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A Closer Look at Environmental Injustice in Indian Country

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Introduction

Over the last two decades, the environmental justice movement has evolved into a recognized social movement within the United States that merges civil rights with environmental protection. It is erroneous, however, to assume that federally recognized tribal governments ("Tribes") and their members suffer environmental injustices of the same type, under the same circumstances, or in the same way as do other minority, ethnic, or low income communities. If the role of Tribes and their concerns are to be visible, accepted, and encompassed within these efforts to alleviate environmental injustices, environmentalists and the mainstream environmental justice community simply must understand, consider, and respect these differences. While there is no simple answer for how to assure environmental justice within Indian country and Alaska Native villages, essential components must include fulfillment of the federal trust responsibility to Tribes and the recognition and exercise of tribal sovereignty.

Significantly, the role of Tribes and their views and concerns are often conspicuously absent from mainstream environmental and environmental justice discourse and literature,[2] and the absence itself may be viewed as an insidious form of environmental injustice. This invisibility flows in large part from general misinformation as well as a lack of information about Tribes and their uniqueness, rights, and special legal and political status in this country. Moreover, many environmentalists' romantic conception of what "Indians" should be is frequently inconsistent with what "Indians" actually

are today, and these stereotypes are "of the same arrogance that led fifteenth-century Europeans to conclude that they had 'discovered' America."[3] This disconnect raises additional challenges to bringing tribal environmental justice issues to the forefront, to raising the conscience of the environmental justice community, and to building effective alliances within the environmental justice movement. As a result, to date, Tribes have not fully participated in or embraced environmental justice with gusto. Nor has the concept or general discourse fairly and accurately portrayed the special circumstances informing the environmental justice concerns of Tribes and Indian country.

Initially, the environmental justice movement focused on how race and income were connected to the siting of waste facilities that discharged hazardous substances. While there is no consensus definition of "environmental justice," the U.S. Environmental Protection Agency's ("EPA") Office of Environmental Justice has defined the phrase as:

> The fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic, or socioeconomic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.[4]

Emerging thought is expanding, however, focusing not only on numerical disparities in environmental protection, but also on what is a healthy, livable, sustainable, and vital community.[5] Others have recognized that environmental justice communities "deserve a fair share of public goods, including a healthy environment and the benefits of economic development, to the same extent that it is afforded to wealthy non-minority communities."[6] Some have found the least cumbersome way to describe the concept "is the inherent right of ALL to live in a healthy environment."[7] People of color, low-income communities, and Tribes often are more susceptible to the effects of

pollution posed by the conditions of their poverty, limited access to health care and lower overall health status, subsistence activities, and even genetic composition.[8] Given these special susceptibilities, some advocates urge that environmental justice simply must use "holistic, integrative, and unifying strategies that address social, economic, and health improvement simultaneously."[9] Moreover, under this view, "the health of the members of a community, both individually and collectively, is a product of physical, social, cultural, and spiritual factors."[10]

Environmental justice in Indian country embodies many, if not all, of these concepts. What distinguishes the situation of Tribes from all other environmental justice groups, however, is the fact that environmental justice issues affecting Tribes must always be viewed against the backdrop of tribal sovereignty, the federal trust responsibility owed by the United States to Tribes, the government-to-government relationship, treaty rights, and the special jurisdictional rules applicable to Indian country. This article focuses on key aspects of that backdrop. Section II analyzes the legal status of Tribes and Indian country. Section III discusses the social, health, and economic status of Tribes and their members as well as their unique susceptibility to environmental health impacts. Section IV identifies barriers to tribal economic development, and Section V discusses the state of environmental regulation in Indian country and Alaska Native villages.

Legal Status of Tribal Governments and Indian Country

There are 562 federally recognized Tribes in the United States, which includes 229 Alaska Native villages and entities.[11] At the time of the 2000 census, some 4.1 million persons identified themselves as American Indians and Alaska Natives ("AI/ANs"). Past estimates indicate that almost half of all AI/ANs still live within Indian country on lands that have been specifically reserved as permanent tribal homelands.[12] "Indian country" refers to several different types of Indian lands—reservations, dependent Indian communities, and Indian allotments—and now comprises about 53 million

acres of land, an area roughly the combined size of Idaho, North Dakota, and South Dakota.[13]

A critical point to remember is that, unlike other environmental justice communities, Tribes are self-governing entities and regulators. They possess broad aspects of inherent sovereignty that have not been given up by treaty, taken away by Congress, or divested by implication due to their dependent status by the United States Supreme Court.[14] Inherent sovereignty means that Tribes have the right of self-governance and the right to exercise governmental authority over their members, resources, and territories, including civil jurisdiction over non-Indians on Indian lands and, under some circumstances, even on non-member fee lands within reservation boundaries.[15] As governments, it is imperative that Tribes not only define, but also ensure environmental justice within their own communities.

Congress also may properly delegate federal authority to Tribes, including authority over non-Indian activities on reservations as well.[16] In recognition of tribal self-government and sovereignty, Executive Order 13175 directs federal agencies to consult with Tribes when developing policies that affect Tribes.[17] The United States recognizes Tribes as unique political groups, and it deals with them on a government-to-government basis, as opposed to its dealings with other minorities that are identified by strictly racial or ethnic classifications. This requires that federal agencies, including the EPA, not treat Tribes as simply part of the general public.[18]

Despite tribal sovereignty, the United States has very broad, but not unlimited, constitutional power over Indian affairs.[19] This so-called plenary power gives Congress the right to make laws specific to Tribes and Indians. However, the United States also owes a trust responsibility to Tribes and Indian people to act in their best interest. Because Tribes are neither foreign nations nor states, the United States Supreme Court has described them as "domestic dependent nations" that sit in relation to the United States as a ward to his guardian.[20] From this guardian-ward relationship, as well as federal laws and the promises made in Indian treaties, a trust responsibility

flows from the federal government to the Tribes and Indians. It is this unique trust responsibility that imposes obligations on the federal government to protect, defend, and provide services to Tribes and Indians.

