

Treating Tribes as States:

Principles and Parallels of Sovereignty in Federal Environmental Regulation

Meghann M. Reifenrath

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Control over natural resources is especially important for communities and cultures that have a close relationship with their land, water, and natural world.¹ As stated by a Navajo elder, “Water, fire, earth, and air. These are the elements that sustain us and define our sovereignty.”² Native Americans are longstanding observers of the effects of human activities on the environment. Although we must be careful to avoid romanticizing the relationship between Native Americans and the natural world, respect for nature does play a more central role in Native American society, culture, and religion than in Euro-American society, culture, and religion.³ Native Americans have traditionally enjoyed an intense relationship with the forms and forces of the environment.⁴ This intense relationship has been called an “environmental ethic.”⁵

This “environmental ethic” makes Indian tribes and the Environmental Protection Agency (EPA) seemingly natural allies.⁶ They share similar goals of protecting the Earth, restoring her health, and keeping her free from pollution.⁷ They confront common adversaries in the forms of recalcitrant industries, thoughtless citizens, and grasping state agencies pursuing agendas that stray far from policies of environmental protection.⁸ Yet, Indian tribes and the EPA cannot quite cement bonds.⁹ There are unbridgeable differences in pace, approach, style, and culture.¹⁰ Nonetheless, the relationship between Indian tribes and the EPA is marked by repeated efforts at bridge-building and the development of mutual respect.

¹ Jessica Owley, Tribal Sovereignty Over Water Quality, 20 J. LAND USE & ENVTL. L. 61, 64 (2004).

² Allison M. Dussais, Asserting a Traditional Environmental Ethic: Recent Developments in Environmental Regulation Involving Native American Tribes, 33 NEW ENG. L. REV. 653, 654-55 (1999).

³ Id.

⁴ Id.

⁵ See id.

⁶ William H. Rodgers, Jr., ENVIRONMENTAL LAW IN INDIAN COUNTRY, § 1.12, *1 (2008).

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Id.

Today, disputes in Indian country often arise under a set of federal environmental statutes, particularly those in which Congress has authorized the EPA to treat Indian tribes as states. The two most prominent statutes to treat Indian tribes as states for the purposes of federal environmental regulation are the Clean Water Act (CWA) and the Clean Air Act (CAA). Equally important, these two statutes evoke fundamental concerns about the contemporary meaning of what it is for a state, and an Indian tribe, to be sovereign. Although largely hailed as significant and long-awaited federal recognition of Indian tribes' authority over their environmental destiny, the "treatment as states" concept brings unimaginable complexity to constitutional law, Indian law, and environmental law. It is the objective of this paper to provide an examination of the notions of federalism, inherent tribal sovereignty, congressional delegation, and federal preemption as they collide in the context of federal environmental regulation.

FEDERAL POLICIES OF TRIBAL CONTROL OVER NATURAL RESOURCES

In the first generation of federal environmental laws, Congress largely overlooked Indian country.¹¹ This significant gap in the federal environmental statutory scheme became increasingly problematic.¹² Beginning in 1984, the EPA took steps to recognize Indian tribes as legitimate and appropriate entities to make decisions regarding the protection of their natural environments.¹³ This recognition soon led to the "treatment as a state" provisions in the CWA and the CAA, as well as a new era in tribal control over natural resources.

The 1984 Indian Policy

Any comprehensive discussion of federal environmental regulation in Indian country must begin with the 1984 Indian Policy. President Ronald Reagan published a Federal Indian Policy on January 24, 1983. His policy supported the primary role of tribal governments in matters affecting Indian

¹¹ Dean B. Suagee, James J. Harvard, Tribal Governments and the Protection of Watersheds and Wetlands in Indian Country, 13 ST. THOMAS L. REV. 35, 36 (2000).

¹² Id. at 36-37.

¹³ Id. at 37.

reservations.¹⁴ The policy emphasized the self-government and government-to-government themes that resonate in Indian country.¹⁵ That same year, the EPA became the first federal agency to adopt its own “Indian policy,” setting forth several principles that would govern its interactions with Indian tribes.¹⁶ As formulated in an official statement by EPA Administrator, William D. Ruckelhaus, on November 8, 1984, the EPA policy stated nine broad principles:

1. The Agency stands ready to work directly with Indian tribal governments on a one-to-one basis, rather than as subdivisions of other governments;
2. The Agency will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions, and managing programs for reservations, consistent with agency standards and regulations;
3. The Agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands;
4. The Agency will take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs;
5. The Agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever the EPA’s actions and/or decisions may affect reservation environments;
6. The Agency will encourage cooperation between tribal, state, and local governments to resolve environmental problems of mutual concern;
7. The Agency will work with other federal agencies which have related responsibilities to Indian reservations to enlist their interest and support in cooperative efforts to help tribes assume environmental program responsibilities for reservations;
8. The Agency will strive to assure compliance with environmental statutes and regulations on Indian reservations;
9. The Agency will incorporate these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system, and ongoing policy and regulation development processes.¹⁷

These nine principles held appeal in Indian country, as they embraced bedrocks of federal Indian law, including sovereignty and self-determination.¹⁸ The EPA soon took several steps to apply these principles to environmental regulation in Indian country.¹⁹ Staffing, workshops, consultation, and other

¹⁴ Rodgers, § 1.12, at *2.

¹⁵ Id.

¹⁶ Id.

¹⁷ United States Environmental Protection Agency, Office of Water, American Indian Environmental Office, EPA Policy for the Administration of Environmental Programs on Indian Reservations, Nov. 8, 1984, <http://www.epa.gov/tribalportal/pdf/indian-policy-84.pdf> (visited Nov. 14, 2008).

¹⁸ Rodgers, § 1.12, at *2.

¹⁹ Id.

forms of assistance appeared.²⁰ Particular programs within the EPA began developing publications of interest within Indian country.²¹ But, perhaps, most significantly, the EPA led the charge to include Indian tribes in two major environmental laws, resulting in the “treatment as states” provisions in the CWA in 1987 and the CAA in 1990.

Indian Water Rights

Treaties between the United States and the Indian tribes rarely mentioned water rights.²² This is largely because the Native Americans entering into the treaties assumed – as they always had – that rivers, lakes, and other waters, belonged to people as a whole and were not attributable to any sovereign entity.²³ Nonetheless, special canons of construction have been established for the courts to interpret treaties liberally in favor of Indian tribes.²⁴ These canons recognize not only the great disparity in bargaining power that existed between the United States and the Indian tribes, but also that the United States negotiated and wrote treaties in a language that most tribal people did not understand.²⁵

Following these basic principles, the Supreme Court developed the notion of reserved tribal water rights on reservations.²⁶ In Winters, the United States sued various landowners along the Milk River in central Montana, including cattle and irrigation companies, to enforce the 1888 treaty creating the Fort Belknap Reservation.²⁷ In affirming a decree that enjoined the defendants from infringing upon river waters intended for the reservation, the Court held that the Tribe retained implied water rights through the treaty, even though the treaty did not contain an express water rights reservation provision.²⁸ The

²⁰ Rodgers, § 1.12, at *3.

²¹ Id.

²² Edmund J. Goodman, Indian Tribal Sovereignty and Water Resources: Watersheds, Ecosystems, and Tribal Co-Management, 20 J. LAND RESOURCES & ENVTL. L. 185, 186 (2000).

²³ Robert Erickson, Comment, Protecting Tribal Waters: The Clean Water Act Takes Over Where Tribal Sovereignty Leaves Off, 15 TUL. ENVTL. L. J. 425, 427 (2002) (citing Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 175-76 (1999)).

²⁴ See County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992); Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

²⁵ Goodman, 20 J. LAND RESOURCES & ENVTL. L. at 192.

²⁶ Winters v. United States, 207 U.S. 564, 565-67 (1908).

²⁷ Id.

²⁸ Id.

Court reasoned that “ambiguities . . . will be resolved from the standpoint of the Indians.”²⁹ This doctrine, which retains implied water rights where an Indian tribe implicitly has understood them to exist, has been repeatedly affirmed.³⁰

Winters established that tribal water rights are a matter of federal, not state, law. Most western states have an appropriations rights doctrine: a system which allocates prior water rights with a requirement that an individual show a continuing beneficial use of the water in question.³¹ The Winters doctrine, however, recognizes that tribal rights are not subject to the laws of the states that surround them.³² Thus, Indian tribes are not subject to the “use it or lose it” system in place in most states.³³ The water rights of the Indian tribes are reserved regardless of their prior use.³⁴ While this doctrine is significant, tribal sovereignty and superior Indian water rights have not been particularly effective means to abate the pollution and misuse of reservation waters.³⁵

Although Winters made clear that Indian tribes have implied rights to water, it did not specify what quantity of water is reserved to the tribes. In Arizona v. California, the Court declared that the quantity of water reserved for tribal use was that amount sufficient to irrigate all the practicably irrigable acreage on the reservation.³⁶ Read narrowly, Arizona stands for the proposition that Indian tribes are only entitled to the amount of water necessary for irrigation.³⁷ A better reading of Arizona draws upon the purposes of the reservation.³⁸ The amount of water reserved would be based on tribal culture and economy, rather than the number of acres within the reservation.³⁹ And, the amount of water reserved would naturally expand to meet tribal needs as the Indian tribe grows and changes.⁴⁰ Despite the

²⁹ Winters, 207 U.S. at 565-67.

³⁰ Erickson, 15 TUL. ENVTL. L. J. at 428.

³¹ Goodman, 20 J. LAND RESOURCES & ENVTL. L. at 193-94.

³² Winters, 207 U.S. at 565-67.

³³ Goodman, 20 J. LAND RESOURCES & ENVTL. L. at 193-94.

³⁴ Id.

³⁵ Erickson, 15 TUL. ENVTL. L. J. at 428.

³⁶ Arizona v. California, 373 U.S. 546, 600-01 (1963).

³⁷ Owley, 20 J. LAND USE & ENVTL. L. at 81.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

importance of Arizona in determining the *quantity* of water to which Indian tribes have rights, it does not touch upon the *quality* of water reserved for the Indian tribes.⁴¹ Although the reasoning of Arizona could be expanded easily to protect water quality, Indian tribes have largely turned to provisions of the CWA to address the pollution of reservation waters.

