

**COMMERCIAL HAZARDOUS WASTE PROJECTS IN  
INDIAN COUNTRY: AN OPPORTUNITY FOR  
TRIBAL ECONOMIC DEVELOPMENT THROUGH  
LAND USE PLANNING\***

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## I. INTRODUCTION

The inequitable geographic distribution of facilities that pose environmental hazards to citizens has come under considerable scrutiny by politicians, citizens, scholars, and the media. Increasing public opposition has stigmatized many essential-industry facilities as "Locally Unwanted Land Uses" (LULUs) in today's "Not in my Backyard" (NIMBY) and "Citizens Against Virtually Everything" (CAVE) milieu.<sup>1</sup> This distribution is arguably the manifestation of environmental practices, be they regulations or actions, having a "predictable distributional impact" that "contributes to the structure of racial and economic subordination and discrimination."<sup>2</sup> This well-documented concentration of environmental risks in minority and low-income communities throughout the United States is popularly known as "environmental racism."<sup>3</sup> The burden shouldered by these

1. For background on the NIMBY syndrome and locational decision-making for stigmatized facilities (particularly hazardous waste sites), see Robert W. Lake, *Planner's Alchemy: Transforming NIMBY to YIMBY*, 59 J. AM. PLAN. ASS'N 87 (1993); Robert W. Lake, *Rethinking NIMBY*, 59 J. AM. PLAN. ASS'N 87 (1993); Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 J. AM. PLAN. ASS'N 288 (1992); Robert W. Lake & L. Disch, *Structural Constraints and Pluralist Contradictions in Hazardous Waste Regulation*, 24 ENV'T AND PLAN. 663 (1992); DENIS J. BRION, *ESSENTIAL INDUSTRY AND THE NIMBY PHENOMENON* (1991); KENT E. PORTNEY, *SITING HAZARDOUS WASTE TREATMENT FACILITIES: THE NIMBY SYNDROME* (1991); Michael Heiman, *From 'Not in My Backyard' to 'Not in Anybody's Backyard': Grassroots Challenges to Hazardous Waste Facility Siting*, 56 J. AM. PLAN. ASS'N 359 (1990); Robert W. Lake & Rebecca A. Johns, *Legitimation Conflicts: The Politics of Hazardous Waste Siting Law*, 11 URB. GEOGRAPHY 488 (1990); *RESOLVING LOCATIONAL CONFLICT* (Robert W. Lake ed., 1988); Richard N. L. Andrews, *Local Planners and Hazardous Materials*, 53 J. AM. PLAN. ASS'N 3 (1987); Richard F. Anderson, *Public Participation in Hazardous Waste Facility Location Decisions*, 1 J. PLAN. LITERATURE 145 (1986); Robert Cameron Mitchell & Richard T. Carson, *Property Rights, Protest, and the Siting of Hazardous Waste Facilities*, 76 A.E.A. PAPERS & PROC. 285 (1986); Richard F. Anderson & Michael R. Greenberg, *Hazardous Waste Facility Siting: A Role for Planners*, 48 J. AM. PLAN. ASS'N 204 (1982); Anthony J. Mumphy, Jr., et al., *A Decision Model for Locating Controversial Facilities*, 33 J. AM. INST. PLAN. 397 (1971).

2. Gerald Torres, *Race, Class and Environmental Regulation—Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 840 (1992).

3. The term "environmental racism" was coined by Dr. Benjamin Chavis in the United Church of Christ Commission for Racial Justice's 1987 report *Toxic Waste and Race in the United States*. Charles Lee, *Toxic Waste and Race in the United States*, in *RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE* 10 (Bunyan Bryant et al. eds., 1992). For general examinations of this topic, see *UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR* (Robert D. Bullard ed., 1994); Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993); *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* (Robert D. Bullard ed., 1993); Edward Patrick Boyle, Note, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937 (1993); Anthony R. Chase, *Assessing and Addressing Problems Posed by Environmental Racism*, 45 RUTGERS L. REV. 335 (1993); *RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE* (Bunyan Bryant et al. eds., 1992); Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921 (1992); Rachel D. Godsil, Note,

communities has apparently not escaped the attention of both President Clinton<sup>4</sup> and the Environmental Protection Agency (EPA).<sup>5</sup> The disparate burden on minorities and low-income communities is not controversial, but its "racism" aspect has generated considerable argument. Experts such as Robert Bullard contend that focusing on intent is counterproductive when combatting this situation: "[w]hen I use the term 'environmental racism' I'm not talking about whether a community is overburdened with environmental hazards intentionally or not—the result is the same. If you argue about intent, you'll never get anywhere."<sup>6</sup>

Though the inequitable distribution of environmental hazards has adversely affected many minority and low-income communities, since the early 1990's environmentalists and the mainstream press have increasingly focused on Indian Country.<sup>7</sup> These observers contend that commercial waste companies have been marauding through the reservations unchecked, relentlessly savaging Indian lands, apparently immune from environmental regulations.<sup>8</sup> Native American legal commentators have invariably come down on both sides of this volatile issue. Some, echoing the "mainstream" position, argue that "[p]oison for profit is the ultimate toxic racism, the ultimate sewage of foreigners."<sup>9</sup> Others, labeling the flood of reports a "steady drumbeat of misinformed stories," work from a controversial premise.<sup>10</sup> They maintain that under certain circumstances, and

*Remediating Environmental Racism*, 90 MICH. L. REV. 394 (1991); ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL EQUITY* (1990).

4. See Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994). This order directs federal agencies to make "environmental justice" part of their missions by identifying and addressing disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations.

5. ENVIRONMENTAL PROTECTION AGENCY, *ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES* (1992).

6. Steven Keeva, *A Breath of Justice*, 80 ABA J., Feb. 1994, at 88, 90.

7. See *infra* note 13.

8. See generally, Margaret Knox, *Their Mother's Keepers*, SIERRA, Mar.-Apr. 1993, at 51; Reese Erlich, *Indians Press Clinton to Halt Waste Storage*, CHRISTIAN SCI. MONITOR, Nov. 25, 1992, at 8; *Maybe In My Backyard, Say Counties, Tribes*, STATE LEGISLATURES, June 1992, at 7; Keith Schneider, *Grants Open Doors for Nuclear Waste*, N.Y. TIMES, Jan. 9, 1992, at A14; Thomas Daschele, *Dances With Garbage*, CHRISTIAN SCI. MONITOR, Feb. 14, 1991, at 36; Mary Hager et al., *Dances With Garbage*, NEWSWEEK, April 29, 1991, at 36; Paul Schneider & Dan Lamont, *Other People's Trash*, AUDUBON, July, 1991, at 108; Conger Beasley, Jr., *Of Landfill Reservations*, BUZZWORM, Sept.-Oct. 1991, at 41; Conger Beasley, Jr., *Dances With Garbage*, E MAG., Nov.-Dec. 1991, at 34; Bill Lambrecht, "Broken Trust" Series, ST. LOUIS POST-DISPATCH, Nov. 17, 1991 to Nov. 21, 1991, at 1A.

9. Scott Morrison & LeAnne Howe, *The Sewage of Foreigners: An Examination of the Historical Precedent for Modern Waste Disposal on Indian Lands*, 39 FED. B. NEWS & J. 370, 372 (1992).

10. Jana L. Walker & Kevin Gover, *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, 10 YALE J. ON REG. 229, 229 (1993) [hereinafter *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*].

within an appropriate regulatory and enforcement framework, utilizing reservations as sites for commercial solid and hazardous waste facilities may provide tribes with economic, social, and political development opportunities. The viability of such facilities, they argue, should be governed by tribal self-determination and economic self-sufficiency, not by public sentiment.<sup>11</sup>

Both views clearly have merit, but this article supports the latter contention. Native Americans living on reservations are generally beset by isolation and a seemingly endless and intractable cycle of poverty due to poor health, low-paying jobs, low levels of education, and high levels of unemployment.<sup>12</sup> Responses to these crippling problems must be equally dramatic and imaginative. Indeed, a commercial solid or hazardous waste project may represent an appropriate and workable form of economic development for some tribes and can provide extraordinary opportunities for development in Indian Country.

This article recognizes that the complex cost-benefit calculus involved in balancing exposure to environmental hazards with economic well-being is most properly determined by the tribal members and their governments. Nevertheless, this article will analyze the critical issues surrounding hazardous waste projects and Indian Country economic development in an effort to establish a workable structure for such projects. The article will first examine the current state of economic development opportunities in an era of Indian self-determination and economic independence. This context necessarily requires that the article address sovereignty issues. The second part of the article will describe Indian Country's current environmental and land use planning regulatory state. Finally, the article will present a model land use planning system, assembled from the work of four tribes in both land use planning and solid and hazardous waste facility planning.

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11. *Commercial Solid and Hazardous Waste Projects on Indian Lands*, *supra* note 10, at 231. See e.g., Bunty Anquoe, *Mescalero Apache Sign Agreement to Establish Facility for Nuclear Waste*, INDIAN COUNTRY TODAY, Feb. 10, 1994, at A1. While the Mescalero Apache tribal government did enter into such an agreement, the tribal membership defeated on January 31, 1995 by a 490-362 vote, a referendum that would have allowed the Tribal Council to continue plans for the nuclear waste facility. Alt.native Internet Newsgroup, Feb. 4, 1995 (posted by Michele Lord). The authors also underscore the evidence that, assuming that waste companies are targeting reservations, tribes are not only rejecting such overtures, but are not even interviewing waste companies. See also *Maybe In My Backyard, Say Counties, Tribes*, STATE LEGISLATURES, June 1992, at 7; Kathleen Shaheen & John T. Acquino, *Waste Disposal on Indian Lands*, WASTE AGE, Oct. 1991, at 58; Rogers Worthington, *Tribes Resist Tempting Landfill Offers*, CHI. TRIB., Sept. 22, 1991, §1, para. 4.

