of an affected State or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such

dispute. If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

2. Tribes continue to be unrecognized for other provisions of the Act.

## II. Statutes as to Which Administrative Action Provides for Tribal Participation

### A. Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y

1. 42 U.S.C. § 136(a)(2) allows states to assume responsibility for certifying persons who apply pesticides registered under the Act. The Act makes no provision for tribes to assume such responsibility.
2. On March 12, 1975, EPA issued regulations that allowed tribes to assume responsibility for certifying applicators. 40 Fed. Reg. 11704. Section 171.10, 40 C.F.R., now provides:

#### "§ 171.10. Certification of Applicators on Indian Reservations

"This section applies to applicators on Indian Reservations.

"(a) On Indian Reservations not subject to State jurisdiction the appropriate Indian governing body may choose to utilize the State certification program, with the concurrence of the State, or develop its own plan for certifying private and commercial applicators to use or supervise the use of restricted use pesticides.

- (1) If the Indian Governing Body decides to utilize the State certification program, it should enter into a cooperative agreement with the State. This agreement should include matters concerning funding and proper authority for enforcement purposes. Such agreement and any amendments thereto shall be incorporated in the state plan, and forwarded to the Administrator for approval or disapproval.

(2) If the Indian Governing Body decides to develop its own certification plan, it shall be based on either Federal standards (§§ 171.1 through 171.8) or State standards for certification which have been accepted by EPA. Such a plan shall be submitted through the United States Department of the Interior to the EPA Administrator for approval.

"(b) On Indian Reservations where the State has assumed jurisdiction under other federal laws, anyone using or supervising the use of restricted use pesticides shall be certified under the appropriate State certification plan.

"(c) Non-Indians applying restricted use pesticides on Indian Reservations not subject to State jurisdiction shall be certified either under a State certification plan accepted by the Indian Governing Body or under the Indian Reservation certification plan.

"(d) Nothing in this section is intended either to confer or deny jurisdiction to the States over Indian Reservations not already conferred or denied under other laws or treaties."

### III. Statutes Not Providing for Tribal Participation

Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991i

RCRA does not provide specifically for delegation of program authority to tribal governments. In the Washington Department of Ecology case, p. 14, supra, the court noted that:

"EPA, having retained regulatory authority over Indian lands in Washington under the interpretation of RCRA that we approve today, can promote the ability of the tribes to govern themselves by allowing them to participate in hazardous waste management. To do so, it need not delegate its full authority to the tribes. We therefore need not decide, and do not decide, the extent to which program authority under Section 3006 of RCRA is delegable to Indian governments. It is enough that EPA remains free to carry out its policy of encouraging tribal self-government by consulting with the tribes over matters of hazardous waste policy, such as the siting of disposal facilities. . . . Other avenues of accommodating tribal sovereignty will doubtless become clear in the concrete administration of the federal program. The 'backdrop' of tribal sovereignty, in light of federal policies encouraging Indian self-government, consequently supports EPA's interpretation of RCRA." 752 F.2d at 1472.