The Clean Water Act

The primary objective of the CWA was “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁴² The Act is primarily carried out through a permitting system, called the “national pollutant discharge elimination system” (NPDES), that directly regulates the discharge of pollutants into navigable waters.⁴³ An NPDES permit is required from the EPA to discharge pollutants into waters from “point sources,” defined as discernible or discrete conveyances such as pipes, ditches, channels, and tunnels.⁴⁴ The CWA calls on the EPA to administer the NPDES and the Army Corps of Engineers to manage the permits.⁴⁵ The NPDES permits list types and amounts of pollutants that entities are allowed to discharge.⁴⁶

The CWA establishes a pollution control regime where states are the primary enforcers.⁴⁷ The CWA allows states to develop water quality standards for all waters within their borders.⁴⁸ These water quality standards are based on the designated uses of individual waters, whether municipal, industrial, commercial, agricultural, or recreational. The state standards must comply with all federal minimum requirements, but can be more stringent if a state desires.⁴⁹ States can also administer the NPDES.⁵⁰ In fact, forty-five states have chosen to do so.⁵¹ The EPA decides whether to delegate the administration of the NPDES to a state based on the state’s capacity, defined by its adequacy of staff and funding as well

⁴¹ Owley, 20 J. LAND USE & ENVTL. L. at 81.

⁴² Clean Water Act, Pub.L. 92-500, § 2, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1377 (2003)).

⁴³ 33 U.S.C. § 1342 (2003).

⁴⁴ Id.

⁴⁵ 33 U.S.C. § 1344(d) (2003).

⁴⁶ 33 U.S.C. § 1342 (2003).

⁴⁷ 33 U.S.C. § 1251(b) (2004).

⁴⁸ 33 U.S.C. § 1313 (2001).

⁴⁹ 40 C.F.R. § 131.4(a) (1994).

⁵⁰ 33 U.S.C. § 1251(b) (2004).

⁵¹ Owley, 20 J. LAND USE & ENVTL. L. at 73.

as its experience in managing state water pollution laws and programs.⁵² Despite a state's broad authority, the EPA retains full authority over permits, polluters, and the state at all times.⁵³ While the EPA has never done so, it has the right to revoke a state's ability to administer any regulation program.⁵⁴

Originally, only the federal government and states with approved programs had the ability to administer CWA programs. In 1987, however, Congress amended the CWA to treat Indian tribes as states for certain purposes.⁵⁵ These amendments broadened tribal regulatory authority over water resources, allowing Indian tribes to exercise the same rights and responsibilities as states. Indian tribes could act as states in the realms of receiving grants,⁵⁶ setting water quality standards,⁵⁷ administering permits,⁵⁸ managing nonpoint sources,⁵⁹ and other programs.⁶⁰ The "treatment as a state" concept put Indian tribes on an equal footing with states, finally allowing tribes to assert their "environmental ethic" in a meaningful manner.⁶¹

"Treatment as a state" status is not automatic.⁶² An Indian tribe applying for "treatment as a state" status must submit a detailed application to the EPA showing that certain criteria are satisfied.⁶³

An Indian tribe must demonstrate the following:

1. The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in § 131.3 (k) and (l),
2. The Indian Tribe has a governing body carrying out substantial governmental duties and powers,
3. The water quality standards program to be administered by the Indian Tribe pertain to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation, and

⁵² Owley, 20 J. LAND USE & ENVTL. L. at 73.

⁵³ 33 U.S.C. § 1342(c) (2003).

⁵⁴ Id.

⁵⁵ 33 U.S.C. § 1377 (2003).

⁵⁶ 33 U.S.C. § 1281-1289 (2003).

⁵⁷ 33 U.S.C. §§ 1313, 1315, 1318, 1319 (2003).

⁵⁸ 33 U.S.C. § 1342 (2003).

⁵⁹ 33 U.S.C. § 1329 (2003).

⁶⁰ 33 U.S.C. §§ 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, 1346 (2003).

⁶¹ See Dussais, 33 NEW ENG. L. REV. at 654-55.

⁶² 33 U.S.C. § 1377(e) (1994).

⁶³ 40 C.F.R. § 131.8 (2003).

4. The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.⁶⁴

Once an Indian tribe files its application, the EPA provides notice of the application to all involved entities and individuals and allows for a comment period.⁶⁵ If the EPA finds that the Indian tribe's application meets the requirements, "treatment as a state" status will be granted.⁶⁶ In general, once an Indian tribe is deemed eligible for "treatment as a state" status under one EPA program, it need only establish that it has the capability to implement any subsequent program.⁶⁷ Beginning in 1994, an Indian tribe was allowed to submit water quality standards simultaneously with an application for "treatment as a state" status.⁶⁸

The 1987 amendments to the CWA had serious ramifications for the civil jurisdiction of Indian tribes. The CWA calls for the regulated water resources to be "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 or alienation, or otherwise within the borders of an Indian reservation."⁶⁹ Under this provision, an Indian tribe would appear to have authority over land owned by nonmembers so long as it is within the borders of a reservation. However, the EPA has not read the CWA as a delegation of authority over lands owned by nonmembers.⁷⁰ Unlike the CAA, the EPA has interpreted the CWA to require that Indian tribes show they have inherent authority to regulate activities on lands owned by nonmembers within reservation boundaries.⁷¹ The EPA draws upon the common law to establish a case-by-case framework to determine jurisdiction over these lands owned so that it can identify "potential threats against water quality as they relate to the particular Indian tribe's health or welfare."⁷²

⁶⁴ 40 C.F.R. § 131.8(a)(1)-(4) (2003).

⁶⁵ 40 C.F.R. § 131.8(c)(4) (2001).

⁶⁶ 33 U.S.C. § 1377(e) (1994).

⁶⁷ Suagee, 13 ST. THOMAS L. REV. at 39.

⁶⁸ *Id.* at 38.

⁶⁹ 33 U.S.C. § 1377(e)(2) (2003).

⁷⁰ *Id.*

⁷¹ 56 Fed. Reg. 64,876 (Dec. 12, 1991).

⁷² See Montana v. United States, 450 U.S. 544 (1981).

The provisions of the CWA have given Indian tribes a legal basis to assert authority over water resources beyond the exterior boundaries of the reservation in certain circumstances. Water pollution does not stop at state or reservation borders. The regulations promulgated under the CWA specifically allow Indian tribes to set water quality standards more stringent than surrounding states and municipalities.⁷³ When jurisdictions set conflicting water quality standards, downstream users receive special consideration.⁷⁴ Although the CWA does not specifically require upstream dischargers to comply with downstream water quality standards, the EPA has the authority to direct such compliance when it feels it is warranted.⁷⁵ Thus, Indian tribes have strong procedural rights against upstream polluters. The ability of Indian tribes to impact the activities of polluters off the reservation, including other states and municipal entities, is significant.

Indian tribes appear most interested in managing and preserving their water resources. Currently, 23 Indian tribes are approved to establish water quality standards in their territories.⁷⁶ A number of tribes have also enacted comprehensive water codes that regulate water use on their reservations.⁷⁷ These codes address both allocation and water quality concerns.⁷⁸ Some of these Indian tribes are motivated to manage their water resources because their livelihood depends on fisheries or irrigation.⁷⁹ Others are concerned for the integrity of their natural environments.⁸⁰ All can agree that water plays an integral role in the spiritual lives of their people.

⁷³ Owley, 20 J. LAND USE & ENVTL. L. at 82.

⁷⁴ Id. at 76.

⁷⁵ 33 U.S.C. § 1342(b)(3) (2002); see *Arizona v. Oklahoma*, 503 U.S. 91, 105 (1992).

⁷⁶ Owley, 20 J. LAND USE & ENVTL. L. at 78.

⁷⁷ Michael C. Blumm, Unconventional Waters: The Quiet Revolution in Federal and Tribal Minimum Stream Flows, 19 ECOLOGY L. Q. 445, 477-78 (1992).

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id.

The Clean Air Act

The primary focus of the CAA is the achievement of healthy air quality throughout the Nation.⁸¹ Under the CAA, the Administrator of the EPA is directed to establish uniform National Ambient Air Quality Standards (NAAQS) for individual air pollutants that have been determined to affect humans adversely, such as sulfur dioxide, carbon monoxide, and ozone.⁸² The NAAQS define federally accepted concentrations of these pollutants in the air.⁸³ In addition to establishing air quality standards, the EPA assumes primary responsibility for developing and managing programs that require a high degree of uniformity, such as a program to phase out substances that deplete the ozone layer.⁸⁴

States play an important role in the implementation of the CAA. Air quality standards, after all, do not themselves produce clean air. While the EPA sets the national standards and requirements, states typically write and implement the programs that achieve the NAAQS.⁸⁵ In order to implement a program, a state must first demonstrate that it has adequate legal authority and resources to meet minimum federal requirements.⁸⁶ If a state can make this showing, the EPA delegates to the state the authority to implement and enforce the provisions of the CAA.⁸⁷ However, the EPA reserves the right to monitor enforcement and compliance and the right to bring enforcement actions against suspected violators.⁸⁸

Originally, only the federal government and states with approved programs had authority to administer CAA programs. However, when Congress amended the CAA in 1990, it added a new provision, permitting the EPA to treat Indian tribes as states for the purposes of regulating air quality.⁸⁹ The 1990 amendments to the CAA broadened tribal regulatory authority over air resources within

⁸¹ Clean Air Act, Pub.L. 88-206, § 1, 77 Stat. 392 (codified as amended at 42 U.S.C. §§ 7401-7642 (2000)).

⁸² 42 U.S.C. §§ 7401-7642 (2000).

⁸³ Id.

⁸⁴ 59 Fed. Reg. 43,957 (Aug. 25, 1994).

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ 42 U.S.C. § 7601(d)(2)(b) (2000).

reservation boundaries and other areas under tribal jurisdiction.⁹⁰ The amendments provided Indian tribes with new opportunities to assert their “environmental ethic” in Indian country.⁹¹

As under the CWA, “treatment as a state” status is not automatic. An Indian tribe applying for “treatment as a state” status must submit a detailed application to the EPA showing that certain criteria have been met.⁹² An Indian tribe must demonstrate the following:

1. The Indian tribe has a governing body carrying out substantial government duties and powers,
2. The functions 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
3. 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 chapter and all applicable regulations.⁹³

Once an Indian tribe files its application, the EPA provides notice of the application to all involved entities and individuals and allows for a comment period.⁹⁴ If the EPA finds that the Indian tribe’s application meets the applicable requirements, “treatment as a state” status will be granted.⁹⁵ Once an Indian tribe is deemed eligible for “treatment as a state” status under one EPA program, it need only establish that it has the capability to implement any subsequent program.⁹⁶ An Indian tribe is permitted to undergo eligibility review at the same time it seeks approval for a particular air quality program.⁹⁷

The 1990 amendments to the CAA had serious implications for the civil jurisdiction of Indian tribes. To qualify for “treatment as a state” status, an Indian tribe must demonstrate that the “functions 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.*”⁹⁸ The EPA

⁹⁰ Steffani A. Cochran, Comment, Treating Tribes as States Under the Federal Clean Air Act: Congressional Grant of Authority-Federal Preemption-Inherent Tribal Authority, 26 N.M. L. REV. 323 (1996).

