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Essay

*461 TURTLE'S WAR PARTY: AN INDIAN ALLEGORY ON ENVIRONMENTAL JUSTICE

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Once, a long time ago, Turtle organized a war party against the Human Beings. [FN1] As he was paddling his canoe down the river, he chanced upon Bear, who asked him where he was going. Turtle said that he was going to make war on the Human Beings, the ones that call themselves the Haudenosaunee (who are more commonly known now as the Iroquois). In explaining his course of action to Bear, Turtle said, “Too long they have made war on animals. Now is the time for us to strike back.” When Bear offered to join in, Turtle turned him down, purportedly because Bear would be too slow but more likely because Bear was just too big for Turtle's small canoe. Turtle also passed up an offer by Wolf to join his war party. His stated reason was that Wolf was too fast and that he would run away and leave Turtle behind, but the real reason was that Turtle had gotten a good close look at Wolf's long sharp teeth.

Turtle did succeed in picking up a couple of allies, though. He accepted the offer of both Rattlesnake and Skunk to join his war ***462** party. The attack, however, did not go as Turtle had hoped it would. Although he and his allies escaped with their lives, [FN2] they did suffer a humiliating defeat.

Maybe **Turtle's war party** was doomed from the start. Maybe he should have known better than to even try to challenge the Human Beings. On the other hand, maybe things would have turned out differently if he had used better judgment in choosing his allies and planning his strategy.

INTERPRETING THE ALLEGORY

Several different interpretations might be offered for this allegory. One explanation is that Turtle represents an Indian community that can no longer control its outrage at some kind of environmental damage, such as the environmentally destructive activities that the dominant society carries out under the misnomer “economic development.” [FN3] Perhaps the outrage of the particular Indian community represented by Turtle is focused on some particular outrage, such as the perceived need to find a place to dispose of the mountains of waste produced by an economic system that converts the natural world first into resources, then consumer products, then waste. As we all think we know, after the politically more powerful communities have mounted their “not in my backyard” defenses, declining to deal with the more fundamental issue of why we are creating so much waste in the first place, the waste merchants head off to Indian country and other communities of color to peddle their wares. [FN4]

So, if Turtle represents an Indian community, then who are the other characters? Perhaps Rattlesnake and Skunk are local grassroots environmental organizations, groups that know the particular issue and the particular Indians well enough to put aside whatever differences they may have and join together to take on the common enemy. Perhaps Bear and Wolf represent ***463** the big national (and international) environmental groups. Maybe the Indians turned down their offer to help this time because the Indians sensed that the big groups were more interested in their own agendas than in really helping the Indians in their struggle. [FN5] Distrust between Indians and environmentalists is nothing new, of course. It can be challenging to work through the distrust to find the common ground that many of us think we know is there.

Why do Indians view the big environmental groups with some suspicion? One big reason is that many environmentalists, like most people in the dominant American society, just do not know much about basic principles of federal Indian law, such as the doctrine of retained inherent tribal sovereignty. [FN6] Or if they do know about the doctrine of tribal sovereignty, they don't fully accept it. Or, even if they do accept the doctrine, they may not understand its nuances and limitations. Even if they do accept the basic idea that Indian tribes should be self-governing as a matter of right, if a particular tribal government (which is recognized by the federal government) is pursuing a course of action that environmentalists regard as environmentally incorrect, they may go so far in their opposition as to challenge the very legitimacy of the tribal governing body.

As someone who has done some law school teaching in the field of federal Indian law, I know from experience that very intelligent people can have some trouble developing a working knowledge of the relevant legal principles. Their efforts are confounded by the Supreme Court's tendency in recent years to issue unprincipled decisions and to fashion new rules, such as the rule that Indian tribes can be implicitly divested of certain aspects of their original sovereignty as a necessary implication from their dependent status, [FN7] a rule that I have suggested is inconsistent***464** with international human rights law. [FN8] So I can understand how the big environmental groups, both in their leadership and their grassroots membership, have some difficulties with the complexities of federal Indian law. I also acknowledge that in recent years some of the big groups have done a better job in dealing with some of the issues that matter to Indian communities.

In some cases the big groups have shown some appreciation of the fact that the legal doctrine of tribal sovereignty is more than just another rule of federal law. Rather, this doctrine also can be seen as part of the fabric of international human rights law. Around the world, indigenous peoples are seeking recognition and protection of their human rights to exercise self-government within their traditional homelands. [FN9] People in the dominant American society who help to uphold the doctrine of inherent tribal sovereignty can rightfully think of themselves as human rights workers. Thinking about this can be tricky, however. When Americans think about human rights they generally think of the rights of individuals and limits on the powers of governments, while the efforts in the United Nations to develop a universal declaration of the rights of indigenous peoples illustrate that indigenous peoples tend to be more concerned with their collective rights to remain distinct societies. [FN10]

THE ENVIRONMENTAL JUSTICE MOVEMENT

To some extent the environmental justice movement can claim credit for the enhanced interest in Indian concerns that some of ***465** the big environmental groups have shown in recent years. Activists in communities of color, and their Euro-American advocates, apparently want to count Indians among their numbers in the environmental justice movement. Since issues that concern Indian communities often do not receive much attention in the larger society, some tribal leaders and Indian environmental activists have welcomed the attention that the

environmental justice movement has brought to Indian environmental issues.

Indians have learned to be cautious about making alliances, however. Given the significant differences between the status of Indian tribes under federal law and minority communities in the United States, [FN11] minority community activists and their advocates should exercise caution in making statements that may be taken as speaking for reservation Indians, or even in describing Indian country environmental issues without making any pretense of speaking for Indians. Unfortunately, we have been provided with numerous examples of misstatements on the part of environmental justice activists. In some instances they fail to grasp the importance of basic principles such as tribal sovereignty and the right of Indian communities to exercise self-government. In other instances, although they acknowledge that tribes are sovereigns, they just seem to get mixed up when they deal with specifics. If we are going to have much success in building alliances, we are going to have to get beyond misunderstandings of this sort.

Let's consider one example, a misstatement by Professor Robert Bullard, a prominent figure in the environmental justice movement, in the introduction to the book Unequal Protection: Environmental Justice & Communities of Color. [FN12] Professor Bullard's***466** introduction contains the following statement: “Because Native American reservations are sovereign nations, most federal and state environmental regulations do not cover these lands.” [FN13] There is some truth in this statement. In federal law, Indian tribes are considered “domestic dependent nations” [FN14] that continue to possess important aspects of their original sovereignty over both their members and their territory. States generally lack civil regulatory authority over reservation Indians, or over the activities of a tribal governing body within the boundaries of its reservation. [FN15]

This much of Professor Bullard's statement is generally true. But more than that. It's true in an “oh well” kind of way-environmentalists should get used to it and realize that the suggestion that state laws should be rendered applicable in Indian country [FN16] will be seen by Indians as a direct assault on tribal sovereignty.

The part of the statement that asserts that “most federal environmental regulations” do not apply on Indian lands, however, is grossly inaccurate. [FN17] Someone really should have caught ***467** this before the book was published. The Supreme Court long ago established a rule that Congress has plenary power over Indian affairs, [FN18] and, although there are some limits on the scope of this power, it is clear that Congress has the power to provide that federal environmental laws do apply in Indian country. In the context of particular federal laws in which the intent of Congress is not clear from the statutory language, the general rule is that a generally applicable law applies to reservation Indians unless its application would conflict with a treaty or statutory right, or interfere with tribal self-government. [FN19]

***468** In the case of most of the major federal environmental laws, the intent of Congress that they are applicable to reservation Indians is clear from the statutory language. [FN20] Moreover, in recent years, the Environmental Protection Agency (EPA) has revised many of its regulations to include express provisions relating to Indian reservations. [FN21]

Of course, although I am saying that the federal environmental statutes and regulations are generally applicable, I am not suggesting that EPA's record in administering its statutes and regulations in Indian country is beyond criticism. Far from it. Professor Bullard's description of Indian reservations as “lands that the feds forgot” does contain a certain element of truth, as long as the reader understands that it is overstatement. [FN22] Since ***469** 1984, EPA has had a fine policy for Indian lands, a policy which recognizes tribal governments as the “primary parties for setting standards and making environmental policy decisions” for reservations and which

also acknowledges EPA's responsibilities for assuring compliance with federal environmental laws and regulations. [FN23] Beginning in 1986, Congress has enacted amendments to many of the major federal environmental statutes to include express provisions for Indian country in a way generally consistent with the EPA policy. [FN24] The implementation of the EPA Indian policy, however, has left a lot to be desired. And a lot of what has been left to be desired has to do with the amount of money and the number of people that the EPA has dedicated to its Indian program. There have been some signs of improvement in recent years, but we still have a long way to go. We will return to this issue later in this essay. [FN25]

We should try, I think, to convert misunderstandings such as that conveyed by Professor Bullard's statement into learning situations. I think that by doing so, we might learn a few things about self-government, in tribal communities, in minority communities, and in the larger American society as well. But before we explore that idea, I think we should return to the scene of our allegory and see what happened after **Turtle's war party** was routed.

BEAR AND WOLF DISCUSS THEIR DREAM

Let us suppose that, a few days after **Turtle's war party** was routed by the Human Beings, as Wolf was tending his clan's ***470** campfire, Bear dropped by for a visit. Both had heard through the woodland animals' moccasin telegraph what had happened to Turtle and his allies. They each wondered if the outcome would have been different if Turtle had accepted the offer of help from either or both of them. But the main reason that Bear dropped by the campfire that morning was that he wanted to tell Wolf about one of his recent dreams.

“The night before last,” Bear said, “I woke up in the middle of the night and just couldn't get back to sleep. I had the most disturbing dream. I dreamed about **Turtle's war party**, and it was just like I was there, but the strange thing was that those people who call themselves the Haudenosaunee were nowhere to be seen. Where they used to live in their village there were huge buildings and pathways made of stone, and though I think that only human beings could have built a village like that, I didn't see any anywhere. Except that there were these big colored shells that looked something like huge turtles sliding around on the stone pathways, and inside of the shells there were some pale creatures that might have been human beings.”

“And the really disturbing thing about this dream,” Bear continued, “was that when I wandered around in the woods outside the village I didn't see any sign that there were any bears anywhere. Then an owl landed on a tree right in front of me and told me that there hadn't been any bears around there for a long, long time.”

