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Douglas A. Brockman

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CONGRESSIONAL DELEGATION OF ENVIRONMENTAL REGULATORY JURISDICTION: NATIVE AMERICAN CONTROL OF THE RESERVATION ENVIRONMENT

Native American Tribes,¹ America's original inhabitants, have a strong and unique relationship with the natural environment.² Recently, many tribes have taken steps to preserve the environment in "Indian country."³ While attempting to assert regulatory authority

1. Because courts and legislatures commonly use the term "Indian," this Note will use the terms "Indian" and "Native American" interchangeably. The term "Native American" or "native" is generally preferred, however, when referring to the aboriginal peoples of North America.

2. See Richard A. Du Bey et al., *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 ENVTL. L. 449, 450 (1988); see also Chief Justice Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989). With regard to tribal courts' perspective when rendering decisions, the Chief Justice of the Navajo Nation's Supreme Court stated, "[w]e refer to the earth and sky as Mother Earth and Father Sky. These are not catchy titles; they represent our understanding of our place. The earth and sky are our relatives Understanding this relationship is essential to understanding traditional Navajo concepts which may be applied in cases concerning natural resources and the environment." *Id.* at 233-34.

3. The statutory definition of "Indian country" includes:

(a) 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, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

over their territory, tribal regulatory programs inevitably reach non-native people and enterprises located within the reservation.⁴ However, environmental protection and regulation has long been the exclusive domain of federal and state regulatory agencies.⁵ These assertions of tribal authority have led to jurisdictional conflicts involving questions of tribal, federal, and state sovereignty. Tribal implementation of environmental regulatory schemes thus adds a new chapter to the recent proliferation of Indian litigation.⁶

This Note will focus on the ability of tribal governments to effectively and lawfully implement their own environmental programs to both Indians and non-Indians located on tribal land. Part I examines the common law origins of tribal sovereignty and the federal government's inconsistent Indian policies which are the source of most of to-

18 U.S.C. § 1151 (1988).

Thus, "Indian country" technically encompasses more territory than a reservation because the term "Indian country" includes native lands located outside the reservation borders as well as land within reservation boundaries. In general, this Note will use the terms "Indian country," "native lands," "reservation lands" and similar terms to describe all land within the exterior boundaries of Indian country as described by the statute.

Although the above definition is specifically applicable in the criminal context, it is often used to describe Indian territory in the civil context as well. *See DeCouteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

4. *See generally* FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1982) (hereinafter COHEN) for a historical overview of self-government in Indian country and the challenges by states and non-natives. The modern Indian reservation is a "checkerboard" pattern of Indian owned and non-Indian owned lands. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 9 (1987). The checkerboard pattern is the result of early federal Indian policies which allowed settlement and alienation of reservation lands. *Id.* at 8.

Generally, reservation lands are either held in trust by the federal government, held in fee by a tribe, or held in fee by non-Indians. Land held in fee by non-natives (hereinafter "fee land") has the greatest implication for purposes of this Note. Jurisdictional conflicts frequently involve fee land. Tribes attempt to enjoin state action affecting fee land within the reservation, and state or non-native landholders attempt to bar tribal assertions of regulatory jurisdiction on fee land.

5. Du Bey, *supra* note 2, at 450-51. One consequence of the federal and state regulatory agency's exclusive domain over environmental protection is the reservation environment's virtual neglect. *Id.* at 451. The lack of protection stems from the tribal governments' inability to directly participate in, or receive funding through, federal environmental grant programs administered by the Environmental Protection Agency (EPA). *Id.*

6. *See* Peter W. Sly, *EPA and Indian Reservations: Justice Stevens' Factual Approach*, 20 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,429, 10,430 n.12 (1990) (noting that "[s]ince 1970, the Supreme Court has issued more Indian law decisions than in the combined fields of consumer and antitrust law").

day's legal problems. Parts II and III consider two potential threats to tribal implementation of environmental programs throughout the reservation. Part II analyzes state assertions of regulatory jurisdiction in Indian country. Part III explores the limits of tribal jurisdiction with respect to the ability of tribes to regulate non-Indians on reservations. Part IV reviews federal environmental statutes and their inconsistent treatment of Indian tribes. Finally, Part V suggests various ways in which Congress can respect tribal rights to self-determination and preclude endless and costly litigation between state and federal or tribal authorities.

I. THE ORIGINS OF TRIBAL SOVEREIGNTY

In two early Indian law cases, Chief Justice John Marshall boldly⁷ set the framework for the current federal Indian policy which views tribes as sovereign political bodies.⁸ In *Cherokee Nation v. Georgia*,⁹ Marshall first enumerated the trust relationship¹⁰ between the United States and the tribes. Although Marshall ruled that the Indians were not independent "foreign nations" within the meaning of the Constitu-

7. Marshall's decisions were bold because they directly conflicted with President Andrew Jackson's executive policy at the time. Jackson's administration vigorously pursued a policy to move Indians to Western lands. In his First Annual Message to Congress in December 1829, Jackson clearly prescribed that "if [Indians] remain within the limits of the States they must be subject to [the states'] laws." President Jackson on Indian Removal (Dec. 8, 1829), reprinted in FRANCIS P. PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 47, 48 (1990).

8. See President's Statement on Indian Policy, 1983 PUB. PAPERS 96 (Jan. 24, 1983) [hereinafter Reagan Indian Policy]. Former President Ronald Reagan's official Indian Policy Statement explicitly recognized Indian tribes as sovereign political entities by acknowledging the enduring "government-to-government relationship between the United States and Indian tribes." *Id.* at 96. See also Proclamation No. 6080 3 C.F.R. 192 (1990). Although President Bush has not issued an official policy statement concerning Indians, Congress designated "National American Indian Heritage Week" for the week beginning December 3, 1989. In his proclamation, President Bush stated that "tribal elected governments and the United States have now established a unique and special government-to-government relationship . . . we look forward to greater economic independence and self-sufficiency for Native Americans, and we reaffirm our support for increased Indian control over tribal government affairs." *Id.* at 193.

9. 30 U.S. (5 Pet.) 1 (1831).

10. The trust relationship has been described as "one of the primary cornerstones of Indian law." COHEN, *supra* note 4, at 221. The relationship defines the standards of conduct for the federal government when interacting with native governments. *Id.* at 220. Treaties, statutes, executive orders, and administrative rules and regulations are construed in light of federal trust obligations; thus, federal action will be read in a manner favorable to Indians. *Id.* at 220-21.

tion,¹¹ he described them as “domestic dependent nations”¹² to whom the federal government owes a special responsibility.¹³ This responsibility includes the general protection¹⁴ and the insurance of tribal nations’ economic stability.¹⁵

One year later, in *Worcester v. Georgia*,¹⁶ Justice Marshall overturned a Georgia law forbidding whites in Cherokee country without a state permit.¹⁷ *Worcester* became the first case in which the Supreme Court held that state law is not applicable to affairs within Indian territory.¹⁸ Thus, *Worcester* defined the state jurisdictional limits by geographical boundaries rather than by personal jurisdiction.¹⁹

The federal-tribal trust relationship described in *Cherokee Nation* and the jurisdictional analysis from *Worcester* laid the groundwork for modern legal analysis of tribal regulations. Just as the *Cherokee Nation* Court recognized Indian tribes as distinct governmental entities,²⁰ recent presidential administrations have explicitly recognized tribes as

11. 30 U.S. (5 Pet.) at 20. Marshall did not grant relief to the Indians, who sought to enjoin the state of Georgia from implementing their laws in Indian country, because the Constitution extends power to the judiciary to hear cases and controversies only “between a state or the citizens thereof, and foreign states, citizens, or subjects.” *Id.* at 15 (quoting U.S. CONST. art. III, § 2, cl. 1). Therefore, he held that the Court did not have jurisdiction to hear the case. *Id.* at 20.

12. *Id.* at 17.

13. *Id.* Marshall stated that the Indians’ “relation to the United States resembles that of a ward to his guardian.” *Id.* See also Larry B. Leventhal, *American Indians-The Trust Responsibility: An Overview*, 8 HAMLINE L. REV. 625 (1985) (discussing the parameters of the trust relationship between the United States and the Indian tribes); Mark Allen, Comment, *Native American Control of Tribal Natural Resource Development in the Context of the Federal Trust and Tribal Self-Determination*, 16 B.C. ENVTL. AFF. L. REV. 857 (1989) (discussing the trust responsibility in the context of environmental regulation on reservation lands).

14. See *United States v. Kagama*, 118 U.S. 375 (1886) (discussing protection from state intrusion as part of the federal trust responsibility).

15. 30 U.S. (5 Pet.) at 17 (“They look to our government for protection . . . [and] appeal to it for relief to their wants . . .”).

16. 31 U.S. (6 Pet.) 515 (1832).

