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Treating Tribes as States under the Clean Water Act: The Good and the Bad

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TREATING TRIBES AS STATES UNDER THE CLEAN WATER ACT: THE GOOD AND THE BAD*

MR. MONETTE:[1] Good morning. Nice to see you all again. We have a slight change in the panel, as you can see. Let me just first mention that John Harbison has, I understand, taken ill and probably won't be with us today. So he could probably use some of our good thoughts. And Sam Deloria will sit in in his place to help respond.

Our topic is, as you can see, Treating Tribes as States Under the Clean Water Act: The Good and the Bad. A whole host of environmental statutes have done this sort of thing in recent years, extending-Congress extending to the agencies the authority to deal with the tribes as states. It raises a lot of peculiar questions, and, if I can, I'll give the speaker a little time to think about it. Let me set up some ground work the way I look at it. And I guess if I looked at it quite the exact same way that the speakers did, I maybe wouldn't do this, but I don't look at it exactly the same way. So I'll give you some of my perspectives; they'll give you theirs.

Let me just give a real simple background in civics that we all had in sixth grade. We all remember the states becoming states and we all remember them wanting to form a union and the people wanting to form a union and all the bickering and battling that went back and forth. But a couple of the themes running through there are still alive and well in the Constitution and are still with us today. And I think it's worthy for us to know both of those themes, both of these sort of traditions of thought that come down to America today. We have a tendency to think, you know, us versus them when it's the tribal people, us versus the United States, or us versus the states. When we do that, we have a tendency to think that perhaps the United States or all the states think alike, and they don't. We know, of course, that they have vast differences in thought and ideology from, for example, someone like Chief Justice Rehnquist to someone like Former Vice President Walter Mondale, vastly different political theory coming from these sorts of people.

And early on, some of the quotes that I find important and hang with me, one is by the colonial governor of Massachusetts. He said that

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1. Assistant Professor of Law at the University of Wisconsin where he teaches Indian Law, Water Rights, and Torts.

two legislatures, two law-making bodies, two legal systems cannot exist in the same jurisdiction. Simply can't happen, he said. And he was, of course, being opposed to the formation of the union. He was opposed to the idea that Massachusetts might give up some sovereignty. Massachusetts, as you know, at that point was a very powerful entity in this budding country. In fact, around the world quite often when people were coming to the United States and trading, doing commerce, et cetera, they didn't even talk about the United States. They didn't talk about any particular state, Virginia, Massachusetts.

Quite often it was "We're taking goods to Boston." Boston was the place to be. Massachusetts was quite likely going to be a very powerful country in its own right, had the history developed that way. And the Governor felt very strongly in those terms. Now, another quote that I like to use to shed a little light on it, so to speak, was by the minority of the convention in Pennsylvania where one of them said, "We apprehend that two coordinate sovereigns would be a solecisim in politics." I don't know what that means either. But I think it means something like what the governor of Massachusetts was saying. If you have two law-making bodies, they came down to one inevitable conclusion, conflicts are going to arise between them and we have to find a way to work them out. That's inevitable. And they were going to create a union and they wanted it to work. Just to make a long story short, we know what happened, right? We had people like James Madison and others saying, "Well, one of them is going to have to be supreme, but only one can be supreme." Well, if one's supreme, it's going to swallow up the others. Well, then we'll make the others a little bit broader and extend their power beyond the supremacy so that where they act outside the supremacy, they're going to have power. That way we'll strike a balance between the two. We'll make sure this one doesn't swallow up these and make sure these don't swallow up this one. And we know that that logic came to be embodied in the Tenth Amendment to the Constitution. Right? What is not granted by these states and the people in the Constitution to the union shall be reserved to the states or to the people. All of that embodied the logic of Democracy coming from the people through their states to this union but that they would have the vast inherent sovereignty that was not given to the union. They would be the source of it, they would be the custodians of it, and they would retain it.

Now, however it happened—and there's room for debate here—but however it happened, the tribes' sovereign spheres came to overlap with the United States. So, however through treaties, through conquest, through force, however it happened, day in and day out tribes are dealing with Indian Gaming Acts, Indian Civil Rights Acts, Indian Child

Welfare Acts, their sovereign spheres are overlapping with the U.S., and that's reality. Now one of the ways it happened is the most ideal way, and I would like to see that way developed in the law personally, is by treaties. And I'll tell you the reason I'd like to see it developed that way, because one of the first treaties that the Supreme Court construed, the Supreme Court wrote, basically, treaties are to be construed as a grant of rights from the Indians, not to them, and the reservation of those not granted. That's in a case called *United States v. Winans*.[2] In other words, it used logic and wording remarkably similar to the logic and wording that was put into the Tenth Amendment to guide the relationship between the union and the states.

The source of the sovereignty issue will be guided by democracy. It will come from the local people, and where the sovereign sphere overlaps by treaties, it will come from the tribes and their people. Just the niceties of Democracy being applied in both relationships. And it's played itself out often, even though we haven't really discussed it this way I think and we haven't always studied it this way and attorneys haven't always argued it that way, and the Court hasn't always explained it this way. But, for example, there's a case out there, one of the early cases, called *Barron v. Baltimore* where the Court held that the Bill of Rights didn't apply to the states. Why not? "They have their own source of sovereignty," the Court said. "If their citizens don't want their states to be infringing on their civil rights, they can use their own states and their own Constitutions. They don't need the Federal Bill of Rights to do that." Well, there's a case called *Talton v. Mayes*[3] where the question was whether the Federal Bill of Rights bound the Cherokee Nation, and the Court said almost exactly the same thing using almost exactly the same language. The Cherokee Nation has its own source of sovereignty and its own participatory process. If the Cherokee Nation and Cherokee people don't want the tribe infringing on their rights, they can do it in their own Constitution. They don't need the Bill of Rights to do that.