The political status of tribes as sovereigns, coupled with the federal plenary power over Indian affairs, explains why state regulatory laws generally never apply to Tribes and tribal lands. Unquestionably, repelling efforts to limit tribal sovereignty is one of the most significant issues facing Tribes today. Many of these attacks on sovereignty center on who has jurisdiction to regulate people, activities, natural resources, and the environment on reservations, particularly on non-Indian owned fee lands within reservation boundaries. These are some of the most complex questions in law today. Restrictions on tribal sovereignty can occur directly by Congress exercising its plenary authority over Indian affairs or by the United States Supreme Court deciding, often subjectively, that some inherent sovereign right is inconsistent with a Tribe's status as a domestic dependent nation.[21] Unfortunately, as one legal scholar has noted, it would be very difficult to find any litigant, including convicted criminals, with a worse track record than Indians in the Rehnquist Court.[22]

Finally, in addition to sovereign rights, many Tribes also possess treaty rights. Although treaties preserve important tribal rights, these rights are not grants from the United States to the Tribes. Rather, a treaty may be regarded as a negotiated contract between a Tribe and the United States. In many treaties, Tribes expressly reserved cultural, traditional, and subsistence rights to hunt, fish, and gather both within and without their reservations at all usual and accustomed places. Under the "reserved rights" doctrine, Tribes retain all rights that were not granted away or taken away by subsequent congressional enactments.[23] Thus, such rights to hunt, fish, and gather on-reservation exist even without express language. Many Tribes and their members rely heavily on subsistence activities not only for survival, but also as an integral element of their cultural and traditional dietary practices and ways of life.

SOCIAL, HEALTH, AND ECONOMIC STATUS OF TRIBES AND THEIR MEMBERS AND UNIQUE SUSCEPTIBILITY FACTORS

Social and Economic Status

The economic condition and public health status of AI/ANs are among the lowest of any ethnic or minority group in the United States. As previously noted, poverty, poor health, and limited access to health care all make AI/ANs more susceptible to adverse impacts from pollution. Poverty and unemployment rates among Native Americans are the highest for any ethnic group in the United States, with nearly one out of every three AI/ANs living below the poverty line.[24] Frequently, the poverty rate exceeds 50%,[25] and the average Indian jobless rate remains at 46%.[26] On the Blackfeet Reservation, 74% of adult members are unemployed.[27] A 1999 study reported that some 90,000 AI/AN families are homeless or living in substandard housing.[28] One out of five Indian homes lack plumbing.[29] Even more disheartening are the living conditions present in many Alaska Native villages. Only about 40% of these families have basic and safe sanitation services such as flush toilets and piped drinking water, and over 50% of the systems that do exist can only be considered rudimentary.[30] Harsh climate conditions, along with the lack of funding and economic development, present extreme challenges to the provision of sustainable and effective sanitation services in Alaska Native villages. And, in this age of the Internet, only 39% of rural Native American households even have telephones compared to 94% for non-Native rural households.[31]

Health Status

Although the trust responsibility, government-to-government relationship, and, in some cases, treaties obligate the federal government to provide health-related services to Tribes and AI/ANs, shamefully, the Indian Health Service has been grossly under-funded and staffed at only 34% of the level of need for years.[32] Currently, Indian health coalitions are asserting that the meager 2% funding increase for Indian health in the 2003 budget proposed by the Bush Administration will only exacerbate current problems in Indian health care delivery, not alleviate them.[33] Additionally, some of these groups also

have noted the inequitable distribution of health care to AI/ANs nationwide. For example, only $100 million, or less than 5% of the $2.6 billion spent annually on Indian health care, is received in California, although that state is home to 14% of the Nation's Indians.[34]

While there is a general lack of comprehensive health care data on Tribes and their members, some of the reported statistics suggest an alarming disparity in the health status of AI/ANs compared to the general population in the United States. For example, in comparison to all other races in the country, AI/ANs have a death rate for diabetes mellitus that is 249% higher; a death rate for tuberculosis that is 533% higher; a death rate for pneumonia and influenza that is 71% higher; and a death rate from alcoholism that is 627% higher.[35] AI/ANs also have unique issues regarding cancer, including under-diagnosis and under-reporting, inadequate screening, and lack of access to quality cancer treatments. In 2000, the Association of American Indian Physicians reported that cancer is the leading cause of death for AN women; the second leading cause of death for AI/ANs forty-five years of age or older; and the third leading cause of death for AI/ANs regardless of their age. The Association also noted that generally, AI/ANs have worse cancer survival rates than do whites, Hispanics, Asians, and African Americans.[36] Additionally, AN women have the highest cancer and lung cancer mortality rates of any major racial group of females, and the leading cause of death of AI women is lung cancer.[37] Finally, it has even been reported that in most parts of the country AI/ANs have the lowest life expectancy of any population group in the northern hemisphere except Haitians.[38]

