5

Federal Indian Policy And Jurisdictional Considerations In Reservation Solid Waste Management

> We have treatment as States under the Clean Water and Clean Air Acts. But under RCRA.... we don't have the authority that States have. Yet we are a sovereign nation, and we want to maintain, we want to do the things tribes are going to have to do. If its enforcement, we want to do it.
>
> *-Cleve Neiss, Chairman Rosebud Sioux Tribe of South Dakota*[1]

> While Indian lands have become part of the United States, Indian communities have neither been allowed to remain isolated as independent political entities nor have they been granted full status within the American political system. Consequently, American Indians have been forced to live within a political/legal no man's land from which there seems to be no possibility of extrication.
>
> *Vine Deloria*[2]

Controlling the wastestream is the core objective of SWM. But to control the wastestream the power to choose community SWD alternatives and enforce community disposal practices is needed. Carrying out a conventional solid waste management (CSWM) program therefore relies partially upon possessing authority and enforcement capability for SWD related ordinances and laws throughout the relevant region. As discussed in Chapter 2, this type of authority and capability is characteristic of conventional community governments. Another reason why CSWM can fail on Indian Reservations is that Indian tribes do not possess such local governmental authority and capability in either a straightforward or encompassing manner.

Description of the authority capabilities that Indian tribes do possess is complex. As described below, tribal legal authority[3] is unclear and/or limited in many situations. And the question of governmental authority itself is inherently associated with tribal sovereignty issues. So the play for authority is a passionate and crucial one for tribes, giving rise to a number of practical impediments to exercising the authority they have. In this chapter, the nature of tribal governmental authority and how it can impact SWM on reservations is examined in the following sections.

(1) Federal Indian Policy and Its Relationship to Tribal Authority

(2) History and Formation of Federal Indian Policy

(3) The Structure of Federal-Indian Policy Development: The Federal Court versus Congress

(4) Federal Indian Policy on Tribal SWM: Full Responsibility and Partial Authority Federal Indian Policy on Tribal SWM

(5) Present Day Tribal Authority

(6) Some Common SWM Problems Due to Legal limits on Tribal Jurisdiction: A Return to the Un-enforced Enforcement Program

(7) Practical Obstacles to Tribal Jurisdiction: Bringing Sovereignty To Court

(8) Practical Obstacles to Tribal Jurisdiction: Bringing in the Outside

(9) Chapter Summary

5.1 FEDERAL INDIAN POLICY AND ITS RELATIONSHIP TO TRIBAL AUTHORITY

At the day to day implementation level, tribal authority is what manages the reservation's solid wastes. But tribal authority depends both implicitly and explicitly on Federal-Indian Policy (FIP). Federal Indian Policy defines the legal relationship of tribes to the federal, state, and local governments. It also defines the political and administrative stance and structure of the federal government in relation to Indian affairs, a topic examined briefly in the next chapter. And it defines the legal, and many of the practical limits, of tribal authority.

So to understand tribal authority, FIP must be understood. Unfortunately, description of FIP and its defining effect on tribal authority is problematic. Policy has fluctuated greatly over time. It is affected by current political climate and its own past. Tribes in the present day also can affect policy through the tribal authority they choose to exert or pursue. And FIP is comprehensive, but generally nonspecific. It defines tribal authority implicitly as much as explicitly. Thus, tribal authority is associated with significant uncertainty.

5.2 HISTORY AND FORMATION OF FEDERAL INDIAN POLICY

> Like the Miners Canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere
>
> -- *Felix Cohen*[4]

Since its early formation, a number of major shifts and reversals of FIP have occurred. The resulting effects on tribal authority still affect tribal circumstances, lifestyles, and social consciousness today[5], and so affect the carrying out of SWM as well. Therefore, to analyze tribal perspectives on many SWM matters, and to understand the legal and practical subtleties of tribal SWM authority, an understanding of the historical periods and precedents of FIP is needed. A brief description is provided below. However, to grasp fully the importance of history to Indian tribes, and hence its pervasive influence in tribal SWM decision making, it is essential to become familiar with the literature on Native American history[6].

The Trade and Intercourse Act Period: The Principles of Inherent Sovereignty and Federal Trust Responsibility

When European settlers first began colonizing the continent in the early 1700’s, in accordance with international law of the time, the relationship with Indian tribes was based mainly on the premise that Indian consent was necessary to gain title to the land[7]. A "government-to-government" agreement was generally exercised even after the American Revolution, up until the 1820’s. Many Native American scholars and Law experts have construed the Treaty[8] and Indian Commerce[9] clauses

in the U.S. Constitution as intentionally validating separate nation treatment, not subject to state jurisdiction[10].

But in the first major reversal of FIP, the Supreme Court adopted the "Doctrine of Discovery" in 1823. The first Christian nation "discovering" a non-Christian land was given the right to its "exclusive title." [11] According to the Doctrine tenets, the basis of which are still held valid today, Indians could continue inhabitation and use of their lands, "but their rights to complete sovereignty, as independent nations, were necessarily diminished", and they had no power to sell the land.

Formation of Federal Trust Responsibility

In 1831, the Supreme Court (Court) defined the status of Indian tribes and their relationship to the United States more exactly. In Cherokee Nation v. Georgia[12], the Court ruled that tribes were "domestic dependent nations", and their relationship with the U.S. "resembles that of a ward to his guardian". This seminal case provides the primary basis for what is termed the "federal trust responsibility"[13]. Technically, because the federal government holds legal title for the exclusive "benefit" of the tribes, the federal government is legally required to act as trustee[14]. The concept of trust responsibility is quite broad, and includes the duty to protect the land. It is why the Department of Interior (DOI), the department that upholds the trust, is involved in so many facets of reservation business. One direct implication of the trust responsibility for SWM is that it is interpreted by many tribes to mandate the federal government provide resources to carry out any programs required of them, including RCRA[15].

Foundation of Tribal Inherent Sovereignty

Immediately following *Cherokee,* the Supreme Court found in Worcester v. Georgia that, although they had ward status, tribes had essentially superior powers to those of states because their sovereignty had never been abolished. The ruling is the primary argument against state interference on reservations today. It is also the basis for the key concept of *inherent* tribal sovereignty[16]. Essentially, because tribal sovereignty has not been extinguished formally, any limitations to it must be expressly divested, and any power is retained. How tribes can be regulated by the federal government was defined by *Worcester* as well.

> The political existence of the tribes continued after their relations with both the state and the federal government. As a consequence of the tribe's relationship with the federal government, tribal powers of self-government are limited by federal statutes, by the terms of treaties with the federal government, and by restraints implicit in the protectorate relationship itself. In all other respects the tribes remain independent and self-governing political communities.[17]

Another result of the *Worcester* decision is that any dispute that involves tribal jurisdiction must be considered a constitutional matter, and thus, be decided in federal court[18]. The ramifications of involvement with the Federal Court System are examined later in this chapter.

The Removal Period: Westward Expansion and Indian Country Contraction

In 1829, regardless of the tribal sovereignty and federal guardianship that had been legally entrenched by the Marshall Supreme Court, President Andrew Jackson[19] called for a reversal in policy and the removal of the Southeastern tribes. The Removal Period commenced with the Congressional passage of the Removal Act of 1830[20]. Within a decade, most of the Eastern and

Southern tribes had been voluntarily uprooted, pressured, or physically driven onto substitute reservations located in present-day Oklahoma, Kansas and Nebraska ("Indian Territory")[21].

Within a couple of decades, discovery of western gold, acquisition of the western states, the need for overland transportation routes, desire for good farm land, and acculturalist or anti-Indian public sentiment combined to create strong pressures to "breach" what had legally been established as the permanent Indian frontier[22]. As a result, throughout the mid-1800's, with an interruption during the Civil War, land cession treaties were negotiated with numerous tribes and a number of reservations established. In 1871, formal nation to nation treaty-making was ended, and the treatment of tribes as separate nations ended[23].

The Allotment Period: Loss of Land and Checkerboard Nations

> [The Indian] must be imbued with the exalting egotism of American civilization so that he will say 'I' instead of 'We', and 'This is mine' instead of 'This is ours'.
>
> -- *Commissioner of Indian Affairs, 1886*[24]

The historical period with the most direct effect on reservation SWM is the Allotment Period. In another shift of FIP, the Allotment Act[25] was passed in 1887, dividing reservations into 160 ac parcels. Each male head of household in the tribe was allotted one parcel, and single males a smaller plot. The "surplus" land created was opened up to white settlers for purchase.

By all accounts, the experiment of turning Indians into individual property owners failed dramatically[26]. Over the next fifty years, about ninety million acres of tribal lands were turned over to settlers through direct purchase, documented illegal manipulation, or later purchase from impoverished Indian allottees[27]. The randomly placed land parcels resulted in the complex "checkerboard" land status of many reservations today that so complicates tribal management.

Of equal or greater consequence, because of the incompatibility of group versus individual values described in the previous chapter, the allotment process devastated tribal society[28]. As a result, the Allotment Period has been referred to as a period of cultural “genocide”[29].