17. The petitioner in *Worcester* was a non-Indian missionary who was condemned to four years of hard labor in a Georgia penitentiary. *Id.* at 532. The Court held that the Georgia law was unconstitutional and had no force to deprive plaintiff of his property or liberty. *Id.* at 596.

18. COHEN, *supra* note 4, at 259.

19. 31 U.S. (6 Pet.) at 557. Native tribes are “distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries.” *Id.*

20. Earlier Indian cases were not particularly sympathetic to the concept of Indian

sovereign nations.²¹ Furthermore, Justice Marshall considered tribes to be much like states²² in terms of self-government; similarly, today's Congress often treats tribes as states for purposes of implementing their own environmental programs.²³ Thus, the source of today's jurisdictional disputes in Indian country does not lie in philosophical differences between today's government and that of the early Republic. Instead, the source lies in several important nineteenth century developments regarding federal Indian policy. Soon after Justice Marshall laid the foundation for tribal sovereignty, the principles established in *Cherokee Nation* and *Worcester* began to erode.²⁴

A. The "Checkerboard" Reservation

A series of nineteenth century congressional acts led to the severe erosion of Indian land holdings. The 1830 Indian Removal Act²⁵ authorized the President to exchange land west of the Mississippi River for eastern tribal lands.²⁶ The forceful removal²⁷ of the Indians created many western Indian land holdings and reservations in the West.²⁸ The Indians' migration to the western frontier solved nothing

tribal sovereignty. See, e.g., *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

21. See *supra* note 8 for a discussion of recent Indian policies.

22. See 30 U.S. (5 Pet.) 1, 16 (1831) (recognizing the Cherokee tribe as a body capable of managing its own affairs and stating that "they have been uniformly been treated as a state from the settlement of our country").

23. See *infra* notes 149-168 and accompanying text for a detailed description of environmental laws that view tribes as states.

24. President Jackson allegedly reacted to the *Worcester* decision by stating, "John Marshall made his law; now let him enforce it." COHEN, *supra* note 4, at 83. In fact, the administration at the time did nothing to enforce the decision. Followers of Jackson requested the governor of Georgia to pardon the petitioner to avoid potential embarrassment resulting from the President's receipt of an enforcement order from the Supreme Court. *Id.* at 83 n.175.

25. Act of May 28, 1830, ch. 148, 4 Stat. 411 (1830).

26. *Id.*

27. Although Jackson's removal policy was contemplated as voluntary, in practice the program was coercive. The military was needed for effective removal because the Indians generally resisted leaving their homeland. See COHEN, *supra* note 4, at 91-92; see also Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 239-58 (1989) (positing that the removal stems from the legacy of European-based racism which continues to dominate federal policy and attitudes toward natives).

28. See COHEN, *supra* note 4, at 124 (stating that the rapid expansion of the white

and merely delayed the problems that imminent western expansion would soon create.

As the frontier shrank, differences between westbound settlers and Indian tribes became more prominent.²⁹ In 1887, Congress passed the Dawes Act (also called the General Allotment Act)³⁰ which severely altered the original title rights on most reservations. Under the Act, individual Indians were allotted parcels of reservation land,³¹ while surplus lands were sold to non-Indian homesteaders.³² This parceling of reservation land had devastating effects on Indian landholdings,³³ resulting in the present day “checkerboard” ownership pattern on many reservations.³⁴ Checkerboard ownership is the principal source of most of today’s jurisdictional problems.³⁵

While the Indian policies of the late nineteenth and early twentieth centuries attempted to assimilate the Indians into the white culture,

population made it necessary to limit the mobility of Indian tribes and force them to settle on permanent reservations).

29. *Id.* at 132. Eastern philanthropists wanted to cultivate and civilize the “savage” Indians and the western expansionists wanted the Indians’ land. Other interests included those of private land speculators, the timber industry and the railroads. *Id.*

30. 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381 (1988).

31. *See* COHEN, *supra* note 4, at 130-31. Title to this land was held in trust by the federal government for twenty-five years or longer at the President’s discretion. *Id.* at 131. During this period, any alienation or encumbrances were void. *Id.* If surplus land existed after the allotments were made, the government usually bought the land and sold it to private parties. *Id.*

32. *Id.* at 130-32. The Dawes Act and other nineteenth century Indian policies were actually attempts to destroy the tribal system which reformers thought was necessary in order to allow the Indians to fully participate in the American lifestyle. *Id.* at 131. Reformers also attempted to terminate the existence of reservations because of fundamental differences between the Indians and the Americans regarding property ownership concepts. *Id.* at 131-32. The idea of individual land ownership was central to the American way of life. On the other hand, the Indians firmly believed in communal property ownership. Dawes Act advocates felt that assimilation would be impossible unless these socialist communities were destroyed. *Id.* at 131 n.39. Therefore, individual ownership, through allotments, became necessary to meet the assimilationist goal. *Id.* at 131.

33. By the time the allotment program came to an end, Indian landholdings diminished from 138 million to 52 million acres. *See* WILKINSON, *supra* note 4, at 8.

34. *Id.* at 8-9 (noting that Indian country now contains tribal land, allotted trust land held by Indians, fee land held by both Indians and non-Indians, federal public land and state land).

35. Checkerboard jurisdiction is inefficient and results in various possibilities of tribal, federal and state jurisdiction. *Id.* at 9. Moreover, the lack of a well-defined jurisdictional doctrine causes repetitious and unnecessary litigation. *Id.*

support for assimilation began to wane with the implementation of New Deal reforms.³⁶ Ultimately, the assimilation policy was repudiated in 1934; however, the jurisdictional picture on reservations was irreversibly clouded.

B. *The Road To Tribal Self-Determination*

The Indian Reorganization Act of 1934 (IRA)³⁷ was an attempt to encourage tribal economic development and self-determination.³⁸ The basic premise behind the IRA was to allow native tribes to govern themselves effectively with the federal government's help.³⁹ Although the IRA was a positive step towards true tribal self-determination, it contained many flaws.⁴⁰ Dissatisfaction with the Act resulted in several amendments and attacks on the IRA's principles in the 1940's and 1950's, including regression to an assimilation policy.⁴¹ The late 1960's, however, saw the emergence of tribal self-determination as the dominant federal Indian policy.⁴²

Current federal Indian policies do not threaten tribal autonomy.⁴³

36. See COHEN, *supra* note 4, at 145-52 (discussing the new policy of preserving the Indian culture and the laws enacted to fulfill this goal).

37. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461, 462, 464, 465, 466-70, 471-73, 474, 475, 476-78, 479 (1988)).

38. See COHEN, *supra* note 4, at 147.

39. *Id.*

40. For example, Section 16 of the Act permitted the tribes to draft and adopt their own constitution. *Id.* at 149. However, most of these constitutions were standardized forms provided by the Department of the Interior which granted only limited tribal autonomy. *Id.* In addition, the IRA authorized the purchase of new lands for tribal use but Congress never appropriated the necessary money. *Id.* at 150.

41. *Id.* at 153-59 (outlining the specific attacks on and proposals for the IRA).

42. See generally President's Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," PUB. PAPERS 335 (March 6, 1968) (President Johnson's Message to Congress on Indian Affairs); President's Message to Congress on Indian Affairs, PUB. PAPERS 564 (July 8, 1970) (President Nixon's Message to Congress on Indian Affairs). Also, several congressional acts from the 1960's and 1970's manifested the self-determination policy. See, e.g., Indian Civil Rights Act, 25 U.S.C. §§ 1301-41 (1988); Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-50n, 455-58(e) (1988).

43. Although beyond the scope of this Note, current federal Indian policies are not immune from serious criticism. They have been described as attempts to cut funding for tribal governments while doing as little political damage as possible during a budgetary crisis. Indeed, recent administrations may be shirking their federal trust obligations. The policy statements' rhetoric, at the very least, clearly supports tribal self-determination. The administration should be held accountable for such rhetoric through a continued federal-tribal cooperation. See Allen, *supra* note 13, at 885-87.

