THE INDIAN COUNTRY ENVIRONMENTAL JUSTICE CLINIC: FROM VISION TO REALITY

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INTRODUCTION

Something remarkable is happening in the environmental law system in the United States—something that has virtually escaped notice by the mainstream environmental community and by the legal educational establishment. Indian tribal governments are building their own environmental protection programs, and they are doing so with a sense that this mission is a sacred trust. Tribes are building their programs within the general framework of the federal environmental statutes, but also within the framework of cultural traditions that have ancient roots in this land. These cultural traditions generally hold that human beings have important responsibilities, including responsibilities to the communities of nonhuman living things with whom we share this Earth.[1]

Tribes face formidable challenges in fulfilling these responsibilities. Some of these challenges result from the status that tribes occupy within our federal system as self-governing communities,[2] and from the fact that many people in the larger American society do not know very much about the status of tribes as governments. Environmental law in the United States has been carried out as a partnership between the federal government and the states. In federal law, Indian tribes are recognized as sovereign governments that are distinct from both the federal government and the states. In the 1970s, when Congress enacted the first generation of federal environmental laws, it overlooked Indian country.[3] Since the mid-1980s, Congress has amended

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1. *See* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 223, 268-87 (1996).

2. *See generally* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland ed., 1982 ed.) [hereinafter COHEN'S HANDBOOK]; ROBERT N. CLINTON, ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS (3d ed. 1991); DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW: CASES AND MATERIALS (4th ed. 1998).

3. The definition of Indian country is found at 18 U.S.C. § 1162 (1994). *See* GETCHES ET AL., *supra* note 2, at 7-30.

many of the environmental laws to authorize tribes to perform regulatory roles like those performed by state governments.[4]

The approach of treating tribes like states is generally consistent with the right of tribes to govern their territories and with the historic but often neglected stature of tribes as sovereigns within our federal government. The enactment of tribal amendments in the federal laws, however, is really just the beginning. Tribes must make these laws work by using their own sovereign powers. Tribes must now establish regulatory programs that satisfy the requirements of federal law. This requires the enactment of tribal laws and the development of administrative structures for carrying out tribal laws, including law-enforcement and appeal procedures. In addition to exercising their sovereign powers within reservation boundaries, Indian tribes typically have environmental concerns that extend beyond these boundaries. In some cases these concerns arise because off-reservation activities cause on-reservation impacts and in other cases because off-reservation places hold cultural or religious importance.

To describe the range of challenges that the tribes face as "formidable" is an understatement. Yet where there are challenges there are opportunities. In conjunction with the challenges that tribes face in assuming their rightful places in environmental federalism, law schools face a tremendous range of opportunities to provide enriching educational experiences for students by helping to serve the needs of tribal communities.

Vermont Law School (VLS) is one school that is actively working to help meet the challenges by treating them as opportunities. In the twenty-five years since its founding, VLS has established a reputation as one of the best environmental law programs in the country. As a private law school with a national reputation, VLS draws future environmental lawyers from all over the country. A large number of students combine the juris doctor (J.D.) degree with the Master of Studies in Environmental Law (M.S.E.L.), which is only offered by VLS. In addition, each year a number of students enroll just for the M.S.E.L., which is open to non-J.D. students who hold a bachelor's degree. For these students, the M.S.E.L. is a Masters for non-lawyer environmental professionals.[5]

In 1995, VLS launched the First Nations Environmental Law Fellowship Program, which provides financial assistance for a small number of Native American students to obtain the M.S.E.L. degree. The goal of this program is to help the people who work in tribal environmental programs obtain a specialized education in environmental law that they can use in building

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4. *See infra* notes 33-37 and accompanying text.

5. The Environmental Law Center, the First Nations Environmental Law Fellowship Program, and the Indian Country Environmental Justice Clinic can be found at www.vermontlaw.edu/elc/elc.htm.

programs for their communities.[6] In addition to the Fellowship Program, since 1994 VLS has included a course in Indian country environmental law in its summer program.

In the 1998-99 academic year, VLS took the next step by deciding to establish an environmental clinic to serve some of the needs of tribal governments and reservation communities. Taking this step meant that the First Nations Fellowship Program became one component of an over-arching First Nations Environmental Law (FNEL) Program. The clinic is planned as the second major component of the FNEL Program. As currently designed, one member of the faculty[7] is responsible for both components of the program. We have named the clinic the "Indian Country Environmental Justice (ICEJ) Clinic." This Essay presents an introduction to the ICEJ Clinic.

Part I of the Essay examines the concept of environmental justice as it might be applied to Indian country. In my view the concept holds great potential for protecting communities of Indian country from environmental degradation and for helping the people of these communities to bring about healing where Mother Earth has been injured. This potential will not be realized by simply taking the concept of environmental justice from the context in which it arose and assuming that it fits in Indian country. Indian country is different.

The key to making the concept of environmental justice useful is to understand why Indian country is different. It is different because reservations are places where tribal peoples have the collective right to carry on their distinct cultures. During much of American history, the tribal right of self-government has been under assault from the dominant society and its institutions of government. One of the most important lessons that we should learn from American history is that the tribal right of self-government is essential for the survival of tribes as distinct cultures. Over most of the last four decades, official federal Indian policy has reflected this lesson. This does not mean that the right of tribal self-government is secure—far from it. In the American legal system, tribal self-government is a fragile right. The survival of this right depends on both the determination of Indian people and the commitment of the larger American society.

The potential of the environmental justice movement for helping the communities of Indian country lies, I believe, in its ability to help the larger American society understand the need for commitment to the tribal right of self-government. I believe that the existence of exemplary tribal

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6. As of spring 1998, eight First Nations Fellows have earned an M.S.E.L., and two are currently enrolled. We plan to offer four Fellowships in the 1999-2000 academic year.

7. The Director of the First Nations Environmental Law Program—the author of this Essay—who is also a visiting assistant professor.

environmental programs will be essential in building this commitment. As the American people become more aware that tribes are in fact protecting the environment, they will be grateful that tribes are still around. If the environmental justice movement helps to build such a national commitment, then we can see particular environmental justice cases as opportunities to help tribal governments become more responsive to the people they serve. But if environmental justice activists do not begin with an understanding of the crucial importance of the right of tribal self-government and an appreciation of the nature of the threats to this right, then I am afraid that activists and tribal representatives will simply be talking past each other.

Part II identifies some of the environmental issues that arise in Indian country that might be analyzed under the rubric of environmental justice. The application of the concepts of environmental justice to Indian country raises a number of issues that are unique. These issues add several degrees of difficulty to the challenges that tribal governments face in building environmental protection programs. Some of these issues should be acknowledged as threats to tribal sovereignty. Some of them come from within Congress and others come from the U.S. Supreme Court. Lawyers, legal educators and law students who seek to help the communities of Indian country deal with environmental justice problems should be aware of these threats to tribal sovereignty in present day America. These threats are real.

In raising these issues I hope to attract the interest of others in the legal education community. Others who look at challenges and see opportunities are more than welcome to draw on our experience at VLS in fashioning their own approaches to meeting the challenges.

Part III presents a description of the ICEJ Clinic. Readers are cautioned that the Clinic is only now in the start-up phase, and that our ideas are evolving. We expect and hope that the development of the ICEJ Clinic will reflect what we hear and read from the people who work in the tribal governments and inter-tribal organizations that we seek to serve.

Before moving into Part I, a word about the general emphasis of the ICEJ Clinic is in order. Most environmental clinics are oriented toward litigation, but we do not intend for litigation to be the main focus of our Clinic. Since the overall need for tribal governments is to build environmental regulatory programs, the overall emphasis of the ICEJ Clinic will be to help meet this need, including building the institutions of tribal government. This emphasis will provide educational opportunities to develop a wide range of legal skills, such as legislative drafting, rulemaking, administrative advocacy, and inter-disciplinary problem-solving. These are the kinds of things that environmental lawyers do, and most environmental lawyers spend more time

doing these kinds of things than going to court.[8] Of course, litigation is an important tool in some cases, and the ICEJ Clinic will assist with litigation if that is what it takes to solve a particular environmental problem.

I. THE CONCEPT OF ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY

What does the term "environmental justice" mean? Over the last decade or so, the term has come into rather widespread use by activists, academicians, government officials and others, but there does not seem to be a commonly accepted definition. In one sense, environmental justice is the aspirational counterpart to the charge of "environmental racism" which has been made by community activists in a variety of facility siting decisions that have had undeniably disproportionate affects on communities that are mostly comprised of racial minorities.

Of course, while the charge of racism is accurate in some cases, race is too narrow a term. In late twentieth century America, one need not be a member of a racial minority to be a victim of environmental injustice. Civil rights laws recognize a number of protected classifications in addition to race. If a group that fits within a protected class would be disproportionately affected by a proposed government action, the group may choose to make its case under the rubric of environmental justice. In this general sense, it may be accurate to say that environmental justice is the "intersection of civil rights and environmental law."[9]

Civil rights laws generally prohibit discriminatory treatment based on race, color, religion, sex, or national origin. Most people probably think that at least some of these classifications include Indians. Not surprisingly, a handful of decisions by federal courts have ruled that discriminatory treatment against Indians is prohibited, although the reasoning has varied.[10] But the Supreme Court has held that, at least for certain purposes, being an Indian is *not* a racial classification, but rather a political classification.[11] Being an

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8. *See* Daniel Esty, Rethinking Environmental Clinical Education 3 (Jan. 5, 1999) (unpublished paper presented at the 1999 Association of American Law Schools annual conference, New Orleans, Louisiana, on file with *Vermont Law Review*); *see also* Heidi Gorovitz Robertson, *Methods for Teaching Environmental Law: Some Thoughts on Providing Access to the Environmental Law System*, 23 COLUM. J. ENVTL. L. 237 (1998) (discussing how environmental law clinics that focus on litigation introduce students to only a part of environmental law practice).

9. Tseming Yang, *Balancing Interests and Maximizing Rights in Environmental Justice*, 23 VT. L. REV. 529, 530 (1999).

10. *See* COHEN'S HANDBOOK, *supra* note 2, at 648. In one recent case, the Ninth Circuit ruled that discrimination against a member of the Hopi Tribe violated Title VII of the 1964 Civil Rights Act because it constituted discrimination based on national origin. *See* Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117 (9th Cir. 1998).

