Tribal Environmental Policy Acts and the Landscape of Environmental Law

Dean B. Suagee

Where do federally recognized Indian tribes fit in the development of environmental law? Where do American Indian and Alaska Native cultures fit into the landscape of environmental protection and natural resources management? The answer that I would give to both questions is a lot of places. Tribal cultures are deeply rooted in the web of life in North America, with particular tribal cultures rooted in particular ecosystems. Many of these roots go down through countless generations, with some reaching into mythic time. In my view, the larger American society could benefit from enhanced appreciation of and respect for tribal cultural values concerning the web of life and from greater attention to incorporating some of these values into the framework of environmental law.

The number of lawyers and scholars working in, or at least interested in, the intersection of environmental law and federal Indian law is not insubstantial and seems to be growing. *See* William H. Rodgers, Jr., Environmental Law in Indian Country (2005); Cohen's Handbook of Federal Indian Law Ch. 10 (2005 ed.). Still, the number of environmental lawyers who have given much thought to this intersection is dwarfed by the number of those who rarely, if ever, have reason to think about Indian tribal governments. This, I think, presents us with a wealth of missed opportunities.

I say "wealth" because the benefits of efforts to rectify this situation would be immense, profound, and mutual. Scholars and practitioners often say, in reference to the ways that states contribute to the development of environmental law, that the states are "laboratories." There are fifty states. There are 562 federally recognized Indian tribes. In many ways, each tribe is unique, and what works for any given tribe may not work for others. Yet systematic research could ascertain common patterns in the development of tribal environmental law. In the absence of such research, we can only speculate about the kinds of benefits that more mainstream attention to developments in Indian country and Alaska Native environmental law could bring. The benefits would certainly include an enriching understanding about how individuals, families, and clans within tribes understand their responsibilities to their ancestors and to those who are yet to come and how they did and will find their places in the web of life.

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Practically every tribe struggles to promote economic development with employment and entrepreneurship opportunities while managing ecosystems and natural resources in ways that support the continuation of tribal cultural traditions. One way to create a legal framework for facilitating informed decisions by tribal officials is the enactment and implementation of a kind of law generically known as a Tribal Environmental Policy Act (TEPA). A TEPA is a tribal law adapted from the National Environmental Policy Act (NEPA), a tribal counterpart to the kind of state laws often called "little NEPAs." *See generally* Daniel R. Mandelker, NEPA Law and Litigation § 12:1 (2d ed., 2002 with annual updates). Fifteen states plus the District of Columbia and Puerto Rico have enacted little NEPAs. *Id.* at § 12:2. To my knowledge, there is no authoritative and comprehensive compilation and analysis of TEPAs comparable to the analysis of such state statutes in Professor Mandelker's treatise.

The 2005 Energy Policy Act includes a mandate for the secretary of the interior to provide funding and technical assistance to a national, intertribal environmental organization that would "establish a national resource center to develop tribal capacity to establish and carry out environmental programs." The programs would encompass "the development of model environmental policies and tribal laws, including environmental review codes, and the creation and maintenance of a clearinghouse of the best environmental management practices." Pub. L. No. 109-58, § 503; 119 Stat. 764, 766 (amending § 2602 of the Energy Policy Act of 1992 (codified as amended at 25 U.S.C. § 3502(a)(2)(D)). Unfortunately, this provision of the 2005 Energy Policy Act has not yet been funded or implemented. Maybe the ABA Section of Environment, Energy, and Resources' Native American Resources Committee and Environmental Impact Assessment Committee could collaborate on a project to collect information on all the enacted TEPAs.

In the absence of comprehensive information, I offer this article based on my experience working with several different tribal governments in developing, implementing, and promoting the basic idea of TEPAs. It is a subject that I have written about before. *See* Dean B. Suagee & Patrick A, Parenteau, *Fashioning a Comprehensive Environmental Review Code for Tribal Governments: Institutions and Processes*, 21 Am. Indian L. Rev. 297 (1997); Gillian Mittelstaedt, Libby Halpin Nelson & Dean B. Suagee, Participating in the National Environmental Policy Act; Developing a Tribal En-

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vironmental Policy Act: A Comprehensive Guide for American Indian and Alaska Native Communities (2000, published by the Tulalip Tribes). Both of those publications drew on earlier work, including a Model Tribal Environmental Review Code (Model Code), which I presented at the first annual conference of the National Tribal Environmental Council in 1993. That Model Code was based on NEPA and the Model Land Development Code (American Law Institute, 1976). *See* 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. Intl. Envtl. L. & Pol'y 59 (1994).