Unique Susceptibility Factors

Traditional, cultural, and subsistence uses of, and strong dependence on, natural resources make AI/ANs especially susceptible to adverse health affects from pollution. In many cases, AI/ANs "have greater exposure risks than the general population as a result of their dietary practices and unique cultures that embrace the environment."[39] Gathering, hunting, and fishing are necessary not only for survival, but also for maintaining the cultural,

social, spiritual, and economic aspects of AI/AN communities. Frequently, the right to engage in gathering, hunting, and fishing is legally protected by treaty. Tribes and their members also use water, plants, and animals in religious, traditional, and cultural ceremonies and practices. When pollutants contaminate the air, water, soil, plants, and animals, these contaminants eventually accumulate in the people through consumption, ingestion, contact, and inhalation. A classic environmental justice site exists on the Akwesasne reservation where industry has devastated the traditional lifestyle of the Mohawk community. Core samples of the St. Lawrence River bottom have found over 6,000 ppm of polychlorinated biphenyls ("PCBs").[40] As result, while many Mohawk families used to eat twenty to twenty-five fish meals each month it is now said that, "the traditional Mohawk diet is spaghetti."[41]

Unfortunately, the threat of such contamination is not limited to the health of AI/ANs, but also extends to the health and well-being of their future generations. Several studies have shown that children are particularly susceptible to pollution. A New York State Department of Health study of lactating women linked breast-feeding to the exposure of infants to hazardous substances. The study found that while the PCB concentrations in the breast milk of Mohawk women decreased over time, their infants' urine PCB levels were ten times higher than that of their mothers.[42] Another example concerns southern California Tribes who are worried about the health and safety of some three hundred traditional basket makers. These basket makers are being exposed to pesticides as they gather natural basket materials, weave these materials often by holding the grasses or other materials in their mouths, and wear, cook with, and use the completed baskets.[43] Tribes believe that health studies are needed because a disproportionate number of AI residents in Humboldt Country, California have been diagnosed with cancer.[44]

BARRIERS TO TRIBAL ECONOMIC DEVELOPMENT

Clearly, poverty, unemployment, health care, housing, and pollution in AI/AN communities are some of the most pressing issues confronting tribal governments. Like other governmental entities, Tribes bear a responsibility

to provide governmental services to protect the health, safety, and welfare of their members and other reservation residents. Under current federal policies supporting, at least in principle, tribal self-determination and economic self-sufficiency today, many Tribes are concerned with promoting economic development to provide funding for such services. However, economic development on reservations is very difficult for a number of reasons. These reasons include, but are not limited to, lack of money for new projects on Indian lands, as tribal and Indian trust land cannot generally be mortgaged or put up for collateral; the remoteness of most reservations which makes many projects not economically feasible; lack of infrastructure–electricity, communication systems, water, roads, and buildings–conducive to business; lack of skilled laborers and professionals; and the applicability of many federal, as well as tribal, laws to activities in Indian country that may make businesses reluctant to locate there.[45]

Federal Policies

The federal government itself often underestimates or misunderstands these problems. In a recent speech before the National Congress of American Indians, Assistant Secretary for Indian Affairs Neal McCaleb discussed the need to develop reservation-based technology and energy resource development, to expand the Bureau of Indian Affairs Indian Loan Guaranty Program, and to create new jobs through direct contracts with Indian owned entities through the Small Business Administration.[46] The Assistant Secretary failed, however, to indicate whether money was actually available or anticipated for all those programs and initiatives. The Assistant Secretary commented about the economic conditions in Indian communities, "[i]f you keep on doing what you've always done, then you're always going to get what you've always gotten."[47] Although not so intended, the remark stands as a telling commentary on the federal government's Indian policy. President Bush's fiscal year 2003 budget request contained mostly level funding for Indian programs for fiscal year 2003, reflecting yet again the declining federal *per capita* spending for Indians compared to *per capita* expenditures

for the general population.[48] Absent equitable funding and support, all the programs and economic initiatives in the world will do nothing more than ensure that everything, including the abject poverty now existing, remains *status quo* in Indian country.

A recent request by Congress demonstrates this matter. Curious about the continued widespread unemployment and poverty in tribal communities despite federal funding, Congress asked the General Accounting Office to issue a report on the availability and effectiveness of federal programs that provide funding for economic development activities to Tribes and tribal members. The 2001 Report found that less than 60% of the eligible Tribes and tribal entities reporting had used the approximately one hundred federal programs that could potentially provide funding.[49] Although efforts have been made to increase the effectiveness of these federal programs, longstanding funding limitations to the agencies themselves hinder progress in this area. One example is the Native American Business Development, Trade Promotion, and Tourism Act of 2000 requirement that the Department of Commerce establish an Office of Native American Business Development.[50] This office, whose responsibilities would include coordination of federal programs relating to economic development, has yet to be established because no funding exists to do so.[51]

Indian Gaming

Of course, tribal sources of revenue include more than just federal funding. Unquestionably, the biggest economic boom in Indian country has been Indian gaming, which is just barely twenty years old. In 1988, Congress passed the Indian Gaming Regulatory Act, which allows Tribes to operate casinos if they follow certain procedures.[52] Unlike the non-Indian casinos operating in places like Atlantic City and Las Vegas, federal law requires that *all* Indian gaming revenues be used to promote the economic development and welfare of the Tribe.[53] Currently, 280 Indian gaming facilities are operating in twenty-nine states.[54] Although many people believe that all Tribes are now rich and no longer need federal assistance, in fact many

Tribes do not now and will never operate gambling facilities on their reservations, and not all gaming tribes enjoy great wealth from such activities. As of 1998, over two-thirds of the Tribes did not participate in gaming; the twenty largest casinos accounted for over 50% of all revenues from Indian gaming, and the next eighty-five casinos accounted for 41.2% of all such revenues.[55] Clearly, for the majority of Tribes with casinos, revenues have been modest with most of the benefit being in the form of jobs for tribal members. Yet, while gaming is clearly not curing the poverty now found on most reservations, it should nevertheless be recognized as an effective means for some Tribes to reduce unemployment and move towards economic self-sufficiency.