11. *See* Morton v. Mancari, 417 U.S. 535 (1974); United States v. Antelope, 430 U.S. 641 (1977).

Indian is primarily defined by being a member of a tribe that is recognized by the federal government. Some individuals who are Indian by ancestry are not members of federally recognized tribes, and many tribal members have a high degree of non-Indian ancestry. It is because of the relationship between the federal government and the tribes that it is constitutionally permissible for Congress to enact laws that treat Indians differently from any other group of American citizens.[12]

Regardless of whether Indians fit within a protected class, in the context of Indian country, I think that the concept of environmental justice is not very useful unless it is broader that just the intersection of civil rights and environmental law. Instead, I think that in Indian country a vision of environmental justice must also include the tribal right of self-government. Unless the larger American society honors the tribal right of self-government, the word "justice" as applied to Indian communities simply does not have much meaning. This means that tribal governments must be involved in performing the full range of functions that governments are expected to do in protecting the environment: making the law, implementing the law, and resolving disputes.

For now, rather than engaging in a lengthy discussion of what the term "environmental justice" means, perhaps it would be more productive to simply borrow a definition and move on. Within the U.S. Environmental Protection Agency (EPA), the Office of Environmental Justice has defined the term as follows:

> The fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic, or socioeconomic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.[13]

This definition requires fair treatment and meaningful involvement so that no group bears a disproportionate share of adverse environmental impacts. How does this concept play out in Indian country?

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12. *See* David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 U.C.L.A. L. REV. 759 (1991); Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples"*, 39 U.C.L.A. L. REV. 169 (1991).

13. U.S. EPA, INTERIM FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES 2 (1997) [hereinafter EPA'S NEPA COMPLIANCE].

A. Measured Separatism Rather than Equal Treatment under the Law

Indian tribes differ from other minority groups in modern day America in one very significant respect—tribes are sovereign governments. They have the power to make and enforce laws to govern their reservations. Within our federal system, tribal governments have a status roughly comparable to that of the states, although people in the larger American society tend to ignore this status. The status of tribes as governments is based on the fact that tribes were recognized as sovereigns by European governments during the colonial era and by the United States during its period of westward expansion. The status of tribes as governments is woven into the body of federal Indian law in treaties, acts of Congress and court decisions dating from the earliest years of the Union.[14] As Professor Charles Wilkinson has explained, the essence of what the tribes bargained for in the treaties, and what the United States promised to protect, was "a measured separatism. That is, the reservation system was intended to establish homelands for the tribes, islands of tribalism largely free from interference by non-Indians or future state governments."[15]

While other minority groups look to the civil rights laws in making their claims for fair treatment and equal protection, these laws are not very useful for tribes. To quote again from Professor Wilkinson:

> The most cherished civil rights of Indian people are not based on equality of treatment under the Constitution and the general civil rights laws. These special Indian rights derive from different sources and take on different definitions. For American Indians, their survival as a people—mark down those words, survival as a people—depends on nineteenth century treaties, statutes and executive orders recognizing a range of special prerogatives, including hunting, fishing and water rights; a special trust relationship with the United States; and, ultimately, the principle of tribal sovereignty, the right of tribal members to be governed on many key issues by their own tribal governments, not by the states.[16]

Unfortunately for Indian people, many people in the larger society seem to have a hard time understanding the "special" nature of the rights of Indian tribes—perhaps because these rights are rooted in history, and because they seem to run counter to the notions of egalitarianism that are central to

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14. *See generally* COHEN'S HANDBOOK, *supra* note 2.

15. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 32 (1987).

16. Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 378.

American democracy. As I have discussed elsewhere, writers identified with the environmental justice movement, who apparently want to claim Indian people as part of their movement, have provided numerous examples of basic misunderstandings about the status of tribal governments within our federal system.[17]

Similarly, scholars and teachers in the field of environmental law seem to have difficulty incorporating tribal governments into their analyses. This scholarly neglect may reflect an attitude that Indian law is an esoteric specialty or that scholars are reluctant to reveal the gaps in their knowledge. Or perhaps they just do not regard the roles of tribal governments as all that important, or do not think about tribal governments unless someone reminds them.[18]

Environmental protection in Indian country does raise some challenging questions, and some of these questions are too important to ignore even if they do not have easy answers. For example, is it fair for a tribe whose members comprise less than half the population of its reservation to set water quality standards for all surface waters within its reservation? Answering this question requires an acknowledgment that opening the reservation to settlement by non-Indians in the late nineteenth or early twentieth century was accomplished over the objections of tribal leaders and in violation of the promises made in a treaty half a century earlier, and that these actions were done with the intent of destroying the tribe.[19] If we are really concerned with fairness, then we must consider not only the rights of non-Indians to representative government, but also the right of the tribe to continue to exist as a distinct culture. And we must recognize that the tribe's identity as a distinct culture is inextricably interwoven into the portion of its homeland that it reserved to itself in its treaty (or that was otherwise set aside for it).

Sometimes it seems that every generation of Americans must learn for itself that Indian people are determined to survive as distinct cultures, as distinct peoples. Every lawyer who works for Indian tribes must be a student, and a teacher, of history. The right of self-government, promised in treaties and acts of Congress and executive orders one hundred or two hundred years ago, is a fragile right—the Supreme Court has said that the plenary power of Congress is so sweeping that Congress can do away with this right

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17. *See* Dean B. Suagee, *Turtle's War Party: An Indian Allegory on Environmental Justice*, 9 J. ENVTL. L. & LITIG. 461 (1994) [hereinafter Suagee, *Turtle's War Party*].

18. *See* Dean B. Suagee, *Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability*, 3 WIDENER L. SYMP. J. 229, 230 n.6 (1998) [hereinafter Suagee, *Tribal Self-Determination*].

19. *See* Montana v. United States, 450 U.S. 544 (1981). "[T]hroughout the Congressional debates [of the General Allotment Act], allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction." *Id.* at 559 n.9. "[A]n avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Id.*

completely.[20] But Congress will not do this if the American people are committed to honoring the tribal right of self-government. Sometimes I think that a commitment to a permanent place in American federalism could be based on knowledge of the history of the relations between the United States and the tribes. If this is true, then those of us who are partisans of the tribal cause must help the American people learn the lessons of our history.

While some people supportive of Indian rights have struggled with how to reconcile the "special" nature of these rights with egalitarianism, people who oppose Indian rights have used the rhetoric of equal treatment under the law in their efforts to deprive Indian people of treaty rights.[21] Some of these opponents of tribal rights have attained positions of significant power within the federal system.[22] Fortunately, tribal leaders have had some well placed champions in Congress and the Executive Branch and have not yet had to count on a groundswell of support from the general American public. Not yet.

B. Tribal Self-Determination as a Collective Human Right

People in the larger American society, no doubt, could reap substantial benefits from the efforts of tribes to educate them about tribal self-government and the historical foundations of tribal rights. The quality of life in Indian country might improve sooner, however, if tribal leaders did not have to devote so much attention to defending their right to exist. Since the constitutional framework of American democracy does not secure this right,[23] some tribal leaders and advocates look to international human rights law. A discussion of the human rights of Indian tribes, either under existing human rights law or under the emerging international law of the rights of indigenous peoples is beyond the scope of this paper,[24] but a few points should be noted.

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20. *See* United States v. Wheeler, 435 U.S. 313 (1978). The Court stated:

> The sovereignty that Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Id. at 323.

21. *See, e.g.*, GETCHES ET AL., *supra* note 2, at 251-52.

22. *See infra* notes 110-11 and accompanying text.

23. The status of Indian tribes in American federalism is reflected in the Constitution, expressly in the Commerce Clause and implicitly in the Treaty Clause, which acknowledges treaties that had been made prior to the ratification of the Constitution, many of which were with Indian tribes. The Constitution, however, does not protect the right of self-government, because Congress has the power to abrogate treaties with Indian tribes. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

24. *See generally* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996). *See also* Dean B. Suagee, *Human Rights of Indigenous Peoples: Will the United States Rise to the Occasion?*, 21 AM. INDIAN L. REV. 365 (1997).

Under existing international human rights law, each human culture has a right to exist. This is a necessary implication of several human rights instruments, including the Convention on the Prevention and Punishment of the Crime of Genocide.[25] Professor James Anaya has referred to this legal principle as the norm of cultural integrity.[26] The right to cultural survival is also reflected in Article 27 of the International Covenant on Civil and Political Rights,[27] which recognizes the right of members of minority groups to engage in cultural practices. In the context of indigenous peoples, this is a right that would have no meaning if the group itself ceased to exist.

The right of cultural survival and the right of self-government can also be framed in the context of the emerging international law of the human rights of indigenous peoples. The development of human rights instruments such as the Draft United Nations Declaration on the Rights of Indigenous Peoples (hereinafter Draft U.N. Declaration)[28] reflects a growing recognition that the existing instruments of international human rights law are inadequate for protecting the rights of indigenous peoples. In this Essay, I only want to cite one provision in the Draft U.N. Declaration, Article 31, which provides:

> Indigenous peoples, as a specific form of exercising their right of self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.[29]

Although this language comes from a draft declaration that has yet to be adopted by the U.N. General Assembly, it does reflect years of deliberations, and it has been endorsed by the U.N. Subcommission on the Prevention of Discrimination and the Protection of Minorities.[30]

The language of Article 31 is also supported by lessons drawn from U.S. history. The history of relations between the United States and Indian tribes

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25. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Nov. 4, 1988, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

26. *See* ANAYA, *supra* note 24, at 99.

27. *See* UNITED NATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) (entered into force Mar. 23, 1976).

28. *See* UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, REPORT OF THE SUBCOMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES; DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (1994), *reprinted in* ANAYA, *supra* note 24, at 207-216.

29. *Id.*

30. *See* ANAYA, *supra* note 24, at 98-105.

holds many lessons for the larger American society. These lessons can be drawn from the experiences of the times when federal policy sought to force Indians to give up their tribal ways and become assimilated into the American melting pot as well as from the times when federal policy supported measured separatism and self-government. In my view, one of the fundamental lessons of this history is that tribal self-government is a prerequisite for cultural survival. Article 31 recognizes that, since the cultures of indigenous peoples are deeply rooted in the natural world, the right of self-government must include the power to control the ways in which people use the natural world to provide for human needs and wants.