“That is very peculiar indeed,” said Wolf, “for I, myself, had what seemed to have been the same dream on the same night. Only in my dream the owl told me that there were not any wolves around. He also told me that the human beings had made a law to protect wolves and other kinds of animals, a law called the ‘Endangered Species Act.’ But he told me that none of the human beings seriously considered the possibility that one day the wolves might come back to this part of Turtle Island.”

Then Bear thought of something. “I think that it might not have been such a good idea for Turtle to declare war on the Haudenosaunee,” he said. “It's true that they kill a few of our kind, and that they also kill the same kinds of animals that we kill for our food. But they do respect and honor us. They don't take so much from the world that things get out of balance. [FN26] They ***471** don't take so much that our kind can no longer share the world with them.”

Wolf was thinking along the same lines. “You know,” he said, “there could be different kinds of human beings in the world. This kind that we have around here now might be easier for us to live with than some other kinds of human beings. These ones that we have around here now at least seem to know how to get along with the animals and plants of the world, and with the spirits of the mountains and the rivers and the other kinds of sacred places.”

REINTERPRETING THE ALLEGORY

Maybe I was mistaken to suggest that Bear and Wolf represent the big environmental groups. Another interpretation might be that they stand for Indian tribal governments. In this interpretation, Turtle might be a grassroots Indian environmental group, and Skunk and Rattlesnake might stand for a grassroots non-Indian environmental group and one of the major groups, respectively. This interpretation would help to bring out one of the key differences between Indian tribes and other “communities of color” whose interests are championed under the banner of Environmental Justice. Indian tribes are sovereign governments. Unlike other communities of color, Indian tribes have the power to make and enforce their own laws. Tribes have this power because they were here when the Europeans first set foot in North America, because the sovereigns of Europe interacted with them based on the premise that the tribes did possess sovereignty, and because, although the European sovereigns and later the United States succeeded in acquiring from the tribes the legal title to most of the land in the United States, they did so in a way that recognized that tribes retained for themselves both the lands that they did not give up and the right to exercise governmental authority over those lands.

Because of the status of tribes as sovereign governments that are subject to the plenary power of Congress, the Supreme Court has ruled that it is constitutionally permissible for Congress to enact laws that result in differential treatment of Indians. For ***472** example, in upholding Indian preference for employment and advancement in the Bureau of Indian Affairs, the Supreme Court characterized the preference as one based on a classification that is “political rather than racial in nature.” [FN27] Of course, while this kind of reasoning works to the benefit of Indians and tribes in some cases it also may seem to work to their detriment in other cases. [FN28] Either way, that differential treatment of Indians in federal law is constitutionally permissible is a significant difference between Indians and other “communities of color” that comprise the environmental justice movement.

As noted earlier, many of the major federal environmental statutes include provisions relating to Indian tribes. [FN29] Most of these provisions were enacted within the last decade. The general approach is to authorize tribes to be treated in the same manner as states. Since most of the major federal environmental statutes are carried out through a partnership between the federal government and the states, and since tribes are the third kind of sovereign in our federal system, it makes sense that tribes should have the option of taking on roles like those performed by the states.

That tribes may do this makes tribes fundamentally different from the other kinds of minority communities that are involved in the environmental justice movement. As an Indian lawyer, I think this is a really big deal. And I think that it is a major omission that the book Unequal Protection does not include a chapter that explains this. The chapter written by Deeohn Ferris does a fine job of noting the need for an equitable redistribution of EPA's resources to help tribes build their programs, [FN30] but it struck me that the treatment in her chapter assumed a certain ***473** level of understanding about the legal status of the tribes. There is nothing elsewhere in the book, however, to provide readers with the information on which to build the requisite understanding.

[FN31]

Why do we need two different animals to stand for the tribes? There are many different kinds of animals in the world, and many differences among the tribes. Some have more power in fact than others. Many tribes will take on some or many of the kinds of roles that state governments perform in carrying out federal environmental laws. Many other tribes, however, most likely will not, or they will take quite a bit longer to take on such duties. For some of the smaller tribes the notion of being treated like a state may seem like some kind of impossible dream (or perhaps even a cruel hoax). In light of the differences among the tribes, it makes sense to use at least two different kinds of animals to represent tribal governments in this allegory. Using two different kinds of animals is my metaphorical way of asking readers to be cautious in making generalizations about tribal governments based on what they know about any one particular tribe.

WASTE MANAGEMENT AND DISPOSAL IN INDIAN COUNTRY

Since many of the specific struggles that collectively comprise the environmental justice movement have arisen in the context of waste disposal facilities, those readers who consider themselves ***474** part of the movement may find it helpful to have at least a brief explanation of how the relevant federal law applies within Indian country. [FN32] The Resource Conservation and Recovery Act (RCRA) [FN33] is the federal statute that establishes the framework for regulating municipal solid waste and hazardous waste. By looking at how RCRA applies in Indian country, I think we can see that waste disposal in Indian country really is an environmental justice issue. We also can see that the biggest part of this problem has been largely overlooked, even by environmental justice advocates.

In enacting RCRA, Congress charted one regulatory approach for dealing with hazardous wastes and a different approach for dealing with municipal solid wastes. [FN34] Subtitle C of RCRA [FN35] establishes a comprehensive federal program to regulate transportation, handling and disposal of hazardous wastes. [FN36] EPA administers the hazardous waste program directly, but it can be ***475** delegated to states. [FN37] EPA has broad enforcement powers, [FN38] and, even for states that have been delegated authority, EPA retains substantial authority over their programs. [FN39]

In contrast to the federal program for hazardous wastes, subtitle D of RCRA [FN40] charges the states with the lead role in regulating municipal solid waste. EPA does not administer a federal permit program. Rather, RCRA charges states with developing solid waste plans in accordance with federal guidelines [FN41] and EPA has provided financial assistance to states for developing their plans. [FN42] While states have long had the lead role for developing standards for disposal practices and for enforcement, EPA has recently issued federal standards for municipal solid waste landfills. [FN43] Facilities that are covered by these standards but that do not comply with them are considered to be “open dumps,” [FN44] and RCRA prohibits open dumps. [FN45] Violators may be subject to citizens suits. [FN46] EPA itself, however, lacks enforcement authority except in situations in which there is an imminent hazard to health or the environment [FN47] or in states in which there is no approved state permit program. [FN48]

Both the hazardous waste part of this statutory scheme and the municipal solid waste part have been held to apply in Indian country. [FN49] Since EPA administers the hazardous waste program directly unless a state has been delegated authority, and since states generally lack authority over Indian lands, proposals to locate hazardous waste facilities on Indian lands are subject to regulation by EPA. With respect to the municipal solid waste part of the scheme, there are major practical problems, since EPA ***476** lacks the statutory mandate to administer

a program directly and lacks the staff resources even if it did have the mandate. RCRA is also one of the few remaining major federal environmental statutes that has not yet been amended to expressly authorize treating tribes as states. [FN50] One implication of this is that tribes generally have not been able to tap into financial assistance from EPA to set up their own programs.

So, that is the nature of the regulatory void in Indian country when it comes to dealing with municipal solid waste. When limited to this context, the statement that Indian reservations are "lands the feds forgot" [FN51] does have the ring of truth. When proposals come from outside of an Indian reservation, whether from a commercial waste merchant or from a consortium of nearby or far off municipalities (representing the citizens of the larger American society), if the tribal government has not established a regulatory program under tribal law, the only government action required for such a proposal to proceed may be the approval of a land transaction by the Bureau of Indian Affairs. In such a case, the environmental review will take place in the context of an environmental assessment or environmental impact statement prepared in order to comply with the National Environmental Policy Act (NEPA). [FN52] Of course, the members of a tribe considering such a proposal may reach a decision using a formal or informal procedure that may make use of the NEPA process or that may be entirely separate.

***477** It could just be my perception, and I admit that I have not done any kind of systematic empirical analysis, but it seems to me that the media, including the environmental group media and the statements of environmental justice advocates that have found their way into the media, have given a great deal of attention to the problem of waste merchants (and municipalities) trying to peddle their wares in Indian country.

This great deal of attention given to proposals for Indian reservations to become dumping grounds should be contrasted with the lack of attention that has been given to the problem of how to clean up the hundreds of open dumps that currently exist in Indian country. [FN53] Many of these open dumps were originally operated by the Indian Health Service (IHS) and then transferred to a tribe for operation, and, while they may have initially complied with federal standards, most do not comply with EPA's new standards for landfills. [FN54] IHS has estimated that the amount of funding needed to deal with this problem is at least $144 million. [FN55] A number of tribes have begun to deal with this problem by developing comprehensive solid waste management plans, and they have done so largely without federal financial or technical assistance. [FN56]

The problems relating to the disposal of municipal solid waste in Indian country really cannot wait for Congress to amend ***478** RCRA. Fortunately, Congress recently enacted free-standing legislation to begin to deal with this problem without amending RCRA, the Indian Lands Open Dump Cleanup Act of 1994. [FN57] Among its provisions, this Act directs IHS to prepare an inventory of open dumps on Indian lands and to submit an annual report to Congress on priorities and funding needs for dealing with this problem.

In addition, without waiting for Congress to amend RCRA, EPA has decided to take administrative action to treat tribes like states. EPA has announced its intention to issue rules which would authorize tribes to apply to EPA for approval of municipal solid waste landfill regulatory programs. [FN58]

Even before the issuance of proposed rules by EPA, two tribes have stepped forward to administer programs to regulate municipal solid waste on their reservations, and EPA has given notice that it intends to approve these two tribal programs. [FN59] In explaining its tentative decision to approve these tribal programs, EPA has said that while the agency will consider applications from tribes on a case-by-case basis, it has taken the position that tribes "are likely to possess sufficient inherent authority" to regulate solid waste management within their reser-

vations, including regulating the activities of non-Indians on fee lands within reservation boundaries. [FN60]

Some readers may be thinking that this is not an "environmental justice" issue. They might suggest that environmental justice means that communities of color should not be forced to accept the wastes of other, more politically powerful, communities, but that the term is not appropriate when speaking of a community's efforts to deal with its own waste. But I think this is an environmental justice issue. It is such a problem now because Congress really did not deal with Indian country in 1976 when it enacted RCRA. It has remained a problem in large part because most people in the larger society, including the big environmental groups, do not seem to care much about mundane environmental ***479** problems in Indian country and really do not understand the status of tribal governments in our federal system. To the credit of congressional leadership in both the House Natural Resources Committee and the Senate Committee on Indian Affairs, Congress has finally enacted legislation to begin to deal with this problem. A number of tribes worked for the enactment of this legislation. The environmental movement and the environmental justice movement were conspicuously absent. I hope that they will not be absent when we go back to Congress for appropriations to carry out the Indian Lands Open Dump Cleanup Act and to enact appropriate tribal amendments to RCRA.