> The individual's economic setbacks were compounded by the cultural devastation. With the tribal powers severely enervated by the loss of communal lands and the diminishment of sovereignty, the particular members were more vulnerable to other assimilationist measures such as the indoctrination of children, the suppression of native language, religious proselytizing and the criminalization of traditional ceremonies[30]

The Indian Reorganization Act Period: A New Federal Deal

Another FIP swing began in 1924, when U.S. citizenship was granted to most Indians[31]. Later, largely as a result of increased public awareness and sympathy with tribal plight, preservationist sentiment, and failure of Allotment and its assimilationist policies the Indian Reorganization Act of 1934[32] (IRA) known as the "New Deal" for Indians was passed)[33]. In it, Allotment was formally ended, and the principles of "economic development, self-determination, cultural plurality, and the revival of tribalism" were affirmed as goals of the federal government.

The most visible and direct outcome of the IRA today for SWM is that it established a mechanism for the formal organization of the vast majority of tribes[34]. However, tribal constitutions had to be approved by the federal government (through the DOI), and formal federal supervision over

Indian tribes was increased[35]. As a result, the bulk of the "IRA tribes", as they are termed, were forced to formally abandon their own traditional styles of authority and decision making and adapt structures based on that of the U.S. government[36]. Ramifications of this controversial policy to SWM are discussed in the next chapter.

The Termination and Relocation Period: Condemned to Repeat the Past

A scant two decades passed before FIP again shifted dramatically. In another attempt at legislated assimilation in 1953, Congress passed the Termination Act, authorizing a procedure for the "termination" of federal recognition of tribes[37]. As a result of Termination, 61 tribes were formally disavowed between 1954 and 1962, and an additional 33 million acres of tribal lands were lost to private hands, adding to the reservation land jumble that Allotment created. In most cases, for many of the same reasons that Allotment failed, economic, political, and socio-cultural devastation again followed[38].

Overlapping the Termination Period was the Relocation Period when, through a series of legislated incentives, a large number of Indians were induced to leave the reservations and move to urban areas[39]. The effects for tribes today of such a policy are viewed as both positive and negative[40]. In many instances a brain drain, disenfranchisement within the tribal community, and social dissipation for relocated Indians resulted. But, as a result as well, Native American urban assistance centers and support groups were created, and many Indians received higher education before returning to the reservations with conventional scientific and business knowledge that have furthered tribal aims[41]. Because Relocation affected who and how many stayed on the reservations, it affects tribal SWM ability as well, a topic for the next chapter.

Federal Indian Policy Today: Self Determination and Legal Confusion

By the late 1960's, the thrust of FIP changed once more towards tribal self-determination, ushering in the present day "Self-Determination Period"[42]. Socially, the mid-1960's saw the beginning of a Native American Literary renaissance[43] and politically, the Red Power movement[44], most visibly demonstrated by the American Indian Movement (AIM) and subsequent stands at Wounded Knee, Alcatraz, and Washington D.C.[45]. Since Richard Nixon in 1970, each president has reaffirmed the principle of tribal self-determination[46].

> The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions... the practical results [of Termination] have been clearly harmful in the few instances in which termination actually has been tried. The removal of Federal trusteeship responsibility has produced considerable disorientation among the affected Indians and has left them unable to relate to a myriad of Federal, State and local assistance efforts. Their economic and social condition has often been worse after termination than it was before.
>
> *--U.S. President Nixon, July 1970* [47]

Legislatively, the hallmark Congressional action of the period is the Self-Determination and Educational Assistance Act of 1975, known generally in Indian Country as "638"[48]. This Act affirms the federal government's commitment and encouragement of tribal self-determination, and authorizes tribes to take over broad responsibility for federal government services, and serve as their own contractors. A number of subsequent Acts in such areas as tribal financing, self-gambling regulation, child welfare and adoption, and religious freedom[49] are viewed generally as indicative of the self-determination trend[50].

However, while a commitment to self-determination has marked the period so far, the delineation of where that self-determination stops is marking the period as well[51]. Restrictions on tribal sovereignty through limits on tribal jurisdiction, encroachment of state interests, and rejection of tribal immunity all have occurred during the past couple decades[52]. And an increasing number of tribal sovereignty cases are being seen in court so that new precedents are being introduced[53]. How FIP is decided is changing[54]. The SWM ramifications of defining what tribes can do are examined below.

5.3 THE STRUCTURE OF FEDERAL-INDIAN POLICY DEVELOPMENT: THE FEDERAL COURT VS. CONGRESS

Because FIP has changed over time, discussion on how FIP works has been deferred until now. As may be apparent from its history, the Supreme Court and Congress, through judicial decisions and laws, are the main parties responsible for making or changing prescribed FIP[55]. Presidential executive orders and decrees play a role as well, but they primarily influence judicial and legislative actions[56], as well as practical federal policy "in the field" by setting policy directives for agencies dealing with tribes[57]. States have no legal role in making FIP, but through FIP precedents and laws, they may have limited influence and authority on individual reservations[58]. What has changed in the past three decades is how the authority of the Court and Congress are interpreted, and what relative influence each exerts[59].

Congressional Authority

Due to the "dependent" status of tribes, the basic authority of Congress over Indian tribes is considered "plenary", allowing it "general federal authority to legislate over [tribal] health, safety, and morals"[60]. Somewhat controversially[61], Congress derives all of its legal authority over Indian tribes from the Interstate Commerce Clause in the Constitution, where Congress can "regulate Commerce... with the Indian tribes"[62]. Broad federal laws may be passed that affect all tribes (e.g. such as the Allotment Act), or Congress may grant or delegate rights to specific tribes.[63] Congress also can abrogate a treaty right, although to be legal the action must be stringently defensible[64].

Both houses of Congress have internal committees that deal with Indian affairs, and oversee and recommend Indian legislation[65]. Committee hearings are the primary way by which tribes formally present their FIP views to the federal government.

The Supreme Court and Implicit Divestiture

The Supreme Court is the other main avenue by which prescribed FIP is decided because its opinions are "the law of the land"[66]. Its main authoritative power comes from its interpretation of the Constitution, Congressional actions, and previous Court precedents. A new interpretation becomes new policy[67]. For example, in Federal Power Commission v. Tuscarora Indian Nation (1960) the Court found that federal statutes (including environmental laws) applied to Indians unless a "clear expression to the contrary" was included[68]. Prior to that time, FIP was based on Elk v. Wilkins (1884), "General Acts of Congress do not apply to Indians, unless so expressed as to clearly manifest an intention to include them"[69].

Perhaps the most powerful tool the Court has in determining FIP is its interpretation of the nature of tribal rights. Recall the inherent sovereignty status first applied to tribes in *Worcester*. This

guiding principle of tribal rights, absent Congressional or treaty declaration to the contrary, has been used countless times to decide in favor of tribal jurisdiction[70]. But during the present period, a seemingly contradictory principle has been established by the Court, called "implicit divestiture"[71].

Implicit divestiture limits inherent sovereignty "so as not to conflict with the interests of the overriding sovereignty"[72]. What the principle of implicit divestiture allows is the Court to decide, in any given situation, whether a tribe's authority is implicitly lifted as a "necessary result of their dependent status"[73], or, in keeping with the spirit of *Worcester* and subsequent cases[74], whether authority is still intact, and thus legitimate[75].

Role of Court and Congress in Policy Setting

As far as the relationship of the Court and Congress to FIP, Congress generally sets broad laws pertaining to all tribes (e.g., the Indian Civil Rights Act), but is generally reluctant to use its authority in specifically limiting or defining tribal sovereignty[76]. The Supreme Court (and its associated lower federal courts) generally hears cases involving individual tribes or tribal members[77]. So specific limitations or expansions of tribal sovereignty rights are generally decided[78].

Congress has the right to circumvent Court decisions by passing laws[79]. And the Court has the right to overturn Congressional actions it finds unconstitutional[80]. Yet, the Court appears to defer to Congress as the federal body with authority to delegate Indian power[81], and has ruled that Congressional authority over tribes is "plenary, *political* and beyond judicial review"[82]. Yet, possibly because of the different nature of the type of policy each sets (i.e. broad versus specific), direct conflict is not frequent[83].

Changing Influence of Congress and Court

In the past, Congress set the tone for FIP. Most of the historical periods are named after the major Congressional Acts of the time. In the present period, however, it is widely agreed the Court is becoming the primary vehicle for defining FIP[84].

Why is this? There may be a congressional reluctance to deal directly and explicitly with what sovereign powers the tribes have due to a wariness of public reaction[85]. Demographically, tribes may not constitute enough of a voting block to make a priority[86]. Or Congress may not wish to use its powers because it would impinge upon tribal sovereignty[87].

The Uncertainty of FIP - Indian Assimilation or Sovereignty?

There is a tremendous underlying uncertainty regarding specifics of tribal authority[88], what it means[89], and how the limits of that authority may be defined in the future[90]. The uncertainty is important because not only is it troublesome to describe tribal authority absolutely, it is difficult for tribes to apply it confidently, as examined in a later section.

Inherent Sovereignty or Implicit Forfeiture

What type of uncertainty is there? First, there are the cumulative contradictions in the law itself[91]. These inconsistencies boil down to how tribes are viewed. Are tribes a nation with inherent sovereignty rights, where authority must be explicitly divested by Congress? Or are tribes a nation remnant, where any rights that impact non-tribal members or land outside the tribe are implicitly forfeited and must be granted piecemeal?[92]

The Debate over How Policy is Made Today and its Impact on Tribal Sovereignty

Whether FIP development is good for tribes is debatable[93]. At one end, Court intrusion into FIP is viewed as a threat to tribal sovereignty[94], an impingement on rightful Congressional authority[95], and/or unconstitutional[96]. And Congressional authority, while perhaps not desired in the first place, is viewed as legitimate[97], more favorable to tribal sovereignty[98] and, in the recent past, less likely to be used at all[99].

