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Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation

Judith V. Royster

Indian nations today are faced with a critical dichotomy in their treatment by the federal government. For the most part, Congress has embarked on a path of promoting and encouraging economic development and self-sufficiency, while the Supreme Court has taken virtually every opportunity in recent years to undercut the legal and practical basis of reservation self-government. Nowhere is this dichotomy more starkly illustrated than in the environmental arena.

For the past decade, Congress and the Environmental Protection Agency have been promoting and strengthening the tribal role in environmental regulation of Indian territories. Each of the major federal pollution control acts that has come up for reauthorization has been amended to include provisions that treat Indian tribes as states for environmental protection purposes. Tribal primacy over environmental regulation on Indian lands is both expected and encouraged. The Supreme Court, on the other hand, has hobbled the ability of many Indian nations to take full control over environmental affairs in their territories. In 1989, the Court held that when an Indian reservation has significant non-Indian ownership, the tribe is divested of authority to zone the non-Indian lands.¹

Land use planning and environmental regulation are, of course, different concepts. Land use planning is concerned primarily with actual use of the land, while environmental regulation is concerned with controlling the environmental damage resulting from use of the land.² Nonetheless, land use controls represent a prior restraint on pollution problems: separating, controlling, and preventing environmentally incompatible uses of neighboring lands.³ Accordingly, a government that has lost the authority to zone its lands—the authority to control land use planning—has lost as well the full capability to control environmentally harmful land uses. It can neither exclude those uses altogether, nor control the location of those uses that are permitted.

This is the position in which the Supreme Court has placed Indian tribes. Those tribes whose reservations contain significant non-Indian land ownership have lost the authority

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to regulate land use planning on the non-Indian lands. Consequently, those tribes have lost their first-line environmental defense: control of the location of environmentally harmful activities. Despite the broken promise of zoning, however, Indian nations are not bereft of all control. As the tribal role in environmental protection in Indian country

continues to expand, environmental regulation may hold an emerging promise for Indian tribes: the renewal of at least some measure of control over the use of the land itself.

This article will explore the nexus between land use planning and environmental regulation in Indian country.⁴ The first section will briefly review the background issues: tribal sovereignty and reservation land tenure. The second section will discuss land use planning in Indian country, and the third section will concentrate on environmental regulation. Finally, the fourth section will explore the effects of the discrepancy between the territorial reach of tribal zoning powers and the territorial extent of tribal environmental authority. The article will conclude that tribal environmental controls, which extend to the full reach of Indian country, hold a promise for the Indian nations—that land uses beyond their zoning control will at least be environmentally sound.

Sovereignty, Territory, and Land Tenure

The fundamental issues in land use and environmental controls in Indian country revolve around one basic question: who decides? Any land-based issue necessarily involves the often-competing jurisdictional roles of three distinct sovereigns—the tribe, the state, and the federal government. Moreover, these issues require a determination of the territorial extent of each sovereign's rights in Indian country, and that territorial reach in turn depends upon the particular land tenure configuration of the Indian country at issue.

Territory is the sine qua non of sovereignty. Although most sovereigns exercise complete authority within the confines of their territories, the Indian nations are unique. Despite their recognized status as sovereign governments, tribes often find the territorial extent of their sovereign powers curtailed. Depredations on the Indian estate over the history of the Republic have led to a modern land tenure system in much of Indian country that apports governmental authority by

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land ownership. The result is a checkerboard of sovereign territorial power.

Land tenure in Indian country

Governmental authority in Indian country is often dependent upon the intricacies of land tenure. Within tribal territories, there are four basic types of land ownership: tribal trust land, Indian allotments, Indian fee land, and non-Indian fee land. The rights of any sovereign to govern activities within Indian country may vary with the type of land on which those activities take place.

Originally, all Indian country was land set aside for the exclusive use and occupation of the tribe to whom the land belonged.⁵ Although Indian country was territory designated as homelands for the tribes,⁶ the lands were—and still are—held in trust status by the United States government. Indian land that is held in trust cannot be alienated, restricted, or encumbered without the consent of the United States.⁷ Today, virtually all tribal land of federally recognized Indian tribes is held in trust.

Not all trust land, however, is held for the tribes. There are also Indian allotments: lands held in trust for individual Indians. Allotted land held in trust for individuals is an outgrowth of the failed 19th century experiment in imposing private ownership on Indian peoples. In 1887, Congress enacted the General Allotment Act,⁸ which allotted to each Indian head of household a set number of acres,⁹ to be held in trust for twenty-five years and then patented in fee to the Indian owner.¹⁰ Although considerable land was allotted, and thousands of patents issued, subsequent remedial legislation extended the trust period on any allotment not yet patented.¹¹ Today the trust status of Indian allotments on which patents have not been issued is permanent.¹²

The General Allotment Act led to more than allotment to individual Indians, however. Once the allotment parcels were allocated, the remainder of the reservation territories was declared “surplus” land and opened to non-Indian settlement.¹³ In addition, when a patent in fee was issued to an Indian allottee, the land lost its trust status and became subject to encumbrance and alienation.¹⁴ For many Indian landowners, this meant the loss of the land to repossession or sale for back taxes; purchasers at these sales were almost inevitably non-Indian. Even though the Allotment Act was not extended to all tribes, and patents in fee did not issue after 1934,¹⁵ approximately two-thirds of all Indian lands were lost to non-Indian ownership.¹⁶

Although some tribes were unaffected by allotment, many others emerged from the allotment era with checkerboard reservations. On these reservations, a jumble of tribal trust

lands, Indian allotments, and non-Indian fee lands exists in a patchwork. This checkerboard of land tenure, in turn, gives rise to jurisdictional disputes. Although tribal governmental authority over Indians on Indian lands is unquestioned, states increasingly are gaining regulatory jurisdiction over non-Indians and non-Indian lands within Indian country.

Territory and sovereignty

Control over Indian land and resources implicates the jurisdictional claims of three sovereigns: the tribes, the states, and the federal government. To a different degree, each sovereign asserts its right to control decision making with respect to the land within Indian territory and its uses.