COYOTE VISITS THE CAMPFIRE

As Bear and Wolf carried on with their conversation around Wolf's campfire, they heard the cry of a songdog in the distance. To Wolf's ears it was a song at once strange and familiar. He knew it was not the song of another wolf, yet he knew he had something in common with the animal that was making that song. After some time, it might have been around midnight, the singer walked into camp. It was Coyote. Now, neither Bear nor Wolf had ever seen Coyote before, but they had heard some stories. At the time of **Turtle's war party**, that part of North America was outside of Coyote's home territory. But the human beings had heard stories about Coyote from other nations of human beings, and, of course, the animals had heard most of the stories that the human beings told.

"Welcome, Coyote," Wolf said. "Would you like something to eat? And tell us, please, what brings you to pay a visit on us?"

"Thank you, Cousin, for your hospitality," Coyote said. "I came because I need to tell you about this dream that I keep having." As Coyote began to describe his dream, Bear and Wolf realized that it was quite similar to the dream that each of them had had, and so they told Coyote about their dream. Coyote said that he knew about their dream and that, in fact, it was because of their dream that Coyote had felt compelled to journey to their part of the world.

"In my dream," Coyote said, "I did not see any bears or wolves in this part of the world, which seemed very unusual. But what was stranger still was that there were lots of coyotes around, and as you both know well, there aren't any coyotes around here now, except for me, of course. I'm sure that this dream must ***480** mean something important, so I decided to come and talk it over with the two of you."

ANOTHER LAYER OF INTERPRETATION

As we all know, Coyote is not just another animal. He is a revered figure in the oral traditions of many tribal cultures. [FN61] And he is also something of a trickster. In some tribal traditions, Coyote is given the credit for

bringing many or most forms of living beings into existence, but he's also getting into trouble all the time.

From the perspective of wildlife biology, coyotes are very adaptive and opportunistic. They are not limited to any one ecological niche or any particular kind of prey animal, but, rather, as the populations of other predators have been decimated, coyotes have been able to expand their range. Personally, I find wolves to be a more admirable predator, because I find their social organization most impressive. But in most of the lower forty-eight states, wolves were just not able to withstand the onslaught of the Euro-Americans. In many areas, coyotes have moved in to fill the voids, and I, for one, think they have earned the right to a measure of respect from human populations.

If Wolf and Bear stand for the tribes, then I want to suggest that Coyote stands for the states and their political subdivisions. I will admit that the symbolism is not a perfect fit, but there are some significant areas of convergence. As the territorial domains of the tribes were drastically reduced throughout the nineteenth century, state governments (like coyotes moving in to fill the ecological niches left open by the decimation of wolves) were formed to fill a void in an otherwise lawless frontier.

From reading some of the literature of the environmental justice movement, Coyote of Indian oral traditions bears another resemblance to state and local governments of today - one should be careful when dealing with Coyote. This is one reason I think Coyote makes a good symbol. Environmental justice advocates do not convey much of a sense of trust in state and local governments, but rather the sense that they convey is one of disenfranchisement. [FN62] ***481** My impression is that this is one of the basic themes of the environmental justice movement - state and local governments in a number of cases have run roughshod over the interests of communities of color, and these communities now demand political empowerment. [FN63] Robert Bullard writes that grass-roots leaders in the environmental justice movement "want participatory democracy to work for them." [FN64] Indeed, some of the success stories to date are examples of participatory democracy working [FN65] (or at least public outrage stopping the formal ***482** trappings of representative government from carrying on in a business-as-usual fashion). Regardless of this stated aspiration, suspicion of government is an attitude that is shared by many environmental justice advocates.

Like Coyote, a state government is a powerful being, and one should be wary of placing too much trust in it. So I think that Coyote is an appropriate image, at least for purposes of this essay. I recognize that there is a great deal of variation among the states, and that, while Coyote might be an appropriate symbol for some states and for some local governments, other states and local governments are not like that at all. But remember, please, that Coyote is quite capable of changing his outward appearance to suit his purposes. [FN66]

Wolves and coyotes, of course, are different kinds of animals. Environmental justice advocates should be cautious in extrapolating from their experiences with state and local governments to situations involving tribal governments. With grass-roots suspicion of government as a background, I feel compelled to say that in my admittedly less-than-comprehensive reading of the environmental justice literature I have noticed scarcely any attention at all given to the National Tribal Environmental Council (NTEC), a national organization comprised of tribal governments. [FN67]

Perhaps NTEC is just too new to have attracted much attention. On the other hand, perhaps those who write about the environmental justice movement are a little too suspicious of government to grasp the potential significance of an organization comprised of tribal governments. Given the enormous challenges that tribes face in becoming effective environmental regulators, any number of important functions could be performed by an in-

tertribal organization focused on helping tribes build their programs in accordance with tribally defined priorities.

***483** Elsewhere I have suggested some of the ways in which the big environmental groups might help tribal governments to build environmental programs, [FN68] and no doubt there are ways in which some of the individuals and groups that comprise the environmental justice movement could help tribes build their programs, but those who would help tribes must begin with an understanding that tribes are governments. Prospective helpers who come with a generalized attitude of suspicion toward government may find that tribes would rather do without their help.

For my fellow partisans in the ongoing struggle to carry on tribal self-government, let me say that there is something of a converse to this principle which also holds some truth - the simple fact that tribal governments are different from the states is not a sufficient reason for tribal governments not to be responsive to the concerns of those who are subject to tribal jurisdiction, whether they be tribal members, nonmember Indians or non-Indians. In a very important sense sovereignty is a social compact through which people vest authority in their governments, and, although a social compact that reflects Indian values might differ in some significant ways from the social compact embodied in the U.S. Constitution, [FN69] the exercise of sovereignty by tribal governments must be founded on responsiveness to the will of the governed.

One very significant difference between tribes and states has to do with culture and religion. In most of the federal environmental statutes, the term “Indian tribe” is used to describe a governmental entity constituted by tribal members to exercise sovereignty within reservation boundaries and over other lands that are subject to tribal jurisdiction. And in this sense tribes are similar to states. But tribes are more than this. They are also the present-day aggregations of individuals, families and clans that make up living cultures that have very deep roots in North America. To a large extent these roots are religious in nature. [FN70]

Many places in North America are sacred to Indian people, and many kinds of wildlife and plants also have religious significance. Many individual Indians have ongoing religious obligations***484** with respect to sacred places, and many of these places are outside the current boundaries of reservations, many on public lands owned by the federal government. In a 1988 case, [FN71] the U.S. Supreme Court held that when a federal agency decides to carry out a project that would destroy sacred places on public lands, and would “virtually destroy” the tribal religion, [FN72] the right to freedom of religion in the First Amendment does not even require the federal agency to show that it has a compelling governmental interest in proceeding with its project.

Over the last several years, a broad coalition of Indian tribes and organizations, with support from environmental groups, civil rights groups and mainstream religious groups, has been working toward the enactment of legislation to protect places that have religious importance for Indian tribes. [FN73] The need to enact such legislation strikes me as an environmental justice issue, but I do not recall this issue being discussed in the environmental justice literature. [FN74] While I ponder the implications of this, perhaps readers would prefer to return to the scene of Wolf's campfire.

***485** EAGLES IN THE DAWN'S EARLY LIGHT

Wolf, Bear and Coyote talked and talked, and, as the sky was beginning to grow light and the morning star was shining in the eastern sky above the sliver of the new moon, they noticed a pair of Eagles circling above the river flowing beside Wolf's campsite. Before they knew it, the Eagle pair flew into camp. After exchanging

greetings, the Eagles revealed that they too had experienced their own version of the same frightening dream. The She Eagle spoke first.

"In our dream," she said, "we watched as the newcomers swept across the land, and we saw how they caused disruptions in the natural world. At first we felt a certain honor when the newcomers adopted the image of our kind as the symbol of their new nation. They formed a system of government in which the power of the government was said to be based on the will of the people and in which each human being was said to have certain rights that the government could not take away. In their system there were two different levels of government, one at the local level that they called "states" and one at the national level, which was a kind of federation of the states. They called their nation the United States, and their system of government became a model for the whole world of human nations. Since they used the image of our kind as their symbol, we thought they might not be so different from the human beings who are here now, these ones who use our feathers in their religious ceremonies. But then in our dream we watched them as they pushed our kind to the brink of extinction. They did pass some laws to protect our kind and other kinds of animals that they call "endangered species," including wolves and Bear's western cousins, the grizzlies. We formed the impression, however, that these new human beings considered themselves to be superior to nonhuman living beings, and they definitely tried to keep their communities separate from the natural world."

Then her mate described what they had seen in their dream of the dealings between the newcomers and the original human beings. "There were many battles along the shifting frontier," he said, "and while sometimes the Indian tribes, as the newcomers called the original people, held their own, ultimately, there were ***486** just too many of the newcomers, and they had more powerful weapons, too. But they didn't carry all their battles through until one side had won and the other lost. Rather, a lot of times they worked out agreements that they called "treaties," and under these treaties the original human beings retained the right to carry on their own nations, but to keep this right they had to give up their rights to most of the land. In these treaties, the United States-the national government-promised to protect the rights of the Indian tribes to carry on self-government within the territories that they had reserved to themselves. So, you see, although most of the newcomers thought that there were two levels of government in their nation, in reality there were three-the national government, the states, and the Indian tribes."

"But the promises were broken much more often than they were honored," said the She Eagle. "The national government was split into three different branches: one branch, called the 'Congress,' to make the laws; another branch, called the 'executive,' to carry them out, and a third, called the 'courts,' to interpret the laws. Sometimes Congress passed laws that were generally consistent with the promises that had been made in the treaties, and sometimes it passed laws that broke those promises. The courts said that the Congress had the power to break those promises, but that, unless there was a clear indication that Congress meant to break promises, the executive should act to carry out those promises. Sometimes Congress and the executive did everything they could think of to get the Indians to change their ways of life, to stop being Indians. The courts said that was all right, Congress had that power. Eventually, Congress and the executive branch realized that Indians were not going to stop being Indians, and they made some laws that set up a framework for tribes to carry on governing what remained of their homelands with the stamp of approval under the laws of the national government. But that didn't settle things, because then the courts turned on the tribes and made some new rules, based on repudiated national laws, that resulted in taking away some of the powers of the tribes to govern their homelands. Since the courts still defer to the power of Congress, however, some of the problems resulting from those new rules could be fixed if more human beings outside Indian communities knew more about the situation, and if more human beings came to believe that it is ***487** important to all kinds of beings for these Indian communities to be able to

carry on their ways of life."