My point in raising these human rights issues is to suggest that when tribal leaders and their advocates speak of the right of self-government and the right to survive as distinct cultures, even if the status of these rights in the U.S. legal system is fragile, there is a body of international law that supports the assertion of these rights. Raising these issues introduces a collective rights dimension into Professor Yang's dichotomy between interest-balancing and rights-maximization,[31] but it is a dimension that must be acknowledged. When the larger society has reconciled itself to the permanent existence of tribal governments and has expressed this commitment in some kind of legally enforceable way, then perhaps tribal leaders will not feel compelled to devote so much energy to defending their right to exist.

In raising these human rights issues, I am not suggesting that the tribal right of self-government should always trump other rights or even other interests. Rather, what I am saying is that in any case in which other rights and interests appear to conflict with the right of self-government, we must find ways of resolving these conflicts that leave the basic right intact.

C. Tribes as Partners in Environmental Federalism

Environmental law in the United States exists within a federalist framework.[32] For the most part, the basic policies and mechanisms have been established by federal laws, but these laws provide major roles for the states. The allocation of roles reflects the historical tension between the national government and the states, as well as the realization that dawned in the late 1960s that some environmental problems must be addressed through national legislation. In the 1970s, Congress enacted several environmental statutes, and the EPA issued a host of regulations. Most of these statues and regulations either totally overlooked Indian tribes or barely mentioned them.

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31. *See generally* Yang, *supra* note 9.

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

Beginning in the mid-1980s, Congress has amended most of the major federal environmental statutes to authorize tribal governments to become treated like states for a variety of purposes.[33] For example, under the Clean Water Act, tribes can adopt water quality standards, and they can take over the permit program that regulates point sources of water pollution.[34] Under the Clean Air Act, tribes can adopt tribal implementation plans for their reservations.[35] Under the Comprehensive Environmental Response, Compensation and Recovery Act, tribes can act as trustees for natural resources damage claims.[36] Under the National Historic Preservation Act, tribes can establish programs to carry out the functions of a state historic preservation officer.[37] These are just some of the options, and any given tribe might choose to pursue a mix of options, depending on its environmental priorities and the funding and human resources that are available to it.

Over the next several decades, tribal leaders and staff, along with their lawyers and consultants, will be working to build environmental programs for their reservations. A flowering of tribal environmental programs on reservations across this land could be a very good thing for the American environment and for the American people. Tribal programs carried out within the federalist framework could help to bring tribal cultural values into environmental protection, values such as what Professor David Getches has called the tribal "philosophy of permanence."[38] As Professor Rebecca Tsosie puts it, one aspect of the traditional Indian world view that is common to most indigenous cultures of North America is "a concept of reciprocity and balance that extends to relationships among humans, including future generations, and between humans and the natural world."[39] As tribal people, acting as regulators, draw upon their cultural traditions when they express themselves in public meetings and in their dealings with other governmental entities, I

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33. *See generally* David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Law and Regulations*, [1993] 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,579 (Oct. 1993) (reviewing environmental statutes and regulations authorizing EPA to treat tribes like states). *See also* Judith V. Royster, *Native American Law*, *in* THE LAW OF ENVIRONMENTAL JUSTICE (Michael B. Gerrard ed., forthcoming 1999).

34. *See* 33 U.S.C. § 1377 (1994).

35. See 42 U.S.C. § 7410 (o) (1994).

36. See 42 U.S.C. § 9607 (a)(4)(A) (1994).

37. *See* 16 U.S.C. § 470 (a)(2)(D) (1994); *see generally* Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145 (1996) [hereinafter Suagee, *Tribal Voices*].

38. *See* DAVID H. GETCHES, *A Philosophy of Permanence: The Indians' Legacy for the West*, J. OF THE WEST, July 1990 at 54, *reprinted in* GETCHES ET AL, *supra* note 2, at 30.

39. Tsosie, *supra* note 1, at 276 (citing Ronald L. Trosper, *Traditional American Indian Economic Policy*, 19 AM. INDIAN CULTURE & RES. J. 65, 67 (1995)).

believe that people in the environmental movement will find themselves giving thanks.

D. Fair Treatment of All Groups

If we accept that tribal self-government is a necessary component of any meaningful definition of environmental justice as applied to Indian country, then we can move on to examine other components of the concept. According to the EPA definition quoted earlier, "fair treatment" means that no group of people "should bear a disproportionate share of the negative environmental consequences," including consequences resulting from the execution of tribal environmental programs and policies.[40]

Accepting tribal self-government as a basic principle does not mean that every decision of a tribal legislature or chief executive officer is beyond scrutiny on environmental justice grounds. Nor does it mean that federal agency officials should abdicate their responsibilities. Rather, it should mean that when any group of people challenges a decision by a tribal institution, they should focus on the decision—the facts and the procedure—and they should make use of tribal institutions to air their concerns. Tribal administrative appeals procedures and tribal courts have key roles to play in making sure that other tribal government institutions are competent and fair in their decision-making processes.

II. INDIAN COUNTRY ENVIRONMENTAL JUSTICE ISSUES

This Part discusses some of the nuances of applying the concept of environmental justice in Indian country. These observations are not intended to be comprehensive, but rather to give readers a sense of the kinds of issues that present themselves in Indian country and that might be described as fitting within the concept of environmental justice.

A. Building Tribal Programs

If we accept that tribal self-government is essential to any meaningful notion of environmental justice, we might also be tempted to assume the existence of tribal environmental programs that are comparable to those of the states. That would be a big leap of faith. Tribal programs do in fact exist, but most are very new, understaffed, and underfunded.

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40. EPA'S NEPA COMPLIANCE, *supra* note 13, at 2.

There are some 555 federally recognized tribes, including 329 in the contiguous states and 226 in Alaska.[41] The tribes exhibit a great deal of diversity.[42] Indian reservations can be found in thirty-three of the states. Some twenty-four reservations are larger in area than the smallest state (Rhode Island); many other reservations are only a few hundred acres in size. Only one of the tribes in Alaska has a reservation. About two-thirds of the tribes have fewer than 1000 members.

1. Funding and Human Resources

As of March 1998, 146 tribes had received program authorization from EPA (or a determination of eligibility to be treated like a state) for at least one purpose under a federal statute,[43] though the vast majority of these were for the purpose of receiving grants under section 106 of the Clean Water Act (CWA). In terms of assuming regulatory roles, the most popular program is the Water Quality Standards (WQS) program under section 303 of the CWA. Tribes that are approved for this program are also approved for the section 401 certification program.[44] As of March 1998, some twenty tribes had been approved for setting WQSs, and applications from some fifteen other tribes were pending. The number of tribes setting WQSs is substantial, but these numbers also mean that nearly 300 other tribes that are eligible to take this step have not done so.[45]

For many tribes, the environmental program consists of one person. The most common source of funding is an EPA grant program specifically designed for tribes known as the General Assistance Program (GAP).[46] In fiscal year 1998, EPA funding for tribes amounted to $79 million, and the

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41. *See* Indian Entities Recognized and Eligible to Receive Services from the Unites States Bureau of Indian Affairs, 63 Fed. Reg. 71,941 (1998). In addition, there are a number of entities that are recognized as tribes by a state government, as well as groups that are seeking federal recognition. *See* GETCHES ET AL., *supra* note 2, at 11-12. This Essay does not address such non-federally recognized tribes because federal recognition is a prerequisite for treatment like a state for purposes of the federal environmental laws.

42. *See* GETCHES ET AL., *supra* note 2, at 8.

43. *See* U.S. EPA, TREATMENT IN THE SAME MANNER AS STATES/PROGRAM APPROVAL MATRIX (1998) (visited Mar. 6, 1999) <http://www.epa.gov/indian/matrix.html>.

44. *See* 40 C.F.R. § 131.4(c) (1998).

45. Tribes may only set WQSs within the border of an Indian Reservation, which leaves out all but one of the tribes in Alaska. *See* Clean Water Act, 33 U.S.C. § 1377 (1994); *see also* 56 Fed. Reg. 64,881 (1991); 40 C.F.R. § 131.8(1)(3); U.S. EPA, PROTECTING PUBLIC HEALTH AND WATER RESOURCES IN INDIAN COUNTRY (1998).

46. *See* Indian Environmental General Assistance Act of 1992, 42 U.S.C. § 4368b (1994); Dean B. Suagee & Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 59, 82 n.2 (1994).

GAP program accounted for 49% of this total.[47] EPA recently circulated a draft paper to the tribes with some suggestions for improvements in the GAP program. One of the key shortcomings is that the GAP program is currently limited to capacity building—to receive EPA funding for implementation, a tribe generally must have taken over a delegable regulatory program. Many of the smaller tribes may never have the resources to take over regulatory programs, but it still makes sense for EPA to provide some level of on-going funding for their tribal environmental programs.

How should tribal environmental programs be funded for tribes that do not have a sufficient tax base or other sources of revenue? Should there be some base level of assistance that EPA provides to each tribe on an on-going basis? The current situation, in which many tribes fund their environmental programs by writing grant applications, is clearly less than ideal. I think that this is one of the most important environmental justice issues in Indian country today. As long as tribal programs are under-funded and under-staffed, Indian communities remain at a disadvantage in avoiding disproportionate environmental impacts.

In addition to funding, tribes also face challenges in finding qualified people to work for their environmental programs. Tribal employment policies typically include preferences for tribal members,[48] although in many tribes, key staff positions are held by non-Indians and by members of other tribes. While the pool of Indians with the educational and experiential qualifications for running environmental programs is growing, my guess is that there will be major roles for non-Indian environmental professionals for the foreseeable future.[49] I like to think that as the tribal workforce grows, the environmental movement will benefit from the interaction of Indian and non-Indian environmental professionals working together.

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47. *See* U.S. EPA, DRAFT PAPER, RETHINKING THE GENERAL ASSISTANCE PROGRAM 2 (1998) [hereinafter EPA RETHINKING].

48. *See* Indian Self-Determination Act, 25 U.S.C. § 450e(c) (1994). A 1994 Amendment to the Act provides:

> Notwithstanding subsections (a) and (b) of this section, with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, the tribal employment or contract preference laws adopted by such tribe shall govern with respect to the administration of the contract or portion of the contract.

Id.