Environmental Consequences of Federal Policies

In addition to the federal policy supporting Indian gaming, many Tribes are now enduring the environmental consequence of decades of federal policy promoting mining and other natural resource development on Indian lands. Such development can be a significant source of pollution in tribal communities. While Tribes often do not reap the full benefits of these activities, they are left to deal with the after effects. Although most Americans recall the Three Mile Island nuclear plant accident, few remember that in March 1979, the Nation's worst radioactive release occurred due to a uranium mill spill near the small Navajo community of Church Rock.[56] Years of mining on Navajo lands also have resulted in uranium seeping into and contaminating drinking water wells on the reservation.[57] The Navajo Nation alone has approximately 1,000 old mines and waste piles but has received only about 1% of the cost of cleaning them up from the federal government.[58] In 1980, the Jackpile, located on the Laguna Pueblo in New Mexico, was the largest open pit uranium mine in the world. One pit was located only 1,000 feet from the Laguna community of Paguate. Following the mine's closure in 1982, disputes arose concerning reclamation. The Department of the Interior predicted, "without reclamation, 95-243 additional radiation-induced cancer deaths could be expected within 50 miles of the mine."[59] In Oklahoma, the Tar Creek Superfund Site, a former zinc and lead mine occupying

some forty square miles within the former Quapaw Indian Reservation, continues to adversely affect the health and welfare of Quapaw children and adults.[60] Some 80% of the contaminated lands are Indian-owned, and both the Quapaw Tribe's powwow grounds and campgrounds are contaminated. Studies indicate that about 25% of the Quapaw children have elevated blood levels of lead as compared with a state average of 2%.[61] Recently, this site was caught in the crosshairs of the Bush Administration's cut of cleanup monies for Superfund sites. Current estimates of various cleanup and relocation proposals for Tar Creek range from $70 to $250 million.[62] While the EPA asked for $5 million dollars for Tar Creek, no money will be provided for the site this year.[63]

Economic Paternalism

In summary, funding is insufficient to support sustainable and environmentally benign forms of economic development in Indian country.[64] As a practical matter, this means that Tribes seeking to free themselves from federal dependence and poverty often must consider less desirable forms of economic development that may include potentially polluting industries and locally unwanted land uses ("LULUs"). The result is a pervasive form of environmental injustice within Indian country itself. Moreover, when Tribes do choose to proceed with such projects, they face economic paternalism from those who believe that Tribes are targeted by particular businesses such as the waste industry, that only certain forms of economic development are appropriate for Tribes, and that Tribes are simply incapable of making proper and intelligent decisions. The fact is that Tribes have seriously considered very few waste proposals and acted on even fewer.[65] Tribes are fully capable of deciding for themselves when projects will or will not serve their best interests.[66] As a result, what initially may appear to be a classic environmental justice siting issue in a tribal community, may in fact be a legitimate exercise of tribal sovereignty and self-determination authorizing a viable, well planned, and regulated economic development project fully supported by the Tribe and tribal community.

But what of potentially "bad" development decisions made by Tribes? As pointed out by some scholars, recognition of tribal self-government "does not mean that every decision of a Tribe is beyond scrutiny on environmental justice grounds," or that "federal agency officials should abdicate their responsibilities."[67] Respect of tribal self-governance should mean "that when any group of people challenges a decision by a tribal institution, they should focus on the decision–the facts and the procedure–and they should make use of tribal institutions to air their concerns."[68]

Environmental Regulation in Indian Country and Alaska Native Villages

Although Tribes are among the most impoverished groups in our Nation, few issues are more significant than the protection of the environment within Indian country and Alaska Native villages. These lands serve as the permanent homeland for AI/ANs and are one of the most valuable tribal resources. This is particularly so because, if these homelands are polluted, AI/ANs do not consider leaving an option. As previously noted, contamination of the soil, air, water, and food web, in turn, also contaminates the people consuming, ingesting, or contacting such resources. For many Tribes, there are strong cultural ties to the earth, water, plants, and animals and sometimes religious ties to sacred sites on those lands. As a result, effective regulation and protection of the environment in Indian country and Alaska Native villages is crucial to achieving environmental justice.

General Principles and Policies

General principles of Indian law support a finding that Tribes share the responsibility for regulating the environment in Indian country with the federal government,[69] and absent express congressional authorization states do not possess such jurisdiction.[70] Until 1986, none of the major federal environmental laws included a role for Tribes. Because the special jurisdictional rules applicable to Indian country left the EPA unable to delegate primary enforcement to states, and in recognition of Tribes' special legal

status, the EPA was forced to develop new practices and policies for regulating the reservation environment. In 1984, the EPA adopted its formal Indian policy,[71] reaffirmed most recently by EPA Administrator Christine Todd Whitman on July 11, 2001,[72] which provides:

> In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands.