12. Vicki Page, *Reservation Development in the United States: Peripherality at the Core*, 9 AM. INDIAN CULTURE & RES. J. 21, 21 (1985).

## II. ECONOMIC DEVELOPMENT ISSUES IN INDIAN COUNTRY

### A. Introduction

As used in this article, Indian Country<sup>13</sup> refers to a geographic location that necessarily includes more territory than a "reservation"<sup>14</sup> the article thus adopts a political geographer's view<sup>15</sup> as well as a legal view. One must necessarily employ such a view in order to appreciate fully the complexity of sovereignty issues presented in part II(C) of this article. Embracing this view also helps to delineate the differences between tribal environmental regulation, which can impact land uses outside the reservation, and tribal land use planning, which is primarily confined to the territory within reservation boundaries.

Commentators and scholars have consistently and convincingly shown that Native Americans living in Indian Country have been and continue to be one of the most disadvantaged minority groups in the United States, subject to severe levels of poverty and its concomitant conditions.<sup>16</sup> This situation has apparently continued unabated despite decades of professed federal and public concern as well as a

13. "Indian Country" is statutorily defined as:

(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 the 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.

18 U.S.C. § 1151 (1982).

14. This term refers to land reserved by treaty, statute, or executive order. *See generally* FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*, ch.1 (1942, reprinted 1986).

15. "One will look in vain for Indian Country on most maps . . . we will encounter many Indians who are residents of lands and towns external to reservations. This broader view of Indian Country focuses attention on a geographical reality in which Indians live adjacent to one another either within the political milieu of a tribal entity—the reservation—or within the bounds of civil governments—towns and counties." Imre Sutton, *Preface to Indian Country: Geography and Law*, 15 *AM. INDIAN CULTURE & RES. J.* 3, 3-4 (1991).

16. "Several Reservation counties, such as Shannon County on the Pine Ridge Reservation, Buffalo County on the Crow Creek Reservation, Ziebach County on the Cheyenne River Reservation, and Todd County on the Rosebud Reservation," have been and continue to be "among the poorest in the United States." Frank Pommersheim, *The Reservation as a Place: A South Dakota Essay*, 34 *S.D. L. REV.* 246, 246 n.2 (1989). *See also* Peter T. Kilburn, *Sad Distinction for the Sioux: Homeland is Number One in Poverty*, *N.Y. TIMES*, Sept. 30, 1992, at A1; Stephen Cornell & Joseph Kalt, *Culture and Institution as Public Goods: American Indian Economic Development as Collective Action*, in *WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT* at 219-22 (Stephen Cornell et al. eds., 1992); Stephen Cornell & Joseph Kalt, *Pathways From Poverty: Economic Development and Institution-Building on American Indian Reservations*, 14 *AM. INDIAN CULTURE & RES. J.* 89 (1990).

seemingly endless flow of federal and private dollars. On most reservations, circumstances have not significantly improved, and evidence of sustainable productive activity remains elusive.<sup>17</sup>

Scholars attempting to understand this phenomenon<sup>18</sup> in terms of economic development opportunities in Indian Country have stressed two prominent characteristics: while the severe symptoms of underdevelopment uniformly cut across Indian Country, some reservations appear to be emerging from poverty.<sup>19</sup> Though many theories have been offered in explanation for these observations, two factors appear to determine most directly the outcome of economic development efforts in Indian Country: federal domination and tribal self-reliance.<sup>20</sup> The former, federal government *de facto* ownership of reservations (in the sense of ultimate decision-making control), is characterized by significant conflicts of interest, arguably creating a hindrance to development efforts. On the other hand, tribes can take greater responsibility for their economic, social, and political affairs through the efforts of Indian tribal leadership and Indian lawyers, given that tribes exercise substantial judicial, legislative, tax, and regulatory authority. In short, the tribes exerting significant local control have been the most successful in creating sustainable economic activity. Encouragingly, the current relationship between the federal government and tribes promises to set the stage upon which opportunities for tribally-initiated and tribally-controlled projects can succeed.

### B. Self-Determination and Economic Development

When attempting economic development<sup>21</sup> initiatives, like gambling casinos, leasing of tribal natural resources, capital-intensive

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17. Stephen Cornell & Joseph Kalt, *Culture and Institutions as Public Goods: American Indian Economic Development as a Problem of Collective Action*, in PROPERTY RIGHTS AND INDIAN ECONOMIES 215 (Terry L. Anderson ed., 1992) [hereinafter *Culture and Institutions as Public Goods*].

18. See generally, WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT (Stephen Cornell et al. eds., 1992); *Culture and Institutions as Public Goods*, *supra* note 17; Ross O. Swimmer, *A Blueprint for Economic Development in Indian Country*, 10 J. ENERGY L. & POL'Y 13 (1989); JOSEPH P. KALT, THE REDEFINITION OF PROPERTY RIGHTS IN AMERICAN INDIAN RESERVATIONS: A COMPARATIVE ANALYSIS OF NATIVE AMERICAN ECONOMIC DEVELOPMENT (1987).

19. *Culture and Institutions as Public Goods*, *supra* note 17, at 216.

20. *Id.* at 217.

21. This article recognizes that the concept of "economic development" is a complex one, composed of economic, social, and political elements. See *Culture and Institutions as Public Goods*, *supra* note 17, at 215.

manufacturing, large-scale agribusiness ventures<sup>22</sup> or waste disposal facilities, tribes must necessarily struggle with the interrelated concepts of self-determination (the latest phase in the ever-changing panorama of U.S.-tribal relations<sup>23</sup>) and sovereignty.

Tribal self-determination is both a concept and a federal policy, officially articulated most recently by President Ronald Reagan<sup>24</sup>. The policy mandates a "government-to-government" relationship between the federal and tribal governments by strengthening tribal governments and by lessening federal control over tribal governments' affairs. Self-determination primarily involves tribal efforts to reduce dependence on federal funding, with the ultimate goal of economic independence. A 1984 report issued by the Presidential Commission on Reservation Economies<sup>25</sup> which supported and expanded upon President Reagan's pronouncement, generated considerable controversy by proposing that Indian governments relinquish some of their rights in order to attract new business<sup>26</sup>. Nonetheless, the Presidential Commission policy was officially adopted and expanded by the EPA in 1984.<sup>27</sup>

Some commentators have likened these modern pronouncements to policies established during the discredited and repudiated Termination Era.<sup>28</sup> These critics claim that the current policies seemingly resurrect the old Bureau of Indian Affairs (BIA) policy of leasing Indian-owned resources to individuals or to non-Indian businesses<sup>29</sup>.

22. Frank Pommersheim, *Economic Development in Indian Country: What Are the Questions?*, 12 AM. INDIAN L. REV. 195, 195 (1987).

23. See generally, CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1987) and VINE DELORIA ET AL., AMERICAN INDIANS, AMERICAN JUSTICE (1983).

24. Statement on Indian Policy, 1983 PUB. PAPERS 96 (Jan. 24, 1983).

25. PRESIDENTIAL COMMISSION ON RESERVATION ECONOMIES, REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES (1984).

26. Gary D. Sandefur, *Economic Development and Employment Opportunities for American Indians*, in AMERICAN INDIANS: SOCIAL JUSTICE & PUBLIC POLICY (Donald E. Green et al. eds., 1991) at 208.

27. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS, Nov. 8, 1984. See the more focused examination of the EPA policy's repercussions *infra* part III(B).

28. See generally VINE DELORIA ET AL., AMERICAN INDIANS, AMERICAN JUSTICE (1983).

29.

Without sound reservation economies, the concept of self-government has little meaning. In the past, despite, or perhaps because of its good intentions, the federal government has been one of the major obstacles to Indian economic progress. The President has committed his administration to removing impediments to Indian economic development and to encouraging cooperative efforts among tribes, federal, state, and local governments, and the private sector toward developing reservation economies.

This article, however, argues that the policies do not harken back to the Dark Ages in application and that official recognition of tribal authority works to the benefit of the tribes.

Effective tribal economic development through self-determination possesses three components: *sovereignty*, the tenuous key to development; *institutions* through which the tribes can successfully exercise their sovereignty; and a sound local *development strategy*.<sup>30</sup> The opportunities for tribal governments to devise and implement their own institutions, regulatory framework, and development strategies in accordance with this model are apparently broad in a climate of self-determination, but tribes must still confront and ultimately reconcile sovereignty issues to succeed. The crucial connection between sovereignty and Indian economic development is reflected in the aphorism "Economy follows Sovereignty."<sup>31</sup> Aggressive tribal assertions of local control can lead to the economic independence envisioned by the tribes' and the federal government's self-determination policy.

