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"Not In My State's Indian Reservation"-- A Legislative Fix to Close an Environmental Law Loophole

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NOTES

“Not In My State’s Indian Reservation”— A Legislative Fix to Close an Environmental Law Loophole

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I. INTRODUCTION

We share this Earth with everything that grows. The first thunder of the season, we go out and give thanks because it brings rain. Somehow we have to go back to that kind of thinking.

With all of this experience, are we going to do anything different? Do you think we're going to get up tomorrow and say, "Today is a new day?"
I don't.

Oren Lyons, Chief of the Onondaga
Indian Nation¹

For hundreds of years, this continent's Indians² shared a spiritual belief that they must respect and protect their Mother Earth above all else.³ Today, however, many tribes no longer view the environment as a bank of natural resources that they must shield and shelter at any cost. Instead, the economic pressures of the twentieth century—particularly underdevelopment, unemployment, and pov-

1. Dele Olojede, *Indian Attitude Called Best Hope of Saving Earth*, *Newsday* 11 (Feb. 24, 1990).

2. This Note generally will employ the word "Indian" instead of "Native American" when referring to the aboriginal inhabitants of the American continents and their descendants. This choice is made solely to promote consistency with the federal government's preference for adopting the term "Indian" in statutes, interagency departments, statute names, and references in case law. Consider, for example, the "Indian Gaming and Regulatory Act," 25 U.S.C. §§ 2701 et seq. (1988); the "Bureau of Indian Affairs" of the Interior Department; the "Indian Resources Section" of the Environment and Natural Resources Division, Department of Justice; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (using the word "Indian" in its discussions). The Author intends no disrespect toward any reader who might be particularly sensitive to the use of the word "Indian" instead of "Native American."

3. Although it would be difficult, if not impossible, to generalize how the nation's various Indian tribes regard what nonnatives call "the environment," a philosophy common to a large group of Indians is that the planet's natural resources must be treated with immense respect and admiration. These Indians view all the natural world—from individual blades of grass and insects to raging rivers and flocks of birds—as parts of the "Cycle of Life." See Steve Wall and Harvey Arden, *White Deer of Autumn*, ed., *Wisdomkeepers* 24 (Beyond Words, 1990) (quoting Onondaga Clan Mother Audrey Shenandoah). The Indian attitude is to acknowledge and honor equally all elements within the Cycle of Life:

[A]ll life is equal. That's our philosophy. You have to respect life—all life, not just your own. The key word is "respect." Unless you respect the earth, you destroy it. Unless you respect all life as much as your own life, you become a destroyer, a murderer.

Man sometimes thinks he's been elevated to be the controller, the ruler. But he's not. He's only a part of the whole. Man's job is not to exploit but to oversee, to be a steward. Man has responsibility, not power.

Id. at 67 (quoting Oren Lyons).

It is even wrong to generalize that all Indians view the planet as "Mother Earth." For example, one tribe considers the Earth to have the persona of an attractive young man; another tribe considers the Earth to be a disagreeable old man who cries and complains. See *The Earth as Mother* in John Bierhorst, *The Way of the Earth: Native America and the Environment* 89 (William Morrow, 1994).

erty⁴—are forcing a growing number of Indian tribes to exchange the spiritual view of their once pristine environment for a commercial one. This shift from nurturing nature to exploiting the environment on a growing number of reservations results largely from a legal loophole that permits nonnatives to pollute inside Indian country⁵ in ways they could not elsewhere.

States that neighbor reservations⁶ are virtually powerless to regulate environmentally hazardous activities on tribal land—even when the ramifications of such activities spill outside Indian country. Tribal sovereignty shields reservations and Indians belonging to tribes⁷ from the reach

4. The poverty rate among Indians is considerably higher than the national poverty rate for all races. In 1980, 23.7% of Indians lived below the poverty level, compared with 11.7% of all citizens and 9% of whites. *Statistical Abstract of the United States: 1991* Tables 43-44 (U.S. Bureau of the Census, 111th ed. 1991). Studies have linked the high poverty level on reservations to the enhanced alcohol and drug addiction rates on many reservations. For example, the alcoholism death rate among Indians in 1988 was 5.4 times higher than the national death rate for all races. See Daniel J. Anderson, *Indian Community Attacks a Continuing Problem*, *Star Trib.* 3E (Aug. 9, 1994).

5. For Title 18 criminal actions, Congress has defined "Indian country" as:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1988).

Although technically this statutory definition of Indian country governs only the application of federal criminal laws over tribal territory, the Supreme Court generally has adopted this definition when resolving civil matters as well. See, for example, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987) (stating the Section 1151 definition of Indian country applies to both civil and criminal jurisdiction questions); *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975) (noting that although Title 18 "on its face" applies only to criminal jurisdiction, the Section 1151 definition "generally applies" to questions of civil jurisdiction as well). For extensive discussions on when land properly is considered part of Indian country, see generally Felix S. Cohen, *Handbook of Federal Indian Law* 27-46 (Michie Bobbs-Merrill, 1982); Nicholas J. Spaeth, ed., *American Indian Law Deskbook* 35-38 (U. of Colo., 1993).

6. Thirty-four states house Indian reservations within their borders. See Robert Famighetti, ed., *The World Almanac and Book of Facts* 434 (World Almanac Books, 1994).

7. In the legal context, an individual is an "Indian" if he or she establishes two criteria: (1) the individual's ancestors lived in the land the United States now occupies before Europeans discovered the continent (the Indian blood requirement); and (2) a tribe or Indian community recognizes the individual to be an Indian. Cohen, *Handbook of Federal Indian Law* at 20 (cited in note 5) (interpreting *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938)). See also *United States v. Rogers*, 45 U.S. 567, 571-74 (1846) (denying a white man status as an Indian who, although he was "adopted" by the Cherokee Indian Nation, did not meet the Indian blood requirement). This is different from being an "Indian" in the ethnological sense that instead examines racial composition more closely. The result of the legal definition is that courts might consider a person who has never had any relations with an Indian tribe to nonetheless be an "Indian" if the person has some Indian ancestry. See Cohen, *Handbook of Federal Indian Law* at 19-27; Robert

of most state laws.⁸ Accordingly, state and local statutes regulating pollution usually do not apply to Indian reservations.⁹

This legal loophole in the interstices of tribal sovereignty and state environmental regulation creates both an incentive and a problem. The incentive is for industry to move onto reservations to avoid increasingly stringent state regulations,¹⁰ and for tribes to welcome industry as a means of remedying economic woes. The problem affects states when activities inside the reservations' borders threaten the environment and natural resources outside the tribes' boundaries.

Perhaps nowhere is this incentive/problem scenario as evident as in southern California, where 100,000 people fear that the state's lack of authority to regulate the tribal environment will destroy their drinking water.¹¹ Interior Secretary Bruce Babbitt recently approved a six-hundred-acre landfill on the 16,000-acre Campo Indian Reservation seventy miles east of San Diego that will collect daily some three thousand tons of garbage for thirty years.¹² It also will provide the tribe with approximately \$1.62 million per year in earnings, and eliminate the tribe's severe unemployment.¹³ While the business prospect of being home to the nation's largest landfill¹⁴ might come as a blessing to the tribe's members, the 100,000 people who drink from an aquifer beneath the landfill site are not rejoicing.¹⁵

N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 513-21 (1976).

8. *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (describing the Cherokee nation as "a distinct community occupying its own territory, with boundaries accurately described, in which [state laws] can have no force . . . but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress"); *Williams v. Lee*, 358 U.S. 217, 219-20 (1959) (finding that state law applies to reservations only when "essential tribal relations" are not involved and when the state law does not infringe on the "right of reservation Indians to make their own laws and be ruled by them"). See notes 49-50 and accompanying text; Part III.B.

9. See *Washington Dep't of Ecology v. United States*, 752 F.2d 1465, 1467-68 (9th Cir. 1985) (refusing to apply inside Indian country state hazardous waste regulations that were enacted "in lieu of" a federal regulatory program). See text accompanying notes 124-29.

10. Although usually federal laws of general applicability apply inside Indian country, see note 48, state laws may be stricter than federal regulations in two situations: (1) when states enact standards more stringent than those required by the federal government; and (2) when states enact statutes regulating areas that the federal statutes currently ignore.

11. Philip J. LaVelle, *County Suit Seeks to Stop Landfill Proposed for Campo Reservation*, San Diego Union-Trib. B-3 (July 3, 1993).

12. Bill Lambrecht, *Indians to Get Special Advocate on Environment*, St. Louis Post-Dispatch 1A (April 29, 1993).

13. Julie Tamaki, *Pressure Mounts Against Dump*, L. A. Times B1 (April 7, 1992).

14. Rogers Worthington, *Tribes Resist Tempting Landfill Offers*, Chi. Trib. C4 (Sept. 22, 1991).

15. Groundwater flows along distinct routes beneath the surface of the ground similar to the way surface water flows in a stream. Therefore, pollutants leaking into groundwater under

They fear the landfill operator's immunity from California's tighter regulation and monitoring procedures inevitably will contaminate their wells.¹⁶

This Note focuses on the states' vulnerability to environmentally dangerous activities conducted in Indian country as a result of the states' inability to enforce their environmental statutes against Indian reservations. Part II describes the scope of the environmental problem resulting from this legal loophole. Part III shows that, because of tribal sovereignty and the current jurisprudence surrounding that doctrine, states likely will face significant obstacles in front of efforts to control the environment on reservations. Part IV proposes two potential solutions to this problem—one judicial and one legislative—and concludes that the legislative response is preferable. Part V expands on this legislative solution by offering a model Congressional statute drawing upon other acts that waive tribal sovereignty and grant states regulatory authority over tribes in limited situations. This Note concludes that the best solution is for Congress to close the loophole and enact a statute similar to the one proposed.

II. A DISTRESSED SITUATION ON PRISTINE LANDS

"Indian land is the easiest place in the world to dump your wastes."

Ward Stone, Wildlife Pathologist
for New York state¹⁷

Despite the common belief that Indian reservations contain much of the nation's most pristine and pure regions of land, the environmental situation on many, if not most, reservations is distressed.¹⁸

a reservation can travel under a tribe's borders and pollute the wells—or aquifers—of communities outside the reservation.

16. Worthington, *Chicago Tribune* at C4 (cited in note 14).

17. Bill Lambrecht, *Illegal Dumpers Scar Indian Land . . . Indifference Endangers Reservations*, *St. Louis Post-Dispatch* 11A (Nov. 17, 1991).

18. The Environmental Protection Agency ("EPA") estimates that the condition of environmental regulation and control on reservations is at least 20 years behind that of the states. "Some of the worst environmental problems in the country are on Indian reservations. Indians don't have the money to address the problems, and they don't have the technical expertise." John Harmon, *Environmental Plight of Reservations Spurs Indians, EPA to Seek Solutions*, *Atlanta Journal-Constitution* A3 (May 20, 1992) (quoting Roderick Ariwite, administrator of the National Tribal Environmental Council). The problems arose during the past three decades as Indian tribes lacking sufficient capital worked to entice industry onto their reservations. *Id.* Although the reservations technically fell under federal regulations, only in the late 1980s did the EPA begin to take a direct role in Indian affairs regarding clean-up and

One of the nation's politicians has described the situation as "Dances with Garbage."¹⁹

Today, the nation's approximately three hundred Indian reservations²⁰ serve as homes to mammoth oil refineries, strip mining²¹ and forestry operations, toxic waste dumps, hazardous waste recycling centers, and agricultural waste incinerators, among scores of other types of heavy industrial activities and factories.²² Both geologically and geographically, these operations have been particularly well suited to Indian reservations. Miners and refiners viewed tribal lands as attractive because many reservations contain vast natural resources—including large stores of petroleum and precious minerals—as well as residents desperate for money. Landfill and incinerator operators traditionally liked Indian country because of its frequent isolation and the sparse population of most reservations.