At the other end, a strong Court role is seen as advantageous to tribes[100]. Court decisions are given due by some for most of the improvements in Indian lives since the 1960s[101]. And the fact that tribal jurisdiction cases almost certainly will end up in the federal court system is viewed as a useful deterrent to appropriation of tribal land.

> Because of [the Worcester decision], and federal statutes, anyone who covets tribal land or opposes tribal sovereignty must run the gauntlet of federal legislative and administrative processes and of judicial review. And because of the Court's canons of construction, it is not even enough to get ambiguous federal approval. Structure effectively defangs the specter of plenary federal power. It also legitimizes tribal control over reservations.[102]

Another advantage of current FIP formulation is the legal recognition of inherent tribal sovereignty and immunity. Regardless of the conflicting signals of some cases, inherent sovereignty has never been struck down explicitly as a principle. The doctrine and its associated precedents provide tribal rights advocates strong legal ammunition for furthering and defending sovereignty[103]. Also, because Congress is seen as being prevented politically from doing so[104], the Court may be the main hope in eventually and incrementally forming an absolute, and hence absolutely defensible, definition of FIP[105].

Uncertainty about the Future of FIP

Due to the past dynamic history of FIP, it is uncertain also what FIP will be like in the future and whether what tribes can and cannot do will ever be specifically defined.

> Despite the facts that the current contours of very limited federal review may be adequate and the present will of Congress relative to Indian issues seems negligible , it is not difficult to imagine a swift change in that attitude [106].

> The residual and not unrealistic, fear is that the federal mood could shift again, and another threat to the Indian lands could lurch forth from Washington.... the Supreme Court casually legitimized the shifting will of Congress with the backhanded, non-qualitative apology that congressional power over the tribes is plenary, political and beyond judicial review[107].

A *Caveat Emptor*

One point on which Indian legal and cultural scholars agree is that no clear-cut definition of FIP exists, and what that definition may be is rapidly evolving. One noted Native American scholar, has remarked that the policy of the federal government towards Indians is that "there is no policy"[108]

Obviously, this circumstance makes the following examination of how FIP translates to tribal SWM authority somewhat problematic. A sufficient summary for the purposes of this study is possible only with a "reader beware" warning. Virtually all principles of FIP, and their interpretations as to what they mean and in what exact situations they should be applied, are attached to at least one, often important, exception.

5.4 FEDERAL INDIAN POLICY ON TRIBAL SWM: FULL RESPONSIBILITY AND PARTIAL AUTHORITY

> As long as Congress leaves the issue of jurisdiction at all unsettled, there is room for controversy. And that leads to confusion. Because you have an uncertain [SWM] regulatory environment... and it leads to uncertainty and ultimately leads to paralysis. That's the worst possible thing to do in [the SWM] arena.
>
> *Don Wharton, Native American Rights Fund*[109]

FIP specific to SWM is scant., because the federal government recognized problems with reservation SWM only recently, as described in Chapter 3. Just as with general FIP, policy on SWM is formed primarily by Congress and the federal court system. In addition, there is an additional player. The EPA develops and enforces regulations and guidelines to carry out federal environmental law for tribes as well as for conventional communities[110]. In the process, policy is interpreted. So EPA can determine, to an extent, how federal environmental law, including RCRA, applies to tribes. Since 1984, in accordance with presidential policy, EPA has been recognizing Indian tribes on a "government to government" basis as the "primary parties for setting standards, making environmental policy decisions and managing programs for reservations[111].

However, given inconsistent FIP, where jurisdictional matters are involved, EPA policy at times may be incompatible with what tribes are actually able to do under Federal-Indian law. What has happened is that tribes are treated by EPA as sovereign governments with "primary authority and responsibility" for the whole of their reservation, including lands and populace[112]. So on the reservation, tribal responsibility is equal to that of state governments to carry out their environmental programs. But exercising such functions on non-tribal land or over non-Indians presents a predicament for many tribes in terms of what their actual prescribed and/or practical tribal authority is[113]. Tribes don't have the full conventional authority that state governments have.

EPA Policy

EPA's government-to-government treatment includes tribal eligibility for assuming responsibility for major environmental programs such as those under CERCLA, CWA, SDWA, and CAA[114]. Such delegation, often termed 'TAS' (treatment as a "state")[115] has been granted several tribes in setting air and/or water quality standards[116]. For each program, the EPA sets certain minimum criteria to ensure that tribes have the capability to carry out the program in a manner consistent and in compliance with the applicable statute[117]. One criteria that EPA evaluates on a case by case basis is whether a tribe can demonstrate adequate jurisdiction throughout their reservation.

Once they have satisfied the minimum criteria, tribes formally submit an application for program responsibility.

EPA Management of Non-Delegated Programs

Where tribal governments are not yet "willing and able to assume full responsibility for delegable programs, the [EPA] will retain responsibility for managing programs for reservations[118]. Such management in practice is very limited. EPA policy is that tribes "participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs"[119]. EPA does not have a presence on reservations. And tribes have the right to refuse anyone, including EPA, entry to their reservations[120]. To enforce RCRA without tribal permission, EPA can only enter reservation grounds in the case of "imminent and substantial endangerment to the health or environment "[121]. EPA is authorized to rectify the situation, but must first have data to support its actions.[122] -- something difficult to do if it can't gain access. Only a few such instances have occurred[123].

Tribal Retention of RCRA Compliance Responsibility

RCRA is the lone exception among major environmental statutes where tribes are not eligible to receive TAS[124]. But the RCRA regulations are self-implementing[125]. Thus, without delegated program authority, the responsibility of daily SWM activities (i.e., collection, hauling, enforcement, etc.) is retained by the "operating governmental authority"[126].

States do not have authority to implement a RCRA program on reservations, regardless of whether a program exists[127]. So they aren't the responsible party. In many cases however, the local county government provides SWM services for non-Indian reservation residents living on privately-owned land. County SWM ordinances are commonly enacted on these lands as well. Based on the history of Court cases dealing with non-Indian lands[128], these counties could be considered to be the operating governmental authority for SWM purposes, especially without tribal challenge to the contrary. However, many tribes have enacted SWM ordinances of their own[129], and tribal environmental and health ordinances on non-Indian reservation lands have been held valid by federal courts in several cases[130]. And clearly crucial here is the view of both EPA and tribes that tribes are or should be the governmental authority throughout their reservations[131]. So, as a practical matter, for tribes to claim sovereignty over their non-Indian lands, and to be in line with EPA policy, they must have the responsibility of complying with RCRA throughout their reservations.

The Question of a Practical Jurisdictional Void and a Catch 22

A situation exists where, if tribes are not able to implement delegable programs, EPA is the responsible implementor. But EPA does not, in practice, assert its authority over tribes and is not in the legal position to even enter reservations. On the other hand, state-delegated county programs have the capability and infrastructure to manage and enforce day-to-day SWM at the local level. But, in practice, while they may provide services, counties typically don't enforce their ordinances on non-Indian lands or in some cases provide county services without a tribe's tacit approval[132] And they are not responsible for reservation SWM; tribes are-- or seemingly in most cases, anyway.

> Sometimes [tribes] call 911 and get assistance, other times [they] don't -- fire departments won't help.
>
> -- *Speaker, Intertribal Nevada Environmental Coalition*[133]

This quandary creates a practical jurisdictional void on non-tribal reservation lands. And a high stakes "catch-22" is posed for tribes filling the void and exercising environmental control over non-Indian lands. Tribes are responsible for reservation SWM, yet do not possess full conventional authority to carry it out, and so may risk losing the practical authority they have if they try to exercise it. Two federal court cases deal directly with SWM on reservations. Coincidentally, these two cases represent the crux of the jurisdictional problem that tribes are faced with in carrying out their SWM; full responsibility without full authority.

The *Blue Legs* Case: Full Responsibility

Assignment of full responsibility to tribes was initiated in 1987, when Mattie Blue Legs (a tribal member) and other residents sued under RCRA the Oglala Sioux Tribe, EPA[134], BIA, and IHS to clean up the open dumps on the reservation[135]. The Federal District Court found that sovereign immunity did not prevent the tribe from being sued. Furthermore, it was ruled that it *was the tribe* who has the responsibility to regulate, operate and maintain the reservation SWD sites, and *not* the EPA, BIA, or IHS[136].

Besides establishing that tribes are subject to RCRA requirements and citizen's suits [137], the case is also important for bringing the issue of SWM on reservations to the forefront of environmental problems in Indian Country. A series of Congressional hearings were prompted[138], eventually leading to other hearings[139] that culminated in the passage of the Indian Lands Clean Up of Open Dumps Act of 1994[140].

The B.A.D. Decision: Partial Authority

That RCRA is the only major environmental statute where the primary delegable program cannot be delegated to tribes was formally established in Back Country Against Dumps et al. v. EPA et al. 1996[141]. A federal suit was brought by a group that opposed the Campo Band of Kumeyaay Indian's plan of constructing a 2,500 t/d sanitary landfill. While the reservation landfill was not located on any non-Indian land, the lead petitioner is one of several non-Indian landowners whose off-reservation property borders the site.