Federal authority within Indian country stems from Congress' plenary power over the Indian nations.¹⁷ Plenary power, grounded in the colonial doctrine of discovery¹⁸ and incorporated into the Constitution,¹⁹ permits Congress to exercise virtually unlimited power over the Indian nations, their lands, and their sovereignty.²⁰ Subject to the restraints of the takings clause of the Fifth Amendment²¹ and the general trust responsibility that the federal government has toward Indian lands,²² Congress is empowered to legislate specifically as to the Indian nations. Using this power, the federal government has exercised its authority over both Indian lands and resources.²³ Moreover, in addition to specific regulation of Indian lands and activities, federal laws with only general applicability often apply to Indians and Indian tribes.²⁴ For example, the federal government has extended application of general legislation such as pollution control laws to the territories of the Indian tribes.²⁵

Nonetheless, the paramount sovereign in Indian country is the tribe. Despite the doctrine of plenary power and the constraints that the Supreme Court persists in placing on tribal sovereign powers, Indian tribal sovereignty remains a recognized and abiding fact.²⁶ The Indian nations are sovereign governments, exercising inherent governmental authority over their peoples and their territories.²⁷ As to internal social and political affairs—matters involving tribal citizens and tribal land—the Indian tribes retain full sovereign powers to govern.²⁸

Nevertheless, Indian nations today exercise less than full sovereign powers. In the classic phrase, Indian tribes are “domestic dependent nations,”²⁹ subject to certain restrictions upon their national sovereignty. For nearly two hundred years these restrictions were narrowly defined: Indian tribes could not freely alienate their lands to, nor engage in foreign relations with, any power other than the United States.³⁰ In the last decade and a half, however, the Supreme Court has significantly curtailed the remaining sovereign powers of the

tribes. Increasingly, the Court has stripped tribes of their sovereign powers over non-Indian individuals, activities, and lands on the theory that tribes have been implicitly divested of inherent sovereignty as to non-Indians by virtue of their “dependent” status.³¹ Even these restrictions on the so-called external powers of tribal sovereignty were subject to significant limitations, however. Tribes retained the inherent governmental power to regulate non-Indians, non-Indian conduct, and non-Indian land when non-Indian activities threatened or directly affected tribal political or economic stability or the health or welfare of the tribe.³²

Emboldened by the doctrine of implicit divestiture of tribal authority, states increasingly asserted the right to control non-Indian activity in Indian country. In virtually all instances, the federal courts emphatically rejected state attempts to regulate non-Indian conduct on Indian lands within reservation boundaries.³³ State jurisdiction over non-Indians on non-Indian lands, however, has received a far more favorable reception.³⁴ Courts generally permit this degree of state authority when the courts perceive that the sovereign tribal interest in regulating the non-Indian conduct is minimal. The Supreme Court appears increasingly willing to find that the tribal governmental interest in comprehensive and long-range resource planning is insufficient to oust state authority. In two cases in the past decade, the Court has permitted state jurisdiction over non-Indians on non-Indian land even though that authorization has created checkerboard regulation of resources.³⁵

In tribal territories with significant non-Indian ownership, then, states are often permitted jurisdiction over non-Indian activities on fee lands, at least where the courts deem the tribal interest in regulating the non-Indians to be minimal. The resultant patchwork of governmental authority not only undermines the territorial sovereignty of the tribes, but is unwieldy and ultimately unworkable. Checkerboard jurisdiction over resource use discourages long-range planning, hinders comprehensive resource management, and breeds conflict and distrust.

Both tribes and states fear that resource control by the other will lead to the use of Indian country as the dumping ground for non-Indian environmental problems. States are concerned that Indian country provides industry with an opportunity to pollution shop: to choose the location with less

bureaucratic regulation, lower environmental standards, and fewer and lower taxes.³⁶ The fear of spillovers—harmful effects outside Indian country from activities within it—is the reason cited most often by states as a justification for state control. Yet “[s]pillovers spill over both ways,”³⁷ and the Indian nations in turn fear that relatively pristine, isolated Indian country will be subject to degradation from state activities located upwind and upstream of the reservations. The limited land area of most Indian country exacerbates this concern; any environmental harm from resource development, industrial pollution, and waste facilities may well affect most of a tribe’s territory.³⁸ Moreover, the tribes are concerned that remote and sparsely populated lands in Indian country will be favored by state planners as attractive locations for environmentally harmful activities.³⁹

The right to control environmental decision making in Indian country thus implicates the jurisdictional concerns of three governments. Although the Indian nations, both from a practical and a sovereignty perspective, are the optimum government to control and manage reservation lands and resources,⁴⁰ federal plenary power and state assertions of jurisdiction complicate any land-related issue. In particular, these jurisdictional claims have focused in recent years on the right to control conduct affecting the land itself. Moreover, the jurisdictional questions are complicated by land tenure. States assert a greater right to jurisdiction, at least as to non-Indians, in tribal territories with checkerboard land ownership. It was, for example, on a reservation with a patchwork pattern that the modern zoning issue arose.

The Broken Promise of Zoning

Prior to 1989, Indian nations opposed to non-Indian activity within tribal territories that would cause environmental damage had a relatively easy and straightforward approach: they could zone reservation lands to prevent, or at least to control the location of, environmentally harmful concerns. Tribal zoning authority stemmed from inherent tribal sovereignty and encompassed the activities of non-Indians on non-Indian fee land within Indian country. In 1981, in *Montana v. United States*,⁴¹ the United States Supreme Court reaffirmed the right of Indian tribes to regulate non-Indians, even on non-Indian fee land, when the non-Indian conduct “threatens or has some direct effect on the

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political integrity, the economic security, or the health or welfare of the tribe."⁴²

Under the *Montana* test, tribes were able to use their zoning powers to control activities harmful to the environment. Because zoning is the process by which a government determines how its territory may be used and ensures that neighboring uses are not destructive or even incompatible,⁴³ lower federal courts had recognized that zoning is a governmental power specifically designed to promote health and welfare.⁴⁴ As Justice Blackmun later observed, "[i]t would be difficult to conceive of a power more central to 'the economic security, or the health or welfare of the tribe,' than the power to zone."⁴⁵

Thus, application of the *Montana* test led courts to reaffirm tribal power to zone Indian country, in particular to control environmentally harmful uses. For example, the Colville Tribal Court preliminarily enjoined a non-Indian wood products company, doing business on non-Indian land, from expanding its dump site for wood product wastes.⁴⁶ The injunction was issued because the company refused to comply with the Colville Interim Land Use Development Ordinance. Similarly, a federal court preliminarily enjoined the construction and operation of asphalt and cement or concrete plants on non-Indian land within the Pinoleville Rancheria.⁴⁷ In that case, land within the reservation was owned in fee by non-Indians, who had obtained the county's authorization to operate the plants. The tribe, however, had adopted a land use ordinance prohibiting new industrial uses for one year. The court upheld the tribe's right to zone the reservation lands and found that "operation of the plants [would] threaten[] injury to the land, water, and air, as well as the health and welfare of the Indians of the Rancheria."⁴⁸ More specifically, the court noted evidence of the following environmental effects: increased siltation and turbidity in waters used as a spawning ground for fish and as a water source for the reservation; particulate and gaseous emissions that would violate state air quality standards; storage of oil and diesel fuel; and "strong and offensive" odors that would be detectable throughout the tribal territory; as well as increased traffic and noise levels.⁴⁹

Under the *Montana* analysis, courts upheld not only the general power of Indian nations to zone and regulate land use within the exterior boundaries of their reservations, but also the governmental right of tribes to impose related measures of

public health and safety on non-Indians on non-Indian land. Thus, lower federal courts approved measures such as the extension of tribal building, health, and safety codes⁵⁰ and sewer hook-up requirements⁵¹ to non-Indians on fee land.

