
The Tribal Right to Protect the Environment

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Indian country in the United States can be seen as a venue in which a global movement is taking place, a movement that seeks respect for the rights of indigenous peoples as a matter of international law. International recognition of such rights occurred in September 2007, when the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (Declaration). U.N. document A/61/L.67 (7 Sept. 2007), available at www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. This event marked the culmination of three decades work by indigenous peoples and their advocates.

One key way in which the Declaration differs from other human rights instruments is that it is not limited to the rights of individuals but also addresses collective rights as peoples, including rights to self-determination and self-government. Prior to adoption, the United States opposed the inclusion of collective rights; when it was adopted, the United States voted against it. Then, in December 2010, after an interagency review conducted by the Obama Administration, the United States formally endorsed the Declaration. www.state.gov/r/pa/prs/ps/2010/12/153027.htm.

Now that the United States has endorsed the Declaration, it is appropriate to investigate how well our laws and policies measure up, in theory and in practice, to the standards proclaimed in the Declaration. The rights recognized in the Declaration constitute, as stated in Article 43, “the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.” Does the United States meet these “minimum standards”?

Should this be a matter of concern for lawyers practicing in environmental, energy, and resources fields? Should such lawyers be concerned about the human rights implications of their work when rights proclaimed in the Declaration are at stake? This article begins to explore these questions with a focus on standards in the Declaration dealing with environmental protection.

Of the 46 Articles that comprise the Declaration, quite a few concern the relationships between indigenous peoples and their homelands, addressing such matters as the importance of wildlife, plants, and natural resources for cultural and religious traditions. For example, Article 25 states: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.” See also Articles 11, 12, 13, 19, 20, 24, 26, 27, 28, 29, 31, and 32.

Of particular relevance to environmental protection is Article 29, which proclaims: “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.”

In the United States, environmental protection law has been carried out within a framework of federalism. Federal laws

such as the Clean Air Act (CAA), Clean Water Act (CWA), Safe Drinking Water Act (SDWA), Resource Conservation and Recovery Act (RCRA), and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) establish prominent roles for states. The basic approach is that the federal laws and implementing regulations establish the framework, including minimum standards and permit requirements. The framework generally allows states to set standards that are more stringent than required by federal law, and also allows for states to administer permit programs. When the states accept their roles under these federal laws, the federal Environmental Protection Agency (EPA), to a considerable extent, defers to state agencies.

When Congress enacted the first generation of environmental regulatory laws in the 1970s, lawmakers and their staffs paid little attention to how these federal laws would be implemented within Indian reservations or how Indian tribal governments would fit into the regulatory framework. In retrospect, this omission can be seen in the context of the history of federal Indian policy. From the end of World War II through the 1950s, the federal government enacted laws and carried out policies intended to force Indian people to become assimilated into the American mainstream and to “terminate” the status of Indian tribes as governments under the protection of the United States; this era of federal Indian policy is known as the “termination” era. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.06 (2005 ed.). During this era, the federal government ended its relationship with more than 100 tribes, many of which have since been restored to federal recognition, though generally after loss of much of their land. While the policy was ultimately recognized to be a disaster for Indian people and was abandoned, the legacy of the termination era lived on for the next couple of decades. If held to the standards in the Declaration, the policies and laws of the termination era would be contrary to Article 8, among others. Article 8 forbids forced assimilation and destruction of culture.

During the 1960s, federal Indian policy was evolving into “self-determination,” the policy that remains in force today. See COHEN’S HANDBOOK § 1.07. The policy of self-determination did not spring forth fully formed. In 1970, in a Special Message to Congress, President Nixon called for a new Indian policy, an event that is sometimes cited as the beginning of the self-determination era. Another key event occurred in 1975 with the enactment of the Indian Self-Determination and Education Assistance Act (ISDEAA). Pub. L. No. 93-638 (codified as amended at 25 U.S.C. § 450 *et. seq.*). The ISDEAA provides that tribes can contract with the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) to operate governmental programs themselves in lieu of BIA or IHS. Self-determination contracts provided the revenue streams that enabled many tribes to become truly functional governments.

By the time the ISDEAA was implemented, the first generation of environmental regulatory laws had already been enacted. In the 1980s, Congress began to rectify the lack of attention to tribal governments and Indian country by authorizing EPA to treat tribes like states through amendments to several statutes: SDWA, CERCLA, CWA, and CAA, though not RCRA. See COHEN’S HANDBOOK §§ 10.02–10.05; see also JAMES M. GRIMALVA, CLOSING THE CIRCLE: ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY (2008). In principle, at least, the basic approach of treating tribes like states appears generally consistent with Article 25 of the Declaration, as quoted above. In the American

federal system, after all, states exercise real sovereign powers.