Other barriers to tribal autonomy, however, continue to exist. One potential barrier arises when states attempt to assert regulatory jurisdiction in the Indian country.⁴⁴ As the next section demonstrates, federal courts have not clearly articulated when a state may lawfully assert regulatory authority over tribal lands.⁴⁵

II. LIMITS OF STATE REGULATORY JURISDICTION

The landmark case of *Williams v. Lee*⁴⁶ opened the modern era of federal Indian law.⁴⁷ The Supreme Court addressed the issue of whether a state court has civil jurisdiction over reservation Indians.⁴⁸ In *Williams*, a non-native store owner operating on a Navajo Indian Reservation sought to collect payment for goods sold to an Indian and his wife on credit.⁴⁹ The petitioners moved to dismiss, asserting that the tribal court, rather than the state court, had jurisdiction.⁵⁰ In granting the motion, the Supreme Court ruled that state court jurisdiction unlawfully infringed on the ability of the tribes to make and enforce their own laws.⁵¹ Moreover, the Court found that a party's non-

44. Another jurisdictional dispute occurs when states and tribes assert criminal jurisdiction in Indian country. The unique problems related to criminal jurisdiction in Indian country are beyond the scope of this Note. For a more detailed analysis of this area of Indian law, see, e.g., COHEN, *supra* note 4, at 286-308; Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976). See also *Duro v. Reina*, 110 S. Ct. 2053 (1990) (holding that a tribe has no criminal jurisdiction over an Indian who is not a member of the tribe asserting jurisdiction); *United States v. Wheeler*, 435 U.S. 313 (1978) (upholding tribal criminal jurisdiction over tribal members); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that tribes have no criminal jurisdiction over non-Indians on the reservation).

45. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (stating that "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members").

46. 358 U.S. 217 (1959).

47. See WILKINSON, *supra* note 4, at 1-3 (discussing the importance of *Williams* to all subsequent Indian law decisions).

48. 358 U.S. at 218.

49. *Id.* at 217-18.

50. *Id.* at 218. The Supreme Court of Arizona rejected this argument, holding that no congressional act expressly denies Arizona courts' jurisdiction over the matter. *Id.*

51. *Id.* at 223. In so holding, the Court stated that "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.*

native status was immaterial.⁵² The Court invoked the “infringement test” stating that, absent Congressional authority to the contrary, a state has regulatory authority as long as such authority does not infringe on tribal self-government.⁵³

Although based on logical notions of tribal sovereignty, the “infringement test” is problematic in its application. The test does not articulate clear standards to determine when states infringe on tribal self-governance.⁵⁴ Fortunately, a new test evolved in order to better determine the validity of state actions on the reservation.

A. Preemption

In *McClanahan v. Arizona State Tax Commission*,⁵⁵ the Supreme Court held that a state cannot tax a reservation Indian for income derived exclusively from reservation resources.⁵⁶ The Court noted that the modern trend was away from the “infringement test” and toward reliance on federal preemption when considering the validity of state laws in Indian country.⁵⁷ Thus, the Court ruled that federal treaties⁵⁸ and laws⁵⁹ preempted the state tax.⁶⁰

52. 358 U.S. at 223.

53. *Id.* at 220. “Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.” *Id.* Cf. *Utah & Northern Railway Co. v. Fisher*, 116 U.S. 28, 31 (1885) (noting that a state only has jurisdiction over an Indian reservation where the controversy is in its cognizance).

The basis of the Court’s infringement analysis was the notion of tribal sovereignty as articulated in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). 358 U.S. at 218-20.

54. See WILKINSON, *supra* note 4, at 4 (stating that “in the crucial area of tribal-state relations, the specific shape of doctrine has yet to be formed”).

55. 411 U.S. 164 (1973).

56. *Id.* at 165. McClanahan sought a refund of state taxes withheld from her reservation wages. When the state refused, she sued the state requesting the return of her money and a declaration that the state tax was not applicable to reservation Indians. *Id.* at 165-66.

57. *Id.* at 172. “[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. The modern cases thus tend to . . . look . . . to the applicable treaties and statutes which define the limits of state power.” *Id.* (citation omitted).

58. “The beginning of our analysis must be with the treaty which the United States government entered with the Navajo Nation in 1868.” *Id.* at 173-74.

59. Statutes that the Court considered in rendering its decision included the Arizona Enabling Act, the Indian Civil Rights Act of 1968, and the Buck Act (a federal guidance system for state taxation of those living on federal land). *Id.* at 175-78.

60. *Id.* at 173. “When the relevant treaty or statutes are read with this tradition of

Reliance on the preemption analysis did not render the “infringement test” irrelevant. Instead, tribal sovereignty became the backdrop for the preemption analysis.⁶¹ Courts have struggled, however, to fit sovereignty notions into their preemption analysis.⁶²

B. *Current Doctrine*

In *White Mountain Apache Tribe v. Bracker*,⁶³ the Supreme Court articulated the present approach to jurisdictional conflicts between states and tribes when a state seeks authority over reservation activities of non-natives.⁶⁴ The modern test combines elements of both *McClanahan* and *Williams* by barring state jurisdiction if the state law either infringes on tribal sovereignty or is preempted by federal law.⁶⁵ Although each is an independent barrier to state jurisdiction,⁶⁶ the two are related.⁶⁷ Today, most courts rely primarily on preemption analysis.⁶⁸ Against the backdrop of tribal sovereignty, preemption analysis requires a “particularized inquiry” into the relevant state, federal and

sovereignty in mind, we think it clear that Arizona has exceeded its lawful authority by attempting to tax appellant.” *Id.*

61. *Id.* at 172. “The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues . . . but because it provides a backdrop against which the applicable treaties and federal statutes must be read.” *Id.*

62. *See, e.g.,* *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 482-83 (1976) (upholding a state tax on cigarettes sold to non-natives on a reservation, relying on the state’s interest in taxing non-natives rather than tribal sovereignty interests).

63. 448 U.S. 136 (1980).

64. *Id.* at 137. In *Bracker*, Arizona sought to apply a licensing requirement and fuel tax to a non-Indian logging company operating exclusively on the Fort Apache Reservation.

65. *Id.* at 142. “First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe ‘on the right of reservation Indians to make their own laws and be ruled by them.’” *Id.* (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)) (citations omitted).

66. *Id.* at 143. Either barrier, standing alone, would be a sufficient basis to hold a state law inapplicable to activities undertaken on Indian land or by tribal members. *Id.*

67. *Id.* The Indians’ right to self-government is ultimately subject to the broad power of Congress. Moreover, the tradition of tribal sovereignty over the reservation and the tribe must aid in determining whether federal law preempts the exercise of state authority.

68. This reliance is probably due to the difficulty courts have in discerning unlawful infringement. Furthermore, legislative guidelines are better articulated in subject matter statutes than the vague treaties establishing Indian country. *See WILKINSON, supra* note 4, at 94.

tribal interests.⁶⁹ The *Bracker* Court balanced the various interests and determined that the federal and tribal interests outweighed state interests.⁷⁰

C. *Balancing the Interests in the Environmental Context*

A particularized inquiry into the tribal, federal, and state interests in environmental protection demonstrates the states' inability to regulate non-native enterprises operating on the reservation.⁷¹ Because air,

69. 448 U.S. at 145. "This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* See generally Stephen M. Feldman, Comment, *The Developing Test For State Regulatory Jurisdiction in Indian Country: Application in the Context of Environmental Law*, 61 OR. L. REV. 561 (1982) (applying the particularized inquiry to environmental regulatory laws).

70. 448 U.S. at 145-53. As to the federal interests, the Court emphasized the comprehensive and pervasive nature of the government's regulation which included specific congressional acts and detailed regulations by the Secretary of the Interior. *Id.* at 145. The Court further noted that imposition of the state taxes would undermine federal authority and objectives. *Id.* at 149. See also *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 686 (1965) (holding that pervasive federal regulation of Indian traders prohibited a state tax on a non-Indian company operating a retail trading business on a reservation).

With respect to tribal interests, the Court noted that the tax would undermine the federal policy of supporting the tribe's ability "to revitalize their self-government" and take control of their "business and economic affairs." 448 U.S. at 149 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973)).

As to the state's interest, the Court found that the general interest in raising revenue was not sufficient to allow state intrusion into the federal regulatory scheme. 448 U.S. at 150.

71. Several commentators reached this conclusion even before the Supreme Court articulated the balancing test in *Bracker*. See, e.g., J. Kemper Will, *Indian Lands Environment-Who Should Protect It*, 18 NAT. RESOURCES J. 465, 504 (1978) (postulating that states will not have jurisdiction over non-Indian operations on a reservation with regard to environmental issues); Lynne E. Petros, Comment, *The Applicability of the Federal Pollution Acts to Indian Reservations: A Case for Tribal Self-Government*, 48 U. COLO. L. REV. 63, 93 (1976) (stating that the Indians' interests in self-government mandate tribal jurisdiction over environmental regulation).