Let me give you one more example. There is a case called *United States v. Lanza*, one of the seminal cases in the area, where, out of the same set of facts, the federal government and the state were going to prosecute a crime. Of course, the defendant raised a double jeopardy claim. The Court just simply held "We have two sovereigns here. Their spheres do overlap but they also have separate interests that each of them can vindicate to take care of themselves." Well, we also have a case

2. 198 U.S. 371 (1905).
3. 163 U.S. 376 (1896).

called *United States v. Wheeler*[4] where the United States and the Navajo Nation both attempted to prosecute a crime arising out of the same set of facts, the same person. He raised double jeopardy in his defense. The Court again said almost exactly the same thing. I mean, the wording is remarkably the same. We have here two separate sovereigns, each with its own source of sovereignty. So, I guess one of the lines of thinking here gets to the point of, well, we're sort of treating tribes as states. Some people appreciate that. Some people don't. I'm not necessarily saying that tribes are states, should be states, want to be states, but what I am saying is this: That in order to enjoy and cultivate that difference between those sovereigns that Professor Laurence was talking about yesterday, along that line where their sovereign spheres overlap, this country has a well-developed logic steeped in democracy to ensure that those states continue to function. My question is, how often have we developed, can we develop, do these papers develop, do these laws attempt to develop that idea for tribes? Where the sovereign spheres of the tribes and the United States overlap, can we take that logic and apply it here using democratic principles to ensure that the tribes survive? Just simple democracy. So, I think some of that is at play, although I think that our papers don't necessarily look at it that way. We'll have some time to respond after Jim gives us a somewhat different rendition but from a very well-thought-out perspective. So the first speaker is James Grijalva. He's a graduate of Lewis and Clark College of Law, as most of you know is sort of the preeminent environmental law institution, with your school, of course, Bruce. Jim is now at the University of North Dakota teaching Indian law and environmental law and other subjects as an Assistant Professor. So let me give you James Grijalva.

PRESENTATION BY JAMES GRIJALVA

Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters. Omitted.

PRESENTATION BY REBECCA TSOSIE'S OF JOHN HARBISON'S PAPER

The Downstream People: Treating Indian Tribes as States under the Clean Water Act. Omitted.

MR. MONETTE: I was in Albuquerque a couple weeks ago and I walked downtown into a gallery that a non-Indian owned and was

4. 435 U.S. 313 (1978).

working at, full of beautiful Indian artwork and jewelry and he was doing well. He was really, you know, making a mint off selling this stuff. And so I thought I'd, you know, just have a few discussions with him. And I asked him what he thought about the Isleta thing and he went off. He was paying, you know, as much as twelve dollars a month more for water and he was being taken to the cleaners by these darned Indians. I thought, you're certainly being taken to the cleaners by somebody, but I don't think you're sending that money to the tribes. In the meantime he's probably sold an extra piece of jewelry a month just to make up for that.

Our panelist is going to be Professor Judith Royster. You all met her yesterday so I won't go on lengthily about her, but perhaps the most prominent thing in her life, that I don't think was aired as well as it might have been yesterday, she's a stellar graduate from the University of Wisconsin where I now teach. She graduated before I got there but we all know that the alumni are the most important people around. So Professor Judith Royster.

MS. ROYSTER: The basic thing that I want to talk about, unfortunately, is what Professor Grijalva referred to earlier as that depressing stuff. I'd like to return to the issue that came up at the second afternoon session yesterday and talk about what I think is a kind of fundamental cognitive dissonance between the way we deal with the environmental protection statutes in Indian country, and *Brendale*[5] and the way that we deal with zoning in Indian country. In particular, I want to make the point that land use planning is a first-line environmental defense and that the Supreme Court has removed from tribes much of their ability to engage in that first-line environmental defense, has left tribes with, I don't know, 85, 90 percent of environmental protection under the statutes. But that's not 100 percent.

Brendale, which is discussed in Professor Grijalva's paper but which he didn't have an opportunity to present, was the follow-up case to *Montana*[6] and it dealt with zoning and the ability of the Yakima Nation in Washington State to zone on its reservation. Zoning or land use planning—I prefer to talk about the concept of comprehensive land use planning rather than zoning. I think that it makes the point a little better. The Court found that the Yakima territory was divided up into an open area and a closed area, according to whether a given area of the reservation was "Indian" enough. And it was Justice Stevens, joined by

5. Brendale v. Confederated Bands and Tribes of the Yakima Indian Nation, 492 U.S. 408 (1989).

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

Justice O'Connor, who made that distinction and who didn't give us much of an explanation as to exactly when a reservation or a part of a reservation is sufficiently Indian that we can call it closed. That depends on land use patterns, on land tenure, on population, on the presence of towns, any or all of the above; he wasn't clear. There was no majority opinion in *Brendale*. There was a 4, 2, 3 split, but the bottom line was that when a reservation or an area of a reservation is closed, is sufficiently "Indian," whatever that might mean, the tribe retains full land use planning authority throughout the entirety of that reservation or that area regardless of ownership—regardless of title to any particular parcel of land. Where a reservation or a part of a reservation is open, is not sufficiently "Indian," of sufficiently Indian character, whatever that might mean, the Court said that primary land use planning authority rests with the state. The tribe retains authority on non-Indian fee lands, on trust lands, and the Court bypassed the issue of what to do about Indian-owned fee lands. But on non-Indian fee lands the county has primary zoning authority and what's left for the tribe is the ability to challenge that on a use-by-use, parcel-by-parcel basis under the *Montana* direct effects test. The tribe apparently has the ability to go before the county zoning board (the Court was vague on the precise procedures) and argue that a particular land use designation or a particular land use proposal on non-Indian fee land within its territory has enough of a direct effect on tribal interests, on tribal health and welfare, that the tribe should have control over that parcel, or at least that the county's proposed zoning use or zoning designation is inappropriate.