This article draws on more recent work for the Hualapai Tribe of Arizona, the Oneida Tribe of Wisconsin, the Eastern Band of Cherokee Indians, and United South and Eastern Tribes. The article begins with a discussion of a few of the reasons that a tribe might want to enact a TEPA and then discusses a number of factors to consider in developing one. The article concludes with some observations on how and why the federal government could support the enactment and implementation of TEPAs.

Reasons for Enacting a TEPA

To begin with, tribal leaders simply might want to have a law on the books that expresses their cultural values with respect to the environment and the responsibilities of human beings to the rest of the web of life. These leaders also might want to make policy statements on important environmental issues, such as climate change driven by global warming, the loss of biological diversity, or the global movement of indigenous peoples for recognition of their human rights, including the right to flourish as distinct cultures.

Tribal leaders may enact a TEPA as part of a strategy to make their governmental processes more transparent and to empower the people living or doing business within their reservation to become involved in the decision-making processes of tribal government agencies. NEPA is widely regarded as having brought about a fundamental change in opening up federal-agency decision making to public involvement. One reason tribal leaders might want to enact a law to emulate this aspect of the federal experience with NEPA is that it could help to deflect the hostility that the Supreme Court has shown in recent decades to the exercise of tribal sovereignty. As I have explained in some detail elsewhere, I believe that many of the Supreme Court's Indian law rulings over the past three decades were wrongly decided. *See* Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, a Theory That Has No Place in the Realm of Environmental Law*, 7 Great Plains Nat. Res. J. 90 (2002). Legal scholars in the field of Indian law give me a lot of company in this view. *Id.* at 96, n. 21 (citing articles by nine law professors); *see also* Cohen's Handbook § 4.02[3] and source cited therein. As Professor Philip Frickey sees it, Supreme Court decisions inconsistent with the foundation principles of federal Indian law seem to be motivated by a "judicial aversion to basic claims of tribal authority over nonmembers," and the Court seems to assume that Congress shares this aversion. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L. J. 1, 7 (1999). Justice Souter's concurring opinion in *Nevada v. Hicks*, 533 U.S. 353, 375 (2001), sets out some of his concerns regarding assumed lack of fairness in the exercise of tribal authority over nonmembers, including uncertainty about the law that tribal courts apply, especially when drawing on tribal oral traditions and different standards for procedural fairness. A transparent TEPA process is a constructive response, codified as positive law, to such judicial fears that tribes will not treat nonmembers with basic fairness.

Tribal leaders simply might want to have a law on the books that expresses their cultural values with respect to the environment and the responsibilities of human beings to the rest of the web of life.

There are many pragmatic reasons for enacting a TEPA. Lots of things that happen in Indian country involve federal funding and/or federal actions, including federal approval of transactions involving Indian trust land, and, as such, NEPA applies. Tribal government agencies have become adept in the preparation and review of NEPA documents, in large part because most tribes have contracted various natural-resource programs from the Bureau of Indian Affairs (BIA) pursuant to the Indian Self-Determination and Education Assistance Act. Pub. L. No. 93-638 (codified as amended at 25 U.S.C. §§ 450–450n, 458–458hh). By enacting and implementing a TEPA, a tribe may be able to make the federal NEPA process better serve its interests. For example, if a tribe objects to certain kinds of actions being treated as categorical exclusions, a TEPA can operate to require an environmental assessment (EA), as the violation of a tribal law imposed for the protection of the environment is an extraordinary circumstance, at least for all Department of the Interior bureaus and offices. *See* Department of the Interior, Implementation of the National

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Environmental Policy Act (NEPA) of 1969; Final Rule, 73 Fed. Reg. 61,921, 61,319 (Oct. 15, 2008) (to be codified at 43 C.F.R. part 46, § 46215).