Post-*Bracker* commentators reaching the conclusion that states are unable to regulate non-native enterprises on reservations include: Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 659 (1989) (concluding that state environmental laws are preempted by federal law and Indian sovereignty); Du Bey, *supra* note 2, at 503 (noting that absent specific statutory language authorizing state jurisdiction over Indian country, states do not possess the power to implement environmental regulatory programs); Stephen M. Christenson, Note, *Regulatory Juris-*

water, and land pollution often know no boundaries, all three types of government have substantial interests in protecting their citizens from the dangers of pollution emanating from reservation lands.⁷²

Federal interests stem, in part, from their trust obligation to protect native governments from unlawful state intrusion.⁷³ In the area of pollution control, the trust responsibility includes preventing tribal lands from becoming a haven for environmental statute violators and encouraging native governments to effectively develop, implement and enforce their own environmental programs.⁷⁴ In addition, federal interests include the general policy of encouraging tribal self-determination.⁷⁵ Inherent in this general self-determination policy is the policy of promoting tribal control over the reservation environment.⁷⁶

General tribal sovereignty interests and their ability to regulate reservation territory are subject to a balancing test when determining the validity of state actions.⁷⁷ In the environmental protection area, native

diction over Non-Indian Hazardous Waste in Indian Country, 72 IOWA L. REV. 1091, 1116 (1987) (concluding that tribal governments are the proper authority to regulate non-Indians under federal environmental statutes). *But see* Leslie Allen, *Who Should Control Hazardous Waste on Native American Lands? Looking Beyond Washington Department of Ecology v. EPA*, 14 ECOLOGY L.Q. 69, 115 (1987) (reaching the conclusion that states should have regulatory jurisdiction over hazardous waste in Indian country).

72. Royster & Fausett, *supra* note 71, at 584-85.

73. *See United States v. Kagama*, 118 U.S. 375, 384 (1886) (noting that protecting tribal governments from state intrusions on the reservation was one of the initial reasons for developing the federal trust responsibilities).

74. The federal government is just beginning to fulfill their trust duties with respect to allowing native governments to establish their own environmental regulatory schemes. *See* The Indian Environmental Regulatory Enhancement Act of 1990, Pub. L. No. 101-408, § 1, 104 Stat. 883 (codified as amended at 42 U.S.C. § 2991) (establishing grants to tribes for the specific purpose of enabling them to develop, monitor and enforce tribal environmental laws).

See generally Allen, *supra* note 13 for a discussion of the federal trust obligations in the environmental context.

75. *See supra* notes 8 and 42 and accompanying text for a brief discussion of recent presidential administrations' Indian policy goals of promoting tribal self-determination.

76. *See* ENVIRONMENTAL PROTECTION AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984) [hereinafter EPA INDIAN POLICY] (stating that the EPA will recognize native governments as the primary parties responsible for establishing standards and policy affecting Indian reservations; the EPA will also encourage tribes to assume certain management responsibilities for environmental programs); *see also* *The Environmental Protection Agency and Tribal Governments*, AM. INDIAN L. NEWSL. (American Indian Law Center, Albuquerque, N.M.), Jan.-Feb. 1985, at 4 (summarizing the main points of the EPA Indian policy).

77. *See, e.g., Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir.

governments have a particular interest in ensuring that the reservation does not become a dumping ground for hazardous waste or a regulation free sanctuary for enterprises looking for loopholes around costly pollution control laws.⁷⁸ A related tribal concern is the threat of pollution spillover from nearby off-reservation sources.⁷⁹ As the political bodies closest to the reservation population,⁸⁰ native governments are directly responsible and accountable for the health and welfare of their people.⁸¹ Indeed, tribal governments are best able to determine their people's needs and the condition of their land. In addition, native interests include the right to control land use on the reservation⁸² and the

1981) (suggesting that the state of Washington may not regulate waterways on a reservation because the regulation of water on a reservation is critical to the tribes); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987) (considering the tribe's land use interests in striking down state rent control ordinances); *cf. Rice v. Rehner*, 463 U.S. 713, 720 (1983) (finding that when there is a lack of Indian traditions in a particular activity, the backdrop of tribal sovereignty is given less weight when balancing federal, tribal and state interests).

78. *See, e.g., EPA Surveys Indian Tribes For First Look at Environmental Problems on Reservations*, 17 Env't Rep. (BNA) 1424 (Dec. 19, 1986) (citing results of EPA study indicating that water quality, solid waste, and sewage treatment are serious problems on many reservations); *Study finds 1,200 Sites near Indian Lands, Recommends Immediate Action at Six Locations*, 16 Env't Rep. (BNA) 1228, 1228-29 (Nov. 8, 1985) (identifying nearly 1,200 hazardous waste generators or sites on or near Indian land and indicating that "midnight dumping" is a contributing factor to the growing pollution problem).

79. *See Royster & Fausett, supra* note 71, at 651 n.276 (arguing that spillovers should not only be a state concern but also a tribal concern because tribes are just as threatened by off-reservation pollution sources as states are by on-reservation sources).

80. *See Reagan Indian Policy, supra* note 8, at 96. Former President Reagan stated, "[t]his administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to State and local governments but also to federally recognized American Indian tribes." *Id.* The former President recognized that native governments, rather than states, have the primary authority over the well-being of their people. *Id.*

81. *See infra* note 111 and accompanying text for a discussion of how tribal concerns become more important when the tribe's health and welfare is implicated.

82. Several courts have upheld native land use and zoning authority over non-native lands on the reservation. *See, e.g., Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987) (recognizing that "[i]t is beyond question that land use regulation is within the Tribe's legitimate sovereign authority over its lands"); *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900, 903 (10th Cir. 1982) (opining that "the interest of the Tribes in preserving and protecting their homeland from exploitation justifies the zoning code," notwithstanding the fact that the code affects non-Indians); *see also United States v. Mazurie*, 419 U.S. 544, 557-58 (1975) (holding that tribes can subject non-Indians to liquor sales regulations); *Pinoleville Indian Community v. Mendocino County*, 684 F. Supp. 1042, 1047 (N.D. Cal. 1988) (enjoining operations of asphalt and cement plants because of the threatened injury to land, water, air, as well as the health of Indians); Jane E. Scott, Note, *Zoning: Controlling Land Use on the Checkerboard:*

related right to control the extent of reservation development.⁸³

State interests include spillover threats from tribal to state lands,⁸⁴ the possibility of relatively lenient native pollution standards⁸⁵ and the potential inability of tribes to effectively control pollution.⁸⁶ Moreover, the desire to regulate all lands within its border, including Indian coun-

The Zoning Powers of Indian Tribes after Montana v. United States, 10 AM. INDIAN L. REV. 187 (1982) (noting the increasing responsibility that Indian tribes have over the management of environmental resources on their reservations).

83. See Reagan Indian Policy, *supra* note 8, at 98 ("Tribal governments have the responsibility to determine the extent and the methods of developing the tribe's natural resources.").

84. This interest is essentially nullified because tribal concerns regarding spillover pollution are equally as great as state concerns. See Royster & Fausett, *supra* note 71, at 652.

85. Compare Allen, *supra* note 71, at 98 n.177 (arguing that a state's most pressing interest is protecting its environmental program from lesser tribal standards; discounts the threat from neighboring states because states rarely share urban developments and are often separated by geographic features) with Royster & Fausett, *supra* note 71, at 654 n.287 (arguing that distinguishing state-state borders from state-tribal borders is chimerical).

Many states are legitimately concerned that waste management companies, in an attempt to evade state regulation and taxes, will offer tribes lucrative proposals to locate on reservation land. In practice, however, many tribes that have been tempted with such lucrative proposals have rejected them out of concern for their land. See, e.g., Macy Hager et al., 'Dances with Garbage', NEWSWEEK, Apr. 29, 1991, at 36; Bill Lambrecht, *Arizona Indian Tribe Backs Out of Deal to Accept Toxic Waste*, ST. LOUIS POST-DISPATCH, Feb. 3, 1991, at A1; Ronald Smothers, *Future in Mind, Choctaws Reject Plan For Landfill*, N.Y. TIMES, Apr. 21, 1991, § 1, at 22; Roger Worthington, *Tribes Resist Tempting Landfill Offers*, CHI. TRIB., Sept. 22, 1991, at C4.

86. Many tribes are extremely destitute and may lack the financial resources and expertise to effectively implement and enforce pollution control laws. However, the EPA must approve tribal programs and provide education and technical assistance to the tribes. See generally EPA INDIAN POLICY, *supra* note 76.

In addition, the federal government recognizes native governments' need for financial assistance. See Indian Environmental Regulatory Enhancement Act of 1990, Pub. L. No. 101-408, 104 Stat. 883 (codified as amended at 42 U.S.C. § 2991) (appropriating funding and authorizing the Department of Health and Human Services to award grants to tribes for environmental regulatory purposes).

Environmental funding exemplifies federal recognition of their trust responsibilities. See 136 CONG. REC. S6866 (daily ed. May 23, 1990) (stating that "[f]or many years, Indian tribes have been attempting to address their own environmental problems without adequate federal assistance") (statement of Sen. McCain).