Ironically, the increasingly stringent environmental regulations that state governments have imposed during the past several decades have made a bad situation on Indian reservations even worse.²³ Under the doctrine of tribal sovereignty, states have limited

enforcement. *Id.* Furthermore, Congress mistakenly omitted Indians from most environmental laws passed in the early 1970s. Although Congress corrected most of these errors in the mid-1980s, severe environmental problems had already surfaced on most reservations. *Id.* See also William W. Quinn, Jr., *Federal Environmental and Indian Law Confluent*, 29 *Ariz. Att'y 19* (Dec. 1992); Bill Lambrecht, *Indians Say EPA Not Doing Enough*, *St. Louis Post-Dispatch* 8A (Nov. 18, 1991).

19. Lauren Ina, *Sioux Debate Whether to Use 'Mother Earth' for Waste Dump*, *Wash. Post A3* (Aug. 24, 1991) (quoting Sen. Thomas A. Daschle (D-S.D.)).

20. Currently, the federal government recognizes 287 Indian reservations. *The 1994 Information Please Almanac* 683 (Houghton Mifflin, 47th ed.).

21. For example, as a result of lead and silver mining on the Couer d'Alene Reservation, some of the tribal land is considered to be among the worst polluted sites on the planet and would require \$1 billion to clean up. Bill Lambrecht, *President Meets with Top Indians; Health, Pollution are Issues at First Summit Since 1892*, *St. Louis Post-Dispatch* 3A (April 30, 1994).

22. Furthermore, activities of Indians incidental to everyday life create environmental hazards in ways that likely would not occur if regulated by states. For example, the EPA has determined that septic systems on reservations are generally in very poor condition and often discharge waste directly into lakes and fields. Tom Meersman, *Indians Struggle Against 'Environmental Racism'*, *Star Trib.* 1A (Sept. 12, 1993). Smaller landfills serving the needs of the tribes usually are scattered, open dumps not controlled or monitored for pollution. *Id.* In 1991, two of 108 tribal-operated landfills met federal standards. *Id.*

23. The problem of Indian reservations housing society's broader environmental problems is analogous to the "environmental racism" or "environmental discrimination" phenomenon plaguing an increasing number of the nation's minority communities. It has become evident during the past decade that, compared to white neighborhoods, minority neighborhoods are hearing a disproportionately large environmental burden. See Edward Patrick Boyle, Note, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 *Vand. L. Rev.* 937, 967 (1993). For example, one report discovered that in Houston, Texas, seven of eight city-operated waste incinerators are located in predominantly black areas, as are all of the five city-owned landfills.

authority over Indian lands with regard to regulating pollution and other environmental conditions inside Indian country.²⁴ A state possesses little more authority to control pollution on a neighboring reservation than it has to prevent Canadian sulfur dioxide emissions from causing acid rain or Mexican factories from polluting groundwater that reaches the United States. As a result, nonnatives use the borders and boundaries of Indian tribes as shields against strict state²⁵ environmental regulations and taxes on dumping, giving industry more incentive than ever to move onto reservations.²⁶

Examples of nonnatives moving onto reservations to conduct activities that states otherwise would prohibit have been plentiful since the mid-1980s. For example, a member of the Onondaga Tribe in 1991 charged a sandblaster fifty dollars to deposit tons of "black beauty"²⁷ on his land that the generating company otherwise would have had to pay \$25,000 to bury properly in a landfill.²⁸ A garbage

Id. at 969 (citing *Toxic Wastes and Race in the United States* (United Church of Christ Commission for Racial Justice, 1987)). Recently, the effectiveness of the movement to correct the environmental discrimination problem was questioned after the NAACP dismissed its director—the person who coined the term "environmental racism" more than a decade ago—Benjamin F. Chavis, Jr. Marianne Lavelle, *Greens and Companies Lose Leader*, 17 Nat'l L. J. A1 (Sept. 5, 1994). Part of the reason for his dismissal is thought to concern the NAACP's collaboration with industry groups to block the reauthorization of the Superfund program. Id.

For discussions of the environmental racism problem and suggested solutions, see generally Boyle, 46 Vand. L. Rev. 937; Carolyn M. Mitchell, *Environmental Racism: Race as Primary Factor*, 12 Nat'l Black L. J. 176 (1993); Pamela Duncan, *Environmental Racism: Recognition, Litigation, and Alleviation*, 6 Tul. Envtl. L. J. 317 (1993); Symposium, *Race, Class, and Environmental Regulation*, 63 U. Colo. L. Rev. 839 (1992).

24. See Part III.B.

25. Federal environmental laws of general applicability apply with equal force in Indian country as they do to the states. See note 48.

26. The problem described here is not limited to Indian tribes within the borders of the United States—it is a problem also experienced on a more global scope between industrialized and developing nations. Industrialized countries increasingly send waste to developing nations to avoid local opposition to landfills and because of a shortage of space for dumps. See Clare Nullis, *Conference Bans All Toxic Waste Exports*, AP Worldstream (March 25, 1994) (available on LEXIS, News library, Curnws file). Some 90% of waste exports include mercury waste, lead, acid batteries, and plastics that give off noxious fumes when burned. Id. Many developing nations desperate for cash accept the shipments. Id. Despite the fact that some countries in Africa and Central America imposed formal bans on such waste, the governments lack the resources to block many of the shipments. Id.

In early 1994, a United Nations-sponsored conference banned all exports of toxic waste from industrialized to developing countries that will take effect Dec. 31, 1997. Id. Although 60 nations agreed to the prohibition, the United States attended the conference as an observer rather than a participant and has not yet ratified the earlier Basel Convention on the Transboundary Movement of Hazardous Wastes. Id.

27. Black beauty is granular lead-filled material left over after sandblasting bridges.

28. Lambrecht, St. Louis Post-Dispatch at 11A (cited in note 17). Problems on the Onondaga Indian Nation are so severe that the Onondaga Council of Chiefs has created its own 24-hour patrol aimed at blocking nonnatives from dumping on the reservation. See Roger Martella, Jr., *Onondagas Battle Dumping on Reservation*, Syracuse Post-Standard B1 (June 4, 1991).

hauler in southern California dumped waste on several tribal reservations in the state because state standards classified the refuse as hazardous, while federal standards imposed on the tribe regarded it non-hazardous.²⁹ One tribe charges the same hauler seventy-five dollars to dump twenty tons of automobile shredder waste—radically less than the \$1,600 a typical state-regulated dump outside the reservation would charge.³⁰ A Pittsburgh waste disposal firm negotiated with a California tribe to build a dump on the tribe's land that the state would have denied outside the reservation. The company failed to follow the state's planning standards for closure of the dump and for monitoring the dump thirty years after closure.³¹ And in what might have been the most egregious result of this legal loophole, the Choctaw tribe in Mississippi considered buying 466 acres from a landfill company in order to lease it back to the waste disposal company for the development of a landfill immune from state regulations.³²

Moreover, private industry is not the only group taking advantage of this loophole. The federal government is offering to pay any tribe willing to accept nuclear waste millions of dollars a year, despite any objections from the states that border volunteering tribes.³³

Although many tribes have resisted the temptation of generating revenue at the cost of degrading their environment,³⁴ other tribes

29. Larry B. Stammer and Louis Sahagun, *Profits vs. Toxics; Indian Land Opening to City Wastes*, L.A. Times 1 (Sept. 26, 1987).

30. *Id.*

31. Ralph Frammolino and Amy Wallace, *Landfill Lease on Indian Land Has Substandard Controls*, L.A. Times B1 (April 14, 1991).

32. Ronald Smothers, *Future in Mind, Choctaws Reject Plan for Landfill*, N.Y. Times 22 (April 21, 1991). Although the tribe backed away from the deal at the last minute, *id.*, it is foreseeable that this scenario could be played out regularly in the future. Indeed, Massachusetts is taking advantage of tribal sovereignty in the gaming context to help one of the state's struggling cities prosper. There, the City of New Bedford is seeking approval of a plan to sell the city's golf course to the Wampanoag Indian Tribe. The tribe would then open a casino and a 40-acre theme park on the land—a project that would create 5,000 to 7,000 jobs. Megg Vaillancourt and Mitchell Zuckoff, *Ante Upped on Casino Deal; Legislators Want a Say on Details*, Boston Globe 1 (Aug. 24, 1994). Under the proposed deal, the tribe would pay the State and county a share of its gambling revenue in exchange for the exclusive right to operate a casino in eastern Massachusetts. *Id.* Said the state's Governor, William Weld: "This deal is truly a win-win, a sure bet. . . . The Tribe stands to gain economically [and the complex will bring] a much-needed jolt to the southeastern Massachusetts economy." *Id.*

33. Matthew C. Wald, *Nuclear Storage Divides Apaches and Neighbors*, N.Y. Times A18 (Nov. 11, 1993).

34. A further problem is caused by the fact that sometimes a tribe might lack the power to control illegal polluting inside its lands. For example, Indians at the Torres-Martinez Indian Reservation recently blocked for a week sewage shipments to a composting operation that began on the reservation in 1989 without tribal approval. *Across the USA*, U.S.A. Today 11A (Oct. 24, 1994).

view the legal loophole as an economic windfall. At a minimum, most landfills operating on reservations can bring at least \$1 million annual revenue to a tribe and provide a quick solution to the unemployment and poverty problems plaguing tribes for generations. Recognizing this, the chief of the Campo Indian Reservation has indicated that his tribe is welcoming the 600-acre landfill that will operate on the reservation for the next three decades.³⁵

The problem of loosely regulated activities on Indian reservations impacting neighboring states is one that already has been realized. Two months after a private hauler opened a landfill on a California reservation, a fire broke out in the waste, sending a cloud of thick smoke over a nearby town.³⁶ An EPA report said it was unknown whether the ash was hazardous, and feared dioxins—the most hazardous chemical known—might have been left lingering in the town.³⁷

Although treating reservations as islands within states might create economic benefits for reservations, this treatment also creates problems for neighboring states. The problem is that from a geological perspective, reservations are not islands. Environmental problems do not recognize political boundaries—states share groundwater, surface water, air, wildlife, and other natural resources with reservations. However, state statutes aimed at protecting and regulating such resources cease application at the borders of Indian tribes. As a result, unregulated environmental threats on tribal land also endanger those who live outside Indian country.³⁸

35. For a description of the proposed Campo landfill, see text accompanying notes 11-16. Said Campo Tribal Chairman Ralph Goff: "It's an economic development project for the tribe. It will provide education, health, housing, the whole bit. . . . It's a priority, a very important project." LaVelle, *San Diego Union-Trib.* at B-3 (cited in note 11). And the Campos are clearly not alone. In support of a proposal to build a 954,000-acre solid waste dump on the Sioux reservation in South Dakota—the tribe depicted in the movie "Dances with Wolves"—tribal President Ralph Moran cited the assistance that such a landfill could bring to the tribe's 17,000 members and its 85% unemployment rate: "People still think we live in teepees and have spotted horses. They have to wake up. We may not be a part of white society, but we certainly want all the same things they do." Ina, *Wash. Post* at A3 (cited in note 19).

36. See Stammer and Sahagun, *L.A. Times* at 1 (cited in note 29).

37. See *id.*

38. This problem would occur, for example, if pollution from an unregulated landfill on a reservation leached into the aquifer under the landfill and then crossed the reservation's border underground, polluting the state's drinking supply. In another example, a state's effort to cleanse a river could be frustrated entirely if the river meanders only briefly through a reservation that houses a factory dumping pollution into the stream.

III. TRIBAL SOVEREIGNTY AND STATE POLLUTION LAWS

A balance must be struck. Although it is important to recognize the long-established policies behind tribal sovereignty, particularly the notion that tribes should be able to govern themselves and dictate their own destiny without undue interference from the government,³⁹ a company or individual should not be permitted to pollute in a way that jeopardizes a state's natural resources merely because the pollution occurs on the opposite side of some invisible line.⁴⁰ Yet, under current law evolving out of the tribal sovereignty doctrine, it is unclear and even unlikely that states have the power to prevent such pollution and harm to their environments.

