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Endangered Peoples: Indigenous Rights and the Environment

*59 INDIGENOUS SELF-GOVERNMENT, ENVIRONMENTAL PROTECTION, AND THE CONSENT OF THE GOVERNED: A TRIBAL ENVIRONMENTAL REVIEW PROCESS

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I. INTRODUCTION

Indigenous peoples seek recognition under international law of their collective human rights to govern themselves within their traditional homelands. They seek assistance in defending their homelands against environmentally destructive and culturally devastating so-called “development.” The Draft Declaration of the Rights of Indigenous Peoples (Draft Declaration), [FN1] which is under consideration in the United Nations (UN), declares that indigenous peoples are entitled to certain enumerated human rights, including the right of self-determination, [FN2] and that they are entitled to assistance from national governments and the international community in exercising these rights. [FN3]

If we can assume that the Draft Declaration eventually will be adopted by the United Nations General Assembly with substantive provisions acceptable to indigenous peoples, that adoption will constitute the formal reversal, as a matter of international law, of hundreds of years of practice by the world's states. Achieving widespread reversal in nations' actual practice will be much more difficult. Established patterns of dominance over indigenous peoples, and exploitation and expropriation of their homelands by nations with more powerful technologies and domineering ***60** worldviews, will take time and effort to change. The recognition in international law of the human rights of indigenous peoples will be an important step in the right direction, but it certainly will not be the end of the struggle. Rather, it will only begin a new era of the struggle.

In this new era in which human rights of indigenous people are recognized, a major theater of action will be the reform of national laws. [FN4] Some indigenous peoples can expect to seek recognition as fully independent states, but most will seek recognition of some form of autonomous self-government within existing states. The experiences of the American Indian tribes and nations within the United States of America hold many lessons, both positive and negative, relevant to the fashioning of workable arrangements for indigenous autonomy. This article examines the US model for self-government by Indian tribes in the field of environmental protection.

In the United States, as in many other countries, national policies have encouraged or forced indigenous individuals to assimilate into the dominant society. These policies have been abandoned in the United States, but their legacy remains. One aspect of this legacy is the fact that on many reservations a large percentage of resid-

ents are not tribal members, either Indians of other tribes or non-Indians, and many of these people are landowners within reservation boundaries. Tribal governments now face the difficult issue of how to accommodate the legitimate interests of nonmembers, including their human rights, while still carrying on *tribal* self-government. Although it is difficult, we think that this issue can be resolved.

This article explores this issue and suggests a general approach that tribal governments might take in the field of environmental protection. Although we focus on the rights and interests of nonmember reservation residents, we think the suggested approach also would be useful in providing some structure in which non-Indians who are not reservation residents, such as neighboring landowners and public interest organizations, can interact with reservation Indians on environmental issues that cross jurisdictional boundaries. If tribes in the United States can fashion ways of accommodating the interests of nonmembers, we think that indigenous peoples in other parts of the world would be interested in the approaches taken by US tribes.

***61** Part II frames the issue in the context of international law, focusing on the emerging law of the rights of indigenous peoples and on some of the relevant existing human rights norms. To simplify this framework, we focus on one of the most essential aspects of human rights law: the idea that governments are vested with sovereignty as part of a social compact and that the just exercise of sovereign powers must reflect the consent of the governed. In Part III we offer some observations on Indian experiences with the US model of the social compact. Throughout much of US history, the federal government has asserted power over Indian tribes with very little regard for niceties such as the consent of the governed. We believe that efforts to bring nonmembers into a present-day tribal social compact must be built upon an appreciation of the historical pattern of disregard for consent on the part of Indian people. This part also critiques recent US Supreme Court decisions that severely undercut the doctrine of tribal sovereignty. The Court majority appears to be quite concerned about hypothetical infringements on the rights of nonmembers, especially non-Indians. At the same time it routinely disregards, denies, or flippantly acknowledges the lack of tribal consent to the historical imposition of federal laws, the very laws that set the stage for the current situation in which the rights of nonmembers figure so prominently in the Court's analysis.

Part III includes an overview of the law of environmental protection in Indian country in the United States. It discusses the approach taken in recent amendments to the major federal environmental laws, amendments that authorize tribes to assume roles in carrying out these federal laws similar to the roles performed by state governments. We see this as a manifestation of the US social compact that presents tribal governments with an historic opportunity and an enormous challenge.

Part IV proposes a framework in which tribal governments could provide nonmembers with meaningful opportunities to participate in tribal environmental protection programs. We suggest that tribes go well beyond the minimal requirements of the Environmental Protection Agency's (EPA) regulations and enact tribal legislation that would give nonmembers a real sense of enfranchisement. Mainstream environmental groups could help tribes to build effective environmental protection programs. By building effective tribal programs, tribes will also be cultivating public support for their programs because the tribes will be serving a broad range of public interests. Public support will help tribal programs to withstand the challenges that are sure to arise, and public support will be especially important when those challenges are resolved in the legislative arena.

***62** II. EMERGING INTERNATIONAL LAW OF INDIGENOUS SELF-GOVERNMENT

Over the past decade, the UN has taken the lead in formulating international standards for the recognition

and protection of the rights of indigenous peoples. Within the UN, the lead role has been performed by the Working Group on Indigenous Populations, which was established in 1982. [FN5] At its eleventh session, held in 1993, the Working Group completed drafting a Declaration of the Rights of Indigenous Peoples. The Draft Declaration is now beginning to work its way up the UN hierarchy, with initial consideration being given by the Subcommission on the Prevention of Discrimination and the Protection of Minorities at its forty-sixth session in 1994. [FN6]

Although the formulation and adoption of the Draft Declaration is only a part of the emerging international law of indigenous rights, it is an essential part. Extensive literature exists on the Draft Declaration [FN7] and other aspects of the emerging international law of indigenous rights. [FN8] Most of this subject area is beyond the scope of this article. We have chosen to focus on those principles expressed in the Draft Declaration that are specifically concerned with environmental protection.

***63** *A. Principles in the Draft Declaration*

The Draft Declaration consists of some forty-five articles, many of which concern the relationships of indigenous peoples to the natural environment of their traditional homelands. Some of these articles emphasize the rights of indigenous peoples to the possession and use of their traditional territories, some emphasize the importance of the natural world in indigenous cultural practices, and others emphasize the rights of indigenous peoples to exercise self-government within their territories. Articles 25 and 26, which are particularly relevant to environmental protection, read as follows:

Article 25

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard. [FN9]

Article 26

> Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by states to prevent any interference with, alienation of or encroachment upon these rights. [FN10]

Article 25 acknowledges both the spiritual nature of the relationship that indigenous peoples have to their territories and their widely shared belief in responsibility to future generations. Article 26 makes it clear that indigenous peoples have human rights to make use of wildlife, plant life, and other aspects of the natural world for the good of human communities. These two articles taken together reflect a basic value held by most indigenous peoples: the natural world is sacred, and indigenous communities are part of the natural world. [FN11]

Several other articles in the Draft Declaration elaborate on the rights of indigenous peoples to govern human uses of the resources and human ***64** effects on the environment of their traditional territories. [FN12] Article 33 sets some important limits on the ways in which indigenous peoples may carry out their governmental powers. This articles reads:

Article 33

> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, *in accordance with internationally recognized human rights standards.* [FN13]

In other words, indigenous peoples are expected to respect the human rights of all individuals within their jurisdiction, whether or not such individuals are members of indigenous communities or citizens of indigenous nations.

The next section takes note of a few key internationally recognized human rights standards. These include both those that support affirmative actions by indigenous governments to promote the human rights of indigenous individuals and those that place some limits on the prerogatives of indigenous governments, just as they limit the prerogatives of all sovereign governments.

B. Existing Human Rights Norms

Most of the body of international human rights law has emerged since the founding of the UN following the end of the Second World War. [FN14] In addition to including human rights in the statement of purposes and principles in the UN Charter, [FN15] the UN General Assembly adopted both the Universal Declaration of Human Rights [FN16] and the Convention on the Prevention and Punishment of the Crime of Genocide [FN17] in its early years.

In 1966, the UN General Assembly adopted and opened for ratification by member states the two principal multilateral treaties for the protection of human rights: the International Covenant on Civil and Political Rights [FN18] and the International Covenant on Economic, Social and Cultural ***65** Rights. [FN19] Scholars and activists sometimes refer collectively to these two international covenants, along with the Universal Declaration and the Optional Protocol to the International Covenant on Civil and Political Rights, [FN20] as the International Bill of Human Rights. [FN21] In proclaiming the rights of individuals against states, these instruments constitute significant limits on the basic principle of international law that a state's sovereignty over matters within its domestic jurisdiction is not subject to intervention by other states or by international organizations. [FN22]

An analysis of the norms proclaimed in the International Bill of Human Rights could be carried out in great detail. We have chosen to focus on three articles of the Civil and Political Rights Covenant that go to the heart of this article's subject matter. First, Article 27 proclaims:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. [FN23]

Indigenous peoples all over the world have been deprived of this human right. It is largely because of this widespread deprivation that in its Draft Declaration the UN Working Group on Indigenous Populations has emphasized the collective right of indigenous peoples to exercise autonomous self-government within their traditional territories. This amounts to a recognition that autonomous self-government is a prerequisite to protect the rights of indigenous peoples to carry on their own cultures, religions, and languages. Article 33 of the Draft Declaration suggests that if an indigenous people were to become an independent state, and if such a state were to include ethnic, religious, or linguistic minorities most likely including individuals belonging to the previously dominant nonindigenous culture, the newly constituted indigenous state would be bound to honor the human

rights of such nonindigenous individuals to carry on their culture, religion, and language.

***66** In addition, Articles 25 and 26 of the Civil and Political Rights Covenant proclaim human rights that should be taken into account by indigenous peoples that choose to exercise autonomous self-government within an existing state rather than to become an independent state. These two articles read:

Article 25

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in his country; [FN24]

Article 26

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [FN25]

We have chosen to focus on these principles in the Civil and Political Rights Covenant because they go to the heart of the concept of sovereignty in the modern world. These principles reflect one of the "self-evident" truths proclaimed in the US Declaration of Independence, that governments derive "their just powers from the consent of the governed." [FN26] Sovereignty *is* a social compact. Although this statement describes the real world in some countries much more than in others, in the United States people believe that governments exist to serve the public good; therefore if a government fails to faithfully carry out its responsibilities to the public, the citizens have the right to change the government, usually by throwing out the individuals and/or parties in charge. In this context, it will be a real challenge for tribal governments in the United States to fashion effective ***67** environmental regulatory programs that non-Indians subject to tribal jurisdiction will accept rather than resist. If Indian tribal governments can succeed in this effort, the models that they develop could prove very useful for other indigenous peoples around the world.

III. INDIAN EXPERIENCES IN THE AMERICAN SOCIAL COMPACT

Western civilization generally regards itself as having given the rest of the world the idea that governments derive their powers from the collective will of their citizens and that individuals have rights that governments cannot take away. A number of scholars have shown that the social philosophers who are credited with having developed these ideas, and the founding fathers of the American republic who incorporated these ideas into a system of government, drew upon their knowledge of how the Indian nations of eastern North America governed themselves [FN27] (especially the nations of the Haudenosaunee or Iroquois Confederacy). Some writers have noted that the framers of the Constitution overlooked certain key aspects of the Iroquois Great Law of Peace, such as the role of women. [FN28] Similarly, if Indian leaders had been participants in the American constitutional convention, the Constitution might include specific provisions to reflect Indian values, such as responsibilities to future generations and the natural world and respect for the wisdom of the elders.

Some principles that have become central to the American social compact might have less importance or

might not fit at all in an Indian social compact. For example, the principle of "one person-one vote" would conflict with the Iroquois tradition of the clanmothers selecting the chiefs based on their abilities rather than by popular vote. [FN29] Because people have responsibilities toward the natural world and toward future generations, an ***68** Indian social compact might give greater weight to the votes of those who try to faithfully carry out these responsibilities.

We leave it to others to debate the extent to which American Indian political thought and social organization influenced the development of social compact theory and the belief that individuals have certain inalienable rights, but we think it is clear that the larger American society and the world owe at least some kind of a debt of gratitude to North American Indians. This debt should be at least acknowledged. To the extent that it makes sense to speak of repayment of this debt, the repayment should take the form of supporting the surviving Indian tribes and nations of United States in their efforts to exercise their collective human right of self-government.

A. The Changing Terms of Relations Between the United States and Indian Tribes

This article makes no pretense of offering either a detailed analysis of the field of federal Indian law or a detailed discussion of the history of relations between the federal government and the Indian tribes and nations. [FN30] But some knowledge of history is necessary if one is to make any sense of much of the body of federal Indian law, and although there are broad patterns and common themes, the history of each tribe's relations with the federal government is unique.

Throughout most of the history of the United States, Congress exercised sweeping powers over Indian peoples with little regard for consent on the part of Indians, either as tribes or individuals. Federal policymakers, including the judges whose decisions often have professed to discern congressional intent from scant indicia, [FN31] generally have acted on the basis of one of two fundamentally different attitudes toward Indian tribes. One paradigm regards the tribes as separate peoples for whom the federal government is obliged to provide a measure of protection; the other regards the tribes as primitive forms of social organization that should be abolished as individual Indians become assimilated into the larger society. [FN32]

***69** During the early period of treaty making between the United States and the most powerful of the eastern Indian nations, the treaties that were made were genuine bilateral agreements between parties of comparable power. Therefore, those tribes and nations that accepted the superior sovereignty of the United States "relatively freely" consented to become subject to the sovereignty of the federal government in accordance with the terms of their treaties. [FN33] A similar point could be made regarding some of the early treaties with the tribes of the Great Plains.