⁹¹ See Dussais, 33 NEW ENG. L. REV. 653 at 656.

⁹² 42 U.S.C. § 7601(d)(2) (2000).

⁹³ 42 U.S.C. 7601(d)(2)(A)-(C) (2000).

⁹⁴ 40 C.F.R. § 49.9(b), (c) (2002).

⁹⁵ 42 U.S.C. § 7601(d)(2) (2000).

⁹⁶ 59 Fed. Reg. 43,962 (Aug. 25, 1994).

⁹⁷ Id.

⁹⁸ 42 U.S.C. § 7601(d)(2)(B) (2000) (emphasis added).

interprets this provision as an express congressional delegation of authority to Indian tribes to regulate all air resources on reservations, as well as resources outside the technical reservation boundaries, assuming the tribes can make a particularized finding of authority over the off-reservation source.⁹⁹ In the latter case, the EPA has made clear that Indian tribes can implement CAA programs on these lands only if they demonstrate regulatory authority over the affected areas under general principles of federal Indian law.¹⁰⁰

The transboundary nature of air pollution greatly complicates Indian tribes' efforts to protect their air resources. As a result, the CAA provides three primary means to address transboundary air pollution problems.¹⁰¹ First, Indian tribes and states can redesignate areas that are already meeting the NAAQS, imposing stricter air quality requirements to constrain upwind emissions.¹⁰² Second, tribes and states can petition the EPA to regulate upwind sources that are significantly interfering with the maintenance of their air quality standards.¹⁰³ Third, the CAA encourages cooperative planning efforts among Indian tribes and states to address regional-scale pollution problems.¹⁰⁴ The ability of Indian tribes to impact the activities of off-reservation polluters is significant.

The EPA has identified statutory provisions for which "treatment as a state" status is not appropriate. For example, regulations promulgated by the EPA exempt Indian tribes from "treatment as a state" status with regard to certain citizen suit provisions.¹⁰⁵ The CAA authorizes any person who provides advance notice to bring certain civil actions in federal district court against states in their capacity as states, to the extent permitted by the Eleventh Amendment to the Constitution.¹⁰⁶ The EPA declined to take a position on the extent to which Indian tribes are subject to this citizen suit

⁹⁹ Milford, *supra* note 45, at 221.

¹⁰⁰ 63 Fed. Reg. 7259 (Feb. 12, 1998).

¹⁰¹ Milford, 44 NAT. RESOURCES J. at 229.

¹⁰² 42 U.S.C. § 7474(a), (c) (2000).

¹⁰³ 42 U.S.C. § 7426(b)-(c) (2000).

¹⁰⁴ See 42 U.S.C. § 7511(a) (2000); 42 U.S.C. § 7492(f) (2000).

¹⁰⁵ 63 Fed. Reg. 7254, 7260 (Feb. 12, 1998).

¹⁰⁶ 42 U.S.C. § 7604 (2000).

provision.¹⁰⁷ The EPA reasoned that this question should be resolved by established principles of tribal sovereign immunity.¹⁰⁸

Regulations promulgated by the EPA also exempt Indian tribes from “treatment as a state” status with regard to judicial review of certain tribal governmental actions.¹⁰⁹ For example, the CAA requires judicial review of a final permit action.¹¹⁰ The EPA recognized that some avenue for appeal of tribal governmental actions to an independent review body ought to be provided.¹¹¹ However, the EPA declined to consider alternative means for providing that review until Indian tribes actually submitted air quality permit programs to the EPA for approval.¹¹²

Indian tribes have demonstrated increasing interest in developing and administering air quality programs.¹¹³ The number of Indian tribes receiving federal grants to initiate or operate air programs has grown from about 20 in 1995 to more than 120 in 2002.¹¹⁴ The latter number represents more than 20 percent of the 556 federally-recognized Indian tribes in the United States.¹¹⁵ While a few Indian tribes have major air pollution sources on their reservations, most are concerned primarily with the cumulative effects of minor sources of pollution.¹¹⁶ Other tribes are particularly concerned with the environmental impact of off-reservation activities and want to build strong air quality programs so as to better negotiate with neighboring states, local governments, and industries.¹¹⁷ No matter the motivation, all see air resources as cultural resources worthy of protection.¹¹⁸

¹⁰⁷ 63 Fed. Reg. 7254, 7260 (Feb. 12, 1998).

¹⁰⁸ 63 Fed. Reg. 7261 (Feb. 12, 1998).

¹⁰⁹ 40 C.F.R. § 49.4(p) (2002).

¹¹⁰ Id.

¹¹¹ 63 Fed. Reg. 7254, 7262 (Feb. 12, 1998).

¹¹² Id.

¹¹³ Milford, 44 NAT. RESOURCES J. at 213.

¹¹⁴ Id. at 213-14.

¹¹⁵ Milford, *supra* note 4, at 214.

¹¹⁶ Milford, NAT. RESOURCES J. at 214.

¹¹⁷ Id.

¹¹⁸ Id.

THE PRINCIPLES AND PARALLELS OF SOVEREIGNTY

Principles of State Sovereignty

Before analyzing the “treatment as a state” concept and its effect on Indians, non-Indians, and the environment, we must first examine what is for a state to be sovereign. As a model of understanding the meaning of “state” and “sovereignty” in America, Professor Alexander Bickel has pointed out two lines of political reasoning which shape American political and legal thought.¹¹⁹ Professor Bickel writes that two diverging traditions – one “liberal” and the other “conservative” – have long competed for control of the American democratic process and constitutional system.¹²⁰

Professor Bickel largely identifies the liberal tradition with the writings of Thomas Paine.¹²¹ Paine argued that people, by logical necessity, preceded government.¹²² Paine believed that individual persons first entered into compacts with each other, these compacts being the only mode in which governments have a right to arise, and the only principle on which they have a right to exist.¹²³ Thus, the people must consent to government, for that it putting the effect before the cause.¹²⁴ The people must first authorize government, being government’s only legitimate source of sovereignty. The essence of the liberal tradition is that the government does not have the power to do anything the people have not authorized the government to do.¹²⁵

Professor Bickel identifies the conservative tradition with the writings of Edmund Burke.¹²⁶ Burke and others argue that government arises out of shifting societal exigencies – geography, economy, and religion – and emerges as a spontaneous “state.”¹²⁷ The *continued* existence of the state is thus justified

¹¹⁹ Richard A. Monette, Treating Tribes as States Under Federal Statutes in the Environmental Arena: Where Laws of Nature and Natural Law Collide, 21 VT. L. REV. 111, 118 (1996).

¹²⁰ Alexander Bickel, THE MORALITY OF CONSENT 3 (1975).

¹²¹ Id.

¹²² Thomas Paine, RIGHTS OF MAN 186-87 (1958).

¹²³ Id. at 186.

¹²⁴ Id. at 186-87.

¹²⁵ Monette, *supra* note 41, at 118.

¹²⁶ Bickel, THE MORALITY OF CONSENT, at 20-21.

¹²⁷ Monette, *supra* note 44, at 119.

by the *continued* consent of the people.¹²⁸ When the people do not consent, the state has acted on its own source of sovereignty, which precedes and supersedes that of its own people.¹²⁹ The exercise of power without attaining authority, or prior to attaining consent, is the essence of the “state police power.”¹³⁰

These diverging traditions may be cast in terms of territorial or popular sovereignty.¹³¹ Territorial sovereignty reflects the conservative political tradition.¹³² On the other hand, complete popular sovereignty reflects the liberal tradition.¹³³ These traditions compete for control of the democratic process. In the context of environmental regulation, disputes are often transboundary, pitting multiple adjacent sovereigns against each other over shared territorial boundaries.¹³⁴ Or, disputes may be intrastate, pitting notions of territorial sovereignty against notions of popular sovereignty.¹³⁵ Today, the extent to which each political tradition prevails varies from state to state.¹³⁶ However, regardless of which prevails, the important point is that states jealously guard their right to determine which tradition prevails.¹³⁷ As long as the balance between the traditions is determined by that state’s own citizenry, within that state’s own territory, free from outside influence, its overall sovereign integrity remains intact.¹³⁸

The forces of history have diminished states’ rights to determine their own governance. The original thirteen states pre-existed the Constitution.¹³⁹ Early American political thinkers disagreed whether the primary source of state sovereignty was the people or the state itself, but both sides agreed that the Union – a confederation of states and an aggregation of peoples – would not, in and of itself, be

¹²⁸ Monette, 21 VT. L. REV. at 118.

¹²⁹ *Id.*

¹³⁰ Monette, *supra* note 45, at 119.

¹³¹ Monette, 21 VT. L. REV. at 122.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 119.

¹³⁷ *Id.*

¹³⁸ *Id.* at 122.

¹³⁹ THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 465 (Jonathan Elliot ed., 2d ed. 1941).

a source of sovereignty.¹⁴⁰ Rather, the states were to imbue it with certain governing powers.¹⁴¹ The federal government was to be a government of limited, granted powers.¹⁴² In order to protect those limited powers, it would be given supremacy.¹⁴³ In order to protect the states from the supremacy of the federal government, their sovereignty would be fused with the vastness of inherent sovereignty, extending well beyond the reach of the supremacy of the federal government.¹⁴⁴ Consequently, neither the federal government nor the states would triumph over the other.¹⁴⁵ Rather, they would engage in a continued struggle for dominion, each checking the other's intrusions upon the liberty of the individual.¹⁴⁶

The Supreme Court has very recently articulated the import of states' territorial sovereignty.¹⁴⁷ Global sea levels rose somewhere between 10 and 20 centimeters in the course of the twentieth century as a result of global warming.¹⁴⁸ These rising sea levels began to swallow Massachusetts' coastal land.¹⁴⁹ As a result, Massachusetts and several other states petitioned the EPA to regulate emissions of carbon dioxide and other gases contributing to global warming.¹⁵⁰ Massachusetts argued that the EPA was required to regulate these greenhouse gases under the CAA, which states that Congress must regulate any air pollutant that can "reasonably be anticipated to endanger public health or welfare."¹⁵¹ The EPA denied the petition, claiming that the CAA does not authorize the EPA to regulate greenhouse gas emissions.¹⁵² Massachusetts sought review in the Court of Appeals for the District of Columbia Circuit.¹⁵³ A divided panel ruled in favor of the EPA.¹⁵⁴ Calling global warming the "most pressing

¹⁴⁰ Monette, 21 VT. L. REV. at 120.