SO WHAT DOES THIS MEAN?

The pair of Eagles must stand for the federal government, the United States of America. I think that one stands for the supremacy of the federal government over the states in governing relations with the Indian tribes. The other Eagle stands for the federal trust responsibility to the Indian tribes. [FN75] The trust responsibility is based in part on the fiduciary obligations of the federal government for lands and other resources held in trust for Indian tribes, but an underlying purpose of the trust responsibility is to protect the right of tribes to carry on self-government. [FN76]

Some readers may be thinking that these notions of federal supremacy and the trust responsibility seem to be imbedded in history. They may wonder what the point could be in bringing up history in an essay about the very contemporary issue of environmental justice. The point is that the larger society just does not seem to know much of the details of the history of Indian tribes and the way that tribes have been treated by the federal government. Indian tribes have suffered as a result of this ignorance, especially in the Supreme Court in recent years. [FN77]

Given the judicial doctrine of deference to the plenary power of Congress, tribes have the opportunity to hold off further damage at the hands of the Supreme Court if Congress can be persuaded to act with some degree of honor in its dealings with the tribes. I believe that the recent amendments to many of the major environmental laws authorizing tribes to be treated in the same manner as states are examples of congressional steps in the right direction. Although it has been a rather drawn out process, ***488** the EPA has taken quite a few important steps toward carrying out the statutory amendments, including issuing most of the necessary implementing regulations. But other steps need to be taken as well. We need more provisions in the statutes to help tribes assume roles like those of the states, and we need some special provisions to provide an express mandate for EPA to carry out the federal trust responsibility where tribes have not yet assumed roles like those of states and to cover the many specific environmental programs (and the many reservations) for which it is simply unrealistic to think that tribes will be carrying out anything like the full range of state program responsibilities any time soon.

As some of the tribes step forward and actually carry out environmental regulatory programs, tribal provisions in pending legislation increasingly attract attention from those who might prefer that Congress set limits on the authority of the tribes and from those who are not fully supportive of the EPA's Indian policy. [FN78] In this atmosphere tribes really could use some allies in ***489** persuading Congress to support tribal sovereignty and to faithfully carry out the federal trust responsibility.

Different lines of reasoning can be advanced when calling on Congress to do the right thing. One could make an ethical argument stressing the importance of a great nation keeping its word to the dependent peoples who gave up vast tracts of land in exchange for the promise of a right to remain autonomous self-governing communities. One could argue that if the larger American society has learned any lesson at all from its history of relations with Indian tribes, that lesson should be that Indians will not stop being Indians, that federal policies to force Indians to become assimilated have tragic consequences, and that, therefore,***490** the larger society ought to insist that Congress remain committed to the policy of Indian self-determination.

Additionally, one might stress the importance of Indian self-government in the United States as one model in the global campaign for the recognition of the human rights of indigenous peoples. One might even argue that

the larger society, for its own good, needs to create mechanisms for bringing the nature wisdom of tribal cultures to bear on environmental problems.

Making these arguments requires some understanding of history if they are to be advanced effectively. Unfortunately, examples of lack of knowledge of history, or of significant gaps in knowledge, on the part of environmental justice advocates are all too common. The abundance of such examples makes me wary of calling on environmental justice advocates to support a Congressional agenda that will serve the interests of tribes. Let's consider an example, again from the book UNEQUAL JUSTICE. The chapter by Kathy Hall, entitled "Impacts of the Energy Industry on the Navajo and Hopi," [FN79] contains the following statements:

> A complete restructuring of all Native American reservations was initiated under the auspices of the Tribal [sic] Reorganization Act of 1934. Reservations nationwide were offered "some control of their own affairs and the right to own land communally" if a tribal council and tribal structure were set up. After the 1934 reorganization act, traditional Native American political systems and decision making went unacknowledged by the United States government.
>
> Tribal council systems became the only federally recognized legitimate representatives of Native American policy and transactions.
>
> ***
>
> While the U.S. government and international corporations recognize tribal councils as the legitimate and only representatives of Native American people, many reservation residents do not and have not from the beginning. [FN80]

These statements contain some elements of truth, but as sweeping generalizations they go too far, and their implications are dangerous and counterproductive. The Department of the Interior did take a heavy-handed approach in carrying out the ***491** Indian Reorganization Act (IRA) of 1934. [FN81] The quoted passage implies that the only tribal governments that the federal government recognizes are those that have IRA constitutions. In fact, the federal government recognizes many tribal governments that do not have IRA constitutions, and the Supreme Court has held that inherent tribal sovereignty does not depend upon a tribe having adopted an IRA constitution. [FN82]

There is also a substantial amount of truth in the statement that after 1934 (during the early years of implementing the IRA) the federal government did not pay much heed to traditional tribal decision making processes and governmental systems. [FN83] On the other hand, many tribes that have IRA constitutions continue to use more or less informal cultural mechanisms to assert control over their elected leadership. [FN84] In the current era of federal Indian policy, the members of tribes that have IRA constitutions or other formal governing documents have the right and the power to change their constitutive documents to better reflect tribal cultural values and traditional governmental processes. [FN85] Ultimately, whether or not the federally recognized governing body of a reservation serves the interests of tribal members is a matter for the tribal membership to determine. [FN86]

***492** I am not really sure just what point Kathy Hall is trying to make, but the way I read it, she seems to be questioning the legitimacy of all federally recognized tribal governments. I find this frightening, and, as a member of the Sierra Club, I find it disturbing to read these statements in a Sierra Club Books publication. Whatever else environmental justice means, in Indian country the concept must include recognition that tribes need a lot more federal assistance to build effective environmental regulatory programs. [FN87] When I go to Congress as part of a delegation seeking tribal amendments to RCRA, or refinements in the existing tribal provisions of other federal environmental laws, or increased funding for environmental grant programs to tribes, the idea that maybe

tribal governments are not legitimate is a point of view that I really do not want to hear voiced.

But the attack on the IRA in Kathy Hall's chapter should be seen as well in light of the omission of any discussion of the historical events that led up to the enactment of the IRA - the half century of concerted federal efforts to destroy tribal cultures during the allotment era of federal Indian policy. [FN88] I do not want this to be taken as an unqualified endorsement of the IRA, but I think that anyone who attacks the IRA should begin by acknowledging that it did put an end to the allotment policy. [FN89] For tribes ***493** that lost substantial amounts of land during the allotment era, [FN90] the damages done to tribal cultures and governmental structures tended to be severe. After all, as the Supreme Court has said, “an avowed purpose of the allotment policy was the ultimate destruction of tribal government.” [FN91] Some tribes weathered this assault on their traditional governmental institutions better than others, but, for some tribes, by 1934 there was precious little remaining of traditional government.

Although the policy of the allotment era has long since been repudiated, the legacy of the allotment era continues. A thorough discussion of this subject is beyond the scope of this essay, but I strongly recommend that environmental justice advocates who become engaged in Indian country controversies invest some effort to educate themselves.

I think that one good way to pursue such an education would be to work on building alliances with tribes to use the National Historic Preservation Act to provide some degree of protection for places outside of reservation boundaries that have religious or cultural importance for Indians. [FN92] While such traditional cultural properties are important to Indians for religious and cultural purposes, they may be eligible for the National Register because of their historic significance. Using this law to help specific tribes protect places in the natural world would help environmental justice activists learn some history.

One aspect of this legacy of the allotment era that I find particularly disturbing is that the Supreme Court has ruled that, through implicit divestiture, the inherent sovereignty of tribal governments over non-Indians on non-Indian lands within reservation boundaries is limited to situations in which: (1) the non-***494** Indians have entered into consensual relations with the tribe or its members; or (2) “the conduct of non-Indians on fee lands threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” [FN93] As Professor Singer has demonstrated, this is a threshold inquiry that can be stacked against a tribe, especially when the tribe is precluded from using its own governmental institutions to determine whether the threshold has been met. [FN94]

In the midst of explaining how the Supreme Court has confused principles of property law and principles relating to sovereignty, Professor Singer expresses the conclusion that “the conquest of American Indian nations continues, waged by the Supreme Court of the United States.” [FN95] Strong words. But, I think, accurate. Environmental justice advocates should understand that this is what those of us who are partisans of tribal sovereignty and self-determination are up against.

TURTLE HIMSELF MAKES AN APPEARANCE

The sun was just beginning to rise as Turtle himself slowly made his way into Wolf's camp. After exchanging greetings, he said, “My friends, I've been listening to your discussion since early last evening, and I've been thinking real hard about the things that have been said here. I can see now that it was wrong for me to declare war on these human beings with whom we share our land. I think the time will come that we will need them to

protect the natural world for our kinds of beings."

"And another thing," he continued. "The next time I think about organizing a war party, I will seek the counsel of each of you. I realize now that different kinds of animals have different kinds of talents and strengths. After hearing each of you talk about this dream that has haunted us, I feel a fear in my very bones that the time is coming when we will need to form a war party for a battle that will matter more than anything any of us ***495** has ever done before. When that time comes, we will need to make the best use of the talents and strengths of each and every one of us."

A REVELATION AND SOME CLOSING THOUGHTS

Having worked my way through this allegory, I see now that all along I have been wrong about the identity of Turtle. Clearly, I am the Turtle in this allegory. We have much in common. When I admit that I can be rather slow in getting things done, I hope that the real Turtle will not take offense at the comparison. I also admit that, like Turtle in the story, community organizing is not one of my talents; and so I generally let other kinds of animals do that.

But, if I am the Turtle, who or what is the village of human beings supposed to represent? Maybe it is all of us. Maybe it is the way we participate in economic and governmental systems that convert parts of the natural world into resources, consumer products, and waste. It seems to me that we are all caught up in this, and that we all need to do better. If there really is such a thing as "sustainable development," [FN96] and if that is the way to a greener and more equitable economic order, then the environmental justice movement must be about promoting sustainable development as well as stopping unsustainable development.

Whether or not it can be called "sustainable," development is shaped by a mix of private sector economic decisions and governmental policies. Environmental justice activists can pursue sustainable development through nongovernmental means, but I think that the proportion of what is called "development" that can truthfully be called "sustainable" will increase as governments become more proficient in making the market prices of the goods and services produced by "development" more accurately reflect environmental and socioeconomic costs. Thus, I think we need to make our governments more responsive and more effective in doing the kinds of things that only governments can do. These include enforcement of environmental laws and ***496** administration of regulatory programs to prevent violations of these laws.