49. The VLS First Nations Fellowship Program contributes to the pool of tribal environmental specialists, and other VLS programs train non-Indians as well–through summer classes and the clinic.

2. Reinvention and Devolution

It may be somewhat ironic that tribes are engaged in trying to build traditional regulatory programs just when many people in and out of government have become convinced that old-style command and control regulation is not adequate and that new approaches are needed.[50] Some of the people who hold this view have argued for more emphasis on market mechanisms to provide incentives for industry to comply with environmental laws, with less emphasis on enforcement and more on voluntary compliance. Some of the states have urged that they should be allowed to assume more responsibility for enforcement with less federal oversight, and that states accepting this "devolution" should be allowed to exercise their responsibilities with flexibility. While some advocates of flexibility and devolution no doubt sincerely believe that environmental enforcement can be made more effective even while it is being carried out with fewer people and less money, a case can be made that some advocates of devolution are more interested in ideology than results.[51] States use rhetoric about "Big Government" being out of touch in arguing for devolution with flexibility, yet some of the states that are the strongest advocates of devolution have demonstrably weak records in administering environmental protection programs.[52]

One of the primary mechanisms that EPA has devised for carrying out devolution to the states is the National Environmental Performance Partnership System (NEPPS), a program through which a state can receive funding for up to sixteen programs in a single grant known as a performance partnership grant (PPG).[53] The purpose of these PPGs is to afford states "the flexibility to address their highest environmental priorities, while continuing to address core program commitments."[54] Recent developments suggest that, while most states like the flexibility, some states strongly resist the efforts of

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50. *See, e.g.*, ENTERPRISE FOR THE ENV'T, THE ENVIRONMENTAL PROTECTION SYSTEM IN TRANSITION: TOWARD A MORE DESIRABLE FUTURE (1998).

51. *See* Rena I. Steinzor & William F. Piermattei, *Reinventing Environmental Regulation Via the Government Performance and Results Act: Where's the Money?*, [1998] 28 Envtl. L. Rptr. (Envtl. L. Inst.) 10,563 (Oct. 1998); Rena I. Steinzor, *Reinventing Environmental Regulation Through the Government Performance and Results Act: Are the States Ready for Devolution?*, [1999] 29 Envtl. L. Rep. (Envtl. L. Inst.) 10,074 (Feb. 1999) [hereinafter Steinzor II].

52. *See* Steinzor II, *supra* note 51, at 10,082.

53. Performance Partnership Grants for State and Tribal Environmental Programs: Revised Interim Guidance, 63 Fed. Reg. 53,764 (1998) [hereinafter PPG Guidance].

54. *Id.* at 42,888. One of my colleagues, Patrick Parenteau, Director of the VLS Environmental Law Center, describes the purpose of PPGs differently. In commenting on a draft of this Essay, he described the main purpose as allowing states to "reduce their commitment to environmental protection under the guise of setting priorities using pseudo-scientific tools like risk assessment and cost-benefit analysis."

EPA to develop performance measures to determine how well states are addressing their core program commitments.[55]

In addition to states, tribes are also eligible for PPGs, and EPA has suggested the use of PPGs as a way to address some of the limitations of GAP grants.[56] This would allow EPA to provide on-going funding for implementation of tribal programs. Before a tribe could receive a PPG, it would need to meet all the requirements for each program included in the grant, which would generally include "treatment as a state" for regulatory programs. Since only a relative handful of tribes have been approved for regulatory programs, it appears unlikely that the PPG approach will solve the ongoing funding problem for many tribes, but it might work for some tribes. Even if only a few tribes enter into PPGs, the value of the PPG concept for tribes may be that it serves as one model in fashioning a set of options. If there is one generalized lesson to be drawn from the last decade or so of experience with the "treatment as a state" provisions of the environmental statutes, it may simply be that there is a need for a range of options.

With tribes and states coming to the PPG approach from different stages of program development, dialogue among tribes and states might be productive in devising models for effective yet efficient environmental programs, with flexibility as well as commitment to core national objectives. Legal scholars and teachers might find this a productive topic for research and analysis. As yet, however, it does not appear that much dialogue is occurring between tribes and states, and the topic has so far escaped the interest of legal scholars.

One of the environmental justice issues lurking in this topic is the role of tribes in helping to define the scope of EPA's responsibilities for overseeing states when carrying out federal environmental regulatory programs. In defining EPA's role, tribes may choose to emphasize the federal trust responsibility to the tribes.[57] The trust responsibility includes the duty of the federal government to manage lands and resources held in trust for the benefit of the tribes, as well as the duty of the federal government to protect each tribe's right of self-government.[58] Because reservations were set aside as

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55. *See* Steinzor II, *supra* note 51, at 10,078-79 (describing resistance of some states to the development of performance measures under the Government Performance and Results Act).

56. *See* EPA RETHINKING, *supra* note 47, at 9-10.

57. *See generally* COHEN'S HANDBOOK, *supra* note 2, at 220-28. *See also* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 [hereinafter Wood, *Indian Land and the Promise*]; Mary Christina Wood, *Protecting the Attributes of Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109.

58. *See* Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, § 2, 107 Stat. 2004, 2004 (codified at 25 U.S.C. § 3601 (1994)).

permanent homelands and tribal cultures are rooted in the natural world, we can say that the trust responsibility includes a duty to protect the environments of the reservations. Accordingly, EPA has expressly recognized that, in carrying out its responsibilities under federal law, the trust responsibility imposes a duty on EPA to protect the environmental interests of Indian tribes.[59] This could be seen as an environmental justice issue because if an EPA action overlooks adverse impacts on trust resources, a tribe would necessarily suffer disproportionate impacts.

As a result, tribes have an important role to play in determining the limits on the devolution of federal programs to the states. Tribes must also have a role in determining when it is appropriate for EPA to step back into the administration of a program that it has turned over to a state. Such roles can be seen as manifestations of one of the long-standing federal limitations on the sovereign powers of the states—the constitutional authority to regulate relations with the Indian tribes is vested exclusively in the federal government.[60] Since one of the critical sets of issues in the whole devolution debate is under what circumstances EPA should reassert control, the tribes must participate in this dialogue.

B. Cross-Boundary Issues

One of the most important benefits that a tribe can realize from becoming a partner in environmental federalism is the use of federal law to deal with cross-boundary pollution matters. For example, once a tribe has become treated like a state for the purpose of setting water quality standards, the tribe is also treated like a state for purposes of the section 401 certification program.[61] This not only gives the tribe the power to veto federal permits for point sources and other activities resulting in a discharge to surface waters within its reservation, it also gives the tribe a statutory right to object to upstream permits, whether issued by EPA or a state (or tribe) pursuant to a delegated program.[62] A tribe without "treatment as a state" status can ask EPA to be sure to consider its interests when an upstream permit is under

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59. *See* U.S. EPA, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS, PRINCIPLE 5 (1984) (visited Mar. 6, 1999) <http://www.epa.gov/ indian/1984.htm>.

60. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). An executive order on federalism, issued in the Spring of 1998 and subsequently withdrawn, cited impacts on Indian tribes as one of the accepted reasons for the federal government deciding not to defer to a state. *See* 63 Fed. Reg. 27,651 (1998).

61. *See* 40 CFR § 131.4(c) (1998).

62. The right to object to upstream permits is based on section 402(b)(5) of the Clean Water Act, 33 U.S.C. § 1342(b)(5).

consideration, but a tribe that has set its own water quality standards can speak for itself as a sovereign partner in environmental federalism.

But there is also a downside to being a separate sovereign, and it is a downside that fits within the environmental justice rubric. Many—perhaps most—decisions on the siting of facilities that pollute the environment (water, air, solid waste, hazardous waste) are made by state and local government agencies. Many state and local government agencies apparently feel little or no obligation to seek the views of tribal governments on their siting decisions. Tribal representatives sometimes perceive this practice as the consequence of a state or local government agency's acknowledgment of the tribe's sovereignty, in that the state/local agency staff seem to say to themselves, "Since we do not have authority to make decisions for reservation lands, we have no obligation to let them have input into our decisions."[63]

But state and local siting decisions do have impacts on reservations. One scenario results from a decision to site a polluting facility in proximity to a reservation. This scenario appears to be similar to a typical environmental justice case, in that the people of reservation communities are exposed to the adverse environmental impacts of a decision in which they feel they had no input.

Another scenario arises from a pattern of decisions by state and local government agencies allowing so many polluting facilities in an area that each new proposed facility must be subjected to very close scrutiny. For example, there may be so much air pollution that an area where a reservation is located has become a nonattainment area for purposes of the Clean Air Act. In such a case, the tribe may not be at fault as the reservation may have no stationary sources of air pollution. But if the tribe wanted to allow the development of a new source, the tribe may first have to invest in off-reservation pollution control equipment to reduce the emissions from an existing source.[64] It would not matter if the tribe's proposed project was a comparatively benign source, such as a natural gas fired co-generation plant to produce electricity for a factory to manufacture photovoltaic energy systems. While this may not be a typical environmental justice situation, it would still be characterized by disproportionate adverse effects. But in this scenario, reservation communities would also receive a disproportionately small share of the economic benefits.

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63. Credit for this perception must be given to Michael Connolly, Councilman, Campo Band of Kumeyaay Indians.

64. *See* 40 C.F.R. § 51.165 (1998); *see also* Eileen Gauna, *Major Sources of Criteria Pollutants in Nonattainment Areas: Balancing the Goals of Clean Air, Environmental Justice, and Industrial Development*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 379, 387 (1996).

C. Public Participation and the Government-to-Government Relationship

Having noted that tribal officials perceive that state and local government agencies often leave them out of decisions that have on-reservation impacts, I should also note that a number of cases have arisen in which non-Indian neighbors, and sometimes groups of tribal members, have complained that tribal officials have not provided sufficient opportunities for public involvement in tribal decisions on proposals that have environmental impacts. Sometimes such claims have little basis in fact. Tribes that take on regulatory roles like states under federal environmental statutes also assume responsibility for a range of requirements regarding public participation and due process.[65] For example, when a tribe adopts, or revises, water quality standards under the Clean Water Act, it must hold a public hearing, just as a state is required to do.[66]

Sometimes, however, tribal officials do seek to limit public involvement. As a rationale they may assert that, because the tribe has a government-to-government relationship with the federal government,[67] federal officials should simply defer to tribal decisions. In effect, this view asserts that the tribal government speaks for all reservation residents.