What the Court declined to do, and what the dissent argued strenuously that the Court should have done, was not to address the issue of zoning on a discrete parcel-by-parcel basis but to look at the fact that the tribe was asserting its power of land use planning, comprehensive land use planning, which, if done right, is what zoning is all about. And that comprehensive land use planning, or the ability to engage in comprehensive land use planning, is something which under any set of circumstances has a direct and substantial impact on tribal interests, on tribal health and welfare. The Court declined to address it in that global context and brought it down to the specifics. In *Brendale* itself, the proposed use in the open area was to subdivide a 32-acre tract into 20 single family lots. And when you take it down to that discrete level, it's much more difficult for a tribe to argue that that has a substantial and direct impact on tribal health and welfare than it is to argue that the ability to comprehensively plan for land use has a substantial impact on tribal health and welfare.

What the Court did in *Brendale*, then, was to remove from tribes, or at least tribes with open reservations or open areas of reservations, the ability to engage in comprehensive land use planning. It maybe left them with sort of bits and pieces of zoning authority in an attempt to at least address particular parcels or particular proposed uses, but took from them that ability to zone generally, to engage in the comprehensive nature of determining what uses ought to be made where within the territory. That seems to me to remove from those tribes the ability to engage in that first-line environmental defense.

Professor Grijalva argues in his paper that there is a difference, and I think I understand why he made this argument and I would make this argument, too, as an advocate,[7] although I fundamentally don't agree with it. The argument is that there's a difference between environmental or water quality planning and zoning in that zoning has discrete and localized impacts, whereas water pollution has migratory and widespread impacts. And on one level I think that that's very true. But on another level it's not.

Where government has the ability to engage in comprehensive land use planning it can create green-belt zoning. It can create riparian zones in which development is restricted or prohibited. It can control uses near waterways. Let me take it specifically to water rather than trying to go into other environmental media. It can create zones to control nonpoint source pollution: that is, runoff, agricultural runoff, construction runoff, residential runoff, which is not dealt with well by the Clean Water Act, if it's dealt with by the Clean Water Act at all. In that sense it seems to me that the ability to engage in that kind of land use planning is central to a tribe's ability to control the environment or to regulate the environment. And the Supreme Court has bypassed that issue and said that for most tribes, at least in part, that ability to engage in the fundamental first-line comprehensive land use planning is not there.

Contrasted to that, we have the federal environmental statutes, and in particular here we're talking about the Clean Water Act. The EPA is not willing to come right out and say that tribes have authority over the entire territory of the reservations, but the EPA wanders its way around and ends up close to that. The EPA says basically that most tribes should in all instances have the authority to regulate the waters throughout the territorial boundaries of the reservation because it finds under *Montana/Brendale* that Congress has said that water pollution has such substantial and direct impacts on tribal health and welfare that this

7. *See* Judith V. Royster, *Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation*, 1 KAN. J. L. & PUB. POL'Y 89 (1991).

is necessarily something over which tribes retain authority on non-Indian fee lands as well as on trust lands.[8] I think the EPA's interpretation is much too tentative and not sufficiently categorical, but I agree with where the EPA ultimately ends up.

The problem that I see is this kind of dissonance: that we understand that water pollution is something which has impacts on health and welfare issues, and that therefore under *Montana/Brendale*, water pollutants are something which tribes ought to have the authority to regulate within the territorial boundaries of the Indian country. But the Supreme Court over here is saying, "That's not true of land use planning." And it seems to me that the two form an integrated whole.

I don't have an answer to this. I suppose the old-fashioned answer is: wouldn't it be nice if Congress fixed it. Wouldn't it be nice if Congress recognized that *Brendale* was really a seriously bad decision and overturned *Brendale* in the way that it dealt with *Duro*.[9] Congress certainly has the ability to do that. Congress has done it on rare occasions when the Supreme Court has gone one step too far. Unfortunately, Congress did not believe that *Brendale* had gone one step too far. And it seems to me to leave tribes in an anomolous position: that they can control through the water quality standards program and other programs under various of the environmental acts the pollution of the waters. What they cannot do in many instances is decide what the use of the land is going to be in the first place. And it seems to me that any sort of integrated theory of environmental protection by tribes in Indian country should accord tribes necessarily the ability to engage in the full range of environmental protection programs. Thank you.

MR. MONETTE: You know, this question about the non-Indian land on the reservation and allotments and all these rights that I still hear running through all this stuff seems not to get squarely addressed. I do believe that non-Indians who live on the reservation have great equities to consider, property rights and other such things. I don't think it has to be all quite that difficult. Did you ever see the first episode of Little House on the Prairie? If you remember it, Charles went out there and built a cabin out on this land. And he then got a letter in the mail a few days later, a month later or something. And he got kind of teary-eyed the way only Charles could do. And he just said, you know, "Well, the federal government says we can't live here." That's all he said. And so then the whole episode was about tearing down the house and moving it, rebuilding it and all, and it was rather dramatic. But they never told what

8. *See* 56 Fed. Reg. 64,876 (1991).
9. Duro v. Reina, 495 U.S. 676 (1991), "fixed" by 25 U.S.C. § 1301(2).

the letter said. So I went to Little House on the Prairie archives and got a hold of a copy. Here's what it said. "Dear Mr. Ingalls, the federal government has been informed that you and your family have settled upon land in contravention of federal law. The U.S.A. has not yet acquired the territory on which your parcel sits. As Chief Justice John Marshall has said, Indian territory may be acquired by purchase or conquest. And since the territory is yet to be purchased, we fear that Laura's writings may give the tribe the indication that we think we have conquered them, which we have not. And, as you know, President Thomas Jefferson once said, 'I view this discovery right merely as a right of preemption, but until it is exercised, our right is subject to the tribe's use and occupancy, and that may be forever.'" The letter then quoted John Marshall's cases, saying, "You can, however, live there, Charles, but you take the property subject to the laws and the title and all the regulation of the Indian tribe. And if you don't want to do that, then don't move there and don't live there until we acquire it. Signed the Federal Government." Seems to be a pretty simple answer you think?