Campo was one of the first tribes to submit an SWM plan for EPA approval. Having an approved RCRA permitting program would allow them to grant reservation landfill permits and to implement more flexible landfill design, operation, closure, and monitoring requirements. But in October 1996, the Court ruled the EPA could not grant the tribe program approval.

The reasoning used is based on a passage in RCRA that "defines Indian tribes as municipalities, not states, and says nothing about municipalities submitting permitting plans for [EPA's] review"[142]. Prior to the ruling, EPA had operated under the assumption that they had adequate authority to permit programs for tribes as well as states[143] . EPA's view was that the municipality passage was a mistake, and formal treatment of tribes as states would be forthcoming with the new RCRA authorization[144]. In fact, the Clean Air Act and all other major environmental statutes have been amended to define tribes as states[145].

Legal Impact of Decision on Tribal SWM

It was pointed out by the Court that the ruling does not mean that tribes are municipalities, nor does it "strip the tribe of its sovereign authority to govern its own affairs."[146] As a legal matter at

least, any SWM jurisdictional power that tribes had was left intact. Unfortunately, for those looking to define FIP, while leaving the authority of tribes unchanged, the court did not elucidate what it viewed that authority to be.

> ...the tribe has as much authority to create and enforce its own solid waste management plan *as it ever did*. .. what the tribe loses is the ability to take advantage of the leeway built into the regulations, including the ability to take site-specific factors into account. [emphasis added][147]

Still, tribes are able to build and operate landfills. But they must meet the more rigid federal specifications, regardless of whether less stringent standards are appropriate, or even whether a different approach is more technically sound[148]. The Court allowed an exception where tribes can apply for site-specific permits from EPA. Also, tribes are eligible still to receive any federal solid waste funding that is available to states because, as of now, all SWM funding is available to local governments and states with or without approved programs. However, because approval of programs is required to site or plan hazardous waste facilities under Subtitle C, tribes are ineligible for funding there[149].

Practical Ramifications on Federal Indian Policy

The lack of legal change in the tribes' authority does not mean that the case is without significance. On the contrary, more light has been shed on how Federal Indian environmental policy is decided today. In the past, the Court has used implicit divestiture to rule against tribal authority. But the D.C. Circuit Court found in this case that even if tribal treatment was "unfair" policy, and/or was a result of *error,* it could not rectify the situation by ruling *for* tribal authority That ball was thrown into the court of Congress, and specifically out of reach of the executive branch EPA:

> Although treating tribes differently from states may be unfair as a policy matter, and may be the result of Congressional inadvertence, the remedy lies with Congress, not with the EPA or the courts[150].

Impact on Tribal Sovereignty

A second ramification of the case is precisely the opposite of what the court claims. Tribal authority and sovereignty *is* affected in both a practical and ideological manner. As a result of the ruling, most tribes have been denied a means to gain the practical authority they now lack over solid waste management activities that take place on non-tribal lands, or that concern non-Indians. Only with delegated programs can tribes be absolutely certain that imposing regulations on related non-Indian activities will hold up in court[151].

Delegated program authority has been recognized by tribes and scholars alike as a substantial step toward tribal self-determination and sovereignty. At the time of the ruling, some 44 tribes had submitted SWM programs for review[152]. This number is quite substantial, considering the still under-developed state of the majority of tribal programs, and relative newness of the RCRA amendments. Very few to none of these tribes had plans to construct landfills because of the expense and strict stipulations on design required, regardless of any flexibility granted under program approval[153]. What they desired was treatment as a state--the idea of sovereignty, and the perceived legal muscle of a federal blessing.

Now, not only are tribes not given state treatment, their classification as a *municipality* under RCRA has been sanctified. They are unable to operate or obtain funding for Subtitle C programs[154]. They have less authority than conventional communities because in complying with RCRA, these

communities have delegated flexibility from autonomous state programs. If tribes wish to build a site specific permitted landfill, states and surrounding non-tribal communities can have an impact on whether the permit is granted[155]. This circumstance alone runs against treating tribes as sovereign nations, independent of any actual legal harm done to tribal SWM authority-- whatever that may be.

And for many tribes, particularly those with either a substantial non-Indian population, or whose reservations are used for dumping grounds from off-site, SWM authority is already questioned[156]. Tribal ineligibility for approved SWM programs can be construed by non-Indians to mean that tribes are not capable of handling an SWM program, or that tribes have no SWM authority over them. This contradiction makes SWM authority over non-Indian lands even more problematic.

For the tribes, what it means to be a tribe is questioned-- a separate nation and place, or simply a minority-run community. And, as examined in the previous chapter, it is both concept and actual authority that hold together the holistic tribal-reservation community. The ruling has generated intense interest from tribes precisely because it is linked so directly with the idea of their tribal sovereignty[157]. And as is explored in Chapter 6, motivation for running a sound SWM program has been lessened as a result.

5.5 PRESENT DAY TRIBAL AUTHORITY

> The precise limits of tribal powers are not readily definable because tribal authority "is attributable in no way to any delegation to [the tribes] of federal authority"
>
> *--Felix Cohen* [158]

There is no FIP particular to tribal SWM authority. What tribes can do is determined by general FIP on what their tribal authority is--as applied to SWM.

Fundamental Principles of Tribal Authority

There are three fundamental federal judicial principles of tribal authority[159]. They are that Indian tribes (1) retain inherent sovereignty, (2) possess internal, but not external, self-government authority, and (3) their authority is subject to treaties and express Congressional legislation.

Depending on the historical period, these principles have been interpreted either loosely or strictly, with a varying amount of favor to tribal sovereignty. For example, as a result of their inherent sovereignty, sovereignty immunity (to legal suit) is generally granted tribes[160]. But there is substantial uncertainty as to its legal validity in "diverse situations at the margin of current case law"[161]. One such "marginal case" is the *Blue Legs* case discussed above. For the present period, the above principles are manifested in the federal policies of essentially treating tribes as state governances (i.e., a "government-to-government" relationship), continuing implementation of the trust responsibility, and granting "Indian preference" (in Indian federal programs)[162].

The Wrench of Implicit Divestiture and the External in the Reservation Interior

From the above principles, tribes on the surface would appear to have broad, clearly defined powers. However tribal authority is defined by what is left over - what is subtracted through FIP from full sovereignty. And what is subtracted depends on codified and established limitations on tribal power, as well as those that are implicitly divested.

Basically, tribal authority is limited if it is external to tribal affairs, and thus, "inconsistent with [tribal] status"[163], or if it is subsumed to overriding state or federal interests[164]. So, the extent of tribal authority depends on how the difference between internal and external tribal matters is decided. And there are a variety of circumstances where authority is implicitly divested that may not be apparent unless evaluated in Court. FIP is uncertain. There is no list of what is external and in what cases non-tribal authority may supersede that of the tribe. The answer is not found at the border of the reservation. The presence of non-Indians, the reservation land they own, and the business ventures and societal functions and activities they partake in, on and near the reservations assures that. So tribal authority becomes ambiguous in subject areas not fully explored. And as society changes in and around reservations, new circumstances and new subject areas, such as casino gambling, appear.

Separating Internal from External: Deciding Limits on Tribal Authority

> Everybody says they have jurisdiction, and therefore no one is going to move forward
>
> *--Richard DuBey, Attorney, Puyallup Tribe*[165]

Federal, state, and even local governments will claim jurisdictional authority on reservations over persons and/or their activities they view as external, or "non-internal", to tribal authority. Likewise, individuals who do not wish to be under tribal jurisdiction will claim the activity they are engaged in is external, and attempt to bring the issue before a court. In SWM, governments may want jurisdiction for zoning, taxing revenues, regulation, "protection of their citizens"[166], or to try a criminal negligence case. Individuals and businesses may want exclusion from tribal government authority to avoid the tribal court system and/or tribal zoning and regulations.

As explained previously, jurisdictional challenges typically end up in federal court because they ultimately involve questions of sovereignty and the federal trust. Whose legal jurisdiction over a person, property, or activity it is then is ultimately decided in federal court, or based on its precedents. But once brought within the realm of judicial decision, rather than one simple jurisdictional rule for all activities that take place on reservation land-- a whole matrix of characteristic decision variables for each situation is created.

Factors in Determining Jurisdiction

When characterizing jurisdictional issues on Indian reservations, tribes face a remarkable situation, quite different from conventional governments. First, there are 4 classes of persons over which tribes can have a varying amount of authority: tribal members, Indian non-members, non-Indian residents, and non-reservation residents[167]. Then there are also the several types of reservation property including tribal trust, allotted, right-of-way, and fee land, over which the extent of tribal authority generally varies(refer to Table 5-1 for general description).

Tribal activities can affect non-tribal government interests and non-Indian/member activities can affect, or be in the purview of, tribal interests. So jurisdiction over an activity is decided by examining the class of person(s) and type of property that the matter concerns, as well as the "subject matter" of the case[168]. Then, given these case characteristics, whether it is the tribe or the non-tribal government that has an "overriding interest" is evaluated[169]. No one element decides necessarily[170]. Even the way to evaluate each set of characteristics for a particular jurisdictional situation is not set. Often, conflicting Federal-Indian laws, policies, and court precedents, not specific to the case at

Table 5-1

Primary land status types on Indian Reservations.