In 1989, however, the United States Supreme Court shattered the ability of many Indian nations to control land use in their territories. In *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*,⁵² the Court gave county governments significant zoning power over reservation lands. The Court did not question the sovereign right of Indian nations to zone trust lands within reservation boundaries,⁵³ but limited tribal authority to zone non-Indian lands to those reservations or parts of reservations with "enough" non-Indian

land ownership. Where all or a part of an Indian reservation has significant non-Indian ownership, the state or county has land use control over all non-Indian land.

This checkerboard outcome was the result of the justices' inability to find a majority for any one point of view. The Court split 4-3-2: four justices found that the county had exclusive zoning authority over all non-Indian land within the reservation;⁵⁴ three justices found that the Indian tribe had exclusive zoning authority over all land within the reservation, regardless of ownership;⁵⁵ and two justices, the swing votes, found that the county's right to zone non-Indian land depended on the extent of non-Indian land ownership.⁵⁶

The structure of the Yakima Nation territory also contributed to the checkerboard result. The Yakima Reservation is divided roughly into two sections. The so-called "open" northeastern section contains three incorporated towns; nearly half the land in that section is owned in fee by non-Indians,⁵⁷ and Yakima Nation members comprise less than twenty percent of the population.⁵⁸ The western two-thirds of the reservation, however—the "closed" area—is primarily forest land and contains only a small percentage of non-Indian land.⁵⁹ The *Brendale* decision was based on consolidated cases brought by two owners of non-Indian fee land who wanted to develop their parcels in accordance with county zoning policies, but in opposition to Yakima zoning ordinances. One of the owners had land in the open section; the other's land was located in the closed section.

Justice Stevens, the author of the swing decision, found this distinction in land tenure controlling.⁶⁰ According to

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Stevens, the deciding issue is apparently the “essential character” of the land.⁶¹ When a region is “almost entirely . . . reserved for the exclusive benefit of the Tribe,”⁶² the tribe retains the power—through zoning—to “define the essential character of that area.”⁶³ When a “large percentage” of the land is owned in fee by non-Indians, however, the tribe has ceased to be able to “establish the essential character of the region.”⁶⁴ The region then has lost its “Indian” character and become “an integrated portion of the county,” which the county may zone as it sees fit.⁶⁵ In a masterpiece of understatement, Justice Stevens noted that in relying on the land’s essential character, he had not created “a bright-line rule.”⁶⁶

The Yakima Nation had argued, consistent with the opinions of multiple lower courts, that the Court’s own decision eight years earlier in *Montana* recognized the right of Indian tribes to regulate the activities of non-Indians on non-Indian land when those activities would “threaten[] or ha[ve] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁶⁷ Nothing has a more direct effect on a tribe’s economy, health, and welfare, the Yakima argued, than the use of the land.⁶⁸ Land use planning through zoning is a fundamental method for regulating activities that may have detrimental effects.⁶⁹

The Court, in response, severely undercut the *Montana* decision. The four-justice opinion, written by Justice White, gutted the *Montana* test on which tribes and lower courts had relied. Justice White noted that *Montana* said a tribe “may” retain authority to regulate non-Indians when effects on tribal health and welfare will result.⁷⁰ This one word, Justice White concluded, means that tribal authority does not extend to all conduct that threatens or even adversely affects tribal health and welfare.⁷¹ Instead, the impact of the non-Indian activity on non-Indian land “must be demonstrably serious and must imperil the political integrity, economic security or the health and welfare of the tribe.”⁷² Only then will tribal interests prevail.

For some tribes—like most in the Southwest, who escaped the ravages of allotment—the *Brendale* decision will have little or no effect on their ability to control land use and to directly control the siting of environmentally harmful activities anywhere within their territories. Because these Indian nations have no significant non-Indian land ownership within the boundaries of their territories, the tribes’ zoning and other land use decisions should be exclusive for all lands.

For most tribes, however, *Brendale* represents a serious threat to sovereignty. Where there is “enough” non-Indian land ownership in Indian country, the tribe may zone only the Indian land, and the county will zone all non-Indian land. The

tribe may, of course, appear before the county zoning commission on a use-by-use basis to plead its case and may appeal any adverse decision to the courts,⁷³ but it may not control the county’s decision as to non-Indian lands within the tribe’s reservation unless there is a “demonstrably serious” impact that “imperil[s]” the tribe or its members.⁷⁴ Even then, it is not clear that zoning power reverts to the tribe. Justice White’s opinion, rather, indicates that a demonstrably serious impact will still only entitle the tribe to “complain or obtain relief.”⁷⁵

Justice White, however, gave no indication of how or where a tribe should go to complain or obtain relief. If in fact the county land use decision will have a direct, immediate, and substantial impact on tribal health and safety—for example, if the county authorizes a hazardous waste site—may the tribe simply overrule the county’s decision? Must the tribe go to court for a determination? If so, which court—state, tribal, or federal—has primary authority to hear the dispute?

Once the tribe “complains” to the correct body, what relief will be available? What if the zoning board or the court determines that by conditioning a detrimental use it can lower the impact from “imperiling” the tribe to merely adversely affecting it? May the county or the court then condition the proposed use rather than disallow it? Alternatively, if the county or the court finds that the impact on tribal health and welfare is not substantial enough, is the tribe simply stuck with an environmentally harmful activity located in its territory? If land use planning were the only avenue of environmental defense available to tribes, the answer might well be yes.