After the early treaty period, however, the relationship between the United States and the tribes became much more one-sided. In many cases the United States unilaterally changed the terms of relations agreed to in treaties or ignored treaty promises altogether. Even as the treaties became one-sided and the tribes were pressed to give up more and more of their lands, the treaties were still founded on the premise that tribes would remain separate peoples and on the understanding that tribal homelands or "reservations" were essential if tribes were to maintain their separateness. [FN34] This premise was understood by both the tribes and by the federal government and, although the tribes did not want to give up most of their lands, they did want to remain separate.

As the balance of power became increasingly one-sided during the course of the nineteenth century, the belief that Indian tribes should be treated as separate peoples gave way to the belief that Indians should be assimil-

ated into larger society. This occurred over the span of several decades, but the watershed event was the enactment of the General Allotment Act of 1887, also known as the Dawes Act. [FN35] Under the policy of allotment, Congress attacked the basic tribal value and cultural practice of holding land in common. [FN36] The allotment era of federal Indian policy saw numerous separate legislative acts directed toward specific reservations, although other tribes escaped altogether. For those tribes whose reservations were allotted, the basic approach was to take land out of tribal ownership and divide it into parcels for allotment to individuals.

***70** Congress ultimately repudiated this policy when it enacted the Indian Reorganization Act of 1934, [FN37] but by the end of the allotment era Indian tribes and individuals held only about a third of the land that the tribes had held in 1887. [FN38] Some of these lands passed out of Indian possession when the trust restrictions were lifted and the lands became subject to state property taxes. Other lands were declared "surplus" and were sold to non-Indians or opened for homesteading. This is the historical explanation for the presence of substantial populations of non-Indian landowners within the boundaries of many reservations that, according to treaties, were set aside for the exclusive use of Indians forever.

Viewed from the perspective of the late twentieth century, the General Allotment Act can be seen for what it was--an attempt to carry out cultural genocide against Indian tribes and nations. [FN39] If the federal government were to carry out such a policy in the modern era, tribal leaders could oppose it on many grounds, including calling attention to the violations of international human rights law inherent in such a policy. [FN40] But it happened and, as a result, many tribes now have many non-Indians living within their reservation boundaries.

***71** In recent decades the belief that tribes are entitled to a measured separatism from the larger American society has regained prominence in federal law and policy. Congress has enacted a substantial body of legislation in support of tribal self-government, including the Indian Self-Determination and Education Assistance Act of 1975. [FN41] During this modern era of federal Indian policy, sometimes referred to as the "self-determination" era, [FN42] tribal governments have become increasingly involved in carrying out a wide range of governmental functions.

On many reservations the expanding sphere of tribal governmental functions has included taxing and regulating the activities of non-Indians within reservation boundaries. In many cases, however, non-Indians or state governments have challenged tribal authority in federal courts. In addition to challenging tribal authority, many of these cases also have raised issues regarding whether state laws can be applied within reservation boundaries. Since the early years of the United States, the supremacy of federal authority in Indian affairs has served to protect tribes against the imposition of state laws within reservations. [FN43]

In the modern era, decisions by the US Supreme Court have employed principles which are neither clearly articulated nor consistently applied, thus making it hard to predict whether tribal or state authority, or both, will be sustained in a given case. Many commentators have criticized the reasoning of the Supreme Court's recent Indian law decisions, [FN44] which have had the effect of eroding tribal sovereignty in an era when Congress and the Executive have been generally supportive of tribal sovereignty. In a particularly damaging blow to tribal sovereignty, the Court in a 1978 ***72** decision fashioned a new rule that tribes can lose aspects of their sovereignty by implication as a result of their dependent status. [FN45] Prior to the announcement of the "implicit divestiture" rule, tribes were assumed to have retained all those aspects of their original sovereignty that had not been given up or were expressly taken away or limited by an act of Congress. [FN46] The practical effect has been to invite challenges to tribal sovereignty. Even in cases in which tribal governmental powers have been held not to have been implicitly divested, and in which federal law and policy have been held to preempt state

authority, the Court has suggested that the interests advanced by a state must still be considered. A strong enough state interest might tip the balance in favor of sustaining state regulatory authority. [FN47]

B. Supreme Court Confusion Over Tribal Regulatory Authority and the Power to Exclude

Regulatory power is a fundamental attribute of sovereignty, through which the sovereign exercises control over the conduct of individuals and land use within its territory. Although the power of tribes to regulate the conduct of members on tribal lands is settled, [FN48] the extent to which tribes may regulate the conduct of nonmembers is less certain. In recent cases, such as *South Dakota v. Bourland*, [FN49] the Supreme Court has created considerable confusion about the extent to which a tribe may regulate the conduct of nonmembers on fee lands within reservation boundaries.

1. Sources of Tribal Regulatory Authority

The Supreme Court's decisions defining the scope of tribal regulatory power demonstrate a fundamental uncertainty over the extent to which tribes retain regulatory authority as an aspect of their original sovereignty. [FN50] ***73** Historically, the Court has recognized two sources of tribal regulatory authority: inherent tribal sovereignty [FN51] and the power to exclude nonmembers from tribal lands. [FN52] More recent Supreme Court opinions, however, indicate a retreat from the Court's earlier holdings. In an attempt to restrict the tribes' power over nonmembers, the Court has now stated that the tribes' power to regulate nonmembers stems soley from the tribes' power to exclude, [FN53] and that the tribes' inherent sovereign power as a basis for regulatory jurisdiction has been implicitly divested. Thus, in instances where a tribe can no longer exclude nonmembers from lands within its territory, the Court argues that the tribe has also lost the power to regulate those nonmembers' conduct. Yet, the Court has conceded that a tribe still may regulate or tax nonmembers living or conducting activities on fee lands in two special instances under the *Montana* test: where the nonmembers have entered into consensual relations with a tribe or its members, or where the nonmembers' activities infringe upon or have a direct effect on the tribe's political integrity, economic security, or health or welfare. [FN54]

The flaw in the Court's analysis is that the tribes' remaining regulatory authority over nonmembers' activities on fee lands cannot stem from the tribes' power to exclude. They have none. Rather, the tribes' remaining regulatory authority must stem from retained inherent ***74** sovereignty. [FN55] Thus, despite the Court's pronouncements to the contrary, tribal regulatory authority continues to derive from two sources--the power to exclude and inherent tribal sovereignty.

2. The Bourland Analysis

The Supreme Court's decision in *Bourland* illustrates its confusion over the scope of tribal regulatory power. In *Bourland*, the Supreme Court held that the Cheyenne River Sioux Tribe does not have the power to regulate non-Indian hunting and fishing in the reservoir behind the Oahe Dam which inundates a portion of the Cheyenne River Reservation.

In the 1950s, under congressional pressure, the tribe relinquished 104,000 acres of its land to the government for the Oahe Dam and reservoir. [FN56] The Cheyenne River Act permitted the tribe to continue to hunt and fish in the reservoir, "subject, however, to regulations governing the corresponding use by other citizens of the United States." [FN57] It was undisputed on appeal that the portion of the reservation taken for the reservoir retained its reservation status. For a time both the tribe and the state regulated public hunting and fishing within

the reservation. In 1988 the tribe announced that henceforth it would not recognize state game licenses and that non-Indian hunters would be subject to prosecution in tribal court (and civil penalties) unless licensed by the tribe. The state sued.

***75** Writing for the Court, Justice Clarence Thomas agreed that prior to the taking, the tribe had the power to exclude non-Indians, and therefore "arguably" had the power to regulate them. [FN58] But, citing the *Montana* and *Brendale* cases, he said that when a tribe conveys land to non-Indians, it loses its right to exclusive use of the land as well as its regulatory jurisdiction over the land. [FN59] Justice Thomas said that in taking the tribal land and opening it up for public use, Congress eliminated the tribe's regulatory jurisdiction by transferring it to the US Army Corps of Engineers. [FN60]

Justice Thomas further wrote that *Montana* means that when Congress has "broadly opened up such land to non-Indians, the effect of the transfer is the destruction of preexisting Indian rights to regulatory control." [FN61] With respect to the tribe's argument that it had "inherent sovereignty" over all parts of its reservation, Justice Thomas repeated language from the *Montana* case that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Thomas also found that there was no evidence of such a congressional delegation in this instance. [FN62] He then turned to whether the *Montana* exceptions applied. The trial court had found they did not, but the appellate court did not rule on this issue. The Supreme Court referred this question back to the appeals court to decide. [FN63]

Thus, according to the Court in *Bourland:* (1) tribal regulatory authority over non-Indians stems solely from the power to exclude; (2) tribal regulatory authority over non-Indians disappears whenever a tribe ***76** loses the power to exclude those non-Indians; (3) but, tribal regulatory authority over non-Indians may exist if Congress expressly delegates that power; and, (4) tribal regulatory authority over non-Indians also may exist if either of the two *Montana* exceptions come into play.

The inconsistency in Justice Thomas's analysis lies in his dismissal of the idea that the tribe's own inherent sovereignty provides a source of regulatory power over non-Indians on non-Indian lands. For instance, Justice Thomas wrote that "regulatory authority goes hand in hand with the power to exclude." [FN64] He also added that "after *Montana,* tribal sovereignty over nonmembers cannot survive without express congressional delegation, 450 U.S. at 564, and is therefore *not* inherent." [FN65] But, as Justice Thomas admits, a tribe may exercise regulatory authority, without congressional delegation, over non-Indians on fee lands in two instances. The only basis for such regulatory jurisidiction is that "Indian tribes retain *inherent sovereign power* to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." [FN66] Thus, inherent sovereignty remains a source of tribal regulatory power, despite the *Bourland* Court's attempts to bury it.

Although the Supreme Court's recent rulings do not eliminate inherent tribal authority as a basis for regulatory power over non-Indians, the fact remains that such power is viewed with suspicion by the non-Indian community and is often the subject of judicial challenge. In the next section, we discuss a key aspect of the courts' concerns with tribal regulatory authority over non-Indians.

C. Consent as a Limit on Tribal Powers over Nonmembers

As descibed earlier, the Supreme Court has retreated from the view that tribal regulatory authority stems

from inherent tribal sovereignty. Although *Duro v. Reina* [FN67] is set in a criminal context, the Supreme Court's opinion in that case indicates that in the context of tribal civil regulatory authority as well, the principle of consent of the governed is a key factor in the Court's application of the implicit divestiture rule. [FN68] In Duro, the Court stated that:

> [A] basic attribute of sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens. ***77** *Oliphant* recognized that the tribes can no longer be described as sovereigns in this sense. Rather, as our discussion in *Wheeler* reveals, the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order. [FN69]

Although the *Duro* court recognized that a tribe's civil jurisdiction over nonmembers is broader than its criminal jurisdiction, [FN70] the Court stated: "[W]e hesitate to adopt a view of tribal sovereignty that would single out a group of citizens, nonmember Indians, for trial by political bodies that do not include them." [FN71] Thus, the Court said that in the criminal context:

> The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. . . . A tribe's additional authority comes from the *consent of its members*, and so in the criminal sphere membership marks the bounds of tribal authority. [FN72]

The Court declared that tribal courts are "influenced by the unique customs, languages, and usages" of the tribes, that they are "often 'subordinate to the political branches of tribal governments,' and legal methods may depend on 'unspoken practices and norms."' [FN73] Therefore, "[t]he special nature of the tribunals at issue makes a focus on *consent* and the protections of citizenship most appropriate." [FN74] The Court then reinvented the basis for tribal criminal jurisdiction over nonmembers by saying:

> Retained criminal jurisidiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, *the authority of which rests on consent.* [FN75]

The Supreme Court's decision in *Duro* was subsequently overturned by Congress in 1990 and 1991 through legislation affirming the power of tribes to execise inherent criminal jurisdiction over all Indians. [FN76] Congress ***78** did so in response to public outcry, led by both tribal and state coalitions, who were angered at the effect of the *Duro* ruling, which had created severe law enforcement problems on Indian reservations. In overturning the Supreme Court's holding, Congress chose to affirm the inherent criminal jurisdiction of tribes over nonmember Indians, rather than delegate tribal jurisdiction. Congressional affirmation thus rejected the Supreme Court's conclusion that tribes had been implicitly divested of inherent authority over nonmember Indians. [FN77]

Non-Indians persistently claim that tribal authority over them is government without representation, thereby advancing personal rights arguments against tribal sovereignty. [FN78] We expect that non-Indians will continue to challenge tribal regulatory actions on these and other grounds. Professor Richard Collins has suggested that the plenary power of Congress over the tribes provides tribes with a response to this argument, because non-Indians are represented in Congress. Plenary power therefore "gives democratic legitimacy to tribal jurisdiction over non-Indians." [FN79] While we are inclined to agree with this line of reasoning, tribal governments should try to find ways to address the concerns of non-Indian reservation residents other than telling them to take their case to Congress.