For another example, a TEPA can help to make EAs more useful for a tribe as planning documents. While the purpose of an EA is to determine whether to prepare an environmental impact statement (EIS) or a finding of no significant impact (FONSI), an EA may also be prepared to assist in planning and decision making. Because NEPA applies to many kinds of actions in Indian country, EAs will be prepared for many kinds of actions on a tribe's reservation, and a TEPA can require EAs to include analyses of specific kinds of factors that are important to the tribe, such as consistency with a tribal land use and development plan. A TEPA might be designed so that the analysis of alternatives in an EA is done early enough so that the information is actually used in planning for economic development. In this way, EAs might become documents that have some shelf life rather than ones that just sit on a shelf.

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Another pragmatic reason for enacting a TEPA is to establish coordination among various review requirements applicable to certain aspects of the environment, certain kinds of natural or cultural resources, or certain kinds of activities. In my experience, the driving force for the enactment of a TEPA has often come from tribal employees who see a need to coordinate such requirements. Typically, these are people who take their job responsibilities seriously, want to protect the natural and cultural environment, and do not want their tribal agencies to become bottlenecks in economic development. A comprehensive TEPA process can assure the regulated public that they will receive a decision within a reasonable time period if they fulfill the requirements of the process and that they will not be surprised to find out that there is yet one more requirement when they thought they were finished. Or, if there is another requirement, it will not come as a surprise because it will be addressed earlier in the review process.

In fashioning a comprehensive process, a TEPA should include tribal programs pursuant to federal laws that recognize tribal authority over all lands within reservation boundaries, such as the Clean Air Act, National Historic Preservation Act, and Native American Graves Protection and Repatriation Act. *See* Suagee, *Whack-a-Mole Game Theory*, *supra*, at 150–61. A TEPA process built on federal laws that affirm tribal authority over nonmembers may be resilient enough to withstand legal challenge. The judicially created theory of implicit divestiture should not apply in subject matters in which acts of Congress indicate an affirmation that tribes do retain their inherent sovereignty.

Factors to Consider when Developing a TEPA

The decision to enact a TEPA is just the beginning. Developing its content involves a number of other decisions.

What is the threshold? One of the first questions is what will trigger the application of the TEPA with the corollary question of how closely it should be modeled on NEPA. Although NEPA can serve as a starting point for an environmental review mechanism, most tribes will find that it does not meet all of their needs. In the first place, NEPA only applies when there is a federal action; it generally does not deal with impacts where there is no federal action, as is often the case with impacts resulting from changes in land use or construction activities. Nevertheless, because the enactment of a TEPA does not circumvent compliance with federal NEPA procedures, it is generally advisable to fashion a TEPA so that it dovetails with NEPA in order to reduce duplication of efforts, especially with respect to document production.

Some aspects of NEPA are not ideal for emulation in a TEPA. One aspect of NEPA that may not work well when applied in the tribal context is how NEPA resolves the threshold question of whether or not NEPA compliance is required. NEPA applies to all federal agencies, each of which engages in a wide range of activities, and each agency is responsible for making its own determinations as to whether NEPA applies and, if so, what level of documentation if required. Under the Council on Environmental Quality regulations implementing NEPA, 40 C.F.R. parts 1500–08, each agency is required to have issued implementing procedures that include a list of the categories of actions they take that normally require an EIS and a list of the kinds of actions that are normally excluded from the requirement to prepare an EA, i.e., "categorical exclusions." Just about everything else is supposed to require an EA to determine whether an EIS is required or whether the action can proceed on the basis of a FONSI. There is no federal agency with the authority to issue a NEPA clearance to other agencies. If a person or organization seeks to challenge an agency's compliance with NEPA, it does so through an ad-

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ministrative appeal and/or lawsuit. State environmental policy acts typically take a similar approach.

In the tribal context, my view is that it is preferable to vest a single tribal government agency with the authority to administer the TEPA process. The mechanism that I recommend to facilitate the process is a permit incorporating a TEPA document. In the tribal context, it may not be realistic to expect each tribal agency to have staff charged with responsibility for environmental compliance. Vesting a single agency with authority to review proposed actions of other agencies for environmental compliance will generally be a more efficient and effective use of available resources. If tribal lawmakers want the TEPA to cover persons and entities other than tribal agencies, a permit requirement is a convenient way to do that. Many tribes already have laws requiring permits for various kinds of activities, requirements that typically apply to private persons, and a TEPA permit can serve to coordinate compliance with such other permit programs.