In practice, however, treating tribes like states has not yet lived up to its potential. While a substantial number of tribes have adopted federally approved water quality standards under CWA, only a handful of tribes have been approved for treatment like states to carry out other regulatory programs. Tribal cultures are deeply rooted in the environment, yet the potential of treating tribes like states has not yet been fulfilled. Why not?

There are, no doubt, many reasons. One reason, or set of reasons, is that decisions by the U.S. Supreme Court over the past three decades or so have made it hard for tribes to govern their reservations. In one line of cases, the Court has imposed limits on the extent to which tribal governments can exercise authority, as an aspect of inherent sovereignty, over persons who are not tribal citizens. The legal theory that the Court has invoked to strip tribes of aspects of sovereignty has been labeled “implicit divestiture.” This theory posits that, in addition to losing aspects of sovereignty through treaties and acts of Congress, tribes can also be divested of sovereignty by implication. See COHEN’S HANDBOOK § 4.02[3]. As applied in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court supported its holding that tribes had been implicitly divested of criminal jurisdiction over non-Indians with a finding that the three branches of the Federal Government had historically assumed this to be the case, although there was no positive law in support of such a finding. *Id.* at 197–205.

In 1981, the Court extended its implicit divestiture theory to the civil regulatory context. *Montana v. United States*, 450 U.S. 544. The *Montana* Court announced the “general proposition” that tribes have been divested of civil regulatory authority over persons who are not tribal members. *Id.* at 565. Acknowledging that the Court had previously upheld tribal civil authority over non-Indians, this proposition came with two exceptions. *Id.* at 565–66. Moreover, the proposition applied only to fee lands within reservation boundaries, since tribal authority over non-Indians on trust lands was not at issue in the case. The Court has since decided several cases involving one or both of the exceptions to the *Montana* general proposition, cases that I have called the “Whack-a-Mole” line of cases. 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).

In “Whack-a-Mole” *Game Theory*, I argued that the theory of implicit divestiture should not be applied in the subject matter of environmental law because, having enacted statutory language authorizing EPA to treat tribes like states, Congress has explicitly recognized that environmental protection is a subject matter in which tribes still possess their original inherent

sovereignty. *Id.* at 96–97, 140. After all, in enacting environmental laws, states are not simply exercising delegated federal authority, but, rather, they are exercising their inherent sovereignty as states. While it is true that delegated federal authority does come into play in the implementation of some regulatory programs, the basic approach of environmental federalism is built on the recognition of the sovereignty of the states. See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995). Laws that treat tribes like states reflect an assumption that tribal sovereignty for environmental protection is comparable to state sovereignty. In “Whack-a-Mole” *Game Theory*, I also argued that evidence of Congressional recognition of retained inherent tribal sovereignty in the subject matter of cultural resources can be found in the National Historic Preservation Act and the Native American Graves Protection and Repatriation Act. Suagee, *supra*, at 152–61. If implicit divestiture does not apply, then, I argued, disputes between tribes and states over which sovereign’s environmental laws apply should be resolved through federal Indian law version of preemption analysis. *Id.* at 135–62.

In a human rights framework, it is important to have some understanding of the historical background of how it came to be that on many Indian reservations, including the Crow Reservation where *Montana* arose, much of the land is owned in fee by non-Indians. At Crow and many other reservations, the main reason is the legacy of the “allotment” era of federal Indian policy, which was in force from the late Nineteenth century until it was disavowed in the Indian Reorganization Act of 1934. See generally COHEN’S HANDBOOK § 1.04. Like the termination era mentioned earlier, the laws and policies of the allotment era sought to force assimilation and destroy tribal cultures. If held to the standards in the Declaration, those laws and policies would be contrary to Article 8, among others. In *Montana*, the Court in effect resurrected the policies of the Allotment era, long after those policies had been repudiated by Congress.

Looking at environmental protection in Indian country with a human rights lens yields a new perspective on many issues, only a few of which have been mentioned here. Achieving a genuine measure of conformity with the rights proclaimed in the Declaration, would, I believe, yield a range of the benefits, benefits which will extend far beyond Indian country.

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