Finally, Senator McCain introduced a bill on August 2, 1991 for the purpose of increasing tribal governments' capacity for waste management on Indian lands. This bill explicitly recognizes the federal trust responsibility toward tribal governments and acknowledges the inherent authority of tribes to regulate tribal lands. It also seeks to establish a system of tribal regulation and federal review of waste management and disposal activities and to provide technical and financial assistance to tribal govern-

try,⁸⁷ and to regulate non-native state citizens,⁸⁸ has boosted state interests in regulating fee land.⁸⁹

Another interest which is not directly attributable to tribal, federal, or state governments includes avoiding checkerboard jurisdiction.⁹⁰ Such jurisdiction creates inconsistent standards and piecemeal authority which leads to confusion among the regulated states.⁹¹ However, it is well settled that checkerboard jurisdiction is avoidable only by giving the tribes sole authority to control the reservation because the states cannot regulate the natives or the reservation.⁹²

Although each respective government has compelling interests in regulating Indian country, the conclusion that tribal government laws preempt state environmental laws when applied to the reservation is unavoidable. Reservation activities, including those on fee land, directly affect native Americans. Since tribal governments have primary authority over the health and welfare of their people, environmental

ments to effectively implement waste management programs. S. 1687, 102nd Cong., 1st Sess. §§ 2-3 (1991).

87. See Allen, *supra* note 71, at 99-100 (asserting that states are concerned over the havoc that the patchwork of regulatory jurisdiction wreaks on unified environmental programs).

88. Concededly, a tribe's regulatory interest diminishes when their authority reaches non-Indians. However, courts have consistently held that native governments have jurisdiction over territory and not merely over people. See *supra* notes 16-19 and accompanying text for a discussion of the origin of this rule.

89. See generally Charles F. Wilkinson, *Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands*, 2 U.C.L.A. J. ENVTL. L. & POL'Y 145, 156-62 (1982) for a historical discussion of legitimate state interests in regulating native lands.

90. Just because checkerboard ownership patterns exist does not mean that checkerboard jurisdiction must also exist. See, e.g., Craighton Goepple, Note, *Solutions For Uneasy Neighbors: Regulating the Reservation Environment After Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 109 S. Ct. 2994 (1989), 65 WASH. L. REV. 417, 424-25 (1990) (arguing that "[c]omprehensive planning is impossible with two uncoordinated, independent bodies regulating land use on the reservation"); Jessica S. Gerrard, Note, *Undermining Tribal Land Use Regulatory Authority: Brendale v. Confederated Tribes*, 13 U. PUGET SOUND L. REV. 349, 375 (1990) (suggesting that, under the current checkerboard zoning scheme, comprehensive land use regulation will never be achieved).

91. See Goepple, *supra* note 90, at 424-25.

92. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (prohibiting the imposition of state and county gambling laws within the reservation because state laws are applicable to tribal Indians only if Congress expressly provides); *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465, 1467-68 (9th Cir. 1985) (holding that a state has no authority under RCRA to regulate Indian hazardous waste on a reservation).

regulation is in their hands.⁹³ Additionally, the trust relationship which intertwines both federal and tribal interests tips the scale in favor of the Indians.⁹⁴ Perhaps the most vital interest shifting the balance toward native governments, particularly in the environmental context, is the special relationship native Americans have with their land.⁹⁵

The conclusion that states are unable to regulate any part of the reservation environment does not end the inquiry. The question still remains: Who fills the regulatory gap? Increasingly, tribes have attempted to fill the gap, but their success has been limited by judicially-imposed barriers to tribal jurisdiction over non-native reservation activity.⁹⁶ Inevitably, conflicts arise when tribes assert jurisdiction throughout the reservation, especially when their jurisdiction reaches non-Indians on fee land.⁹⁷

III. THE SCOPE OF TRIBAL REGULATORY POWER

A. *Montana and Its Exceptions*

Native American governments have exclusive jurisdiction over non-natives on tribal land.⁹⁸ However, *Montana v. United States*,⁹⁹ the

93. See Royster & Fausett, *supra* note 71, at 655 (asserting that native governments should regulate the reservation environment because pollution directly affects the health and welfare of tribal members).

94. See *supra* notes 7-24 and accompanying text for an historical overview of the development of the federal-tribal trust relationship.

95. See *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 902 (9th Cir. 1987) (finding the tribe's power to manage the use of their natural resources particularly important in precluding Montana's assertion of taxes on coal mined within the Crow reservation), *aff'd*, 484 U.S. 997 (1988); see also Tso, *supra* note 2, at 234. The Chief Justice of the Supreme Court of the Navajo Nation described the unique relationship between Indians and their environment:

[W]e are so related to the earth and the sky that we cannot be separated without harm. The protection and defense of both must be preserved. On the other hand, the dominant society views things in terms of separateness, of compartmentalization. For this reason, the Navajo Nation is best able to make the laws and decisions regarding our own preservation and development. *Id.*

96. See generally Russel L. Barsh, *Is There Any Indian "Law" Left? A Review of the Supreme Court's 1982 Term*, 59 WASH. L. REV. 863 (1984) (criticizing several Supreme Court decisions which limit tribal jurisdiction in several legal contexts).

97. See *supra* notes 46-70 and accompanying text for a discussion of jurisdictional conflicts between states and tribes and the judicial tests applied.

98. See, e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 343-44 (1983) (recognizing "the strong interests favoring exclusive tribal jurisdiction" in holding that "concurrent jurisdiction by the State would effectively nullify the Tribe's unquestioned

seminal case in the area of modern tribal jurisdiction, created the general presumption that tribal governments have no regulatory jurisdiction over non-natives when their activities occur on fee land.¹⁰⁰ This general rule is not absolute,¹⁰¹ but instead creates a rebuttable pre-

authority to regulate the use of its resources by members and non-members"); *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465, 1467-68 (9th Cir. 1985) (holding that RCRA does not authorize a state to regulate Indians on native lands); see also Stephen E. Woodbury, *New Mexico v. Mescalero Apache Tribe: When Can a State Concurrently Regulate Hunting and Fishing by Nonmembers on Reservation Lands?*, 14 N.M. L. REV. 349 (1984) (discussing concurrent state-tribal jurisdiction as it affects hunting and fishing rights).

99. 450 U.S. 544 (1981).

100. *Id.* at 565. The general proposition is "that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* The Supreme Court decided two similar cases around the time of *Montana*. Read in conjunction, these cases seem to limit the general presumption *Montana* creates because they establish independent grounds on which to analyze tribal assertions of civil regulatory jurisdiction.

In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), a pre-*Montana* case, the Court held that "[t]ribal powers are not implicitly divested by virtue of the tribes' dependent status." *Id.* at 153. Instead, the Court "found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government." *Id.*

In the environmental control context, there will never be the problem of inconsistency with national standards because tribal pollution control programs are subject to EPA approval and must meet minimum federal standards. See *infra* notes 143-81 and accompanying text for a discussion of tribes' roles under federal environmental programs. See also *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 963-64 (9th Cir. 1982) (applying *Colville* and *Montana* alternatively in allowing tribal regulatory authority under either test).

In the post-*Montana* case of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Court upheld a tribal severance tax on oil and gas production on tribal land which the tribal governments imposed on non-natives. *Id.* at 137. The Court found that the power to tax did not derive solely from the tribe's power to exclude non-natives from tribal land, but rather from the tribe's general sovereign authority to control economic activity in its jurisdiction. *Id.* Furthermore, the Court concluded that even if the tribe derived the power to tax solely from its exclusionary power, then non-natives lawfully entering tribal lands would remain subject to a tribe's power to exclude. *Id.* at 144. Also, tribes possessed the lesser but related power to place conditions on non-natives' conduct and presence on the reservation. *Id.* at 144-45. See also *Morris v. Hitchcock*, 194 U.S. 384 (1904) (upholding tribal tax based on the tribe's power to exclude non-members); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905) (relying on the power to exclude in upholding a requirement that non-Indians must pay a fee to trade within the reservation's borders); cf. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983) (upholding tribal power to condition vehicle repossession on native vehicle owner's consent), *cert. denied*, 466 U.S. 926 (1984).

101. 450 U.S. at 565. "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." *Id.* (emphasis added).

sumption if the tribal regulation falls under either of two broad exceptions. First, a tribe may regulate nonmembers who enter consensual relationships with the tribe.¹⁰² Second, a tribe may assert regulatory jurisdiction if nonmembers' activities threaten or directly affect the tribe's political integrity, economic security or health and welfare.¹⁰³

The second exception becomes more important, and its reasoning more powerful, for purposes of environmental protection. However, both exceptions enable a tribe to control the reservation environment. For example, *Montana's* first exception will apply to nearly all reservation enterprises that are subject to federal environmental laws. Many reservation lands contain an abundance of natural resources.¹⁰⁴ Businesses seeking these resources have to enter mining leases or other contractual arrangements in order to obtain access to raw materials located on tribal land.¹⁰⁵ This scenario subjects a non-native business to tribal regulations when it is located on fee land.¹⁰⁶ In addition, the first *Montana* exception does not require a nexus between the consensual agreement and the regulated activity.¹⁰⁷

Furthermore, the consensual relationship exception¹⁰⁸ pertaining to commercial dealings does not require an explicit arrangement or contract.¹⁰⁹ This becomes important for tribal jurisdiction over businesses operating landfills or hazardous waste sites located on fee land. The only jurisdictional requirement needed to regulate such enterprises is

102. *Id.* "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.*

103. *Id.* at 566.