To carry out the Indian policy, the EPA has committed to work directly with Tribes on a government-to-government basis; to recognize Tribes as the primary parties of environmental policy decisions and program management; to help Tribes assume regulatory and program responsibilities for reservation lands; to remove existing legal and procedural impediments to tribal environmental programs; to consider tribal concerns and interests whenever the EPA's actions or decisions or both may affect them; to ensure tribal, state, and local government cooperation in resolving environmental problems of mutual concern; to work cooperatively with other federal agencies that have related responsibilities on Indian reservations; to assure compliance with environmental laws on Indian reservations; and to incorporate the Indian policy into all planning and management including the EPA's budget, guidance, legislative initiatives, and ongoing regulations and policies.[73]

In line with the Indian policy, since 1986, tribal amendments to some of the major federal environmental regulatory laws—the Safe Drinking Water Act, Clean Water Act, and Clean Air Act—have been enacted to afford Tribes substantially the same opportunities as states under those Acts for certain programs and purposes.[74] However, since these amendments, Tribes continue to face many environmental injustices, including, but not limited to, inadequate enforcement by the EPA, gaps in the federal environmental regulatory scheme, statutory barriers to tribal participation, and lack of

funding and technical support for tribal environmental programs. Alaska Native villages face a unique set of challenges including but not limited to an inability to participate in the same manner, or to the same extent, under the Clean Water Act as Tribes located in the lower forty-eight states due to the status of their land.[75]

Funding Shortages for Tribal Environmental Programs, Unmet Goals, and Environmental Injustice

Assuring that environmental justice exists in Indian country and Alaska Native villages requires full implementation of the Indian policy. The EPA simply must take serious its commitment to incorporate the Indian policy goals into its decision-making, rulemaking, initiatives, programs, and especially its budget. A major injustice concerns the utter inadequacy of federal funding for tribal environmental programs, which is particularly inequitable when compared to the billions of dollars spent on state environmental programs over the last three decades. Actual assumption of federal programs by the Tribes has been extremely limited to date, most often due to lack of funding. With the exception of the few successful gaming Tribes, not many Tribes have sufficient resources to implement strong regulatory schemes for the protection of the environment. When resources are available for the *development* of such programs, funds for *continued implementation* are woefully lacking. As of November 30, 2001, only about twenty-three Tribes had promulgated and received EPA approval for their water quality standards.[76] Unless and until Tribes assume program responsibility, the EPA is responsible for administering the federal environmental laws within Indian country. With respect to the water quality standards program, this poses significant enforcement problems, as no federal standards exist for EPA to enforce within Indian country and, where traditional, cultural, and subsistence activities are involved, upstream state standards often are inadequate to protect tribal interests from environmental harm.[77]

Another area of continuing injustice concerns solid and hazardous waste on Indian lands. Under the Resource Conservation and Recovery Act of

1976,[78] a law for which no tribal amendments have yet been enacted, mandatory closure of open dumps was required. In 1994, Public Law No. 103-399, the Indian Lands Open Dump Cleanup Act of 1994, was enacted.[79] The Act identified congressional concerns that solid waste open dumpsites located on Indian and Alaska Native lands threaten the health and safety of residents of those lands and contiguous areas.[80] Under the Act, the Indian Health Service was delegated the responsibility to inventory all open dump sites on Indian lands, to identify funding necessary to bring the identified sites into compliance with statutory and regulatory provisions, and to provide an annual report to Congress on the status of the mandated cleanup.[81] In 1998, four years after the passage of the Act, the Indian Health Service reported that 1,104 open dumps continued to exist within Indian country, and, of these, 587 were considered to present a moderate to high threat to health and the environment.[82] The 1998 Indian Health Service study apparently is the last published report on the status of open dumps in Indian country. No full inventory on hazardous waste sites in Indian country or Alaska Native villages appears ever to have been conducted.

At the June 2002 National Tribal Conference on Environmental Management, EPA Administrator Christine Todd Whitman discussed the provision of environmental protection within Indian country.[83] Administrator Whitman admitted that "the evidence is all too apparent that [the] EPA needs to do more."[84] The Administrator reported the following statistics: only about 10% of the Tribes have developed solid waste management programs; eighty-three Tribes are located in areas with air pollution problems; less than 30% of Indian households have access to safe drinking water, while 90% of the rest of population have such access; and water and wastewater needs within Indian country is estimated at $400 million.[85] According to the Administrator, "Despite possible cutbacks in funding for many federal agencies, we were able to protect [the] EPA's resources designated for tribal programs in President Bush's budget request for fiscal year 2003."[86] According to EPA sources, President Bush has requested $232 million for the EPA's tribal programs, a six fold increase in spending since 1994.[87] Tribal water pro-

grams have increased from $8 million to $37 million during that period, and EPA spending on water and wastewater infrastructure has risen from $6 million to $70 million.[88] While increases in funding of tribal programs over the past ten years are commendable, the total budget does not even come close to meeting the identified water and wastewater needs in Indian country and Alaska Native villages. Moreover, while Tribes in Alaska constitute about 40% of the national total, Tribes in Alaska receive less than 1% of available funding because these Tribes do not reside within Indian country.[89]

Again, while lack of funding for the development of effective tribal environmental programs is certainly an impediment to achieving environmental justice in Indian country, environmental paternalism also presents challenges. Opponents of Tribes and tribal economic development and self-determination not only presume, but often argue, that Tribes are incompetent to develop and administer environmental programs.[90] Until tribal sovereignty is universally recognized and equitable funding provided, tribal regulation of the Indian country environment will continue to be discounted and its legitimacy challenged.