The Emerging Promise of Environmental Regulation

While the Supreme Court was curtailing Indian tribal powers to regulate land use, Congress and the Environmental Protection Agency (EPA) were taking a far different approach to tribal powers to regulate the environment in Indian country. The emerging promise of environmental regulation is that it may accomplish more than the control of pollutants. It may in fact permit tribes caught in the *Brendale* net to reassert at least some degree of control over land use decisions within their sovereign territories.⁷⁶

Direct regulation of pollution sources

In 1983, President Reagan announced his Indian policy, with its major theme of government-to-government relations.⁷⁷ Unlike other federal agencies, the EPA took this presidential mandate and ran with it. The EPA promulgated an Indian policy of its own in 1984, which recognized Indian

governments “as sovereign entities with primary authority and responsibility” for environmental matters in Indian country.⁷⁸ The EPA pledged to “work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.”⁷⁹

True to its word, the EPA instituted a legislative agenda of amending the federal pollution control statutes, as they came up for reauthorization, to include provisions treating Indian tribes as states for purposes of the acts.⁸⁰ Amendments to the Safe Drinking Water Act⁸¹ and the Superfund Act⁸² in 1986, the Clean Water Act⁸³ in 1987, and the Clean Air Act⁸⁴ in 1990, generally provide for treating tribes as states for most or all of the programs authorized by the acts. Under these federal laws, authorized tribes may, for example, redesignate reservation air quality;⁸⁵ promulgate standards for reservation air quality, general water quality, and drinking water quality;⁸⁶ and issue permits for discharges to waters within the reservation.⁸⁷

These amendments leave the Resource Conservation and Recovery Act (RCRA),⁸⁸ which governs solid and hazardous waste management, as the only major federal pollution control act that does not yet include a tribes-as-states provision.⁸⁹ RCRA comes up for reauthorization next session, however, and all indications from the EPA and Congress are that it will be brought into line with the other federal environmental statutes.⁹⁰ In the meantime, the EPA has interpreted RCRA’s existing structure to preclude state authority in Indian country,⁹¹ and that interpretation has been upheld by the courts.⁹²

Territorial extent of tribal environmental regulation

Unlike tribal zoning authority, which the Supreme Court has restricted to areas of “essential Indian character,” tribal control of the environment extends to the full reach of “Indian country.” And Indian country includes *all* lands within the exterior boundaries of an Indian reservation, regardless of ownership.⁹³ Congress, the courts, and the EPA have all acknowledged that tribal environmental authority extends to the entire territory of the reservation.

In part, congressional recognition of the extent of tribal environmental authority has been implicit in the language of the various pollution control acts. Most of these acts expressly direct the EPA to treat tribes as states for most or all of the programs contained in the acts.⁹⁴ With the exception of “Indian lands,”⁹⁵ states have environmental regulatory authority over the full extent of their territories. If tribes are to be treated “as states,” then Indian tribes, by definition, must have environmental authority as well over the full extent of their tribal territories.

In some instances, moreover, Congress has made plain its intent. Both the Clean Water Act and the Clean Air Act, for example, expressly authorize tribal environmental control over all lands within the tribe’s Indian country. The recent Clean Air Act amendments provide that a tribal plan for implementation of air quality standards shall, unless expressly provided otherwise in the tribal plan, be applicable to “all areas” within the tribe’s reservation territory.⁹⁶ Similarly, the Clean Water Act provides for tribal authority throughout Indian country.⁹⁷ The Act also expressly provides that when an Indian tribe assumes program authority, it will exercise jurisdiction over water resources held by the tribe, by the United States in trust for the tribe, or “otherwise within the borders of an Indian reservation.”⁹⁸

In addition, the EPA has expressly adopted the congressional parameters of Indian country in its dealings with states and tribes under the federal pollution control acts. For example, the EPA regulations implementing the tribes-as-states provision of the Safe Drinking Water Act state that “Indian lands” include all Indian country.⁹⁹ The EPA, moreover, has applied this definition to exclude state authority within reservation boundaries even in the absence of a tribes-as-states provision in the governing act. Since at least 1980, the EPA has asserted continually that it, not the states, has authority under RCRA to regulate on “Indian lands.”¹⁰⁰ And for RCRA purposes, the Agency defines “Indian lands” as Indian country.¹⁰¹

In *Washington Department of Ecology v. EPA*,¹⁰² the federal court declared this definition a “reasonable marker” of the territorial reach of tribal environmental authority.¹⁰³ Despite this plain statement, the intent of the court is somewhat ambiguous. The State of Washington asserted only its right to regulate on Indian-owned lands, and the court specifically noted that it was not deciding whether a state could take RCRA jurisdiction over non-Indians within Indian country.¹⁰⁴ The EPA, however, expressly rejected the concept of environmental checkerboarding when Washington State subsequently petitioned for RCRA authority over non-Indian activities within Indian country.¹⁰⁵ The Agency reaffirmed the territorial basis of authority: the state may regulate outside Indian country, and the EPA—until RCRA is amended to permit treating tribes as states—will regulate within Indian country, regardless of the status of the land or the person conducting the activities.

Thus, tribal environmental authority necessarily extends to all lands, persons, and sources within Indian country. Both Congress and the EPA have expressly provided for the full territorial extent of tribal environmental control, and the courts have declared this geographic demarcation to be

reasonable. Moreover, the EPA has specifically rejected a patchwork approach to environmental regulation, with the tribe regulating Indian activities and the state regulating non-Indian activities. Not only would that approach cause a host of practical implementation problems, but it would necessarily interfere with the federal statutory schemes for pollution control. If, as Congress has clearly indicated, the EPA and the Indian nations retain environmental jurisdiction over all lands within Indian country, then state authority over non-Indian persons on those lands would be inconsistent with the federal scheme. The state could not regulate non-Indian environmental activities without necessarily infringing on federal and tribal environmental regulation of the land.

Realizing Environmental Values in Indian Country

An anomaly of serious consequence thus has developed in Indian country. At a time when Indian governmental control of environmental pollution is increasingly recognized and promoted by Congress and the EPA, the Supreme Court has severely curtailed tribal authority over land use decisions. Tribal environmental control has been expressly extended to all lands and activities within Indian country; yet the Court has restricted tribal land use control on many reservations to lands of "essential Indian character."¹⁰⁶

The Supreme Court's zoning decision in *Brendale* was a direct attack on Indian tribal sovereignty. No government can engage fully in long-range planning and development when it does not have control over the very use to which the land within its territory is put. In much of Indian country presently, counties are free to permit land uses on non-Indian land that are incompatible with tribal goals and needs, including uses that are environmentally harmful. The *Brendale* decision limits the tribes' ability to oppose such uses.