104. *See* Allen, *supra* note 13, at 887 (noting that many tribes own great mineral wealth).

105. *See, e.g., FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1312 (9th Cir. 1990) (enforcing the Tribal Employment Rights Ordinance which required all reservation employers to give mandatory hiring preference to natives).

106. *Id.*

107. *Id.* at 1315 (relying on *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982)). In *FMC*, the valid employment ordinance had no direct link with the mining leases and contracts. *Id.*

108. *See supra* note 102 and accompanying text for an explanation of the consensual relationship exception as enumerated in *Montana*.

109. *See, e.g., Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 593 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984) (upholding Navajo regulation of non-Indians because of their business dealings on the reservation with tribal members); *Cardin v. De La Cruz*, 671 F.2d 363, 366 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982) (upholding the application of health and safety regulations to non-Indian grocery store owner on fee land because he opened his store for tribal business).

for the tribe and the business to engage in commerce.¹¹⁰ Thus, as long as the tribe's solid waste contributes to the landfill or dump, the jurisdictional requirement is satisfied.

The second *Montana* exception always applies to enterprises subject to federal pollution control laws. Any pollution source is a direct threat to tribal health and welfare¹¹¹ and can affect tribal economic security by decreasing the value of tribal lands located near the source.¹¹² Pollution can also affect a tribe's political integrity whenever a tribal regulation is challenged.¹¹³

Thus, under either of *Montana's* broad exceptions, tribes have the jurisdictional authority to regulate the entire reservation, including non-native owned fee land. However, the Supreme Court recently complicated the *Montana* analysis in *Brendale v. Confederated Tribes*

110. See *FMC*, 905 F.2d at 1315 (stating that a non-native company subjects itself to the civil jurisdiction of tribes when it actively engages in commerce with the tribes).

111. See *Babbitt Ford*, 710 F.2d at 593. The *Babbitt* court found that vehicle repossession consent regulation "is designed to keep reservation peace and protect the health and safety of tribal members. The Navajo reservation covers a vast expansion of land. Repossession of an automobile has the potential to leave a tribal member stranded miles from his or her nearest neighbor." *Id.* See also *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900, 903 (10th Cir. 1982) (finding that zoning ordinance "relates substantially to the general welfare of those living on the Reservation and reflects the Tribes' concern over the perceived threat to the rural character of the Reservation and the lifestyle of a majority of those living on the Reservation"); *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 964 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982) (holding that the tribe had authority to regulate the common law riparian rights of non-Indians owning property bordering reservation property because of the potential affect on tribal health and welfare).

112. *Namen*, 665 F.2d at 964. The court reasoned that the use of the non-Indian property on the border of the reservation property, a lake, could create a pollution problem resulting in damage to the economy, welfare, and health of the tribes. *Id.* See also *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1315 (9th Cir. 1990). The *FMC* court did not reach the second *Montana* exception, but if it had, the court surely would have found that *FMC's* activity affected the tribe's economy since *FMC* was the largest employer on the reservation and was making royalty payments to the tribe.

Tribal courts have also applied the *Montana* exceptions to uphold tribal ordinances and regulations. See, e.g., *Colville Confederated Tribes v. Cavenham Forest Industries*, 14 Indian L. Rep. (Am. Indian Law. Training Program) 6043 (Colv. Tr. Ct., Nov. 16, 1987) (granting preliminary injunction against landfill operator because its activities "have the ability to affect the value of surrounding Indian allotments and thereby may affect the economic security of the tribes and its members").

113. *Colville*, 14 Indian L. Rep. at 6043. "Cavenham's refusal to recognize the tribes' power to regulate zoning on the reservation directly affects the tribes' political integrity." *Id.*

and Bands of Yakima Indian Nation.¹¹⁴

B. Brendale: *Narrowing the Exceptions*

Brendale consisted of two cases consolidated on appeal. In the first case, Philip Brendale, a non-member, attempted to divide his twenty acre parcel of land located on the reservation's closed area into two cabin sites.¹¹⁵ In the second case, Stanley Wilkinson, also a non-member, sought to subdivide his thirty-two acres located in the open area of the reservation.¹¹⁶ Both proposed subdivisions complied with Yakima County zoning but violated the tribal zoning ordinances.¹¹⁷

Three divergent opinions made up the Supreme Court's holding in *Brendale*. A plurality of four justices,¹¹⁸ joined by two concurring justices,¹¹⁹ held that the tribe does not have the authority to zone non-member fee lands in the open area. However, the two concurring justices, joined in part by the three dissenting justices,¹²⁰ held that the tribe has the power to zone non-member property in the closed area. Therefore, *Brendale's* ultimate holding is that tribes may enforce their zoning laws on non-member fee land in reservation areas that are closed to the public, but not in areas open to the public.

In his plurality opinion, Justice White narrowly interpreted the second *Montana* exception¹²¹ and concluded that it did not apply to every situation adversely affecting the tribe.¹²² The impact on the tribe must

114. 492 U.S. 408 (1989).

115. *Id.* at 417-18. The Yakima Reservation consists of two parts: a "closed area" which is closed to the general public and an "open area" to which the public has access. *Id.* at 415-16.

116. *Id.* at 418.

117. *Id.*

118. Justices Rehnquist, Scalia and Kennedy joined Justice White's plurality. 492 U.S. at 414.

119. Justice O'Connor joined Justice Stevens' concurring opinion. *Id.* at 433.

120. Justice Blackmun wrote the dissenting opinion with which Justices Brennan and Marshall joined. *Id.* at 448.

121. The parties agreed that the first *Montana* exception did not apply because *Brendale* and *Wilkinson* had no "consensual relationship" with the Yakima Nation simply by owning reservation land. *Id.* at 428.

122. *Id.* at 431. The plurality found it "significant that the so-called second *Montana* exception is prefaced by the word 'may'. . . . This indicates to us that a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,' but instead depends on the circumstances." *Id.* at 428-29 (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)).

be demonstrably serious and imperil the tribe's political integrity, economic security, or health and welfare.¹²³ White reasoned that the county zoning ordinance did not seriously threaten tribal interests.¹²⁴ Thus, White held that the tribe cannot zone non-native fee lands, regardless of whether it is in open area.¹²⁵

In stark opposition, Justice Blackmun's dissent¹²⁶ found that the tribe has the authority to zone all non-member fee land in either the open or the closed area.¹²⁷ Justice Blackmun reasoned that the ability to zone reservation land fell within the second *Montana* exception because of the Indians' "unique historical and cultural connection to the land."¹²⁸ Moreover, Justice Blackmun declared that once the tribe decides to exercise its power to zone, the power is exclusive because any concurrent zoning would be unworkable.¹²⁹

Justice Stevens' concurrence¹³⁰ was essential to the ultimate disposition of the case because he distinguished the open areas on the reservation from the closed areas. Stevens based his opinion on the tribal government's power to exclude non-members from their territory.¹³¹ He reasoned that because only a small portion of the closed area was fee land,¹³² the tribe retained its exclusionary power throughout most of the area.¹³³ Therefore, the tribe's ability to define and maintain the closed area's pristine character by zoning non-members' land was not impaired merely because non-members owned a few parcels of land.¹³⁴

123. 492 U.S. at 431.

124. *Id.* at 432.

125. *Id.*

126. *Id.* (Blackmun, J., dissenting).

127. 492 U.S. at 465.

128. *Id.* at 458.

129. *Id.* at 466-68.

130. *Id.* at 433 (Stevens, J., concurring).

131. 492 U.S. at 434. *See also supra* note 100, discussing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) and the power to exclude as an independent basis to regulate the entire reservation.

132. *Id.* at 438. Only 25,000 of the 807,000 acres in the closed area was owned in fee. *Id.*

133. *Id.* at 441. "By maintaining the power to exclude nonmembers from entering all but a small portion of the closed area, the Tribe has preserved the power to define the essential character of that area. In fact, the Tribe has exercised this power, taking care that the closed area remains an undeveloped refuge of cultural and religious significance. . . ." *Id.*

134. *Id.* "[T]he fact that a very small proportion of the closed area is owned in fee does not deprive the Tribe of the right to ensure that this area maintains its unadulter-

Stevens distinguished the open area because non-natives held almost half of the land in fee.¹³⁵ Since the tribe could no longer exclude non-members from much of the open area, they also could not zone non-members' land in the area.¹³⁶ Stevens also emphasized the tribe's inability to maintain the open area's unspoiled character because most of the fee land was industrialized and developed.¹³⁷

Brendale's application is extremely problematic because neither Justice White's narrow reading of *Montana* nor Justice Stevens' "power to exclude" analysis examine tribal authority to impose regulations on the reservation.