Conclusion

If Tribes are to achieve environmental justice within Indian country and Alaska Native villages, and participate equitably and effectively in the environmental justice movement, it is absolutely imperative that environmental justice issues affecting Tribes be viewed against the backdrop of tribal sovereignty, the federal trust responsibility owed by the United States to Tribes, the government-to-government relationship, treaty rights, and the special jurisdictional rules applicable to Indian country. Indian country is different from other parts of the Nation, and Tribes have distinct political, legal, cultural, and traditional aspects that distinguish them from all other minority, ethnic, and low income groups and communities. The environmental justice community must learn about, consider, and stand by those differences consistently if the role of Tribes and their environmental justice concerns are to be both visible within and a part of the mainstream environ-

mental justice movement. Finally, if Tribes are to exist in environmentally safe, beneficial, and sustainable homelands, "holistic, integrative, and unifying strategies that address social, economic, and health improvement simultaneously" will be required.[91] In the environmental arena, this means that in meaningful consultation with Tribes, the federal government must fulfill its trust responsibility to Tribes by providing proper health care; effective and appropriate economic development initiatives for Indian country and Alaska Native villages; adequate and equitable funding for tribal environmental programs; prompt enforcement and cleanup; and restoration.

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[2] *See, e.g.*, ENVTL. LAW INST., A CITIZEN'S GUIDE TO USING FEDERAL ENVIRONMENTAL LAWS TO SECURE ENVIRONMENTAL JUSTICE 9 (2002) (fails to mention Tribes in identifying governmental entities and other interested parties likely to be involved in environmental decision making), *available at* http://www.eli.org.

[3] 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, 942 (1992). *See generally* VINE DELORIA, JR., GOD IS RED 49 (1973).

[4] *See, e.g.*, EPA, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES § 1.1.1 (1998), *available at* http://www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf.

[5] Charles Lee, *Environmental Justice: Building a Unified Vision of Health and the Environment*, 110 ENVTL. HEALTH PERSPECTIVES 141, 142 (Apr. 2002).

[6] Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1, 31 (2002).

[7] THE NORTHWEST ARCTIC REGION, ENVIRONMENTAL JUSTICE GUIDELINES FOR THE TRIBES 25 (2001).

[8] Lee, *supra* note 5, at 141–42.

[9] *Id.*

[10] *Id.*

[11] Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,328 (July 12, 2002). While there are both common aspects and important differences between the legal status of Tribes in Alaska and Tribes in the lower forty-eight, this paper is not intended to analyze those distinctions in any detail.

[12] *See* Rose L. Pfefferbaum et al., *Providing for the Health Care Needs of Native Americans: Policy, Programs, Procedures, and Practices*, 21 AM. INDIAN L. REV. 211, 247 (1997) ("[o]ver half of the American Indian population live in urban areas, less than a quarter live on reservations, and the remainder live in rural areas (often defined as Indian country. . .)"); *See also* THE NATIVE NORTH AMERICAN ALMANAC: A REFERENCE WORK ON NATIVE NORTH AMERICANS IN THE UNITED STATES AND CANADA 220 (Duane Champagne ed., 1994) (Today, fewer than half of all Indians live on reservations).
[13] STATES AND TRIBES: BUILDING NEW TRADITIONS (James B. Reed & Judy A. Zelio eds., 1995). "Indian country" encompasses more territory than the term "reservation," which generally refers to land reserved by treaty, statute, or executive order. "Indian country" is statutorily defined as including land within a reservation, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished. *See* 18 U.S.C. § 1151 (2002). In Alaska v. Venetie, 522 U.S. 520 (1998), the United States Supreme Court held that only one Indian reservation existed in Alaska and that land conveyed to Alaska Native villages by the federal government under the Alaska Native Claims Settlement Act was not Indian country.
[14] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
[15] *See* Montana v. United States, 450 U.S. 544, 565–66 (1981).
[16] United States v. Mazurie, 419 U.S. 544, 558 (1975).
[17] Exec. Order No. 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249, 67,250 (Nov. 9, 2000). By a letter dated June 19, 2002 to Congressman Frank Pallone, Jr., Alberto Gonzales, Counsel to President Bush, noted "the Bush Administration reviewed the Executive Order and found it to be consistent with the views of the Administration on tribal consultation and coordination." Frank Pallone, Jr., *Bush Administration Favors Tribal Consultation*, INDIAN COUNTRY TODAY, July 17, 2002, at A-5, *available at* http://www.indiancountrytoday.com.
[18] *See, e.g.*, Executive Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951, 22,952 (Apr. 1994).
[19] *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Sioux Nation, 448 U.S. 371, 415 (1980) (congressional power to control Indian affairs is not absolute, but subject to guardianship and constitutional limits).
[20] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).
[21] Many legal scholars have disagreed strongly with the Court's Indian law jurisprudence and its inconsistency with established principles of Indian law. *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001). *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650 (2001).
[22] During the fifteen terms of the Rehnquist Court, tribal interests lost 77% of the cases decided and, 82% of cases decided by the Court in the last ten terms. However, during the same period, convicted criminals achieved reversals in 36% of all cases reaching the Court. *See* Getches, *supra* note 21, at 280–81.
[23] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 680 (1979); United States v. Winans, 198 U.S. 371, 381 (1905).
[24] NATIONAL GAMBLING IMPACT STUDY COMMISSION FINAL REPORT 6-5 (June 18, 1999) (quoting the statement of Sen. John McCain, R-AZ in 141 Cong. Rec. S11881 (Aug. 8, 1995)).
[25] Erik Pages, *Entrepreneurship in Indian Country*, INDIAN COUNTRY TODAY, July 10, 2002, at A-3.
[26] *Id.*