### C. Sovereignty

The unsettled issue of tribal sovereignty in Indian Country cannot be separated from the interaction of three entities that typically exhibit competing interests: the federal government, the state, and the tribe. Tribal governments are unique aggregations possessing attributes of sovereignty over both their members and their territory in both the criminal and civil arenas.<sup>32</sup> Tribes have enjoyed such inherent fundamental powers as those establishing a form of government,<sup>33</sup> determination of tribal membership,<sup>34</sup> administration of justice,<sup>35</sup>

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Donald T. Stull, *Reservation Economic Development in the Era of Self-Determination*, 92 AM. ANTHROPOLOGIST 206, 209 (1990), quoting PRESIDENTIAL COMMISSION ON RESERVATION ECONOMIES at 3.

30. Stephen Cornell & Joseph Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT at 53 (Stephen Cornell et al. eds., 1992).

31. *Culture and Institutions as Public Goods*, *supra* note 17, at 245.

32. *United States v. Wheeler*, 435 U.S. 313 (1978).

33. AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., INDIAN TRIBES AS SOVEREIGN GOVERNMENTS: A SOURCEBOOK ON FEDERAL-TRIBAL HISTORY, LAW, AND POLICY 36 (1988) [hereinafter INDIAN TRIBES AS SOVEREIGN GOVERNMENTS].

34. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (stating that the Indian Civil Rights Act does not require tribes to follow Anglo concepts of equal protection and due process).

35. INDIAN TRIBES AS SOVEREIGN GOVERNMENTS, *supra* note 33, at 37.

exclusion of persons from the reservation,<sup>36</sup> chartering business organizations,<sup>37</sup> sovereign immunity,<sup>38</sup> and the police power, which includes the ability to develop and implement zoning controls<sup>39</sup> Tribes thus have the power to enforce tribal laws, including environmental ones, against their own members.

On the other hand, tribes exercise a diminished degree of authority over non-Indians and their lands. In *Montana v. United States*<sup>40</sup> the United States Supreme Court established that "tribal governments retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian-owned fee lands."<sup>41</sup> In particular, a tribal government may exercise civil authority over the conduct of non-Indians within its reservation when that conduct threatens the health and welfare of the tribe.<sup>42</sup> This exercise of the police power conceivably applies to the creation and enforcement of both tribal environmental and land use regulations.

Congress's plenary power must be included in any discussion of the bounds of tribal sovereignty. Grounded in the doctrine of discovery and incorporated into the U.S. Constitution, the plenary power permits Congress to exercise virtually unlimited control over individual Indians, their lands, and their tribes<sup>43</sup> This power is subject to both the Fifth Amendment's "takings clause"<sup>44</sup> and the U.S. government's trust relationship with tribes<sup>45</sup> Perhaps the most significant aspect of this power, though, is Congress's ability to legislate

36. *Id.* Sovereignty is a fundamental means by which tribes can protect their territory against trespassers; this prohibition does not cover non-members who hold land in fee within the reservation.

37. *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968).

38. INDIAN TRIBES AS SOVEREIGN GOVERNMENTS, *supra* note 33, at 39.

39. Tribal regulation of land use through zoning has been upheld in *Governing Council v. Mendicino County*, 684 F.Supp. 1042 (N.D. Cal., 1988); *Knight v. Shoshone and Arapahoe Indian Tribes*, Wyo., 670 F.2d.900 (10th Cir. 1982); *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977; *Santa Rosa Band v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977); and *Snohomish County v. Seattle Disposal Co.*, 425 P.2d 22 (Wash. 1967), *cert. denied*, 389 U.S. 1016 (1968).

40. 450 U.S. 544 (1981).

41. *Id.* at 565.

42. *Id.* at 565-66.

43. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (stating that rights established by documents such as treaties can be abrogated by Congress). The primary constitutional underpinnings of this plenary power are 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. *But see United States v. Winans*, 198 U.S. 371 (1905) (establishing the "Reserved Rights Doctrine," i.e., intrinsic tribal rights are not granted by the United States, but are retained by the tribes as sovereigns).

44. *United States v. Sioux Nation*, 448 U.S. 371 (1980).

45. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). *See infra* note 47.

specifically regarding Indian lands, people, and resources. Complementing this ability is the judicially-created doctrine, known as the "Farris rule," that federal laws with general applicability apply to Indians and tribes.<sup>46</sup> The operation of Congress's plenary power and the "general applicability" rule undoubtedly subject Indian Country to the application of federal environmental laws.

The "Marshall Trilogy" of United States Supreme Court decisions involving tribes further delineated the legal topography of U.S.-tribal relations.<sup>47</sup> The Trilogy, spanning the decade between 1823 and 1832, established that Congress possesses the right to extinguish tribal rights to possession of land ("Aboriginal" or "Original Indian" title)<sup>48</sup> that tribes possess the status of "Domestic Dependent Nations," organizationally distinct from states, but subject to certain restrictions upon their ability to self-govern;<sup>49</sup> and, most importantly for purposes of this article, that tribes are "Sovereigns": they exercise inherent governmental authority over their peoples and territories and state law does not apply within reservation boundaries without explicit Congressional consent.<sup>50</sup>

Indian tribal sovereignty, as established by *Worcester v. Georgia*<sup>51</sup> in 1832, has governed internal social and political affairs for over 150 years. More recently, however, the Supreme Court has eroded tribal sovereignty by stripping tribes of their powers over non-Indian individuals, activities, and land on the theory that tribes' dependent status implicitly divests them of such power.<sup>52</sup> The Court first utilized this theory in devising the *Oliphant v. Susquamish Indian Tribe*<sup>53</sup> modern sovereignty test. Under this test, tribes can lose sovereignty

46. *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980) (holding that in the absence of specific congressional intent, federal laws generally applicable throughout the United States apply with equal force to Indians on reservations).

47. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). See *infra* notes 48-49.

48. 21 U.S. (8 Wheat.) at 543.

49. 30 U.S. (5 Pet.) at 17 (establishing the trust relationship between the tribes and the federal government, likened to that between a ward and its guardian; this relationship holds the government to fiduciary standards when dealing with tribes). The most cited restrictions on self-government are those imposed on tribal power to alienate fee land to non-Indians without Congressional consent and tribal authority to engage in relations with foreign nations. See *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

50. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

51. *Id.*

52. See, e.g., *Duro v. Reina*, 495 U.S. 676 (1990) (holding that tribe has no criminal jurisdiction over Indians who are not members of the prosecuting tribe), *Brendale*, 492 U.S. at 408, *infra* notes 120-125 and accompanying text; *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (holding that the existence of jurisdiction is a federal question and federal courts should abstain until the tribe involved expresses itself on the question), and *Montana v. United States*, 450 U.S. 544 (1981), *supra* notes 40-42 and accompanying text.

53. 435 U.S. 191 (1978).

in three ways: voluntary surrender (as in a treaty with the United States government), unilateral diminishment by Congress, and by implication as found by the courts.<sup>54</sup> Loss of sovereignty through implication occurs when the exercise of tribal sovereignty would be inconsistent with tribes' dependent status.<sup>55</sup>

The *Oliphant* test, which prohibits any unauthorized exercise of tribal power but provides no specific restrictions,<sup>56</sup> seemingly allows courts to determine tribal sovereignty by judicial fiat. However, the seminal case of *Montana v. United States*<sup>57</sup> delineated the extent of tribal civil regulatory authority over non-Indians within reservation boundaries:

To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.<sup>58</sup>

Tribal sovereignty does not completely bar the assertion of a state's authority in Indian Country, however.<sup>59</sup> Indeed, many controversies remain because state assertions of authority are said to stem primarily from the refusal of states to recognize Indian Country as extraterritorial to state borders.<sup>60</sup> Nonetheless, a presumption still runs against the application of state law within reservation boun-

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54. *Id.* at 208.

55. *Id.* Commentators have described the three-pronged test as "squishy" and "unsettled," and called for Congress to exercise its plenary power and legislate a definitive rule. Robert Laurence, *American Indians and the Environment: A Legal Primer for Newcomers to the Field*, NAT. RESOURCES & ENV'T, Spring 1993, at 4, 5.

56. 435 U.S. at 208. ("Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.'" (emphasis in original)).

57. 450 U.S. 544 (1981) (no tribal jurisdiction to regulate non-Indian hunting and fishing on non-Indian reservation lands). See *supra* notes 40-42 and accompanying text.

58. *Id.* at 565-66 (citations omitted).

59. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), (citing *Williams v. Lee*, 358 U.S. 217, 219 (1959)).

60. Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 600 (1989) [hereinafter *Control of the Reservation Environment*].

daries.<sup>61</sup> This presumption rests on the courts' apparently increasing reliance on the doctrine of federal preemption. This doctrine holds that state regulatory laws cannot be applied within reservation boundaries "if their application will interfere with the achievement of policy goals underlying federal law relating to Indians."<sup>62</sup> The Supreme Court's most recent articulation of the modern test for preemption was in *California v. Cabazon Band of Mission Indians*.<sup>63</sup> The *Cabazon* test begins with a determination of the "backdrop" of tribal sovereignty and focuses on broad concepts of self-government and an examination of federal policies that promote self-government.<sup>64</sup> Courts then balance the federal, tribal, and state interests impacted by the state regulatory effort. Federal law preempts state jurisdiction if it "interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."<sup>65</sup>

The primary regulatory issue examined by this article concerns environmental and land use regulation in the context of Indian Country. Specifically, tribal authority to regulate in Indian Country arises from an inherent sovereign power, but tribes apparently exercise somewhat less than full sovereign powers over non-Indians on non-Indian lands within the reservation.