Our next speaker is going to be Professor Rebecca Tsosie, who is at the Arizona State University College of Law. She has clerked for the Arizona Supreme Court and worked with Brown & Bain in Phoenix and has a keen interest in Indian law.

MS. TSOSIE:[10] I want to raise a couple of points in response to Professor Harbison's paper, and then I will, of course, reserve enough time for Sam Deloria's comments. I think that we need to look closely at the two main premises of this paper.[11] First of all, that integrated watershed management is a goal that we should all aspire to; and, second of all, that we know integrated watershed management is a goal we all should aspire to because we know that it's economically efficient. And my starting position to thinking about these issues, I will admit, is one of suspicion. I'm always suspicious of a theory that is not generated from within but has been transposed onto tribal environmental policy. And so my own goal is always to figure out from a tribal perspective, do these

10. Rebecca Tsosie, Associate Professor of Law, Arizona State University; J.D., UCLA 1990. My thanks and appreciation to the North Dakota Law Review for the opportunity to participate in the symposium. This text reflects oral comments I made at the symposium. In preparing to make these comments, I relied on the following sources: U.S. Environmental Protection Agency, *The Watershed Protection Approach: An Overview*, (Dec. 1991); William Goldfarb, *Watershed Management: Slogan or Solution*, 21 B.C. ENVT'L AFF. L. REV. 483 (1994); Jeffrie G. Murphy, *The Justice of Economics*, in JEFFRIE G. MURPHY, RETRIBUTION RECONSIDERED: MORE ESSAYS IN THE PHILOSPHY OF LAW (1992).

11. These comments are offered is response to Professor Harbison's excellent and insightful article, *The Downstream People: Treating Tribes as States Under the Clean Water Act*, 71 N.D. LAW REV. 523 (1995). Because Professor Harbison could not be present at the symposium to deliver his own paper, I have taken the liberty of interpreting the paper as I understood it. I apologize for any errors in this interpretation.

things make sense? What is the impact? And how do we understand those things? Federal environmental legislation provides a threshold or baseline way to measure environmental quality nationwide, however it also transposes Euro-American values and norms on the American Indian nations. One of Professor Harbison's positions on the Clean Water Act is that tribes should use the leverage that they can acquire from being treated as states under the Clean Water Act to foster a watershed approach to water quality protection.

So, I want to ask, does this make sense in terms of tribal environmental policy or are we just using the tribes as a means to an end that is for the greater national good? For example, tribal lands were used in the federal dam projects of the 1930s, '40s, and '50s for the greater public good, although that had devastating effects on the tribes.

Now, my first question when I look at the whole issue of integrated watershed management is, "what is a watershed?" And I was hoping that there was an easy answer to that. People toss the concept of "watershed" around and they say, well, it applies to all surface waters, and that sounds nice and friendly. But then I looked in the EPA manual that deals with a watershed concept. And they define watershed, first, as "a drainage basin of a receiving water body," which makes sense; "a geographic area in which water, sediments, and dissolved materials drain to a common outlet; a point on a larger stream, a lake, an underlying aquifer, an estuary, or ocean." In other words, therefore, groundwater can be a receiving water body for purposes of the watershed, which is a little more complicated than the first definition. But then the EPA goes on to say, that the Watershed Protection Approach does not even require a particular definition of watershed, rather, and I'm quoting from the EPA manual, "local decisions on the scale of a geographic unit consider many factors, including the ecological structure of the basin, the hydrologic factors of underlying groundwaters, the economic uses, the type and scope of pollution problems, and the level of resources available for protection and restoration projects." So the watershed concept includes several socioeconomic concepts. And that means to me that it is not a value neutral scientific concept. It is a concept that is loaded with values and norms from the majority culture.

Now I think that that fact that it is not a value neutral concept is borne out in the history, and I won't bore you with the long history of this. But suffice it to say that this concept of watershed management has very long historical roots in the concept of unified river basin management that's been around since the turn of the century and was, in fact, responsible for the dam projects. And the hydroelectric dam projects I'm speaking of were driven by this idea of regional socioeconomic

development and publicly-owned hydropower. However, the effects of those projects on tribes, for example, on the Northwest Coast, were devastating on traditional ways of life. I'm thinking of Celilo Falls being flooded, these places. I mean, there is no way to describe the impact on the tribal people up there. Therefore, although the dams were to promote a greater public good, I think that we have to acknowledge that the Indian nations in many cases were sacrificed for that.

And the concept of unified river basin management persists. In 1965 Congress passed a Water Resources Planning Act. This established a federal intra-agency water resources council that was supposed to accomplish localized consensus building about watershed problems and come up with proposed solutions. Of course the Act failed to achieve this in part because it was very difficult to reach consensus, particularly about who should bear the economic cost of the proposed solutions. Nonetheless, the concept persists and is embodied in the EPA's proposal of watershed management that I referred to earlier. Notably, the concept of watershed management is encompassed within the terms of the Clean Water Act as it is now drafted. For example, the EPA Act uses the phrase "watershed management" with reference to programs such as wasteload allocations for point sources, also elements of the point source stormwater management program, such as watershed-wide permitting, and also supervision of state nonpoint source control programs under section 319. So we do have the concept already embodied in the legal structure. Now the EPA proposal really deals with a bottom-up process, consensus building, not a top-down regulatory enforcement process. And there's a big difference between those two approaches. I was a little bit confused from Professor Harbison's paper as to which method he's advocating. I believe that he is probably advocating the voluntary consensus driven approach, but in some places he almost indicates a more regulatory top-down approach. So that's one question I would have for him that I don't have any clear answers for at this point.