We also need to remain aware that no matter how responsive and responsible governments are, they reflect the values of their citizens. In late twentieth century America, it seems to me that we need our public policies for environmental protection to better reflect Indian cultural values. If this is going to happen, tribes need to play increasingly prominent roles as the third kind of sovereign in our federal system. The environmental justice movement and the big environmental groups could help this to happen by finding ways to help tribes build their programs.

In closing, I feel that I need to give readers at least some insight into why I chose to let animals do so much of the talking in this story. Wildlife is important for all the tribal cultures of North America, and some of the ways in which wildlife is important seem to distinguish Indians from the other kinds of communities that comprise the environmental justice movement. Some of my readings in the environmental justice literature [FN97] just left me with the feeling that it is important to pay attention to some of our culturally important wildlife relatives.

Let me underscore the cultural importance of some kinds of wildlife with a reference to a short story that recently captured my imagination. The story, with the intriguing title "The Lone Ranger and Tonto Fistfight in Heaven," [FN98] on one level is a story about a love relationship between an Indian man and a white woman, and on another level might be about Indians and Euro-Americans living together in North America. As the story closes, the young Indian man is living in Spokane, wishing that he lived closer to the river where the ghosts of salmon jump the falls on their upstream journey. The ghosts of salmon.

Am I suggesting that environmental justice activists who want to include Indians among their numbers ought to invest some energy in trying to appreciate the significance of ghost salmon? Maybe. Then again I don't really know whether I am someone who belongs in this movement, so who am I to suggest how those ***497** who are in the movement should direct their mental energy? I do know, however, that I am haunted by the image of ghost salmon. One way that I deal with this is to try making that mental image change into a vision of an America that I want for future generations of Indian children; an America that I would like to help bring about. Environmental justice activists who find this vision appealing are welcome to join in this **Turtle's war party**. (But I think I will ask Bear and Wolf to nominate the co-chairs of the strategic planning committee.)

In this vision, human communities have learned how to get along with enough, without always wanting more. Tribal governments are accepted as permanent players in our federal system. Federal agencies help to protect tribal sacred places and other traditional cultural properties on the public lands, and most people in the larger society believe that the broader public interest is served by protecting these places and by ensuring Indian access to them. Tribal governments, states and federal agencies cooperate in managing the habitat of culturally and economically important wildlife populations which do not pay much attention to jurisdictional boundaries.

In this vision, more than the ghosts of salmon are jumping falls throughout the watersheds of the pacific northwest. More than the ghosts of the great herds of buffalo darken the plains like summer thunderclouds darken the sky. More than the ghosts of eagles soar in the skies all across this land. And it is not at all uncommon for human beings to hear the songs of wolves as the full moon rises in the evening sky.

[FNa1]. Of counsel, Hobbs, Straus, Dean & Walker, Washington, D.C. J.D., University of North Carolina, 1976; LL.M., The American University, 1989.

[FN1]. The version of this story used in this essay is "Turtle Makes War on Men," published in JOSEPH BRUCHAC, IROQUOIS STORIES: HEROES AND HEROINES, MONSTERS AND MAGIC 45 (1985). This version of the story was previously published in JOSEPH BRUCHAC, TURKEY BROTHER AND OTHER TALES 26 (1975). A somewhat different version of the story has been published in THE NAKED BEAR: FOLKTALES OF THE IROQUOIS 31 (John Bierhorst ed. 1987). I do not know if one version is more "authentic" than the other, but for purposes of this essay, the Bruchac version works better. My reason for drawing upon the published literature of the Iroquois oral tradition is simply that, as the father of two Mohawk young people, it is a body of literature with which I have acquired some degree of familiarity.

[FN2]. In the Bierhorst version, supra note 1, Rattlesnake and another ally, Porcupine, apparently lost their lives in the attack.

[FN3]. See Dean B. **Suagee**, Self-Determination for Indigenous Peoples at the Dawn of the Solar Age, 25 U. MICH. J. L. REF. 671, 714-30 (1992) (discussion of the concept of economic development).

[FN4]. See Pamela A. D'Angelo, Waste Management Industry Turns to Indian Reservations as States Close Landfills, 21 Env't Rep. (BNA) 1607 (1990); Jane Kay, California's Endangered Communities of Color, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 155 (Robert D. Bullard ed., 1994) (hereinafter UNEQUAL PROTECTION); Dick Russell, Dances with Waste, 13 AMICUS JOURNAL, NO. 4, 28 (Fall 1991).

[FN5]. See, e.g., Gail Small, War Stories: Environmental Justice in Indian Country, 16 AMICUS JOURNAL, NO. 1, 38, 40 (Spring 1994) (noting lack of responses from "white environmental organizations" to requests for help from tribe in resisting coal strip mining).

[FN6]. See generally FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 229-57 (2d ed. 1982); see also ROBERT N. CLINTON ET. AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 311-491 (3d ed. 1991); DAVID H. GETCHES ET. AL., FEDERAL INDIAN LAW: CASES AND MATERIALS 395-550 (3d ed. 1993).

[FN7]. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). Prior to the announcement of the implicit divestiture rule in Oliphant, the legal principle was generally understood as being that the powers of inherent sovereignty were limited only by treaties and by express legislation by Congress. COHEN, supra note 6, at 123 (1982); see also Curtis G. Berkey, International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples, 5 HARV. HUM. RTS. J. 65, 70-71 (1992); Alex Tallchief Skibine, Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions, 66 S. CAL.L.REV. 767, 772-73 (1993); Mary Beth West, Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal Jurisdiction, 17 AM. INDIAN L. REV. 71, 77-79 (1992).

[FN8]. Dean B. **Suagee** & Christopher T. Stearns, Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process, 5 COLO. J. INT'L ENVTL. L. & POL'Y 59, 103 (1994).

[FN9]. See generally S. James Anaya, Indigenous Rights Norms in Contemporary International Law, 8 ARIZ. J. INT'L & COMP. L. 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); **Suagee**, supra note 3; Robert A. Williams, Jr., Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World, 1990 DUKE L.J. 660 (1990).

[FN10]. See CLINTON, supra note 9.

[FN11]. See infra notes 27-31 and accompanying text. For a discussion of how characterizing Indian tribes as minorities has worked to the detriment of tribes, see Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 HARV.L.REV. 381, 424-26 (1993) (arguing that it is wrong to characterize the Indian law canon of construction, i.e., that treaties with tribes and statutes enacted for the benefit of Indians are to be liberally construed with ambiguities resolved in favor of Indian interests, as a canon that is intended to favor a "disadvantaged group" because the Indian law canon is, rather, a quasi-constitutional, structural interpretive rule; arguing also that characterizing the Indian law canon as one that favors disadvantaged groups has contributed to the deflation of the status of the Indian law canon at the hands of the Rehnquist Court, in part because "this Court is hardly interested in generous construction of federal statutes to promote the lot of disadvantaged peoples.").

[FN12]. Robert Bullard, INTRODUCTION, in UNEQUAL PROTECTION, supra note 4, at xv.

[FN13]. Robert Bullard, INTRODUCTION, in UNEQUAL PROTECTION, supra note 4, at xxi.

[FN14]. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991); 111 S.Ct. 905, 909 (1991); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). Please note a slight but significant inaccuracy in Professor Bullard's wording. It is the tribe (a collective human entity) that is the sovereign; the word "reservation" is generally used to describe a tribe's land base or territory.

[FN15]. See generally COHEN, supra note 6, at 259-279; CLINTON ET AL., supra note 6, at 502-86; GETCHES ET AL., supra note 6, at 438-58.

[FN16]. E.g., the article Dances with Waste, supra note 4, notes that a proposed contract for a waste disposal project on the Rosebud Sioux Reservation contained a clause providing that "in no event shall any environmental regulations or standards of the state of South Dakota be applicable to this project." Id. at 29. It is not clear to me whether the intent of the author in noting this contract provision is to suggest that state regulations should apply or whether the author intends for the reader to find this contract provision shocking. I can imagine a scenario in which a tribal government would voluntarily agree, with appropriate terms and conditions, to subject a project within its jurisdiction to state environmental regulations, or perhaps just the substantive standards contained in state regulations, but it is hard to imagine that scenario occurring in a state like South Dakota, which has a record of challenging tribal jurisdiction at every turn.

[FN17]. It is not clear to me why Professor Bullard made the statement that federal environmental regulations are inapplicable in the portion of his introduction discussing Kathy Hall's chapter, because I did not find such an assertion in the chapter. The chapter does contain the statement that an environmental impact statement was not prepared for strip mining on Black Mesa until June 1990, although mining has been going on since the 1960s. Kathy Hall, Impacts of the Energy Industry on the Navajo and Hopi, in UNEQUAL PROTECTION, supra note 4, at 132. Since the mining began in the 1960s, the lease(s) authorizing the mining must have been executed before the enactment of the National Environmental Policy Act (NEPA) of 1969. On the applicability of NEPA to federal actions in Indian country, see Dean B. **Suagee**, The Application of the National Environmental Policy Act to "Development" in Indian Country, 16 AM. INDIAN L. REV. 377 (1991).

Professor Bullard's own chapter in the book UNEQUAL PROTECTION, supra note 4, contains a statement on this point that is somewhat more accurate:

> Because of more stringent state and federal regulations, Native American reservations, from New York to California, have become prime targets for risky technologies. Native American nations are quasi-sovereign and do not fall under state jurisdiction. Similarly, reservations are "lands the feds forgot," and their inhabitants "must contend with some of America's worst pollution."

Robert D. Bullard, Environmental Justice for All, in UNEQUAL PROTECTION, supra note 4, at 16-17 (quoting Robert Tomsho, Dumping Grounds: Indian Tribes Contend with Some of the Worst of America's Pollution, WALL ST. J., November 19, 1990, at A1.) Although the first sentence of the quoted passage wrongly suggests that federal regulations do not apply in Indian country, at least the second sentence is accurate. Regarding the first clause of the third sentence, i.e., that reservations are "lands the feds forgot," see infra notes 49-56, and accompanying text.

[FN18]. See generally COHEN, supra note 6, at 207-16. By acknowledging this principle of federal Indian law I do not want to be understood as endorsing it as good law or good policy, or even as having any basis in the U.S.