### III. REGULATORY ISSUES IN INDIAN COUNTRY

#### A. Introduction

Land use planning and environmental regulation are distinct from one another in that land use planning concerns the actual *use* of land, but environmental regulation concerns controlling the *environmental*

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61. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214 (1987) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) (state jurisdiction over natives is permissible only "in exceptional circumstances")); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (when on-reservation conduct involving only Indians is at issue, state law is generally inapplicable). Compare with *Montana v. United States*, 450 U.S. 544 (1981) ("general proposition" in favor of state jurisdiction over non-natives, but sharply limited by broad areas of tribal sovereign power), see *supra* notes 40-42 and accompanying text.

62. B. Kevin Gover & Jana L. Walker, *Tribal Environmental Regulation*, 36 FED. B. NEWS & J. 438, 439 (1989) [hereinafter *Tribal Environmental Regulation*].

63. 480 U.S. 202 (1987).

64. The inquiry is to proceed in light of the traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development." See *Control of the Reservation Environment*, *supra* note 60, at 603 n.76 (citations omitted).

65. 480 U.S. at 216, quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983).

*impact* resulting from the land's use.<sup>66</sup> Thus, a tribe can prevent environmentally incompatible uses primarily by exercising land use controls implemented through a comprehensive planning mechanism. Accordingly, some commentators assert, a tribe cannot exercise its full capacity to exclude environmentally harmful uses or to determine the location of permitted uses without the authority to implement its comprehensive plan through zoning.<sup>67</sup>

Waste disposal management on Indian lands became an important issue for tribal governments in 1989, when the Eighth Circuit Court of Appeals affirmed a decision finding that Indian tribes were liable under the Resource Conservation and Recovery Act<sup>68</sup> (RCRA) for cleaning up open dumps on reservations. The Court reached this result despite both the ineligibility of tribes to assume primary responsibility for RCRA enforcement on their reservations and the inability of tribes to benefit from the considerable sums of federal dollars spent to support state environmental programs.

### *B. Tribal Authority to Create and Enforce Environmental Regulations*

The body of legal literature concerning Indian Country environmental regulation in general and commercial solid and hazardous waste regulation in particular has become increasingly rich in recent years.<sup>69</sup> Scholars generally agree that tribes have the right and the

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

67. Judith V. Royster, *Environmental Protection and Native American Rights: Controlling Land Use Through Environmental Regulation*, 1 KAN. J.L. & PUB. POL'Y 89, 89 (1991) [hereinafter *Environmental Protection and Native American Rights*]. See discussion of the current state of Indian Country zoning controls *infra* part III(C).

68. 42 U.S.C. §§ 6901-6992k (1988).

69. See *e.g.*, Steven M. Christenson, *Regulatory Jurisdiction Over Non-Indian Hazardous Waste in Indian Country*, 72 IOWA L. REV. 1091 (1987); Mark J. Connot, *Blue Legs v. United States Bureau of Indian Affairs: An Expansion of BIA Duties Under the Snyder Act*, 36 S.D. L. REV. 382 (1991); B. Kevin Gover & Jana L. Walker, *Tribal Environmental Regulation*, 36 FED. B. NEWS & J. 438 (1989); Ruth L. Kovnat, *Solid Waste Regulation in Indian Country*, 21 N.M. L. REV. 121 (1990); Robert Laurence, *American Indians and the Environment: A Legal Primer for Newcomers to the Field*, NAT. RESOURCES & ENV'T, Spring 1993, at 5; Scott Morrison & LeAnne Howe, *The Sewage of Foreigners: An Examination of the Historical Precedent for Modern Waste Disposal on Indian Lands*, 39 FED. B. NEWS & J. 370 (1992); William W. Quinn, Jr., *Federal Environmental and Indian Law Confluent*, ARIZ. ATT'Y, Dec. 1992, at 19; *supra* note 67, at 89. *Control of the Reservation Environment*, *supra* note 60; Walter E. Stern, *Environmental Regulation on Indian Lands: A Business Perspective*, NAT. RESOURCES & ENV'T, Spring 1993, at 20; Catherine Baker Stetson & Kevin Gover, *CERCLA Liability and Regulation of Solid and Hazardous Waste on Indian Lands*, NAT. RESOURCES & ENV'T, Spring 1993, at 24; *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, *supra* note 10; Theresa A. Williams, *Pollution and Hazardous Waste on Indian Lands: Do Federal Laws Apply and Who May Enforce Them?*, 17 AM. INDIAN L. REV. 269 (1992); Amanda K. Wilson, *Hazardous and Solid Waste Dumping Grounds Under RCRA's Indian Law Loophole*, 30 SANTA CLARA L. REV. 1043 (1990); Douglas A. Brockman, Note, *Congressional Delegation of Environmental Regulatory Jurisdiction: Native American Control of the Reservation*

responsibility to regulate the disposition of both solid and hazardous waste. Until quite recently, however, tribes were neither permitted to exercise such a right nor required to meet such a responsibility.

Congress and the EPA encourage economic development and self-sufficiency through tribal governments' exercise of their environmental regulation powers.<sup>70</sup> Although tribal zoning authority has been restricted to areas of "essential Indian character," tribal control of the environment extends to the full reach of Indian Country<sup>71</sup> In theory, then, no person or activity is beyond the reach of federal statutes or outside state jurisdiction. Special rules apply, however, when the regulating entity is a tribal government or when the regulated activity takes place in Indian Country.<sup>72</sup>

Given Congress's plenary power to include Indians and tribes within the scope of federal statutes, the initial inquiry is whether federal environmental regulatory statutes apply to Indians, tribes, and Indian lands.<sup>73</sup> Tribes can effectively regulate the reservation environment through federal laws only if they have authority over non-Indians as well as their own members.<sup>74</sup> The ability of a tribe to oversee or even to manage a solid or hazardous waste facility directly relates to its ability to enforce federal laws and to create and to enforce its own environmental regulations.

In the environmental law sphere, tribes can rely on the rule established in *Farris* that federal statutes generally applicable throughout the United States apply with equal force to Indian Country and its residents absent a treaty or federal statute to the contrary.<sup>75</sup> The EPA can therefore delegate program authority to Indians and tribes where the statute expressly provides for such a delegation.<sup>76</sup> Virtually all of the most important federal environmental statutes expressly provide for regulatory delegation or contain provisions for tribal participation. Tribal assumption of primary enforcement responsibility appears as the "tribes as states" clauses of such federal statutes as the Clean Air

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*Environment*, 41 Wash. U. J. URB. & CONTEMP. L. 133 (1992); Stephen M. Feldman, Comment, *The Developing Test for State Regulatory Jurisdiction in Indian Country: Application in the Context of Environmental Law*, 61 OR. L. REV. 561 (1982).

70. *Environmental Protection and Native American Rights*, *supra* note 67, at 94. See discussion *infra* part III(C).

71. *Id.* at 104.

72. *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, *supra* note 10, at 232.

73. *Tribal Environmental Regulation*, *supra* note 62, at 438.

74. *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, *supra* note 10, at 233.

75. *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *supra* note 46 and accompanying text.

76. *United States v. Mazurie*, 419 U.S. 544 (1975).

Act,<sup>77</sup> the Clean Water Act,<sup>78</sup> the Safe Water Drinking Act,<sup>79</sup> and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>80</sup> One can find tribal participation provisions in both the Surface Mining Control and Reclamation Act<sup>81</sup> and the Federal Insecticide, Fungicide, and Rodenticide Act<sup>82</sup>

Interpretation issues arise when federal environmental laws do not specifically refer to Indians and tribes but seemingly apply everly to all persons or property.<sup>83</sup> Currently, only one major federal environmental statute, the Resource Conservation and Recovery Act (RCRA),<sup>84</sup> does not contain either a "tribes as states" clause or a provision for tribal participation.<sup>85</sup> RCRA provides standards for the management, production, transport, treatment, and disposal of hazardous waste. Under RCRA, states are responsible for siting such facilities.<sup>86</sup> Since the statute provides states with only a rudimentary framework for making such decisions,<sup>87</sup> states are also required to develop and implement appropriate siting procedures and standards.<sup>88</sup>

More importantly, however, RCRA provides for the EPA to "authorize" states, upon proper request, to administer and enforce RCRA programs within their borders.<sup>89</sup> RCRA places a high priority

77. 42 U.S.C.A. § 7601(d) (1993).

78. 33 U.S.C. § 1377 (1988).

79. 42 U.S.C. § 300j-11 (1988).

80. 42 U.S.C. § 9626 (1988).

81. 30 U.S.C. § 1300 (1988).

82. 7 U.S.C. § 136 (1988).

83. COHEN, *supra* note 14, at 282.

84. 42 U.S.C. §§ 6901-6992 (1988).

85. Theresa A. Williams, *Pollution and Hazardous Waste on Indian Lands: Do Federal Laws Apply and Who May Enforce Them?*, 17 AM. INDIAN L. REV. 269, 285 (1992).

86. 42 U.S.C. § 6924 (1988).