A. *The Tribal Sovereignty Doctrine and its Rationale*

Indian tribes retain sovereignty⁴¹ over both their members and their territory.⁴² Chief Justice John Marshall expressed the foundation for the tribal sovereignty doctrine when he described tribes as independent political communities.⁴³ Justice Marshall's view of

39. See Part III.A.

40. See note 38 and accompanying text.

41. "Sovereignty" has been defined as:

The supreme, absolute, and uncontrollable power by which any independent state is governed; . . . the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; . . . The power to do everything in a state without accountability,—to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like.

Black's Law Dictionary 1396 (West, 6th ed. 1990).

42. *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (stating that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory . . . [and] are 'a separate people' possessing 'the power of regulating their internal and social relations'").

43. *Worcester*, 31 U.S. at 559 (justifying the tribal sovereignty doctrine on the ground that Indians retain their "original natural rights, as the undisputed possessors of the soil, from time immemorial").

Treating Indian tribes as sovereigns evolves out of the recognition that most tribes were independent, self-governing societies before Europeans discovered the continent. See Cohen, *Handbook of Federal Indian Law* at 229 (cited in note 5). The tribal sovereignty doctrine that Justice Marshall established flows from the governing powers that tribes exercised before the territorial boundaries of the United States were established. *Id.* In arguing why the tribes retained sovereignty upon being discovered by the more powerful European nations, the Chief Justice applied concepts of international law and concluded that the United States adopted the role of "protector" over the tribes rather than one of conqueror:

[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under

Indian tribes as independent "domestic dependent nations"⁴⁴ that should govern themselves free from intrusion by the states remains the foundation of the tribal sovereignty doctrine today.⁴⁵ In fact, the importance of recognizing a tribe's right to govern itself serves as the "backdrop" of the sovereignty doctrine.⁴⁶ It is against this backdrop that courts consider whether states have authority to regulate a tribe.

The tribal sovereignty doctrine carries with it several ramifications for the regulatory powers of tribal, federal, and state governments. First, tribes possess the right "to make their own laws and be ruled by them" without interference from the states.⁴⁷ Second, tribal

the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.

Worcester, 31 U.S. at 560-61. See also Robert G. McCoy, *The Doctrine of Tribal Sovereignty*, 13 Harv. C.R.-C.L. L. Rev. 357, 360-69 (1978).

44. *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17 (1831). In *Cherokee Nation*, decided during the term prior to *Worcester*, Chief Justice Marshall acknowledged that the federal government already had recognized Indian tribes as "states" whose relation to "the United States resembles that of a ward to his guardian." *Id.* As a result, Marshall believed the federal government has a strong interest in protecting tribes from attempts to jeopardize their sovereignty:

[Indian tribes] look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

Id. at 17-18.

45. See, for example, *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (recognizing that Indian tribes "still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status"). Although the United States to some extent—and perhaps to a great extent—has limited the powers of tribes to regulate themselves, the Constitution, statutes, judicial decisions, administrative practices, and treaties all explicitly recognize tribal rights to retain powers of self-government. See Cohen, *Handbook of Federal Indian Law* at 231 (cited in note 5). Furthermore, a trust relationship between the United States and tribes evolving out of *Cherokee Nation* imposes a fiduciary duty on the United States to protect each tribe's status as a self-governing entity. See *Cherokee Nation*, 30 U.S. at 16-20. See generally Cohen, *Handbook of Federal Indian Law* at 220-28.

46. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). The Court in *McClanahan* said that the tribal sovereignty doctrine provides a "backdrop" against which courts must analyze how federal statutes and treaties protect Indians against interference from state laws. *Id.* In describing this "backdrop," the Court stated: "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." *Id.* See also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (stating that "traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' . . . against which vague or ambiguous federal enactments must always be measured") (quoting *McClanahan*, 411 U.S. at 172).

47. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *McClanahan*, 411 U.S. at 171-72). Although the *New Mexico v. Mescalero Apache Tribe* Court said a state may not infringe on the right of tribes to make their own laws and emphasized that tribes and their reservation lands are "insulated in some respects" from state and local control because of a "historic immunity," the Court stated that sovereignty does not shield reservations

sovereignty remains subordinate to Congress' plenary power.⁴⁸ Third, and most relevant in this context, a presumption exists that states lack regulatory powers over tribes⁴⁹ unless Congress explicitly grants such power.⁵⁰

from actions "inconsistent with the overriding interests of the National Government." *Id.* (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980)).

48. See, for example, *Washington v. Confederated Tribes*, 447 U.S. at 154 (recognizing that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (acknowledging that Congress has plenary power to "limit, modify or eliminate" a tribe's powers of self-government).

The Court also has held that absent a treaty or federal statute to the contrary, Indian tribes are subject to federal laws of general applicability. See *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) (stating that it is "now well settled" that federal statutes of general applicability apply to Indians and their property interests). This rule enables federal environmental statutes such as the Clean Air Act, 42 U.S.C. §§ 7401 et seq. (1988 and Supp. 1992), and the Comprehensive Environmental Recovery, Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq. (1988 and Supp. 1992), to apply with equal force to reservations as they do to states and non-Indian individuals. However, deciding whether a particular federal statute applies to a reservation is not always as straightforward as the black letter law indicates and may involve an analysis of Congress' intent. See Cohen, *Handbook of Federal Indian Law* at 282-86 (cited in note 5); B. Kevin Gover and Jana L. Walker, *Tribal Environmental Regulation*, 36 Fed. B. News & J. 438 (1989). For specific discussions of how the Clean Air Act, the Clean Water Act, 32 U.S.C. §§ 1251 et seq. (1988 and Supp. 1993), the Resource Conservation and Recovery Act, 42 U.S.C. §§ 690 et seq. (1988 and Supp. 1992), and the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (1988), apply to Indian reservations, see Quinn, 29 Ariz. Att'y at 20-21 (cited in note 18). For a survey of how various federal environmental statutes treat Indian tribes, see Judith V. Royster and Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 Wash. L. Rev. 581, 619-24 (1989).

49. When states attempt to regulate conduct on reservations involving Indians directly, courts generally will hold the state law inapplicable. See, for example, *White Mountain Apache Tribe*, 448 U.S. at 144 (noting that "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 331-32 (recognizing that only "in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members"); *United States v. Harvey*, 701 F.2d 800, 805 (9th Cir. 1983) (declining to apply state traffic safety laws to Indians inside a reservation). See Part III.B.1.

Yet, when a state attempts to assert regulatory authority over non-Indians operating activities inside a reservation, the presumption that the state law fails to apply is weaker than when a state attempts to regulate Indians only. See, for example, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 331 (stating that a state may assert authority over activities of non-natives on reservations in "certain circumstances" compared to the "exceptional circumstances" required when the state attempts to assert authority over tribal members). In such situations, courts make a "particularized inquiry into the nature of the state, federal, and tribal interests at stake." *White Mountain Apache Tribe*, 448 U.S. at 145. Compare *id.* at 145-51 (declining to apply a state tax to a nonnative business engaged in timber activities on a reservation because imposing the tax would interfere adversely with the tribe's and the federal government's interests) with *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 481-83 (1976) (holding state cigarette sales tax applicable to on-reservation sales to non-tribal members, but not to sales to reservation members). See Part III.B.2.

At the same time, tribal sovereignty contains a "significant geographical component" such that off-reservation activities of Indians generally are subject to nondiscriminatory state regu-

Therefore, before a state can enforce an environmental regulation on a reservation, it must overcome the presumption that the regulation would interfere with the protected rights of tribes to govern themselves under the tribal sovereignty doctrine.⁵¹ When considering whether a state has met its burden to defeat the sovereignty presumption, courts apply the infringement-preemption test.

B. *The Infringement-Preemption Test*

The established analysis for whether a state may enforce its laws on a reservation is the infringement-preemption test.⁵² The test balances the competing tribal, federal government, and state interests in deciding whether state law applies.⁵³

In theory, preemption and infringement analyses operate independently as bars to state law enforcement on a reservation.⁵⁴

lations in the absence of express federal law to the contrary. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 335 n.18 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148-49).

50. Congress can waive tribal sovereignty and allow states to regulate reservations in particular areas. See, for example, 25 U.S.C. § 231(2) (1988) (granting states power to enforce compulsory school attendance laws against Indian children and their parents) (described in note 169); Indian Gaming Regulatory Act, 25 U.S.C. § 2710(a)(3)(C) (requiring that tribes negotiate with neighboring states how certain aspects of casino operation will be regulated); 18 U.S.C. § 1162(a) (1988) (granting certain states civil and criminal jurisdiction over tribes).

51. Although the legal definition of sovereignty is the relevant definition that courts apply when considering the authority of a state to regulate a tribe, it is helpful also to consider sovereignty as explained by the people who have the most interest in making sure the word is described accurately—Indians themselves:

Personally I'm sovereign. I'm not dependent on anybody. For thirteen years I was a high-steel construction man. I did that very well and I loved it. It satisfied something in my ego and my manhood. But then, after I'd put up hundreds of towers and skyscrapers and bridges, I looked around and saw that no skyscrapers were being built on the reservation. I said, "Hey, this ain't doin' my people any good." So I climbed down off the iron and picked up the flag of self-determination. Then I had to learn how to make my family sovereign, how to make my people sovereign. Sovereignty is something that goes in ever-widening circles, beginning with yourself. In order for Indian people to attain sovereignty, each of us has to be sovereign in ourselves. If a person can go out into the stream and fish for their needs, if they can do whatever they have to do to provide for those who are dependent on them, then that person is sovereign. Sovereignty isn't something someone gives you. You can't give us our sovereignty. Sovereignty isn't a privilege someone gives you. It's a responsibility you carry inside yourself. In order for my people to achieve sovereignty, each man and woman among us has to be sovereign. Sovereignty begins with yourself.

Eddie Benton-Banai, of the Ojibway Tribe, quoted in Wall and Arden, *Wisdomkeepers* at 51 (cited in note 3).

52. See *White Mountain Apache Tribe*, 448 U.S. at 142-44.

53. See, for example, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 330-43 (refusing to apply to a reservation state fish and wildlife regulations that conflicted with tribal regulations because such an application would interfere with tribal and federal interests without promoting any justifiable state interests).

54. *White Mountain Apache Tribe*, 448 U.S. at 142-43.

First, federal law may preempt state law from operating against a tribe.⁵⁵ Second, state law may be blocked if it unlawfully infringes "on the right of Indians to make their own laws and be ruled by them."⁵⁶ Yet, in practice, courts today apply only the preemption test in deciding whether state law applies on a reservation,⁵⁷ and have abandoned the infringement test as an independent consideration.⁵⁸

The preemption test in this context is one unique to Indian law and is not the traditional test that refers to federal preemption of state statutes.⁵⁹ Instead, the test for whether federal law preempts state law in the Indian law context is whether applying the state statute would interfere with the federal and tribal interests in promoting tribal self-government that evolve from the tribal sovereignty doctrine.⁶⁰ A consideration of traditional tribal sovereignty interests as the backdrop to this analysis is crucial.⁶¹ If the court finds a con-

55. *Id.* Although the test refers specifically to "federal" law preemption of state law, the test incorporates the interests of the tribes—particularly the interest in tribal self-government—into federal law through the "backdrop" principle discussed in note 46 and accompanying text. See *id.* at 143 (stating that "[t]he tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law"). The recognition of tribal interests in self-government as the "backdrop" of the preemption analysis enables federal law to preempt state law, even when Congress has not enacted a federal statute that specifically touches upon the relevant issue. *Id.* at 143-44.

56. *Mescalero Apache Tribe*, 462 U.S. at 332-33.