Land Type	Description
Trust	Refers to reservation land that is held "in trust" by the federal government for the use and general jurisdiction over by the tribe. Generally not subject to state or county jurisdiction in civil matters. Lease or sale of any trust land, or commencement of activities that may be considered to significantly alter the land's economic or environmental value, must typically be transacted through, and approved by DOI. In essence, trust land can be viewed as common property to all tribal members with the exception of assignments (see below) or that leased to members or non-members.
Fee	Or "land held in fee". Typically non-Indian held land that was parceled out during Allotment. Privately owned property within the reservation, but subject to county (and sometimes state) taxation and jurisdiction, and which the sale or lease is not subject to DOI approval. Owned occasionally by state or local governments, as well as tribes and tribal members. Tribal jurisdiction over fee land is limited and, in practice, may be almost negligible on many reservations. But some tribes have gained the legal right to regulate a broad range of activities on fee lands when tribal interests are determined to be significant, or federal delegation has been granted.
Allotted	Indian-owned properties that are remnants of the Allotment Act. Essentially private property, except that , like trust land, DOI approval is necessary for the sale or lease of the land. Generally subject to land holding and use taxation. Because allotted land is owned by Indians, tribes generally have more practical authority over activities on these lands than they do over reservation land owned by non-Indians.
Right-of-ways	Generally public roads crossing a reservation, such as federal highways, that have been deemed important to the flow of commerce in the region and which the state, federal government, or county is typically responsible for maintaining. While considered reservation land, and part of "Indian Country", practical jurisdiction over right-of-ways is not straightforward. Roads constructed with federal funds are required to be kept open to the public. Activities concerning right-of-ways are likely to be held as being of strong state, federal, or county interest.
Assignment	Trust land assigned to individual members by the tribe . Dependent on a tribe's policies, tribal authority over assignments and activities taking place on them can be equivalent to that of non-assigned trust land. Or may be treated essentially as private property by tribe in all matters not conflicting with trust status.
Leased Trust	Trust land leased to Indians or non-Indians. Extent of tribal jurisdiction varies with tribal policies, who leases it (Indian or non-Indian), and particularly with lease stipulations (generally approved by the BIA).
Tribal*	General term used in this study to denote any type of trust, fee, or allotted land within the reservation that tribes own or control.

hand, are invoked[171]. As a result, the outcome of whose jurisdiction it is can not always be predicted. However, there are some general rules of thumb, described below, and summarized in Table 5-2[172].

Tribal or State Authority?

> ...the first indication and the first sensitivity we get of a problem on an Indian reservation when it comes to a commercial waste dump is either the Governor or a member of the legislature immediately coming to us and saying "What are you going to do to stop this" with absolutely no thought of the authority that rests in the tribes.
>
> -- *Official, Bureau of Indian Affairs* [173]

Where the tribe or federal government (as trustor) does not have authority, the state (or county as state agent) does. Whether it is the tribe or state that has jurisdiction in a SWM situation is of vital

Table 5-2
General Rules of Thumb in Determining Jurisdiction for Over Disputed Reservation Matters.

Matter Involves	Typical Jurisdiction
Only Indians on trust land	Tribe (or federal for criminal)
Non-Indian on trust land, tribal matter	Tribe (or federal for criminal)
Non-Indian on trust land, federal or state matter	Federal
Non-Indian on fee land, federal matter	Federal
Non-Indian on fee land, state matter	State
Non-Indian on fee land, tribal matter	Federal, possibly tribe
Indian on fee land, federal matter	Federal
Indian on fee land, state matter	State
Indian on fee land, tribal matter	Tribe, possibly federal
Indian off-reservation, federal matter	Federal
Indian off-reservation, non-federal matter	State

importance in such daily activities as zoning, regulation and taxing for waste collection and disposal practices, and enforcement authority for unauthorized disposal. The Supreme Court has ruled that a state can "protect its interest up to the point where tribal self-government would be affected"[174]. So cases where Indians are involved generally will not be under state jurisdiction. And, in general, states retain their usual powers of jurisdiction over civil and criminal activities involving only non-Indians on fee lands, and also typically in civil cases involving a non-Indian defendant and Indian plaintiff[175].

But when an Indian defendant and a non-Indian plaintiff are involved, the tribal court (or Court of Indian Offenses) normally has exclusive jurisdiction[176]. And the federal government has jurisdiction over all other non-Indian activities on a reservation, including criminal offenses against Indians or their property. When federal subject matter is involved, state authority is preempted, and the case is tried in the federal court. Such cases include transgressions of federal statutes, as well as those where tribal self-government is jeopardized, or trust land is involved significantly. State courts normally have concurrent jurisdiction in federal civil cases involving non-Indians and in some federal criminal cases.

There are several specific circumstances where state interest is typically sufficient for state jurisdiction over reservation Indians[177]. These activities include Indians exercising their rights as state citizens or residents[178] (for example in determining eligibility for state programs), Indians exercising state authority in the role of state (or county) officers, and state administration of federal-state programs (for example, welfare or unemployment programs). Of particular relevance to tribal SWM, a 1929 statute permits state officers to enter Indian lands to inspect health and education conditions and to enforce sanitation and quarantine regulations[179]. But, in practice, only activities that are allowed by the DOI are authorized. And the DOI's opinion is that any time the "state health and

sanitation laws impact or involve the regulation of *trust* property in any significant way", they are not authorizable[180]. Non-trust land however, is not covered.

States also may be delegated certain responsibilities by the federal government[181], or preempted from doing so[182]. For example, several congressional statutes have been passed allowing states to tax mineral production on certain tribal lands[183], and possibly other

activities as well[184]. County services, including SWM, on fee lands have been taxed or fees levied[185]. Exactly what states (and counties) are allowed to tax is still unclear[186], and may depend on whether natural resources are involved[187]. The extent of state services on the reservation does not even need to be considered in some cases[188]. States can tax non-Indians who bought cigarettes in reservation shops, and can even require the tribe to collect the taxes for them[189]. However, in all of these cases, the general rule of non-interference with tribal self-government normally applies[190]. Whether tribal sovereignty is threatened by state jurisdiction anywhere on the reservation is questioned automatically.

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits
>
> --*White Mountain Apache Tribe v. Bracker, 100 S Ct. 2578 (1980)*

An important power of states is in situations where tribal regulation does not exist, including health and environmental management, such as SWM. To protect its citizens, the state may assume authority up to the point, again, where tribal self-government is affected[191]. Such cases can involve the many smaller reservations where formal tribal government is limited. It is unclear whether state jurisdiction is valid in instances where non-Indians are not involved[192].

Public Law 280: A Codified Wrench

Complicating matters, in states where Public Law 83-280[193] is in force, the above "rules of thumb" are overridden. Known as Public Law 280, or simply "280", the statute was passed by Congress in 1953. Initially it conferred criminal and substantial civil jurisdiction to what are known as the six "mandatory states"[194]. Subsequently, ten "optional states" took advantage of 280's provisions and chose to assume jurisdiction over different subsets of the full criminal and/or civil jurisdiction of mandatory states[195]. The partial jurisdiction areas chosen range from air and water pollution only in Arizona, to full 280 jurisdiction in the case of Florida[196]. Several of the states chose to assume jurisdiction only at tribal request. Several cover only certain reservations while leaving tribal jurisdiction intact at others. A 1968 amendment made further state assumptions of jurisdiction subject to Indian consent in a special election. The amendment also allows states to retrocede all or part of their assumed jurisdiction to the federal government.

Under 280, state civil and criminal laws of "general application" are to have the same application in Indian country as elsewhere in the state[197]. But in regulatory and tax fields, there are several limits to state authority. The Supreme Court ruled in 1975 that no new state taxing jurisdiction is conferred[198]. New state regulatory jurisdiction also was found to be invalid in the *general* case[199]. A 280 proviso disallows state regulatory laws that are "inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant there to". But where state regulation is prohibitory in nature, it is likely valid under 280[200]. Whether county, as opposed to state, civil laws apply under 280 has not been reviewed by the Supreme Court, but a Circuit Court has

found them invalid[201]. Whether county criminal laws may apply is somewhat unclear[202]. Because it was not specifically taken away, tribal courts may have concurrent jurisdiction with states over areas where they previously held concurrent jurisdiction with the federal government[203].

The main impact of 280 on SWM is that generalizing about what tribes can and can't do is made more difficult. Even reservations in the same state may be subject to different state jurisdiction[204]. Just as with FIP and tribal authority, Public Law 280 is not interpreted fully and its application in different circumstances is unclear. Generally, tribes under 280 need to be more concerned with state involvement in reservation SWM issues.

Tribal Authority over Tribal Members

In line with their inherent sovereignty, tribes have exclusive authority over their members, unless taken away by explicit legislation or expressly or inherently relinquished as a trustee of the United States[205]. On the reservation and lands within their jurisdiction, tribes have civil powers over members similar to states[206]. Their undisputed authority in this realm includes the power "to adopt and operate under a form of government of the Indian's choosing, determine tribal membership, to regulate domestic relations or members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice"[207]. Tribal civil jurisdiction over members is so broad that it can extend to fee lands[208] and off-reservation[209].

In dealing with their members on tribal land, tribes have the needed authority for carrying out the majority of conventional SWM activities. But prosecuting and punishing members for serious illegal dumping violations is restricted. Tribal criminal jurisdiction over members is limited by the Indian Civil Rights Act to fines of $5,000 and imprisonment of one year[210]. Additionally, 13 "major crimes" fall automatically under Federal jurisdiction and are tried in federal court[211].