Nevertheless, the Indian nations now possess another weapon with which to control environmentally harmful land uses: environmental regulation under the federal pollution control acts. Although a tribe may not be able to prevent use of non-Indian land unless the tribe can prove a demonstrably serious impact that imperils the tribe,¹⁰⁷ it may nonetheless be able to control at least the environmental damage that might otherwise result.

Brendale itself provides an example. In that case, an owner of non-Indian property proposed to develop a twenty-acre site into ten summer cabin sites. The district court found

that this proposed development

would disrupt soil conditions; cause a deterioration of air quality; change drainage patterns; destroy some trees and natural vegetation; cause a deterioration of wildlife habitat; alter the location and density of human population in the area; increase traffic, light, and the use of fuel wood; and require added police and fire protection as well as new systems for waste disposal.¹⁰⁸

If a development such as this were approved by a county in an area within Indian country where the county had authority to zone, not all the environmental damage could be controlled. Adverse environmental effects such as increased housing density and increased traffic can only be controlled through careful and comprehensive land use planning.

An Indian nation with regulatory authority under the federal pollution control acts, however, can control some of the environmental damage. The tribe can require that any activity approved for non-Indian land be environmentally sound. For example, Indian tribes long have had the authority to redesignate the air quality of a reservation to preserve pristine air quality.¹⁰⁹ In 1990 Congress extended tribal authority under the Clean Air Act beyond the power to redesignate; tribes now are authorized to develop tribal plans for implementing, maintaining, and enforcing air quality standards.¹¹⁰ This authority surely would permit a tribe to regulate a proposed activity on non-Indian land in Indian country that would "cause a deterioration of air quality" below that permitted for the reservation airshed.

Similarly, tribes are empowered under the Clean Water Act to promulgate water quality standards for the waters of the reservation¹¹¹ and to regulate discharges of pollutants and dredge and fill materials into those waters.¹¹² Using the federal authority to establish water quality standards, Indian nations can set the level of pollutants that will be tolerated in the waters of the tribes' territories.¹¹³ Subsequently, through the issuance of permits for discharges into those waters, and through conditions placed on permit holders, the tribes can maintain and enforce those water quality standards. Moreover, permit authority for dredge and fill materials reaches activities harmful to wetlands, thus allowing tribes the opportunity to control or at

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least to minimize the environmental harm to Indian country wetlands.¹¹⁴

As tribes begin to take regulatory authority under the federal pollution control acts, then, their ability to impose environmental restrictions on non-Indian development of non-Indian land within Indian country should increase significantly. Tribal program authority under statutes such as the Clean Air Act and the Clean Water Act should permit tribes to require, at a minimum, that non-Indian land use accord with tribal environmental values.

Moreover, all indications are that the Resource Conservation and Recovery Act will be amended next session to include the tribes-as-states provisions now found in most of the other federal pollution control acts.¹¹⁵ Treatment as states under RCRA may well empower tribes to exercise more direct control over proposed uses of non-Indian lands within reservation boundaries. Under RCRA program authority, for example, a tribal permit should be required for the siting of any hazardous waste facility within Indian country.¹¹⁶ Thus, at least where the proposed use of Indian country is hazardous, some measure of land use decision-making will be returned to the government whose territory it is.

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Conclusion

Environmental regulatory authority is not a panacea for the loss of land use controls. In most instances, environmental regulation will not permit tribes to wrest control of the reservation territory back from county zoning boards. What environmental regulatory authority will do, however, at least in some instances, is return to tribes some measure of decision-making as to the uses

made of their territories.

Environmental regulation allows less than full decision-making. Tribes may not, under environmental laws, be able to control the existence or location of incompatible land uses. But tribes will be able to condition those uses to impose environmental restrictions on potentially harmful non-Indian activities and uses. At a minimum, the Indian nations, having lost the authority to control land use, should nonetheless be able to oversee incompatible uses so that tribal environmental values are preserved. Environmental regulatory authority should permit Indian nations to re-instill tribal environmental goals and values into land use activities in Indian country.

Notes

1. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 109 S. Ct. 2994 (1989).

2. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987).

3. See Gelpe, *Organizing Themes of Environmental Law*, 16 WM. MITCHELL L. REV. 897, 910 (1990) ("One of the long standing mechanisms for controlling pollution problems has been to prevent them by prior planning."); Malone, *The Necessary Interrelationship Between Land Use and Preservation of Groundwater Resources*, 9 UCLA J. ENVTL. L. & POL'Y 1, 60-61 (1990) (noting that "land use restrictions are the most stringent means of groundwater protection").

4. "Indian country" is defined at 18 U.S.C. § 1151 (1988):

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits

of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

This paper will use the terms "Indian country", "Indian lands", and "tribal territories" interchangeably.

5. See, e.g., Treaty with the Sioux (Treaty of Fort Laramie), Apr. 29, 1868, art. 2, 15 Stat. 635, 636 ("set apart for the absolute and undisturbed use and occupation"), reprinted in 2 INDIAN AFFAIRS: LAWS AND TREATIES 998 (C. Kappler ed. 1904) [hereinafter Kappler]; Treaty with the Yakima, June 9, 1855, art. 2, 12 Stat. 951, 952 ("set apart . . . for the exclusive use and benefit"), reprinted in Kappler, *supra*, at 699.

6. See, e.g., Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868, art. 4, 15 Stat. 673, 674 (territory set aside as a "permanent home"), reprinted in Kappler, *supra* note 5, at 1021.

7. Trade & Nonintercourse Act of 1834, 25 U.S.C. § 177 (1988); see also 25 C.F.R. § 1.4(a) (1990).

8. Ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C. (1988)).

9. 25 U.S.C. § 331 (1988).

10. *Id.* § 348.