Now the EPA proposal has three main elements, risk-based targeting of focused watersheds, participation by all affected and interested stakeholders, and integrated solutions established by stakeholder consensus. And I think that Professor Harbison includes many of those things in his own proposal. Now this raises some problems in terms of alternative dispute resolution theory that I think that we can't lose sight of. First of all, how do we get the parties to the negotiating table? Of course, volumes of literature exist on this, but usually parties don't negotiate very effectively unless they believe that they really can't achieve everything that they want, complete victory, if you will, through the courts or the political process. Second of all, parties will not

generally negotiate matters of principle. So if you have a clear value conflict, that is going to be very difficult to bring successfully to the negotiating table. And, finally, we need to have equal knowledge and data and resources on both sides.

Next, I want to look at whether economic analysis is a useful way or the only way to think about this concept of watershed management. And that requires me to think about whether economic analysis is a useful concept for Indian nations to apply to their own policies. Professor Harbison mentions,[12] I think tongue in cheek, that maybe Native Americans are not "members of the species homo economicus," that they may be "paradigm-busting altruists whose sole concern is the public welfare, though I doubt it." And he goes on to say that "It is not for nothing that economics is called the dismal science." I question whether we need to buy into the values that are encompassed in economic theory, although I admit do think that it's often a useful way to think about issues, and what the benefits of a given course of action will be. And it seems to me that what emerges out of the Clean Water Act is the question, "who should pay for the negative impacts of growth and development?" It seems to me that in the Clean Water Act we impose those costs on the polluter who's actually benefitting from the pollution. He or she has to pay to bring his or her operation into compliance with the permit requirements. And, again, economic analysis is really implicit in the Clean Water Act, for example, determining appropriate technology to be used to control pollution, or how clean can we make water and still have it be feasible. And, of course, tribes are also held to those norms.

Now, why should we shift the cost from the polluter to the downstream user? And that seems to me the main problem with what Professor Harbison is suggesting; that in order to get an economically efficient result, in some cases we will have to pass the cost down to, for example, Isleta. It seems to me that the downstream users are already disproportionately impacted just by virtue of their position in the natural order of things. And do we want to make the downstream users bear more of the costs of compliance? As long as economic analysis is built into the standards in the first place, why do we have to look at it again? And also, can we really quantify the types of costs that we're talking about in the cost-benefit equation? Professor Harbison talks about marginal social damages. What are marginal social damages? Professor Harbison claims that the optimal level of pollution in each jurisdiction is

12. Throughout this commentary, Professor Tsosie's references are to an earlier draft of Professor Harbison's paper.

the point where the marginal social damages of waste equal the marginal social costs of abatement. What is a marginal social damage? I think it's fairly easy to quantify economic loss to an industry, for example, the cost of compliance and loss of jobs if the industry can't make it. But what are marginal social damages? Are we talking about health costs? Increased risk of cancer? Birth defects? Deformities? Contamination of fish or wildlife? I mean, what is it exactly we're talking about and do we want to quantify that? Is there an "optimal" level of pollution? Can we say that for a certainty? I mean, should we say that a dollar's worth of prevention must buy us a dollar's worth of environmental quality and establish that standard across the board? My mind actually resists that. I mean, why shouldn't there be a right to environmental quality? And, I'm not sure that wealth maximization is the goal that we should all advocate.[13] Many Indian people have other very valid ways of looking at the environment and their relationship to the environment. And I'm not talking about romanticized notions. I'm talking about a relationship that goes back to the beginning of time for them, in their minds.

So I guess I should conclude by saying that beyond all of this, we need to look at the impact on tribal sovereignty. And when you throw all of this into a negotiating process, a political process, it churns through many segments of society, private interest groups, cities, states; I don't know that the tribes aren't going to get lost in that. Right now we have a fairly distinct relationship. We have tribes on an equal playing field with states in many respects, and so we have a power relation that looks much different than if we throw all those different interests into some big political tumbler and let them get sorted out by applying concepts of economics and watershed consensus building and scientific value. And so that's basically what I want to say. I want to reserve time for Sam Deloria to give us his take on all this. So thank you all.

MR. HARBISON (*written comments provided after the symposium*): My response to Rebecca Tsosie's comments will be brief. With most of what she says, I completely agree. I agree, for example, that watershed projects that have focused on development, such as the Oahu Dam and Reservoir in the *Bourland* case, have done substantial harm to tribal interests. Professor Tsosie is right to caution tribes concerning the

13. Needless to say, economic analysis is premised on a normative theory that maintains that the principle of wealth maximization *ought* to guide adjudication and policy-making decisions. As Professor Murphy notes in his excellent criticism of economic analysis, the principle of wealth maximization appears to lack any ethical value in its own right. *See* Murphy, *supra* note 10. It is certainly not "intrinsically valuable," as is, for example, a human life, nor is there any compelling argument that it has an instrumental value that does not depend upon controversial ethical assumptions. Rather, the ethical nature and value of wealth maximization seems to be "totally derivative from whatever ethical priniples it assists in fulfilling." *Id.* at 89.

potential ramifications of watershed management. I also agree that watershed pollution management may involve high transaction costs, depending on factors like the size of the watershed and the number of stakeholders.

Most importantly, I agree that polluters should pay. In a well-functioning regulatory system, polluters pay through the expenditures necessitated by pollution standards. In my paper, I merely argue that the watershed is the appropriate locus for deciding what these standards should be, and consequently what the compliance costs will be. If watershed stakeholders decide that every last particle of pollution is to be removed from effluent and runoff streams, no matter how high the cost, the outcome reflects the local demand for clean water. In such a case, presumably, the benefits of absolutely clean water, some of which may be hard to quantify, equal the costs. I predict that this case would be unlikely to occur, of course, in the real world. Indeed, I predict that it would be unlikely to occur even in a tribal world where, as Professor Tsosie suggests, Indians have a relationship with the earth that entails long-term stewardship rather than an instant cost/benefit balance sheet. Theoretically, however, it is not an outcome contradicted by marginal economics.