Authority over Nonmember Indians

Nonmember Indians are Indians not enrolled in the tribe on whose reservation they reside. The number of nonmember Indians on a reservation can be significant due to intermarriage, and other social phenomenon associated with Pan-Indianism[212]. These reservation residents are eligible for the same federal benefits as tribal members. However, depending on the reservation, nonmember Indians can be, and often are, excluded from voting in tribal elections and receiving tribal services or other benefits.

In 1988, the Supreme Court ruled that tribes had no criminal authority over nonmember Indians[213]. Later that year, Congress essentially reversed the decision by passing a law that does allow tribal authority[214]. But practically, a problem still exists in determining whether a person is "Indian" or not. Two tests have been used in federal court that depend on whether a person is "recognized" as an Indian, or has a number of contacts with the Indian community[215]. Obviously, these tests are somewhat subjective. Additionally, there is debate over whether the Congressional law actually was intended to include nonmember Indians not enrolled in any federally recognized tribe, a category of persons that many nonmember Indians on reservations fit[216].

So legally, for the present, tribal authority over nonmember Indians can be similar to that over members. But practically, depending on the circumstances, person, and the tribe's wishes, tribal authority over a nonmember Indian may be limited to that over a non-Indian, discussed below.

Authority over Non-Indians

> How you figure it out is if its going to cost [the federal government] anything, then they say, oh...tribal sovereignty...its your responsibility. But if they can get anything out of it...then its...oh, there's no tribal sovereignty here, sorry.
>
> *California Pomo Indian*[217]

Tribal authority over non-Indians is derived either from their inherent sovereignty or, infrequently, delegated power[218]. Like other tribal powers, it can be superseded by U.S. interests. So, as ruled in Oliphant v. Suquamish 1978 Indian tribes presently possess no criminal authority over non-Indians because overriding U.S. interests in protecting the personal liberty of U.S. citizens exist[219]. However, a tribal criminal ordinance or code may be written to include non-Indians, and approved by the Department of Interior[220]. Although it has not occurred yet[221], specific criminal authority can be delegated to tribes by Congress. And tribal officers likely can *arrest* non-Indians for state or federal offenses and turn them over to state or federal officers[222]. But prosecution must be under state or federal law (in a state or federal court).

The question of civil jurisdiction over non-Indians is the greatest challenge for tribes in SWM, and in other areas[223]. Civil jurisdiction is situation-dependent, and the type of situations that give rise to tribal jurisdiction is relatively hazy. The telling account that follows is indicative of the confusion.

> The plaintiff sued the tribes in tribal court. The tribal court refused to accept the case without approval of the tribal council, which was not given. The plaintiff then brought the case in federal court. The trial court originally dismissed for want of jurisdiction. The Tenth Circuit reversed and remanded for a trial on the damages. Before the case was finally resolved at the trial court level, the Supreme Court decided *Martinez*. The district court then again dismissed for want of jurisdiction. ...But the Tenth Circuit again reversed, using *Oliphant* for authority rather than *Martinez*.. Although this was a circuit court case, the Supreme Court denied a writ of certiorari. .... The appeals court distinguished the Court's decision by pointing out that: "Martinez was entirely an internal matter concerning tribal members.... The problem was thus strictly an internal one between tribal members and the tribal government relating to the policy of the Tribe as to its membership. *Of course, there were no non-Indians concerned."*[224]

The muddiest jurisdiction is found in regulatory matters, normally the biggest SWM legal concern for communities without end-disposal facilities, the case with the vast majority of tribes. A number of legal experts hold that non-Indian involvement is the key to whether sovereignty is used by the Court to rule for the tribe, or whether sovereignty is limited by the Court to decide against the tribe[225]. At a minimum, non-Indian involvement throws some uncertainty into what might otherwise be a straightforward jurisdictional ruling in a tribes favor[226]. The rule is not strict, however, as several cases have been decided in a tribe's favor even in the face of non-Indian involvement.[227] As typical, subject matter counts. There is a very good chance that tribal legislative jurisdiction will extend to non-Indians when important tribal matters are affected[228].

And location counts--regulation and protection of tribal resources is considered to be necessary in retaining sovereignty, so that tribal jurisdiction claims over non-Indians are very strong on tribal lands, particularly trust lands[229]. The real litmus test for tribal jurisdiction over an activity involving non-Indians is whether the jurisdiction extends to non-tribal lands[230]. Are tribal interests sufficient? Having jurisdiction over non-tribal lands is crucial for SWM. It is not just tourists or passers-through on trust lands that tribes must incorporate into their SWM plans. The typically more sizable population of non-Indian residents (and their residences) needs to be included as well[231].

> The real issue becomes when it its a matter of exercising jurisdiction over non-members on fee land, and coming into contests with States and local jurisdictions over who is going to decide when and in what manner these [SWD facilities] are going to be operated
>
> *Don Wharton, Native American Rights Fund*[232]

Support of Tribal Jurisdiction

A few civil regulation cases involving non-Indians have been decided by the federal court system. One of the most frequently cited cases supporting tribal regulation of non-Indians on fee lands is United States v. Mazurie (1975)[233]. The Supreme Court upheld the right of the Shoshone and Arapahoe Tribes on the Wind River Reservation to require non-Indians to obtain a tribal permit for selling liquor on fee land[234].

Only a few cases have been decided in the area of environmental or health regulation[235]. In Cardin v. De la Cruz (1982)[236], the ninth Circuit ruled that the Quinalt Nation's health and safety ordinance did apply to a non-Indian owned store on privately held reservation lands. The same Court ruled in favor of the Confederated Salish and Kootenai Tribes in governing water rights[237]. And a non-Indian was forced to comply with the Lummi Tribe's sewer hookup laws[238]. In Nance v. Environmental Protection Agency (1981), the 9th Circuit agreed with the EPA that the Northern Cheyenne Tribe could redesignate reservation air quality standards[239]. In another case, the Wyoming District Court ruled tribes may apply land use, business, and environmental zoning to non-Indian lands if nearby Indian lands or individuals are "directly affected"[240] . Crucially, these rulings are not the "law of the land" because none of the cases were decided by the Supreme Court.

While its policy is not codified law[241], the executive branch of the federal government is regarded generally as very supportive of tribal civil jurisdiction over non-Indians, including fee lands [242]. As mentioned above, EPA carries out a formal policy of treating tribes as the primary government bodies for reservation environmental affairs. For example, although it proceeds on a case by case basis, its formal opinion for delegating TAS in SWDA programs is that tribes likely will be able to demonstrate "*per se*" their water quality management authority on fee lands, and

> as a *general* matter there are substantial legal and factual reasons to assume the Tribes *ordinarily* have the legal authority to regulate surface water quality within a reservation [italics added][243].

As reviewed, Congress with its plenary power to enact laws has remained formally silent on the issue of civil jurisdiction over non-Indians. Considering that its views on criminal jurisdiction have been voiced, such an omission is seen by some experts as tacit support for civil authority[244].

Supreme Court Decisions Against Tribal Authority

But unless Congress specifically delegates authority, which it has yet to do, it is not the body that is setting law -- the Court is. And the Supreme Court has not been favorable to tribes in several important cases involving regulative authority over non-Indians[245].

Montana v. United States Perhaps the most seminal case in terms of tribal regulation of non-Indians is that of Montana v. United States (1981)[246]. In this instance, the Supreme Court found that the Crow Tribe has no power to regulate non-Indian hunting and fishing on non-Indian-owned land within their Reservation. The decision is based on the fact that the Crow Tribe did not depend on hunting and fishing historically or as a present lifestyle, so the principle of inherent sovereignty does not apply.

> Exercise of Tribal power beyond what is necessary to protect Tribal self-government or to control internal relations is inconsistent with the dependent status of the Tribes, and so cannot survive without express congressional delegation. ...Although Oliphant only determined inherent Tribal authority in criminal matters, the principles on which it relied support the general proposition that *the inherent sovereign powers of an Indian Tribe do not extend to the activities of non-members of the Tribe. [emphasis added]*

The Montana Exceptions Ironically, while the language denying tribes authority over non-Indians is broad, the case also provides a rather sweeping "test" to determine when tribal jurisdiction may be legitimate.[247] The Court ruled that a tribe may "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealings, contracts, leases, or other arrangements" and "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or *the health or welfare of the tribe* [italics added]" EPA relies largely on this *Montana* ruleto justify its belief that tribes should typically be able to demonstrate sufficient authority in environmental matters[248].

Brendale v. Confederated Bands and Tribes of Yakima Indian Reservation That a tribe acts as sovereign only with respect to its own members has been put forth in several cases [249]. One key Supreme Court regulatory decision with ramifications discussed below is Brendale v. Confederated Bands and Tribes of Yakima Indian Reservation (1989)[250]. While there was no majority decision, it was ruled the county government had jurisdiction to zone non-Indian fee lands in an area of the reservation where non-Indians were the predominant residents, even though about half of the land was tribal[251]. The reasoning was not based on *Montana.* Instead, the Court found the Tribe had "voluntarily" relinquished its authority by opening the area to non-Indians[252]. Tribal jurisdiction was removed as a matter of implication, because the area was considered essentially non-Indian in influence[253]. If allotment is very extensive, the Court may perceive a congressional intent to diminish the scope of the reservation[254].