11. Indian Reorganization Act of 1934, ch. 576, § 2, 48 Stat. 984 (codified at 25 U.S.C. § 462 (1988)).
12. *Id.*
13. 25 U.S.C. § 348.
14. *Id.*
15. Indian Reorganization Act of 1934, § 1, 25 U.S.C. § 461 (1988).
16. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 614 (R. Strickland ed. 1982).
17. *See, e.g.*, National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985).
18. Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).
19. The primary constitutional underpinnings of the doctrine of plenary power are said to be the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; the Treaty Power, U.S. CONST. art. II, § 2, cl. 2; and the Supremacy Clause, U.S. CONST. art. VI, § 2. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973).
20. *See generally* Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).
21. Treaty-protected rights may not be taken by the federal government without payment of just compensation, although aboriginal rights have no such protection. *See* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (treaty-recognized rights); Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (aboriginal rights).
22. The trust doctrine, derived from the guardian-ward analogy first articulated by Chief Justice Marshall in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831), in theory holds the federal government to fiduciary standards in its dealings with Indian nations. *See, e.g.*, White Mountain Apache Tribe v. United States, 11 Cl. Ct. 614, 681 (1987) (awarding tribe more than five million dollars for federal mismanagement of tribal rangeland and forest resources), *later proceeding*, 20 Cl. Ct. 371 (1990). *See generally* Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975); Newton, *Enforcing the Federal-Indian Trust Relationship after Mitchell*, 31 CATH. U.L. REV. 635 (1982).
23. *See, e.g.*, Trade & Nonintercourse Act, 25 U.S.C. § 177 (1988) (providing that Indian lands may not be alienated or encumbered without consent of the federal government); 25 U.S.C. §§ 391-412 (1988) (governing leasing of both allotted and unallotted lands for mining and timber harvesting).
24. This doctrine derives from the case of Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960). The *Tuscarora* rule provides that laws of general applicability apply to Indians absent a treaty or federal statute to the contrary.
25. *See* Phillips Petroleum Co. v. EPA, 803 F.2d 545 (10th Cir. 1986) (Safe Drinking Water Act); Blue Legs v. Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989) (Resource Conservation and Recovery Act citizen suit provisions).
26. Just this term, the Supreme Court affirmed once again the sovereign status of Indian nations when it recognized tribal sovereign immunity from suit. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 111 S. Ct. 905 (1991).
27. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983). *See also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).
28. *See Mescalero Apache Tribe*, 462 U.S. at 331-32; White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980).
29. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).
30. *Id.* at 17-18; *Worcester*, 31 U.S. (6 Pet.) at 559.
31. *See* Montana v. United States, 450 U.S. 544 (1981) (no tribal jurisdiction to regulate non-Indian hunting and fishing on non-Indian lands within Indian country); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (no tribal jurisdiction over non-Indians who commit crimes in Indian country). *See also* Brendale v. Confederated Bands & Tribes of Yakima Indian Nation, 109 S. Ct. 2994 (1989) (discussed *infra* at text accompanying notes 52-75).
32. *Montana*, 450 U.S. at 566.
33. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (rejecting state authority over non-Indian hunting and fishing on tribal lands).
34. *See, e.g.*, *Montana*, 450 U.S. 544 (permitting state jurisdiction over non-Indian hunting and fishing on non-Indian lands within reservation boundaries).
35. *Id.* (fish and game management); *Brendale*, 109 S. Ct. 2994 (land use planning) (discussed *infra* at text accompanying notes 52 - 75).
36. Letter from Ken Eikenberry, Attorney General of Washington, to Edwin Meese, United States Attorney General, at 2-3 (Dec. 9, 1987).
37. Barsh, *Is There Any Indian "Law" Left? A Review of the Supreme Court's 1982 Term*, 59 WASH. L. REV. 863, 875 (1984). Some measure of this concern may be alleviated if the Supreme Court chooses to follow the Tenth Circuit in Oklahoma v. EPA, 908 F.2d 595 (10th Cir. 1990) (holding that on a shared watercourse, the upstream state may only permit discharges that do not adversely affect the downstream state's water quality standards) *cert. granted sub nom.* Arkansas v. Oklahoma, 59 U.S.L.W. 3672 (1991).
38. Governing Council v. Mendocino County, 684 F. Supp. 1042, 1045 & n.2 (N.D. Cal. 1988) (noting that the small size of the reservation—about 100 acres—would heighten the interests of the tribe in controlling environmentally harmful activity, and that operation of asphalt and cement or concrete plants within reservation borders would produce strong, offensive odors detectable throughout the reservation). *See also* Barsh & Henderson, *Tribal Administration of Natural Resource Development*, 52 N.D.L. REV. 307, 333 (1975).
39. *See* COUNCIL OF ENERGY RESOURCE TRIBES, INVENTORY OF HAZARDOUS WASTE GENERATORS AND SITES ON SELECTED INDIAN RESERVATIONS 2, 24 (1985) (noting that Indian lands are convenient locations for both the legal disposal of industrial wastes and for midnight dumping). Indian country increasingly is being targeted as the prime location for waste dumps, if only by waste management companies. *See generally* Waste Management Industry Turns to Indian Reservations as States Close Landfills, 21 Env't Rep. (BNA) (Env't Rep. Cas.) 1607 (Dec. 28, 1990) [hereinafter *Waste Management*]. The use of Indian country as the nation's dump site, however, has divided tribes, with a few tribes actively seeking

contracts to dispose of hazardous wastes. See *id.* at 1610 (describing the Kaibab Paiute Tribe's negotiations for a hazardous waste incinerator and ash landfill); *State Asks Interior Not to Declare Land Part of Reservation in Waste Site Dispute*, 21 Env't Rep. (BNA) (Env't Rep. Cas.) 1945 (March 1, 1991) [hereinafter *Waste Site*] (describing Choctaw Tribe of Mississippi's efforts to construct an industrial waste landfill on site owned by tribe); *Tribe Says BIA Stalling Contract for Waste*, Tulsa World, Feb. 22, 1991, at B-13 (describing Pawnee accusations that the Bureau of Indian Affairs is deliberately stalling a municipal waste contract for tribal lands). Many other Indian nations, however, are adamantly unwilling to become the forgotten solution to the non-Indian world's waste problem. See *Waste Management*, *supra*, at 1609 (describing the successful efforts of Navajo residents in the Dilcon, Arizona, area to block a hazardous waste incinerator). Note, however, that the tribal council vote rejecting the project was 9-8. *Id.*

40. For an analysis that states have no jurisdictional authority over environmental concerns in Indian country, see Royster & Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581 (1989).

41. 450 U.S. 544 (1981).

42. *Id.* at 566. The Court also upheld the right of tribes to regulate non-Indians on non-Indian land when the non-Indian enters into a consensual relationship with the tribe or its members. Non-Indians who enter into such consensual relationships—usually business dealings—are subject to regulation “through taxation, licensing, or other means.” *Id.* at 565.

43. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 387 (1926).

44. See *Governing Council v. Mendocino County*, 684 F. Supp. 1042, 1044 (N.D. Cal. 1988) (quoting *Confederated Tribes & Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529, 534 (9th Cir. 1987)). The Ninth Circuit's decision in *Whiteside* was reversed in part by the Supreme Court in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 109 S. Ct. 2994 (1989), discussed *infra* at text accompanying notes 52-75.

45. *Brendale*, 109 S. Ct. at 3022 (Blackmun, J., dissenting) (citation omitted). See also *id.* at 3009-10 (Stevens, J.).