To the extent that the lower federal courts adopt the Supreme Court's assumption that the principle of consent of the governed provides a basis for limiting or implicitly divesting tribal powers over non-Indians, such challenges may prevail in court. [FN80] Conversely, to the extent that tribes involve non-Indians in the process of developing and carrying out the exercise of tribal regulatory authority over nonmembers, the courts may be ***79** more inclined to sustain such exercises of tribal authority. To the extent that nonmembers feel that tribal regulatory programs actually provide them with ways to deal with their concerns, to become a part of the program if they so desire, many such cases may be resolved without recourse to the federal courts. Part IV of this article explores a framework for providing nonmembers and non-Indians with a way to be involved in tribal decision making in the substantive area of environmental protection, but first we present an overview of relevant federal law.

D. Federal Environmental Law in Indian Country

Governmental programs for environmental protection are a relatively recent manifestation of the social compact. In the 1960s and early 1970s, a significant portion of the US public became aware of a wide range of environmental problems and demanded that Congress take action. In response, Congress enacted a number of statutes to protect and restore the environment.

Most federal environmental laws enacted over the past two decades forge a partnership between the federal government and the states. Under these federal statutes, states have substantial responsibilities and may take on additional "delegable" responsibilities if they so choose. States assume the additional responsibilities to avoid direct control by the EPA. Federal laws generally do not preempt state laws, but do establish an overall framework, along with some minimum requirements for state environmental protection programs. States may establish requirements that are more stringent, and they may enact laws to cover subjects not covered by the federal laws. Thus, citizens can take their environmental concerns to the federal or the state sovereign or both.

For the most part, federal environmental laws enacted in the 1970s included few specific references to Indian tribes or Indian lands. Congress did not demonstrate much awareness of, or concern for, reservation environments, and tribes generally had more pressing concerns. This was, after all, the early years of the self-determination era in federal Indian policy, [FN81] and many tribal governments were engaged in taking control of basic governmental programs like health care, education, and social services. [FN82]

***80** In 1984, the EPA adopted a "Policy for the Administration of Environmental Programs on Indian Reservations," [FN83] in which it recognized tribal governments as sovereign entities, which are "the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations." [FN84] Pursuant to this policy, the EPA encourages and assists tribes to assume regulatory responsibilities, but "[u]ntil Tribal Governments are willing and able to assume full responsibility for delegable programs, [the policy of] the Agency [is to] retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government)." [FN85]

Given the prominent role of the states in carrying out federal environmental laws and the history of conflicts between tribes and states, it was to be expected that some states would not embrace the EPA policy. In a leading case, [FN86] the state of Washington asserted jurisdiction over all persons, Indians and non-Indians, within reservation boundaries for the purpose of regulating hazardous wastes under the Resource Conservation and Recovery Act (RCRA). [FN87] The court upheld the EPA's decision not to approve the state's program with respect

to Indian reservations, based in ***81** part on the EPA's policy for Indian lands. [FN88] The court acknowledged the state's "vital interest" in the effective regulation of hazardous wastes throughout the state, including Indian reservations, but reasoned that federal enforcement by the EPA would be sufficient to protect the state and its citizens. [FN89]

In recent years, Congress has amended many of the federal laws in ways that are generally consistent with the EPA's 1984 policy--in essence ratifying the EPA's policy. These laws now provide that tribes may, if they choose, assume roles similar to the roles performed by states. [FN90] In response to the mandates of these amended statutes, the EPA has issued numerous amendments to its regulations to establish procedures for tribes to be treated as states for a wide variety of purposes. [FN91] In addition, Congress has ***82** enacted a law providing the EPA with a mandate to provide general assistance to tribes in building the capacity to plan, develop, and implement environmental regulatory programs. [FN92]

These changes in the federal laws present tribal governments with an historic opportunity and an enormous challenge. Obviously, tribes that succeed in fashioning effective environmental regulatory programs will be better able to preserve the quality of their reservation environments for the benefit of present and future generations of tribal members and to protect and restore the natural environments that sustain tribal cultures.

Perhaps as important in the context of American democracy, effective tribal programs will serve a broad range of public interests that extend well beyond reservation boundaries. In doing so, tribes may find that important non-Indian interest groups will come to regard tribes as indispensable units of government in our federal system. Because important public interests are involved, it is not surprising that EPA regulations require tribes that are treated as states to provide meaningful opportunities for public involvement. [FN93]

After all, the tribes are being asked to help carry out federal laws. Like the states, tribes are charged with making many of the basic policy decisions, [FN94] and they may adopt standards that are more stringent than ***83** federal minimum requirements [FN95] and enact their own laws to address environmental concerns that are not covered by the federal laws. But when tribes are treated as states for the purpose of carrying out federal environmental law, in addition to acting in their own sovereign capacity, they are acting for the federal sovereign as well, carrying out the social compact between the American people and our national government.

Tribes should regard the current federal policy for environmental protection in Indian country as a window of opportunity, one that may not remain open indefinitely if tribes do not accept the challenges that this opportunity presents. Moreover, given the recent judicial erosion of the tribal right of self-government and the increasing use by federal courts of the implicit divestiture rule and the balancing of governmental interests analysis in Indian law cases, [FN96] if tribes do not establish effective environmental regulatory programs, some states will assert that there is a void and that state interests justify state regulatory jurisdiction. Some of the states can be expected to assert jurisdiction regardless of what tribes do. In such cases, judicial resolution may turn on whether the EPA has acted in accordance with its stated policy and actually has retained primary enforcement authority over the reservation as a "single administrative unit." [FN97]

If a tribe has not established a program under a particular federal statute, the tribe should be sure that the EPA is committed to federal enforcement so that there is no enforcement void. If there is in fact a void, a federal court may be receptive to a state's argument that, on balance, its interests justify state regulatory jurisdiction. Given the language in the federal statutes authorizing tribes to be treated as states, and given the ***84** EPA's policy for implementing the federal statutes, [FN98] a reviewing court should find that the field of environment-

al regulation within Indian country has been preempted by federal law, that tribal civil regulatory authority over non-trust lands within the reservation boundaries has not been implicitly divested, and that there is no need to engage in a balancing of governmental interests. [FN99] Even if the courts take this approach and find that the field has been preempted, under the Supreme Court's rulings the federal courts will still give some consideration to the interests advanced by a state. [FN100] If there is no tribal program and if federal enforcement is lax, a court might find the interests of the state sufficient to justify jurisdiction. [FN101]

Tribal governments have taken on a variety of roles in environmental protection and restoration. Changes made in the federal environmental laws, in conjunction with the actions of the EPA in carrrying out its policy for Indian reservations, have supported the efforts of tribal governments to build environmental protection regulatory programs. As a result, many tribes have made substantial progress in doing so. Although Indian tribes and nations generally did not consent to the taking of their lands so that nonmembers could become landowners within reservations, nonmembers have become a substantial part of the popululation of many reservations and a majority on some. As discussed earlier, the concept of sovereignty embodies not only power but also responsibility. For tribal governments, this means not only responsibility toward past, present, and future generations of tribal members and toward culturally important plant and animal ***85** species and sacred places, but also toward nonmembers, both Indian and non-Indian, who reside within reservation boundaries. Unless tribal governments act responsibly with respect to the rights and interests of nonmembers, nonmembers can be expected to take their cases to other sovereigns such as the federal government and the states. No doubt many nonmembers will take their cases to other sovereigns regardless of what tribal governments do, but tribal governments' actions can influence how those other sovereigns respond.

We believe that the field of environmental protection provides a context in which tribes can show the rest of American society that they are fully capable of handling the responsibilities of sovereignty. By attending to the legitimate rights and interests of the governed--tribal members, nonmember Indians, and non-Indians--tribes will find that their environmental protection programs will become not only effective but also resilient. Resiliency will prove to be a critical characteristic if tribal programs are to withstand the challenges that they are sure to face. Although the American public shows strong general support for environmental protection, the objectives of environmental protection programs often conflict with powerful economic interests. The more effective the public perceives an environmental protection program to be in protecting public interests, the greater the likelihood that the program will have critical public support when it comes under attack.

IV. A TRIBAL ENVIRONMENTAL REVIEW PROCESS

As tribal governments assume a growing range of responsibilities in the field of environmental protection, they are inclined to use the same types of tools used by both federal and state governments, including the enactment of laws, adoption of regulations, and establishment of administrative agencies. Regulatory programs should be considered only part of the mix and, in order to control environmental problems effectively, governmental economic policies should operate to make market prices reflect the true costs of products. One way that this may be done is by eliminating government subsidies to environmentally destructive industries. [FN102] Although there is merit to such an argument, environmental ***86** regulatory programs have become a fact of life in most of the United States, and it should be taken as a given that the next several years will see substantial growth in tribal regulatory programs. The focus for tribal governments should be on how to build *effective* environmental regulatory programs given the constraints that many tribes face, such as limited financial and human resources.

But how should tribal governments go about building effective programs? Tribal governments typically do not have sources of revenue comparable to those of the federal and state governments. [FN103] Nor do tribes typically have large numbers of tribal members with advanced degrees in environmental sciences from which candidates can be selected for positions in tribal regulatory agencies. For the most part, tribes cannot be expected to build replicas of the federal EPA, the Fish and Wildlife Service, or the Advisory Council on Historic Preservation in the immediate future. Even if many tribes could do so, it may not be the best use of their human and financial resources. Despite limited resources, tribal governments can nevertheless establish effective environmental regulatory programs. In this part of the article, we outline an approach that tribes should consider in building their programs.

A.A "Blanket" Environmental Review Process

We suggest that tribes strategically plan their approach to building environmental regulatory programs. At an early point in the development of its environmental program, a tribe's political leaders and staff should proactively and comprehensively think about the environment and about how all the various regulatory programs that they might eventually decide to establish should fit together. One of the first steps should be the enactment of a tribal code that establishes an overall, or "blanket," environmental review requirement for proposed development activities on lands under tribal jurisdiction.

A blanket environmental review process can serve two basic purposes. First, by establishing such a process, a tribal government could assert control over a broad range of activities that may cause adverse environmental and cultural impacts, and second, such a review process could serve to enfranchise the reservation populace, Indian and non-Indian, by providing a structure through which interested individuals and groups could become involved in the tribal decision-making process. In other ***87** words, the environmental review process should not simply be an assertion of tribal governmental authority but rather a genuine manifestation of the social compact.

1. Making the NEPA Serve Tribal Purposes

One approach to establish a blanket tribal environmental review process is to make the existing federal environmental review process work to serve tribal interests. Many kinds of activities that cause environmental impacts in Indian country involve some kind of federal agency action. If a federal action is a prerequisite for or an indispensable aspect of an activity that causes environmental impacts (such as federal permitting of a nonfederal entity), the responsible federal agency must comply with the review process established under the National Environmental Policy Act (NEPA). [FN104] The NEPA has been described as a statute of constitutional dimensions because it constitutes a kind of social compact that empowers citizens to participate in the decisions of government agencies affecting the environment. [FN105]

The NEPA requires the responsible federal agency to prepare an environmental impact statement (EIS) prior to taking any "major Federal action significantly affecting the quality of the human environment." [FN106] This requirement has been implemented through regulations issued by the President's Council on Environmental Quality (CEQ). [FN107] Among other things, the CEQ regulations establish a screening process to help federal agencies determine which proposed actions require an EIS and which require a less detailed environmental assessment (EA). Although the NEPA is the blanket federal environmental review process, there are numerous other federal environmental review and consultation requirements that are concerned with particular kinds of resources or aspects of the natural world. [FN108] If an EIS is prepared for a proposed federal action, the CEQ regulations mandate that the EIS should also address compliance with any other federal environmental laws that

apply to the proposed action. [FN109] ***88** Similarly, if an EA is required, the EA should at least identify any other federal requirements that would apply.

Because the NEPA applies to a variety of actions in Indian country that cause environmental impacts, tribes can serve their interests in having an effective environmental review process by becoming actively involved in, and asserting control over, the federal NEPA process within their reservations. [FN110] Two key methods of ensuring involvement are to have tribal staff prepare and review NEPA documents and for tribal officials to wait for NEPA documents to be prepared and reviewed before making tribal decisions on proposed actions. Another key step that tribes can take is to enact tribal laws that expressly require the preparation of an EA when any federal agency is considering a proposed action that may affect important tribal interests. For agencies within the Department of the Interior, including the Bureau of Indian Affairs (BIA), the department's procedures for implementing the CEQ's NEPA regulations expressly require preparation of an EA prior to any proposed federal action that would violate a tribal law. [FN111] Thus, it would be quite simple to make Interior agencies, including the BIA, prepare EAs before they take or approve actions that may adversely affect important tribal interests by enacting a tribal law requiring an EA for certain kinds of actions. Practically speaking, in some cases, litigation may be necessary to force federal agencies to comply.

2. Federal Help in Fashioning a Review Process

One reason tribes should pay particular attention to the NEPA stems from the fact that while all federal agencies are subject to it, no single federal agency has a lead role in overseeing federal agency compliance. The EPA serves as a clearinghouse for NEPA documents and customarily comments on NEPA documents prepared by other agencies, [FN112] but it has no enforcement role. Because the EPA does not have a delegable program that states or tribes can take over, it does not have a grant program for the specific purpose of helping tribes develop and sustain their NEPA capabilities.