[27] U.S. GEN. ACCOUNTING OFFICE, WELFARE REFORM: TRIBES ARE USING TANF FLEXIBILITY TO ESTABLISH THEIR OWN PROGRAMS, GAO-02-695T, at 6 (May 10, 2002), *available at* http://www.gao.gov/new.items/d02695t.pdf.
[28] NATIONAL GAMBLING IMPACT STUDY, *supra* note 24, at 6-5.
[29] *Id.*
[30] Videotape: The Forgotten America—Alaska's Rural Sanitation Problem (Media Support Center for the Alaska Department of Environmental Conservation 2000) (on file with authors).
[31] Pages, *supra* note 25, at A-3.
[32] Transcript, Fifteenth Meeting of the National Environmental Justice Advisory Council, at II-252 (May 24, 2000) (statement of Michael Rathsam, Indian Health Service representative), *available at* http://www.epa.gov/compliance/resources/publications/ej/community_based_health_recom_report.html.
[33] Benjamin Spillman, *Tribal Group Wants More Health Funds*, DESERT SUN, July 8, 2002.
[34] *Id.*
[35] NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, ENVIRONMENTAL JUSTICE AND COMMUNITY-BASED HEALTH MODEL DISCUSSION AND RECOMMENDATIONS REPORT 73 (Feb. 2001), *available at* http://www.epa.gov/compliance/resources/publications/ej/community_based_health_recom_report.html.
[36] *Id.*; *see also* K. Marie Porterfield, *American Indian Cancer Statistics Under Reported*, INDIAN COUNTRY TODAY, July 26, 2000, at C-1.
[37] NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, *supra* note 35, at 73.
[38] *Id.*; *see also* Lyric Wallork Winik, *There's a New Generation with a Different Attitude*, PARADE MAGAZINE, July 18, 1999, at 6–7.
[39] NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, INTEGRATION OF ENVIRONMENTAL JUSTICE IN FEDERAL AGENCY PROGRAMS 46 (May 2002), *available at* http://www.epa.gov/compliance/resources/publications/ej/; *see also* NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, *supra* note 35, at 73.
[40] WINONA LADUKE, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE 18 (1999) (the Mohawk PCB standard was 0.1 parts per million). The Environmental Protection Agency has set a maximum contaminant level of 0.0005 milligrams (0.0005 mg/L) PCBs per liter of drinking water, and the Food and Drug Administration requires that certain foods such as eggs, milk, fish and shellfish, and infant foods contain no more than 0.2-3 parts of PCBs per million parts (O.2-3 ppm) of food. AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, TOXFAQS FOR POLYCHLORINATED BIPHENYLS (PCBs) (Feb. 2001), *at* http://www.atsdr.cdc.gov/tfacts17.html (on file with the Seattle Journal for Social Justice).
[41] LADUKE, *supra* note 40, at 18.
[42] *Id.* at 11–23.
[43] Chuck Striplen, Mutzun Oholone Tribe, *Native Subsistence in a Toxic Environment: A Tribal Viewpoint*, EPA's OPPTS TRIBAL NEWS, Fall/Winter 1999-2000, at 14.
[44] *Id.*
[45] For example, leases of tribal land must have approval of the Bureau of Indian Affairs, which constitutes a major federal action and triggers the National Environmental Protection Act of 1969 ("NEPA"). 42 U.S.C. § 4321 (2002). Compared to off reservation development, a NEPA review can be extremely time consuming: a minimum 180-day process, and often up to three to four years.
[46] *Id.*
[47] Press Release, U.S. Dep't of Interior, Assistant Secretary McCaleb Calls On Tribal Leaders To Choose Prosperity Over Poverty (June 20, 2002) *available at* http://www.doi.gov/news/020620a.html.

[48] *National Congress of American Indians Testimony on the President's FY 2003 Budget Request for Indian Programs Before the Senate Comm. on Indian Affairs*, 107th Cong. (Mar. 7, 2002) (written testimony presented by the NCAI), *available at* http://www.ncai.org/main/pages/issues/other_issues/appropiations.asp. Similarly, no "bridge" exists for Tribes on the other side of the digital divide. President Bush has called for the elimination of programs designed to bridge the digital divide based on a recent report from the Department of Commerce indicating that nearly half of America is on-line. Approximately 75% of households that earn less than $15,000 a year still do not have access. John Schwartz, *Report Disputes Bush Approach to Bridging 'Digital Divide'*, N.Y. TIMES, July 11, 2002, at A-16; Derrick Z. Jackson, *President Shrugs at the Digital Divide*, BOSTON GLOBE, July 17, 2002, at A-23; *see also* Kade Twist, *A Nation Online, But Where are the Indians?* (Feb. 5, 2002) *at* http://www.digitaldividenetwork.org/content/sections/index.cfm (last visited Nov. 10, 2002) (on file with the Seattle Journal for Social Justice).

[49] U.S. GEN. ACCOUNTING OFFICE, ECONOMIC DEVELOPMENT: FEDERAL ASSISTANCE PROGRAMS FOR AMERICAN INDIANS AND ALASKA NATIVES, GAO-02-193, at 7 (Dec. 2001), *available at* http://www.gao.gov/new.items/d02193.pdf. Tribes identified many barriers to obtaining funding, including: (1) insufficient collateral to meet matching fund requirements; (2) inflexibility of federal programs to meet business need resources; (3) overly burdensome administrative and paperwork requirements; (4) inability to rely on federal funds for long-term projects; and (5) discouragement due to repeated funding denials. *Id.* at 13–14.

[50] Native American Business Development, Trade, Promotion, and Tourism Act of 2000, Pub. L. No. 106-464, 114 Stat. 2012 (2000).

[51] U.S. GEN. ACCOUNTING OFFICE, *supra* note 49, at 14.

[52] 25 U.S.C. §§ 2703–2721 (2002).

[53] 25 U.S.C. § 2710(b)(2)(B) (2002).

[54] *See* National Indian Gaming Association: Membership, *at* http://www.indiangaming.org/members/casinos.shtml (last visited Nov. 10, 2002) (on file with the Seattle Journal for Social Justice).