Professor Tsosie asks whether we should look at the problem of water pollution through the lens of marginal economics. To this I can only say, how can we not, as long as we live in a world of scarcity and constraint.

Finally, I want to make it clear that my paper does not disavow the traditional tools of pollution regulation, neither water quality-based nor technology-based standards. Even a consensus-driven approach to regulatory standards must employ enforceable rules to achieve agreed-upon goals. There is no choice between a bottom-up, consensus building process to determine the goals and a top-down, enforcement process to achieve them. Both are required.

MR. DELORIA: I wonder if they figure in the cost of conferences to talk about stuff, with the costs of environmental regulation or cost—any kind of economic cost. Figure the cost of conferences, it would make everything prohibitive and we could close government down. I want to start with a couple of images to try to conjure in your minds as I make some remarks about this topic today. First is one that those of you who are on the circuit with me will have heard before, but some of these folks are newcomers so I'll say it again. I kind of developed this in response to the hassling the tribes were getting over fishing rights. And that was the image of a boarding house. They used to have things like boarding houses where single working men lived and they had a

common place to eat. And in this boarding house there was one Indian living there and he was sitting at the end of the table and at the other end of the table was a huge platter of pork chops and they started serving themselves and the platter of pork chops worked its way down to the Indian's end of the table. When it got to him, there was one little bitty, dried-up, pitiful pork chop left. And so what was he going to do? He took it. And all eyes turned down towards him and somebody said, "That damn Indian ate up all the pork chops," which at that time was my way of characterizing the arguments about the effect of Indian fishing on the fishing resource. But it seems to me that anybody that suggests that Indians sitting at the table on watershed management are going to screw up an otherwise orderly system suggests to me that that last regulatory pork chop is jeopardized.

I think one of the problems we have in this business is that we sometimes fail to appreciate the limitations of metaphor or analogy. Clearly there are senses in which you have to think of things in terms of watersheds. And, clearly, there comes a time when a process gets too complicated and too cumbersome. None of those observations really answers anything for us when we talk about what, if any, is going to be the role of Indian tribes in the regulatory system. They're both true observations but not particularly helpful. I think one of the things that we need to do more of and some of the things that I was trying to say yesterday about the conflict of interest problem is we have to look at a total decision-making system which I define as a structure with a process. And we have to see how power is allocated in that system, what its architecture is and where decisions are made and who makes those decisions and what it costs you in terms of power to be at a certain place in the system, what you give up in order to do that.

If we look at, for example, different theories of protecting water quality, you see that certain decisions are going to be made by legislative bodies, certain decisions are going to be made by courts, certain decisions are going to be made by technocrats. I think the strategy for Indian tribes has to be to have plans ready to participate at every stage in the process, to have an argument ready to maximize your power at any stage in the process, not necessarily because you have to exercise that power, but because that's all you've got to trade, which is precisely what's going on in the gaming situation is tribes have to continue the metaphor of a particular pile of chips in this area and they've got to spend them carefully as they deal with state governments. So, the notion—and I'm responding to the idea, not so much to Mr. Harbison's paper because he's not here to present it or defend it—that somehow an otherwise orderly governmental system is going to be wrecked if Indians

take that last pork chop of power. And I think that it may be complicated and it may create some problems but it's not a real argument against it.

The other image I want to leave with you is how to characterize Supreme Court jurisprudence of the last couple years on the subject of Indian affairs. And, you know, I was thinking yesterday, as the panelists were talking, about right after the American Indian Policy Review Commission Report in 1977, Congressman Lloyd Meads of the state of Washington introduced legislation which would have restricted tribal jurisdiction to trust land and tribal members. And that legislation was not even seriously considered by Congress, not because Congress thought that was already the law, but because Congress thought that that was a stupid and ridiculous solution to the problem. In fact, in the systematic terms I was talking about a few minutes ago it was not a solution to the problem at all because it simply took a particular set of legal issues and moved them from one place to the next, moved them from the reservation borders to the edge of every piece of trust property. It didn't really help anything. And it also did not solve the problem that our distinguished panel has addressed in several ways this morning. And that is, you can't draw a substantive line and say that certain kinds of activities don't spill over. Water's not the only thing that's migratory. And so the Congress, correctly understanding that this Lloyd Meads bill was more petulance than it was policy, rejected it. Now what we're getting is the Supreme Court under the guise of announcing congressional intent taking us from where the law was in 1977, precisely to where Lloyd Meads wanted it to be and they claim to be a conservative court. It's absolutely the most spectacular sleight of hand we're going to have to add to that famous list of lies about "the check's in the mail" and "I'm from the government, I'm here to help you," to the "I'm on the United States Supreme Court and all I do is interpret congressional intent." That's going to have to go to the top of the list.

I finally realized the proper way to characterize this. You've all heard that old story about Michelangelo's dictum of sculptor, which is if you're going to do a statue of a horse, you get a big block of marble and you knock off anything that doesn't look like a horse. That's the Supreme Court's jurisprudence. We had an idea of what we want an Indian tribe to be so we'll take the law of 1977, just knock off everything that doesn't look like what we want an Indian tribe to be. And so I think that we've got to have a way to address this question of Congress fixing this in a more systematic way. And I know it's not easy to be optimistic about that because I have some misgivings about

whether Congress is going to do that, but I do think we have to address the question of who properly has the power in Indian affairs.