87. Bram D.E. Carter, *Hazardous Waste Disposal and the New State Siting Programs*, 14 NAT. RESOURCES LAWYER 421, 430 (1982). The EPA currently requires siting decisions to meet just three broad criteria: (1) that a complete technical analysis of all proposed sites be completed before any single site is selected; (2) that site selection be accompanied by full public participation; and (3) that the process of selection not be hampered by blanket local vetoes. U.S. ENVIRONMENTAL PROTECTION AGENCY, HAZARDOUS WASTE FACILITY SITING: A CRITICAL PROBLEM (1980). In addition, the EPA has established its options for management of hazardous waste, listed in order of decreasing preference: reduction of hazardous waste generation, separation and concentration of hazardous waste, utilization of wastes in other manufacturing processes, destruction in special incinerators or detoxification and neutralization, and disposal in secure landfills. U.S. ENVIRONMENTAL PROTECTION AGENCY, SOLID WASTE FACTS: A STATISTICAL HANDBOOK (1978).

88. See, e.g., the Massachusetts Hazardous Waste Facility Siting Act, Mass. Gen. Laws Ann. ch. 21D, §§ 1 et al. (West 1981 & Supp. 1993).

89. States are eligible for such authorization upon submittal to the EPA of a program that is equivalent to the federal program, is consistent with the federal program and other state RCRA programs, provides for sufficient administration and resources, and provides for public access to information regarding the program. 42 U.S.C. § 6926(b), (f) (1988).

on the development of federal-state partnership in the regulation and management of hazardous waste. Congress intended the states to have the primary role in administering RCRA, which explicitly encourages states to obtain authorization to operate the hazardous waste regulatory program in lieu of EPA management<sup>90</sup> In creating programs, states can impose regulations that are more—but not less—stringent than comparable RCRA regulations<sup>91</sup> Finally, RCRA requires that all facilities treating, storing, or disposing of hazardous waste obtain an operating permit from the EPA, or if so authorized, the state.<sup>92</sup> Tribes planning to establish a hazardous waste project would obviously seek to be treated as a state under such a regime.

RCRA expressly includes tribes within the class of persons against whom the statute may be enforced,<sup>93</sup> but Congress has yet to amend the Act to allow tribes to be treated as states for authorization and permitting purposes. Therefore, although experts predict that RCRA will soon be brought into line with other federal environmental laws,<sup>94</sup> federally-recognized tribes cannot assume program responsibility under the Act as it stands in 1995. There are a host of issues unrelated to Indians surrounding the complex RCRA reauthorization process. However, many parties are actively attempting to secure the program development funding necessary to build a tribal delegation program.<sup>95</sup>

The absence of express acknowledgement of tribal jurisdictional authority in RCRA creates two unresolved issues: first, to what degree did Congress intend for RCRA to be applied to Indians and tribes, and second, whether and to what degree state law applies to reservations. Both issues will be discussed in this article.

As to the first issue, both substantive due process and the *Farris* rule demand that RCRA should be applied evenhandedly. If tribes are to bear RCRA's burdens, they should be able to enjoy its benefits as well. Despite the fact that tribes do not currently enjoy program delegation, two federal courts have held that RCRA applies to Indian

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90. 42 U.S.C. § 6902(a)(7) (1988).

91. 42 U.S.C. § 6929 (1988).

92. 42 U.S.C. § 6925(a), (c)(1) (1988).

93. RCRA includes tribes as "persons" subject to its provisions. Under RCRA, a "person" includes a municipality, 42 U.S.C. § 6903(15) (1988), and the definition of municipality includes tribes. § 6903(13). Tribes are thus subject to suit under RCRA's citizen suit provision. *Environmental Protection and Native American Rights*, *supra* note 67, at 99 n.89.

94. See, e.g., National Waste Reduction, Recycling, and Management Act, H.R. 3865, 102nd Cong., 1st Sess. (1991); Indian Tribal Governmental Waste Management Act of 1991, S. 1687, 102nd Cong., 1st Sess. (1991).

95. Telephone interview with Mr. Edsidy, U.S. EPA Office of Pacific Islanders and Native Americans (March 22, 1994).

lands and may be enforced against tribes<sup>96</sup> In *Blue Legs v. United States Bureau of Indian Affairs*<sup>97</sup> the Eighth Circuit Court of Appeals held that tribes have the inherent authority to regulate, operate and maintain dumps on their reservations as well as the concomitant liability for dumps that do not comply with RCRA. The court did not attempt to reconcile its holding with the fact that tribes are unable to secure grants or contracts to deal with waste problems under RCRA in its present incarnation. This holding obviously presents tribes with a classic "Catch-22."

The second issue, whether and to what degree state environmental laws apply to reservations in lieu of RCRA, was resolved by the Ninth Circuit Court of Appeals in *State of Washington Department of Ecology v. United States Environmental Protection Agency*.<sup>98</sup> The court first noted RCRA's silence regarding the authority of states to enforce their hazardous waste regulations against tribes or individuals on Indian land.<sup>99</sup> In ultimately holding that state environmental laws have no application to reservations,<sup>100</sup> the *Washington Ecology* court determined that the EPA reasonably interpreted RCRA as not granting state jurisdiction over the activities of Indians within reservation boundaries unless Congress had clearly expressed an intention to permit it.<sup>101</sup> Congress has apparently not expressed such an intention in RCRA. In addition, one could confidently argue that federal environmental laws fulfill the requirements of the *Cabazon* preemption test,<sup>102</sup> as the EPA promotes tribal self government through their application. One would be hard-pressed to forward a state interest sufficient to trump federal authority in this area.

Finally, EPA policy supports delegation of RCRA program authority to tribal governments. The EPA's "Indian Policy"<sup>103</sup> demonstrates compliance with the Reagan self-determination mandate and sets forth nine principles by which the EPA will pursue its objectives

96. *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), *aff'g* *Blue Legs v. EPA*, 668 F.Supp. 1329 (D.S.D. 1987) (the Oglala Sioux Tribe, the BIA and the Indian Health Service are all liable for cleanup of open dumps on reservations under RCRA) and *State of Washington Department of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985) (prohibiting the application of state environmental law to reservations).

97. 867 F.2d 1094 (8th Cir. 1989).

98. 752 F.2d 1465 (9th Cir. 1985).

99. *Id.* at 1468.

100. *Id.* at 1472.

101. *Id.* at 1469.

102. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The *Cabazon* test holds that federal law preempts state jurisdiction if it "interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Id.* at 216. See discussion *supra* part II(C).

103. See *supra* note 27 and accompanying text.

with tribes. These principles include recognizing tribes as "sovereign entities with primary authority and responsibility" regarding reservation environmental matters; promoting cooperation in areas of mutual concern between federal, state, and tribal governments; cooperating with tribal governments as "the independent authority for reservation affairs, and not as political subdivisions of states"; and helping tribes to assume program responsibility.<sup>104</sup> The *Washington Ecology* decision supported these principles by holding that the EPA correctly interpreted RCRA's existing structure as precluding state authority in Indian Country.<sup>105</sup>

Congress, the courts, and the EPA currently view the states as having no jurisdiction to enforce environmental laws on reservations.<sup>106</sup> Indeed, tribes unquestionably have the authority to regulate waste facility operations on their reservations because the quality of the reservation environment unquestionably has a direct effect on the health and welfare of the tribe.<sup>107</sup> Cases interpreting *Montana v. United States*<sup>108</sup> have upheld tribal jurisdiction on non-Indian-owned fee lands for tribal health and safety regulations.<sup>109</sup> In addition, the *Washington Ecology* court explicitly reiterated the Ninth Circuit's approval of the EPA's efforts to promote tribal self-government in environmental matters<sup>110</sup> in *Nance v. United States Environmental Protection Agency*.<sup>111</sup> The current state of RCRA certainly would not preclude tribes from creating an enforcement and permitting mechanism, but amending RCRA to acknowledge tribal jurisdictional authority undoubtedly would enable tribes to establish the only regulatory system governing solid and hazardous waste disposal on Indian lands.<sup>112</sup>

### C. Tribal Authority to Enforce Land Use Planning and Zoning Controls

Effective and responsible land use planning relies on the will and ability to plan, processes that are open to full public participation, competent governmental management, and government financial

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104. See *supra* note 27 at 2-4.

105. *State of Washington Department of Ecology v. United States Environmental Protection Agency*, 752 F.2d 1465, 1469 (9th Cir. 1985). See *supra* notes 98-102 and accompanying text.

106. See discussion *supra* notes 98-105 and accompanying text.

107. *Tribal Environmental Regulation*, *supra* note 62, at 444.

108. 450 U.S. 544 (1981). See *supra* notes 40-42 and accompanying text.

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

110. *State of Washington Department of Ecology v. United States Environmental Protection Agency*, 752 F.2d 1465, 1471-72 (9th Cir. 1985).

111. 645 F.2d 701 (9th Cir. 1981).

112. *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, *supra* note 10, at 239.

solvency. The manifestation of these ideals is the tribal comprehensive plan and its implementing device, the tribal zoning ordinance. The comprehensive planning process is by definition a local concern in jurisdictions throughout the United States. The process would determine both the desirability and the location of a commercial solid or hazardous waste facility on a reservation. Though Indian tribes clearly possess the sovereign authority required for comprehensive planning, the atmosphere surrounding their ability to zone non-Indian lands within their reservations is cloudy. This uncertainty can only erode a tribal government's confidence in engaging in land use planning through zoning, a primary method through which tribal governments are able to regulate activities that may have detrimental effects on tribal health and safety.