South Dakota v. Bourland In South Dakota v. Bourland (1993) [255], how a tribe "relinquishes" land was interpreted to tribal disadvantage. The Cheyenne Sioux Tribe was challenged by the state for regulating non-Indian hunting and fishing rights on land purchased by the federal government for flood control. The land had been transferred to fee lands by a Congressional Act, and not by tribal request. But citing *Montana* and *Brendale*, the Supreme Court again ruled against tribal regulation on fee lands. The new land status was judged to confer public use, thus implying, as in *Brendale*, a "loss of regulatory jurisdiction".

A Question of Specifics

It is crucial to understand that the court cases finding in favor of tribal regulation are quite specific. And the rulings are based on case facts not present in every regulatory matter. For example, while tribal jurisdiction was found in *Mazurie*, the authority is based on the federal reservation liquor laws, and is a regulatory power explicitly *delegated* by Congress[256]. And in *Cardin,* the ruling was based partially on the circumstance that the non-Indian store owner was involved in *voluntary* commercial dealings (a circumstance implicitly covered by *Montana*). As noted previously, in the case of SWM matters, authority is not delegated. Most reservation non-Indians do not own businesses; they reside or drive through there, a more difficult grounds for claiming a voluntary transaction. So interpreting these cases for tribal jurisdiction in SWM is unclear.

Civil Suit

Having judicial jurisdiction over cases arising from SWM activities is also part of conventional SWM authority. Generally, tribes have judicial jurisdiction over civil suit cases involving non-Indian plaintiffs, but not defendants[257]. For example, in the landmark case of Santa Clara Pueblo v. Martinez 1978[258], the Court looked at whether a tribe, with a patrilineal inheritance membership policy, had jurisdiction over a case involving a tribal member suing them to gain membership status for her children. While the case involved only Indians, the Court opinion on jurisdiction over non-Indian civil suit was seemingly stated as well.

> Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

The opinion concurs with an earlier seminal case, Williams v. Lee (1959)[259]. About a non-Indian who was suing for a debt incurred by Indians, the Supreme Court ruled:

> It is immaterial [the plaintiff] is not an Indian. He was on the Reservation and the transaction with an Indian took place there... The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Yet, a seemingly conflicting ruling against tribal jurisdiction was issued in a more recent case. In Dry Creek Lodge v. Arapahoe and Shoshone Tribes (1981)[260], a non-Indian sued the tribe for cutting off access across a tribal member's property so they were unable to get to their own privately owned land. The Court ruled the logic for the tribal civil jurisdiction found in Santa Clara Pueblo v. Martinez "disappears when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian".

Taxation

The ability to tax non-Indians to fund SWM presents another jurisdiction-related problem for tribes. Tribes appear to be able to tax non-Indians on tribal lands[261]. However, the taxing of non-Indians on non-tribal lands, where *they reside* and conduct the bulk of their reservation activities, including SWD, is probably not legal[262].

Non-Indian Non-Residents

Fnally, the difference in tribal authority over non-Indians who are residents of the reservation and those who are not must be considered. Non-residents will either be passers-through and tourists from a distance away, or they will be "over-the-border" locals. There are three main distinctions. One is that in non-280 states, civil cases on reservation with a non-Indian resident plaintiff typically will be under the jurisdiction of the tribe. But where the plaintiff is a non-resident of the state in which the reservation is located, they seem to have redress in federal court[263].

Second, residents and non-residents can be treated differently under tribal codes. Non-Indian residents are included in some tribal codes, but non-residents generally are not[264]. EPA policy only recognizes the tribe as the sovereign government for the reservation populace (see above). Not including non-residents conforms to the idea that the tribe has jurisdiction throughout, but up to its borders. Beyond that, except for limited circumstances in the case of tribal members, the state has authority. So the third distinction is that tribal police cannot go the homes of non-residents, nor can bordering non-resident property be regulated.

So whether tribal interests can override state or federal interests in matters where the persons involved do not live on the reservation is highly questionable. As discussed in the following chapter, it is even more doubtful when the difficult logistics in exercising that authority are considered. Tribes do have more authority over non-residents than residents in one important area, the ability to escort them off the reservation.

Section Summary

Tribal authority is broad in civil and minor criminal matters regarding tribal members and Indian non-members residing on the reservation and taking part in the tribal-reservation community. Tribal authority over matters involving non-Indians is generally absent in criminal matters, and dependent on a variety of circumstances in civil matters. Jurisdiction over reservation lands is generally broad, but depends on several factors for lands owned privately within the reservation, or used for public right-of-ways. Once brought to court, the nature of the matter - i.e. how it relates each to tribal and non-tribal legitimate government interests is a key factor in determining jurisdiction. If jurisdiction is judged to be necessary to the functioning of the tribe, and not to the state or county, a decision for tribal jurisdiction generally can be expected. But how this judgment process works is often unclear.

The EPA and Congress appear to support at least some tribal civil authority. But it is the Court (in Congress' absence) that decides law. And as with B.A.D decision, EPA opinion may not mesh well with the Court. While lower courts have ruled in favor of tribes in regulating environmental matters based on the *Montana* health and welfare exception, the Supreme Court has used the general *Montana* decision to rule against tribes.

What this means for SWM is that there is no definitive answer on whether tribes will have authority over non-Indians, particularly non-residents, and particularly on fee lands[265]. The operating rule may be the *Montana* exceptions, or it may be based on *Oliphant*, where the existence of overriding federal or state interests preempts inherent tribal sovereignty[266]. Until the Supreme Court decides a case on full tribal SWM authority (including regulation, enforcement, zoning, and fee-levying) of non-Indians on fee lands, there is no jurisdictional uncertainty.

For the purposes of this study, it is sufficient to realize that in some cases civil regulation is legitimate, in others it is not, and the distinction is sometimes unclear. It should be pointed out that the legitimacy may be quite clear to some tribes, and they may act accordingly. It is whether the action would be regarded in court as legitimate that is unclear. And there is a difference between regulating someone passively and enforcing those regulations when they are transgressed. Jurisdiction matters most when it is challenged. Without legitimate jurisdiction, there is no point in regulation. On its own, this situation substantially differentiates tribes from conventional governments in developing and implementing their SWM codes and zoning ordinances.

5.6 SOME COMMON SWM PROBLEMS DUE TO LEGAL LIMITS ON TRIBAL JURISDICTION: A RETURN TO THE UNENFORCED ENFORCEMENT PROGRAM

Characteristics of tribes and their reservation environments vary drastically. With the multitude of different reservation situations is the lack of precedents related to SWM and the tenuous process for deciding jurisdiction in other matters. So there is no way to state what all tribes are able to do in

any given circumstances, let alone describe those circumstances. Still, it should be clear that the history, ambiguities, and limits of tribal jurisdiction can explain much of many tribal SWM problems. Some of the more common problems are examined below, employing examples from the case of the Unenforced Enforcement Program described in Chapter 3. This case involves several variations of the most fundamental of jurisdiction problems, enforcement difficulties directly due to a lack of full tribal authority over reservation lands and people.

Open Dumping On Fee Lands

One reason that unclear tribal authority on non-trust lands is a problem for tribes is because a significant amount of reservation open dumping can be on fee lands. For example, out of three case study reservations with fee lands, the number of fee land dumps ranged from 10 to 25 percent of the total. While no official record has been kept to differentiate fee land dumps from those on trust lands, other tribes have suggested similar numbers[267].

The tribe with the Unenforced Enforcement Program from Chapter 3 must deal with eight fee land open dumps. The sites are "operated" by non-Indian land owners, the majority of whom are farmers. Wastes are discarded on the ground surface, although some farmers use their tractors to dig and cover trenches as needed. Much of the wastes are agricultural. Household waste is less frequent because it is normally burned or hauled by a household collection service. Most disturbing is the high number of 5 gal pesticide containers and motor oil drums, the bulk empty, but non-rinsed and some partially full.

Even with its no-dumping ordinance, the tribe has been unable to carry out enforcement against the farmers because the dumps are on private land. The tribe has no access to the land, and because the non-Indians live there, the tribe can't prevent them from entering the reservation[268]. Nor does the tribe have a clear legal mechanism to cite the dumpers. True, there are the *Montana* exceptions to invoke. But to use these precepts invites lawsuit, not a very efficient, practical, or cheap method to deal with a total of about 100 yd^3 of wastes.

Matters can be worse. Another tribe has plans underway to clean up all of their open dumps[269].; about a half dozen or so are on fee land. But the landowners can’t be found. They live off-reservation in another part of the state. The tribe has sent them notices to clean up their dumps, but there has been no response. Yet if the tribe enters the land, they risk litigation for trespassing, not to mention an almost certain chance of being stuck for a very long time with a cleanup bill they can't afford.

Criminal Waste Disposal on Fee Land

Two of the Unenforced Program tribe's fee land dumps are relatively large and rather sophisticated operations with private trenching. Hazardous waste drums are discarded regularly, perhaps a couple of dozen each year. This hazardous disposal could be considered criminal under RCRA and FIFRA. But the tribe has no criminal authority over non-Indians. It can only appeal to the federal government for help in prosecution, or appeal to the county for violation of county law. But on their own, the tribe is essentially powerless over the situation.