Constitution. See Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations, 132 U. PA. L. REV. 195, 213-14 (1984) (demonstrating the lack of a constitutional basis for the Supreme Court's decision in U.S. v. Kagama, 118 U.S. 375 (1886), in which the Court upheld the constitutionality of the Major Crimes Act, 23 Stat. 385). On the other hand, one can find something of a silver lining in the cloud of the plenary power of Congress. For example, Professor Richard Collins has suggested that the plenary power of Congress provides tribes with a response to those who challenge the governmental authority of tribal governments over non-Indians on the ground that non-Indians do not have the right to vote in tribal elections-non-Indians are represented in Congress. Richard B. Collins, Indian Consent to American Government, 31 ARIZ.L.REV. 365, 386 (1989). Thus the plenary power of Congress does provide a logical response to this complaint made by non-Indians, but this, of course, does not mean that Congress is beyond criticism in exercising its plenary power in response to concerns raised by non-Indians. See note 78 infra.

[FN19]. See United States v. Dion, 476 U.S. 734, 745 (1986) (Eagle Protection Act abrogates treaty right to hunt eagles); Equal Employment Opportunity Comm'n v. Cherokee Nation, 871 F.2d 937, 938 (10th Cir.1989) (Age Discrimination in Employment Act does not apply to Indian tribes because its enforcement would interfere with treaty-protected right of self-government); Phillips Petroleum Co. v. U.S. Envtl. Protection Agency, 803 F.2d 545, 555 (10th Cir.1986) (Safe Drinking Water Act does apply to Indian lands); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1117 (9th Cir.1985) (Occupational Safety and Health Act does apply to commercial activities of tribal farm; no treaty and no interference with right of self-government); Donovan v. Navajo Forest Products Industries, 692 F.2d 709 (10th Cir.1982) (Occupational Health and Safety Act does not apply to tribal business because the application would violate treaty promises of self-government). See generally Alex Tallchief Skibine, Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians, 25 U.C. DAVIS L. REV. 85 (1991); see also CLINTON ET AL., supra note 6, at 229-30.

[FN20]. 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) (Supp. II 1990) (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 Envtl. L. R. (Envtl. L. Inst.) 10579 (Oct. 1993) (discussing federal environmental statutes that provide for Indian tribes to be treated as states and summarizing implementing regulations promulgated by Environmental Protection Agency); Judith V. Royster & Rory SnowArrow Fausett, Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion, 64 WASH.L.REV. 581 (1989) (discussing disputes over environmental regulation on Indian lands); **Suagee** & Stearns, supra note 8, at 81-84.

[FN21]. See generally Coursen, supra note 20; see also **Suagee** & Stearns, supra note 8, at 81 n.91.

[FN22]. Robert D. Bullard, Environmental Justice for All, in UNEQUAL PROTECTION, supra note 4, at 16-17. If we count the beginning of the modern era of federal environmental law from the enactment of the National Environmental Policy Act of 1969, Pub. L. No. 91-190 (codified as amended at 42 U.S.C. §§ 4321-4370c) (1988 & Supp. III (1991)), then it is generally accurate to say that EPA devoted little attention to Indian reservations until well into the second decade of the modern era. One significant exception to this pattern of neglect was the early recognition of tribal governments as the appropriate level of government for the redesignation of area quality classifications under the prevention of significant deterioration provisions of the Clean Air Act. See Nance v.

EPA, 645 F.2d 701 (9th Cir.1981), cert. denied, 454 U.S. 1081 (1981).

[FN23]. ENVIRONMENTAL PROTECTION AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS at 2 (Nov. 8, 1984). In addition, 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 a Memorandum from William K. Reilly, EPA Administrator, to Assistant Administrators, General Counsel, Inspector General, Regional Administrators, Associate Administrators, and Staff Office Directors (July 10, 1991), reaffirming the 1984 policy. More recently, current EPA Administrator Carol M. Browner distributed a document captioned Tribal Operations Action Memorandum, under cover of a memorandum captioned Announcement of Actions for Strengthening EPA's Tribal Operations (July 14, 1994) (the Browner and Reilly documents are on file with author).

[FN24]. See supra note 20.

[FN25]. See infra note 87 and accompanying text.

[FN26]. See J. Baird Callicott, American Indian Land Wisdom, in THE STRUGGLE FOR THE LAND: INDIGENOUS INSIGHT AND THE INDUSTRIAL EMPIRE IN THE SEMIARID WORLD 255 (Paul A. Olson, ed., 1990) (critiquing various claims that traditional Indian tribal cultures either did or did not carry on some kind of "land wisdom" and concluding that an examination of the oral tradition of some tribal cultures indicates that they did). See also infra notes 70-74 and accompanying text.

[FN27]. Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974). See David C. Williams, The Borders of the Equal Protection Clause: Indians as Peoples, 38 UCLA L. REV. 759 (1991); Carole Goldberg-Ambrose, Not "Strictly" Racial: A Response to "Indians as Peoples", 39 UCLA L. REV. 169 (1991); David C. Williams, Sometimes Suspect: A Response to Professor Goldberg-Ambrose, 39 UCLA L. REV. 191 (1991).

[FN28]. See Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 501 (1979) (rejecting the Tribes' argument that state laws, enacted pursuant to federal law, treating Indians differently were based on racial classifications that were suspect and that could be upheld only if justified by a compelling state interest). In light of this holding, one of the arrows in the quiver of environmental justice litigators, Title VI of the Civil Rights Act of 1964 (codified at 42 U.S.C. § 2000d (1988), may be of limited relevance for Indian country.

[FN29]. See supra note 20.

[FN30]. Deeohn Ferris, A Call for Justice and Equal Environmental Protection, in UNEQUAL PROTECTION, supra note 4, at 303-04.

[FN31]. The chapter by Regina Austin and Michael Schill, Black, Brown, Red, and Poisoned, in UNEQUAL PROTECTION, supra note 4, at 53, includes two paragraphs on Indian experiences with proposed waste facilities, but, while it cites two examples in which Indian people used their tribal governments to stop proposals, it does not mention the concepts of tribal sovereignty and self-government. Austin & Schill, in UNEQUAL PROTECTION, supra note 4, at 62-63. The chapter by Jane Kay, California's Endangered Communities of Color, includes a lengthy section, captioned "Toxic Wastes and Native Lands," which mentions a number of proposed waste projects, some involving toxics and some not, some in California and some not. UNEQUAL PROTECTION, supra note 4, at 155. The author uses the term sovereignty in referring to tribes but does not attempt to

explain the legal framework, except for a few passing statements such as: “State environmental laws do not apply to Native American lands, and the U.S. Environmental Protection Agency admits that its laws are weaker than many state laws and that it cannot oversee all projects.” UNEQUAL PROTECTION, supra note 4, at 182. Another recent Sierra Club Books addition to the environmental justice literature, JIM SCHWAB, DARKER SHADES OF GREEN: THE RISE OF BLUE-COLLAR AND MINORITY ENVIRONMENTALISM IN AMERICA (1994), includes an informative and well-documented chapter covering a range of environmental issues in Indian country, but does not include any treatment at all of the amendments to the major federal environmental statutes authorizing tribes to take on roles like those of the states. Id. at 321-82.

[FN32]. For a more detailed treatment, see Jana L. Walker & Kevin Gover, Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands, 10 YALE J. REG. 229, 237-39 (1993); Catherine Baker Stetson & Kevin Gover, CERCLA Liability and Regulation of Solid and Hazardous Waste on Indian Lands, 7 NATURAL RESOURCES & ENVIRONMENT, no. 4, 24 (Spring 1993). In addition to hazardous waste and solid waste, RCRA also establishes a regulatory program for underground storage tanks. 42 U.S.C. §§ 6991-6991i (1988). Underground storage tanks have caused serious problems on many reservations, and the program under RCRA has proven to be largely ineffective for dealing with these problems. This subject, however, is beyond the scope of this essay.

[FN33]. 42 U.S.C. §§ 6901-6992k (1988). RCRA is also known as the Solid Waste Disposal Act (SWDA).

[FN34]. Some environmental justice writers appear to have missed the significance of the distinction between hazardous waste and solid waste for purposes of federal law. See, e.g., Kay, in Unequal Protection, supra note 4, which contains the following statement: “On the Mexican border, the tribal governments of the Campo and La Posta Native American reservations have agreed to the siting of a multimillion dollar garbage dump and a hazardous waste incinerator on their lands.” Kay in UNEQUAL PROTECTION, supra note 4, at 177. Such misstatements may contribute to misunderstandings about the regulatory regime under federal law. In addition, the sloppy wording in this example may create the wrong impression that the Campo Band's proposal involves hazardous waste. On the contrary, the plan for the Campo Band's project includes a municipal solid waste landfill as well as a recycling facility and a composting facility, but the tribal government by law has prohibited the handling, processing or disposal of hazardous waste. Walker & Gover, supra note 32 at 252-53. See also Kevin Gover & Jana L. Walker, Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country, 63 U. COLO.L.REV. 271 (1992).

[FN35]. 42 U.S.C. §§ 6921-6934 (1988).

[FN36]. 40 C.F.R. §§ 260-68, 270 (1993).

[FN37]. 42 U.S.C. § 6926 (1988); 40 C.F.R. § 271 (1993).

[FN38]. 42 U.S.C. § 6928 (1988 & Supp.1994).

[FN39]. 40 C.F.R. §§ 271.19, 271.21 (1993).

[FN40]. 42 U.S.C. §§ 6941-49a (1988 & Supp 1994).

[FN41]. 42 U.S.C. §§ 6942, 6943 (1988 & Supp 1994); 40 C.F.R. § 256 (1993).

[FN42]. 42 U.S.C. §§ 6947, 6948 (1988 & Supp 1994).

[FN43]. 56 Fed. Reg. 51016 (1991) (codified at 40 C.F.R. part 258 (1993)).

[FN44]. 40 C.F.R. § 258.1(g) (1993).

[FN45]. 42 U.S.C. § 6945(a) (1988).

[FN46]. 42 U.S.C. § 6972 (1988 & Supp.1994).

[FN47]. 42 U.S.C. § 6973 (1988 & Supp.1994).

[FN48]. See 56 Fed. Reg. 50,995 (1991).

[FN49]. Washington Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir.1985) (upholding EPA's rejection of Washington's bid to take over the hazardous waste program in Indian country); Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094 (8th Cir.1989) (holding BIA, Indian Health Service and Tribe liable for operating and disposing of municipal solid waste in open dumps in violation of RCRA).