¹⁴¹ THE DEBATES, at 465.

¹⁴² U.S. CONST. amend. X.

¹⁴³ U.S. CONST. art. VI, cl. 2.

¹⁴⁴ Monette, 21 VT. L. REV. at 121.

¹⁴⁵ United States Term Limits v. Thornton, 514 U.S. 779, 838-39 (1995) (Kennedy, J., concurring).

¹⁴⁶ Id.

¹⁴⁷ Massachusetts v. Environmental Protection Agency, 127 S. Ct. 1438, 1453-56 (2007).

¹⁴⁸ Id. at 1456.

¹⁴⁹ Id.

¹⁵⁰ Id. at 1449.

¹⁵¹ Id.

¹⁵² Id. at 1450.

¹⁵³ Id. at 1451.

environmental challenge of our time,” a group of states, local governments, and private organizations, alleged in a petition for certiorari that the EPA had abdicated its responsibility under the CAA to regulate the emissions of four greenhouse gases, including carbon dioxide.¹⁵⁵

Article III of the Constitution limits federal court jurisdiction to “cases and controversies.”¹⁵⁶ These words confine the business of federal courts to questions presented in an adversarial context and in a form capable of resolution through the judicial process.¹⁵⁷ On appeal, the EPA maintained that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presented an insurmountable jurisdictional obstacle to the petitioners’ claims.¹⁵⁸ The question of standing is whether the petitioners have such a personal stake in the outcome of the controversy as to assure “concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.”¹⁵⁹ To establish standing, a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury.¹⁶⁰

It was of considerable relevance to the Court that Massachusetts was a sovereign state, and not a private individual:

This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity, the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.¹⁶¹

The rising sea levels had begun to swallow Massachusetts’ sovereign territory.¹⁶² The EPA’s refusal to regulate greenhouse gases presented an actual and imminent risk of harm to the States’ territory.¹⁶³ The

¹⁵⁴ Massachusetts, 127 S. Ct. at 1451-52.

¹⁵⁵ Id. at 1446.

¹⁵⁶ Id. at 1452 (quoting U.S. CONST. art. III).

¹⁵⁷ Massachusetts, 127 S. Ct. at 1452 (citing Flast v. Cohen, 392 U.S. 83, 95 (1968)).

¹⁵⁸ Massachusetts, 127 S. Ct. at 1453.

¹⁵⁹ Id. (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

¹⁶⁰ Massachusetts, 127 S. Ct. at 1453 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

¹⁶¹ Massachusetts, 127 S. Ct. at 1454 (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)).

¹⁶² Massachusetts, 127 S. Ct. at 1454.

¹⁶³ Id. at 1455.

State's well-founded desire to preserve its territory and, therefore, sovereignty gave it a stake in the outcome of the case sufficiently concrete to warrant the exercise of judicial power.¹⁶⁴ The Court ultimately found that Massachusetts' claims satisfied one of the most demanding standards of the adversarial process, based in large part on threats to the State's territorial sovereignty.¹⁶⁵

Massachusetts stands for the proposition that the federal government may be responsible for protecting a state's territory. Infringement on a state's territorial sovereignty is not to be taken lightly. However, the Court's rationale does not end there. Justice Stevens writes, "When a State enters the Union, it surrenders certain sovereign prerogatives."¹⁶⁶ This statement, along with the Court's citation to Tennessee Copper, reaffirms the notion that states are sovereigns pre-existing the United States, imbued with powers through dominion over their territory.¹⁶⁷ Indeed, the language of Tennessee Copper is perhaps as clear an articulation of the principle of territorial sovereignty as can be found in the Court's jurisprudence.¹⁶⁸ It is interesting that the Court's adherents to the conservative political tradition fail to adopt this rationale.¹⁶⁹

The meaning of "state sovereignty" remains in flux. The early federalism debates were not conclusive as to whether the original colonies preceded the Constitution as free and independent states.¹⁷⁰ Even today, the several states and their people do not always determine the ultimate balance between their respective spheres of sovereignty.¹⁷¹ In a territorial dispute between adjacent states, the federal government may side with one state against another state.¹⁷² In an intrastate dispute, the federal government may side with the states' unfettered governance over its territory at the expense of its

¹⁶⁴ Massachusetts, 127 S. Ct. at 1455.

¹⁶⁵ Id.

¹⁶⁶ Id. at 1454.

¹⁶⁷ Id. (quoting 206 U.S. at 237).

¹⁶⁸ See Tennessee Copper, 206 U.S. at 237.

¹⁶⁹ See Massachusetts, 127 S. Ct. at 1463-78 (Roberts, Scalia, Thomas, and Alito, JJ., dissenting).

¹⁷⁰ Monette, 21 VT. L. REV. at 121-22; see also Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); National League of Cities v. Usery, 426 U.S. 833 (1976).

¹⁷¹ Monette, 21 VT. L. REV. at 123.

¹⁷² Id.

people.¹⁷³ Or, the Union may side with the state’s people at the expense of the state’s unfettered governance over its territory.¹⁷⁴ The very fact that the Union plays a role in setting this balance infringes on and defines the contemporary meaning of “state sovereignty.”¹⁷⁵

Principles of Tribal Sovereignty

Before analyzing the “treatment as a state” concept, we must also understand what it is for an Indian tribe to be sovereign. Indian tribes see their sovereignty as both territorial and popular, and the inherent tensions between the two lie at the heart of their governance as well.¹⁷⁶ A young Indian activist had grown weary of his own strained explanations to non-Indians of what Indians meant when they said “our sovereignty.”¹⁷⁷ So he asked a respected elderly Indian couple of the Tribe, “Just what do we mean when we say ‘sovereignty’?”¹⁷⁸ In response, the old man reached for his walking stick, drew a deep line in the dirt, pointed to one side and then the other, and said, “That’s North Dakota. This is Turtle Mountain. That is sovereignty.”¹⁷⁹ The young man then turned to the elderly woman who subtly added, “This is sovereignty,” as she pointed directly inside herself.¹⁸⁰ To the young man, it stood to reason that the old man, the warrior and protector of his people, would define sovereignty by separating the homelands of his people from that of others.¹⁸¹ It also stood to reason that the old woman, matriarch and bearer of life, saw the ultimate power coming from within, running through the lives of the people.¹⁸²

An Indian tribe thus derives its sovereignty from its people and its territory, not the United States.¹⁸³ The inherent sovereign powers of Indian tribes generally include the power to adopt their own form of government, to determine tribal membership, to regulate the domestic and commercial relations

¹⁷³ Monette, 21 VT. L. REV. at 123.

¹⁷⁴ *Id.*; see *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

¹⁷⁵ Monette, 21 VT. L. REV. at 123.

¹⁷⁶ *Id.* at 125.

¹⁷⁷ *Id.* at 124.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

and conduct of individuals under their jurisdiction, and to raise revenues through taxation.¹⁸⁴ Indian tribes also retain inherent sovereign authority to regulate their land and resources through the passage and enforcement of environmental laws and regulations.¹⁸⁵ Whether these laws have any impact upon the conduct of nonmembers or upon activities on land owned by nonmembers, however, has been strenuously contested through the years.

The territorial sovereignty of Indian tribes can be traced to the famous case, Johnson v. M'Intosh.¹⁸⁶ Mr. Johnson, an American citizen, purchased property in Indian country directly from a tribe with which the United States had no treaty.¹⁸⁷ Some years later, the Tribe sold land to the United States, including the parcel the Tribe had issued to Mr. Johnson.¹⁸⁸ The United States then issued a patent to Mr. M'Intosh for the parcel Mr. Johnson owned.¹⁸⁹ Mr. Johnson sought redress in federal court to have his conveyance from the Tribe upheld.¹⁹⁰ Ultimately, the Supreme Court sided with Mr. M'Intosh.¹⁹¹

Johnson has been misconstrued as standing for the proposition that the Tribe could not issue good title to its territory. Yet, this interpretation ignores one key portion of Chief Justice Marshall's opinion in which he wrote, "The person who purchases lands from the Indians, within their territory, incorporates himself with them, and so far as respects the property purchased, holds their title under their protection, and subject to their laws."¹⁹² Chief Justice Marshall recognized that if a person held property under a tribe's authority and the tribe subsequently sold the encompassing territory, that person's legal recourse lie with the tribe and not with the purchasing sovereign.¹⁹³ This portion of the

¹⁸⁴ Milford, 44 NAT. RESOURCES J. at 215.

¹⁸⁵ Id.

¹⁸⁶ Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

¹⁸⁷ Id. at 560-61.

¹⁸⁸ Id. at 560.

¹⁸⁹ Id.

¹⁹⁰ Id. at 571-72.

¹⁹¹ Id. at 604-05.

¹⁹² Id. at 593.

¹⁹³ Id.

opinion recognizes that Indian tribes possess inherent territorial sovereignty, including the power to issue title to whomever they please.¹⁹⁴

The latter two cases of the Marshall trilogy paint a different picture, demonstrating that the inherent sovereignty of Indian tribes is not without limitation.¹⁹⁵ The Constitution provides, “The Congress shall have the Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁹⁶ The Indian Commerce Clause is not the ultimate source of Congress’ authority over the Indian tribes, but merely recognition of the long-standing relationship between the Indian tribes and the United States.¹⁹⁷ While treaties are generally tools of international relations, a treaty between an Indian tribe and the United States was not a grant of rights to the tribe.¹⁹⁸ It was a reservation of some inherent rights and a cession of others.¹⁹⁹ In return, the United States assumed responsibility for the well-being of Indian people.²⁰⁰ Thus, while Congress has plenary power over the Indian tribes, it also has the responsibility to protect these “domestic dependent nations.”²⁰¹

A vital corollary to the principle of retained tribal sovereignty is that states have no authority over Indian tribes’ internal affairs, lands, or resources.²⁰² The grant of plenary power to Congress to regulate Indian affairs was a reasoned judgment by the Framers to exclude states from regulation.²⁰³ Even at the time of the Founding, the states had proved too eager to enrich themselves at the expense of Indian tribes and Indian lands.²⁰⁴ The power of the federal government was considered the only feasible protector of Indian interests.²⁰⁵ While Congress’ plenary powers afford it the full authority to destroy

¹⁹⁴ Monette, 21 VT. L. REV. at 128.