Territory has been described as the *sine qua non* of sovereignty.<sup>113</sup> As of 1990, 220 tribes controlled sixty million acres, or three percent, of the United States' land base, territory generally characterized by open space, sparse population, and largely pristine environments.<sup>114</sup> This "checkerboard"<sup>115</sup> ownership pattern is intensely complicated: some land is held in trust by the United States for the benefit of the tribe ("tribal trust land"); some land is held by tribal members subject to a trust ("Indian allotments"); some land is held in fee by tribal members ("Indian fee land"); and the rest of the land is held in fee by non-members ("non-Indian fee land").<sup>116</sup> The unwieldy and unworkable<sup>117</sup> patchwork of competing governmental authorities has been described as the "hopelessly crumpled fabric of the law of . . . regulatory jurisdiction in Indian Country."<sup>118</sup> The territorial sovereignty of tribes, consequently, is further undermined. The determination of regulatory authority over each of the checkerboard's constituent parts directly bears on the source and extent of inherent sovereign tribal powers to regulate through zoning activities that threaten tribal health and environment.

Though the level of scrutiny lavished on Indian Country zoning has not remotely approached that of tribal environmental regulations, commentators have engaged in serious examinations of this issue<sup>119</sup>

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113. *Environmental Protection and Native American Rights*, supra note 67, at 89.

114. Richard A. DuBey et al., *Protection of the Reservation Environment: Hazardous Waste Management on Indian Land*, 18 ENVTL. L. 449 (1988).

115. *Id.* at 474.

116. Ruth L. Kovnat, *Solid Waste Regulation in Indian Country*, 21 N.M. L. REV. 121, 121 (1990).

117. *Environmental Protection and Native American Rights*, supra note 67, at 91.

118. See note 116, at 123.

119. See, e.g., J. Bart Wright, Note, *Tribes v. States: Zoning Indian Reservations*, 32 NAT. RESOURCES J. 195 (1992); Craighton Goeppele, Note, *Solutions for Uneasy Neighbors: Regulating*

Prior to the landmark case of *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*,<sup>120</sup> tribes opposed to non-Indian activity within the reservation that could cause environmental damage could simply zone reservation lands, regardless of ownership, to protect or to control the location of environmentally harmful concerns.<sup>121</sup> This authority arose directly from the inherent tribal police power, and was supported by the *Montana* decision. Thus, tribes could freely zone any part of the land within their reservation boundaries for the location of a hazardous waste facility, presuming the location satisfied RCRA technical criteria.

The *Brendale* decision shattered the ability of many tribes to control land use in their territories. The *Brendale* court did not question tribes' sovereign right to zone trust lands within reservation boundaries;<sup>122</sup> nevertheless, the Court limited tribal authority to zone non-Indian lands on those reservations or parts of reservations that contained "substantial" non-Indian land ownership.<sup>123</sup> Where all or part of a reservation has significant non-Indian ownership, the state or the county has land use control over all non-Indian land.<sup>124</sup> Thus, any tribe contemplating a hazardous waste facility would be well-advised to zone for its location on land clearly controlled by the tribe.

*Brendale* represents a serious intrusion into the heart of tribal sovereignty: Indian control of land within reservation boundaries. Those tribes whose reservations contain significant amounts of non-

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*the Reservation Environment After Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 109 S. Ct. 2994 (1989), 65 WASH. L. REV. 417 (1990).

120. 492 U.S. 408 (1989).

121. *Environmental Protection and Native American Rights*, *supra* note 67, at 91.

122. 492 U.S. 408, 428 (1989).

123. *Id.* at 422. The decision itself is badly fractured. Four Justices found that the county had exclusive zoning authority over all non-Indian land. *Id.* at 409 (Justices White, Rehnquist, Scalia and Kennedy). Three others held that the tribe had exclusive zoning authority over all land within the reservation. *Id.* at 468 (Justices Blackmun, Brennan and Marshall). Two Justices found that the tribal right to zone depended on the essential Indian character of the land. *Id.* at 411 (Justices Stevens and O'Connor). Though one can distinguish the physical character of many Indian lands from that at issue in *Brendale*, the decision nonetheless compels a tribe to assess the percentage of non-Indian-owned property within its reservation when considering the establishment of a zoning ordinance. This requirement could obviously work to chill the zoning activities of those tribes unfortunate enough to lack the necessary financial and administrative resources. *Id.* at 424 (Justices White, Rehnquist, and Scalia dissenting).

Notably, Justice Blackmun's *Brendale* dissent interprets *Montana v. United States*, 450 U.S. 544 (1981), as contemplating tribal civil jurisdiction over non-Indians who reside within their reservations' boundaries when those powers are central to self-government. Justice Blackmun observed that "[i]t would be difficult to conceive of a power more central to 'the economic security, or the health and welfare of the tribe,' than the power to zone." *Brendale*, 492 U.S. at 458 (quoting *Montana*, 450 U.S. at 566) (concurring, dissenting opinion). *Brendale* thus apparently erodes tribal sovereignty in a way that the *Montana* Court anticipated and tried to discourage.

124. *Environmental Protection and Native American Rights*, *supra* note 67, at 92.

Indian land ownership have apparently lost the authority to regulate reservation land use planning through zoning. Consequently, commentators have noted, these tribes have lost their first-line environmental defense mechanism: the control of the location of environmentally harmful activities.<sup>125</sup> In the post-*Brendale* reservation regulatory environment, commercial solid and hazardous waste facilities still hold promise as the linchpin that links tribal environmental and land use controls.

#### IV. A MODEL SYSTEM OF LAND USE PLANNING IN INDIAN COUNTRY

##### A. Introduction

In the early 1980's, the EPA commissioned the Council of Energy Resources Tribes (CERT) to determine the extent and location of hazardous waste sites in Indian Country. Their findings, published in the "CERT Study,"<sup>126</sup> revealed that over 1200 hazardous waste generators or other hazardous waste activity sites were located on or near twenty-five reservations. Presumably, this concentration has increased in the time that has elapsed between the CERT study and today. Thus, tribes have a distinct interest in participating in the location and monitoring of such facilities because of their concentration and the potential health risks they pose. In fact, tribes are in a unique legal and political position to recruit actively these types of facilities as an economic development mechanism.

Indian Country waste disposal really revolves around two questions. First, how to dispose of both reservation-generated and illegally-dumped solid waste is worthy of examination, but it is beyond the scope of this article. Whether a tribe wants to use its land as a site for a commercial waste project as a form of economic development<sup>127</sup> is another question. A model system of land use planning in Indian Country that can assist tribes in assessing the propriety of pursuing a commercial hazardous waste project follows. Based on four existing tribal initiatives, the model is composed of the ingredients necessary to a successful commercial waste project planning initiative: a comprehensive planning process, a stringent land use evaluation and permitting system, an effective public par-

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125. *Id.* at 89.

126. COUNCIL OF ENERGY RESOURCE TRIBES, INVENTORY OF HAZARDOUS WASTE GENERATORS AND SITES ON SELECTED INDIAN RESERVATIONS (July 1985).

127. Kevin Gover & Jana L. Walker, *Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country*, 63 COLO. L. REV. 933, 933 (1992) [hereinafter, *Escaping Environmental Paternalism*].

ticipation process, and a scheme for commercial solid and hazardous waste project planning. Tribes do not currently possess the power under RCRA unilaterally to manage and to regulate these projects, but EPA policy indicates that tribes could successfully engage the EPA in a joint effort to establish commercial hazardous waste initiatives in Indian Country.<sup>128</sup>

*B. Comprehensive Planning Process: White Mountain Apache Tribe (Arizona)*<sup>129</sup>

The White Mountain Apache tribe is a recognized leader in creative and successful Indian Country economic development initiatives.<sup>130</sup> The tribe engaged Jonathan Taylor of the Harvard Project on American Indian Economic Development to assist in the design of a comprehensive planning process influenced by the highly-respected Confederated Salish & Kootenai tribes' model.<sup>131</sup> The four-phase prototype process outlined below is the result of this collaboration.

*1. Deciding to Plan.*

Preparation for planning would begin with a general consensus-building meeting of the tribe's main leadership, which would include the Chairperson, the Council, the managers of tribal enterprises, the directors of the tribal government, and leaders from previous administrations. In reviewing planning principles and discussing the merits of planning, this group would ideally create a Planning Task Force (PTF). The PTF would be responsible for carrying out the coordination work of the planning process. The PTF's form and membership would vary by tribe.

The PTF would initially engage in an assessment of what elements the planning process would include, such as the duration and staging of planning phases, the role and degree of involvement of various tribal institutions, the project's staff and budgetary needs, funding source identification, and the form of a Memorandum of Understanding with the Bureau of Indian Affairs (BIA). Once the process is designed, the PTF would submit the proposal to the tribal

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128. See *supra* note 27.

129. See JONATHAN B. TAYLOR, *NEGOTIATING A VISION: PRINCIPLES OF COMPREHENSIVE RESOURCE PLANNING AND A PLANNING PROCESS FOR THE WHITE MOUNTAIN APACHE TRIBE* (Harvard Project on American Indian Economic Development, 1992).