***89** If tribes do not choose to make this one of their own environmental priorities, neither the EPA nor any other federal agency is likely to make this an area of emphasis. Tribes that do choose to make this a priority, however, might use the EPA's general environmental assistance program for tribes [FN113] to help them develop the capacity to administer a blanket tribal environmental review process. [FN114] Another source of federal assistance is the Administration for Native Americans. [FN115]

B. Toward a Tribal "Mini-NEPA"

Beyond making federal agencies comply with NEPA in a way that serves tribal interests, tribal governments can establish their own overall or "blanket" environmental review processes. Because the NEPA process applies to so many actions, tribes should use the NEPA process in building their own review frameworks. Many states have enacted this kind of legislation, and such state statutes are often called "mini-NEPAs." [FN116] Although state mini-NEPAs may be used as models in developing tribal mini-NEPAs, state mini-NEPAs exist in a context of state environmental laws and land use regulatory laws--much of which may not be very relevant to Indian country. We have fashioned a model mini-NEPA for tribes [FN117] that is based on the federal NEPA and on the Model Land Development Code, [FN118] published by the American Law Institute (ALI) in 1976. The ***90** ALI's Model Code was the culmination of a fifteen-year effort to remake state zoning and subdivision laws, which were regarded as flawed and outdated mechanisms for exercising governmental police power to control land use in the interests of public health, safety and welfare. [FN119] Although the ALI's Model Code has not been widely adopted by the states to date, we think that it is a major improvement over traditional zoning and

subdivision laws and have drawn upon it in fashioning a model tribal mini-NEPA.

1. A Blanket "Development" Permit

One of the key concepts in the ALI's Model Land Development Code is the requirement of a permit for any kind of activity that falls within the statutory definition of "development." [FN120] The NEPA itself does not establish a permit requirement; but instead, it applies to any federal action that may significantly affect the human environment. If a tribal government is to carry out an environmental review process for development activities within its reservation, there should be a mechanism through which each activity can be carefully considered by the tribe. One such mechanism is to require any proponent of a development project to come before a tribal agency and obtain a development permit.

A permit process is, of course, not necessary for a tribe to exercise control over development on tribally owned land, but a permit process could facilitate tribal environmental review. For development on individual Indian lands or on fee lands, a permit requirement could act as a critical mechanism, allowing a tribe to assert the full measure of its sovereign authority to protect important tribal interests, including public health and safety and respect for tribal environmental and cultural values. If the tribal permit requirement is crafted to protect tribal interests that meet the second prong of the *Montana* test--if the regulated conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" [FN121]--then the tribal permit requirement should withstand judicial attack even though a tribal zoning ordinance might not.

In our draft tribal mini-NEPA, the term "development" is broadly defined in the statutory language to include any building operation, any material change in a structure, or any material change in the use or appearance of land. A tribe using our draft as a model might expressly ***91** exclude certain kinds of development activities that usually have minimal adverse environmental impacts. In addition, our draft provides that the tribal Environmental Review Commission, which would be established by the tribal code, would have authority to issue rules to define a category of "low-impact" development for which the permit process would be a largely ministerial function.

2. A Tribal Environmental Review Commission

Our draft calls for the establishment of a tribal Environmental Review Commission (ERC) [FN122] charged with reviewing permit applications for development proposals. The ERC's primary mission would be to issue or deny permits, and it would have the power to include conditions in permits that it does issue. Appeals from ERC decisions should be provided in tribal court.

The tribal governing body would delegate authority to the ERC to develop and promulgate rules, although the tribal governing body might choose to reserve to itself the power of legislative veto over the ERC's rules. [FN123] If a tribe has enacted its own administrative procedure act (APA), the ERC should be governed by the tribal APA. [FN124] If a tribe has not adopted its own APA, then the tribal environmental review code might expressly require the ERC to follow EPA requirements for rule making by states, which also apply to tribes treated as states. [FN125] We suggest that the ERC be directed to hold public meetings, and possibly public hearings, as part of its rule-making process.

The ERC would consist of three commissioners appointed to staggered terms by the tribal governing body. [FN126] Ideally, the ERC should have ***92** some professional staff, but initially it could depend on the staff of relevant tribal agencies, such as a tribal Environmental Protection or Natural Resources Department. The ERC

itself would not be composed of tribal staff, however; instead, it would be an independent, quasi-judicial tribal administrative agency. The ERC would have authority to review development permit applications from tribal government agencies and instrumentalities and to hold administrative hearings as part of the application process. The ERC also would be charged with a role in enforcing the tribal environmental review code by holding adjudicatory hearings on alleged violations.

In addition, although the draft only hints at this possibility, the tribal governing body might delegate authority to the ERC to administer one or more of the EPA's delegable regulatory programs, such as setting water quality standards under the Clean Water Act or regulating public water systems under the Safe Drinking Water Act. [FN127] Tribal leaders should be aware that the EPA, in its rule-making documents for these statutes, has expressed concerns regarding possible conflicts of interest when the regulatory agency and the regulated entity are both tribal entities. [FN128] Tribal delegation of authority to an independent tribal agency such as an ERC would be one way to address the EPA's concerns.

3. Tribal Land Use and Development Plan

One of the main functions of the ERC would be to determine whether or not the development proposed in an application for a permit would be consistent with the tribe's land-use and development plan. This plan would be similar to a land-use plan adopted pursuant to a zoning code but could be more flexible. Rather than providing that certain kinds of development can only take place in certain areas, as zoning codes do, the plan might describe the kinds of development that the tribe wants to encourage and provide a set of standards for the ERC to use in determining whether development proposed in an application is consistent with the plan. The plan also might include areas of special tribal concern in which development proposals would be strictly scrutinized. The plan would not be developed by the ERC but by tribal staff in an appropriate department of tribal government. The ERC, however, would be directed to facilitate public involvement in reviewing the tribe's plan, including for example, a hearing on the plan similar to a rule-making procedure. The ERC also ***93** would be directed to make recommendations to the tribal governing body regarding the plan. The adoption of the plan would be by action of the tribal governing body.

4. Application for a Development Permit

The draft code establishes two procedures that would apply to development permits: one for “low-impact” development and one for “general” development. For low-impact development, the procedure would be very simple. The applicant would certify that the proposal meets the criteria established by the ERC for low-impact development, and the applicant would agree to comply with any conditions imposed by the ERC in issuing a permit. Low-impact permits could be issued by the chairperson of the ERC without holding a hearing.

For “general” permits, the applicant normally would be required to prepare a draft environmental assessment (EA) and to include it with the application. If the proposed development fits within a categorical exclusion under the ERC's rules, then an EA would not be required. In addition, if ERC staff determine that the environmental impacts of the proposed development are sufficiently addressed in an earlier EA or EIS, then the staff would advise the applicant that a new EA is not necessary. The ERC staff would be authorized to assist applicants in the preparation of EAs and to charge fees for this service. Making the proponent of an action bear the responsibility for, or at least the cost of, preparation of an EA is consistent with BIA policy, [FN129] although this policy is often overlooked in practice. The ERC staff would review applications to determine their adequacy, as well as the adequacy of any EA prepared by an applicant, and to determine consistency with the tribal land-use and de-

velopment plan. The ERC staff would submit a report to the Commission providing staff assessment of these and other issues.

An important reason for incorporating EA preparation in the permit application is that for many kinds of development proposals in Indian country, some kind of federal agency action will be required. Although it may not be apparent at the outset that a federal action will be required, if it turns out that it is, a previously prepared EA will tend to expedite the federal NEPA process. Another reason for requiring an EA is that in many cases the applicant for the permit will be a federal agency, and federal agencies are familiar with EA preparation. Moreover, as was already discussed, if tribal law says that federal agencies are required to prepare EAs for certain kinds of actions, the agencies' own procedures require ***94** them to comply with the tribal law. A final, and perhaps most important, reason for using an EA as part of a tribal environmental review process, is simply that EAs work. They have proven to be effective tools for evaluating the environmental impacts of proposed actions and for formulating measures to avoid or mitigate adverse impacts.

5. Action on Permit Applications

Decisions on permit applications would be made by the Commission. Permits for low-impact development would be issued by the chairperson. General permits would be issued by the full Commission, after holding an informal administrative hearing. Requiring a hearing recognizes that in many tribes important decisions affecting Indian communities are reached only after people have had an opportunity to talk things out. This hearing requirement should not become excessively formal. While it could be called something other than a “hearing,” non-Indian applicants for tribal permits probably expect that they will be given a hearing, [FN130] and this is an expectation that we believe tribes would be well-advised to honor. After the hearing, the Commission would render its decision, subject to appeal to tribal court.

6. Enforcement

Enforcement presents practical problems for tribal governments, in part because recent Supreme Court decisions seem to invite non-Indians to challenge tribal jurisdiction. Our draft would charge the ERC with authority to investigate alleged violations of the code, and it would charge the chairperson of the ERC with the duty of issuing notices of violation and cease and desist orders. The ERC would serve an adjudicatory role by holding a hearing on any such notice or order to determine if a violation of the code had occurred. The ERC could assess civil penalties, and it could order a violator to take corrective action. [FN131] Any tribe that adopts a code based on our model draft should carefully consider issues relating to enforcement through consultation with tribal legal counsel.

***95** *C. How Big Should the Blanket Be?*

A tribe which establishes a blanket tribal environmental review process would build a framework for taking on regulatory roles, or review and consultation roles, with respect to particular aspects of environmental protection that are priorities for the tribe. Some of the possibilities are obvious. For example, the ERC might be delegated authority from the tribal governing body to promulgate rules setting water quality standards under the Clean Water Act. [FN132] If a tribe does this, EPA's rules provide that it must also take on the certification process under section 401 of the Clean Water Act. [FN133] The tribal governing body may want to delegate this function, which is technical and to some extent ministerial, to tribal staff, such as the head of the tribe's environmental protection or natural resources department, with a right of appeal to the ERC. A tribe may want to limit the re-

sponsibilities that it assumes under the Clean Water Act. For example, a tribe may decide to let the EPA continue to issue section 402 permits (National Pollutant Discharge Elimination System or "NPDES") [FN134] to enforce the tribal water quality standards.

If air pollution is a problem on a reservation, the tribal governing body may want to delegate to the ERC authority to develop a tribal implementation plan under the Clean Air Act. [FN135] On the other hand, if air quality is currently pristine but potentially threatened by off-reservation development, the tribal governing body might delegate authority to the ERC to conduct a study leading to redesignation from Class II air quality to Class I. [FN136]

The role of an ERC need not be limited to programs administered by the EPA. A tribal ERC might also be charged with duties pursuant to environmental laws administered by other federal agencies or with duties under tribal laws that have no direct counterpart in federal law. For example, tribes for which anadromous fish runs have great cultural and economic importance have enacted tribal regulations on activities that affect fish habitat. The ERC could be charged with making sure that applicants for development permits are in compliance with the tribal fish ***96** habitat regulations. The list of options under tribal law is limited only by the range of interests that a tribe seeks to protect and the need for efficiency in the legislation that the tribe chooses to enact. Rather than enact a number of separate tribal laws protecting different aspects of the environment, the tribe could include some of those aspects in parts of its comprehensive environmental review code. [FN137] Thus, a tribe might protect other aspects of the environment through its land-use and development plan rather than through separate tribal legislation.

The ERC may not be charged with lead responsibility for all of a tribe's environmental protection program, but, through its permit process, the ERC should exercise a review function over the whole scope of tribal environmental programs. For example, if another tribal agency or department is charged as lead for setting water quality standards, the ERC should ensure that no development takes place without certification under section 401 of the Clean Water Act and the issuance of a permit under section 402 or 404, if applicable. A tribal government, particularly for one of the larger tribes, might establish advisory committees or review commissions for specific aspects of its environmental program, which would operate under the blanket of the ERC. In such cases, non-Indians with appropriate expertise or representatives of important non-Indian interest groups such as non-Indian fee landowners, might be appointed to serve on such advisory committees or review commissions. This would help to give non-Indians a sense of enfranchisement and also would allow the tribe to make use of their expertise.

The ERC's duties should not necessarily be limited to lands within a tribe's jurisdiction. Tribes are routinely provided copies of NEPA documents prepared by federal agencies for proposed federal actions near reservations that may affect off-reservation resources in which tribes have treaty or statutory rights. Pursuant to the federal cultural resources laws discussed later, [FN138] tribes also have rights to notice and consultation when proposed federal actions may affect places that have religious or cultural importance or when such actions may cause disturbance of Indian graves.

***97** A tribal ERC could be designated by the tribal governing body to serve as the initial point of contact for all such notices received from federal and state agencies and from other tribes. The ERC could ensure that the appropriate tribal staff and officials, as well as community organizations or religious societies, are informed about particular proposed off-reservation actions. The ERC also could be charged with responding to such notices on behalf of the tribe. [FN139] Serving this function would be more important for some tribes than for oth-

ers, depending on the nature of the off-reservation rights and interests of particular tribes.

Even though most tribes do not have the resources to pursue all of these options, many are already pursuing some of them. Establishing a blanket environmental review process would mean that, for those aspects of environmental regulation for which a tribe has not yet established a program, or for which it may not intend to establish a program, there would nevertheless be a review process through which the tribe would be exercising a measure of control. In addition, in the event that a tribe's regulatory jurisdiction is challenged in the context of a particular proposed action and the court engages in a balancing of interests analysis, the tribe will have a stronger case if it has established some kind of program of its own.