¹⁹⁵ See Worcester, 31 U.S. (6 Pet.) at 561; Cherokee Nation, 30 U.S. (5 Pet.) at 17.

¹⁹⁶ U.S. CONST. art I, § 8.

¹⁹⁷ Cherokee Nation, 30 U.S. (5 Pet.) at 17.

¹⁹⁸ United States v. Winans, 198 U.S. 371, 381 (1905).

¹⁹⁹ Id.

²⁰⁰ Cherokee Nation, 30 U.S. (5 Pet.) at 17.

²⁰¹ Worcester, 31 U.S. (6 Pet.) at 561.

²⁰² Id.

²⁰³ Martha A. Field, The Seminole Case, Federalism, and the Indian Commerce Clause, 29 ARIZ. ST. L. J. 3, 18 (1997).

²⁰⁴ Id. at 18.

²⁰⁵ Id.

Indian tribes, the unique relationship between the tribes and the United States also protects the tribes from state incursion.²⁰⁶

Even now, Indian tribes retain sovereignty independent of not only the United States, but also the individual states within the Union.²⁰⁷ However, the inherent sovereign authority of the Indian tribes has been diminished. Indian tribes have lost some or all of their inherent sovereignty through voluntary relinquishment in treaty, by express congressional abrogation, or whenever “inconsistent with their status as domestic dependent nations.”²⁰⁸ This amorphous third category has become the primary basis for attacks on Indian tribes’ sovereignty in environmental protection and land-use planning within the exterior boundaries of their reservations.²⁰⁹ Nonetheless, the important point is that all that has not been lost is retained.

Non-Indians in Indian Country

Indian tribes and states are engaged in a constant struggle; the exercise of sovereignty by one grinds against the sovereignty of the other. An understanding of the General Allotment Act (GAA) of 1887 is necessary to fully appreciate the complexities of this constant strife.²¹⁰ In 1887, Congress enacted the GAA, dismantling what appeared to be the most serious obstacle to the assimilation of the Indians – the communal nature of property in Indian country.²¹¹ The GAA authorized the federal government to divide each reservation into designated parcels and to allot a designated amount of land to each individual tribal member.²¹² The GAA imposed restrictions on the acquisition of these allotments, requiring that the federal government hold title to the lands in trust for twenty-five years.²¹³ Any “surplus” lands remaining after each tribal member was awarded his or her share were available for

²⁰⁶ Worcester, 31 U.S. (6 Pet.) at 561.

²⁰⁷ Id.

²⁰⁸ Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

²⁰⁹ See Brendale v. Confederated Yakima Indian Nation, 492 U.S. 408 (1989).

²¹⁰ See General Allotment Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-42, 349-49, 354, 381(1994)).

²¹¹ Monette, *supra* note 151, at 134.

²¹² Act of Feb. 8, 1887, ch. 119.

²¹³ Act of Feb. 8, 1887, § 5.

purchase from the federal government or were placed in the public domain for homesteading by non-Indians.²¹⁴

Through the years, the GAA worked its indulgences on Indian tribes. States bordered by Indian country became reservations surrounded by states. Non-Indians acquired property in Indian country through the purchase of surplus lands, through the purchase of property from tribal members during or after the trust period, and through the purchase of property in Indian country after a sale or foreclosure for tax purposes.²¹⁵ Non-Indians also acquired property by inheritance, as many were descendants of tribal members but were not eligible for tribal membership themselves.²¹⁶ Tribal lands thus decreased from approximately 140 million acres in 1887, to 78 million acres in 1900, to 48 million acres in 1934.²¹⁷ In 1934, Congress passed the Indian Reorganization Act (IRA) in an effort to end the loss of territory and sovereignty that had resulted from the GAA.²¹⁸ But, the damage had been already been done.

Oliphant was perhaps the one of the first cases to fully evidence the devastating effects of the GAA on tribal sovereignty. In Oliphant, the Court held the Suquamish Tribe did not have criminal jurisdiction over non-Indians, as that power was “inconsistent with their status.”²¹⁹ In so doing, the Court provided a powerful statement describing Indian tribes’ relationship with the United States: “By submitting to the over-riding sovereignty of the United States, Indian tribes . . . necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”²²⁰ This statement was a reaffirmation of the principle that Indian tribes have ceded a degree of their rights and powers through their long-standing relationship with the United States.

²¹⁴ Act of Feb. 8, 1887, § 5.

²¹⁵ Frank Pommersheim, *BRAID OF FEATHERS* 19-20 (1995).

²¹⁶ Id.

²¹⁷ Id.

²¹⁸ See Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-66, 470-76, 478-79 (1994)).

²¹⁹ Oliphant, 435 U.S. at 208.

²²⁰ Id. at 210.

Montana further demonstrated that the loss of territory meant the loss of tribal sovereignty.²²¹ The Crow Tribe prohibited hunting and fishing by nonmembers within reservation boundaries.²²² The State of Montana asserted authority to regulate hunting and fishing by non-Indians within the exterior boundaries of the reservation.²²³ The United States and the Tribe sought a declaratory judgment to quiet title to the riverbed of the Big Horn River, asserting sole authority to regulate all hunting and fishing activity within reservation boundaries.²²⁴ The Court ultimately held that the Tribe had no power to regulate hunting and fishing by non-Indians on lands owned by nonmembers.²²⁵

Montana set forth the modern test for Indian civil jurisdiction. The Court, extending the holding of Oliphant, explained, “Though Oliphant only determined the extent of inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”²²⁶ The Court conceded, however, that “Indian tribes retain some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.”²²⁷ “A tribe may regulate the activities of nonmembers who enter into consensual relationships with the tribe or its members. . . A tribe may also retain inherent power when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”²²⁸

Eight years later, the Court again addressed the civil jurisdiction of Indian tribes in Brendale.²²⁹ The reservation of the Yakima Nation consisted of two areas: one known as the “closed area” and the other known as the “open area.”²³⁰ The “closed area” comprised two-thirds of the reservation, was

²²¹ Montana, 450 U.S. at 544.

²²² Id. at 547.

²²³ Id. at 549.

²²⁴ Id.

²²⁵ Id. at 557-67.

²²⁶ Id. at 565.

²²⁷ Id.

²²⁸ Id. at 565-66.

²²⁹ Brendale, 492 U.S. at 408.

²³⁰ Id. at 415-16.

primarily forested, and public access to it was restricted.²³¹ The “open area” comprised the remaining one-third of the reservation and was used for agricultural and residential purposes.²³² Property owned by nonmembers made up one-half of the “open area.”²³³ The Tribe sought to zone the property of two nonmembers, Mr. Brendale and Mr. Wilkinson.²³⁴ Mr. Brendale was a descendant of the Tribe, although he did not meet the Tribe’s present qualifications for participatory membership.²³⁵ He had come into his property by inheritance.²³⁶ Mr. Wilkinson, on the other hand, was not a descendant of the Tribe.²³⁷ Although both proposed actions on their land permissible under county zoning laws, the actions violated tribal zoning ordinances.²³⁸ The Tribe filed a declaratory judgment in federal court, challenging Yakima County’s authority to zone lands within the exterior boundaries of the reservation.²³⁹ The Court ultimately held that the Tribe could regulate the activities of Mr. Brendale as he owned land in the “closed area,” but not Mr. Wilkinson as he owned land in the “open area.”²⁴⁰

The Court’s reasoning rested on the Tribe’s ability to exclude nonmembers from the “open area.” Because the Tribe did not have the ability to exclude nonmembers from the “open area,” the Tribe lost its sovereignty over that area.²⁴¹ The Court considered the right to exclude the essence of sovereignty over tribal lands.²⁴² Justice White went on to heighten the standard under the second prong of Montana: “The impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe.”²⁴³ Justice White reasoned that this new standard would

²³¹ Brendale, 492 U.S. at 415-16.

²³² Id.

²³³ Id. at 416.

²³⁴ Id. at 419.

²³⁵ Id. at 417.

²³⁶ Id.

²³⁷ Id. at 422.

²³⁸ Id. at 418.

²³⁹ Id. at 419.

²⁴⁰ Id. at 432.

²⁴¹ Id. at 422-25.

²⁴² Id.

²⁴³ Id. at 431.

protect tribal interests while avoiding interference with state sovereignty and providing certainty in zoning regulations to property owners.²⁴⁴

The Court again considered the right of an Indian tribe to exclude nonmembers in Strate v. A-1 Contractors.²⁴⁵ Strate involved a car accident on a state highway that traversed tribal lands.²⁴⁶ Although the state highway was on tribal land, the Tribe had granted a right-of-way to the state.²⁴⁷ This right-of-way precluded the Tribe from exercising the right of exclusion.²⁴⁸ Because the Tribe could not exclude non-Indians from the land, the Court viewed the land as similar to land owned by a nonmember.²⁴⁹ Strate has serious implications for examining the ownership, and thus authority to regulate, navigable waters and submerged lands.²⁵⁰

Indian civil jurisdiction can be defined in terms of territorial and popular sovereignty. The notion of consent is the essence of popular sovereignty.²⁵¹ Accordingly, the Court is weary to allow an Indian tribe to assert authority over nonmembers living within the boundaries of the reservation as they do not participate in the governance of the tribe.²⁵² A nonmember, however, may manifest consent to the governance of the Indian tribe by entering into a consensual relationship with the Indian tribe or one of its members.²⁵³ In that case, the Indian tribe can assert its jurisdiction over him.²⁵⁴ On the other hand, the assertion of authority for the health, safety, and welfare of the Indian tribe, regardless of the consent of the individual, is the essence of territorial sovereignty.²⁵⁵ Indeed, the Court may allow an Indian tribe to assert its jurisdiction over a nonmember by virtue of his presence within the tribe's territory when his conduct threatens or has some direct effect on the political integrity, the economic security, or the health

²⁴⁴ Brendale, 492 U.S. at 431.