130. See, e.g., Erik Eckholm, *The Native and Not So Native American Way*, N.Y. TIMES MAGAZINE, Feb. 27, 1994, at 45.

131. Confederated Salish & Kootenai Tribes, Proposal to Administration for Native Americans for a Comprehensive Plan Development Project (Oct. 14, 1988) (unpublished manuscript, cited in TAYLOR, *supra* note 129).

Council for review. With the support of the Council, the PTF would begin developing institutions and soliciting public opinion.

## *2. Evaluating Current Conditions and Choosing Future Goals*

This iterative, reciprocal process involves technical experts educating the public about past land use practices, current conditions, and future possibilities. Additionally, the public communicates its preferences, goals, and values to the experts. First, the PTF and the Council draft the scope of the plan. Once this sketch is completed, the PTF would create tribal and BIA technical teams as well as other institutions necessary for the plan's development and implementation. The relationship between such institutions is illustrated in Appendix 1.

Many tribes will not likely possess the in-house expertise required to conduct the interdisciplinary technical work to follow. Such tribes can contract out, develop the necessary talent internally, or allow the BIA to execute the necessary planning analysis. In any case, the PTF should ensure objective analysts. While the technical teams begin collecting and assessing the data needs of the plan, the PTF should begin soliciting public opinion and goals. Finally, the PTF must collate and summarize the technical teams' and public hearings' findings for Council approval. It is critical that this summary be in a written form, which describes current conditions as well as the plan's scope and goals.

## *3. Generating Alternatives and Choosing Among Them*

The generation of policy alternatives to accomplish identified goals is best accomplished by the technical teams, tribal enterprise managers, and department directors. The technical team presumably has a good sense of current conditions and their causes. Including managers and directors at this point gives them an "ownership interest" in the plan. Because they ultimately implement the policies generated in this phase, the chances of successful implementation are improved.

The PTF should hold another round of public hearings after it creates policy alternatives and distributes these to the Council, associations, and tribal members. Public comment then should be recorded. The PTF should then draft a final list of alternatives, including a summary of public commentary, for the Council. The Council then should evaluate the work of the PTF and should choose among the policy alternatives in approving the plan.

## *4. Putting the Plan to Work and Reviewing Its Outcomes*

To avoid being "just another study," the plan must be implemented. Planning policies must be developed into guidelines for day-to-day decision making, and a new organization superseding the PTF and technical teams would be necessary. This monitoring body, termed a Comprehensive Plan Review Board, would establish the guidelines for managers and directors, thus transferring the goals into performance standards. Finally, the Council should decide whether the process of developing the plan furthered tribal interests.

*C. Land Use Evaluation & Permitting: Puyallup Tribe (Washington)*<sup>132</sup>

Tribes need to build strong institutional structures for enforcing federal laws and for developing and enforcing tribal land use and environmental laws. Informed by the legal status of Indian lands, Paul Nissenbaum and Paul Shadle developed a model system for devising and implementing land use policies and procedures through the processing of land use proposals. The model seeks to weed out unacceptable proposals while expediting approval of options that promote tribal goals.

*1. Recognizing the Necessity of Long-Range Comprehensive Planning*

The Puyallup model is founded on tribes establishing a long-range planning strategy. As in the approach of the White Mountain Apache Tribe,<sup>133</sup> a tribe must conduct a thorough inventory of its lands. If a tribe is presently unable to assess its lands and long-term land-related needs, it should develop a system to do so before entering into this phase.

*2. Alternatives to Traditional Zoning*

Given the nature of land ownership in Indian country,<sup>134</sup> tribes must implement zoning systems significantly different than the traditional "Euclidian" system.<sup>135</sup> Performance, or "flexible," zoning schemes allow a tribe to set standards and goals with which to guide market-driven development projects. Performance-based schemes avoid the problems associated with mapping out the entire jurisdiction into use districts, the hallmark of Euclidean zoning.

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132. See Paul Nissenbaum and Paul Shadle, *Building a System for Land-Use Planning*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT (Stephen Cornell et al. eds., 1992).

133. See *supra* notes 129-31 and accompanying text.

134. See *supra* notes 113-18.

135. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Flexible zoning evaluates the appropriateness of development proposals in terms of tribal policy priorities, rather than predesignated uses for particular locations. Two types of criteria drive this scheme: absolute and variable. Absolute criteria, which apply to all developments, address compliance with adopted comprehensive plans, minimum requirements for engineering and public services, and environmental and site design standards. Variable criteria assign "performance points" to proposals based on type of use, impact, and community preferences. This weighting system is designed to guide projects toward the achievement of long-term development goals identified in the comprehensive plan.

### *3. Proposal Evaluation Standards*

This element of the model addresses a recognized fundamental inadequacy in that most tribal planning systems lack a method for evaluating pending proposals. Any systematic approach to land use development appraisal must be based on identifiable criteria. These criteria essentially serve as a checklist against which all development proposals are judged. The model proposes two types of evaluation criteria: baseline and variable. Baseline criteria are fundamental standards for development which can be clearly defined and measured. Applied uniformly to all development projects, these criteria concern building and safety codes, environmental impact assessments, and infrastructure capacity, heights, setbacks, floor-to-area ratios, parking, and signage. Variable criteria, in contrast, are not as easily quantified. Their application and weight will necessarily vary depending on the type of project and tribal planning priorities at the time of review. These criteria concern cultural enrichment, economic development, financial benefit, human services provisions, natural resource preservation, and sovereign identity promotion.

### *4. Implementing a Comprehensive Permitting Process*

Any facility that receives hazardous waste must receive a permit from the EPA or an authorized state. Given RCRA's current configuration, the EPA would be the primary permitting entity in Indian Country. However, as the EPA is likely unable to keep tribal interests paramount, detailed decision-making consistent with RCRA procedures is best left to the tribes. Given the EPA's self-determination policy, tribes arguably have a tremendous opportunity in guiding hazardous waste facility permitting.

The evaluation standards set forth in this model are useless without some means of implementing the baseline and variable criteria. The scheme described in this part is composed of five phases: baseline

code review; staff analysis; community evaluation; planning commission decision; and tribal council oversight, and is presented in Appendix 2.

Any land use project, from a minor building alteration to a hazardous waste disposal facility, would be required to go through Baseline Code Review. This review would ensure compliance with baseline criteria and would strive to achieve fairness and objectivity in meeting tribal standards. Requiring this step would also discourage wasteful ad hoc activity, which consumes scarce tribal administrative resources. Evaluation at this phase would be carried out by staff members of the tribal environmental, land use or planning divisions, or perhaps contracting out where expertise is lacking.

Any project designated "high impact" moves into the Staff Analysis phase, which implements the variable criteria. In contrast to Baseline Code Review, no two proposals would undergo the identical set of tests. Evaluation at this phase would be coordinated by staff members who may or may not be members of a tribal Planning Commission. This Planning Commission could be the same organization as the Comprehensive Plan Review Board proposed in part IV(B)(4) above. After the application passes phases one and two, the Planning Commission would receive it with staff comments.

The Planning Commission would then coordinate a Community Review. This phase could serve to prevent internal conflict among tribal members as well as a method of electing feedback from affected parties. Following the Review, the application should be formally considered by the Planning Commission or tribal Council. The purpose of this phase is to synthesize all of the information gathered and to render a decision in light of tribal policy priorities. The Council may be benefitted by postponing its involvement in the process until this point, given the Council's broad policy agenda and chronic time shortages. Finally, to ensure that the Council retains a degree of authority over crucial development matters, it would approve or disapprove such applications during a regularly-scheduled meeting. The Council should allow aggrieved parties to appeal this decision to tribal courts.

#### *D. Public Participation Process: Gila River Pima Tribe (Arizona)<sup>136</sup>*

This 1993 American Planning Association award-winning public participation process<sup>137</sup> was designed in response to the tribe's request

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136. See STERZOR GROSS HALLOCK, INC., GILA RIVER INDIAN COMMUNITY PUBLIC PARTICIPATION PROGRAM (1992).

for assistance in developing a land use management plan, a water budget, and a water rights claim. Over half of the adults of the 12,000-member tribe participated in over fifty meetings that took place in 1985; the process was built on the cultural pattern of village-based grass roots democracy and consensus decision-making. The importance of integrating the Gila River process into the model scheme proposed by this article cannot be overstated. Meaningful public participation cuts across each phase of the model scheme, and the Gila River model is arguably the most appropriate way to go about eliciting this participation.

The consultant team recommended that non-Indians adhere to seven basic principles in order to engage Indians in a constructive dialogue:

1. One must recognize that Native Americans have every right to their beliefs and way of life.
2. One must understand the differences between various Native American cultures.
3. One must learn about the specific culture one is dealing with.
4. One must listen carefully to individual Native Americans to find out how they view themselves.
5. One must be aware of, but not participate in, their politics; allow them to run their own government.
6. One must defer to Native American political and cultural structure when formulating decisions.
7. Most importantly, one must accept their decisions.