In my view, this confuses public participation with the power to decide. Public participation means that people who are affected by a governmental decision should be able to find out about the proposal that is under consideration and make their views known before a decision is made. If a decision is within the province of a tribal government, affording the affected public an opportunity to become informed and express views does not detract from the tribal government's ultimate decision-making power. Nor does it affect the tribe's government-to-government relationship with the federal government. Failure of a tribal government to allow for meaningful involvement by members of the affected public would clearly run afoul of the EPA definition of environmental justice quoted earlier.[68] Moreover, when a tribe seeks involvement in the environmental review of development activities outside reservation boundaries, it may find that other units of government are

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65. *See generally* Dean B. Suagee & John P. Lowndes, Due Process and Public Participation in Tribal Environmental Programs (unpublished paper presented at the Sovereignty Symposium, Tulsa, Oklahoma, June 9-11, 1997, on file with the *Vermont Law Review*).

66. *See* CWA § 303(c), 33 U.S.C. § 1313(c); 40 C.F.R. § 131.20. *See* Albuquerque v. Browner, 93 F.3d 415 (10th Cir. 1996) (rejecting allegation that public hearing held by the tribe did not meet requirements of the statute).

67. *See* Memorandum of President, 59 Fed. Reg. 22,951 (1994); *see also* Exec. Order No. 13,083, 63 Fed. Reg. 27,651 (1998).

68. *See supra* note 13 and accompanying text.

more receptive to the tribe's concerns if the tribe lets its neighboring governments have some input into tribal decisions.

If a decision is within the province of a federal agency, limiting official contact to the representatives of tribal government may make it difficult or impossible for the federal official to fulfill his or her legal responsibilities. For example, if EPA is considering an application for a permit for a point source under section 402 of the Clean Water Act,[69] or if the Corps of Engineers is considering an application for a section 404 permit,[70] consultation with the tribal government cannot take the place of public notice and opportunity to comment. Similarly, in the context of the National Historic Preservation Act, the federal agency has a duty to make a reasonable and good faith effort to identify places that may be eligible for the National Register of Historic Places, so that inadvertent impacts on such places can be avoided and so that unavoidable impacts can be mitigated.[71] To identify traditional cultural properties, that is, historic places that hold ongoing religious and cultural importance,[72] a reasonable and good faith effort may require seeking information from individuals or groups that possess traditional cultural knowledge, whether or not such individuals or groups are specifically authorized to represent a tribal government.

Once the federal official obtains the relevant information to make a decision, it may appropriate to defer to a tribal government's judgment on whether the proposed federal action will serve the public interest. It may also be appropriate to assign great weight to the tribe's views on what measures would be acceptable to mitigate adverse impacts. In my view, however, deference to the tribe at the ultimate decision point is a different matter from ensuring that people who may be affected by a decision have the opportunity to find out about the proposal and make their views known beforehand.

1. Short Shrift to NEPA

For proposed development projects on Indian reservations, the environmental review is typically carried out using the process established by the National Environmental Policy Act (NEPA)[73] and the regulations issued by the Council on Environmental Quality (CEQ).[74] Because development projects typically include a transaction involving Indian trust land, the Bureau

69. *See* 33 U.S.C. § 1342.
70. *See id.* § 1344.
71. *See* 16 U.S.C. § 470f (1994); 36 C.F.R. § 800.4(b)(1) (1998).
72. *See generally* Suagee, *Tribal Voices*, *supra* note 37.
73. *See* 42 U.S.C. §§ 4321-4370d (1994).
74. *See* 40 C.F.R. §§ 1500-1508 (1998).

of Indian Affairs (BIA) is usually the federal agency responsible for NEPA compliance,[75] although it is not uncommon for some other federal agency, such as the Indian Health Service (IHS) or Department of Housing and Urban Development (HUD), to be the lead agency.

None of these agencies has an exemplary record for NEPA compliance. The practice of the BIA, in particular, tends to foreclose rather than facilitate opportunities for public involvement. This results from a number of factors, two of which are noted here. First, for the vast majority of BIA actions that are subject to NEPA, compliance is achieved through an environmental assessment (EA) and finding of no significant impact (FONSI) rather than an environmental impact statement (EIS), and the CEQ regulations provide virtually no guidance on how to prepare an EA. The BIA's guidance document, its NEPA Handbook,[76] is an internal document that is not readily available to the affected public. Second, most BIA actions requiring NEPA compliance are taken in response to proposals initiated by tribes or private parties. In such cases the BIA NEPA Handbook provides that the responsibility for preparing the EA falls on the proponent of the action.[77] The BIA NEPA Handbook is a reasonably good source of guidance on how to prepare an EA, but first the one must obtain a copy. I have long advocated that basic guidance on preparing EAs should be published in the Code of Federal Regulations where it would be readily available to everyone.[78]

These factors combine to create an atmosphere in which the proponents of actions and BIA officials and staff regard NEPA as a compliance requirement rather than a decision-making tool.[79] Proponents of actions, who are bearing the cost of preparing EAs, typically do not want to do more than what is minimally required. But they also tend to want to avoid having to prepare an EIS because the EIS process is widely perceived as taking so much time that the proponent of an action will typically threaten to drop the project and go someplace else if an EIS is required. A typical outcome is an EA that has been rewritten several times with enough mitigation measures added so that the federal decision-maker is reasonably sure that the EA and FONSI will stand up in court in the event that opponents of the project sue.

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75. For a detailed discussion of the BIA procedures for NEPA compliance, see Dean B. Suagee, *The Application of the National Environmental Policy Act to "Development" in Indian Country*, 16 AM. IND. L. REV. 377 (1991) [hereinafter Suagee, *NEPA*].

76. *See* 30 Bureau of Indian Affairs Manual, NEPA Handbook, Supp. 1 (revised Sept. 24, 1993) [hereinafter BIAM].

77. *See id.* §§ 4.2B, 4.5A.

78. *See* Suagee, *NEPA*, *supra* note 75, at 464.

79. This approach to NEPA compliance is, of course, not limited to actions in Indian country. *See* H. Welles, *The CEQ NEPA Effectiveness Study: Learning from Our Past and Shaping Our Future*, *in* ENVIRONMENTAL POLICY AND NEPA: PAST, PRESENT, AND FUTURE 193, 202 (Ray Clark & Larry Canter eds., 1997).

The EA prepared to support such a "mitigated FONSI" may look very much like an EIS in its thickness and content.[80] The only thing missing is the public involvement required for an EIS by the CEQ regulations. The BIA NEPA Handbook encourages providing opportunities for public involvement in the preparation of an EA,[81] but the minimum requirement is found in the CEQ regulations—a notice of availability must be published *after* a FONSI has been signed.[82] The proponent of the action is responsible for the preparation of the EA, and project proponents typically do not want to pay for any more environmental review documentation than they are required to in order to persuade the federal official to sign a FONSI. So, the minimum requirement for public involvement—a notice of availability after the FONSI has been signed—has become the standard.

Having seen quite a number of these encyclopedic EAs, and having heard and read accounts of community members who feel that they have not had any opportunities for meaningful involvement (because they haven't), I have come to the conclusion that the NEPA process needs to be changed in at least one way. My proposal is rather simple: when the BIA decision-maker is presented with an EA and she determines that the EA does not support a FONSI, if she directs staff or the proponent of the project to rework the EA so that it will support a FONSI, that decision must be published and the EA must be made available to the public. I believe that this would be a major step toward improving public involvement, giving concerned members of the public an option short of suing to compel the preparation of an EIS.

2. Trust Responsibility in the Era of Self-Determination

The problems presented by NEPA compliance can be seen as manifestations of a fundamental challenge of the modern era of federal Indian policy, the era of self-determination. The basic policy of this era is that the federal government supports the tribes in their efforts to take control over governmental programs and services that would otherwise be administered by the BIA and IHS. More broadly, the federal policy supports tribal governments exercising authority over their reservations. Basic policy decisions should be made by the tribes, and federal agency staff should provide support and technical assistance.

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80. *See id.* at 202 for a discussion of "mitigated FONSIs"; *see also* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION 8-124 to 8-128 (2d ed. 1992) (discussing case law on the use of mitigation measures to avoid causing significant impacts and thus avoid the requirement to prepare an environmental impact statement; collecting cases in which courts accepted this practice, and cases in which courts have not).

81. *See* BIAM, *supra* note 76, at § 4.5A.

82. 40 C.F.R. § 1506.6(b) (1998).

This necessarily creates tensions between tribal and federal officials whose responsibilities under specific statutes may put them in a position to reject a project that a tribal government has decided to support. These tensions may be even harder to resolve in the context of BIA duties under the doctrine of the federal trust responsibility, a doctrine that may give rise to conflicting obligations.

If the self-determination era is viewed with an awareness of the historical context, one can appreciate deference to tribal officials on the part of BIA and IHS officials. After all, the basic reason for the self-determination policy is to empower tribes to take control over their own reservations and end the dominance of the BIA and IHS. While both agencies, especially BIA, still have trust responsibilities, the trust doctrine does not provide clear standards for evaluating federal decisions, but rather calls for informed judgments.[83] In the self-determination era, it may be perfectly appropriate for the BIA to approve a tribal decision to use trust resources in a way that would be not be appropriate if proposed by BIA rather than by the tribal government.

Such a pattern of deference to tribal decisions does not necessarily extend to situations in which a federal agency has a clear statutory mandate that applies to a proposed, or actual, development project in Indian country. Examples include the requirements to obtain a permit under the Clean Water Act before filling wetlands[84] or before discharging pollutants into surface waters,[85] and the requirement under the Clean Air Act to obtain a permit for any new source of air pollution.[86] Similarly, if a federal agency action is a legal prerequisite for a proposed development project in Indian country, the federal agency is required to comply with NEPA[87] and, if the project may affect a historic property, the National Historic Preservation Act.[88] Although the BIA may defer to tribal officials in the exercise of its trust responsibilities, and although the trust doctrine applies to agencies other than BIA,[89] tribal officials should not expect federal officials to ignore their responsibilities under federal environmental laws out of deference to tribal self-government.

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83. *See* Wood, *Indian Land and the Promise*, *supra* note 57, at 1550-67 (discussing the apparent conflicts between the trust doctrine and tribal sovereignty and the lack of standards for judging whether the actions of the Executive Branch agencies are consistent with trust obligations).