57. See *Rice v. Rehner*, 463 U.S. 713, 718-24 (1983) (applying primarily the preemption test while discussing the infringement test only briefly). See also Royster and Fausett, 64 Wash. L. Rev. at 601-02 (cited in note 48) (stating that courts currently apply "almost exclusively" the federal preemption test in deciding whether tribal sovereignty blocks the application of state law).

58. At the same time, the policy and considerations underlying the infringement test have been incorporated into the preemption test. See Royster and Fausett, 64 Wash. L. Rev. at 601.

59. *Id.* The "traditional" preemption test referred to above is the test used to decide whether the Supremacy Clause of the U.S. Constitution mandates that federal law preempt state law. See generally John E. Nowak, and Ronald D. Rotunda, *Constitutional Law* ch. 9 (4th ed., 1991) (discussing various preemption tests).

60. See *Cabazon Band of Mission Indians*, 480 U.S. at 216. The test has been expressed formally as:

"State jurisdiction is preempted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.

Id. at 216 (quoting *Mescalero Apache Tribe*, 462 U.S. at 334). The Court in *Mescalero Apache Tribe* stated that courts, in applying the preemption test, traditionally have rejected a narrow approach that focuses solely on Congressional intent or express Congressional statements that state law should be preempted. 462 U.S. at 334. Instead, the question of whether a state has regulatory authority over a reservation demands "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 333. Part III.C discusses these various interests as they relate specifically to environmental issues.

61. *Mescalero Apache Tribe*, 462 U.S. at 334. See notes 44-46 and accompanying text.

flict between federal and state law, it will not apply the state law unless the state's interests are so substantial that the intrusion is justified.⁶² Among the interests to be balanced on the federal and tribal side are the promotion of tribal self-government, economic development, and self-sufficiency.⁶³

Although courts apply the infringement-preemption test to all state statutes that seek to regulate activity on reservations, the manner in which courts apply the test differs depending on whether the state seeks to regulate tribal members directly or whether it only seeks to regulate nonnative individuals⁶⁴ and enterprises on reservations.⁶⁵

1. Regulation of Tribal Activities

When states seek to regulate Indians or Indian activities,⁶⁶ a presumption has emerged from the infringement-preemption test that

62. See *id.* at 341-43. The *Mescalero Apache Tribe* Court followed the typical procedure courts have employed in applying the infringement-preemption test. There, New Mexico attempted to enforce on a reservation a state statute that regulated hunting and fishing. *Id.* at 328-29. The state regulations either conflicted with, or were more restrictive than, the tribe's regulations. *Id.* at 329. First, the Court found that enforcing the statute would interfere with the tribe's authority to regulate its own resources as well as the federal government's interest in encouraging tribal self-government and economic development. *Id.* at 338-41. Second, the Court held that the state failed to "identify any regulatory function or service . . . that would justify the assertion" of regulatory authority. *Id.* at 341. See also *White Mountain Apache Tribe*, 448 U.S. 136 (holding that imposing a state tax on a reservation would undermine federal objectives in administering tribal programs); *Cabazon Band of Mission Indians*, 480 U.S. 202 (denying a state the ability to regulate on-reservation bingo games despite the state's interest in preventing infiltration of organized crime).

63. *Cabazon Band of Mission Indians*, 480 U.S. at 216. See Part III.C for a discussion of how these interests apply in the environmental law context.

64. Indians who are not members of a particular tribe are situated similarly to non-Indians with respect to the authority of states to apply their regulations. See *Washington v. Confederated Tribes of Colville*, 447 U.S. at 160-61.

65. In addition to the difference in analyses when a state seeks to regulate Indians versus nonnatives, there are two other distinctions that are sometimes relevant in this context, yet which are beyond the scope of this Note. First, a state generally has regulatory authority, subject to several exceptions, over nonnative activities occurring on land inside a reservation that nonnatives own in fee. See *Montana v. United States*, 450 U.S. 544, 565 (1981); Royster and Fausett, 64 Wash. L. Rev. at 598-99 (cited in note 48); Timothy R. Malone and Bradley B. Furber, *Regulatory Jurisdiction over Nonmembers' Land within Indian Reservations*, 7 Nat. Resources & Env't 14, 15 (Spring 1993). Second, certain states can enforce "prohibitory" statutes inside Indian country pursuant to 28 U.S.C. § 1360 (1988) and 18 U.S.C. § 1162 (1988), which grant 11 states civil and criminal jurisdiction over certain Indian reservations. See Royster and Fausett, 64 Wash. L. Rev. at 607-11.

66. In this context, a state seeks to regulate Indians when it attempts to apply a statute either to Indians living inside Indian country or Indian enterprises conducted inside Indian country. See, for example, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 165 (1973) (denying state authority to collect state income taxes from Navajo Indians with respect to income derived completely from reservation sources).

the state statute interferes with tribal sovereignty and is, therefore, preempted.⁶⁷ The rationale for this presumption is that when a state attempts to regulate the on-reservation conduct of Indians, the state's regulatory interests are likely to be minimal, while the federal interest in encouraging tribal self-government is at its strongest.⁶⁸ States may rebut this presumption only in exceptional circumstances.⁶⁹

To date, the Supreme Court has found the "exceptional circumstances" test met in only a handful of cases. In *Puyallup Tribe, Inc. v. Washington Game Dep't*,⁷⁰ the Court held that the state had authority to regulate hunting, fishing, and gathering of wildlife on the reservation.⁷¹ The state was permitted to enforce on the reservation state laws that were necessary for conserving the species.⁷² At the same time, the Court added that effective tribal self-regulation would preempt state regulations.⁷³

The Court also found the "exceptional circumstances" test met in *Rice v. Rehner*.⁷⁴ In *Rice*, the Court held state liquor license laws applicable to retail establishments on reservations—including stores operated by Indians.⁷⁵ The Court reasoned that Congress had divested the Indians of any inherent power to regulate in this area by enacting a federal statute⁷⁶ that granted the state power to impose its own liquor regulations on retailers.⁷⁷

2. Regulation of Nonnative Activities

When states seek to regulate nonnatives and their activities conducted inside Indian country,⁷⁸ courts make a "particularized inquiry" into the nature of the state, federal and tribal interests at stake rather than demand "exceptional circumstances" justifying the

67. *Id.* at 215 (recognizing that states may regulate on-reservation activities of natives only "in exceptional circumstances").

68. *White Mountain Apache Tribe*, 448 U.S. at 144.

69. See *id.* See also *Mescalero Apache Tribe*, 462 U.S. at 331-32.

70. 433 U.S. 165 (1977).

71. *Id.* at 176-77.

72. *Id.*

73. *Id.* at 178.

74. 463 U.S. 713 (1983).

75. *Id.* at 713.

76. See 18 U.S.C. § 1161 (1988).

77. *Rice*, 463 U.S. at 732-33.

78. In this context, a state seeks to regulate nonnatives and their activities conducted inside Indian country when it attempts to apply a statute that is generally applicable to the state's residents to nonnatives and their enterprises inside a reservation. See, for example, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989) (allowing state authority to collect severance taxes from on-reservation production of oil and gas by nonnative lessees).

application of the state statute.⁷⁹ The tribal interests flow primarily from the well-established right of tribes to govern themselves expressed in the "backdrop" of tribal sovereignty.⁸⁰ The federal government retains strong interests in assuring that Indians are benefited by the statutes it enacts; in protecting the tribes' rights to govern themselves under the fiduciary relationship existing between the tribes and the federal government; and in assuring that state statutes do not interfere with comprehensive federal programs to regulate Indian affairs.⁸¹ To tip the balance in favor of applying a state regulation to nonnatives, the state must establish that imposing the statute will serve a legitimate regulatory interest.⁸²

The interplay among tribal, federal, and state interests that arises when a state attempts to regulate nonnatives inside a reservation is discussed in *New Mexico v. Mescalero Apache Tribe*.⁸³ There, the Court denied the state authority to enforce wildlife gaming laws against nonnatives hunting and fishing on the reservation.⁸⁴ The tribe and federal government jointly had developed a comprehensive scheme of regulations for such activities on the reservation.⁸⁵ Although the state conceded that the tribe exercised exclusive jurisdiction over hunting and fishing by tribal members,⁸⁶ it argued that the tribe and state shared "concurrent jurisdiction" over nonmembers that permitted the state to impose its own conditions on nonnative hunting and fishing.⁸⁷ New Mexico therefore sought to impose on nonnatives regulations that were more strict in several aspects than the tribe's regulations.⁸⁸

The Court held that the state may exercise concurrent jurisdiction on a reservation when the state's asserted authority is not

79. *White Mountain Apache Tribe*, 448 U.S. at 145.

80. See note 46 and accompanying text.

81. As a result of the federal government's obligation to protect a tribe's right of self-government, federal law technically may preempt state law even though there is no federal statute involved. See note 55.

82. *White Mountain Apache Tribe*, 448 U.S. at 141-45. See Part III.A.

83. 462 U.S. 324.

84. The tribe had anticipated a decline in the sale of lumber from the reservation—its largest income-producing activity—and constructed a resort complex for nonnative hunters and fishermen. The federal government contributed substantially both to the funding for the resort and the development of the reservation's fish and wildlife resources. *Id.* at 327-28.

85. *Id.* at 328-29. Such ordinances regulated, for example, bag limits and season dates. *Id.*

86. *Id.* at 330.

87. *Id.*

88. For example, the tribe permitted a hunter to kill both a buck and a doe while the state permitted a hunter to kill only a buck. *Id.* at 329.

preempted by the operation of federal law.⁸⁹ However, New Mexico's exercise of such authority would have "effectively nullified" the tribe's authority to control hunting and fishing by supplanting the tribal regulations,⁹⁰ thereby interfering with the tribe's right of self-government. The Court emphasized the importance of allowing the tribe to regulate hunting and fishing on the reservation; it found that tribal ordinances reflected the specific needs of the reservation while state laws were based on considerations possibly hostile to the tribe's needs.⁹¹ Also, the Court said that concurrent jurisdiction would conflict with the federal government's interests in two ways: (1) it would completely disrupt the comprehensive scheme of federal and tribal management that federal law established;⁹² and (2) it would threaten Congress' overriding objective of encouraging tribal self-government and economic development.⁹³

As for the state's interest in imposing its regulations, the Court stated that a state's interests are strongest in two situations: (1) when the state provides services in connection with the on-reservation activity;⁹⁴ and (2) when the state can point to off-reservation effects that necessitate state intervention.⁹⁵ New Mexico established neither. New Mexico had not contributed in any significant respect to the maintenance of the tribe's wildlife resources.⁹⁶ It also could not identify any off-reservation effects; some of the species never left the reservation lands and the state could not identify any specific interest

89. *Id.* at 333.

90. *Id.* at 338 (stating that "[t]he Tribe would thus exercise its authority over the reservation only at the sufferance of the State").

91. *Id.* at 339-40 (stating that "[p]ermitting the State to enforce different restrictions simply because they have been determined to be appropriate for the State as a whole would impose on the Tribe the possibly insurmountable task of ensuring that the patchwork application of state and tribal regulations remains consistent with sound management of the reservation's resources").

92. *Id.* at 339-40. The Court held that requiring tribal ordinances to yield to more restrictive state regulations would "undermine" the federal government's ability to make the broad determinations committed to the federal government's authority. *Id.* at 340.