D. Bringing Cultural Resources Under the Blanket

Tribes sorting out their environmental protection priorities should place emphasis on the protection of the cultural as well as the natural environment. From an Indian perspective, of course, one might say that the natural environment *is* the cultural environment. In this article, we focus on the protection and conservation of those things and places that federal agencies describe as "cultural resources," a term that includes historic buildings and places as well as archaeological resources. There are three major federal statutes that are particularly relevant to the protection and conservation of cultural resources: the National Historic Preservation Act of 1966 (NHPA), [FN140] the Archaeological Resources Protection Act (ARPA), [FN141] and the Native American Graves Protection and Repatriation Act (NAGPRA). [FN142] These statutes and the implementing regulations establish a framework for avoiding inadvertent damage or destruction to historically or culturally significant places as a result of development activities. [FN143] ***98** Tribal laws can make these federal statutes more effective in protecting tribal interests. [FN144]

The NHPA is a multifaceted statute that seeks to protect properties that have historic significance. The National Park Service (NPS), an agency within the Department of the Interior, is the lead federal agency for most aspects of the NHPA. The NHPA authorized the creation of the National Register of Historic Places, and the NPS has established criteria and procedures for determining eligibility for the National Register. [FN145] Places that hold religious or cultural importance for Indian tribes are eligible for listing on the National Register. [FN146] The NHPA also created an independent agency, the Advisory Council on Historic Preservation, and charged it with reviewing proposed federal or federally assisted "undertakings" that may affect properties listed, or eligible for listing, on the National Register. The Advisory Council's mandate for this review function is found in Section 106 of the NHPA, [FN147] and the review process has come to be called the Section 106 consultation process.

Like the federal environmental laws administered by the EPA, the NHPA is carried out through a partnership with the states. The NPS provides financial assistance on a recurrent basis to State Historic Preservation Officers (SHPOs), and the Advisory Council, in its regulations for carrying out the Section 106 process, [FN148] has assigned a major role to the SHPOs. Amendments to the NHPA enacted in 1992 authorize tribes, at their option, to take over any or all of the functions of the SHPOs within reservation boundaries. [FN149] A tribal program designed to carry out the NHPA ***99** within reservation boundaries might include the establishment of a tribal register of historic places, including traditional cultural properties. This would help to ensure that tribal cultural values, as well as national interests in historic preservation, are considered in the environmental review of proposed federal actions.

From an Indian perspective, a key provision of the NHPA, as amended in 1992, is that if a proposed federal

undertaking might affect a place that has religious or cultural importance to a tribe, and if the place is eligible for the National Register, the tribe has a right to receive notice and to be involved in the section 106 consultation process. [FN150] This applies to properties outside of reservation boundaries--even on private lands--if there is a federal action involved. A tribe need not have a program established under the NHPA nor have taken over the role of the SHPO to be entitled to notice and consultation under this amended provision of the NHPA.

The ARPA was enacted in 1979 and includes express provisions governing the excavation of archaeological resources on Indian lands. Archaeological resources cannot be excavated on Indian lands without a permit issued under the authority of the Secretary of the Interior. The ARPA does provide exceptions for the tribe itself and for a tribal member if the tribe has enacted a law regulating the subject matter. [FN151] Any ARPA permit issued for Indian lands requires consent of the tribe with jurisdiction over the lands and, in the case of individually owned Indian lands, consent of the Indian landowner(s) as well. [FN152] Thus, a tribe can control archaeological excavations on Indian lands simply by denying consent or by granting consent subject to specified conditions, which must be included in the permit. The ARPA also provides that tribes have a right to notice from a federal agency prior to the issuance of an ARPA permit for work on federal lands that might affect a site that holds religious or cultural importance for the tribe. [FN153]

Enacted in 1990, the NAGPRA includes provisions that enhance the authority of tribes to control the excavation of graves within reservation boundaries and on federal lands. The mechanism that the NAGPRA uses to ***100** accomplish this is the issuance of a permit under the ARPA. [FN154] The NAGPRA expressly covers all lands within reservation boundaries [FN155] and represents congressional recognition that tribes have important interests in the graves of their ancestors, even though the land on which graves are located may have passed out of Indian ownership. [FN156] Thus, a tribal environmental review code that includes the graves of ancestors located on fee lands within reservations in its coverage should satisfy the second prong of the *Montana* test. [FN157] If a tribe is concerned with protecting the graves of its ancestors that are located on lands within reservation boundaries but which have passed out of Indian trust status, then these cultural resource concerns should be covered by the blanket of the tribe's environmental review code.

E. How Can Mainstream Environmental Groups Help?

In recent years several major American environmental groups have been engaged in efforts to make their organizations more responsive to the concerns of minority groups within the American society. Some of these efforts have focused on increasing dialogue and interaction among environmental group leaders and tribal leaders. [FN158] Many tribal leaders and environmental leaders now realize that when they take a position on an environmental issue, both groups often find themselves standing on common ground. We think that the environmental community should seek out ways to support tribal governments in the development and implementation of their environmental protection programs. By helping tribes to build their programs in ways that respect tribal sovereignty and tribal cultural values, ***101** environmental groups can also help tribal governments to build a sense of enfranchisement among the reservation populace, Indian and non-Indian alike.

Primarily, environmentalists need to understand tribal sovereignty. To do this they need some knowledge of history. Indian law is a complex field in which environmental activists cannot become experts overnight. It is encouraging that some of the national environmental groups have made room for Indian lawyers on their boards, although the larger society needs a lot more education than what a few Indian lawyers can reasonably be expected to provide. The larger society needs to learn quite a bit of history as a prerequisite for learning Indian law.

An important way for the major environmental groups to help with this learning would be to turn some of their attention to monitoring federal land managing agencies in their implemention of the 1992 amendments to the NHPA. [FN159] All federal public lands in North America were once Indian lands, and many Indians continue to use areas within public lands for cultural or religious purposes. Federal NHPA programs could help the larger society to understand how tribes used these lands in the past, which would help to build public support for protecting present-day Indian uses of public lands.

Major environmental groups can lend support to tribal environmental programs in a variety of other ways. For example, the groups have a great deal of expertise in legislative advocacy both in Congress and in state legislatures. Many of the major groups have joined with tribes, intertribal organizations, religious groups, and civil rights groups in the campaign to enact the Native American Free Exercise of Religion Act. [FN160] Groups also should be helping tribes to enact amendments to federal environmental laws to address tribal concerns, [FN161] and when they take positions on pending amendments to federal laws, the major groups should have a process in ***102** place to formulate a position on tribal provisions in such bills. Tribal governments have a much stronger presence in the nation's capital than they did twenty years ago, but a lot of legislation still works its way through Congress with little consideration given to its potential impact in Indian country. Major environmental groups could help to ensure that federal environmental laws include well-considered provisions relating to Indian country, provisions that recognize and affirm inherent tribal sovereignty over all lands within reservation boundaries, thus making it clear that this aspect of tribal sovereignty has not been implicitly divested with respect to non-Indians.

Another way to help support tribal environmental protection programs would be to create a bank of technical expertise that would be available to tribal governments. Many environmental professionals could afford to donate some time to help a tribal government build a program; others would be glad to work for tribes for reasonable compensation. Environmental groups could work to create a mechanism to link non-Indian environmental professionals with tribes in need of help. The possibilities are practically limitless and could include using outside professionals as consultants or appointing respected academic specialists to positions on advisory committees or on the tribal ERC. [FN162] We think that non-Indians subject to tribal regulatory jurisdiction are less likely to challenge it if they perceive that the tribe's program is doing a good job, and that the major environmental groups could help tribes to earn this perception by building excellent programs. In addition, environmental groups that work with indigenous peoples in other parts of the world might find that it would help to build rapport and trust if the US groups have some Indian professionals in prominent positions.

We recognize that there are some people living within reservation boundaries who will resist tribal jurisdiction regardless of the lengths to which a tribe goes to enfranchise nonmembers and regardless of the expertise of the people involved in the tribal program. In such cases, one approach would be to buy out such people. The Nature Conservancy is one environmental group devoted to the acquisition of environmentally important areas. In many cases its acquisitions are subsequently transferred to units of government. Their operating principle is that sometimes the best way to protect an environmentally important piece of Mother Earth is to buy it. We would like to see the Nature Conservancy and other organizations***103** work with tribal leaders to establish a program for the reacquisition of lands within reservation boundaries that have passed out of Indian trust status. A program could also be developed to help tribes reacquire culturally important lands outside reservation boundaries.

V. CONCLUSION

In the era when the human rights of indigenous peoples are recognized in international law, indigenous peoples and the states of the world will be engaged in fashioning new arrangements for **indigenous self-government**. The new arrangements between states and indigenous peoples will be recorded in a variety of legal instruments, including international treaties and domestic legislation. Whether or not states are as concerned about the human rights of indigenous peoples as they are that some indigenous peoples may demand complete independence, states must come to the bargaining table prepared to provide indigenous peoples with resources to help empower them in the exercise of self-government. International organizations and nongovernmental organizations must also be prepared to help.

As they fashion new arrangements, indigenous peoples and states will be looking for working models wherever they may be found. They will surely look to the United States as one of the states of the world with long-standing **indigenous self-government**, a flawed model to be sure, but a working model just the same. A key aspect of the US model that may be broadly applicable to other countries is the role of the national government in promoting the autonomy of indigenous peoples and in protecting **indigenous self-government** against infringements by sub-national units of government.

We would like to see Congress and the Executive demonstrate some awareness of the human rights dimensions of their actions relating to the roles of tribal governments in carrying out environmental protection regulatory programs. We believe that the judicially created "implicit divestiture" rule violates the emerging human rights norms supporting self-government for indigenous peoples, and we think that Congress should recognize this conflict and expressly reject the implicit divestiture rule. In addition to taking such actions to support the human rights of indigenous peoples of the United States, the United States should make the human rights of indigenous peoples a central concern in its dealings with the community of nations. As a leader in the international human rights movement, the United States should aspire to be an example for the rest of the world in its relations with indigenous peoples, and the United States should live up to such aspirations.

***104** We believe the existence of functioning tribal government environmental regulatory programs in the United States will help to make **indigenous self-government** in other parts of the world not just a right but also a fact. The existence of working tribal programs in the United States will help to change the terms of the debate from whether indigenous peoples should be engaged in this aspect of governmental authority to a focus on how indigenous peoples can carry out this governmental responsibility effectively. Tribal governments should acknowledge that nonmembers have legitimate interests and find ways to enfranchise them, while still being faithful to tribal cultural values. These factors will help to make tribal environmental regulatory programs become not just functional but truly strong, because they will derive their just power from the consent of the governed.

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[FN1]. *Report of the Working Group on Indigenous Populations on its eleventh session*, U.N. Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination and Protection of Minorities, 11th Sess., Annex I, Agenda Item 14, U.N. Doc. No. E/CN.4/Sub.2/1993/29 (1993) [hereinafter Draft Declaration].

[FN2]. *Id.* at art. 3.

[FN3]. *Id.* at arts. 13, 14, 15, 16, 28, 29, 35, 37, 38, 40.

[FN4]. Many of the articles in the Draft Declaration call on states to take "effective measures to ensure that the rights of indigenous peoples are respected." *E.g., id.* at arts. 13, 14, 15, 16, 17, 28, 35, 37.

[FN5]. The formation of the Working Group on Indigenous Populations was proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 2 (XXXIV) of September 8, 1981, was endorsed by the Commission on Human Rights in its resolution 1982/19 of March 10, 1982, and was authorized by the Economic and Social Council in its resolution 1982/34 of May 7, 1982. *See* Res. 1982/19 U.N. GAOR, Hum. Rts. Comm. (1982); *Report of the Working Group on Indigenous Populations on its eleventh session,* U.N. Commission on Human Rights, Sub-Comm. on Prevention of Discrimination and Protection of Minorities, 11th Sess., Agenda Item 14, U.N. Doc. E/CN.4/Sub.2/1993/29 paras. 62-67 (1993) [hereinafter *Working Group 1993 Report*] at 4.

[FN6]. *Id.* at 44.

[FN7]. *See generally* S. James Anaya, *Indigenous Rights Norms in Contemporary International Law,* ARIZ. J. INT'L & COMP. L. Vol. 8, No. 2 at 1 (1991); Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights,* 32 ARIZ. L. REV. 739 (1990); Hurst Hannum, *New Developments in Indigenous Rights,* 28 VA. J. INT'L L. 649 (1988); Dean B. **Suagee**, *Self-Determination for Indigenous Peoples at the Dawn of the Solar Age,* 25 U. MICH. J. L. REV. 671 (1992); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World,* 4 DUKE L.J. 660 (1991).

[FN8]. For example, another aspect of the emerging international law of the rights of indigenous peoples has been the adoption by the International Labour Organisation of a revised convention on the rights of indigenous peoples, I.L.O. Convention No. 169. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *adopted* June 27, 1989, 28 I.L.M. 1382 [hereinafter Convention 169]. *See generally* Anaya, *supra* note 7, at 10-15; Russel L. Barsh, *An Advocate's Guide to the Convention on Indigenous and Tribal Peoples,* 15 OKLA. CITY U. L. REV. 209 (1990); Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989,* 15 OKLA. CITY U. L. REV. 677 (1990).

[FN9]. Draft Declaration, *supra* note 1, at art. 25.