Justice White fails to articulate clear standards for future courts facing similar fact situations in various regulatory contexts. The "circumstances" sufficient to threaten the tribe and thereby allow it to regulate non-natives on fee land are not clearly spelled out. In the environmental context, however, the presence of an enterprise subject to federal environmental laws clearly poses a demonstrably serious threat.¹³⁸

Justice Stevens' approach creates checkerboard jurisdiction, which is particularly troublesome in the environmental context. Checkerboard jurisdiction spawns inconsistent standards, undermines comprehensive environmental planning and encourages enterprises to locate in areas with the most relaxed standards.¹³⁹ This may tempt local or tribal governments to relax their standards in order to lure profitable enterprises onto their land.

Even under the difficult *Brendale* analysis, tribes still retain author-

ated character." *Id.* at 444. Furthermore, Stevens determined that Congress, in enacting the Dawes Act, did not intend that Tribes would lose control of their reservations simply because non-members owned a few small parcels of land within the reservation. *Id.* at 441.

135. 492 U.S. at 446. Stevens also emphasized that non-natives in the open area could not participate in tribal elections. *Id.* at 445.

136. *Id.* at 444-45. "Because the Tribe no longer has the power to exclude non-members from a large portion of this area, it also lacks the power to define the essential character of the territory." *Id.*

137. *Id.* at 445. "In 'sharp contrast to the pristine, wilderness-like character of the 'Closed Area,' the open area is marked by 'residential and commercial developmen[t].'" *Id.* (quoting *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 750, 752 (E.D. Wash. 1985)).

138. See *supra* notes 111-13 and accompanying text discussing how governmental controls on pollution affect a tribe's political integrity, economic security, and health and welfare.

139. See *Royster & Fausett, supra* note 71, at 656 (concluding that checkerboard jurisdiction adversely affects the tribal pollution control scheme).

ity to regulate the reservation environment. Moreover, the *Brendale* Court stressed the fact that Congress did not expressly delegate the power to zone fee lands to the tribe.¹⁴⁰ However, some environmental laws expressly delegate jurisdiction on fee lands to native governments.¹⁴¹ In those instances, jurisdictional analysis is unnecessary. Other environmental statutes do not explicitly grant tribes jurisdiction over fee lands.¹⁴² Therefore, unless precluded by congressional amendment, courts must undertake the complicated and imprecise jurisdictional analysis enumerated in *Brendale*.

IV. ENVIRONMENTAL REGULATION ON INDIAN RESERVATIONS

Congress has taken steps to recognize native governments' status as the primary decision-making body for reservation environmental matters.¹⁴³ However, only the Clean Water Act (CWA) and Clean Air Act (CAA) delegate jurisdiction over all reservation lands to the tribes.¹⁴⁴ The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) treats tribes as states in certain circumstances but fails to define the jurisdictional bounds in which tribal authority governs.¹⁴⁵ The Safe Drinking Water Act (SDWA) delegates the ability to make jurisdictional determinations on a case-by-case basis to the Environmental Protection Agency (EPA), thus leaving the jurisdictional question an open issue.¹⁴⁶ The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) contains no provisions dealing with tribes as states, but the EPA regulations contemplate some tribal par-

140. 492 U.S. at 428.

141. See, e.g., Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988); see also *infra* notes 149-61 and accompanying text discussing recent Clean Water Act and Clean Air Act amendments.

142. See, e.g., Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26 (1988); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (1988); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (1988).

143. The EPA has also taken steps to recognize tribal authority as the primary regulating body for the entire reservation environment. See EPA INDIAN POLICY, *supra* note 76; see also *Administration of Indian Programs by the Environmental Protection Agency: Hearings Before the Select Committee on Indian Affairs*, 101st Cong., 1st Sess. 4 (June 23, 1989) (statement of F. Henry Habicht III, Deputy Administrator, EPA).

144. See *infra* notes 149-61 and accompanying text for a discussion of CWA and CAA.

145. See *infra* notes 162-64 and accompanying text for a discussion of CERCLA.

146. See *infra* notes 165-68 and accompanying text for a discussion of SDWA.

ticipation.¹⁴⁷ The Resource Conservation and Recovery Act (RCRA) ignores jurisdiction and merely views tribes as municipalities, creating serious problems for tribal authority.¹⁴⁸ As a result, the CERCLA, SDWA, FIFRA, and especially RCRA are in dire need of amendment.

A. CWA and CAA

Congress amended the Clean Water Act¹⁴⁹ in 1987 to allow tribes to be treated as "states" for certain purposes.¹⁵⁰ However, this treatment is qualified by certain criteria.¹⁵¹ If the tribe meets the criteria, Congress clearly provides that the tribe may apply its own standards to the entire reservation regardless of ownership.¹⁵² Thus, any state law purporting to apply to fee land is expressly preempted by congressional delegation.¹⁵³ In light of this express power, recent EPA regulations interpreting the CWA amendments are puzzling because they require the tribe to include the legal basis for their jurisdictional claim in their application for status as a state.¹⁵⁴ The regulations also state that the EPA regional administrator will resolve challenges to tribal jurisdiction.¹⁵⁵ Such a jurisdictional determination is unnecessary because a

147. See *infra* notes 169-70 and accompanying text for a discussion of FIFRA.

148. See *infra* notes 171-81 and accompanying text for a discussion of RCRA.

149. 33 U.S.C. §§ 1251-1387 (1988).

150. Clean Water Act Amendments of 1987, Pub. L. No. 100-4, 101 Stat. 60 (codified as amended at 33 U.S.C. §§ 1251, 1377(e) (1988)).

151. The tribe must show that its governing body carries out substantial governmental duties and powers, the tribe's management and protection of water resources occurs within the reservation boundaries, and the tribe must prove to the EPA that it is capable of carrying out the Act's substantive provisions. 33 U.S.C. § 1377(e).

152. Section 1377(e) provides in pertinent part:

The administrator is authorized to treat an Indian tribe as a State . . . but only if-

. . . .

(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 the 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. . . .

33 U.S.C. § 1377(e)(2) (emphasis added).

153. See *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 428 (citing the CWA amendment and comparing its express regulatory delegation to tribes with Congress' failure to "expressly delegate[] to the Yakima Nation the power to zone fee lands").

154. 40 C.F.R. § 130.6 (1991).

155. 40 C.F.R. § 130.15 (1991).

tribe that meets the criteria for treatment as a state¹⁵⁶ need only show that its functions under the Act pertain to resources within the reservation boundaries.¹⁵⁷

The recent Clean Air Act amendments¹⁵⁸ treat native tribes in a fashion similar to the CWA. For example, its provision delegating jurisdiction is virtually identical to the CWA's.¹⁵⁹ Under the CAA, a tribe must meet the same criteria as in the CWA in order to be treated as a state.¹⁶⁰ Once it meets that criteria, jurisdictional analysis is again unnecessary for exactly the same reasons as under the CWA.¹⁶¹ Thus, any future EPA regulations should not contemplate jurisdictional questions because Congress has already settled the issue.

B. CERCLA

The 1986 amendments to the Comprehensive Environmental Response, Compensation and Liability Act¹⁶² enumerate specific situa-

156. 33 U.S.C. § 1377(e)(1) and (3).

157. 33 U.S.C. § 1377(e)(2).

158. See, e.g., Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 107, 104 Stat. 2464 (1990).

The 1977 amendments give tribes the ability to redesignate air quality standards for the entire reservation, regardless of ownership, by allowing Indians to exercise authority anywhere inside the reservation's borders. The 1977 amendment provides that all "lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body." 42 U.S.C. § 7474(c) (1988). See generally Patrick Smith & Jerry D. Guenther, Note, *Environmental Law: Protecting Clean Air: The Authority of Indian Governments to Regulate Reservation Airsheds*, 9 AM. INDIAN L. REV. 83 (1981). See also 40 C.F.R. § 52.21(g)(4) (1986) (EPA regulations for Indian redesignations containing language similar to 42 U.S.C. § 7474(c)).

Even before the 1977 amendments delegating authority to tribes, the Ninth Circuit approved an EPA delegation order which approved the Northern Cheyenne Tribe's redesignation of its reservation air quality standards. See *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981).

159. The Clean Air amendment provides that the tribe shall be treated as a state "only if: (B) the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 107(d), 104 Stat. 2464, 2464-65 (1990) (to be codified at 42 U.S.C. § 7601(d)(2)(B) (1990)).

