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The Effect of the EPA's Designation of Tribes As States on the Five Civilized Tribes in Oklahoma

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THE EFFECT OF THE EPA'S DESIGNATION OF TRIBES AS STATES ON THE FIVE CIVILIZED TRIBES IN OKLAHOMA

John L. Williams†

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I. INTRODUCTION

In recent years, Americans have become increasingly aware of the pressing environmental concerns that face our nation. To address these concerns, the federal government enacted a myriad of environmental legislation. This legislation establishes maximum pollution levels that state implementation plans (SIPs) must meet. SIPs, however, may set more stringent pollution levels than the federal maximums.

The federal government also granted Native American tribal governments the option to develop tribal implementation plans (TIP's)

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for the lands within their reservation boundaries. The history of Eastern Oklahoma's Five Civilized Tribes, however, resulted in the creation of a distinct legal status for these tribes which may affect their ability to develop TIP's. The Five Civilized Tribes possess fee ownership of their tribal lands rather than reservations. Therefore, determining the impact of the Tribes-as-States provisions in the environmental legislation on the Five Civilized Tribes requires special analysis. This paper explains the applicability of the Tribes-as-States provisions on the Five Civilized Tribes by explaining the reservation status of these Tribes; how reservation status allows the Tribes to enact binding environmental legislation; and the unique opportunity tribal regulation presents for the Native and non-Native Americans of Eastern Oklahoma.

II. HISTORY

The move toward tribal recognition in environmental matters began in 1983, with President Reagan's Indian Policy Statement. This policy explicitly recognized the tribal governments and promised a government-to-government relationship between the federal government and the Indian tribes. Consequently, the Indian Policy Statement endorsed tribal self-government and tribal economic self-sufficiency.¹

In furtherance of President Reagan's new policy, the EPA presented its Indian Policy in November of 1984. It recognized tribal governments' role in environmental areas.² In November of 1985, the EPA adopted the Interim Strategy for the Implementation of the EPA Indian Policy. The strategy recognized that "forcing tribal governments to act through state governments that cannot exercise jurisdiction over [Indian Tribes] is not an effective way of implementing programs overall, and certainly in opposition to the Federal Indian Policy."³ These policy statements indicated that the EPA placed primary authority for the regulation of the Indian environment within the control of the tribal governments rather than within the control of the state governments.

1. Reagan Administration Indian Policy Initiatives, 19 WEEKLY COMP. PRES. DOC. 98, 99 (Jan. 24, 1983).

2. WILLIAM D. RUCKLESHAUS, EPA POLICY FOR THE IMPLEMENTATION OF ENVIRONMENTAL PROGRAMS ON INDIAN LANDS (Nov. 8, 1984).

3. Richard A. Du Bey & Grant D. Parker, *Protection of Reservation Environmental Air and Water Resources Under Federal Law*, INDIAN LAW SYMPOSIUM ON MANAGING THE RESERVATION ENVIRONMENT, April 1990.

As a matter of policy, the EPA adopted the "Indian Country" definition found in federal statutes for Indian criminal matters to establish jurisdictional boundaries for tribal regulation of the Indian environment. "Indian Country" is defined as:

- (a) all land with the limits of any Indian reservation under the jurisdiction of the United States Government,
- (b) all dependent Indian communities and
- (c) all Indian allotments to which Indian titles have not been extinguished.⁴

The United States Supreme Court generally recognizes that "Indian Country" is beyond the legislative and jurisdiction of state governments.⁵

Originally, Oklahoma denied the existence of Indian Country under the authority of the Five Civilized Tribes.⁶ The Oklahoma statehood enabling act, however, reserved authority over the Indian tribes to the federal government.⁷ Further, recent court decisions indicate the existence of Indian Country in Eastern Oklahoma.⁸

At first, the major federal environmental statutes failed to contain primary enforcement provisions for Indian land. Congress later amended these statutes to enforce the federal commitment to tribal self-control through Tribes-as-State provisions. These amendments treat tribes as states and require that all tribal environmental standards meet minimum federal standards. Each federal statute covering a specific aspect of the environment now contains its own tribe-as-states provision. As a result, the effect of each statute depends on the wording of each statute.

4. 18 U.S.C. § 1151 (1979).

5. The United States Constitution gives exclusive jurisdiction over Indian affairs to Congress. U.S. CONST. ART. I, § 8. It is also important to note that both allotted lands and trust lands may be classified as Indian Country. *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665, 669 (10th Cir. 1980).