[FN10]. *Id.* at art. 26.

[FN11]. *See generally* DAVID SUZUKI & PETER KNUDTSON, WISDOM OF THE ELDERS: HONORING SACRED NATIVE VISIONS OF NATURE (1992); J. Baird Calicott, *American Indian Land Wisdom, in* THE STRUGGLE FOR THE LAND: INDIGENOUS INSIGHT AND INDUSTRIAL EMPIRE IN THE SEMIARID WORLD 255 (Paul A. Olson, ed., 1990).

[FN12]. *See* Draft Declaration, *supra* note 1 at arts. 21, 23, 24, 28, 29, 30 and 31.

[FN13]. *Id.* at art. 33 (emphasis added).

[FN14]. Richard B. Bilder, *An Overview of International Human Rights Law, in* GUIDE TO INTERNATIONAL

HUMAN RIGHTS PRACTICE 5 (Hurst Hannum ed., 1984).

[FN15]. U.N. CHARTER, art. 1, ¶ 3 (purposes include "promoting and encouraging respect for human rights and fundamental freedoms for all").

[FN16]. G.A. Res. 217, U.N. GAOR, 3rd Sess., 183rd plen. mtg., at 71, U.N. Doc. A/810 (1948).

[FN17]. G.A. Res. 260, U.N. GAOR, 3rd Sess., 179th plen. mtg., at 174, U.N. Doc. A/810 (1948).

[FN18]. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

[FN19]. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

[FN20]. International Covenant on Civil and Political Rights, *supra* note 18, at 59.

[FN21]. Kathryn J. Burke, *Introduction* NEW DIRECTIONS IN HUMAN RIGHTS xi (Ellen L. Lutz et al. eds., 1989). In addition to these instruments, the UN and other international organizations, including regional international organizations, have adopted numerous other instruments relating to human rights. *See generally* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, *supra* note 14.

[FN22]. *See, e.g., Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,* G.A. Res. 2625, U.N. GAOR, 25th Sess., at 1, U.N. Doc. A/2625 (1970).

[FN23]. International Covenant on Civil and Political Rights, *supra* note 18, at art. 27.

[FN24]. *Id.* at art. 25.

[FN25]. *Id.* at art. 26.

[FN26]. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[FN27]. *See generally* Oren R. Lyons, *The American Indian in the Past, in* EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION 13 (Oren R. Lyons & John C. Mohawk, eds. 1992) (hereinafter "EXILED IN THE LAND OF THE FREE"); John C. Mohawk, *Indians and Democracy: No one Ever Told Us, in* EXILED IN THE LAND OF THE FREE, *supra* at 43; Robert W. Venables, *American Indian Influences on the America of the Founding Fathers, in* EXILED IN THE LAND OF THE FREE, *supra* at 73; Donald A. Grinde, Jr., *Iroquois Political Theory and the Roots of American Democracy, in* EXILED IN THE LAND OF THE FREE, *supra* at 227; Robert J. Miller, *American Indian Influence on the United States Constitution and Its Framers,* 18 AM. INDIAN L. REV. 133 (1993); Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots,* 14 AM. INDIAN L. REV. 323 (1989); *contra* Erik M. Jensen, *The Imaginary Connection Between the Great Law of Peace and the United States Constitution: A Reply to Professor Schaaf,* 15 AM. INDIAN L. REV. 295 (1990).

[FN28]. Renée Jacobs, *Iroquois Great Law of Peace and the United States Constitution: How the Founding Fathers Ignored the Clan Mothers,* 16 AM. INDIAN L. REV. 497 (1991).

[FN29]. *Id.* at 508.

[FN30]. *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds. 1982); ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW (3rd. ed. 1991); DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW (3rd. ed. 1993); *see also* Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law,* 31 ARIZ. L. REV. 203, 210-213 (1989) (arguing the Cohen's HANDBOOK should be used as a source of information and criticizing the elevation of the HANDBOOK to the status of a treatise).

[FN31]. *See* Deloria, *supra* note 30, at 204.

[FN32]. *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 23-31 (1987). *See also* COHEN, *supra* note 30, at 49, 128-132, 139-41, 152, 180-88.

[FN33]. Richard B. Collins, *Indian Consent to American Government,* 31 ARIZ. L. REV., 365, 374-75 (1989).

[FN34]. *See* WILKINSON, *supra* note 32, at 18.

[FN35]. Act of February 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381 (1988)). *See also* WILKINSON, *supra* note 32, at 19-20.

[FN36]. Theodore Roosevelt is said to have described the General Allotment Act as "a mighty pulverizing engine to break up the tribal mass." *Quoted in* WILKINSON, *supra* note 32, at 19.

[FN37]. Act of June 18, 1934, ch. 576, § 1,48 Stat. 984 (codified at 25 U.S.C. § 461 (1988)).

[FN38]. Of approximately 138 million acres of Indian lands in 1887, only 48 million acres remained in 1934. COHEN, *supra* note 30, at 138.

[FN39]. *See* Draft Declaration, *supra* note 1, at art. 7. The allotment policy fits four of the kinds of actions listed in Article 7 as examples of cultural genocide, including:

> (a) Any action which has the aim or effect of depriving [indigenous peoples] of their integrity as distinct peoples, or of their cultural values or ethnic identities;
>
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
>
> (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
>
> (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures.

See also **Suagee**, *supra* note 7, at 695-97 (discussing genocide and cultural genocide); Anaya, *supra* note 7, at 16 (human rights norm inherent in the Genocide Convention that all cultural groupings have the right to exist); Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience,* 34 KAN. L. REV. 713 (1986).

[FN40]. For example, one could argue that the allotment policy violates Article 27 of the International Covenant on Civil and Political Rights, quoted in the text accompanying note 23, *supra,* and that it violates several articles of the Draft Declaration, *supra* note 1, including Article 7. Although the Supreme Court has recognized that

Congress subsequently repudiated the policy of allotment and sale of so-called "surplus" reservation land, the Court nevertheless has decided modern cases by looking to the congressional intent of the allotment policy. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); Solem v. Bartlett, 465 U.S. 463, 468-72 (1984); Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408, 422-23 (1989). Persons on whom we bestow the title "Justice" should be able to find a way to make repudiated congressional policy yield to contemporary international human rights standards.

[FN41]. 25 U.S.C. §§ 13a, 450-450n, 455-458e (1988), 42 U.S.C. § 2004b (1988).

[FN42]. *See generally* COHEN, *supra* note 30, at 180-206 (discussing the self-determination era). The self-determination era followed the assimilationist "termination" era, during which the federal government abruptly and unilaterally ended the special status under federal law of many tribes. *Id.* at 152-80.

[FN43]. *See generally* COHEN, *supra* note 30, at 275-79. Of course, in some cases the plenary authority of Congress also has been used to render Indians expressly subject to state laws without regard for tribal consent, e.g., Public Law 280 imposing state criminal law and civil adjudicatory jurisdiction on reservation Indians in certain states. *See* COHEN, *supra* note 30, at 362-70.

[FN44]. *See generally* Mary Beth West, *Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal Jurisdiction,* 17 AM. INDIAN L. REV. 71, 76-88 (1992) (describing the erosion of the infringement test, the shift from an emphasis on tribal sovereignty to an emphasis on federal preemption, the rise of the implicit divestiture test, and the rise of the balancing og governmental interests analysis); *see also* Judith v. Royster & Rory Snow Arrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion,* 64 WASH. L. REV. 581, 600-07 (1989); Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples,* 5 HARV. HUM. RTS. J. 65, 70-75 (1992); Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations,* 22 HARV. C.R.-C.L. L. REV. 507, 556-83 (1987) (hereinafter *Toward Consent*).

[FN45]. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[FN46]. *See* Berkey, *supra* note 44, at 70-71; West, *supra* note 44, at 77-79; F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942) (powers of internal sovereignty are limited only by treaties and express legislation by Congress).

[FN47]. *E.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987) (state interests might be sufficient to sustain state assertion of authority even if federal preemption applies). *See also infra* note 96 and accompanying text.

[FN48]. A discussion of the foundations of tribal sovereignty is beyond the scope of this article. We simply note the fact that tribal governments are distinct, independent political communities, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832), with inherent attributes of sovereignty, United States v. Mazurie, 419 U.S. 544, 557 (1975). The tribes' inherent sovereign powers are presumed to be retained unless "withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." United States v. Wheeler, 435 U.S. 313, 323 (1978).

[FN49]. __ U.S. __, 113 S.Ct. 2309 (1993).

[FN50]. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Montana v. United States, 450 U.S. 544 (1981); Rice v. Rehner, 463 U.S. 713 (1983); *Brendale* 492 U.S. 408, County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, __ U.S. __, 112 S.Ct. 683 (1992); and *Bourland*, 113 S.Ct. 2309. *See also* Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991) (criticizing transformation of sovereignty into property issues and vice versa to the disadvantage of Indian interests).

[FN51]. The Supreme Court has said, "The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion*, 455 U.S. at 137. *See also* Powers of Indian Tribes, Op. Sol., Dept. Int., 55 I.D. 14, 46 (1934) (opinion stating that a tribe possesses the power of taxation which may be exercised over members and nonmembers); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198-99 (1985) (discussing tribal power to tax as unconditioned on Secretarial approval).

In *Kerr-McGee*, the Court emphasized the federal government's commitment to the goal of promoting tribal self-government in relationship to the tribal power to tax. *Kerr-McGee*, 471 U.S. at 200-201. "The power to tax members and non-Indians alike is surely and essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs." *Kerr-McGee*, 471 U.S. at 201.

In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Supreme Court held that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Colville*, 447 U.S. at 152.

[FN52]. *See, e.g.*, *Brendale*, 492 U.S. at 425; *Merrion*, 455 U.S. at 137, 141-42.

[FN53]. *See* discussion of *Bourland*, *infra* notes 58-65 and accompanying text.

[FN54]. *Brendale*, 492 U.S. at 428; *Yakima*, 112 S.Ct. at 692; *Bourland*, 113 S.Ct. at 2320. *See also* West, *supra* note 44, at 81-82 (criticizing Justice White's narrow application of the *Montana* exceptions in his plurality opinion in *Brendale*).

[FN55]. The Court has so held:

> Even though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the *[Buster]* court held that the Tribe retained its power to tax. The court concluded that "[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.*" This result confirms that the Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government.

Merrion, 455 U.S. at 143, *citing* Buster v. Wright, 135 F. 947, 952 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) (emphasis in original).

[FN56]. Cheyenne River Act of Sept. 3, 1954, 68 Stat. 1191. *See generally* Michael L. Lawson, Dammed Indians: The Pick-Sloan Plan and the Missouri River Sioux, 1944-1980 (1982) (documenting the destruction wreaked upon the Sioux by the Missouri River dams). Although the *Bourland* Court suggests that the Cheyenne River Sioux consented to the taking of their lands for the Oahe dam and reservoir, 113 S.Ct. at 2313-14 (1993), anyone who doubts that the tribes on whose reservations Pick-Sloan reservoirs were located were under duress

should examine the photograph of George Gillette, the Tribal Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation, who broke down in tears while signing the contract with the Army Corps of Engineers for the Garrison dam and reservoir. *Reproduced in* Native American Testimony: A Chronicle of Indian-White Relations from Prophecy to the Present, 1492-1992, 343 (Peter Nabokov, ed., 1991).

[FN57]. Cheyenne River Act, *supra* note 56, at 1193.

[FN58]. *Bourland*, 113 S.Ct. at 2316.

[FN59]. *Id.*

[FN60]. *Id.* at 2316-17. This holding, like the holdings of the *Montana* and *Brendale* cases, is contrary to long-standing policy of the Department of Interior, that "the powers of an Indian tribe [over property] are not limited to such powers as it may exercise in its capacity as a landowner. In its capacity as a sovereign, and in the exercise of self-government, it may exercise powers similar to those exercised by any State or nation in regulating the use and disposition of private property, save insofar as it is restricted by specific statutes of Congress." Powers of Indian Tribes, *supra* note 50, at 55. This statement is reproduced verbatim in the original edition of FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 145 (1942).

[FN61]. *Id.* at 2318. Justice Blackmun anticipated this result in *Brendale*, stating that Justice Stevens's opinion, which grounded tribal regulatory jurisdiction in the power to exclude, "appears implicitly to conclude that tribes have no inherent authority over non-Indians on reservation lands. . . . [T]his conclusion stands in flat contradiction to every relevant Indian sovereignty case that this Court has decided." *Brendale*, 492 U.S. at 462-63 (Blackmun, J., concurring in part and dissenting in part).

[FN62]. *Bourland*, 113 S.Ct. at 2319.

[FN63]. *Id.* at 2320.

[FN64]. *Id.* at 2317, n.11, *citing Brendale*, 492 U.S. at 423-424.

[FN65]. *Id.* at 2320, n.15, *citing Montana*, 450 U.S. 544.

[FN66]. *Montana*, 450 U.S. at 565.

[FN67]. 495 U.S. 676 (1990).

[FN68]. That the Court should emphasize consent of the governed as a basis for tribal sovereignty is somewhat ironic given the fact that Indian tribes have rarely been given the opportunity to consent to federal actions. *See supra* notes 33-38 and accompanying text.

[FN69]. *Duro*, 495 U.S. at 685-86.