84. *See* 33 U.S.C. § 1344(a).

85. *See id.*

86. *See* 42 U.S.C. § 7661(a) (1994). *See generally* Gauna, *supra* note 64.

87. *See* 42 U.S.C. § 4332.

88. *See* 16 U.S.C. § 470.

89. *See, e.g.*, Nance v. EPA, 645 F.2d 701 (9th Cir.), *cert. denied*, 454 U.S. 1081 (1981) (holding that the United States' trust obligations to Indian tribes extend to federal actions by agencies other than the BIA). *See also* Wood, *Indian Land and the Promise*, *supra* note 57, at 1527-35 (discussing application of trust doctrine to agencies other than BIA when agency actions affect Indian land).

The fact that tribally sponsored development projects occasionally are undertaken without compliance with all of the apparently applicable requirements of federal environmental laws[90] may indicate that some tribes are not getting very good advice from their attorneys. Alternatively, it may indicate that tribal officials are not asking for advice when they should or are ignoring the advice that they do get. It may also indicate that many of the lawyers who work for tribal governments have been putting too much emphasis on the power component of sovereignty and not enough on the responsibility component.

D. Threats to Tribal Sovereignty

Sometimes tribal governments make decisions that outsiders, or groups of tribal members, regard as bad decisions. State and federal government agencies often make decisions that some people oppose. That is the nature of representative government. If the American people are committed to the principle of tribal self-government, then we should also recognize that some tribal government decisions are going to make some people unhappy.

The American people should also be aware that tribal governments face a different kind of challenge than other governmental entities when their decisions make people unhappy. Sometimes the people who oppose tribal decisions challenge the very right of tribes to exist as sovereign governments. More commonly, opponents do not make broadside attacks on the tribe's right to exist, but rather attack the existence of the tribe's sovereignty over the subject matter of the particular decision at issue. A few examples may help to explain the nature of these threats to tribal sovereignty.

1. The Specter of Implicit Divestiture

In 1978, in *Oliphant v. Suquamish Indian Tribe*, the U.S. Supreme Court ruled that the retained inherent sovereignty of Indian tribes does not include criminal jurisdiction over non-Indians who commit misdemeanors within

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90. *See e.g.*, Karen L. Testerman, *Judge's Order Puts Limits on Further Hog Farm Work*, INDIAN COUNTRY TODAY, Feb. 8-15, 1999, at A-1 (reporting on a lawsuit challenging BIA approval of a lease of trust land of the Rosebud Sioux Tribe for use as a hog farm which, if built to the planned capacity, would produce 859,000 market hogs per year). In this case, the BIA approved the lease without an environmental impact statement (EIS)—the approval was based on an environmental assessment (EA) and finding of no significant impact (FONSI). *See id.* The EPA filed a 12-page comment memorandum on the EA stating its conclusion that the EA was inadequate and did not support a FONSI. *See* Letter from Kerrigan G. Clough and Max H. Dodson, Assistant Regional Administrators, U.S. Environmental Protection Agency, to Larry J. Burr, Superintendent, Rosebud Agency, U.S. Bureau of Indian Affairs (Oct. 15, 1998) (on file with the *Vermont Law Review*).

Indian reservations.[91] In order to reach this result, Justice Rehnquist, writing for the Court, announced a new legal principle—implicit divestiture—which holds that Indian tribes can lose certain aspects of their original sovereignty by implication rather than by the operation of express language in a treaty or statute.[92] Although this rule was first applied in the context of criminal jurisdiction, it has since been applied in a variety of civil regulatory and civil adjudicatory contexts. In 1981, in *Montana v. United States*, the Supreme Court used the implicit divestiture rule to announce a general proposition that Indian tribes have been divested of civil regulatory jurisdiction over non-Indians on privately owned lands within reservation boundaries, although the Court did acknowledge two categories of exceptions to this proposition.[93] Now, legal challenges to the regulatory authority of tribal governments over non-Indians on private lands begin with the question of whether what the tribe is trying to do fits within one of the exceptions to the rule of *Montana*.[94]

The existence of the implicit divestiture rule makes for a shaky foundation for the efforts of tribal governments to enact and enforce environmental regulatory laws. Congress could easily fix this. One way to fix it would be for Congress to make clear in the environmental statutes that Congress recognizes and affirms that tribes retain inherent sovereignty to protect the environment of all lands within reservation boundaries. In addition, Congress could expressly delegate authority to tribes.[95] This approach would allow tribes to devote their limited resources to protecting the environment rather than to defending their governmental authority.

For purposes of this Essay, my point is that the implicit divestiture rule subjects tribal governments to a kind of legal challenge that cannot be made against any other kind of sovereign in our federal system. This strikes me as a disproportionate impact on the people of Indian country, in that it limits the

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91. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

92. *See generally* N. Bruce Duthu, *The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict*, 21 VT. L. REV. 47 (1996) (discussing the "unique interpretive problems raised" by Indian law). *See also* Suagee, *Tribal Self-Determination*, *supra* note 18.

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

94. *See, e.g.*, Montana v. United States EPA, 137 F.3d 1135 (9th Cir.), *cert. denied*, 119 S. Ct. 275 (1998). In its petition for certiorari in this case, the State described the general proposition announced in *Montana* as a "bedrock" principle of federal Indian law, though it rests upon the implicit divestiture rule, which was itself fashioned as a new principle in 1978. Petition for Writ of Certiorari at 6, Montana v. United States EPA, 137 F.3d 1155 (9th Cir. 1998) (No. 97-1929). *See generally* N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994) (discussing the loss of inherent tribal sovereignty).

95. *See* United States v. Mazurie, 419 U.S. 544 (1975); *see also* Brendale v. Confederated Tribes & Bands of Yakima, 492 U.S. 408 (1989); 63 Fed. Reg. 7254-58 (1998) (explaining EPA's interpretation of the tribal provisions in the Clean Air Act amendments of 1990 as a delegation of authority from Congress to the tribes).

ability of tribal governments to protect the environments of their reservations. Accordingly, I believe it is accurate to say that the implicit divestiture rule is an environmental justice issue.

2. Sovereign Immunity and Citizen Suits

In the American system of government, sovereignty includes the principle of sovereign immunity, which means that a sovereign cannot be sued without its consent. With respect to states, their sovereign immunity is protected by the Eleventh Amendment to the Constitution, which operates to shield each state from suit in federal court "unless it has consented to suit, either expressly or in the 'plan of the [constitutional] convention.'"[96] The Supreme Court has ruled that, under the Eleventh Amendment, a state may be sued by the United States[97] or by a sister state,[98] but not by a foreign state[99] or an Indian tribe.[100]

In *Seminole Tribe v. Florida* the Court, by a five to four majority, struck down as unconstitutional a statute based on the Indian Commerce Clause, in which Congress clearly intended to waive state sovereign immunity to allow suits by Indian tribes.[101] In reaching this result, the Court overruled a recent decision which upheld the Commerce Clause power of Congress to create a private right of action for monetary damages against states found to be liable under federal law for environmental cleanup costs.[102] In contrast, Congress apparently does have constitutional authority under the Spending Power to require a state to enact legislation waiving state sovereign immunity as a prerequisite to the receipt of federal funds to administer an environmental regulatory program under federal law.[103]

In contrast to the insulation that the Eleventh Amendment provides states for their sovereign immunity, the Supreme Court has ruled that Congress does

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96. Blatchford v. Village of Noatak, 501 U.S. 775, 779 (1991).

97. *See* United States v. Texas, 143 U.S. 621 (1892).

98. *See* South Dakota v. North Carolina, 192 U.S. 286, 318 (1904).

99. *See* Monaco v. Mississippi, 292 U.S. 313 (1934).

100. *See Blatchford*, 501 U.S. 775; Seminole Tribe v. Florida, 517 U.S. 44 (1996).

101. *See Seminole Tribe*, 517 U.S. at 44. In an 86-page dissent joined by three other Justices, Justice Souter concluded that "neither text, precedent, nor history supports the majority's abdication of our responsibility to exercise the jurisdiction entrusted to us in Article III." *Id.* at 185. Although federal Indian law comprises but a brief portion of Justice Souter's dissenting opinion, he does point out that "since the States have no sovereignty in the regulation of commerce with the tribes, on Hamilton's view there is no source of sovereign immunity to assert in a suit based on congressional regulation of that commerce." *Id.* at 148.

102. *See* Pennsylvania v. Union Gas, 491 U.S. 1 (1989), *overruled by Seminole Tribe*, 517 U.S. at 72-73 (1996); ZYGMUNT J.B. PLATER, ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 370-74 (2d ed. 1998).

103. *See* Virginia v. United States EPA, 80 F.3d 869 (4th Cir.), *cert. denied*, 519 U.S. 1090 (1996).

have the power to waive tribal sovereign immunity.[104] Some federal courts have found congressional authorization for citizen suits against tribes for alleged violations of federal environmental laws.[105] Citizen suit provisions in federal environmental statutes typically cite the Eleventh Amendment as a limit on their reach against the states, but of course such language does not, on its face, provide any cover for tribal governments.[106] Since this is another way in which federal law treats tribes differently from states, this could be described as an environmental justice issue.

There is a pernicious aspect to the sovereign immunity issue that should be noted—the way that the implicit divestiture rule surfaces. Although the Supreme Court has recognized the existence of tribal sovereign immunity and has interpreted the waiver of sovereign immunity in the Indian Civil Rights Act narrowly,[107] the Court has also relied upon the implicit divestiture doctrine to fashion another route for those challenging tribal authority to get into federal court. This route begins as a requirement that such litigants begin by exhausting remedies in tribal courts,[108] a rule that, on its face, shows judicial deference to tribal courts. The problem is that this rule encourages litigants to come back to federal court after exhaustion of tribal court remedies if they can raise a federal question, and the federal question that the Supreme Court invites litigants to raise is whether a tribe has been implicitly divested of its sovereign authority over the subject matter in the first place.[109]

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104. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (holding that Congress intended to restrict the jurisdiction of federal courts over actions against tribes alleging violations of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1994), to cases arising in the context of *habeas corpus*, and acknowledging that Congress does have the power to authorize other kinds of civil actions in federal court against tribes).