One practical benefit of a permit requirement is that it makes it easy to know whether an activity is in compliance with the law. The permit process serves to ensure that activities subject to the permit requirements established in the TEPA are not allowed to take place until an authorized tribal government agency has reviewed and approved a proposal. The permit requirements include assurances that the proposed activity will not violate any other tribal or federal law. With a TEPA, enforcement personnel can readily determine whether an activity with environmental impacts is legal: if the person or tribal government agency carrying out the activity is supposed to have a permit but does not have one, then a violation of the law has occurred. If the person or government agency has a permit but is not acting in accordance with its terms and conditions, that is also a violation. The permit terms and conditions would facilitate enforcement action against a violator by providing standards for comparing what is actually happening with what is required by the permit.

This basic idea of a TEPA with a permit process can be shaped in a variety of ways to suit the needs of a particular tribe and to address the circumstances of its reservation environment and demographics. A variation on the concept of a permit requirement is a less-formal process for certain kinds of activities, such as issuing "clearance" letters. If the proposed action cannot lawfully go ahead with the tribal government agency's clearance, however, then it really is a permit regardless of what you call it.

A new process? A new institution? Another set of factors to consider in fashioning a TEPA is whether to develop a new process or adapt an existing one and whether to use existing tribal institutions or create one or more new institutions. For a tribe that has existing agencies with the expertise and authority to deal with environmental and land use issues, it is generally advisable for a TEPA to build on existing tribal institutions. For some tribes, the existing review process may be rather informal; for example, maybe "everyone" knows that certain kinds of activities must have the approval of a committee within the tribal council. When making decisions involving existing institutions, in addition to logical reasoning, there are also personality issues to take into account.

Enforcement of the TEPA is easier because enforcement personnel can readily determine whether an activity with environmental impacts is legal.

What kinds of activities are covered? What persons and entities? These questions address two interrelated sets of issues. The word "scope" can be used to refer to the kinds of activities that will be subject to the permit requirement in a TEPA. The word "applicability" might be used to describe the persons and entities covered. To use NEPA to illustrate this terminology, NEPA applies to federal agencies, and the scope of its coverage is actions with the potential to cause significant environmental impacts. If the TEPA applies to persons and entities in addition to tribal agencies, generally it will be desirable to clearly define the scope of the TEPA permit requirement so that the regulated public knows what kinds of actions are covered. The Model Tribal Environmental Review Code used the term "development" as the kind of activity that requires a permit. The terms can be defined to include thresholds, such as the size of the footprint of a project, and to exclude certain kinds of activities. As a practical matter, some actions cause more impacts than others and should receive more scrutiny from regulators, so there is a need to have some kind of screening that treats minor projects differently from major projects. As tribal agencies tend to be familiar with the NEPA screening system (categorical exclusion, EA and FONSI, EIS), this system can be adapted for a TEPA, but if the TEPA permit requirement covers private persons and entities, then, I think, the tribal permitting agency should be charged with deciding and explaining which kinds of actions get minimal review and which are subject to closer scrutiny. The screening process should be transparent so that the applicant can look it up, but the default process should be that the applicant meets with tribal agency staff, who make the decision on the level of

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scrutiny that will be required.

If a tribe chooses to enact a TEPA that applies to nonmembers and to lands that are no longer in Indian trust or restricted status, it will need to give serious consideration to recent U.S. Supreme Court decisions regarding the limits on inherent tribal sovereignty, particularly what I have called the "whack-a-mole" line of cases. Suagee, *Whack-a-Mole Game Theory*, *supra*, at 97–106. This should be done with advice of legal counsel familiar with the whole range of treaties, federal statutes, executive orders, and other laws applicable to the particular tribe, as well as the tribe's history, reservation demographics, and land tenure patterns. Court rulings in cases such as *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (upholding a tribal zoning law as applied to fee land in the so-called "closed" area of the reservation and striking down the tribal law in the "open" area of the reservation, without a majority opinion), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (treating a highway easement on tribal trust land as the legal equivalent of fee land for jurisdictional purposes), make it challenging, to say the least, for tribal lawmakers, especially if they believe that they have obligations under tribal traditions (customary law) to protect the web of life everywhere within their reservation boundaries.

The use of NEPA-style documents does not necessarily require replicating all aspects of federal agency NEPA practice. Tribal governments should consider recommendations for improving federal NEPA practices.