93. *Id.* at 341. The Court emphasized that giving the state regulatory authority in the present case would be particularly disruptive because the situation was far removed from a situation in which the tribal contribution to an enterprise was "de minimis," such as when on-reservation sales outlets market to nonnatives goods not manufactured by the tribe or its members. *Id.*

94. *Id.* at 336. The Court noted that any state regulation imposing additional burdens on a tribal enterprise "must ordinarily be justified" by functions or services the state performs in connection with the on-reservation activity. *Id.* This means a state seeking to tax a transaction between a tribe and nonnatives must assert an interest stronger than a general interest in raising revenue. *Id.*

95. *Id.* In such a situation, the Court said a state's regulatory interest will be "particularly strong." *Id.*

96. *Id.* at 341.

in species that occasionally did leave tribal lands.⁹⁷ The Court concluded the tribe had sole authority to regulate the use of its resources by members *and* nonmembers.⁹⁸

Similarly, in *White Mountain Apache Tribe v. Bracker*,⁹⁹ the Court held that a state's general interest in raising revenue failed to justify its attempt to tax non-Indian timber operations on a reservation.¹⁰⁰ The Court recognized that the "backdrop" of the tribal sovereignty doctrine—particularly, the traditional notions encircling Indian self-government¹⁰¹—required the Court to examine closely the state's asserted interest in imposing its law on reservation activities.¹⁰² Augmenting the tribe's interest in tribal sovereignty was the federal government's interest in tribal economic development.¹⁰³ Because the state's imposition of a tax would interfere with both the tribe's¹⁰⁴ and the federal government's¹⁰⁵ interests, the Court required the state to

97. *Id.*

98. *Id.* at 343-44.

99. 448 U.S. 136 (1979).

100. *Id.* at 150. In *White Mountain Apache Tribe*, an enterprise consisting of two non-Indian corporations felled tribal timber on the Fort Apache Reservation and transported it to the tribe's sawmill, also on the reservation. State agencies attempted to impose the Arizona motor carrier license and use-fuel taxes on the enterprise. *Id.* at 139-40. The enterprise argued that federal law preempted the taxes and that the taxes represented an unlawful infringement on tribal self-government. *Id.* at 138.

101. See Part III.A. The Court began its discussion of the line between state regulatory authority and tribal self-government by establishing "several basic principles." *White Mountain Apache Tribe*, 448 U.S. at 141. First, the Court stated that "the laws of [a State] can have no force" inside a reservation's boundaries. *Id.* (quoting *Worcester*, 6 U.S. at 561). Second, the Court stated that "Indian tribes retain 'attributes of sovereignty over both their members and their territory.'" *White Mountain Apache Tribe*, 448 U.S. at 142 (quoting *Mazurie*, 419 U.S. at 557).

102. *White Mountain Apache Tribe*, 448 U.S. at 144.

103. *Id.* at 143.

104. Apparently, the mere fact that the state *attempted* to assert authority over activities operating on a reservation was enough to interfere with the tribe's interest in self government, thereby triggering the "particularized inquiry" analysis. See generally *id.* at 142-44.

105. In the present case, the Court held that imposing the state tax would conflict with two comprehensive federal schemes. First, the Court considered the federal government's "long history" of regulating tribal timber, *id.* at 145 n.12, and that the regulation in its current form was "comprehensive." *Id.* at 145. Specifically, the Court found that imposing the state taxes would interfere with the federal government's interest by: (1) undermining the federal policy of assuring that profits from timber sales benefit tribes; (2) interfering with the Secretary of the Interior's discretion in setting fees and rates with respect to the harvesting and sale of timber; and (3) adversely affecting the tribe's ability to comply with federally imposed harvesting policies. *Id.* at 149-50. Second, the Court said that the federal government's regulation of tribal roads was also extensive. *Id.* at 147-48.

In all, the Court concluded that the federal regulatory scheme in both tribal timber operations and road regulations was "so pervasive as to preclude the additional burdens" the state would impose through its taxes. *Id.* at 148. Imposing the taxes would "obstruct federal policies." *Id.* The fact that such a comprehensive scheme existed provided the most significant support for the Court's holding that the state could not apply the tax: "[T]he fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted.

identify a legitimate regulatory interest in imposing its tax.¹⁰⁶ The Court concluded that the only interest the state could claim was a generalized interest in raising revenue—an interest insufficient to justify the intrusion into the tribe's and federal government's interests.¹⁰⁷

The Supreme Court has upheld efforts of states to tax on-reservation activities of nonnatives when the state asserts a sufficiently strong interest. In *Cotton Petroleum Corporation v. New Mexico*,¹⁰⁸ the Court upheld the state's authority to tax the oil and gas production of a nonnative enterprise that had leased lands on the Jicarilla Apache Tribe Reservation.¹⁰⁹ The Court held that states may tax on-reservation oil production unless Congress expressly or impliedly has prohibited such taxes.¹¹⁰ Perhaps the strongest factor supporting the state tax was the fact that the state provided on-reservation services to the company and the tribe.¹¹¹ The Court rejected the company's argument that the federal government retained a strong interest in ensuring that Indian tribes receive the greatest return from their oil

. . . Our decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which . . . leaves no room for the additional burdens sought to be imposed by state law." *Id.* at 151 n.15.

106. *Id.* at 150. See also *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 688-90 (1965) (rejecting the state's attempt to impose a gross proceeds tax on a nonnative company that conducted a retail trading business on a reservation because the "comprehensive federal regulation of Indian traders" prohibited the assessment of the attempted taxes).

107. *White Mountain Apache Tribe*, 448 U.S. at 150. The Court suggested that a state might have a stronger interest if it sought to assess taxes in return for governmental functions that it performed for those whom it sought to tax. *Id.*

108. 490 U.S. 163 (1989).

109. *Id.* at 186. The Court upheld the state's 8% severance tax while allowing the tribe to continue imposing its 6% severance tax. *Id.* at 189.

110. *Id.* at 187. Analogizing to the situation when a state taxes a private party that does business with the United States, the Court indicated that a state can impose a nondiscriminatory tax on a private party with whom a tribe does business, even when the financial burden of the tax falls on the tribe. *Id.* at 175. At the same time, Congress can exempt a tribe from state taxation. *Id.*

Courts therefore analyze state efforts to tax nonnative oil and gas leasing activities in a manner different from state efforts to regulate nonnative activities on reservations. In the latter situation, federal law preempts state law in most situations, even when Congress has not expressly or impliedly indicated that states lack authority to regulate a particular area. See notes 83-107 and accompanying text.

111. *Cotton Petroleum*, 490 U.S. at 186. The District Court found the state spent approximately \$3 million per year in providing on-reservation services both to the corporation and the tribe, as well as off-reservation services that benefited the reservation and tribal members. *Id.* at 172 n.7. The Court upheld the tax despite the fact that the revenues collected from the tax were greater than the services the state provided. *Id.* at 172. Although the Court said this discrepancy was the corporation's "most persuasive argument" against the tax, it found two justifications for rejecting the argument: (1) the services the State provided were available to the lessees and members of the tribe off the reservation as well as on it; and (2) no constitutional provision required that benefits received from a taxing authority by a commercial taxpayer equal the taxpayer's obligations. *Id.* at 189-90.

and gas leases.¹¹² Instead, it stated that in authorizing mineral leases on reservations, Congress did not intend to remove all state-imposed obstacles to profitability.¹¹³ As for the tribe's interest in sovereignty, the Court reasoned that because states historically had imposed taxes on nonnative oil and gas lessees, there was no history of tribal independence from state taxation erecting a "backdrop" of sovereignty.¹¹⁴

Although the Supreme Court has not yet considered whether a state may enforce its environmental laws on a reservation, the jurisprudence flowing from the infringement-preemption test reveals that states would lack the authority to regulate the environment of neighboring reservations in many, if not most, circumstances.

C. State Environmental Protection Statutes under the Infringement-Preemption Test

Under the infringement-preemption test,¹¹⁵ states face significant—and perhaps insurmountable—obstacles in front of attempts to enforce their environmental regulations in Indian country. Nonetheless, the height of these obstacles depends on whether a court considers the regulation as a law applying to tribal activities or nontribal activities conducted on reservation lands.¹¹⁶

1. Regulation of Tribal Activities

If a court finds that a state's application of an environmental statute inside a reservation serves to regulate the tribe itself or tribal members,¹¹⁷ a presumption arises that the state is interfering with

112. *Id.* at 179. The Court downplayed the federal government's interest despite the fact that, in the legislative history of the Indian Mineral Leasing Act of 1938 that authorized the tribe's lease, Congress quoted the Interior Secretary stating that a purpose of the Act was to give tribes "the greatest return from their property." *Id.* at 178-79.

113. *Id.* at 179-80 (stating that "a purpose of the 1938 Act is to provide Indian tribes with badly needed revenue, but [the Court finds] no evidence for the further supposition that Congress intended to remove all barriers to profit maximization").

114. *Id.* at 182. The Court concluded that the burden the tax imposed on the tribe was not "substantial." *Id.* at 186.

115. The foregoing analysis assumes that federal law does not preempt the state statute in the traditional sense in which a state statute conflicts with a federal statute. See note 59.

116. A state regulates tribal activities when it seeks to apply a statute to Indians inside a reservation. A state regulates nonnative activities when it seeks to apply a statute only to activities inside a reservation conducted by people other than the tribe's members. See notes 66 and 78.

117. The finding that a state is seeking to regulate Indians could arise in one of two situations: (1) when the state seeks to regulate activities conducted by tribal members such as a landfill that serves the reservation; and (2) when the court classifies activities operated by non-Indians as a tribal activity.

tribal sovereignty. As a result, unless the state can demonstrate that an exceptional circumstance exists in which its interests in regulating the reservation environment outweigh tribal and federal interests, federal law will preempt the state law.¹¹⁸

Under current tribal sovereignty jurisprudence, it is unlikely that a court would allow a state to enforce an environmental regulation on a reservation unless the state could establish clearly that on-reservation activities were harming the off-reservation environment to such a magnitude that an exceptional circumstance exists. Although *Puyallup Tribe*, in which the Court granted a state authority to regulate hunting and fishing on a reservation appears applicable,¹¹⁹ several factual differences likely would distinguish away *Puyallup Tribe's* precedential value. *Puyallup Tribe* involved the sharing of off-reservation fishing by native treaty fishermen and nonnatives.¹²⁰ The fact that some of the fishing stations were actually within Indian country was not realized until late in the litigation.¹²¹ Therefore, it is unclear whether the "exceptional circumstances" test was met because the on-reservation activities threatened the environment outside the tribe's boundaries or because the Court discovered late in the litigation that the reservation in fact was being regulated.

Similarly, the holding in *Rice v. Rehner*¹²² is not immediately applicable to environmental situations because Congress has not divested Indian tribes of authority to regulate their environments. In contrast to *Rice*, most federal environmental statutes explicitly recognize the authority of tribes to adopt their own implementation programs rather than participate in the neighboring state's programs.¹²³

Furthermore, at least one court has held that a state's interest in protecting the environment by regulating pollution inside Indian country does not meet the "exceptional circumstances" test.¹²⁴ In *Washington v. United States*,¹²⁵ the Ninth Circuit rejected the state's argument that either the Resource Conservation and Recovery Act¹²⁶ or federal authorization of the state's hazardous waste management

118. See *Cabazon Band of Mission Indians*, 480 U.S. at 215-16. See also notes 66-69 and accompanying text.

119. See notes 70-73 and accompanying text.

120. *Id.*

121. *Id.*

122. 463 U.S. 713 (1983).

123. See note 129.

124. *Washington v. United States*, 752 F.2d 1465, 1467-68 (9th Cir. 1985).

125. *Id.*

126. 42 U.S.C. §§ 6901 et seq. (1988).

plan entitled the state to implement its hazardous waste regulations on reservations.¹²⁷ In examining the tribal and federal interests at stake,¹²⁸ the court emphasized that states cannot interfere with the federal government's interest in promoting tribal self-determination, self-government, and self-regulation of environmental matters.¹²⁹

Despite the fact that the case law indicates that courts are not likely to permit a state to enforce its environmental laws against tribal members, the possibility remains that a court will hold that off-reservation pollution flowing from on-reservation activity qualifies as an "exceptional circumstance" justifying application of state law. For example, a court might grant a state authority to regulate a tribe's sewage treatment plant if it could prove that the plant's operations were polluting the state's groundwater. At the same time, the state likely would have to prove that enforcement of its regulations would, in fact, resolve the environmental problem.