[FN50]. In the current session of Congress, Senator McCain has introduced a bill to amend RCRA to treat tribes as states. S. 286, 104th Cong., 1st Sess. (1995). At least one of the major environmental groups has included tribal amendments to RCRA in its legislative platform. Sierra Club 1994 Congressional Platform, Agenda for Earth's Future, SIERRA, July/Aug. 1994, at 840 (member copies only) (expressing support for federal legislation to authorize Indian tribes to manage solid and hazardous waste programs under the Resource Conservation and Recovery Act).

[FN51]. See supra note 17.

[FN52]. See generally, **Suagee**, supra note 17. Because the BIA must comply with NEPA before approving a land transaction for a proposal such as a waste facility, it is not entirely inaccurate to describe such proposals as ones in which the “BIA issues the permits.” Margaret L. Knox, Their Mother's Keepers, SIERRA, March/April 1993, at 81. It is not accurate, however, to say, as Knox does, that “EPA has no role in monitoring, regulating, or enforcing environmental standards,” id., unless this statement is limited to the context of municipal solid waste. Incidentally, the Knox article does include a relatively accurate discussion of the concept of tribal sovereignty and its importance to reservation Indians, as well as a pretty fair treatment of instances in which tribal governments have acted in ways that demonstrate responsiveness to concerns raised by tribal members.

[FN53]. Estimates of the number of open dumps on Indian lands vary from more than 600 to more than 1500. Indian Lands Open Dump Cleanup Act of 1994, H.R.REP. NO. 783, 103d Cong., 2d Sess. 6-7 (1994).

[FN54]. Id. at 5. See also ENVIRONMENTAL LAW INSTITUTE, EPA's MUNICIPAL SOLID WASTE LANDFILL REGULATIONS: IMPACT OF THE NEW STANDARDS IN INDIAN COUNTRY 5, 32-33 (July 1994).

[FN55]. H.R.REP. NO. 783, supra note 53, at 7 (noting that this is a low estimate that “may not reflect the actual cost in bringing an existing solid waste landfill into compliance with the new federal landfill criteria”). See also Statement of Gary J. Hartz, Director, Division of Environmental Health, Office of Environmental Health and Engineering, Indian Health Service, in S. REP. NO. 253, 103d Cong., 2d Sess. 19-23 (1994). Under the Indian Health Care Improvement Act, as amended, IHS has statutory authority for the construction of “sanitation” facilities in Indian country, including pubic water supply systems, wastewater treatment systems, and sanitary land-

fills. 25 U.S.C. § 1632 (1988 & Supp.1993). This statutory authority, however, does not include closure and postclosure maintenance of open dumps. H.R.REP. NO. 783, supra note 53, at 6. Moreover, in setting priorities for use of funds appropriated for sanitation facilities, IHS has placed a higher priority on water supply and sewage treatment. Id. at 7. To some extent the lower priority for solid waste disposal reflects the more immediate nature of the public health problems associated with inadequate water supply and wastewater treatment. ENVIRONMENTAL LAW INSTITUTE, supra note 54, at 33-34.

[FN56]. H.R.REP. NO. 783, supra note 53, at 8.

[FN57]. 140 CONG. REC. H10798 (daily ed. October 4, 1994).

[FN58]. Cheyenne River Sioux Tribe; Tentative Adequacy Determination of Tribal Municipal Solid Waste Permit Program, 59 Fed. Reg. 16,642 (1994) (hereinafter "Cheyenne River Notice"); Campo Band of Mission Indians; Tentative Adequacy Determination of Tribal Municipal Solid Waste Permit Program, 59 Fed. Reg. 24422 (1994) (hereinafter "Campo Band Notice").

[FN59]. Cheyenne River Notice, supra note 58; Campo Band Notice, supra note 58.

[FN60]. Cheyenne River Notice, supra note 58, at 16,645.

[FN61]. See generally BARRY LOPEZ, GIVING BIRTH TO THUNDER, SLEEPING WITH HIS DAUGHTER: COYOTE BUILDS NORTH AMERICA (1977) [hereinafter GIVING BIRTH TO THUNDER].

[FN62]. E.g., Austin & Schill, supra note 31, at 62 (noting that communities of color have "little expectation that government will be responsive to their complaints"); Richard Moore & Louis Head, Building a Net That Works: SWOP, in UNEQUAL PROTECTION, supra note 4, at 191, 195-96 (describing New Mexico as a "colony of the United States" and stating that in New Mexico, "[s]tate and local governments have largely functioned at the behest of the federal government and for the benefit of outside industries"); Celene Krauss, Women of Color on the Front Line, in UNEQUAL PROTECTION, supra note 4, at 256, 262-64 (describing the policitization of working class white women as being "rooted in the deep sense of violation, betrayal, and hurt they feel when they find that their government will not protect their families.").

[FN63]. See Luke W. Cole, Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law, 19 ECOLOGY L. Q. 629 (1992).

[FN64]. Bullard, in UNEQUAL PROTECTION, supra note 4, at xvii.

[FN65]. The citizens of several Indian communities have prevailed upon their tribal governments to block commercial waste proposals, and these cases can be seen as examples of tribal self-government at work. See SCHWAB, supra note 31, at 372-75; Knox, supra note 52.

Another example is the recent action by the members of the Torres-Martinez Desert Cahuilla Indians in stopping the use of allotted Indian land within their reservation as a site for storage and composting of sludge from wastewater treatment plants. See Dick Russell, Moving Mountains: Faith and organizing close a dump on Indian land, 6 AMICUS JOURNAL, No. 4, Winter 1995, at 39. This case is instructive because of the rather awkward way that the Tribal Council and the people went about trying to stop the use of allotted land as a dump for sewage sludge. The Council adopted a resolution calling for the dumping to stop, and then passed another resolution calling on the Interior Department, Justice Department and Environmental Protection Agency to do

whatever they could to stop it. When the federal government was slow in responding, the people organized a blockade. As reported in AMICUS JOURNAL, the strategy seems to have worked, and even yielded a federal court decision that the sludge operations were illegal because the individual Indian landowner had not obtained BIA approval for the underlying land transaction. Id. See United States v. Terra Farms, No. ED CV 94-235 TR (EX) (C.D. CA Jan. 20, 1995) (order granting a preliminary injunction).

As reported in AMICUS JOURNAL, the Torres-Martinez Band is a "customs and traditions tribe, with no constitution and no written rules on how to resolve such disputes." Id. at 40. Whether or not a tribe adopts a constitution is a matter for each tribe to decide for itself. See infra note 82. Regardless of whether a tribe has a constitution, I strongly favor the enactment of written tribal legislation, and the implementation of some kind of regulatory structure, to deal with the subject of environmental law. (Well, of course, I would; I'm a lawyer.) A tribe in a similar situation but equipped with tribal police, a tribal court and written tribal law could take enforcement action itself without having to call on the federal agencies and without having to organize a demonstration and roadblock. It might not get the press coverage, but I suspect it would get results faster.

[FN66]. See, e.g., White Crow Hides the Animals, in GIVING BIRTH TO THUNDER, supra note 61, at 16.

[FN67]. Founded in 1991 with an initial membership of seven tribes, NTEC now includes some 51 member tribes. Telephone conversation with Ms. Maggie Gover, NTEC Administrator, Nov. 16, 1994. For further information, contact NTEC at 1225 Rio Grande, N.W., Albuquerque, NM 87104; phone: (505) 242-2175, fax: (505) 242-2654.

[FN68]. See **Suagee** & Stearns, supra note 8, at 100-03.

[FN69]. Id. at 66-68, 78-79.

[FN70]. See generally DAVID SUZUKI & PETER KNUDTSON, WISDOM OF THE ELDERS: HONORING SACRED NATIVE VISIONS OF NATURE (1992) (presenting selected teachings from the oral traditions of indigenous peoples regarding the place of human societies with respect to the natural world).

[FN71]. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

[FN72]. Id. at 472 (Brennan, J., dissenting).

[FN73]. 140 CONG. REC. S8390 (daily ed. July 1, 1994) (statement by Sen. Inouye). While the 103d Congress did enact legislation to protect the religious use of peyote by Indians, American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (Oct. 6, 1994), in neither the House nor the Senate did a bill to protect sacred sites make it out of committee.

[FN74]. Nor have I noticed any attention in the environmental justice literature to the implementation of the 1992 Amendments to the National Historic Preservation Act, Pub. L. No. 102-575, 106 Stat. 4600 (1992) (amending 16 U.S.C. §§ 470-470w-6 (1988)). These amendments give tribes a statutory right to receive notice and be involved in consultation under section 106 of the Act when a proposed federal action would affect a property that holds religious or cultural importance for that tribe if that property is eligible for or listed on the National Register of Historic Places. See **Suagee**, supra note 3, at 710-11. See also Pueblo of Sandia v. U.S., Dean B. **Suagee** & Karen J. Funk, Cultural Resources Conservation in Indian Country, 7 NAT. RESOURCES & ENV'T no. 4, 30 (1993).

Although historic preservation has not become a hot topic in the environmental justice movement, environ-

mental groups have joined forces with Indian tribes to try to keep destructive development activities from damaging historic properties that have religious and cultural significance to Indian tribes. In one recent case, five environmental groups, including the Sierra Club, joined the Pueblo of Sandia in challenging a decision by the U.S. Forest Service to adopt a new management plan that the Pueblo feared would result in damage to traditional cultural properties and tribal cultural and religious practices associated with those properties. Pueblo of Sandia, et al. v. United States, et al., No. 93-2188, 1995 U.S. App. LEXIS 4956 (10th Cir., Mar. 14, 1995) (holding that, in failing to make a "reasonable and good faith effort" to identify traditional cultural properties, the Forest Service violated section 106 of the NHPA and implementing regulations promulgated by the Advisory Council on Historic Preservation).

[FN75]. See generally, COHEN, supra note 6, at 220-28.

[FN76]. COHEN, supra note 6, at 509-10; see also Reid Peyton Chambers, JudicialEnforcement of the Federal Trust Responsibility to Indians, 27 STANFORD L. REV. 1213, 1218 (1975). The 1984 EPA policy for Indian lands, supra note 23, at 3, cites the trust responsibility as one source of EPA's responsibilities for reservation environments.

[FN77]. See generally, Aviam Soifer, Objects in Mirror Are Closer Than They Appear, 28 GA.L.REV. 533 (1994) (discussing decisions that undermine Native American legal claims); see also Milner S. Ball, Constitution, Court, Indian Tribes, 1987 AM. B. FOUND. RES. J. 1 (exploring American Constitutional law's treatment of Indian Tribes); Joseph William Singer, Sovereignty and Property, 86 NW. U. L. REV. 1 (1991) (analysis of Supreme Court decisions infringing upon tribal sovereignty).