As I said yesterday, Congress has plenary power on the subject of Indian affairs, which is different from power over Indians, although the difference very often tends to disappear. When we started our activities in state-tribal relations back in 1976 and right at a time when it was not a popular thing to do, one of the things that we began to discover as we looked at various intergovernmental relationships of Indian tribes was that an ill-formed intergovernmental relationship was one where the tribe and the surrounding governments argued about jurisdiction for its own sake. Who has the power to do something? And it was tugging on the cat. "No, I got the power." "No, I got the power." That's all they cared about. And that's what they would litigate about. That's what they would give press releases about. And it was jurisdiction for the sake of jurisdiction. We want to do it because we want to do it. As we looked at other kinds of relationships which at least in our scale of values, but I think by some objective measurements, were more mature and well-functioning relationships. We found that what they were arguing about was standards and methods and procedures. They had decided, in at least those areas of government, that power for its own sake was kind of irrelevant. Let's talk about what we're going to do with the power because we're both going to do the same thing with the power to govern that maybe it doesn't matter who has the power. And that is an important consideration and it's also, I think, something worth noting in scholarship. As you do scholarship in the future, I suggest—I think it's important to note that what the scholarship tends to be preoccupied with is power for the sake of power. And that's appropriate. I'm not suggesting that scholars should sit there and speculate about what the Three Affiliated Tribes' mission control standards would be if they got fully up and running. What I'm suggesting is that you note analytically that you're talking about the consequences of power for the sake of power and you're spinning that out and it may be that when the governments sit down and actually talk to each other that they will find that there's not really that much of a problem.

But just as we criticized our Utah brothers yesterday for what some people thought was an excessive concern with avoiding tribal jurisdiction when, in fact, they ended up winning in the tribal court and seemed to be complaining because they had not gone to tribal court first. Now they had an answer to that which may have persuaded some of us; may not. But analytically, I think it's important to note how much time we spend doing what I used to do when I was younger; and that is, talking about how I didn't like brussel sprouts to the point where I was driving

everybody nuts. If I'd just eat them and get it over with, it would be done with. Now I don't have that problem because they're not allowedgin the state. How much time has the federal government spent looking at the prospect of tribal regulatory power sitting there on a plate and saying, "ooh," when they don't know what the tribes would do with that power. They have no idea how they'd exercise it. And I think by getting drawn into that game, we tend to encourage that.

We could literally—I really think—I was kind of joking at first—maybe we should include in the cost, the strategic cost, the cost of conferences to talk about something. The Office of Juvenile Justice and Delinquency Prevention has some money to spend on juvenile justice. And some of it goes to tribes according to a formula, flows through the states according to a formula, and the way Congress made the formula a couple years ago the tribal share nationwide was $77,000. I personally went to about four meetings during the year to talk about how that $77,000 should be spent. When you consider the cost of travel and per diem, they had to have spent a half of a million dollars to talk about how to spend that $77,000. How much time have we spent talking about what tribes would do with power as a way of postponing finding out what tribes would do with power in this regulatory area and in other areas? So maybe it's time for the federal government to move from a preoccupation with jurisdiction for its own sake to worrying about standards, and maybe we'd be a little bit better off.

How did we get in this position? The way we got in this position is this: Tribes are a horizontal category that cuts across all vertical areas of organization. In the federal government there's health, education, welfare, agriculture, commerce, on and on and on. In that way of organizing the world, Indians is not a category. Indians is not a category in the same sense that agriculture is a category. And so when you think of Indian affairs in the federal government, you think of Indian agriculture, Indian commerce, Indian education, Indian this, Indian that. It's horizontal. Same way with how tribes relate to state government, the same way, and here's the point of how Indian affairs fit into the activities of Congress because Congress legislates substantive categories the same way the government is organized. When Dan Inoway took over the Senate Select Committee about ten years ago or so, I wrote him a letter and said, Please pay attention, do something that no previous committee has done, and that is pay attention to trying to make sure that Indian tribal considerations are included in general legislation because the reason we're still screwing around with all this environmental stuff is because back in the late '60s and early '70s people laughed when I said these are important issues. You've got to include tribal government in

this legislation. And it's over 20 years later and we're still talking about it. Well, my letter to Dan Inoway was thrown in the trash. It did not get to him. I don't see that the Select Committee even now has a systematic approach to this, and everybody knows that there are joint referrals of committees and if the Senate Select Committee tried to get joint referral on every bill that had to do with Indians, there would not be Senate Select Committee within about a week because they would gum up the works. So there's got to be a more subtle and diplomatic way of getting a piece of the action because that's the only way it's going to happen because of this horizontal problem.

But I would also urge, in closing, for you to keep in mind the distinction between a place at the table in the distribution of regulatory power and a place at the table in terms of a share of benefits and programatic participation. And in the category of benefits, remember that there's two different issues, whether individual Indian people are entitled to benefits as citizens and as people affected by the world, and as opposed to the very different question of the role of the tribe as a government in a delivery system being the ones to give them those services. Very often we fail to make those distinctions and we end up talking about an entire fruit salad and not just apples and oranges.

As a final, final thing, in terms of intergovernmental relations, the things that have to be specified are basically the power to create standards—in the regulatory area the power to create standards and the power to enforce them of the actual enforcement, the adjudication and the you're going to jail and the sit in that chair and strap yourself in, whatever the enforcement is going to be. Other than those particular inflexible constitutional requirements, everything else can be done cooperatively. You can run the entire system cooperatively so you don't have to buy two parts per million machines to measure things. You can buy one parts per million machine, and if you don't trust each other, you have a tribal guy sitting here reading the parts per million machine and you have a state guy sitting there reading the parts per million machine, but you don't have to duplicate it. And just as it's stupid to talk about two economies, it's also stupid to talk about complete duplication of governmental systems as a solution to these problems because one thing I think we have to do again as commentators, if not scholars, is recognize that we can't just dismiss the demographics as an unworthy thing for the Supreme Court to be looking at. We tend to think of tribes still according to the model of South Dakota and North Dakota tribes and Navajo and the larger tribes in the southwest. There are over 100 Indian tribes in the state of California. There are some tribes with almost no reservation land to speak of that have tribal

membership populations anywhere from 20,000 to 250,000. For us to try to talk—to continue to promote or to analyze according to one model when, in fact, that's not what the political impact is going to be is very, very irresponsible on our part because we tend to lull tribal leaders into thinking that one model fits all when it absolutely doesn't. We may be paying the price for it at the wrong place in the process. Thank you.