One less-than-ideal approach to reducing the litigation risks is to include consent to jurisdiction clauses in any contracts the tribe has with nonmembers and to draft such clauses to cover all activities within reservation boundaries. Drafters of such clauses must be mindful of the ways in which the Court has restricted the scope of tribal jurisdiction through consensual relationships. *Atkinson Trading Company v. Shirley*, 532 U.S. 645, 655 (2001).

What kind of documentation should be required for permit applicants? In my view, it is generally preferable to require documents that are comparable to those used in the federal NEPA process. This should include allowing for some kinds of actions to be approved based on a simplified process comparable to categorical exclusions in the federal NEPA process.

The use of NEPA-style documents, however, does not necessarily require replicating all aspects of federal agency NEPA practice. Tribal governments should consider recommendations for improving federal NEPA practices in recent studies, such as CEQ's 2003 *NEPA Task Force Report to the Council on Environmental Quality, Modernizing NEPA Implementation*, as well as reported efforts since the date of that report to implement its recommendations. *See* www.nepa.gov/nepa/nepanet.htm. If tribal lawmakers anticipate that, as in federal NEPA practice, most proposed actions that require a NEPA document will be approved on the basis of an EA and FONSI, then chapter 6 of *Modernizing NEPA Implementation*, which includes topics such as limiting the discussion of alternatives in an EA and the use of "mitigated" FONSIs, may be particularly helpful.

One way that a TEPA could encourage shorter EAs while still protecting the environment would be to authorize the tribal agency charged with administering the TEPA to adopt standardized best management practices and pollution prevention measures for certain kinds of development activities. If an applicant is bound to adopt such measures, then there is really no need to analyze impacts and proposed mitigation measures in an EA.

How will responsibilities and authorities be assigned among tribal government institutions? This set of issues includes whether the tribal government agency helps an applicant prepare environmental documents or simply reviews the documents that are submitted. When the permit applicant is a tribal government agency, will each tribal agency be responsible for its own document preparation or will a single agency be charged with document preparation? The latter option may be more efficient but may also contribute to the agency becoming a bottleneck.

In carrying out a TEPA there will be several different decision points. Some of these decisions will require technical expertise (e.g., Is the documentation in support of an application adequate?) and some will be more in the nature of policy decisions (e.g., Is the planned mitigation sufficient to offset the environmental damage?). This kind of distinction may warrant tribal lawmakers to divide authority accordingly. For example, the technical decisions could be assigned to an agency with technical staff and the policy decisions, or at least some of the policy decisions, to a board or commission.

As a subset of assigning responsibilities, tribal lawmakers need to focus on the decision-making process to be used by tribal agencies charged with carrying out the TEPA. This includes two distinct kinds of decision making: (1) decisions in the context of specific applications and other decisions that affect people (or entities) in individualized ways, such as enforcement actions against violators, and (2) decisions

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on broader policy issues and that affect people and entities as classes rather than as individuals.

The first kind of decision making raises issues relating to due process and fundamental fairness. In the realm of governments in America other than tribal governments, this implicates the concept of administrative due process, which does not always require a lot of process. *See* Dean B. Suagee & John P. Lowndes, *Due Process and Public Participation in Tribal Environmental Programs*, 13 Tulane Envt'l L. J. 1, 14–23 (1999). Sometimes the government's interests justify a relatively informal process without a lot of procedural mechanisms. In some cases, it may be useful to allow for issues to be resolved through collaborative processes in which the affected parties are engaged with the objective of reaching a consensus decision rather than just presenting information to the agency and having it decide.

The second kind of decision making listed above, decisions that affect people as groups rather than as individuals, in the realm of federal and state agencies is often done within the framework of rulemaking, i.e., the adoption of rules (also known as "regulations"). Federal agencies are subject to the Administrative Procedure Act (APA), and state agencies are typically subject to state APAs. The enactment of an APA is not yet a standard practice among tribal governments. Rulemaking is a way of providing opportunities for the affected public to make their views known before the government agency makes a decision. In the tribal context, the affected public often includes nonmembers of the tribe, and, as such, rulemaking can provide a measure of enfranchisement for people who cannot vote in tribal elections. In my view, a TEPA will generally benefit from using rulemaking. If a tribe has not enacted an APA, procedural requirements for rulemaking can be written into the TEPA.