²⁴⁵ Strate v. A-1 Contractors, 520 U.S. at 458 (1997).

²⁴⁶ Id. at 443.

²⁴⁷ Id. at 442-43.

²⁴⁸ Id. at 454.

²⁴⁹ Id.

²⁵⁰ Owley, 20 J. LAND USE & ENVTL. L. at 98-99.

²⁵¹ See Monette, supra note 41, at 118.

²⁵² Oliphant, 435 U.S. at 210; see also United States v. Wheeler, 435 U.S. 313 (1978).

²⁵³ Montana, 450 U.S. at 565-66.

²⁵⁴ Id.

²⁵⁵ See Monette, supra note 45, at 119.

or welfare of the tribe.²⁵⁶ While the balance of these traditions in Indian country is not determined solely by the Indian tribes, free from outside influence, the fact that the federal government and its courts play a role in setting this balance defines the contemporary meaning of “tribal sovereignty.”²⁵⁷

Parallels of State and Tribal Sovereignty

It makes great sense to treat Indian tribes as states. Both Indian tribes and states are sovereign entities located both in the boundaries of and under the protection of the United States.²⁵⁸ Indian tribes, like states, are “distinct political communities, having territorial boundaries, within which their authority is exclusive.”²⁵⁹ Also, like the original thirteen American colonies, Indian tribes pre-existed the Constitution. Indian tribes, like states, thus derive their sovereignty from their people and their territory, not the federal government.²⁶⁰ Finally, mirroring the reservation of the powers of the states embodied in the Tenth Amendment, the Court has declared that the treaties with the Indian tribes were “not a grant of rights to the Indians, but a grant of rights from them.”²⁶¹ Treating Indian tribes as states is not without firm constitutional underpinnings.

Montana is evidence of the parallel sovereign spheres of Indian tribes and states. Indeed, the two prongs of the Montana test may be derived from two of the most contentious areas of American constitutional law.²⁶² The first prong, the “consensual relations” test, finds a counterpart in the “minimum contacts” test for state civil jurisdiction.²⁶³ In the context of state civil jurisdiction, “the Due Process Clause ‘does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.’”²⁶⁴ The second prong, the “health, safety, and welfare” test, is simply longhand for the “police power” analysis

²⁵⁶ Montana, 450 U.S. at 565-66.

²⁵⁷ See Monette, 21 VT. L. REV. at 122-23.

²⁵⁸ Owley, 20 J. LAND USE & ENVTL. L. at 65.

²⁵⁹ Worcester, 31 U.S. (6 Pet.) at 557.

²⁶⁰ Id. at 540; Cherokee Nation, 30 U.S. (5 Pet.) at 2.

²⁶¹ Winans, 198 U.S. at 381.

²⁶² Monette, 21 VT. L. REV. at 117.

²⁶³ World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980); International Shoe Co. v. Washington, 326 U.S. 310, 318-20 (1945).

²⁶⁴ World-Wide Volkswagen Corp., 444 U.S. at 294 (quoting International Shoe Co., 326 U.S. at 319).

applied to states.²⁶⁵ These similarities demonstrate that Indian tribes and states are sovereign in much the same way.

The governance of both Indian tribes and states is defined by tensions between territorial and popular sovereignty. The essence of popular sovereignty is that a government may govern only those who have authorized that government in the first instance, or those who consent through participation.²⁶⁶ This liberal tradition can be seen in the first Montana prong and in the “minimum contacts” test for state civil jurisdiction.²⁶⁷ The conservative political tradition, territorial sovereignty, holds that simple presence within the sovereign’s territory justifies a certain level of governance over that individual.²⁶⁸ The second Montana prong and the traditional police power of the states allow governments to act without prior consent and without popular authority.²⁶⁹ Similar tensions thus lie at the heart of both state and tribal governance.

Yet, Indian tribes are not sovereign in the same sense that states are sovereign. Congress has unquestioned plenary power to deal with Indian tribes.²⁷⁰ While the Constitution restricts Congress’ power to limit the sovereignty retained by the states,²⁷¹ “it is well-established that Congress, in the exercise of its plenary powers over Indian affairs, may restrict the retained sovereign powers of the Indian tribes.”²⁷² Congress may, in fact, exercise its plenary powers to the destruction of Indian tribes. There is, therefore, a greater transfer of power from the Indian tribes to the federal government than from the states to the federal government.²⁷³

²⁶⁵ Monette, 21 VT. L. REV. at 117.

²⁶⁶ Id. at 139-40.

²⁶⁷ Id. at 140.

²⁶⁸ Id.

²⁶⁹ Id.

²⁷⁰ Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

²⁷¹ New York, 505 U.S. at 155-59.

²⁷² Washington v. Yakima Indian Nation, 439 U.S. 463, 501 (1979); see also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 n. 14 (1982); Oliphant, 435 U.S. at 208.

²⁷³ Seminole Tribe of Florida v. Florida, 517 U.S. 44, 62 (1996).

Indian tribes are not states; they are “domestic dependent nations.”²⁷⁴ As sovereign entities, they retain many, but not all, of the same rights and responsibilities of the nations of the world. Rather than viewing “treatment as a state” status as a significant federal recognition of Indian tribes’ authority over their environmental destiny, some Indian tribes see “treatment as a state” status as an insult.²⁷⁵ They see their sovereign nations, which should be considered an equal power with the federal government, as down-graded to the role of a mere state, a subsidiary of the federal government.²⁷⁶ In general, however, most Indian tribes are accustomed to treatment as lesser entities and thus welcome this new statutory recognition of their right to govern their natural resources.²⁷⁷

PRINCIPLES AND PARALLELS IN FEDERAL ENVIRONMENTAL REGULATION

It is clear that Indian tribes retain inherent sovereign authority to regulate the activities of tribal members on their reservations. In most situations, however, states have authority to assert civil jurisdiction over nonmembers on nonmember fee lands, even within the boundaries of a reservation.²⁷⁸ The transboundary nature of pollution and the checkerboard pattern of land ownership on reservations bring an almost unimaginable complexity to the enforcement of environmental regulation in Indian country. With an understanding of the historical and theoretical parallels of state and tribal sovereignty, we can now begin to understand the significance of the “treatment as a state” concept in terms of bedrock principles of federal Indian law: congressional delegation of authority, inherent tribal sovereignty, and federal preemption.

²⁷⁴ Cherokee Nation, 30 U.S. (5 Pet.) at 17.

²⁷⁵ Owley, *supra* note 82, at 77.

²⁷⁶ Id.

²⁷⁷ Id.; see also James M. Grijalva, Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters, 71 N.D. L. REV. 433, 440 (1995).

²⁷⁸ Montana, 450 U.S. at 565-66.

Congressional Delegation of Authority

Congress has broad authority to delegate regulatory powers to Indian tribes as tribes are governmental entities with sovereign authority over their people and territory.²⁷⁹ Through congressional delegation, an Indian tribe may obtain the authority to regulate the activities of nonmembers on nonmember fee lands or outside the boundaries of the reservation, even if it does not meet the Montana test.²⁸⁰ Although the EPA reads the CAA as a clear delegation of authority to Indian tribes, it does not do so for the CWA.

The Clean Air Act

The EPA interprets the 1990 amendments to the CAA as a congressional grant of authority to Indian tribes.²⁸¹ This interpretation is largely based on section 7601(d)(2)(B) of the CAA.²⁸² That section requires that the “functions 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.”²⁸³ The EPA interprets this provision as an express congressional delegation of authority to Indian tribes to regulate all air resources within reservation boundaries, as well as some resources outside technical reservation boundaries, assuming the tribe can make a particularized finding of authority over the off-reservation source.²⁸⁴ In the latter case, the EPA determines the extent of jurisdiction for each Indian tribe on a case-by-case basis, taking into consideration whether the regulated conduct has a direct effect on the tribe’s health or welfare substantial enough to support tribal jurisdiction over nonmembers.²⁸⁵

The CAA contains two other provisions which reveal a congressional delegation of authority to Indian tribes. Section 7474(c) provides, “Lands within the exterior boundaries of reservations of

²⁷⁹ United States v. Mazurie, 419 U.S. 544 (1975); see also Montana, 450 U.S. at 544; McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164, 173 (1973); Worcester, 31 U.S. (6 Pet.) at 557.

²⁸⁰ Id.

²⁸¹ 59 Fed. Reg. 43,959 (Aug. 25, 1994).

²⁸² Id.

²⁸³ 42 U.S.C. § 7601(d)(2)(B) (2000).

²⁸⁴ 56 Fed. Reg. 43,962 (Aug. 25, 1994).

²⁸⁵ 56 Fed. Reg. 43,958 (Aug. 25, 1994) (citing Brendale, 492 U.S. at 408).

federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body.”²⁸⁶ In addition, section 7410(o) provides that Tribal Implementation Plans (TIPs) are applicable to all areas located within the exterior boundaries of the reservation.²⁸⁷ Basic canons of statutory construction require ambiguous provisions to be interpreted liberally in favor of preserving tribal rights.²⁸⁸ In light of this principle, the only permissible construction of these provisions is that the CAA is a federal grant of authority to Indian tribes over all air resources within the exterior boundaries of their reservations.

The EPA relies on case law to include in its interpretation trust lands validly set aside for use by an Indian tribe, but not formally labeled as a reservation. The EPA relies on Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma.²⁸⁹ Citizen Band Potawatomi questioned whether a state may levy a tax over cigarette sales occurring on tribal trust lands.²⁹⁰ The Oklahoma Tax Commission argued that since the sales did not occur on a formal reservation, the exercise of state taxing authority was valid.²⁹¹ The Court rejected this argument stating that “[t]he test for determining whether land is Indian country does not turn upon whether that land is denominated ‘trust land’ or ‘reservation.’ Rather, we ask whether the area has been ‘validly set apart for the use of the Indians.’”²⁹² Thus, Citizen Band Potawatomi supports the EPA’s interpretation of tribal regulatory authority over air resources located on trust land outside formal reservation boundaries.²⁹³

The EPA’s interpretation of the CAA as a congressional delegation of authority is not without its critics. Opponents first argue that the interpretation opens the door to jurisdictional conflicts.²⁹⁴ While the EPA recognizes that jurisdictional disputes may arise, it remains firm that such disputes will not

²⁸⁶ 42 U.S.C. § 7474(c) (2000).