[FN70]. "Our decisions recognize broader retained tribal powers outside the criminal context. . . . Civil authority may also be present in areas such as zoning where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination." *Id.* at 687-88.

[FN71]. *Id.* at 693.

[FN72]. *Id.* (emphasis added).

[FN73]. *Id., citing* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 334-35 (Rennard Strickland, et al., eds. 1982)

[FN74]. *Id.* (emphasis added).

[FN75]. *Id.* at 694 (emphasis added).

[FN76]. *See* Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1892 (codified as amended at 25 U.S.C. § 1301(2)-(4) (1988)), and Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (repealing sunset provision in Act of Nov. 5, 1990). *See generally*, Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. IND. L. REV. 109 (1992).

[FN77]. The Supreme Court's decision in *Duro* was based on federal common law, not the Constitution. In creating federal common law, the federal courts attempt to divine Congressional intent. Thus, where a court mistakenly interprets Congressional intent, Congress retains the power to "correct" the court's interpretation through subsequent legislation. *Duro* is such a case.

[FN78]. Collins, *supra* note 33, at 385. While we agree with Professor Collins that this claim "has obvious force," in *Merrion*, the Supreme Court said, "Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose." 455 U.S. at 147.

[FN79]. *Id.* at 386. *See* Article 25(b) of the International Civil and Political Rights Covenant, *supra* note 18.

[FN80]. *See, e.g.*, Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, No. A1-91-222 (D.N.D. filed Sept. 28, 1993) (order granting summary judgment), in which the District Court struck down the Tribe's employment ordinance and oil and gas production tax as to various oil and energy companies operating on fee lands within the Fort Berthold Reservation. The Court stated, "[n]o doubt George III had some worthy projects in mind in the 1770s, but taxation without representation was not popular with the colonists then and still doesn't seem terribly just." *Id.*, slip op. at 6.

[FN81]. *See* COHEN, *supra* note 30, at 180-206 (discussing the self-determination era). The Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2206 (1975) (codified as amended at 25 U.S.C. §§ 13a, 450-450n, 455-458e (1988))--the statute establishing a framework for tribal governments taking over programs that would otherwise be administered by the Bureau of Indian Affairs or Indian Health Service--had not even been enacted when several of the major federal environmental statutes became law.

[FN82]. Some tribes were engaged in environmental issues. *E.g.*, the Northern Cheyenne Tribe redesignated its reservation from class II to class I under the Clean Air Act. *See* Nance v. EPA, 645 F.2d 701 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981).

[FN83]. Environmental Protection Agency, *EPA Policy Statement for the Administration of Environmental Programs on Indian Reservations* (Nov. 8, 1984) (on file with the COLO. J. INT'L ENVTL. L. & POL'Y).

[FN84]. *Id.*

[FN85]. *Id.* In addition to the EPA's 1984 policy, *supra* note 83, in 1991 EPA issued a document entitled "Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments," which was distributed as an attachment to Memorandum from William K. Reilly, EPA Administrator, to Assistant Administrators, General Counsel, Inspector General, Regional Administrators, Associate Administrators, and Staff Office Directors (Jul. 10, 1991) [hereinafter *Reilly Memorandum*], reaffirming the 1984 policy. (On file with the COLO. J. INT'L ENVTL. L. & POL'Y).

[FN86]. Washington Dept. of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985). In this case, when the state of Washington applied to the EPA for approval of its hazardous waste regulatory program under the Resource Conservation and Recovery Act (RCRA), it sought authorization from the EPA to apply its program to both Indian and non-Indian residents of Indian reservations within the state's borders. *Id.* at 1467. This case has been the subject of numerous articles in the legal literature, *e.g.*, Leslie Allen, *Who Should Control Hazardous Waste on Native American Lands? Looking Beyond Washington Department of Ecology v. EPA*, 14 ECOLOGY L.Q. 69 (1987); Richard A. Du Bey, et al., *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 ENVTL. L. 449 (1988); Note, *Regulatory Jurisdiction over Non-Indian Hazardous Waste in Indian Country*, 72 IOWA L. REV. 1091 (1987); Note, *Environmental Law--Federal Indian Law--Recent Developments*-- State of Washington, Department of Ecology v. United States Equal Protection Agency, 27 NAT. RESOURCES J. 739 (1987). *See also* Judith V. Royster & Rory Snow Arrow Fausett, *supra* note 44, at 629-38.

[FN87]. 42 U.S.C. §§ 6901-6992k (1988). Hazardous waste regulation is governed by RCRA §§ 3001-3023, 42 U.S.C. §§ 6921-6939e (1988).

[FN88]. Washington Dept. of Ecology v. EPA, 752 F.2d at 1469. Because the state's application to EPA sought approval to regulate all persons within reservations, the court expressly did not decide whether the state could have created a program that, within reservations, would have regulated only non-Indians. *Id.* at 1468.

[FN89]. *Id.* at 1472. Regulatory programs such as the hazardous waste program under the RCRA charge the EPA with primary responsibility, a role that states can take over with EPA approval. *See* 40 C.F.R. §§ 271, 272 (1992). For such programs, the EPA can simply retain authority over reservations when states apply for primacy. Some programs established by the federal laws, however, begin by placing the primary responsibility on states, e.g., the solid waste management program under the RCRA which the EPA does not administer directly, although the EPA has established nationally applicable standards. 40 C.F.R. § 258 (1992). The prohibitions of the RCRA relating to solid waste have been held to apply in Indian country, Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir. 1989), but the great majority of waste disposal sites in Indian country nevertheless are not in compliance with EPA standards. This is due in part to a lack of federal financial and technical assistance to tribes and in part to a lack of clarity regarding the responsibilities of federal agencies. *See* S. Rep. No. 370, 102d Cong., 2d Sess, 2-3 (1992).

[FN90]. Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-11(a)(1) (1988) (treating tribes as states for certain purposes); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, also known as "Superfund"), 42 U.S.C. § 9626 (1988) (treating tribes substantially the same as states for certain purposes); Clean Water Act (CWA), 33 U.S.C. § 1377 (1988) (treating tribes as states for certain purposes); Clean Air Act (CAA), 42 U.S.C. § 7601(d) (1988) (treating tribes as states for certain purposes). *See generally* David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Law and Regulations*, 23 ELR 10579 (Oct. 1993); *see also* Steven Berlant, *Responding to the Dangers Posed by Hazardous Substances: An Overview of CERCLA's Liability and Cost Recovery Provisions as they Relate to Indian*

Tribes, 15 AM. INDIAN L. REV. 279 (1990); Royster & Fausett, *supra* note 44; Jana L. Walker & Kevin Gover, *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, 10 YALE J.ON REG. 229, 232-35 (1993); **Suagee**, *supra* note 7 at 704-08.

[FN91]. *E.g.*, Safe Drinking Water Act regulations: 40 C.F.R. §§ 35, 124, 141-46 (1992); Clean Water Act regulations for Water Quality standards: 40 C.F.R. § 131 (1992); Clean Water Act regulations for the § 404 program (dredging and filling waters, particularly wetlands): 40 C.F.R. §§ 232, 233 (1992); Clean Water Act regulations for grants: 40 C.F.R. §§ 35, 130 (1992); Comprehensive Environmental Response, Compensation, and Liability Act regulations for cooperative agreement: 40 C.F.R. § 35 (1992); Emergency Planning and Community Right-to-Know Act reporting requirements: 40 C.F.R. §§ 350, 355, 370, 372 (1992). *See generally* Coursen, *supra* note 90, at 10,582-84.

[FN92]. Indian Environmental General Assistance Act of 1992, Pub. L. No. 102-497, 106 Stat. 3258 (1992)(codified at 42 U.S.C. § 4368b; amended by Pub. L. No. 103-155, 107 Stat. 1523 (1993)) (extending authorization of appropriations through FY 1998 and requiring an annual report to Congress by the EPA). The EPA General Assistance Program is the successor to its "multi-media" program for Indian tribes, which was authorized in annual appropriations acts for the departments of Veterans Affairs and Housing and Urban Development and Independent Agencies for FY 1991 and FY 1992. Pub. L. No. 101-507, 104 Stat. 1351, 1372 (1990); Pub. L. No. 102-139, 105 Stat. 736, 762 (1991). In addition to the EPA General Assistance Program, Congress also has given a mandate to the Administration for Native Americans in the Department of Health and Human Services to provide financial assistance to tribes to build their capacities to administer environmental protection programs. See Indian Regulatory Enhancement Act of 1990, Pub. L. No. 101-408, § 2, 104 Stat. 883 (1990)(amending § 803 of the Native American Programs Act of 1974, 42 U.S.C. § 2991b).

[FN93]. *See* 40 CFR § 25 (1992). In particular, 40 CFR § 25.10 (1992) establishes minimal requirements for rule making by states, including tribes treated as states, although these requirements do not preempt the requirements of a state administrative procedure act, if one exists. The EPA encourages tribal governments to enact administrative procedure acts, and many have done so. *See Reilly Memorandum*, *supra* note 85, at 4-5. In some cases, public involvement requirements for tribes treated as states are based on federal statute, e.g., § 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c), requires a state to hold a public hearing at least once every three years to review, modify and adopt water quality standards. Accordingly, while the general EPA regulations governing state rulemaking provide that a public hearing is optional, EPA regulations for setting water quality standards make clear that, in this context, a public hearing is mandatory. 40 CFR § 131.20.

[FN94]. *E.g.*, designating use classifications for bodies of water under the Clean Water Act, Clean Water Act § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) (1988), 40 C.F.R. § 131.10 (1992); redesignating air quality classification, Clean Air Act § 164, 42 U.S.C. § 7474 (1988), 40 C.F.R. § 52.21(g) (1992).

[FN95]. *E.g.*, states may adopt water quality standards and effluent limitations that are more stringent than those in effect under the Act. Clean Water Act § 510, 33 U.S.C. § 1370 (1988). The EPA has construed this section of the Act to be applicable to tribes treated as states. 56 Fed. Reg. 64,876 (1991) (codified at 40 C.F.R. § 131 (1992)).

[FN96]. *See* notes 44-47, *supra* and accompanying text.

[FN97]. In addition to EPA's 1984 policy, *supra* note 83, in *Reilly Memorandum*, *supra* note 85, EPA has stated:

> Consistent with EPA Indian Policy and the interests of administrative clarity, the Agency will view

> Indian reservations as single administrative units for regulatory purposes. Hence, as a general rule, the agency will authorize a tribal or state government to manage reservation programs only where that government can demonstrate adequate jurisdiction over pollution sources throughout the reservation. Where, however, a tribe cannot demonstrate jurisdiction over one or more reservation sources, the Agency will retain enforcement primacy for those sources. Until EPA formally authorizes a state or tribal program, the Agency retains full responsibility for program management. Where EPA retains such responsibility, it will carry out its duties in accordance with the principles set out in the EPA Indian Policy.

Id. at 3-4.

[FN98]. *See* EPA Policy, *supra* note 83, as elaborated in the *Reilly Memorandum*, *supra* note 85. In addition, the preamble to the final rules for treatment of tribes as states for the purpose of adopting water quality standards, *supra* note 90, explains the EPA's position that the Clean Water Act does not constitute a delegation of authority to tribes but that, rather, like states, tribes that adopt water quality standards do so as an exercise of their own sovereignty. 56 Fed. Reg. 64,876-80, *supra* note 95. While the EPA requires each tribe to demonstrate that it has the requisite authority, the EPA also indicates that the showing a tribe must make is relatively simple, including the assertion that impairment of reservation waters by the activities of non-Indians "would have a serious and substantial effect on the health and welfare of the Tribe." *Id.* at 64,879.

[FN99]. For a more detailed discussion of the balancing of governmental interests analysis in the context of environmental protection, *see* Royster & Fausett, *supra* note 44, at 649-59.

[FN100]. The Supreme Court has said that even the assertion of state authority is preempted if it would interfere with "federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983), *quoted in* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987).

[FN101]. A state might argue that this constitutes "exceptional circumstances" justifying state regulatory jurisdiction even over reservation Indians. *See* note 47 *supra* and accompanying text. *See also* Royster & Fausett, *supra* note 44, at 605, nn.88, 89 (summarizing court opinions that suggest or apply the "exceptional circumstances" factor). In the absence of an effective tribal program, an actual EPA presence may be necessary to disarm such an argument.

[FN102]. One also might argue that the governmental tools used by the federal and state governments should not be assumed to be essential ingredients of environmental protection programs in indigenous territories, because traditional cultural values such as reverence for the natural world and consensus decision making may operate to control environmentally destructive "development" and other activities that nonindigenous governments typically control through regulatory programs. We are concerned in this article, however, with reservations that have substantial populations of persons who are not tribal members.

[FN103]. Many tribal governments do have revenue streams from gaming facilities, and such revenues typically are used to support a wide range of governmental programs and services, including environmental regulatory programs. Many tribes also collect some tax revenues. As a general rule, however, the revenues available to tribal governments are not comparable to those of the states.

[FN104]. 42 U.S.C. §§ 4321-4347 (1988). *See generally* Dean B. **Suagee**, *The Application of the National Environmental Policy Act to "Development" in Indian Country*, 16 AM. INDIAN L. REV. 377 (1991).

[FN105]. Environmental Law Institute, NEPA Deskbook at v. (1989). One of us has observed that tribal leaders do not appear to have shared this view of the NEPA, suggesting that this is in part because the NEPA "was fashioned by the dominant American society and unilaterally imposed on federal actions affecting Indian lands." **Suagee**, *supra* note 104, at 463.