6. FELIX S. COHEN, *HANDBOOK ON FEDERAL INDIAN LAW* 774 (1982 ed.).

7. *Richardson v. Malone*, 762 F. Supp. 1463, 1465 (N.D. Okla. 1991) (citing Act of June 16, 1906, ch. 3335, 34 Stat. 267).

[T]he inhabitants . . . of the area . . . constituting the Territory of Oklahoma and the Indian Territory. . . may adopt a constitution and become the state of Oklahoma. . . Provided, that nothing in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the . . . United States to make any law or regulation respecting such Indians.

Id.

8. *Muskogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1466 (D.C. Cir. 1988); *Housing Auth. of the Seminole Nation v. Harjo*, 790 P.2d 1098, 1104 (Okla. 1990).

The Safe Water Drinking Act's (SWDA) Tribe-as-States amendment authorizes the EPA to delegate enforcement responsibility to the tribal governments for regulation of their public drinking water systems and protection of underground drinking water resources from potentially dangerous injection. The Tribes-as-States provisions in this act also provides funding for tribal implementation.⁹ The provision, however, imposes organizational and administrative requirements on tribal governments that must be met before a tribe may acquire control.¹⁰

The Clean Water Act's (CWA) Tribes-as-States amendment designates tribal control over water resources for specified purposes. Tribes qualify for treatment as states for purposes of grants for pollution control programs, grants for the construction of treatment facilities, establishment of water quality standards and tribal implementation plans, implementation of permit systems, and participation in the clean lakes program.¹¹ The tribes also gained tribes-as-states status for purposes of section 1251(g) of the CWA thus gaining

9. Safe Water Drinking Act of 1986, Pub. L. No. 99-339, 100 Stat. 665 (codified as amended at 42 U.S.C. § 300j-11(a) (1988)) provides:

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

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

10. Safe Water Drinking Act of 1986, Pub. L. No. 99-339, 100 Stat. 665 (codified as amended at 42 U.S.C. § 300j-11(b) (1988)) provides:

(1) Specific provisions.

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

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

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

11. See *infra* note 15.

some control over sewage treatment needs.¹² The Act also provides for funding not to exceed one hundred percent of the total cost of the project.¹³

The Tribe's environmental jurisdiction extends to water on trust land or lands "otherwise within the borders of an Indian reservation." The Tribes-as-States provision specifically provides for the use of the Administrator in dealing with disputes between tribes that share common bodies of water with other tribes or states. This provision applies in almost all instances in Eastern Oklahoma due to the checkerboard pattern of tribal and non-tribal ownership.¹⁴ Once again, the recognition of this tribal authority is subject to certain requirements imposed on the Tribe.¹⁵

12. Clean Water Act, 33 U.S.C. § 1377(b)-(d) (1988) provides:

(b) Assessment of sewage treatment needs

The Administrator in cooperation with the Director of Indian Health Service, shall assess the need for sewage treatment works to serve Indian Tribes, the degree to which such needs will be met through funds allotted to States under section 1285 of this Act and priority lists under section 1286 of this Act, and any obstacle which prevents such needs from being met. Not later than one year after February 4, 1987, the Administrator shall submit a report to the Congress on the assessment under this subsection, along with recommendations specifying (1) how the Administrator intends to provide assistance to Indian Tribes to develop waste treatment management plans and to construct treatment works under this Act and (2) methods by which the participation in and administration of programs under this chapter by Indian Tribes can be maximized.

(c) Reservation of funds

The Administrator shall reserve. . . one-half of one percent of the sums appropriated under section 1287 of this title. . .

(d) Cooperative agreements

In order to ensure the consistent implementation. . . an Indian tribe and the State. . . may enter into a cooperative agreement, subject to the review and approval of the Administrator.

13. Clean Water Act, 33 U.S.C. § 1377(e) (1988) provides:

Such treatment as a State may include the direct provision of funds reserved under subsection (c) of this section to the governing bodies of Indian Tribes. . . The Administrator in cooperation with the Director of the Indian Health Service, is authorized to make grants under Title II of this Act in an amount not to exceed 100 percent of the cost of a project.

Clean Water Act, 33 U.S.C. § 1377(f) (1988) provides grants for non-point sources.

14. Clean Water Act, 33 U.S.C. § 1377(e) (1988) provides in part:

Not later than 18 months after February 4, 1987, the Administrator shall, in consultation with the Indian tribes, promulgate final regulations which specify how Indian Tribes shall be treated as States for purposes of this Act. The Administrator shall, in promulgating such regulations, consult affected states sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by states and Indian Tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream discharges, economic impacts, and present and historical uses of the quality of water subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objectives of this Act.