²⁸⁷ 42 U.S.C. § 7410(o) (2000).

²⁸⁸ See Montana, 471 U.S. at 766; County of Yakima, 502 U.S. at 269; Santa Clara Pueblo, 436 U.S. at 59.

²⁸⁹ Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991).

²⁹⁰ Id.

²⁹¹ Id. at 511.

²⁹² Id. (quoting United States v. John, 437 U.S. 634, 648-49 (1979)).

²⁹³ Cochran, *supra* note 53, at 329.

²⁹⁴ Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir.), *cert denied*, *sub. nom.*, 454 U.S. 1081 (1981).

overcome the EPA's ultimate responsibility to protect the environment.²⁹⁵ As such, the EPA leaves issues of tribal jurisdiction over areas outside technical reservation boundaries to be determined on a case-by-case basis.²⁹⁶ Opponents also argue that the EPA's interpretation creates uncertainty for the regulated community.²⁹⁷ However, a narrow interpretation of jurisdiction limited to geographic boundaries would not alleviate this concern.²⁹⁸ The exercise of tribal sovereignty, like the exercise of state sovereignty, as it relates to the regulation of air quality, will inevitably have extraterritorial effects on neighboring communities.²⁹⁹ In any event, even if the critics are right, Indian tribes may have inherent sovereign authority to regulate air resources on tribal lands.

The Clean Water Act

The plain language of the CWA appears to be an express delegation of authority to Indian tribes to assert jurisdiction over all water resources within reservation boundaries. The CWA calls for the water resources to be "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 or alienation, *or otherwise within the borders of an Indian reservation.*"³⁰⁰ Based on this definition, land owned by nonmembers in fee simple would seem covered by the CWA so long as it is within the boundaries of a reservation. Indeed, in the Brendale decision, Justice White specifically cited the CWA as an example of an express delegation of congressional authority to Indian tribes.³⁰¹ Further, in Montana v. Environmental Protection Agency, the Montana federal district court acknowledged that the CWA shows a clear intention to delegate jurisdiction over all water resources within the boundaries of reservations to Indian tribes.³⁰² After all, without full ability to enforce CWA regulations, tribal

²⁹⁵ Nance, 645 F.2d at 715.

²⁹⁶ See 58 Fed. Reg. 67,976 (1993).

²⁹⁷ See Nance, 645 F.2d at 715.

²⁹⁸ See id.

²⁹⁹ See id.

³⁰⁰ 33 U.S.C. § 1377(e)(2) (2003) (emphasis added).

³⁰¹ See Brendale, 492 U.S. at 428.

³⁰² Montana v. Environmental Protection Agency, 915 F. Supp. 945, 951 (D. Mont. 1996).

administration of permit programs would be meaningless.³⁰³ Common sense dictates that Congress would not have intended to enact a provision made meaningless by piecemeal jurisdiction.³⁰⁴

Nonetheless, the EPA has been unwilling to read the CWA as a delegation of authority to Indian tribes to assert jurisdiction over nonmember fee lands.³⁰⁵ In arriving at this interpretation, the EPA relied upon the legislative history of the CWA. The EPA found the relevant legislative history ambiguous and inconclusive.³⁰⁶ The EPA declined to expand the scope of tribal authority beyond that inherent in the Indian tribe in the absence of an express indication of congressional intent.³⁰⁷ Given the EPA's unwillingness to read the CWA as a congressional delegation of authority, an Indian tribe must rest any assertion of jurisdiction over nonmember fee lands within the boundaries of its reservation on the notion of inherent tribal sovereignty.

Inherent Tribal Sovereignty

In the event the CAA and CWA do not constitute a congressional delegation of authority, those statutes could act to recognize an existing sovereign power of Indian tribes. Tribes generally retain inherent sovereign authority to regulate their land and resources through the passage and enforcement of environmental laws and regulations.³⁰⁸ Outside the environmental arena, several federal statutes treat Indian tribes as states. In almost every instance, either the statute or the attendant Court decision has clarified that the Indian tribe, not the statute, provides the source of the tribe's authority.³⁰⁹ Thus, a strong body of case law supports the notion that, despite the enactment of a federal statute treating Indian tribes as states, the ultimate source of tribal authority rests with the tribe.

³⁰³ Cochran, *supra* note 217, at 101.

³⁰⁴ Montana, 941 F. Supp. at 952.

³⁰⁵ 56 Fed. Reg. 64,876 (Dec. 12, 1991).

³⁰⁶ Id.

³⁰⁷ Id.

³⁰⁸ 56 Fed. Reg. 64,876 (Dec. 12, 1991).

³⁰⁹ See California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987) (The Indian Gaming Regulatory Act of 1988 is not a grant of power to tribes to govern gaming in Indian country; a tribe has an inherent right to regulate gaming activities within its territory); Kerr-McGee v. Navajo Tribe, 471 U.S. 195, 200 (1985) (The Indian Reorganization Act of 1934 is not a grant of tribal sovereignty; a tribe and its people are the source of its sovereignty); Fisher v. District County Court, 424 U.S. 382, 383, 389 (1976) (The Indian Child Welfare Act of 1978 is not a grant of tribal jurisdiction over adoption proceedings involving tribal members on the reservation; a tribe has an inherent sovereign power to decide adoption proceedings involving its members and the ICWA forced errant states to comply).

We turn to the first prong of the Montana test.³¹⁰ Even without an express delegation of congressional authority, Indian tribes retain inherent sovereign authority to exercise some forms of civil jurisdiction over nonmembers.³¹¹ “A tribe may regulate the activities of nonmembers who enter into consensual relationships with the tribe or its members.”³¹²

It is commonly understood that Montana necessarily decided that nonmembers do not have a consensual relationship with an Indian tribe simply by virtue of their status as landowners within reservation boundaries.³¹³ The land left the jurisdiction of the Indian tribe when the nonmember acquired it.³¹⁴ But, was this transaction where the nonmember acquired the property not a consensual transaction between the Indian tribe or its member?³¹⁵ Should the consensual relations test not be applied to that first transaction?³¹⁶ For example, suppose a nonmember purchased property from a tribal member in a consensual transaction after the twenty-five year trust period lapsed in 1913. The land was then conveyed to another nonmember in 2008. If that first transaction were consensual, the property should still be subject to the Indian tribe’s jurisdiction regardless of who holds the deed.³¹⁷ The chain of title would reveal the consensual nature of the original transaction.³¹⁸ This theory is supported by Chief Justice Marshall’s indication that he who “purchases lands from the Indians, within their territory, incorporates himself with them, and so far as respects the property purchased, holds their title under their protection, and subject to their laws.”³¹⁹ Although interesting, this approach is not endorsed by any modern court and is thus an insufficient basis to support tribal jurisdiction over natural resources on fee lands owned by nonmembers.

³¹⁰ Montana, 450 U.S. at 565-66.

³¹¹ Id.

³¹² Id. at 565.

³¹³ Id.

³¹⁴ Monette, 21 VT. L. REV. at 139.

³¹⁵ Id.

³¹⁶ Id.

³¹⁷ Id.

³¹⁸ Id.

³¹⁹ Johnson, 21 U.S. (8 Wheat.) at 593.

We turn now to the second prong of the Montana test.³²⁰ Indian tribes also retain inherent sovereign authority to exercise civil jurisdiction over nonmembers when their “conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”³²¹ This “police power” analysis is particularly appropriate in the context of environmental regulation.

The EPA recognizes that Indian tribes likely maintain inherent sovereign authority over all air resources within the exterior boundaries of their reservations.³²² The EPA assumes that the widespread adverse impacts of air pollution are sufficient to fulfill the second prong of Montana.³²³ The EPA has noted that the “high mobility of air pollutants, resulting in area-wide effects, and the seriousness of such impacts would all tend to support tribal inherent authority” over air resources.³²⁴ The EPA does not interpret the heightened standard under Brendale as preventing Indian tribes from asserting inherent authority over air resources on their reservations.³²⁵ Thus, even without a congressional grant of authority over nonmember fee lands, Indian tribes likely retain sovereign authority over all air resources within the boundaries of their reservations.³²⁶

The EPA also recognizes that, absent congressional delegation, an Indian tribe likely has inherent authority over air resources on trust lands validly set aside for use by the tribe, though not formally labeled as a reservation.³²⁷ In this instance, the EPA, citing Brendale, has noted that “a tribe’s inherent authority must be determined on a case-by-case basis, considering whether the conduct being regulated has a direct effect . . . substantial enough to support the Tribe’s jurisdiction over non-Indians.”³²⁸ Again, however, the widespread adverse impacts of air pollution are sufficient to satisfy

³²⁰ Montana, 450 U.S. at 565-66.

³²¹ Id.

³²² 56 Fed. Reg. 64,876 (Dec. 12, 1991).

³²³ 56 Fed. Reg. 43,958 n. 5 (Aug. 25, 1994).

³²⁴ Id.

³²⁵ 56 Fed. Reg. 64,876, 64,877 (Dec. 12, 1991).

³²⁶ 56 Fed. Reg. 43,958 n. 5 (Aug. 25, 1994).

³²⁷ Id.

³²⁸ 56 Fed. Reg. 43,958 (Aug. 25, 1994).

that standard.³²⁹ Thus, even without an express grant of authority, Indian tribes likely have inherent authority over air resources on tribal lands.³³⁰

The CWA is not a delegation of authority to Indian tribes to regulate all waters within the boundaries of their reservations.³³¹ The EPA, relying on Montana, requires that an Indian tribe demonstrate inherent authority over water resources on fee lands owned by nonmembers.³³² An Indian tribe must demonstrate that the regulation relates to “conduct that threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe.”³³³ As with air resources, the EPA anticipates that this will be an easy showing, based on a generalized assumption that water quality is related to human health and welfare.³³⁴ Indeed, it would be difficult to imagine a situation where serious threats to water quality would not have profound implications for tribal self-government.³³⁵ Thus, even absent a congressional delegation of authority, Indian tribes likely retain sovereign authority to regulate all waters within the boundaries of their reservations.