MR. MONETTE: Does anyone on the panel have anything more to add, say? Anybody out there have any questions?

FROM THE AUDIENCE: Yeah, I have a question and I think it relates to what Mr. Grijalva was saying. I gave a workshop on Indian issues to a bunch of EPA guys that were in charge of enforcing the Clean Water Act in California. And there's one thing that troubled them, and that was the nature of their trust responsibility towards either the tribe or the individual Indians. You said in your speech that all agencies have a trust responsibility toward the tribes. What their problem was is that when they wanted to enforce the Clean Water Act on the reservation, there are two dilemmas. One, they were being told Congress did not delegate to them the role to being the trustee for either the tribe or the individuals. The only general authority of trust responsibility was the Commissioner of Indian Affairs, not to the EPA. That was the first thing that was bothering them. The second thing that was bothering them, if they do have a trust responsibility under the EPA legislation, who does it run to? The individuals or the tribe? And what happens when there's a conflict between the two? And I would like to hear from anybody on the panel if they have a position on this issue.

MR. GRIJALVA: Well, as Professor Royster implied earlier, I've been an advocate a lot longer than I've been an academic, so I tend to take an advocacy position which would favor my former client. I wrote a lot of letters to EPA suggesting that they ought to consider my client's situation, the interest of the tribe at stake, for example, in the cleanup of a hazardous waste site, and that the trust obligation would require the site manager, for example, a second-year graduate from some technical college, to consider the impact of the potential remedy on my client's fishing interest, or whatever interest. Depends on which region of EPA you're in. I'm surprised in California that you got that response.

FROM THE AUDIENCE: Those people are activists and they wanted to go out there and enforce not only the Clean Water but really the RCRA. They had a lot of RCRA problems.

MR. GRIJALVA: You're talking enforcing against an Indian individual or facility?

FROM THE AUDIENCE: No. I think what they were saying is that there are a lot of things that they can just go out there and basically start

advising tribes on how to devise codes to prevent pollution. And they want to spend those resources because they said, we think this is part of our trust responsibility or also telling them, look, those individuals, they're polluting, they're not polluting, but they want to fight the pollution. We want to enforce that. And they were basically told that Congress has delegated to you that trust responsibility.

MR. MONETTE: Let me respond just for a second. Yesterday I tried this little concept, I see that there is such a thing as a trust relationship which is a political concept which really is what came out of the *Cherokee Nation* cases because we weren't talking about allotments and things like that. And there is a trust responsibility to an asset, a property concept of a trust that arose with allotments. And when those two things come into conflict because the tribe is in conflict with its own citizen sometimes over one of its own citizen's property assets, I am of the opinion at least, that the trust relationship, the political relationship with the tribe, ought to prevail over this so-called, you know, property trust responsibility to the asset, for one simple reason. If the individual is not happy with what his tribe is doing, that individual can and should utilize the tribe's Democratic participatory processes to change it. That's the only way the tribes' governing processes get greased, get worked, and will ever survive is if they are used. And I think that's worth a little bit of—maybe even worth a little bit of environmental degradation. Certainly maybe worth a little bit of infringement on what some individual may see as a civil right. But a far greater civil right is the ability to participate to change the way your government works on you. And that's the reason I would do that.

MR. DELORIA: I agree with Professor Monette and I think that's a really important distinction between the trust relationship and the trust responsibility. Even if courts haven't fixed on that, it's an important systematic distinction. My answer to your question, is that the Bureau has certain obligations with respect to a particular piece of land. EPA, according to the things I said yesterday, they have to fulfill their statutory obligations in a way that's appropriate, that does not have a deleterious effect on the Bureau's obligation to the Indians with respect to that land. That's the measure of the trust responsibility of EPA as far as I'm concerned. But EPA does not thereby get a share of the Bureau's power. They just have to exercise their power with the Bureau's responsibility—in line of what the Bureau's responsibilities are, and that may be a limitation or that may affect what they do on the reservation. But I think that there's been far too much loose talk about trust responsibility in the same sense that there's been loose talk about

conflict of interest to the point where a lot of sincere federal people don't have the faintest idea where they stand anymore.

MR. MONETTE: Every little unhappy person on every reservation is that little bud that's going to bloom into the next majority in the tribe. You know, democracy at work. And if every time somebody's unhappy, the federal government—and this is the same thing in states and their citizens—if every time somebody's unhappy they're going to come flying in to take care of the problem, those political processes never learn to work. And that's one of the biggest problems that Indian tribes are facing today in my opinion. Their processes never get to work. One more question and then we're being called to lunch.

FROM THE AUDIENCE: Actually I don't have a question but I have more of a comment, although I agree with your answer. The Tribe, where I come from, we don't have a democratic process. We don't vote in our leaders. It's through religious appointments in the system. So although I do agree that the tribe is the trustee in terms of its population, where I come from our people don't vote.

MR. DELORIA: But you have the power to change that, right?

FROM THE AUDIENCE: No.

MR. DELORIA: Read the Declaration of Independence. You have the power to change that.

MR. MONETTE: Create your own Tribe's Declaration of Independence. You probably could and it may be a long process. You know, the states were not very good at dealing with slavery. They were not very good at dealing with Indian tribes. Slavery may have lasted another 400 years if it had not been for the Fourteenth Amendment. It may have taken some time. A person can hardly stand here and say, "I wish they would have let the state's democratic processes work with slavery." But, on the other hand, you know, Democratic processes can work. And I frankly would error on the side of time and deliberation.

MR. DUTHU: Mississippi ratified the Thirteenth Amendment just a few weeks ago so it does work.

MR. MONETTE: It works. Thank you very much to the panelists.