15. Clean Water Act, 33 U.S.C. § 1377(e) (1988) provides in part:

(e) Treatment as States

The original Clean Air Act did not expressly allow the tribes to participate in the clean air program. Congress later amended the Act authorizing tribes to redesignate air quality classifications on "lands within the exterior boundaries of reservations."¹⁶ In 1990, Congress added tribes-as-states provisions to the Clean Air Act Amendments.¹⁷ The new provision defines "Indian tribe",¹⁸ and also allows tribal implementation plans¹⁹ to apply to all lands within the exterior boundaries of the reservation. Thus, these Tribes-as-States provisions allow tribal participation in all aspects of air regulation. As with other

The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254 [research, training, etc.], 1256 [grants], 1313 [water quality standards and implementation plans], 1315 [reports on water quality], 1318 [records and reports; inspections], 1319 [enforcement], 1324 [clean lakes], 1329 [non-point source], 1341 [certification], 1342 [national pollutant discharge elimination system], and 1344 [permits] of this title to the degree necessary to carry out the objectives of this section, but only if

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

16. Congress added subsection (c) to the Clean Air Act Amendments of 1990, Pub. L. 101-549, § 107(b), 104 Stat. 2399, 2464 (codified as amended at 42 U.S.C. § 7474(c) (1988)) which provides:

(c) Indian Reservations

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

17. See *infra* note 18-20.

18. Congress added subsection (r) to the Clean Air Act Amendments of 1990, Pub. L. 101-549, § 107(b), 104 Stat. 2399, 2464 (codified as amended at 42 U.S.C. § 7602(r) (1990)) which provides:

(r) INDIAN TRIBE

The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

19. Subsection (o) was added to the Clean Air Act Amendments of 1990, Pub. L. 101-549, § 107(c), 104 Stat. 2399, 2464 (Codified as amended at 42 U.S.C. § 7410(o) (1990)) which provides:

(o) INDIAN TRIBES

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans. . . . When such plan becomes effective. . . the plan shall be effective for all lands within the exterior boundaries of the reservation.

Tribes-as-States amendments, the government places organizational restrictions on the tribe.²⁰

Superfund statutes dictate that the Indian tribe shall be treated substantially the same as a state concerning specific provisions of the act.²¹ The act also directs the President to conduct a survey of hazardous waste sites on Indian lands.²² Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA),²³ the EPA also granted the appropriate Indian governing body limited authority to regulate the use of restricted pesticides.²⁴

III. THE EFFECT OF TRIBES-AS-STATE PROVISIONS

Although Indian tribes no longer possess all the powers of a sovereign, they continue to possess attributes of sovereignty over their members and territory.²⁵ Generally, the doctrine of inherent sovereignty reserves all governmental powers to the tribe except those expressly usurped by Congress.²⁶ Typically, terminating or decreasing

20. Clean Air Act Amendments of 1990, Pub. L. 101-549, § 107(d), 104 Stat. 2399, 2464-65 (codified as amended at 42 U.S.C. § 7601 (1990)) provides:

(d) TRIBAL AUTHORITY

(1) Subject to the provisions of paragraph (2), the Administrator

(A) is authorized to treat Indian tribes as States. . .

(2) The Administrator shall promulgate regulations. . . specifying those provisions of this Act for which it is appropriate to treat Indian tribes as States. Such treatment will be authorized only if

(A) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(B) the function to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act and all applicable regulations.

(3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans. . .

(4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose.

21. 42 U.S.C. § 9626(a) (1988).

22. *Id.* § 9626(c).

23. 7 U.S.C. § 136i(a)(2) (1988).

24. 40 C.F.R. § 171.10 (1988).

25. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 541 (10th Cir. 1980).

26. *Lawrence R. Baca, An Introduction to Federal Indian Law*, 36 *FED. B. NEWS & J.* 420 (Nov. 1989).

tribal rights requires express legislation or clear Congressional intent.²⁷ Further, federal policy and legislation preempts concurrent jurisdiction of the state with a tribe concerning the regulation and use of Indian lands.²⁸

Through the tribes-as-states provisions, Congress explicitly granted the tribes authority to govern environmental concerns within the tribe's jurisdiction. This action recognizes the legitimacy of tribal environmental regulation and simultaneously preempts state regulation. Such provisions leave no question of the sovereignty of tribal regulation for tribally controlled areas.