The Court considers the right to exclude the essence of sovereignty over tribal lands.³³⁶ When an Indian tribe is unable to exclude people from the land, tribal authority is eroded.³³⁷ An Indian tribe may not be able to restrict who can use waters running through its land since navigable waters are subject to a federal navigational servitude.³³⁸ Even if an Indian tribe can show ownership of navigable waters and submerged lands, it may not have jurisdiction to try cases arising out of activities on these lands.³³⁹ The Indian tribe has lost its ability to exclude and therefore its jurisdiction over that area.³⁴⁰ Nevertheless, an Indian tribe could seek to invoke one of the Montana exceptions to regulate activities on the navigable

³²⁹ 56 Fed. Reg. 43,958 (Aug. 25, 1994).

³³⁰ Id.

³³¹ 56 Fed. Reg. 64,876 (Dec. 12, 1991).

³³² Id.

³³³ See Montana, 450 U.S. at 577-79.

³³⁴ See Wisconsin v. EPA, 266 F.3d 741, 744 (7th Cir. 2001) (citing 56 Fed. Reg. 64,878 (Dec. 12, 1991)).

³³⁵ Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210, 1220 (9th Cir. 2000).

³³⁶ Brendale, 492 U.S. at 422-25; Strate, 520 U.S. at 454.

³³⁷ Id.

³³⁸ Owley, 20 J. LAND USE & ENVTL. L. at 98-99.

³³⁹ Id. at 98.

³⁴⁰ Id. at 99.

waters and submerged lands within its jurisdiction.³⁴¹ This requirement may be more easily satisfied when Indian tribes are seeking to retain their ability to fish or to protect waterways for cultural and religious reasons.³⁴²

Federal Preemption

Without an express delegation of congressional authority to Indian tribes, a strong argument could also be made that the CAA, the CWA, and the resulting EPA regulatory schemes preempt the entire regulatory field of natural resources in Indian country. The Indian preemption test bars “state jurisdiction if it interferes with 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.”³⁴³ In considering the relevant statutes in light of the Indian preemption analysis, a court will balance the tribal, federal, and state interests involved.³⁴⁴ Under this balancing test, a court will examine each interest to determine whether the state interest is sufficient to support the exercise of state authority.³⁴⁵

Indian tribes have strong interests in protecting the natural environments of reservations and tribal lands. An Indian tribe maintains sovereignty over its people and territory, the right to control the tribe’s natural resources through tribal law and custom, and the right to protect the health and welfare of its citizenry.³⁴⁶ These indicia of tribal sovereignty are fulfilled when an Indian tribe establishes and maintains environmental agencies, administers environmental programs, and enters into cooperative agreements with other sovereigns to regulate its natural environment.³⁴⁷ To allow states jurisdiction over natural resources within the boundaries of reservations or other areas under the jurisdiction of Indian tribes would seriously threaten tribal self-government and self-determination.

³⁴¹ Owley, 20 J. LAND USE & ENVTL. L. at 99.

³⁴² Id.

³⁴³ New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333-34 (1983).

³⁴⁴ See e.g. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).

³⁴⁵ Id.

³⁴⁶ DuBey, et al., *supra* note 122, at 470-71.

³⁴⁷ Cochran, 26 N.M. L. REV. at 341.

The federal government shares in Indian tribes' interest of fostering tribal self-determination and self-government. Indeed, the federal government has a fiduciary responsibility to protect the sovereign spheres of the Indian tribes.³⁴⁸ The EPA policy for administering environmental programs on reservations recognizes the sovereign status of tribal governments, independent tribal authority over reservation affairs, and the underlying tribal responsibility for environmental programs.³⁴⁹ Likewise, the CAA and CWA are recognition of the principle that Indian tribes can be, and should be, responsible for their environmental destiny.³⁵⁰ These are all indicia of a strong federal interest.³⁵¹ To allow states regulatory authority over natural resources within the boundaries of reservations or other areas under tribal jurisdiction would greatly threaten federal objectives of tribal self-government and self-determination.³⁵²

States too, however, have interests in controlling the natural environments within their borders. A state's interests rest primarily with the interests of state citizens who, although not members of an Indian tribe, may nonetheless be subject to tribal jurisdiction.³⁵³ States, understandably, are weary to allow an Indian tribe to assert authority over state citizens who have not consented to the governance of the Indian tribe.³⁵⁴ Another asserted state interest is maintaining a comprehensive and unified regulatory scheme within the state's territorial borders.³⁵⁵ In the absence of a unified scheme, a state might argue, the state would face piecemeal areas of jurisdiction and would thus have difficulty administering any effective program.³⁵⁶ States would argue that tribal authority over nonmembers greatly threatens state territorial and popular sovereignty.

³⁴⁸ Cherokee Nation, 30 U.S. (5 Pet). at 17.

³⁴⁹ United States Environmental Protection Agency, Office of Water, American Indian Environmental Office, EPA Policy for the Administration of Environmental Programs on Indian Reservations, Nov. 8, 1984, <http://www.epa.gov/tribalportal/pdf/indian-policy-84.pdf> (visited Nov. 14, 2008).

³⁵⁰ Cochran, 26 N.M. L. REV. at 341.

³⁵¹ Id.

³⁵² Id. at 341-42.

³⁵³ Id. at 342.

³⁵⁴ Oliphant, 435 U.S. at 210; see also Wheeler, 435 U.S. at 313.

³⁵⁵ Cochran, 26 N.M. L. REV. at 342.

³⁵⁶ Id.

The Court has found justifications for state intrusion sufficient only in limited contexts. For example, in Puyallup Tribe v. Washington Game Department,³⁵⁷ the Court held that the State of Washington could regulate the hunting and fishing rights of Indians within the Puyallup Tribe reservation where necessary to conserve fish and game.³⁵⁸ The Court's ruling, however, was based on years of protracted litigation and the fact that the Tribe had no existing tribal conservation regulations.³⁵⁹ As noted by the Court, if the Tribe had effective regulations, they would invariably preempt state regulations.³⁶⁰ As a matter of Indian law, after all, states have no civil regulatory authority over activities in Indian country absent an express congressional authorization.³⁶¹

The CAA and CWA arguably constitute federal laws which preempt any assertion of state jurisdiction over tribal air or water resources as states lack sufficient interests to support that jurisdiction.³⁶² This is particularly true within the exterior boundaries of reservations.³⁶³ It is less clear, however, whether courts would view the CAA as preempting state authority over "other areas within the tribe's jurisdiction," or areas outside the exterior boundaries of reservations.³⁶⁴ In that case, a court would likely be called to engage in a traditional preemption analysis in light of notions of constitutional federalism.³⁶⁵ Nevertheless, in the absence of a congressional delegation of authority, federal preemption is a powerful tool against encroachment by states.

CONCLUSION

Control over natural resources is especially important for communities and cultures that have a close relationship with their land, water, and natural world. In an attempt to bridge long-standing differences, the EPA issued a broad policy statement recognizing the sovereign status of Indian tribes in

³⁵⁷ Puyallup Tribe v. Washington Game Department, 433 U.S. 165 (1977).

³⁵⁸ Id. at 173-77.

³⁵⁹ Cochran, 26 N.M. L. Rev. at 339.

³⁶⁰ Puyallup, 433 U.S. at 178.

³⁶¹ Id.; see also Williams v. Lee, 358 U.S. 217, 220 (1959); Worcester, 31 U.S. (6 Pet.) at 515.

³⁶² Cochran, *supra* note 129, at 339-40.

³⁶³ Cochran, 26 N.M. L. Rev. at 339-40.

³⁶⁴ Id. (citing 42 U.S.C. 7601(d)(2)(B) (2000)).

³⁶⁵ Cochran, 26 N.M. L. Rev. at 340.

1984. The EPA made it clear that Indian tribes can, and should be, in control of their environmental destiny. Soon thereafter, the EPA took steps to make this policy a reality, leading the charge to enact the “treatment as a state” provisions in two major federal environmental statutes. A new era in tribal control over natural resources was born.

Today, disputes in Indian country often arise under the CWA and CAA, two statutes in which Congress authorized the EPA to treat Indian tribes as states. Although the “treatment as a state” provisions in these statutes are significant and long-awaited recognition of Indian tribes’ sovereign authority over their natural resources, the provisions bring an almost unimaginable complexity to constitutional law, Indian law, and environmental law. They raise fundamental questions about the contemporary meaning of state and tribal sovereignty. It was the objective of this paper to answer those questions.

Indian tribes and states are similar in many ways. Both are sovereign entities located both in the boundaries of and under the protection of the United States. Like the original thirteen American colonies, Indian tribes pre-existed the Constitution. Indian tribes and states thus derive their sovereignty from their people and territory, not the federal government. Like the reservation of the powers of the states embodied in the Tenth Amendment, the Supreme Court has declared that the treaties with the Indian tribes were not a grant of rights to the Indians, but a grant of rights from them. Finally, tensions between territorial and popular sovereignty lie at the heart of both state and tribal governance. We thus find that treating Indian tribes as states is not without firm constitutional underpinnings.

The transboundary nature of pollution and the checkerboard pattern of land ownership on reservations bring an almost unimaginable complexity to the enforcement of environmental regulation in Indian country. It is clear that Indian tribes retain inherent sovereign authority to regulate the activities of tribal members on their reservations. Yet, states have authority to assert civil jurisdiction over nonmembers on nonmember fee lands, even within the boundaries of a reservation. Even if Indian tribes are given the authority to establish and administer environment programs we must wonder whether

enforcement of those programs is practically possible. This question can be answered in terms of bedrock principles of federal Indian law: congressional delegation of authority, inherent tribal sovereignty, and federal preemption.

“Water, fire, earth, and air. These are the elements that sustain us and define our sovereignty.”³⁶⁶

Native Americans are profoundly affected by the destruction of the environment, because they hold cultural, spiritual, historical, and political connections to the land. Yet, Indian tribes face unique circumstances in their quest for environmental protection. They must overcome the overwhelming challenges of fragmented land ownership, thoughtless citizens and recalcitrant industries over whom they have no authority, and grasping state agencies pursuing agendas that stray far from policies of environmental protection. Sadly, in Indian law and in environmental law, public policy often lags far behind our power to destroy ourselves.³⁶⁷ Yet, the “treatment as a state” provisions are a reason to be hopeful. They are a step in the right direction, allowing Indian tribes to bring forth their “environmental ethic” to protect our natural world.

³⁶⁶ Dussais, 33 NEW ENG. L. REV. at 654-55.

³⁶⁷ See Winona LaDuke, All Our Relations: Native Struggles for Land and Life 199 (1999).