[55] NATIONAL GAMBLING IMPACT STUDY, *supra* note 24, at 6-2.

[56] MARJANE AMBLER, BREAKING THE IRON BONDS: INDIAN CONTROL OF ENERGY DEVELOPMENT 175 (1990).

[57] S.J. Wilson, *Uranium Experts Deliver Hard Facts at Black Falls Meeting*, NAVAJO HOPI OBSERVER, July 12, 2002, *available at* http://www.navajohopiobserver.com.

[58] Bill Lambrecht, *Poisoned Land . . . Cold War Brought Mining Jobs to The Indians, But Uranium Mines Also Paid Off In Misery*, ST. LOUIS POST-DISPATCH, Nov. 19, 1991, at 6A.

[59] AMBLER, *supra* note 56, at 181–82.

[60] NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, *supra* note 35, at 83 n.17.

[61] *Id.*

[62] *Bush Cutting Cleanup Funds for Oklahoma Site*, INDIANZ.COM, July 2, 2002, *at* http://www.indianz.com/news/show.asp?ID=2002/07/02/quapaw (last visited Nov. 10, 2002) (on file with the Seattle Journal for Social Justice).

[63] *Id.*

[64] Scoot Sonner noted the funding problems in a recent article. *See* Scoot Sonner, *Whitman: 'EPA Needs to Do More' to Help Protect Indian Lands*, LAS VEGAS SUN, June 5, 2002, *available at* http://www.lasvegassun.com/sunbin/stories/nevada/2002/jun/05/060510598.html.

[65] Jana Walker & Kevin Gover, *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, 10 YALE J. ON REG. 229, 231 (1993).

[66] *Id.*

[67] Dean B. Suagee, *The Indian Country Environmental Justice Clinic: From Vision to Reality*, 23 VT. L. REV. 568, 579 (1999).
[68] *Id.*
[69] In Montana v. United States, the Court established several principles concerning the extent of inherent tribal civil regulatory authority over non-Indians within reservation boundaries, noting that Tribes may retain such authority, even on fee lands, when the conduct of non-Indians "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. 544, 565–66 (1981). Generally, the quality of the reservation environment goes directly to the economic security and health and welfare of a tribal community. Recently, in Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001), *cert. denied*, 122 S. Ct. 2347 (2002), the Court of Appeals for the Seventh Circuit upheld the EPA's treatment of the Sokaogon Chippewa Community as a state under the Clean Water Act. The court held that, pursuant to the tribe's showing that water resources were essential to its survival, and in line with the principles outlined in *Montana* and the purposes of the Clean Water Act, the EPA reasonably authorized the tribe to regulate water quality on its reservation, "even though that power entails some authority over off-reservation activities." Wisconsin, 266 F.3d at 750.
[70] Wash. Dep't of Ecology v. EPA, 752 F.2d. 1465 (9th Cir. 1985) (holding that, absent a congressional grant of authority, states are prohibited from exercising jurisdiction over environmental matters on Indian lands). The EPA recently noted that Indian country, as defined at 18 U.S.C. § 1151, serves as "a reasonable marker for the geographic boundary between state and federal [environmental] authority." Michigan: Final Authorization of State Hazardous Waste Management Program Revision, 67 Fed. Reg. 49,617, 49,618 (July 31, 2002) (to be codified at 40 C.F.R. pt. 271).
[71] EPA, INDIAN POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (Nov. 8, 1984), *available at* http://www.epa.gov/indian/wpdocs/epa-indpol.wpd.
[72] Memorandum from the EPA on EPA Indian Policy, to all EPA Employees (July 11, 2001) *available at* http://www.epa.gov/indian/wpdocs/reafrmem.wpd (on file with the Seattle Journal for Social Justice).
[73] EPA, *supra* note 71.
[74] *See* 42 U.S.C. § 300j-11 (2002); 33 U.S.C. § 1377 (2002); 42 U.S.C. § 7410(o) (2002).
[75] With respect to the Clean Water Act, this is so because the Clean Water Act recognizes Tribes' authority to set water quality standards throughout their reservations. However, the United States Supreme Court held that, with the exception of one reservation, other lands held by Alaska Native villages do not constitute Indian country. *See* Alaska v. Venetie, 522 U.S. 520 (1998).
[76] *See* EPA, TRIBAL WATER QUALITY STANDARDS AVAILABLE THROUGH EPA, *at* http://www.epa.gov/waterscience/standards/wqslibrary/tribes/html (last visited Oct. 17, 2002) (on file with the Seattle Journal for Social Justice).
[77] *See, e.g.*, City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) (upholding the EPA's approval of the Pueblo of Isleta's downstream water quality standards that were more stringent than the state water quality standards and which included a ceremonial designated use).
[78] 42 U.S.C. § 321 (1976) (as amended at 42 U.S.C. §§ 6901–6992 (2002)).
[79] 42 U.S.C. §§ 6901–6992.
[80] INDIAN HEALTH SERV., REPORT ON THE STATUS OF OPEN DUMPS ON INDIAN LANDS 1 (1998) *available at* http://www.epa.gov/tribalmsw/pdftxt/98report.pdf.
[81] *Id.*
[82] *Id.* at 9.

[83] Sonner, *supra* note 64.
[84] *Id*.
[85] *Id*.
[86] *Id*.
[87] *Id*.
[88] *Id*.
[89] Supradit Kanwanich, *Not in Our Backyard*, BANGKOK POST, Jan. 13, 2002, *available at* http://www.bangkokpost.com.
[90] *See generally* Gover, *supra* note 3, at 229.
[91] Lee, *supra* note 5, at 141–142.