[FN106]. 42 U.S.C. § 4332(2)(C) (1988).

[FN107]. 40 CFR §§ 1500-1508 (1992).

[FN108]. One of these other requirements, the consultation process established under section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f(1988), is discussed briefly later in this article. *See* notes 140-150 *infra* and accompanying text.

[FN109]. 40 CFR § 1502.25(a).

[FN110]. *See* **Suagee**, *supra* note 104, at 426-27.

[FN111]. 516 DM [Departmental Manual] 2, app. 2, § 2.10. *See* **Suagee**, *supra* note 104, at 398 n.79.

[FN112]. The EPA's role in reviewing and commenting on the EISs prepared by other agencies is based on section 309 of the Clean Air Act, 42 U.S.C. § 7609 (1988), which also directs the EPA to determine whether the proposed federal action that is the subject of an EIS would be "unsatisfactory from the standpoint of public health or welfare or environmental quality" and, in any such case, to refer the matter to the Council on Environmental Quality. The CEQ regulations establish a process for dealing with such "pre-decision referrals," a process that also allows federal agencies other than the EPA to refer matters to the CEQ. 40 CFR § 1504 (1992). The CEQ cannot order an agency to act in a certain way, but it may refer the matter to the president.

[FN113]. *See* note 95, *supra*. The EPA issued an interim final rule for the Indian Environmental General Assistance Program of 1992, and 58 Fed. Reg. 63,876 (1993).

[FN114]. The statute provides that funding provided to tribes is to be used for "planning, developing, and establishing the capability to implement programs administered by" the EPA. 42 U.S.C. § 4368b(f) (1988). The EPA's interim final rule suggests that this EPA will apply this requirement with flexibility. The preamble to the final interim rule states:

> The primary purpose of these assistance agreements is to support the development of elements of a core environmental protection program, such as: . . . ;
>
> Providing for tribal capacity-building to assure an environmental presence for identifying programs and projects . . . . ;
>
> Fostering compliance with federal environmental statutes by developing appropriate tribal environmental programs, ordinances and services; and
>
> Establishing a communications capability to work with federal, state, local and other tribal environmental officials.

58 Fed. Reg. 63876 (1993). Establishing a tribal core environmental program that includes a blanket environmental review process would fit well with EPA's characterization of the primary purpose of this program. In ad-

dition, since EPA encourages tribes to adopt tribal administrative procedure acts, *see* note 96 *supra*, presumably the General Assistance Program could be used for purposes related to a tribal APA, including training for tribal agency staff.

[FN115]. *See* note 95, *supra*.

[FN116]. *See* **Suagee**, *supra* note 104, at 427 n.218.

[FN117]. Dean B. **Suagee**, Hobbs, Straus, Dean & Wilder, "A Model Tribal Environmental Review Code: Analysis and Draft Text" (unpublished paper presented at the National Tribal Environmental Council First Annual Conference, Albuquerque, N.M., November 14-18, 1993) (hereinafter *"Model Tribal Code"*) (on file with the COLO. J. INT'L L. & POL'Y).

[FN118]. MODEL LAND DEV. CODE (1976) (complete text adopted by the ALI at Washington, D.C., May 21, 1975, and reporter's commentary).

[FN119]. *Id.* at ix-x.

[FN120]. The definition of "development" is in Section 201 of our draft *Model Tribal Code, supra* note 117.In the remainder of this article we generally have omitted specific references to our draft *Model Tribal Code.* For further discussion of the definition of "development," see the ALI MODEL LAND DEV. CODE, *supra* note 118, at 16-26. *See also* **Suagee**, *supra* note 107, at 429-44.

[FN121]. *Montana*, 450 U.S. at 566.

[FN122]. We have used this name for the Commission because it describes the Commission's primary role, but a different name might be preferable for a particular tribe.

[FN123]. In Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), the Supreme Court held a legislative veto of federal agency regulations unconstitutional (actions of one House of Congress under Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254 (1988), violated "strictures" of the US Constitution, namely, separation of powers, and the presentment and bicameral requirements of Art. I, §§ 1,7). A tribal government would not be constitutionally barred from exercising a legislative veto of tribal agency rulemaking because tribes are not bound by the "strictures" of the US Constitution. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); Talton v. Mayes, 163 U.S. 376, 384 (1896).

[FN124]. If a tribe has adopted an APA, it nevertheless may be advisable to review the APA in conjunction with consideration of the enactment of a tribal environmental review code, particularly if the scope of the tribal APA is not sufficiently broad to cover the full range of activities that the ERC will be authorized to carry out.

[FN125]. *See* 40 CFR § 25, discussed in note 93, *supra.*

[FN126]. Many alternatives could be imagined. For example, the commissioners might be elected. Three was suggested because we are trying to fashion a process that can be used by small tribes. For large tribes, a larger number of commissioners might be desirable. If there are many nonmember landowners within reservation boundaries, a tribe might want to consider including one or more nonmembers on the ERC or providing some other structured way for nonmembers to have input into the ERC.

[FN127]. *See* notes 90-91, *supra.*

[FN128]. 53 Fed. Reg. 37,401 (1988) (discussing regulatory independence in the context of the Safe Drinking Water Act); 56 Fed. Reg. 64,876 (1991) (discussing regulatory independence in the context of water quality standards and National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act).

[FN129]. 30 BIAM Supp. 1, § 4.2; *see also* 516 DM § 3.6.

[FN130]. A hearing is widely regarded as an essential element of due process of law when property interests are affected by government action, and tribal governments are prohibited by the Indian Civil Rights Act from depriving any person of property without due process of law. Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8)(1988). Although the Indian Civil Rights Act was imposed upon tribes by Congress through an exercise of its plenary power, *see* COHEN *supra* note 30 at 666-70, tribal officials should be aware that the right to a hearing is also protected by the Article 8 of the International Covenant on Civil and Political Rights, *supra* note 18, that is, it is a universal human rights standard.

[FN131]. A tribe may choose to use the sanction of exclusion of nonmembers from the tribe's reservation, but this is not included in our draft, in part because the reliance of Supreme Court Justices on the power to exclude nonmembers as the basis for tribal jurisdiction over nonmembers is wrong. *See* notes 57-65, *supra.*

[FN132]. 40 C.F.R. § 131 (1992). *See* note 90, *supra.*

[FN133]. 56 Fed. Reg. 64,876 (1991).

[FN134]. 33 U.S.C. § 1342 (1988). Any person discharging pollutants into waters of the United States within a reservation without a section 402 permit, without compliance with the terms of a section 402 permit, and not otherwise permissible under the Clean Water Act, would be subject to an enforcement action by the EPA under section 309 of the Act. 33 U.S.C. § 1319 (1988).

[FN135]. Clean Air Act, § 110(o), 42 U.S.C. § 7410(o) (1988).

[FN136]. Clean Air Act, § 164(c), 42 U.S.C. § 7474(c) (1988).

[FN137]. The *Model Tribal Code* lists the following subjects that might be covered in additional subtitles of a tribal environmental protection code: cultural preservation and cultural resources conservation, public water systems, water quality and wetlands, waste management and recycling, air quality, hazardous and toxic substances, emergency response plan, and community right-to-know.

[FN138]. *See* notes 140-156, *infra* and accompanying text.

[FN139]. If the Native American Free Exercise of Religion Act (NAFERA), S. 6456 (May 25, 1993), is enacted into law with notice and consultation provisions substantially similar to those contained in the bill, a tribal ERC could be designated the point of contact to receive notice from federal agencies.

[FN140]. 16 U.S.C. § 470 (1988).

[FN141]. 16 U.S.C. §§ 470aa-470ll (1988).

[FN142]. 25 U.S.C. §§ 3001-3013 (1988).

[FN143]. *See generally* Dean B. **Suagee** and Karen J. Funk, *Cultural Resources Conservation in Indian Country,*

7 NAT. RESOURCES & ENV'T, no. 4, 30 (Spring 1993). *See also* **Suagee**, *supra* note 7, at 706-12.

[FN144]. Our *Model Tribal Code* does not include express provisions to cover cultural resources in the tribal environmental review process. *See Model Tribal Code*, *supra* note 117. Code language to do this could delegate authority to the ERC or to a separate cultural commission to fill in the details through rule making. If the tribal governing body delegates the authority to deal with cultural resources to an agency or commission other than the ERC, cultural resources concerns nevertheless should be one of the aspects of environmental protection that the ERC considers before issuing a development permit.

[FN145]. 36 C.F.R. § 60 (1992).

[FN146]. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 4006(a)(2), 106 Stat. 4600 (1992) (amending 16 U.S.C. § 470a (1988)). The statutory language expressly provides for properties of religious or cultural importance to an Indian tribe or Native Hawaiian organization and confirms the prior administrative practice; *see* National Park Service, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, National Register Bulletin 38.

[FN147]. 16 U.S.C. § 470f (1988).

[FN148]. 36 C.F.R.§ 800 (1993).

[FN149]. Pub. L. No. 102-575, § 4006(a)(2) (1992) (amending 16 U.S.C. § 470a (1988)). The term "tribal lands" is defined as "(A) all lands within the exterior boundaries of any Indian reservation; and (B) all dependent Indian communities." *Id.* at § 4019(a)(12) (amending 16 U.S.C. § 470w (1988)). If a tribe has taken over the SHPO's role in the section 106 process and a federal undertaking would affect private lands within reservation boundaries, the private landowner(s) may request the SHPO to participate in the section 106 consultation process in addition to the tribal historic preservation official (amending 16 U.S.C. 470a(d)(2)(D)(iii) (1988).

[FN150]. Pub. L. No. 102-575, § 4006(a)(2) (1992) (amending 16 U.S.C. § 470a (1988)). In addition, section 110 of the NHPA as amended now provides that, each federal agency must carry out its process for identifying and evaluating historic properties in consultation with, inter alia, Indian tribes and Native Hawaiian organizations. Pub. L. No. 102-575 (amending 16 U.S.C. § 470h-2 (1988)).

[FN151]. 16 U.S.C. § 470cc(g) (1988). *See also* 43 C.F.R. § 7.

[FN152]. 16 U.S.C. § 470cc(g) (1988), 43 C.F.R. § 7.9(c).

[FN153]. 16 U.S.C. § 470cc(c) (1988), 43 C.F.R. § 7.7.

[FN154]. 25 U.S.C. § 3002(c) (1988).

[FN155]. 25 U.S.C. § 3001(15) (1988) (defining "tribal lands" to include all lands within the boundaries of an Indian reservation and all dependent Indian communities, as well as certain lands held for Native Hawaiian organizations). Although NAGPRA applies to all lands within the reservation boundaries, the coverage of ARPA within reservations is limited to "Indian lands," a term which is defined as lands held in Indian trust or subject to a federally imposed restraint on alienation. 16 U.S.C. § 470bb(4) (1988). NAGPRA provides that "cultural items" located on fee lands within reservation boundaries cannot be lawfully excavated without an ARPA permit, 25 U.S.C. § 3002(c) (1988), but the Bureau of Indian Affairs has taken the position that it lacks authority to

issue ARPA permits for fee lands. 58 Fed. Reg. 65,246 (1993). Thus, any excavation of "cultural items" located on fee lands within the reservation boundaries appears to be illegal, which is surely not what Congress intended. Congress should fix this problem by amending ARPA to apply to all lands within reservation boundaries.

[FN156]. The rationale for this congressional recognition is based, in part, on the common law principle that interred human remains are not treated as property. *See* Jack F. Trope & Walter T. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 47-48, 59-60 (1992).

[FN157]. *See* notes 50-55, *supra* and accompanying text.

[FN158]. At the National Tribal Environmental Council First Annual Conference, in Albuquerque, N.M., on April 14-18, 1993, John Echohawk, Executive Director of the Native American Rights Fund and a member of the Board of Trustees of the Natural Resources Defense Council, made a presentation on the efforts of the environmental groups to build better relationships with tribes and tribal leaders.

[FN159]. *See* notes 149 & 150, *supra* and accompanying text.

[FN160]. *See* note 139 *supra.* A number of national environmental groups are involved in the NAFERA coalition (copy of list of coalition members on file with the COLO. J. INT'L L. & POL'Y). *See also* Michael J. Simpson, *Accommodating Indian Religions: Proposed 1993 Amendement to the American Indian Religious Freedom Act*, 54 MONT. L. REV. 19 (1993).

[FN161]. *E.g.*, proposing amendments to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1988). The Act has not yet been amended to authorize treatment of tribes as states. In the 102d Congress, the Senate Indian Affairs Committee reported a bill specifically concerned with waste management in Indian country. Sen. Rep. 370, 102d Cong., 2d Sess. (1992) (to accompany S. 1687, the Indian Tribal Government Waste Management Act of 1992). For a variety of reasons, this bill was not enacted. *See* statements of Senators Inouye, McCain, Moynihan, Chafee and Baucus, 138 Cong. Rec. S 7059-60 (daily edition, October 5, 1992). The national environmental groups could take a step to ward building some rapport with tribes by including support for tribal RCRA provisions in their legislative advocacy.

[FN162]. For example, environmental groups could help tribes assemble the expertise to act as trustees for natural resource damages under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). 42 U.S.C. § 9607(f) (1988).
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