In applying these concepts to the process, the consultants learned the elements necessary to create a successful public process. Primarily, non-Indians should ask rather than act when in doubt. Also, participation implied change, which caused anxiety among the tribal members. White culture too often has treated Indians with equal doses of arrogance and ignorance, and this has led to trepidation on the part of Indians. Significantly, consensus decision-making means that there may be fifty leaders and not one. Serving food at gatherings created a non-adversarial setting, and asking the governing committee when they would be gathering for their events rather than scheduling them independently ensured fuller participation. Further, the Gila people were not likely to put anything in writing to transfer their perspectives on the process, but were open to visits from other aboriginal groups. Finally, they were able to achieve a comfort level

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137. Mary Lou Gallagher, *1993 Planning Awards—Comprehensive Planning: Small Jurisdiction*, 59 *PLANNING* 12 (March 1993).

with a single plan given that the process was truly participatory and that the plan would be isolated from change in government.

*E. Commercial Solid and Hazardous Waste Project Planning: Campo Band of Mission Indians (California)*<sup>138</sup>

The Campo project is the sole example of a commercial waste project in Indian Country. While the project itself was one involving a commercial solid waste facility, its principles are generally transferable to hazardous waste projects. Jana L. Walker and Kevin Gover, the lawyers who developed the program, convincingly maintain that the process described below is likely to lead to successful projects.

*1. Developing an Infrastructure that Minimizes Environmental Liabilities Associated with Commercial Waste Projects*

Tribes are widely considered to be unattractive business partners, and reservations remain some of the least developed areas in the United States. Much of the problem is that tribes have not developed the institutional infrastructure to provide outsiders with some comfort regarding doing business on the reservation. Environmental liability is a major concern, as RCRA compliance and penalty costs can be overwhelming.<sup>139</sup> The EPA can enforce its laws and regulations against generators, transporters, owners, and operators of hazardous waste treatment, storage, and disposal facilities.<sup>140</sup>

Development on reservations is impaired primarily by the absence of tribal regulatory structures. Tribes must develop a legal infrastructure to allow themselves to participate in and ultimately to control the application of federal law. This type of infrastructure would also enable tribes to prevent the application of state laws to businesses on the reservation. Providing prospective developers with predictability is the goal of creating such a system. The main elements of this system are tribal environmental codes, operating standards, environmental audit, other tribal codes, business form choice, and insurance.

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138. See *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, *supra* note 10 and *Escaping Environmental Paternalism*, *supra* note 127.

139. Federal environmental statutes extend liability to anyone who buys, sells, leases, develops, or manages land, including tribal land. *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, *supra* note 10, at 241.

140. *Id.*

By assuming primary responsibility under federal environmental law, tribes can establish environmental quality standards suited to local and individual situations. Even when federal laws, like RCRA, do not contain tribal amendments providing for primary program responsibility, tribes should promulgate waste codes and regulations. These codes must be sensitive to public opposition and must explicitly provide for coordination with RCRA and neighboring states and reservations. These codes must be designed to be as stringent as the hazardous waste laws of the state in which the reservation is located.

Tribes must develop and enforce effective operating standards that provide for and employ state-of-the-art technologies. These standards must also require that immediate notice be given upon the discovery of contamination or discharge. Environmental audits are becoming commonplace and can be expected to be a requirement for transactions involving real estate or corporations with physical assets. Tribes should require advanced audits that combine technical and legal approaches and should conduct periodic site inspections to monitor potentially dangerous activities on their lands. Tribes should also invite developers to assist them with tax, land use, and business practice codes. Developers' participation in tribal law-making that affects them will increase their confidence that the tribe will not undertake a regulatory program that unduly burdens the project.

The tribal leadership must also decide on an appropriate business form for tribal enterprise. Alternative business forms range from tribally-owned sole proprietorships to numerous forms of joint venture. A corporation, though, is likely the best choice in the case of commercial waste projects, given the enormous potential environmental liability.<sup>141</sup> Insurance coverage is usually limited to "sudden and accidental" pollution. Courts are divided regarding whether comprehensive liability policies cover hazardous waste cleanups and response costs. It is thus critical for a tribe to understand its policy coverage. A tribe may also charge fees to build a cash reserve for additional self-insurance.

## 2. Feasibility

A tribe should conduct feasibility studies before embarking on any economic development project. Such studies use sophisticated cost-

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141. "Using a corporate form to conduct commercial for-profit activities shields a tribe against liability so long as the tribal government does not overlap or control the tribal corporation, oversee the corporation's financial and operating procedures, or share officers." *Id.* at 247.

benefit analyses and identify potential business opportunities based on a tribe's specific investment and development strategies.

### *3. Building and Maintaining Community Support*

The reservation is as susceptible to the NIMBY syndrome as any other environment. Thus, because commercial waste projects receive high media exposure, it is extremely important that tribes considering such projects have the enthusiastic support of their members. Community meetings and open hearings like those described in part IV(D) above, conducted by the tribe, facilitate member participation.

### *4. Financing the Project*

Commercial waste projects are attractive to tribes because such projects require no equity outlay at the beginning of the project, as the developers typically incur these costs. Nevertheless, tribes may seek financial advice to determine the availability of federal grants and other public and private funding mechanisms.

### *5. Finding the Vendor*

Whether the vendor pursues the tribe or vice versa, the tribe should thoroughly investigate the background, reputation, project history, and financial condition of potential developers.

### *6. Environmental Impact Statement (EIS)*

The mandatory approval of the Department of the Interior for real estate transactions on the reservation can clearly be deemed a "major federal action" for purposes of the National Environmental Policy Act (NEPA),<sup>142</sup> and major federal action requires the preparation of an EIS.<sup>143</sup> By providing primary operating standards for a project, the EIS can become the cornerstone of a tribal regulatory program. Private consultants can be indispensable in shepherding the EIS through the BIA review process's potential bottlenecks.

### *7. Tribal-State Cooperative Agreements for Technical Services*

Tribes should seek to create intergovernmental agreements with the states in which their reservation is located. Such joint adminis-

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142. 42 U.S.C. §§ 4321-4370(a) (1988).

143. 42 U.S.C. § 4331 (1988).

tration by agreement is essential because pollution does not respect political boundaries. Moreover, joint regulated programs avoid jurisdictional disputes and promote economic efficiency by reducing administrative costs. Such agreements may also give tribes the ability to call upon state resources and expertise in creating tribal programs.

Ms. Walker and Mr. Gover maintain that the Campo Band's experience in implementing this system demonstrates that existing laws can be successfully employed to further tribal aims if three elements are present: a tribal community that sincerely desires effective environmental protection; officials at every level of the BIA who are willing to conduct a careful and comprehensive environmental review process; and developers who are not discouraged by the rigorous tribal and federal environmental review.<sup>144</sup> The Campo Band benefitted in terms of employment and revenue, an increased sense of pride and purpose, and in demonstrating that a principled application of tribal proprietary and regulatory powers can help to achieve economic self-sufficiency. Predictably, though, the Band is facing reservation-based NIMBY resistance as well as attacks from their non-Indian neighbors and environmentalist "allies."<sup>145</sup>

## V. POLICY RECOMMENDATIONS AND CONCLUSION

The analysis presented above indicates that tribes not only have a need for regulating their own environment in a way that can promote economic self-sufficiency, but they also have the legal right to do so. There are five areas, however, in which tribes can take action to further establish the contours of reservation economic development through environmental and land use planning:

1. Tribes should lobby Congress to amend RCRA to allow tribes to be treated as states for purposes of regulation and grant programs.
2. Tribes must carefully weigh the economic benefits of commercial hazardous waste facilities against the environmental risks they pose as well as lost opportunity costs.
3. Tribes should develop comprehensive plans and zoning ordinances that, together with RCRA, establish the location of hazardous waste facilities on Indian-controlled land.
4. Each tribe that contemplates pursuing this form of economic development should develop a workable regulatory and administrative framework that reflects their particular financial situation.

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144. *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, *supra* note 10, at 258.

145. The Band's opponents included local NIMBYs as well as the Sierra Club and two waste disposal firms. *Escaping Environmental Paternalism*, *supra* note 127, at 941.

5. Tribes may seek to create Inter-Tribal Waste Management Compacts in order to share information and to allocate risk according to tribal principles.

Underlying these recommendations is an understanding that Native Americans' relationship with the land may or may not comport with mainstream environmentalism.<sup>146</sup> As a predicate to throwing its support blindly behind Indian communities, it appears that

Much of the environmental community seems to assume that, if an Indian community decides to accept such a project, it either does not understand the potential consequences or has been bamboozled by an unprincipled waste company. In either case, the clear implication is that Indians lack the intelligence to balance and protect adequately their own economic and environmental interests.<sup>147</sup>

This "concern" can, in fact, be considered another form of "environmental racism," one that simply turns the conventional definition on its ear.

The environmental community external to Indian Country must come to realize that not all commercial hazardous waste projects are unwanted by the host community and that, in those cases where a community wishes to have such a facility, its decision should be respected.<sup>148</sup> Such facilities can best address the long-standing problems of "poor waste disposal systems, inadequate regulation, and unauthorized dumping in Indian Country."<sup>149</sup> Given full federal support, including financial and administrative assistance as well as timely intervention in instances of state interference, tribes are capable of deciding how best to confront their environmental problems and pursue their development objectives.

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146. See James L. Huffman, *An Exploratory Essay on Native Americans and Environmentalism*, 63 U. COLO. L. REV. 901 (1992).

147. *Escaping Environmental Paternalism*, *supra* note 127, at 942.

148. *Id.* at 933.

149. *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, *supra* note 10, at 262.