160. See *supra* note 151, setting forth the criteria for state status.

161. See *supra* notes 156-57 and accompanying text, discussing policy and provisions of the CWA.

162. The Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986), amended the Comprehensive Environmental Re-

tions in which tribes shall be treated as states.¹⁶³ Unlike the CWA and CAA, however, Congress does not expressly delegate jurisdictional authority to tribes.¹⁶⁴ By failing to clearly define tribes' jurisdictional boundaries, Congress has given little guidance to tribes attempting to implement their own CERCLA programs; tribes are unsure as to the scope of their programs. For example, tribal implementation of CERCLA programs to non-Indian enterprises located within reservation boundaries may lead to protracted litigation in which these enterprises challenge tribal jurisdiction under CERCLA. Thus, CERCLA's provisions pertaining to Indian tribes are incomplete without a clear definition of tribal jurisdictional authority.

C. SDWA

In 1986, Congress amended the Safe Drinking Water Act¹⁶⁵ to allow tribes to warrant state treatment.¹⁶⁶ Like CERCLA, the SDWA also does not expressly delegate jurisdiction to tribes. Instead, it delegates jurisdictional determinations to the EPA.¹⁶⁷ The statutory framework

sponse, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (1988).

163. See 42 U.S.C. § 9626(a). Tribes are treated as states for purposes of several CERCLA provisions including notification of releases, consultation on remedial actions, access to information, roles and responsibilities under the national contingency plan, and submittal of priorities for remedial action. *Id.*

164. Under the CWA, Congress has expressly defined tribal jurisdiction as anywhere "within the borders of an Indian reservation." 33 U.S.C. § 1377(e)(2). Under the CAA, Congress has defined tribal jurisdiction as anywhere "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(2)(B). In contrast, Congress does not define tribal jurisdiction under CERCLA.

165. 42 U.S.C. §§ 300f-300j-26 (1988).

166. *Id.* at § 300j-11(a)(1).

167. In other words, the CWA and CAA provide that tribes may be treated as states if their proposed program is applied within the reservation borders and the tribe otherwise meets the criteria for state treatment. Thus, Congress solves the jurisdictional issue by expressly stating that tribes can regulate the entire reservation, regardless of ownership. See *supra* notes 131-43 and accompanying text.

In contrast, the SDWA provides that the EPA may treat tribes as states if the tribe's proposed program is applied within the area of their jurisdiction and the tribe otherwise meets the criteria to qualify as a state. Thus, the CWA and CAA define the tribe's jurisdiction as anywhere within the reservation boundaries; while the SDWA leaves the jurisdictional determination to the EPA. See 42 U.S.C. § 300j-11(b)(1)(B), which provides that treatment as a state "shall be authorized only if: . . . the functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction . . ." *Id.*

of the SDWA mandates a time-consuming and expensive administrative process. During this process, jurisdictional analysis is necessary at least once by the EPA, and potentially several times if a court reviews the EPA determination. As a result, Congress has created costly litigation and tribes must allocate scarce funds and resources toward attorney's fees and court costs rather than implementation and enforcement. Additionally, the EPA determines jurisdiction on a case-by-case basis which leads to potential inconsistent determinations. Each time a tribe submits a program, the affected state may challenge tribal jurisdiction before the EPA makes a final ruling.¹⁶⁸ Congress could effectively preclude long court battles and foreclose potential inconsistencies by amending the SDWA with provisions similar to those in the CWA and CAA.

D. *FIFRA*

The Federal Insecticide, Fungicide, and Rodenticide Act¹⁶⁹ contains no provisions for treating tribes as states. The only mention of native tribes in FIFRA is a provision allowing the EPA to delegate tribal authority to implement pesticide applicator certification programs.¹⁷⁰ FIFRA is an example of a statute which neglects Indian tribes and should be amended to facilitate greater tribal participation in all aspects of the statute's scheme.

E. *RCRA*

The Resource Conservation and Recovery Act¹⁷¹ is another example of an environmental statute which ignores native governments.¹⁷² Jurisdictional disputes under RCRA are likely to increase in the near future with the advent of solid and hazardous waste disposal as a seri-

168. Tribes receive enforcement authority via a three step process: 1) the tribe must seek and acquire treatment as a state; 2) the tribe may apply for a grant for a Public Water System or Underground Injection Control Program; and, 3) the tribe may then apply for primary enforcement authority for their program. 40 C.F.R. § 35.465 (1990). Notice and comment procedures allow states thirty days after submission of a tribe's application to challenge tribal jurisdictional claims. 40 C.F.R. § 142.78(c) (1990).

169. 7 U.S.C. §§ 136-136y (1988).

170. *Id.* § 136u(a).

171. 42 U.S.C. §§ 6901-6992k (1988).

172. The only mention of Indians in the statute is in the definition section which defines "municipality" to include "an Indian tribe or authorized tribal organization." *Id.* § 6903(13).

ous problem on and near many reservations.¹⁷³ Furthermore, waste disposal enterprises are targeting Indian reservations with increased vigor.¹⁷⁴

RCRA is the only environmental statute considered in this Note that neither contains tribe-as-states provisions nor authorizes tribal implementation of any substantive provisions. Furthermore, in light of recent case law, Congress' failure to amend RCRA with provisions for full tribal participation in RCRA programs will continue the line of inequitable court rulings. In *Washington Department of Ecology v. EPA*,¹⁷⁵ the Ninth Circuit held that RCRA applied to Indian reservations.¹⁷⁶ However, tribal sovereignty advocates did not oppose the decision¹⁷⁷ because its application foreclosed state regulatory authority over Native Americans on the reservation.¹⁷⁸

Additionally, a recent Eighth Circuit case demonstrates the problems that can occur when RCRA is applied to the reservation. In *Blue Legs v. United States Bureau of Indian Affairs*¹⁷⁹ the court relied on *Washington Department of Ecology*, holding that RCRA applied to open dumps on the reservation and imposed liability on the tribe for RCRA violations.¹⁸⁰ By amending RCRA to allow full tribal participation, Congress can avoid the inequitable result of imposing liability on tribes for RCRA violations absent their ability to obtain primary regulatory authority to implement their own RCRA scheme.¹⁸¹

173. See *supra* note 78 and accompanying text, discussing the growth of the pollution problem on Indian reservations.

174. See Pamela A. D'Angelo, *Waste Management Industry Turns to Indian Reservations as States Close Landfills*, 19 *Env't Rep. (BNA)* 1607, 1609 (Dec. 28, 1990) (tempting tribes with the prospect of providing reservations with profitable businesses and jobs in order to get around the dearth of state facilities and avoid state taxes).

175. 752 F.2d 1465 (9th Cir. 1985).

176. *Id.* at 1469.

177. See, e.g., Du Bey, *supra* note 2, at 503 (noting that the *Washington Department of Ecology* decision encouraged tribal self-government over hazardous waste management).

178. The *Washington Department of Ecology* court held that the EPA regional administrator properly refused to approve a proposed state program because RCRA does not authorize states to regulate natives on the reservation. 752 F.2d at 1467-68. The court, however, evaded the issue of whether the state could implement their program to regulate non-natives on reservations. *Id.* at 1468.

179. 867 F.2d 1094 (8th Cir. 1989).

180. *Id.* at 1097.

181. Senator McCain of the Senate Select Committee on Indian Affairs has expressed hope that Congress will amend RCRA so that it treats tribes as states. See

V. CONCLUSION

Amending all environmental laws to allow Native American tribes to regulate the environment throughout the reservation, even if it affects non-natives, will serve several useful purposes. First, amendments will promote the federal Indian policy goals of tribal self-determination without undermining pollution control laws because the EPA must first approve tribal environmental programs. Second, congressional amendments will create certainty in environmental regulation because the regulated parties will avoid checkerboard jurisdiction. Finally, and most importantly, the amendments will foster tribal sovereignty by allowing native governments to take responsibility for the health and welfare of their people and their land.

*Douglas A. Brockman**

Administration of Indian Programs by the Environmental Protection Agency: Hearing Before the Senate Select Comm. on Indian Affairs, 101st Cong., 1st Sess. 2 (1989).

In a recent select committee hearing, a leading Indian law attorney urged congressional enactment of tribal amendments to RCRA. Noting that the Clean Air, Clean Water and Safe Drinking Water Acts have all been amended, this advocate characterized RCRA as "the last domino that needs to fall." See *Status of Jurisdictional Authority in Indian Country, An Assessment of Emerging Issues: Hearing Before the Senate Select Comm. on Indian Affairs, 102nd Cong., 1st Sess. 34 (1991)* (statement of Kevin Gover, Counsel, (Campo Band of Mission Indians).

* J.D. 1992, Washington University.