[FN78]. E.g., a bill to amend the Clean Water Act, captioned the Water Pollution Prevention and Control Act of 1994, S. REP. NO. 2093, 103d Cong., 2d Sess. (1994), as reported out by the Senate Committee on Environment and Public Works, would have included language generally confirming EPA's announced policy on the issuance of permits under section 402 of the Clean Water Act for point sources within Indian reservations. See S. REP. NO. 257, 103d Cong., 2d Sess. 98 (1994). EPA's policy on this issue, as stated in the preamble to the final rules for treating tribes as states for the purposes of section 308, 309, 401, 402 and 405 of the Clean Water Act, 58 Fed. Reg. 67966, 67974, 67977-78 (Dec. 22, 1994), is that until tribes assume the NPDES permit program for sources within reservations, EPA will issue or reissue permits but that any existing permits that may have been issued by states will be treated as being enforceable. The Attorneys General of several western states raised concerns with Committee staff regarding this provision and suggested the possibility of a floor amendment. On May 27, 1994, I participated in a conference call with several representatives of states and tribes, as well as Committee staff, in which this and other issues were discussed. The bill that had been reported out by Committee did not reach the floor in the 103d Congress.

In the 104th Congress, a number of western states have weighed in seeking amendments to section 518 of the Clean Water Act, the section which authorizes EPA to treat tribes as states. On April 6, 1995, the House Transportation and Infrastructure Committee approved H.R. 961, a bill captioned the "Clean Water Amendments of 1995." Section 507 of H.R. 961 as approved by the Committee would make certain amendments to section 518 of the Act, including adding a new subsection that would authorize states to bring an action in federal district court challenging any determination made by EPA under section 518, and that would direct federal courts to review EPA's determinations in such cases on a de novo basis, i.e., without the substantial judicial deference to EPA's decision-making that is the well-established rule in environmental law. See Arkansas v. Oklahoma, 503 U.S. 91, 109-114 (1992). This strikes me as an environmental justice issue-after more than two decades of partnership between the federal government and the states in carrying out the Clean Water Act, Indian tribal govern-

ments are finally being enabled to become partners. However, H.R. 961, as approved by the House Committee, would put a new litigation of obstacle in the way of tribes that choose to accept the challenges of regulating water quality, a kind of litigation obstacle that would apply only to tribal governments.

When H.R. 961 reached the House floor, the provisions relating to Indian tribes went from bad to worse. As passed by the House, H.R. 961 includes a package of amendments that were added on the floor, including additional amendments to section 518 of the Act which would provide, in part, that an action by the Administrator of EPA in approving a tribe's application to be treated as a state for any allowable purpose under the Act "does not authorize the Indian tribe to regulate lands owned in whole or in part by nonmembers of the tribe or the use of water resources on or appurtenant to such lands." 141 CONG. REC. H4714 (daily ed., May 10, 1995) (introduced by Chairman Bud Shuster). This language was included in a package of "en bloc" amendments which were offered on the floor and adopted without discussion of the Indian provisions. 141 CONG. REC. H4711-H4716 (daily ed., May 10, 1995). Final passage by the House occurred on May 16. 141 CONG. REC. H5012 (daily ed., May 16, 1995). In addition to the practical problems associated with regulating water quality based on the patchwork pattern of land ownership found on many reservations, this bill language would change the jurisdictional status of Indian country for purposes of carrying out the Clean Water Act, and it would bring about this change without the issue even having been considered by the House subcommittee with jurisdiction over laws affecting Indian tribes, the House Subcommittee on Native American and Insular Affairs in the House Resources Committee. Moreover, the House passed these anti-tribal provisions without even having provided the tribes with any structured opportunity to respond to the arguments and factual assertions that had been advanced in support of these changes in the law. However one chooses to characterize H.R. 961 in terms of its effect on the quality of the nation's surface waters, the process through which it was passed was an abuse of the plenary power of Congress over Indian tribes and Indian country. Indian tribes have mobilized to oppose the enactment of the anti-tribal provisions of H.R. 961. As this Article goes to press it remains to be seen whether tribes can count on any significant help in this struggle from the major environmental groups or the environmental justice movement.

[FN79]. Kathy Hall, Impacts of the Energy Industry on the Navajo and Hopi, in UNEQUAL PROTECTION 130, supra note 4, at 130.

[FN80]. Kathy Hall, Impacts of the Energy Industry on the Navajo and Hopi, in UNEQUAL PROTECTION, supra note 4, at 144-45.

[FN81]. See generally COHEN, supra note 6, at 149-51; CLINTON, ET AL., supra note 6, at 357-84; VINE DELORIA, JR. & CLIFFORD LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY (1984). An example of the Interior Department's heavy-handed approach was the provision included in most IRA constitutions (and since repealed in many) giving the Secretary of the Interior (in practice, the local agency superintendent of the Bureau of Indian Affairs) the authority to disapprove certain categories of tribal legislative enactments. See CLINTON ET AL., supra note 6, at 367-72.

[FN82]. See United States v. Wheeler, 435 U.S. 313, 323-32 (1978) (holding that criminal prosecution by the Navajo Nation, a tribe without an IRA constitution, was an exercise of inherent tribal sovereignty and that therefore the double jeopardy clause of the Bill of Rights did not bar the federal government from prosecuting the defendant for an offense based on the same act); see also Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985) (upholding tax imposed by the Navajo Nation and finding that Congress did not intend to recognize only tribes that have adopted constitutions under the IRA as having the power to tax).

[FN83]. The Constitution of the Hopi Tribe can be seen as a counterexample. See CLINTON, ET AL., supra note 6, at 372-78.

[FN84]. See CLINTON, ET AL., supra note 6, at 379-84.

[FN85]. Amendments to the IRA enacted in 1988 place time limits on the Secretary's responsibilities for conducting elections on amendments to IRA constitutions. 25 U.S.C.A. § 476(c) (West Supp.1993). Conceivably, a tribe could decide to repeal an IRA constitution and carry on government on the basis of oral tradition.

[FN86]. For examples of how such matters have been resolved in tribal courts, see LeCompte v. Jewett, 12 INDIAN L. REP. 6025 (Cheyenne River Sioux Ct. App., May 30, 1985), reprinted in CLINTON ET AL., supra note 6, at 432-35; Kavena v. Hopi Indian Tribal Court, 16 INDIAN L. REP. 6063 (Mar. 21, 1989), reprinted in CLINTON, ET AL., supra note 6, at 435-38.

[FN87]. In April 1994, representatives of a number of tribes serving on a committee established by EPA, known as the Tribal Operations Committee, submitted a document to EPA entitled Completing the Picture: A Tribal Submittal to Address the U.S. Environmental Protection Agency Strategic Plan (April 25, 1994). Under the heading “Environmental Justice,” this document states, in part: “Environmental justice for tribes must include funding and program participation on an equal basis with states. Those individuals living within tribal environmental jurisdiction must be given the same opportunities as everyone else to live in a safe and clean environment.” Id. at 8.

[FN88]. See generally COHEN, supra note 6, at 127-43 (discussing history of allotment and assimilation era).

[FN89]. Knox, supra note 52, does acknowledge that the allotment policy resulted in transferring a great deal of Indian land to non-Indians, but follows this up with the statement that, “Finally, the Indian Reorganization Act of 1934 forcibly replaced traditional, consensual forms of tribal government with constitutions and councils overseen by the Bureau of Indian Affairs.” Id. at 54 (emphasis added). The IRA, of course, was not the final chapter in the story. The IRA had been in the U.S. Code for less than two decades when Congress and the Executive Branch launched into the “Termination” era, in which the overriding theme of federal policy was to force Indians to give up their tribal ways and become assimilated into the larger society. See generally COHEN, supra note 6, at 152-80. In the 1960s, Congress and the Executive Branch came to recognize that the termination policy was yet another tragic mistake, and the current policy of “self-determination” began. COHEN, supra note 4, at 180-206.

[FN90]. From the date of the enactment of the General Allotment Act of 1887 until the enactment of the IRA in 1934, Indian landholdings were reduced from about 138 million acres to about 48 million acres, for a loss of about 90 million acres. COHEN, supra note 6, at 138. The Navajo and Hopi reservations were not allotted, and thus a discussion of the allotment era may not have been relevant for the purposes of Kathy Hall's chapter in UNEQUAL PROTECTION, but then she did go on to make generalizations that appear to be intended to apply to all tribal governments. Kathy Hall, Impacts of the Energy Industry on the Navajo and Hopi, in UNEQUAL PROTECTION, supra note 4.

[FN91]. Montana v. United States, 450 U.S. 544, 559-60, n.9 (1981).

[FN92]. See supra notes 71-74 and accompanying text.

[FN93]. Montana v. United States, 450 U.S. at 565-66 (1981); see also Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (applying same limits to tribal sovereignty over non-Indians on fee lands within reservation boundaries).

[FN94]. Singer, supra note 77, at 36-38 (noting that in Brendale, Justice White's plurality opinion deferred to a "factual" finding by the District Court that the county's land use decision did not imperil any interest of the Yakima Nation despite the fact that the development permitted by the county was prohibited under tribal law).

[FN95]. Singer, supra note 77, at 46; see also Ball, supra note 77, at 57-59.

[FN96]. See **Suagee**, supra note 3, at 721-30 (discussing the concept of sustainable development), and at 743-47 (suggesting some ways that tribal leaders might promote development activities that feature solar and other culturally appropriate renewable energy systems). By Executive Order No. 12852 (June 23, 1993), President Clinton established the President's Council on Sustainable Development (PCSD). For information contact the PCSD at 730 Jackson Place, NW, Washington, D.C. 20503; phone (202) 408-5296; fax: (202) 408-6839; E-Mail: pcsd@igc.apc.org.

[FN97]. E.g., Austin & Schill, in UNEQUAL PROTECTION, supra note 4, at 58 ("[I]n the view of many people of color, environmentalism is associated with the preservation of wildlife and wilderness, which is simply not more important than the survival of people; thus, the mainstream movement has its priorities skewed.").

[FN98]. Sherman Alexie, The Lone Ranger and Tonto Fistfight in Heaven, in a collection of short stories also entitled THE LONE RANGER AND TONTO FISTFIGHT IN HEAVEN (1993).
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