105. *See* Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1097 (8th Cir. 1989) (finding congressional intent to abrogate tribal sovereign immunity in statutory language authorizing citizen suits against any "person" because, although Indian tribes are not explicitly included in the term "person," tribes are included in the term "municipality," and the term "municipality" is explicitly included within the term "person"). *See also* Atlantic States Legal Found. v. Salt River Pima-Maricopa Indian Community, 827 F.Supp. 608 (D. Ariz. 1993).

106. *See* 63 Fed. Reg. 7254 (1998) (announcing decision by EPA not to treat tribes like states for purposes of the citizen suit provision of the Clean Air Act (CAA), thus not taking a position on the question of whether tribes are subject to citizen suits under the CAA).

107. *See Santa Clara Pueblo*, 436 U.S. at 59.

108. *See* National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

109. *See National Farmers Union*, 471 U.S. at 853 n.14; *see also* Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1092 (1995).

3. The Specter of Legislative Fiat

Another kind of threat to tribal sovereignty is legislative fiat. Throughout American history Congress has enacted legislation that has had disastrous effects on Indian tribes and their members without much concern for the views of the tribes.[110] In recent decades, examples of such legislation have become less frequent, but recent experience shows that some members of Congress are not reluctant to support Indian legislation over opposition from tribes, sometimes without even seeking the views of tribes. In some cases, such legislation has come close to being enacted.[111]

Tribal leaders have become vigilant in monitoring and opposing such proposed legislation. Fortunately, they have some champions among both parties in both houses of Congress. Unfortunately, tribes have not received any significant amount of support from the environmental movement or from the environmental justice movement.

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110. *See* GETCHES ET AL., *supra* note 2, at 142-53, 173-82, 204-08.

111. *See, e.g.*, Suagee, *Turtle's War Party*, *supra* note 17, at 488-89 n.78 (discussing H.R. 561, a bill passed by the House in 1995 which would have stripped tribes of authority to be treated as states under the Clean Water Act with respect to lands within reservation boundaries not owned by the tribe or its members); *see also Tribal Rights in Private Property Cases: Before the Sept. 23, 1996 Hearing on the Sovereign Immunity of Tribal Governments*, 104th Cong. (1996) (statement of Daniel K. Inouye, Vice Chairman, Committee on Indian Affairs), *available in* 1996 WL 10831351. This statement by Senator Inouye explains the events that led to the hearing. Briefly, the Senate's Interior Appropriations Bill for Fiscal Year 1997, as reported to the full Appropriations Committee by the Interior Appropriations Subcommittee included a provision, designated section 329, which would have waived tribal sovereign immunity in a broad range of cases; the author of section 329, Senator Slade Gorton (R-Wash.) agreed to delete the provision on the understanding that the Committee on Indian Affairs would hold a hearing on the subject. *See id.* As quoted in Senator Inouye's statement, section 329 would have provided:

> (a) In cases in which the actions or proposed actions of an Indian tribe or its agents impact, or threaten to impact, the ownership of use of private property or another person or entity, including access to such property that might arise from such impacts or which impact the receipt of water, electricity, or other utility to such property, an Indian tribe receiving funds under this act or tribal official of such tribe, acting in an official capacity, shall—
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> (1) be subject to the jurisdiction, orders, and decrees of the appropriate state court of general jurisdiction or federal district courts for requests of injunctive relief, damages, or other appropriate remedies; and
>
> (2) shall be deemed to have waived any sovereign immunity as a defense to such court's jurisdiction.

Id. This provision was not enacted, but Senator Gorton has continued to introduce bills that would waive tribal sovereign immunity, including five bills introduced on July 14, 1998, in the First Session of the 106th Congress, that would waive sovereign immunity in five different contexts: S. 2298, the Indian Civil Rights Enforcement Act; S. 2299, the American Indian Contract Enforcement Act; S. 2300, the State Excise, Sales, and transaction tax Enforcement Act; S. 2301, the Tribal Environmental Accountability Act; and S. 2302, the American Indian Tort Liability Insurance Act. *See* Hobbs, Straus, Dean & Walker, LLP, General Memorandum 98-91, at 1-3 (July 23, 1998) (on file with the *Vermont Law Review*).

More than a decade ago, Professor Charles Wilkinson expressed the hope that the time had finally come in the relationship between the United States and the Indian tribes and nations that tribal governments would no longer be forced to devote so much of their energy and resources to defending their right to exist, and that instead they could begin to focus their resources on governing.[112] To use some of his words, he said:

> To the tribes, their chief task always has been not just to survive but to build traditional and viable homelands for their people. The original promise of a measured separatism might have allowed that goal to be reached, but the work was interrupted by a century of assimilationist policies and their effects. Perhaps, at last, the tribes can begin to withdraw from the judicial system and train their energies on fulfilling their historic task of creating workable islands of Indianness within the larger society.[113]

Experience has shown that sentiment to have been wishful thinking. But even if tribes must still fight in the judicial system and in Congress to defend their right to exist, they must also work to become more effective governments. In the realm of environmental law, the challenges that tribal governments face are truly awesome. Through the creation of the Indian Country Environmental Justice Clinic, Vermont Law School seeks to help tribal governments meet these challenges.

III. THE INDIAN COUNTRY ENVIRONMENTAL JUSTICE CLINIC

Vermont Law School (VLS) is committed to helping tribal governments and the people of Indian communities meet the challenges of environmental protection and restoration. VLS has demonstrated this commitment by establishing the First Nations Environmental Law Program. The new Indian Country Environmental Justice (ICEJ) Clinic is another component of the First Nations Environmental Law Program.

A. The VLS First Nations Environmental Law Program

The First Nations Environmental Law (FNEL) Program is part of the Environmental Law Center (ELC) at VLS. The ELC administers the Master of Studies in Environmental Law (M.S.E.L.) degree program, which, as described earlier, is a unique one-year Masters degree. The M.S.E.L. can be

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112. *See* CHARLES F. WILKINSON, *supra* note 15, at 122.
113. *Id.*

acquired in combination with a Juris Doctor (J.D.) and is also open to students who are not seeking a law degree. M.S.E.L. and J.D. students at VLS can choose from over fifty courses in various aspects of environmental law, some of which are offered during the acclaimed VLS summer program.

1. Mission of the First Nations Program

Before describing the various parts that make up the First Nations Environmental Law Program, let's begin with our mission statement.

> The mission of the First Nations Environmental Law Program is to educate lawyers and environmental professionals who will help American Indian tribes and nations: (1) exercise their sovereign powers of self-government for the protection of the natural and cultural environments of their reservations; and (2) use the law to deal with environmental matters that cross jurisdictional boundaries, working cooperatively with federal and state government agencies when possible and challenging them when necessary.

2. Components of the First Nations Program

The FNEL Program consists of several interrelated and evolving components, beginning with the curriculum. Since long before there was a First Nations Program, VLS has offered *Native Americans and the Law*, which is a survey course in federal Indian law. In 1994 the VLS summer program offered a two-credit course on environmental and natural resources law in Indian country. One course proved to be insufficient, and in 1997 and 1998, two courses were offered. In the 1999 summer session, the two courses are called *Tribal Environmental Programs* and *Indian Country Natural and Cultural Resources. Tribal Environmental Programs* focuses on the roles of Indian tribal governments in carrying out federal environmental laws within their reservations. *Indian Country Natural and Cultural Resources* focuses on federal laws that form a regulatory framework for the management of natural and cultural resources in Indian country, other than the statutes administered by Environmental Protection Agency (EPA). The courses use a common set of teaching and reference materials.[114]

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114. Professor James M. Grijalva of the University of North Dakota School of Law teaches *Tribal Environmental Programs* and I teach *Indian Country Natural and Cultural Resources*. The 1999 summer session will be the second time that we have used a common set of course materials. We do have plans to develop these materials into a casebook. We would be happy to share our materials with faculty members of other law schools.

In addition to the curriculum, the FNEL Program features four other components. Two of these exist as this Essay goes to press in the spring semester of the 1998-99 academic year—the First Nations Environmental Law Fellowship Program and Indian Country Environmental Justice Clinic. Two other components will be introduced when this Essay appears in print—the Indian Country Environmental Information Network and the Indian Country Community Education Program.

a. The First Nations Environmental Law Fellowship Program

As noted in the Introduction, in 1995 VLS established the First Nations Environmental Law Fellowship Program, which provides financial assistance to a small group of American Indian students to enroll in the M.S.E.L. degree program.[115] The purpose of this fellowship program is to enable members of federally-recognized Indian tribes to pursue careers in environmental protection and resource conservation, with the expectation that each Fellow will become directly involved in developing and implementing the legal and institutional framework for tribal environmental programs. Graduates need not necessarily work directly for tribal governments to fulfill this expectation. They might also work in federal agencies, inter-tribal organizations or educational institutions.

b. The Indian Country Environmental Justice Clinic

The ICEJ Clinic will offer a clinical legal education opportunity for VLS law students by providing legal assistance to tribal governments and inter-tribal organizations. The Clinic will focus on helping tribes build their capacities to develop and carry out environmental protection programs. The Clinic has begun on a pilot scale in the spring semester of the 1998-99 academic year, with full-scale operation beginning in the fall semester of the 1999-2000 year. Each semester, a limited number of students will gain experience in a range of lawyering skills by working on real matters for real clients under the supervision of the Clinic Director. The plans for the Clinic are described more fully below.

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115. Eight Fellows have graduated to date. Two fellows are enrolled in the 1998-99 academic year, and we are seeking four fellows for 1999-2000.

c. Indian Country Environmental Information Network

The Information Network will make information available to the interested public through the VLS web page. An electronic journal, which began publication this Spring, will feature papers prepared by students on recent developments and current topics in Indian country environmental law. A virtual library will feature an expanding collection of tribal laws and regulations in the field of environmental protection and natural and cultural resources law. Students enrolled in the pilot phase of the ICEJ Clinic are working on bringing this network into operation.

d. Community Education Program

The Community Education Program will, depending on funding, offer educational programs at locations that are convenient to people who live and work in tribal communities. These programs will be developed in collaboration with tribes, inter-tribal organizations and other higher educational institutions, including tribal colleges. Some programs will feature distance learning. One event is planned in April 1999, and one in September 1999.[116]

B. Creating the ICEJ Clinic

In 1998 the faculty and administration of VLS decided to establish an environmental law clinical program with a focus on Indian country. The factors that went into this decision need not be discussed in any detail here.[117] One key factor was the belief that it would complement the First Nations Fellowship Program, which is a long-term approach to helping tribal governments face the challenges of building environmental programs by helping a small number of tribal members become educated in environmental law. A clinical program would provide short-term help by using law students to do legal work for tribes facing immediate environmental problems. By providing help with immediate problems, the clinic would attract the attention of tribal leaders to VLS, who might then become interested in sending some of their bright young tribal members to enroll in the Fellowship Program. Having a clinic at VLS working on real environmental problems confronting

116. The April 1999 workshop will focus on solar energy as a strategy for community economic development; the September 1999 workshop will focus on wetlands and watershed management.