46. *Colville Confederated Tribes v. Cavenham Forest Indus.*, 14 Indian L. Rep. (Am. Indian Law. Training Program) 6043 (Colv. Tr. Ct. 1987).

47. *Mendocino County*, 684 F. Supp. 1042.

48. *Id.* at 1047.

49. *Id.* at 1045.

50. *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982).

51. *Lummi Indian Tribe v. Hallauer*, 9 Indian L. Rep. (Am. Indian Law. Training Program) 3025 (W.D. Wash. 1982).

52. 109 S. Ct. 2994 (1989). For general commentary on the *Brendale* decision, see Note, *Indian Civil Jurisdiction Over Land Held in Fee by Non-Indians: A Judicial Challenge in Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 7 COOLEY L. REV. 63 (1990); Note, *Solutions for Uneasy Neighbors: Regulating*

the Reservation Environment after Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 65 WASH. L. REV. 417 (1990).

53. *Brendale* concerned conflicts over the use of non-Indian fee land only. All the justices agreed, and the county did not contest, that the Yakima Nation retained complete and exclusive land use authority over all trust lands. See *Brendale*, 109 S. Ct. at 3015 (Stevens, J., concurring). The issue of fee lands within reservation boundaries owned by tribal members was not raised in the case, and thus has not been decided.

54. *Id.* at 2999 (White, J.) (the opinion of the court on non-Indian lands located in areas of the reservation with significant non-Indian ownership).

55. *Id.* at 3017 (Blackmun, J., concurring in part and dissenting in part).

56. *Id.* at 3009 (Stevens, J.) (the opinion of the court on non-Indian lands located in areas of reservations with no significant non-Indian land ownership).

57. *Id.* at 3000 (White, J.).

58. *Id.* at 3016 (Stevens, J.).

59. *Id.* at 3012. Justice Stevens noted that most of the fee land was owned by lumber companies. Excluding that land, less than one percent of the closed area was owned in fee. In addition, there were no permanent residents in the closed area. *Id.*

60. *Id.* “What is important is that the Tribe has maintained a defined area in which only a very small percentage of the land is held in fee and another defined area in which approximately half of the land is held in fee.” *Id.* at n.2.

61. *Id.* at 3013.

62. *Id.* at 3014.

63. *Id.* at 3013.

64. *Id.* at 3016.

65. *Id.*

66. *Id.* at 3017.

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

68. See *Brendale*, 109 S. Ct. at 3022 (Blackmun, J., dissenting), 3007 (White, J.).

69. *Id.* at 3009-10 (Stevens, J.).

70. *Id.* at 3007 (White, J.).

71. *Id.*

72. *Id.* at 3008.

73. *Id.*

74. *Id.*

75. *Id.*

76. This approach, however, is not without fundamental difficulties. The decisions of the United States Supreme Court for the most part curtail the sovereign powers of the Indian nations over non-Indians. The Court has found that these inherent powers have been implicitly divested as inconsistent with tribal status as dependent sovereigns. See, e.g., *id.* at 3005-06 (White, J.). Any powers that have subsequently been restored by Congress and the EPA, through measures such as the pollution control acts, are delegated authority—that is, authority to operate under federal law—rather than a restoration of inherent tribal powers. Although in the short term delegated authority serves as damage control for the effects of the

Supreme Court's decisions, in the long term only recognition of inherent sovereignty will suffice. The dramatic historical shifts in federal policy towards the Indian nations teaches nothing if not that federal policy will change. Any delegation of federal power to the tribes, therefore, ultimately is not secure.

77. Statement by the President on Indian Policy, 19 Weekly Comp. Pres. Docs. 98 (Jan. 24, 1983). Although President Bush has not announced a formal Indian policy, he recently met with tribal leaders and promised that "he would issue a formal statement supporting the 'government-to-government' relationship that acknowledges [that] tribes function within their reservation boundaries as independent nations." USA Today, Apr. 18, 1991, at 3A.

78. U.S. ENVTL. PROTECTION AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS 2 (1984).

79. *Id.*

80. In fact, the EPA and Congress are not confining their attentions to existing environmental laws, but are demonstrating a general regard for the tribal role in all environmental issues within Indian country. See Oil Pollution Act of 1990, Pub. L. No. 101-380, § 1006(a)(3), 104 Stat. 484, 494 (codified at 33 U.S.C. § 2706(a)(3)), which gives tribes the same rights with respect to tribal natural resources as states have with respect to state natural resources.

Nonetheless, the rights of those Indian nations that may be treated as states are limited by statutory language. The provisions of the Safe Drinking Water Act are typical: the tribe must be federally recognized; it must have a governing body that carries out "substantial governmental duties and powers;" the functions to be carried out under the act must be within the tribe's jurisdiction and authority; and the tribe must be "reasonably expected to be capable" of carrying out those functions in accordance with the federal act. Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, § 1451(b)(1), 100 Stat. 642, 665 (codified at 42 U.S.C. § 300j-11(b)(1) (1988)). Whether a tribe is reasonably capable is a decision within the judgment of the EPA Administrator. § 300j-11(b)(1)(C). When the Administrator determines that a tribe is not reasonably capable of directly regulating pollution in its territory, the EPA generally has authority to provide "other means" for achieving the purposes of the particular act. See, e.g., Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 107(d)(4), 104 Stat. 2399, 2464 (to be codified at 42 U.S.C. § 7601(d)(4)). Because the EPA assumes that states lack authority on Indian lands absent an affirmative grant of authority from Congress, the "other means" should be federal authority and enforcement. See *id.*

81. Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, § 302(a), 100 Stat. 642, 665 (codified at 42 U.S.C. § 300j-11(a) (1988)).

82. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 207(e), 100 Stat. 1613, 1706 (codified at 42 U.S.C. § 9626 (1988)) (amending Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675). See generally Berlant, *Responding to Dangers Posed by Hazardous Substances: An Overview of CERCLA's Liability and Cost Recovery Provisions as They Relate to Indian Tribes*, 15 AM.

INDIAN L. REV. 279 (1991).

83. Clean Water Act Amendments of 1987, Pub. L. No. 100-4, § 518, 101 Stat. 7, 77 (codified at 33 U.S.C. § 1377 (1988)).

84. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 107(d), 104 Stat. 2399, 2464 (to be codified at 42 U.S.C. § 7601(d)).