2. Regulation of Nonnative Activities

If a court finds that applying a state environmental law inside a reservation serves to regulate nonnatives or non-Indian enterprises on the reservation, the court will balance the tribal, federal, and state interests by a particularized inquiry.¹³⁰ Under this analysis, the state will have only a slightly stronger chance of convincing the court to permit application of its statute. Although the Supreme Court has not performed this balancing test in a context in which on-reservation activities by nonnatives threaten to pollute a state's environment, it nonetheless remains unlikely the Court would allow a state to protect its resources in such situations.

Tribes have a strong interest in self-regulation and self-government that flows from the tribal sovereignty doctrine.¹³¹ Protected as part of the "backdrop" of tribal sovereignty is a tribe's

127. *Washington v. United States*, 752 F.2d at 1471-72. Specifically, the court recognized that "the sovereign role of the tribes . . . does not disappear when the federal government takes responsibility for the management of a federal program on tribal lands." *Id.* at 1471.

128. *Id.* at 1471-72.

129. *Id.* As support for the federal government's interest in allowing tribes to regulate their own environments, *Washington v. United States* cited the Clean Air Act, 42 U.S.C. § 7474(c), and the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(u) (1988), as two environmental statutes that grant tribes broad discretion to regulate their environment in order to achieve federal goals. *Id.* at 1471.

130. *White Mountain Apache Tribe*, 448 U.S. at 144-45. See notes 99-107 and accompanying text.

131. See Part III.A.

right to regulate the conduct of nonnatives inside Indian country.¹³² This right includes the power of both Indians and nonnatives to manage reservation territory and resources.¹³³ Furthermore, tribal interests in self-regulation are enhanced when the tribe seeks to protect the health and welfare of the reservation¹³⁴ or regulate the tribal resources within Indian country.¹³⁵ Finally, tribes retain strong interests in promoting economic development¹³⁶ and tribal self-sufficiency.¹³⁷

Cutting against the otherwise strong tribal interest in self government is the fact that tribes frequently have no more than a de minimis interest in nonnative activities conducted on their reservations.¹³⁸ Unlike the situation in *Mescalero Apache Tribe*, in which the state sought to regulate an activity on the reservation involving wildlife from the reservation,¹³⁹ a tribe has little self-interest in, for example, a product that is made from raw materials brought into the reservation, manufactured inside the reservation's borders, and then shipped back outside the reservation for sale to nonnatives.¹⁴⁰

The interests of the federal government arise in two contexts: (1) protecting tribal sovereignty; and (2) ensuring that state statutes do not interfere with comprehensive federal regulatory schemes. First, federal Indian policy is to promote tribal self-government and protect tribal sovereignty.¹⁴¹ Congress' "overriding" goal in promoting such self-government is to enable tribes to achieve political and

132. See *Mescalero Apache Tribe*, 462 U.S. at 333 (stating that "[a] tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is . . . well established"). See also notes 83-98 and accompanying text.

133. *Id.* at 335.

134. *Montana v. United States*, 450 U.S. at 566. See Spaeth, *American Indian Law Deskbook* at 272 (cited in note 5).

135. *Mescalero Apache Tribe*, 462 U.S. at 335-37. See Spaeth, *American Indian Law Deskbook* at 272.

136. See authority cited in note 135.

137. *Id.*

138. See note 93.

139. See notes 83-98 and accompanying text.

140. For example, a tribe would have little interest in an activity that refined petroleum mined outside the reservation and then shipped into states for consumption.

141. See, for example, *Mescalero Apache Tribe*, 462 U.S. at 334-35 (stating that the federal government is "firmly committed" to the goal of promoting tribal self-government). See also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (stating that the purpose of the Indian Reorganization Act, 25 U.S.C. § 461 et seq. (1988), is to rehabilitate the tribes' "economic life" and give them "a chance to develop the initiative destroyed by a century of oppression and paternalism"); Indian Financing Act of 1974, 25 U.S.C. § 1451 (1988) (stating that the policy of the Act is to develop and utilize Indian resources "to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources"). See also Spaeth, *American Indian Law Deskbook* at 274 (cited in note 5).

economic self-sufficiency.¹⁴² This policy extends to the environmental regulation arena.¹⁴³ Second, the federal government has a strong interest in assuring that state statutes do not obstruct the operation of comprehensive federal regulatory schemes.¹⁴⁴ Therefore, the likelihood that courts will give state environmental statutes force within reservations is diminished by the fact that the federal government already has a strong presence in the environmental regulation arena and its stated policy favors tribal sovereignty.¹⁴⁵

States undoubtedly will claim a strong interest in protecting their environment. This interest is, of course, enhanced when on-reservation activities are polluting the resources outside Indian country.¹⁴⁶ A state's interest in a particular situation is heightened relative to the extent and threat of the pollution. Finally, a state's interest will be stronger when it provides some services in connection with on-reservation regulation.¹⁴⁷

Any state that seeks to regulate a reservation's environment will have to overcome significant evidentiary burdens¹⁴⁸ and likely will

142. *Mescalero Apache Tribe*, 462 U.S. at 335.

143. See Environmental Protection Agency, Office of External Affairs, *Indian Policy Statement* (Nov. 1984). See also Spaeth, *American Indian Law Deskbook* at 274 (cited in note 5) (quoting Environmental Protection Agency, Office of Federal Activities, *Discussion Paper on Indian Policy* 35, stating the current policy is to "endeavor where appropriate to give tribal governments the primary role in environmental program management and decision-making relating to EPA's delegable programs on reservation lands").

144. See, for example, *White Mountain Apache Tribe*, 448 U.S. at 148. See also notes 83-107 and accompanying text; *Warren Trading Post Co.*, 380 U.S. at 688.

145. Virtually all federal environmental statutes apply to reservations. See note 48. In addition to having a broad presence in the field of environmental regulation, the federal government also may have a specific interest in promoting certain projects. For example, in *Mescalero Apache Tribe*, 462 U.S. at 343-44, the Court held that the federal government's cooperation with the tribe to develop its game and fish resources—providing a source of income from nonnative hunters and fishermen—preempted the state from applying its regulations. See notes 84-85 and accompanying text. Therefore, if a tribe accepted the federal government's nuclear waste, see note 33 and accompanying text, the state likely would be powerless over the disposal site because the federal government presumably would work closely with the tribe to set up and manage the site.

146. The Court in *Mescalero Apache Tribe* recognized that the state had not argued that its attempted regulation of the tribe was justified due to any off-reservation effects that the tribe's regulations were causing. 462 U.S. at 342. At the same time, the Court did not indicate the significance that such a finding would have made on the outcome of the case.

147. See *Cotton Petroleum*, 490 U.S. at 163 (allowing state to tax on-reservation activities of nonnatives when the state contributed funding to the on-reservation activities). Under *Cotton Petroleum*, a state that subsidized the construction of a landfill on a reservation might have a stronger interest in regulating that landfill.

148. For a similar analysis of this balancing test reaching the opposite conclusion of this Note, see Spaeth, *American Indian Law Deskbook* at 267-76 (cited in note 5). For an argument that states probably have authority to regulate hazardous waste activity inside Indian country, see generally Leshe Allen, *Who Should Control Hazardous Waste on Native American Lands? Looking Beyond* Washington Department of Ecology v. EPA, 14 Ecology L. Q. 69 (1987). For an

have to show at a minimum that on-reservation activities are polluting the off-reservation environment. Although the dicta in the current case law indicates that courts will consider seriously a state's interest in protecting its environment when on-reservation activities have off-reservation effects, it remains unclear whether the state's interest in such situations will persuade a court to permit regulation of nonnatives inside the reservation.¹⁴⁹ A state will be most successful when: (1) an on-reservation activity causes significant off-reservation effects;¹⁵⁰ (2) the tribe has a de minimis interest in the activity;¹⁵¹ (3) no federal statutes cover the activity the state seeks to regulate;¹⁵² and (4) the state contributes either funding or resources to the on-reservation activity.¹⁵³

While recognizing that the interests supporting tribal sovereignty might make tribal immunity from state statutes an equitable rule in most situations, the circumstances peculiar to environmental problems warrant a modification of this doctrine. In the environmental arena, many tribal activities create ramifications that spill well beyond the boundaries of the reservation. The need to allow states to have some regulatory authority over the reservation environment is enhanced by the knowledge that nonnatives seeking to escape stricter state laws own many of the polluting operations.¹⁵⁴ The law must, therefore, strike a balance that upholds both tribal sovereignty and states' powers to safeguard their natural resources.

analysis of this balancing test reaching the same conclusion as this Note, see Royster and Fausett, 64 Wash. L. Rev. at 649-57 (cited in note 48).

149. The uncertainty regarding whether a state may ever regulate nonnatives inside Indian country is enhanced by the fact the Court in *Cotton Petroleum*—perhaps the principal case granting states authority inside reservations—applied an analysis in the oil and gas tax area that is strikingly different from the analysis the Court has applied to regulatory matters. See note 110.

150. See note 146 and accompanying text. Some commentators have suggested the state's interest in preventing pollution inside its borders might not be as strong as would be anticipated when compared to the tribal sovereignty interests:

Many of the legitimate state interests—uniform laws, spillover concerns, and enforcement issues—are being addressed through increased attention by EPA to pollution control in Indian country, the growth of tribal programs to address specific and overall environmental concerns, and cooperative agreements between tribes and states. In any case, many of these state interests are no greater in the state-tribal context than they are with regard to neighboring states. Spillovers and problems with lack of uniform laws potentially plague any situation involving contiguous jurisdiction.

Royster and Fausett, 64 Wash. L. Rev. at 654 (cited in note 48) (citations omitted).

151. For example, the activity is one which involves no tribal resources and which produces a product that will be used exclusively outside the reservation. See notes 93, 138, and accompanying text.

152. See note 92 and accompanying text.

153. See note 94 and accompanying text.

154. See Part II.

IV. PROPOSED SOLUTIONS TO CLOSE THE LOOPHOLE

Two potential paths may be taken to address this problem. First, courts may interpret tribal sovereignty jurisprudence in a way that permits states to enforce their environmental regulations on reservations in some situations. Second, Congress could adopt legislation authorizing the Interior Secretary to waive tribal sovereignty and allow states to enforce their regulations when necessary to reduce pollution of the state's environment. As a matter of feasibility, uniformity, and practicality, the latter solution is the preferable one.

A. *The Judicial Path*

Despite the current interpretation of tribal sovereignty generally prohibiting states from regulating reservations, the possibility exists that courts will grant states regulatory authority over Indian reservations in the environmental arena. This solution, however, is unlikely. If a state seeks to regulate Indians who are threatening the state's environment, it will have to establish that an "exceptional circumstance" exists allowing application of the state statute.¹⁵⁵ A state is more likely to be successful in regulating activities inside Indian country if it attempts to apply its statutes only to nonnative operations.¹⁵⁶ The state, however, still would have to assert a sufficiently strong interest to overcome the reservation's and the federal government's interests¹⁵⁷ in tribal sovereignty. To date, no state has met this burden in the environmental context.

Yet, even if a court permitted a state to enforce such a statute, the judicial path would remain an inadequate path. A court might decide a state could regulate only nonnatives and their activities because the state faces a lower burden in applying its statutes to nonnatives.¹⁵⁸ In such a case, however, the state statute would not reach dangerous operations in which Indians engage.¹⁵⁹ Environmental problems are ignorant of who causes them. Yet, a judicial approach likely would distinguish regulation of pollution by

155. Courts could analogize a situation to the circumstances in *Puyallup Tribe*, in which the Court permitted the state to apply laws that are "reasonable and necessary" for conservation of various wild species. 433 U.S. at 180. Similarly, courts could permit a state to enforce a statute "reasonable and necessary" for protecting certain common elements of the state environment, such as groundwater or air. See notes 70-73 and accompanying text.