117. One factor that merits acknowledgment was that a very vocal and determined group of students demanded that VLS establish a clinical program in environmental law. The Indian law clinic was originally conceived as part of a larger clinic which would also focus on the bioregions of Vermont.

tribal communities could enrich the educational experience for the First Nations Fellows. Having First Nations Fellows on campus could enrich the educational experiences of non-Indian law students enrolled in the clinic, by helping them to understand the context of Indian country environmental problems. These are just some of the ways in which the Clinic and the Fellowship Program complement each other. For these and other reasons, the faculty and administration hired me to administer the Fellowship Program and to establish a new clinic, the Indian Country Environmental Justice Clinic.

1. The Curriculum Proposal

The creation of a new clinic at VLS required the preparation of a proposal for the approval of the Curriculum Committee and the full faculty. After consulting with faculty members who teach in the existing VLS experiential programs and reviewing the literature,[118] I developed a curriculum proposal and secured faculty approval.[119]

a. Goals

The ICEJ Clinic has academic goals and community service goals which are set out in the curriculum proposal. The academic goal statements stress the educational opportunities offered by the Clinic, opportunities that arise from the mix of substantive law and lawyering skills in which students will be engaged. The academic goal statements also emphasize collaborative problem-solving and acknowledge the opportunities to develop cross-cultural awareness. The community service goal statements stress the Clinic's commitment to provide meaningful assistance to tribal governments and inter-tribal organizations.

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118. One article that we found particularly helpful was Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175 (1996).

119. The curriculum proposal is not discussed in detail in this Essay, but will be provided to interested readers on request. We also conducted an e-mail and telephone survey of clinical programs at other law schools. In designing the proposal, we had to address a number of issues, and our survey of other programs led to the observation that, as a general matter, there are few general rules in clinical education. Rather, it seems to be an art in which many of the details are determined by institutional factors and by the individuals involved. We resolved some of these issues (e.g., number of credit hours and grading) in a way that is consistent with other VLS experiential offerings, although some schools do things differently. Our survey gave us new insights into many of the issues, and on some points we will modify our plans to reflect what we have learned.

b. The Practicum

Students enrolled in the Clinic earn credit for each of two components: a practicum and a seminar. Each student will earn six credits for the Clinic, which will be allocated as four credits for the practicum and two credits for the seminar. In the Clinic's practicum component, each student will work on one major matter for a "live" client. Typically, students will be assigned to work in teams of two, which will foster a collaborative approach to problem-solving. Each team will meet with the Director at least once a week in a case management meeting.

The selection of client matters will emphasize the problems faced by tribal governments in developing and carrying out environmental regulatory programs within the overall framework of federal environmental statutes. At this stage of the development of the Clinic, we plan to focus on specific matters of concern to tribal governments in the Northeastern U.S., but we also plan to select some projects in which the client is an inter-tribal organization and the matter has national significance. In addition, we may select a few client matters for tribes outside the Northeast where the particular matter has national significance, for example, where the assistance of VLS can help a tribe to establish an exemplary regulatory program.

At the outset, decisions on the selection of client matters will be made by the Clinic Director in consultation with the Director of the ELC. The decision-making process will take into consideration a number of factors that reflect the academic goals of the Clinic as well as its community service goals. We expect that requests for assistance will exceed the capacity of the Clinic. To deal with this we are considering adapting the model used by the Yale Environmental Protection Clinic, a clinic that emphasizes lawyering skills other than litigation.[120] In this model, a prospective client (usually an organization or government agency) contacts the Clinic Director to discuss the matter and then follows up by submitting a description of the project on which they would like assistance. The one-page project summary includes a description of the written work product the prospective client seeks, which must be something that can be produced in one semester. Prior to the beginning of each semester, the Clinic Director and the Student Coordinator review the potential client projects and develop a "menu" of about twice as many projects as the Clinic can handle in a semester. In the first week of the semester, each student submits a form indicating her preferences. The Clinic Director and Student Coordinator then use the preference forms to make the

120. *See* Esty, *supra* note 8, at 19-21.

final selection of projects and to assemble student teams to work on each project.

For the ICEJ Clinic, we will post guidance for potential clients on the VLS web page. We also plan to make this guidance available to tribal governments in the Northeast and to inter-tribal organizations through a variety of other means, such as attendance at conferences and meetings. We know that, given the issues discussed in Parts I and II of this Essay, tribal governments face an awesome array of challenges, and we believe that the ICEJ Clinic can help. We believe that by adapting the Yale project selection process for our purposes, we can identify and develop projects in which the needs of clients and our educational goals converge. This really should not be hard to do because there are so many lawyering tasks in building tribal environmental programs. In light of the fact that the needs are great and that we can only serve some of them, we will consult with attorneys and professional staff who work for inter-tribal organizations when we select our "menu" of potential projects for each semester.

c. The Seminar

The seminar component of the Clinic is designed to complement the experiential learning of the practicum component. The seminar will include substantive law, skills training, and professional responsibility.

Since the client matters assigned to the students may give them a rather narrow (although deep and intense) exposure to the substantive area of Indian country environmental law, the seminar component will cover a range of substantive law topics. The basic objective is to provide all of the students with a working knowledge of environmental federalism in the Indian country context, including the Indian law nuances of the major federal statutes. Students will learn to analyze which levels of government should be responsible for dealing with a particular problem, as well as how to allocate lead and supporting roles. In light of the fact that many problems can be addressed through the exercise of tribal lawmaking and regulatory powers, the seminar component will cover topics such as tribal administrative law and dispute resolution in tribal administrative agencies and tribal courts. The students also will gain a foundation in the application of administrative law and civil procedure in preparation for situations in which solving an environmental problem requires litigation. In addition, the seminar will include classroom training in the legal skills of interviewing, counseling and negotiation. These classes will be supplemented with role-playing exercises designed to simulate the kinds of cross-cultural situations that are likely to arise in dealing with client matters in the Clinic and, more generally, in the practice of Indian country environmental law.

2. M.S.E.L. Students

Although the Clinic is designed as an experiential learning program for J.D. students, non-J.D. candidates for the M.S.E.L. degree can make important contributions to carrying out the mission of the Clinic. Students who seek academic credit for their contributions to the Clinic may enroll in supervised independent research projects (IRPs). M.S.E.L. students, including First Nations Fellows, bring some life experiences with them that may be very relevant to the work of the Clinic. For example, many M.S.E.L. students have environmental science backgrounds, and such students could be key members of interdisciplinary problem-solving teams. Similarly, a First Nations Fellow may be particularly well qualified to develop community education materials to complement the work products of J.D. students. In addition, First Nations Fellows could play helpful roles in the role-playing exercises that are part of the seminar component of the Clinic. A possible scenario is one in which a First Nations Fellow may have direct experience with an environmental problem that the Clinic has selected; perhaps the Fellow's tribe has sent her to VLS for the express purpose of dealing with that particular environmental problem. In such a case, the Fellow could provide a great deal of help to J.D. students in interacting with tribal staff and tribal attorneys.

3. The Electronic Journal

In addition to the specific client matters on which teams of students will work, the Clinic students will help produce the electronic journal, which will report on developments in environmental, natural and cultural resources law that should be of interest to tribal governments and inter-tribal organizations. The journal will be posted on the VLS web page on a periodic basis. While the production of the journal will be an activity of secondary importance in comparison to the client matters, it will help to achieve the goals of the Clinic. In particular, by performing tasks such as monitoring developments and drafting stories for inclusion in the journal, students will have the opportunity to develop a working knowledge of a range of substantive legal issues that may not be presented in their client matters. Similarly, the journal will help to achieve the community service goals by providing useful information to many more tribal governments and inter-tribal organizations than could ever be provided with client-specific service through the Clinic. While the Clinic students will play a key role in producing the journal, contributions from other students will be welcomed as well.

4. The LL.M. Program

Beginning in the 1999-2000 academic year, VLS will offer the Master of Laws (LL.M.) degree in Environmental Law. A natural progression for the ICEJ Clinic will be to seek Indian attorneys who want to pursue careers in law school teaching and offer them teaching experience in the Clinic as part of earning the LL.M.

C. Some Next Steps

Although we are only now in the start-up phase of the ICEJ Clinic, we do have some ideas about how we hope to see it grow. Our foremost hope is that tribes and inter-tribal organizations will find that the Clinic really does help them deal with environmental problems and with the challenges of developing programs to control activities that can cause environmental problems. We hope that, as requests for assistance begin to exceed our capacity to help, we can find ways to expand our capacity. Attracting Indian lawyers to our new LL.M. program looks like one good way to expand our capacity. We hope to make more use of distance learning technologies to make our resources more available to Indian communities.

Finally, we hope that other environmental law clinics and Indian law clinics will join us in helping tribal governments assume their proper place in American environmental federalism. There is a lot of work to be done, and it is work that provides tremendous opportunities for law students to learn how to be excellent lawyers.

CONCLUSION

The Indian Country Environmental Justice Clinic offers VLS students an exciting opportunity for experiential learning; an opportunity to contribute to the efforts of tribal communities to survive and flourish as distinct cultures that are deeply rooted in the natural world. As we work to make the Clinic a reality, we understand that making it a reality is only the beginning. Making it live up to its potential will be the real challenge.

But this is only part of a much larger challenge. Tribal governments need and deserve to be treated by the larger American society as permanent features in the landscape of federalism. As tribes increasingly perform regulatory roles in protecting Mother Earth, and as they show by their actions that they regard their responsibilities to the Earth as a sacred trust, people in the larger society will increasingly recognize that we all have much at stake in honoring the right of tribal self-government. Helping to bring about this realization is the real challenge.