85. Clean Air Act, 42 U.S.C. § 7474(c) (1988).

86. Clean Air Act Amendments of 1990, Pub. L. No. 101-549 § 107(c), 104 Stat. 2399, 2422 (to be codified at 42 U.S.C. § 7410(o)) (air quality standards); Clean Water Act, 33 U.S.C. § 1377(e) (1988) (water quality standards); and Safe Drinking Water Act, 42 U.S.C. § 300j-11(a) (1988) (drinking water quality standards).

87. Clean Water Act, 33 U.S.C. § 1377(e).

88. 42 U.S.C. §§ 6901-6991 (1988).

89. RCRA does, however, include Indian tribes among the "persons" subject to the Act's provisions. Under the Act, a "person" includes a municipality, 42 U.S.C. § 6903(15) (1988), and a municipality includes an Indian tribe. § 6903(13). As one consequence, Indian nations are subject to suit under RCRA's citizen suit provisions. See *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989).

90. See *Waste Management*, *supra* note 39, at 1610.

91. Washington; Phase I and Phase II, Components A and B, Interim Authorization of the State Hazardous Waste Management Program, 48 Fed. Reg. 34,954, 34,957 (1983) ("EPA concludes that RCRA and the act of authorization [of a state program] do not convey to the State any authority relative to Indian lands jurisdiction. States must independently obtain such authority expressly from Congress or by treaty."). See also 51 Fed. Reg. 3779, 3780; 3782, 3782-83; 3783, 3784; 36,804, 36,805 (1986) (expressing the same conclusion as to Oregon, Washington, Wisconsin, and Michigan respectively).

Despite the EPA's express intent to retain full RCRA authority on Indian lands, at least until RCRA is amended to treat tribes as states and authority can pass to the tribes, both California and Mississippi have recently indicated their intent to assume control over hazardous waste sites on Indian lands. See Cal. A.B. 3477, Reg. Sess. (1990), discussed in *Waste Management*, *supra* note 39, at 1608-09 (the law passed both houses, but was vetoed by the governor; nothing daunted, supporters introduced Cal. A.B. 240 this session); S.B. 2984 Reg. Sess., 1991, amending the Mississippi Regional Solid Waste Disposal Authority Act, discussed in *Waste Site*, *supra* note 39, at 1946 (signed into law April 19, 1991). Because a state cannot give itself jurisdiction over Indian country, and because the EPA will not approve state RCRA authority on Indian lands without a showing of such jurisdiction, the states' efforts—even if enacted into law—would be a nullity.

92. *Washington Department of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985). See the discussion *infra* at text accompanying notes 102-05.

93. In addition, Indian country includes Indian allotments and dependent Indian communities not located within the exterior boundaries of any reservation. 18 U.S.C. § 1151 (1988). For the full text of the statutory definition, see *supra* note 4.

94. See *supra* notes 80-87 and accompanying text.

95. See *infra* note 101 and accompanying text for an explanation of the EPA's interpretation of "Indian lands."
96. Pub. L. No. 101-549, § 107(c), 104 Stat. 2399, 2464 (1990) (to be codified at 42 U.S.C. § 7410(o)).
97. The Act defines an Indian "reservation" as all lands within Indian country. 33 U.S.C. § 1377(h)(1) (1988).
98. 33 U.S.C. § 1377(e)(2).
99. 40 C.F.R. § 144.3 (1990).
100. See 45 Fed. Reg. 33,066, 33,378 (1980); 51 Fed. Reg. 3782, 3783 (1986) (rejecting Washington State's assertion of RCRA authority on Indian lands).
101. 51 Fed. Reg. 3782, 3783 (1986). The EPA's definition of Indian country is somewhat abbreviated from the statutory definition, see *supra* note 4, but includes all the essential elements: "EPA view[s] 'Indian lands' to mean all lands (including fee lands) within Indian reservations, dependent Indian communities, and Indian allotments to which Indians hold title."
102. 752 F.2d 1465 (9th Cir. 1985).
103. *Id.* at 1467 n.1.
104. *Id.* at 1467-68.
105. 51 Fed. Reg. 3782, 3783 (1986). See also OFFICE OF FEDERAL ACTIVITIES, U.S. ENVIRONMENTAL PROTECTION AGENCY, ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN LANDS: EPA INDIAN WORK GROUP DISCUSSION PAPER 91 (1983) (noting the "practical difficulties of regulating the environment with two different sets of rules based on racial lines—Indians and non-Indians").
106. See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 109 S. Ct. 2994, 3013, 3016 (1989) (Stevens, J.).
107. *Id.* at 3008 (White, J.).
108. *Id.* at 3002 n.5 (White, J.). In fact, this use was proposed in the so-called "closed" area, and thus would be barred under the *Brendale* decision as inconsistent with Yakima Nation land use plans. Yet the type of use proposed is nonetheless illustrative.
109. Clean Air Act, 42 U.S.C. § 7474(c) (1988). Even before Congress enacted statutory authority for tribal redesignation of air quality, EPA had approved it. See *Nance v. EPA*, 645 F.2d 701 (9th Cir.), *cert. denied sub nom.* *Crow Tribe of Indians v. EPA*, 454 U.S. 1081 (1981).
110. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 107(c), 104 Stat. 2399, 2464 (to be codified at 42 U.S.C. § 7410(o)).
111. 33 U.S.C. § 1377(e) (1988), referencing 33 U.S.C. § 1313 (water quality standards and implementation plans). In 1988, for example, the EPA proposed to adopt the Colville Confederated Tribes' water quality standards as federal water quality standards for the Colville Reservation. 53 Fed. Reg. 26,968 (1988) (to be codified at 40 C.F.R. pt. 131) (proposed July 15, 1988).
112. 33 U.S.C. § 1377(e), referencing 33 U.S.C. § 1342 (national pollutant discharge elimination system permits) and § 1344 (dredge and fill permits). Tribes are also authorized to develop management programs for nonpoint source pollution of waters within Indian country. 33 U.S.C. § 1377(e), referencing 33 U.S.C. § 1329.
113. The Clean Water Act directs that EPA shall "provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water." 33 U.S.C. § 1377(e). This mechanism should serve to protect tribes against lower water quality standards adopted by upstream states (and vice versa). A similar result, without an explicit statutory basis, was reached by the Tenth Circuit in *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990), *cert. granted sub nom.* *Arkansas v. Oklahoma*, 59 U.S.L.W. 3672 (1991).
114. 33 U.S.C. § 1344.
115. See *supra* note 90.
116. See 42 U.S.C. § 6925 (1988) (permits for treatment, storage, or disposal of hazardous waste) and § 6926 (authorized state hazardous waste programs).