What about public involvement in tribal agency decisions? Public involvement is particularly important in the context of policy decisions, which are often made through the rulemaking process. For individualized decisions such as permit applications, it is generally also advisable to provide some opportunities for public involvement because a permit that allows an applicant to discharge pollution into, or otherwise cause degradation of, the environment may adversely affect resources that are important to people other than the applicant. In the nontribal world, public involvement in environmental-agency decision making has become an important environmental justice issue. There is a trend toward flexibility in federal and state agencies that encourages agencies to use a wide range of activities to seek public involvement and recognizes that some decisions cry out for public involvement while others may not. In my view, there should be a standard practice of providing notice of permit applications with action on permit applications made in open meetings. For minor permits, though, a decision based on a paper record with notice after permit issuance may be adequate.

What criteria should be used in making decisions? Assuming a TEPA includes a real delegation of decision-making authority to a tribal agency and/or commission, it is important for the law to spell out criteria. For example, a TEPA may require the agency or commission to make findings regarding (1) compliance with all applicable federal and tribal environmental laws; (2) consistency with a tribe's land use planning law (in the event that the tribe has enacted such a law); (3) consistency with tribal policies that have been adopted for dealing with specific environmental issues, e.g., global warming, wildlife habitat, cultural heritage resources; (4) consistency with standards that might be adopted to promote pollution prevention; (5) consistency with standards that might be developed to promote environmental justice, possibly including both procedural requirements (to promote public involvement) and substantive standards (e.g., avoidance of disproportionate impacts); and (6) consistency with standards based on tribal cultural values.

A bolder step in the direction of federal support for the development of TEPAs would be congressional legislation that expressly affirms that environmental protection is an attribute within the inherent sovereignty of tribal governments.

How will the tribe enforce its TEPA? A variety of administrative enforcement mechanisms can be used to make this an administrative rather than a law-enforcement matter, including civil penalties rather than criminal fines. A board or commission can be assigned to conduct administrative hearings as an alternative, or prerequisite, to judicial review in tribal court. Such administrative mechanisms can reduce the cost and administrative burden of enforcement and may encourage voluntary compliance. If tribal lawmakers want to make tribal agencies subject to private actions in tribal court for injunctive relief to enforce compliance, then a TEPA will need to include a limited waiver of tribal sovereign immunity.

What about appeals from tribal agency decisions? Tribal agency decisions should be subject to judicial review in tribal court. It may be advisable to create an administrative appeal process for decisions on permit applications, e.g., for applicants who were denied and citizens who object that a permit was granted. Such an appeal process could be rather informal, such as in

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the nature of a rehearing, and filing such an appeal could be a prerequisite for judicial review. Appeals may also be necessary for actions taken in the context of administrative enforcement. It may be desirable to allow for some disputes to feed into alternative dispute resolution processes.

An Idea Worthy of Federal Support?

The idea of tribes enacting and implementing TEPAs has never received much attention from the federal government. Maybe this has something to do with every federal agency being responsible for its own NEPA compliance and no agency having a lead role. Some tribes have used grants from the Environmental Protection Agency and from the Administration for Native Americans (in the Department of Health and Human Services) to develop a TEPA, and many tribes use funds from Self-Determination Act contracts with BIA or Indian Health Service to prepare and review NEPA documents.

An incremental step in the direction of federal support for the development of TEPAs would be to fund and implement the mandate in the 2005 Energy Policy Act, cited earlier, for the secretary of the interior to help a national intertribal organization develop an environmental resources clearinghouse, including model environmental review codes. The obvious candidate to develop that clearinghouse is the National Tribal Environmental Council.

A bolder step would be congressional legislation that expressly affirms that environmental protection is an attribute within the inherent sovereignty of tribal governments and provides a mandate for an appropriate agency to help tribes develop and implement TEPAs. The lead role could be assigned to the secretary of the interior, but other candidates would include EPA and CEQ. Such legislation could include express affirmation of tribal authority over all lands and all persons within reservation boundaries and could include measures to ensure that nonmembers are treated with fundamental fairness by tribal governments.

Such legislation could be grounded, in part, on the emerging international law of the human rights of indigenous peoples. It could be grounded on the righteousness of rectifying the legacy of cultural genocide of the allotment era of federal Indian policy. It could be grounded in an enlightened understanding of the concept of tribal self-determination. For tribal cultures that are rooted in the natural world, the "self" of self-government must be understood to include the environment of tribal homelands.

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