156. See Part III.B.

157. See Part III.A.

158. See *White Mountain Apache Tribe*, 448 U.S. at 151. See also Part III.B.

159. See Part III.C.

Indians from pollution caused by nonnatives.¹⁶⁰ From an environmental perspective, this distinction is unjustified.¹⁶¹

A final disadvantage of a judicial solution is the impracticality of implementing it. First, different courts likely would waive sovereignty in different situations, creating a problem of disuniformity. Second, judges are not experts in geology and environmental science. They would have difficulty assessing the amount of, or potential for, environmental harm outside the reservation.¹⁶² Finally, if courts were to start making exceptions to protecting tribal sovereignty, states might flood the courts in an attempt to enforce every environmental statute on every reservation. A judicial solution therefore faces significant legal and practical hurdles.

B. *The Legislative Path*

The most effective way to strike a balance between preventing harm to the environment and protecting tribal sovereignty interests is for Congress to enact legislation that considers these concerns. The purpose of such a statute would be to ensure that activities within a reservation's borders do not damage the environment¹⁶³ while, at the same time, protecting the rights of native tribes to "make their own laws and be ruled by them."¹⁶⁴

The proposed model statute that follows enables Congress to make a policy choice that balances the tribal, federal, and state interests. For example, the statute balances these interests in such a way that states may apply their statutes to reservations when activities inside Indian country are damaging, or threatening to damage, the state's environment. At the same time, it demands that states trump tribal and federal interests to the least possible extent. The model

160. See, for example, *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480-83 (holding a state cigarette sales tax applicable to on-reservation sales to nontribal members, but not to sales to reservation members).

161. *New Mexico v. Mescalero Apache Tribe* recognized this same concern. The Court held that a regulatory scheme in which members would be governed by tribal ordinance and nonmembers would be regulated by general state hunting and fishing laws would create an "inconsistent" dual system and "severely hinder the ability of the Tribe to conduct a sound management program." 462 U.S. at 339.

162. This problem could threaten the interests of both the states and the tribes. A judge who incorrectly finds no damage to the state will injure the state because the pollution will continue. A judge who incorrectly finds damage to the tribe will injure the tribe because the state-law enforcement will interfere with the tribe's interest in self-government.

163. A statute should define damage to the environment as damage not only to human beings, but to wildlife and the physical environment as well. This ensures that the statute would apply to reservations far isolated from population centers.

164. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 343-44. See Part III.A.

statute waives sovereignty only when applying the state regulations would improve the environment—it prohibits states from enforcing regulations unless they are more stringent than the tribe's. The statute applies with equal force to activities operated by Indians on reservations and activities operated by nonnatives on reservations. And, perhaps most importantly, it effectively destroys the incentives for nonnatives to move onto reservations to avoid tighter state pollution controls. Finally, the framework of the model statute recognizes the different challenges posed by new industrial activities starting up on a reservation—such as landfills—and ongoing reservation activities already polluting the environment outside the tribe's borders.¹⁶⁵

1. New Activities

When a tribe seeks to initiate a new industrial activity on a reservation, the statute would require the Interior Secretary¹⁶⁶ or his agents, upon a petition filed by the state, to assess the probability that the operation will pollute or degrade natural resources outside the reservation. Upon a showing that the activity likely will threaten the state's environment, the Interior Secretary could require the tribe to ensure that the facility operates at a level consistent with the state's standards. The Interior Secretary also could allow state officials to inspect the on-reservation facilities consistent with the state regulations if the tribe's inspection policies are inadequate compared to the state's standard. Tribes would have the option, however, of creating their own inspection programs that meet or exceed the state's requirements if they prefer to keep state officials from having any direct control over their activities.

The application of particular state standards should depend upon the nature of the reservation activity and the type of natural resource allegedly threatened. For example, an incinerator at the bottom of a valley in the center of a reservation likely would not threaten a state's aquifer. Therefore, the state's clean water act standards would be inapplicable. Incinerator operations might, however, jeopardize the state's air quality. As a result, the state's air pollution control regulation would apply in the reservation even though the state's water act would not. This ensures that both the state's and

165. A general overview of the model statute's approach is provided in Part IV.B. The statute's operation is discussed in greater detail following each provision in the Appendix.

166. The Department of the Interior is the federal agency with primary responsibility for regulating Indian affairs.

the tribe's interests are protected to the maximum extent; the state may interfere with the tribe's right of self government when its resources are threatened, but only to the extent necessary to protect such interests.

2. Existing Activities

If an ongoing operation on a reservation pollutes the state environment,¹⁶⁷ a state would petition the Interior Secretary to waive tribal sovereignty and allow the state to enforce a particular environmental statute on the reservation. The Interior Secretary would then balance various claims asserted by the tribe and the federal government to determine if the state statute should apply. The Interior Secretary would have broad discretion to determine whether a state regulation would apply to the entire reservation or only the points where the pollution is created and/or crosses the tribe's border.

3. Authority for the Model Statute

Congress has clear constitutional authority to pass such a statute. As to new operations, Congress may grant the Interior Department authority to condition approval of new projects on reservations based on factors relating to the surrounding or neighboring state.¹⁶⁸ Congress has power to waive tribal sovereignty and allow states to apply their statutes to reservations under certain circumstances. Further, Congress may authorize the Interior Secretary to

167. These provisions of the statute would apply in equal force to Indian activities incidental to everyday life as well as to "tribal" operations owned by nonnatives that pollute outside of Indian country. Therefore, the model statute regulates activities such as landfills designated only for tribal use such as tribal septic systems. See note 22.

168. See, for example, Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 et seq. The IGRA requires that a tribe negotiate a compact with a state concerning certain casino operating criteria, such as hours of operation, before the Secretary of the Interior grants a permit to the tribe to operate the casino. 25 U.S.C. § 2710. Although several courts have questioned the constitutionality of the IGRA, their scrutiny focuses on whether the statute violates the Tenth and Eleventh Amendments by mandating that states enter into compacts with tribes. See, for example, *Ponca Tribe of Oklahoma v. State of Oklahoma*, 1994 WL 476316 (10th Cir. 1994) (holding that the IGRA does not violate the Tenth Amendment). Therefore, the controversy surrounding the IGRA is not related to the analogous support it provides for the model statute. For a general discussion of cases analyzing the constitutionality of the IGRA, see generally William T. Bisset, *Tribal-State Gaming Compacts: The Constitutionality of the Indian Gaming Regulatory Act*, 21 *Hastings L. Q.* 71 (1993).

waive tribal sovereignty based on criteria that Congress establishes in the statute.¹⁶⁹

This legislative answer is the preferable approach to closing the legal loophole that exists today. Long-standing congressional acts indicate the legal foundation for this model statute exists. Such a statute would provide a uniform method of dealing with this problem as the Interior Department could establish consistent and efficient policies and regulations. And the floodgates concern is not as great because the Interior Department administratively could reject frivolous state claims much more quickly than courts. In fact, the model statute commands the Secretary to reject claims absent evidence pollution is threatening, or could threaten, the state's environment.

Perhaps most important, such a statute would serve to solve the problem of nonnatives moving onto reservations to avoid stricter state restrictions. The statute wipes out the incentive to enter Indian country unless the operation can locate in an area on a reservation that would not threaten the neighboring state's environment. And facilities already in operation would have to meet the state's standards if they caused or threatened pollution outside the reservation.

At the same time, the statute continues to protect tribal and federal interests to the fullest extent possible. The statute will lower the shield of sovereignty only when the state's interests in protecting its environment are significant and likely to be realized. It permits states to apply only the statutes and regulations addressing the specific type of pollution affecting the state and only over such an area where it is necessary to regulate.

V. CONCLUSION

It is ironic that as state environmental laws are growing more stringent, the threat to the states' environment remains, to some extent, constant. This irony, in part, results from a legal loophole

169. See, for example, 25 U.S.C. § 231 (1988) (discussed in note 50). The Act reads, in relevant part:

The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or (2) to enforce the penalties of State compulsory school attendance laws against Indian children

...
25 U.S.C. § 231.

that allows nonnatives to move onto Indian reservations and ignore tighter state regulations. Because pollution fails to recognize the tribal sovereignty doctrine and political boundaries, a solution must be implemented to ensure that state plans to protect their resources are not frustrated by either overly rigid or unpredictable legal doctrine. The best solution is for Congress to enact legislation that both gives states power to regulate the reservation environment when necessary and still recognizes the deeply embedded principles of tribal self-government.¹⁷⁰

*Roger Romulus Martella, Jr.**

170. Although the solution this Note suggests is the most feasible from a legal perspective; a legal approach is not necessarily the only approach that could be taken to solve distressed environmental problems that both states and Indian tribes face:

I would urge that the whole concept of nature be rethought. Nature, the land, must not mean money; it must designate life. Nature is the storehouse of potential life of future generations and is sacred. Human societies already possess the technologies necessary to provide food, clothing, and shelter for everyone. The organization of distribution of wealth needs to be repaired, for that imbalance destroys both contemporary and future life and nature. Western society needs to prioritize life-supporting systems and to question its commitment to materialism. Spirituality should be our foundation. . . .

Onondaga Clan Mother Audrey Shenandoah, quoted in Wall and Arden, *Wisdomkeepers* at 27 (cited in note 3), from a keynote address she delivered to former Soviet President Gorbachev and former United Nations Secretary General Perez de Cuellar at a 1990 Moscow conference.

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APPENDIX—MODEL STATUTE

25 U.S.C. § 3601

CHAPTER 38—

INDIAN ENVIRONMENTAL EFFECTS CONTROL ACT

§ 3601 Congressional declaration of policy

The purposes of this chapter are—

(1) to provide a statutory basis for ensuring that activities on Indian lands do not damage the physical environment and natural resources of individuals outside such lands;

(2) to protect the physical environment and natural resources of states neighboring Indian lands from activities on reservations that may damage those concerns outside Indian lands;

(3) to reduce substantially the incentive that non-Indians presently possess to move onto tribal lands in order to avoid stringent state environmental regulations and taxes; and

(4) to ensure that Indians retain their fundamental rights to self-government, self-determination, and self-regulation to the fullest extent possible, and that the federal government's interest in protecting such rights is recognized before states are permitted to regulate activities inside Indian lands.

Comment: The primary purpose of this act is to protect the environment of lands outside Indian country. The preeminence of this goal is reflected in the provisions below that place the burden on the tribes and federal government to block application of a state statute once the state demonstrates that harm to its resources is likely or is occurring. At the same time, the policy remains conscious of the important tribal interests flowing from the backdrop of tribal sovereignty as well as the federal government's role in protecting those interests.

§ 3602 Definitions

(1) The term "Indian lands" means—

(A) all lands within the limits of any reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United

States against alienation and over which an Indian tribe exercises governmental power.

(2) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(3) The term "industrial activity" means any activity, operation, or service conducted within Indian lands that alters or has the capacity to alter the condition of the physical environment.

(4) The term "operator" means a person or enterprise engaged in conducting the industrial activity. Operator includes, but is not limited to, Indians, Indian-run industrial activities, nonnative persons, or nonnative-run industrial activities.

(5) The term "physical environment" includes the health of individuals, and resources including, but not limited to, wild and aquatic life and natural resources.

(6) The term "Secretary" means the Secretary of the Interior.

Comment: The terms "Indian lands," "Indian tribe," and "Secretary" are adapted from definitions commonly used in recently-enacted statutes addressing Indian issues.¹⁷¹

The statute defines "industrial activity" broadly to regulate virtually any activity that in some way could affect the physical environment outside Indian country. Presumably under the definition, a landfill operated by a nonnative company would be covered, as would be a septic system serving a small tribal community.

The statute also adopts a broad definition of "operator" to allow the Interior Department discretion in locating a party liable for damages when necessary. The statute explicitly mentions that both Indians and nonnatives can be held liable under the statute.

The statute defines the "physical environment" expansively to include natural resources and the general health of individuals. This is to ensure that the statute covers more than physical damage to the environment—the act guards the health of individuals and protects wildlife as well.