The Ninth Circuit established inherent tribal authority in *Colville Confederated Tribes v. Walton*.²⁹ In *Colville*, the Court established that tribal governments have authority over Indians in Indian Country.³⁰ In some instances, the tribe may extend its authority over non-Indians in Indian Country for the preservation of tribal health.³¹ The most recent trend of the United States Supreme Court limits the inherent power of the tribe to control land use through zoning. Before a Tribe may zone land, that land must be "Indian in nature."³²

Due to the Tribes-as-States provisions, environmental regulation by Indian Tribes goes beyond the inherent powers of the tribe to zone tribal land. The Tribes-as-States provisions illustrate Congress' intent to grant the Tribes the authority to govern their environments. These provisions explicitly recognize that the Tribe's authority to control its environment is equal to the State's authority to control its environment.

The Supreme Court also recognizes the tribes' broad environmental jurisdiction in the *Brendale* decision. Though the *Brendale* decision is a plurality opinion, even those opinions which advocate more restricted Tribal rights acknowledge Tribal authority when it has been explicitly recognized by Congress. Even the conservative Justice White (joined by Justice Rehnquist) cites the Clean Water Act³³ as an example of Congress' express delegation of authority to the tribes for

27. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir. 1981) *cert. denied*, 454 U.S. 1092 (1981) *rev'd on other grounds*, 752 F.2d 397 (9th Cir. 1985) (en banc) *cert. denied*, 475 U.S. 1010 (1986).

28. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 658 (9th Cir. 1975).

29. 647 F.2d at 52.

30. *Id.*

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

32. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 447 (1989).

33. 33 U.S.C. 1377(e) (1988).

all lands within reservation boundaries.³⁴ Thus, Congress' explicit authorization through the Tribes-as-States provisions guarantees Tribal control of environmental regulation of Tribal lands.

IV. ENVIRONMENTAL REGULATION BY THE FIVE CIVILIZED TRIBES

The boundaries of the Five Civilized Tribes are established by treaties between the Tribes and the United States' Government. The jurisdiction of Indian tribes over environmental matters is established by federal environmental statutes which refer to "Indian Country" within "Indian Reservations." The question then becomes whether the boundaries established by the treaties are consistent with the boundaries established by reservations to determine over which lands the Five Civilized Tribes have authority to exert environmental controls.

Labeled the "Five Civilized Tribes" because of their early adaptation of lifestyle and government comparable to European models,³⁵ the United States' government distinguished the Cherokee, Choctaw, Chickasaw, Creek and Seminole from other tribes. A series of treaties with each of these tribes resulted in patent fee title for their tribal lands. This title rested in the control of the national governments of each of the Five Civilized Tribes.³⁶ Thus, patent fee lands of the Five Civilized Tribes escaped treatment as reservation lands.³⁷

The United States Supreme Court recognizes a difference between reservation lands and the patent fee lands, or national lands of the Five Civilized Tribes. The Court's use of the wording "the Creek Nation" in comparison with the "Cheyenne-Arapaho Reservation" illustrates this difference.³⁸ In *Morton v. Ruiz*³⁹ the Court uses the wording "on reservations and in . . . Oklahoma," further indicating that the Court does not view the lands of the Five Civilized Tribes as reservation lands. Additionally, the state of Oklahoma denies the existence of reservations within the state. Therefore, Oklahoma is likely to challenge any claim by the Five Civilized Tribes for reservation status.

34. *Brendale*, 492 U.S. at 428.

35. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 86-87 (1983).

36. *Heckman v. United States*, 224 U.S. 413, 434 (1911).

37. W.F. SEMPLE, *OKLAHOMA INDIAN LAND TITLES ANNOTATED* 26 (1952).

38. *United States v. Cherokee Nation*, 202 U.S. 101 (1906).

39. 415 U.S. 199, 204 n.6 (1974).

The General Allotment Act⁴⁰ decimated most tribal land holdings in Oklahoma except for the Five Civilized Tribes in Eastern Oklahoma (then Indian Territory). Eventually, the Curtis Act forced the Five Civilized Tribes into the allotment process.⁴¹ Under the Curtis Act, each tribal member was enrolled and allotted a portion of the land held in common by tribal governments. Unfortunately, the Curtis Act not only allotted tribal lands but also nearly destroyed the governments of the Five Civilized Tribes.⁴² Difficulties in completing tribal rolls and resistance to the allotment process convinced Congress to extend indefinitely the existence of the governments of the Five Civilized Tribes.⁴³ These tribes reasserted their government activities and authority.⁴⁴ Consequently, the Five Civilized Tribes were not dismantled when Oklahoma achieved statehood and currently maintain governmental authority over tribal areas.