171. See, for example, the Indian Gaming Regulatory Act, 25 U.S.C. § 2703.

§ 3603 New industrial activities on Indian lands**(a) Obligation to report initiation of new activity**

A tribe must notify the appropriate state officials in states neighboring the tribe's lands when a new industrial activity is intended to be commenced on the reservation. If the state seeks to regulate the operation of the new activity, it may bring a proceeding pursuant to subsection (b).

Comment: The provision imposes a reporting requirement on tribes to inform states potentially effected by a new industrial activity on a reservation. Before the new activity commences on the reservation, the tribe must inform states neighboring the tribe. Such states may then bring a proceeding under this Section either to gain permission to regulate the activity or to stop the activity's initiation if the state believes that the activity will damage the state's physical environment.

(b) When new activity may begin

When a state demonstrates by a preponderance to the Interior Secretary that a proposed industrial activity inside a reservation could damage the physical environment outside the reservation, the activity may not commence until the Secretary grants a permit under subparagraphs (c) or (e) allowing the operation to begin. The Secretary may grant the permit contingent on the tribe or enterprise's agreement to accept certain conditions the Secretary sets forth as provided in subsection (d).

Comment: The trigger phrase here is "could damage." Before a proposed industrial activity on a reservation falls within the scope of this statute, the state must meet its burden of establishing that the activity poses a threat to the state's physical environment. This initial burden enables the Interior Secretary to reject frivolous state complaints early in the administrative process if he finds that the threat of damage to the state's environment is highly unlikely. Frivolous complaints could arise in two situations: (1) when it is clear that the on-reservation activity could not pollute the state's environment because of the relative geological location and geographical features of the location of the activity and the reservation's borders; and (2) when the nature of the activity is such that any detrimental effect on the physical environment is unlikely.

The provision also makes a policy choice in favor of protecting the state's environment. Once the state meets its burden by showing that the new activity could damage its environment, the Interior Secretary is required to suspend the initiation of the operation until the agency grants a permit. However, establishing this burden does not mean that necessarily the tribe will have to comply with state standards and regulations. Rather, as described in (c), the

result of proving that threatened harm could exist merely triggers further analysis into whether or not such harm likely will occur.

(c) Finding damage is likely

In deciding whether to grant the permit, the Secretary shall consider evidence from the tribe, the federal government, and the state concerning whether or not the activity threatens to damage the environment outside Indian lands. If the Secretary finds the state has demonstrated by clear and convincing evidence that the proposed activity would likely damage the state's physical environment, and that applying the state's standards and regulations will diminish the likelihood of such damage, the Secretary may decide whether to grant the permit subject to conditions or deny the permit pursuant to subsection (d).

Comment: The purpose of this provision is to decide whether the new activity "would likely" damage the state's environment. This hurdle will be a significantly higher one for the state to clear than the "could threaten" standard in subparagraph (b)—both because the burden of persuasion is now clear and convincing rather than a preponderance of the evidence and because it will be more difficult to establish the likelihood of injury rather than the mere possibility of injury. The state also will have to rebut evidence offered by the tribe and the federal government. If the state is unable to meet its burden, the Secretary will grant the permit to operate the new activity without any influence from state regulations. These enhanced procedural devices further protect tribal and federal interests growing from the tribal sovereignty doctrine.

Finally, if the state standards are equivalent to or less stringent than the tribal standards, the Secretary must grant the permit without any conditions. This prevents the state from taking control of a reservation activity merely because it would prefer to have greater control over the tribe. However, if the state does establish that pollution would be less likely under the state's standards, the agency has two options. The Secretary can grant the permit subject to certain conditions described in subsection (d) or the Secretary can deny the permit.

Despite the procedural constraints designed to protect tribal and federal interests, the statute makes a clear policy choice in favor of protecting the environment. Upon establishing that the activity is likely to harm the state's environment, the Secretary is ordered to apply the state environmental regulations or deny the permit regardless of any strong tribal or federal government interests.

(d) Conditional granting of permit

The Interior Secretary may elect to grant a permit subject to certain conditions if the state establishes by clear and convincing evidence that the proposed activity would likely damage the state's

physical environment under subparagraph (b). Such conditions may include—

(1) that the activity be operated in conformance with applicable state standards and regulations; and

(2) that the tribe permit periodic state inspection of the facility consistent with current state laws, or, in the alternative, that the tribe implement its own inspection program that meets or exceeds the state's monitoring requirements.

The Secretary may reject the permit only if the state establishes by clear and convincing evidence that the activities will damage the state's physical environment under any conditions that could be imposed under this subsection and that the state regulations would outlaw the activity if it were conducted in the state.

Comment: This subsection assures that activities inside reservations that threaten the state's environment will be operated in compliance with state pollution and inspection standards. By employing the word "applicable," the subsection ensures that only the statutes regulating the particular harm that threatens the state's environment will apply. Therefore, a state statute regulating air but not water will apply to a particular activity if the pollution from the activity affects only the state's air, and not its water quality, even if the activity pollutes the water inside the reservation.

The Secretary is authorized to deny a permit only if imposing conditions on the activity will not alleviate the likelihood of damage to the state's physical environment. Furthermore, the Secretary may deny the permit only if the state regulations would prohibit the activity. This serves as a further safeguard to ensure that the states are not able to regulate activities inside reservations more strictly than they can regulate activities outside reservations.

(e) Finding damage is unlikely

If the state fails to establish by clear and convincing evidence that the industrial activity will likely damage the physical environment outside the reservation, or that applying the state's standards and regulations will not diminish the likelihood of such damage, the Secretary will grant the permit to operate the activity without being subject to further conditions.

Comment: Subsection (e) is the inverse to subsection (c) and makes clear that an industrial activity that likely will not damage the physical environment outside the reservation will not be subject to state regulation. Furthermore, it confirms that states will only be able to enforce statutes within reservations that are more

effective at preventing damage than other regulations that are currently applicable to the reservation.

(f) Effect of finding damage is unlikely

A finding that a proposed industrial activity either could not damage, or is not likely to damage, the physical environment outside the reservation shall not preclude the state from seeking to require that the activity be operated consistent with state standards and regulations at a later date under Section 3604 of this Act, if the state establishes that such activity is actually damaging the state's physical environment in accordance with that Section.

Comment: This provision will enable a state to bring a proceeding under § 3604 to apply its regulations to an activity that the Secretary previously permitted if the activity is later proven to be polluting the state's environment.

§ 3604 Existing activities on Indian lands

(a) When state standards are imposed

When a state demonstrates by clear and convincing evidence that an industrial activity inside Indian lands is damaging the physical environment outside the reservation, the Secretary shall order that the operators conduct the activity consistent with applicable state standards and regulations, unless the tribe or federal government demonstrates by clear and convincing evidence that imposing such restrictions will interfere unreasonably with the tribal and federal interests pursuant to subparagraph (b). In determining whether activity is actually damaging the physical environment outside Indian lands, the Secretary may consider evidence from the tribe, the federal government, and the state. The Secretary may not impose state standards or regulations on a reservation activity that will not diminish the damage outside the reservation.

Comment: A state attempting to regulate existing activities must demonstrate that the activity on the reservation is actually polluting the state's environment by clear and convincing evidence. The tribe and federal government may offer evidence to rebut the state's evidence. If the state meets its burden, the tribe and federal government can attempt to show that enforcing the state statute inside the reservation would interfere with tribal sovereignty in an "unreasonable" way. The Secretary is ordered to make this determination of reasonableness pursuant to subsection (b).

To summarize, once the state demonstrates injury to its environment, the burden is on the tribe and federal government to prove that their interests are so strong that the state should not be permitted to apply the statute. This again reflects the policy choice in favor of protecting the environment over interfering with tribal sovereignty.

A distinction therefore exists between § 3603 that regulates new activities and § 3604 that regulates existing activities in terms of the weight given to tribal and state interests. Under § 3603, once a state demonstrates that on-reservation activities will likely harm the state's environment, the Interior Secretary is ordered to abrogate the tribe's and federal government's interests in tribal sovereignty. However, § 3604 requires the Interior Secretary to consider the tribal and federal government interests before lowering the sovereignty shield. The justification for this distinction is that interfering with an activity already operating on a reservation raises greater concerns that the state is interfering with tribal self-government and self-regulation. Therefore, it is more critical that the asserted state, tribal, and federal government interests be closely examined and balanced.

(b) Tribal and federal factors

Applying a state statute on a reservation unreasonably interferes with tribal and federal interests in tribal sovereignty when the state regulations would preclude tribal economic development and self-sufficiency or when the state regulations would effectively destroy a tribe's ability to govern itself. In determining whether a state regulation will unreasonably interfere with tribal sovereignty interests, the Secretary shall consider—

- (1) the right of Indian tribes to govern themselves and regulate their environment;
- (2) the policy of the federal government to protect Indian tribes' rights of self-determination, self-government, and self-regulation; and
- (3) the policy of the federal government to promote economic development and self-sufficiency of the tribes, as reflected in other acts in this Title.

Comment: This subsection ensures that the Secretary will consider the tribe's and the federal government's traditional interests in tribal sovereignty before deciding to apply the state statute. First, the provision sets forth objective criteria for determining whether or not state regulations "unreasonably" interfere with the tribal and federal government interests: enforcing the state regulations either would block economic development or would prevent the tribe from being able to govern itself. Second, the provision enumerates certain criteria that the Secretary should consider when making the objective decision. The subsection ends with a general reference to Title 25 of the United States Code—the title that regulates Indian affairs—to allow the tribe and the federal

government to make use of policies from other statutes in attempting to block application of the state statute.

(c) Effect of finding no damage

A determination that a proposed industrial activity either is not damaging the physical environment outside the reservation, or that applying a state regulation would unreasonably interfere with tribal and federal interests, shall not preclude the state from seeking to require that the activity be operated consistent with state standards and regulations at a later date under this Section if the state establishes pursuant to this Section that such activity is in fact damaging the state's physical environment and if the state establishes by a preponderance of the evidence that the operation of the industrial activity or the condition of the physical environment has changed significantly so as to warrant re-consideration.

Comment: This provision serves the same purpose as § 3603(e), yet requires that the state show that "the situation has changed significantly" before it can bring a second proceeding to enforce its regulations

§ 3605 Failure to comply

The Secretary may enjoin the operator of any activity that fails to comply with applicable standards and regulations under Section 3603(b) or Section 3604(a) from operating the damaging activity. The Secretary also may require any party who violates this Act remedy any damage caused to the physical environment outside the reservation by requiring the operator pay compensatory and punitive damages to the state or any other parties outside Indian lands damaged by the industrial activity.

Comment: This section imposes two separate remedies for failing to comply with other provisions of the Act. First, the Secretary has the power to enjoin any operation that is in violation of an order under § 3603 or § 3604. Second, any operator may be liable for the compensatory damages to remedy the injury that the operator causes to a state's environment, as well as punitive damages.

§ 3606 Regulations

The Secretary, after notice and opportunity for public comment, and at least three months before the effective date of this stat-

ute, shall promulgate regulations implementing the provisions of this statute. Such regulations may describe, but shall not be limited to—

- (1) standards regarding when an industrial activity inside a reservation could damage the physical environment outside the reservation and when such activity will likely damage the environment outside Indian lands under § 3603;
- (2) standards regarding when an industrial activity inside a reservation is damaging the physical environment outside the reservation and when imposing state standards and regulations unreasonably interferes with tribal and federal interests under § 3604; and
- (3) the procedures and documents that states, tribes, and the federal government should apply in accordance with this statute.

Comment: By adopting regulations that provide detail on when the burdens in this provision will be met, the legislative approach will further the goal of implementing a consistent, efficient, and objective method for waiving tribal sovereignty in applicable situations. Furthermore, the Secretary also is encouraged to adopt regulations that implement the procedural aspects of the statute.