The United States Supreme Court recognizes that although the Indian lands in Oklahoma are not reservations, they are given reservation status for the purpose of establishing "Indian Country." In the case of *Oklahoma Tax Commission v. Citizen Band Potawatomi*⁴⁵ the Court established that determining whether an area was "Indian Country" does not depend on whether the land is labeled "trust Land" or "reservation." Instead, "Indian Country" is "Indian Country" regardless of its status as a reservation.⁴⁶ Therefore, the Five Civilized Tribes have the authority under the Tribes-as-States provisions to establish environmental laws for existing tribal trust lands and any areas designated as "Indian Country." Consequently, the critical factor is whether the land was validly set aside for the use of the Indians as required by the definition of "Indian Country."⁴⁷

The Five Civilized Tribes definitely control "Indian Country" in Eastern Oklahoma, but determining the extent and location of "Indian Country" in Eastern Oklahoma poses a very difficult problem. The main reasons for such difficulty include:

- i. vague guidelines for determining dependent Indian communities,

40. Indian General Allotment Act, 25 U.S.C. §§ 331-34 (1888).

41. Curtis Act of June 28, 1898, ch. 517, 11, 30 Stat. 495, 497.

42. *Muskogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988).

43. Act of April 26, 1906, ch. 1876, 34 Stat. 137.

44. The Tribes reasserted their authority by holding national elections for all five tribes beginning in 1970, for Chiefs/ Governors and by their efforts to reestablish tribal court systems.

45. 498 U.S. 505, 511 (1991).

46. *Id.*

47. See *supra* notes 4-8 and accompanying text.

- ii. the use of the Indian blood quantum of the landowner for determining the continuation of restrictions on the land (which is essential to establish the Indian Country designation),
- iii. the disputed status of many lands, and iv. the lack of identification of non-allotted land resulting from the chaos of the Curtis Act's near dismantling of the Five Civilized Tribes.

Further, several tribes (the Creek Nation in particular) are pursuing aggressive land acquisition programs to increase their tribal land base.⁴⁸

V. POSSIBLE APPROACHES

A. *Cooperation Between Oklahoma and the Nations*

Oklahoma should, because of the advantages and disadvantages discussed in the next two sections, divide Eastern Oklahoma into five geographical pollution control zones which correspond to the national boundaries of the Five Civilized Tribes. Within each zone, the state and the controlling tribe should cooperatively establish pollution control standards for the particular area. Provisions should also be made to resolve conflicts between the regions. The best solution would be for all five tribes to enter into cooperative agreements that establish identical environmental standards.

B. *Tribal Legislation Independent of the State*

It is possible for the Five Civilized Tribes to enact tribal legislation regulating environmental concerns for Indian Country under their control without reference to the corresponding Oklahoma statutes. Because of the mixed, uncertain location and extent of tribal lands in Eastern Oklahoma, differing laws will almost certainly lead to conflict between the state and the tribes. The result is a waste of both parties' monetary resources in legal challenges.

Under the Tribes-as-States provisions, the EPA Administrator has the authority to deny tribal control where a tribe lacks the organization needed for environmental regulation. Because the Five Civilized Tribes have very sophisticated governmental and legal systems, the Administrator is unlikely to deny them tribal control.

48. Interview with M. Sharon Blackwell, Assistant Regional Solicitor of the Department of the Interior, in Tulsa, Oklahoma (July 11, 1991).

Tribes-as-States provisions also address the problem of conflicts between state laws and tribal laws. The CWA includes such a provision.⁴⁹ This provision establishes separate guidelines for the resolution of disputes between tribes and states.⁵⁰

The CAA also includes a provision for dispute resolution. The provision allows the state or tribe to request the Administrator to enter into negotiations to resolve the dispute. It also grants final authority to the Administrator if the parties can not resolve the issue.⁵¹ A critical section of this provision for dispute resolution directs the Administrator to consider whether the amount of land involved is sufficient to allow effective air quality management.⁵² This provision could significantly limit the ability of the Five Civilized Tribes to redesignate the air quality classification of their lands due to the small amount of tribal land and its scattered, unconcentrated character within Eastern Oklahoma.

VI. THE CHEROKEE UTILIZE THE TRIBES-AS-STATES PROVISIONS

In the fall of 1992, Tim Houseburg of the Cherokee Nation's Environmental Quality Department and this author launched an effort to

49. Clean Water Act, 33 U.S.C. § 1377(e) (1988) provides in part:

The administrator shall, in promulgating such regulations, consult affected states sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this chapter.

50. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1988); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

51. Clean Air Act, 42 U.S.C. § 7474(e) (1988), provides in part:

If any State affected by the redesignation of an area by an Indian tribe, or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in any State which the Governor of an affected State or governing body of an affected. . . State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan.

52. *Id.* "In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area." *Id.*

draft a comprehensive environmental code for the Cherokee Nation. Chad Smith of the Cherokee Nation's Judicial Office initiated the project. This comprehensive code will eventually control air quality, water quality, solid wastes, toxic substances, and cultural and historical preservation within the Cherokee Nation.

Because of the complexity of the task, phase one of the project included only water, solid waste, toxic and hazardous waste control. The other areas will be addressed at a later date. On June 14, 1993, the Cherokee Nation passed phase one of the project. This action by the Cherokee Tribal Council marked the enactment of the first comprehensive environmental code of any Native American tribe or nation.

For practical reasons, the authors based the majority of the code's provisions on federal statutes. Because the federal environmental laws have been intensely litigated, volumes of federal precedent exist for use by the Cherokee court system. Though not binding on Cherokee courts, this precedent should provide excellent guidance for interpretation of the new Cherokee laws.

Though no conflict between Oklahoma and the Cherokee Nation has occurred in the environmental arena to date, the status quo increases the risk of conflict. The indefinite limits of the Cherokee jurisdiction may lead Oklahoma and the Cherokee Nation into the courts. This approach will waste the precious resources of both sovereigns in legal expenses. Additionally, a power struggle will potentially cost the people of Eastern Oklahoma the great benefits cooperation could yield.

VII. OPPORTUNITIES THROUGH COOPERATION

Cooperative agreements between Oklahoma and the Tribes is Oklahoma's and the Tribes' best option. It also presents an excellent opportunity for both. First, cooperative agreements avoid state and tribal conflict which disrupt intergovernmental relations and waste monetary resources. Second, cooperative agreements assure uniform standards for the region. This uniformity is extremely important for the Five Civilized Tribes area because of the uncertainty of the location of Indian Country.

Such an agreement may give Oklahoma an additional weapon in its battle against out-of-state pollution. A perfect example is the

dumping of treated sewage in the Illinois River which led to the dispute between Oklahoma and Arkansas.⁵³ Though the United States Supreme Court ruled against Oklahoma,⁵⁴ the ruling has no effect on the Cherokee Nation. The Cherokee have an alternative approach due to the dispute resolution mechanism in the Tribes-as-State amendment of the CWA.⁵⁵

The dispute resolution mechanism in the CWA directs the Administrator to resolve the dispute. As a result, the Cherokee Nation has an arsenal not available to Oklahoma. The statute directs the Administrator to determine "the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of water subject to such standards."⁵⁶ These are directives the EPA must consider in disputes involving Indian tribes, but which it does not and did not have to consider in the *Arkansas v. Oklahoma* case.⁵⁷ The "historical and present use" provision of the statute also presents an especially important opportunity because it directs the Administrator to consider that the release of sewage into the river runs contrary to the historical uses of the Cherokee people.⁵⁸

Finally, the Tribes-as-States provisions present an additional opportunity to the people and governments of Eastern Oklahoma. These amendments provide grants to the tribes for the protection of Indian country.⁵⁹ Therefore, a cooperative agreement between Oklahoma and the tribes allows the Five Civilized Tribes to enhance the quality of the environment and protect the precious natural resources of Eastern Oklahoma above what the state may be capable of doing alone.

VIII. CONCLUSION

The Five Civilized Tribes may enact environmental legislation for their territories limited to the areas considered Indian Country. Eastern Oklahoma's citizens, both Indian and non-Indian, could greatly benefit from a cooperative implementation of the Tribes-as-States provisions. The unique opportunity presented by the presence of the

53. *Arkansas v. Oklahoma*, 112 S.Ct. 1046 (1992).

54. *Id.* at 1050.

55. *See supra* note 50 and accompanying text.

56. Clean Water Act, 33 U.S.C. § 1377(e) (1988).

57. 112 S.Ct. 1046 (1992).

58. *See* Clean Water Act, 33 U.S.C. § 1377(e) (1988).

59. *Id.*

tribal governments could allow the people of Eastern Oklahoma to protect themselves against out-of-state pollution. It could also allow the people of Eastern Oklahoma an opportunity to develop more stringent pollution control programs.