Tribal Member Dumping on Non-Trust Land

Tribes may have problems enforcing their SWM policies with their own members. For example, one tribal member used a shotgun and verbal threats to stop a tribal survey of open dumps from entering their allotted land property[270]. Even though it is not under county jurisdiction, allotted land is considered by many owners, and some tribes as well, to be equivalent to fee land in terms of the extent of allowable tribal jurisdiction[271]. A well publicized case in point occurred with the Torres-Martinez Band of Desert Cahuilla Indians[272]. A tribal member invited a waste company to dump biosolids on his allotted land. Tens of thousands of yd^3 were deposited and left untreated. The health threat was immediate and serious. Tribal members became ill, possibly from fumes, and cattle sickened from drinking contaminated water. The tribe on its own was unable to prevent the tribal member from continuing his profitable venture. After months of delay, the federal government responded to tribal requests to step in and shut down the operation in violation of several environmental statutes.

There is also a problem indirectly related to jurisdiction issues in enforcing against tribal members on trust land. How can the tribe justify to members enforcement of its SWM codes, when non-Indians and some tribal members may escape penalties for flagrant violations like open dumping? Background for this sentiment, voiced by both tribal staff and community[273], was discussed in the previous chapter. Combined with resistance to regulation based on cultural grounds, tribes can face substantial difficulties in enforcement even before logistical and resource problems are taken into account.

Trust Land

On trust land, tribes certainly possess much more authority in dealing with their SWM problems. In terms of their members, as long as a tribal SWM code exists, they have absolute authority. Even in the case of non-Indians, they are at least able to get people off the land. But to cite non-Indians they may need to involve the county or federal government. Some tribes have codes approved by the DOI that stipulate any person that violates a code can be cited. However, without county or federal intervention, enforcing the citation ends up being logistically formidable because a non-Indian can avoid a citation by staying off the reservation. And if a non-Indian is a resident, they don't even need to do that. Once they are on fee land, the tribal police have no mechanism to formally arrest them.

Waste Disposal from Off-Reservation

Some of the most difficult enforcement cases tribes deal with are dumping by non-residents. For some reservations, main public thoroughfares, such as highways transect tribal lands and bring thousands of non-Indians through on a daily basis. In the cas eof the tribe with the unenforced program, the reservation provides a convenient stop off an interstate highway. And along paralleling river banks is a huge littering problem due almost exclusively to recreational day travelers[274]. If the tribe could patrol the miles long stretch of river, it could force the guests back onto the highway. But it has no means to cite non-Indians, and because most of the people are out-of-state vacationers, following up on cases would be fruitless. It would also be inefficient since more travelers would simply take their place.

A greater problem for this tribe, and for other tribes, is the regular and purposeful open dumping by nearby non-residents. Ten open dumps are comprised almost exclusively of off-reservation commercial business wastes, mainly tires and construction wastes. Additionally,

approximately 300 white goods, mainly refrigerators, have been dumped on the reservation, partly from businesses[275], and partly from private citizens. Landfill disposal of tires, construction wastes, and white goods commands a high tipping fee. So these wastes are very expensive to clean up. But again the tribe is stuck. They are limited to escorting dumpers off the reservation *if* they are lucky enough to catch them.

The phenomenon of off-reservation dumping of expensive-to-dispose wastes is relatively common[276]. For example, over the past few years, a truck van driven by a non-Indian has been spotted several times by a Western tribe on its roads. Each time a load of used white goods has been found the next day. Once, a tribal staff person saw the truck (which had no license plate), and honked to pull it over. The truck sped up and drove off the reservation. Even if the staff member had been an officer and the truck had stopped, he could issue the driver a civil citation only. And that citation would likely be ignored. The disturbing point here is that the driver had to have driven from the non-Indian community, about 60 to 70 miles away, just to dump his refrigerators on a reservation. There are plenty of rural, isolated roads in-between. But to dump on county land, the driver risked being caught and *prosecuted*.

For some tribes, disposal of off-reservation wastes is not limited to open dumps. Many tribes have free disposal facilities for their members, typically a 10 to 30 yd^3 waste bin[277]. Such tribes with nearby non-Indian communities may have to deal with non-authorized off-reservation dumping. And while aesthetically and environmentally preferable to non-Indian open dumping, the cost burden is at the least inequitable, and at worst, unfeasible. For example, a tribe in California recently closed its open dump and replaced it with a central dumping bin[278]. Unlike the case with the Unused Transfer Station, the free disposal did stop open dumping. But there is no mandatory collection service in the surrounding non-Indian community and, seizing the opportunity, non-residents are using the facility as well. Two of the four case study tribes had serious problems with non-residents making use of free tribal transfer stations. Both were paying hauling and tipping fees for about twice the amount of wastes than what their tribal members could be generating.

Other SWM Jurisdiction Issues

Other SWM issues are affected by the jurisdiction question as well. General access to all waste source and sink information for the reservation can be limited so that waste stream analyses can be highly inaccurate. On reservations with large areas of fee land and leased property, only partial information on non-Indian demographics and fee land infrastructure may be available to the tribe. Control of all reservation SWM services, such as collection and disposal, may be lacking. And jurisdiction issues contribute to problems of inadequate staffing and resources. There are less staff for the reservation entirety that must be patrolled and less funding for the populace that must be served. So enforcement is a logistical nightmare and diseconomies-of-scale make some SWM ventures unfeasible. All of these types of issues are associated primarily with tribal infrastructure problems and will be addressed in the next chapter.

5.7 PRACTICAL OBSTACLES TO TRIBAL JURISDICTION: BRINGING SOVEREIGNTY TO COURT

As may have been guessed, the statement that the tribe can't enforce its ordinances against non-Indians is not strictly true; there are other considerations at work. Almost all jurisdictional problems

tribes encounter are one part clear legal restrictions, and one part unclear divination. First, a tribe may be restricted from enforcing against, or regulating over, non-Indians (and sometimes Indians on non-trust land) by legal strictures and/or the impracticality of law suits. But often the dominating factor is how the uncertainty of FIP and societal dynamics-at-large determine the SWM decisions that tribes can make.

Jurisdictional uncertainty causes tribal sovereignty considerations to surface. And, from the last chapter, tribal sovereignty is indispensable to the integrity of the tribe as a functioning community. So tribes can be bound to foregoing SWM options that are otherwise suitable. In this section, the jurisdiction question in courts is examined, and how the impact on tribal sovereignty makes tribes choose SWM strategies that don't make conventional sense.

A Return to *Montana* and the Specter of *Brendale*

A prime example of problematic jurisdictional uncertainy are the *Montana* exceptions, which could be used to provide tribal authority over non-Indians when they dump on reservations. Invoking the exceptions is all well and good, but if the persons involved are not compliant and cry foul, then what happens is uncertain. It is not clear that open dumping will be judged by the courts to severely threaten tribal lands or people. Many open dumps are quite small and don't contain hazardous wastes[279]. The environmental risk they present is often very modest. The sites can be relatively far from residences and, in some cases, from lands under trust[280]. Typically, the primary risk that these smaller dumps present is that sooner or later, someone will dump a significant quantity of hazardous wastes or set a fire[281]. And it is not known how great of a chance exists for that to happen; scientific data does not exist. So a court might find the *Montana* exceptions do not apply. In fact, the *Montana* exceptions have remained untried. And the *Montana* ruling was *against* tribal authority in fee land hunting and fishing, activities that certainly impact the environment.

Back to the unenforced regulations-- why *doesn't* the tribe enforce them? Not only do most of the open dumps present a small threat, there is the *Brendale* decision. The fee lands on the reservation are mostly clustered together, in areas where non-Indians predominate. County influence is high. It is conceivable under the *Brendale* precedent the court would find the county has zoning privileges.

Another tribe is dealing with a parcel of land used as an informal auto dump by reservation residents (including tribal members)[282]. The land was bought by a nearby city years ago. But the city refuses to take responsibility for maintenance of the property, or its fencing off. It is difficult for the tribe to predict a court outcome. Again there is no serious environmental threat here. But the dumping does despoil the landscape, present a fire danger, and the potential for hazardous waste dumping, among other problems. And it impacts the tribe's sense of reservation sovereignty.

Would a court find for tribal SWM regulatory authority given these circumstances? Who knows. At some point going to court is a chance game, particularly of course with non-Indians and non-tribal land. And that's the crux of the problem. Tribes may not want to take that chance. Why is examined further below.

The Sovereignty Gamble

> Jurisdiction is a very important issue. Because it gets down to who gets to decide. ...So [jurisdiction] becomes the issue instead of solving solid waste or whatever else the issue may be.

Don Wharton, Native American Rights Fund, U.S. Senate Committee on Indian Affairs Workshop of Solid Waste Disposal, July 29, 1991[283]

Jurisdiction questions ultimately have to do with tribal authority, and thus tribal sovereignty. So when tribes enter the legal arena, they are placing what their sovereignty is on the line. And due to the principle of inherent sovereignty, tribes enjoy all sovereign powers that are not explicitly taken away or implicitly divested. And what is taken away is being decided now in the courts. So when jurisdiction is left unquestioned and out of the courts, tribes have, or at least "wear the mantle" of, a broader sovereignty than what could be decided in a court situation.

Conversely, they risk some loss of sovereignty if they do enter the courts. For example, in the *Montana* case, the Crow Tribe was regulating non-Indian hunting and fishing on fee land. They enjoyed this broader sovereignty until it was challenged and it went to court. If it had never gone to court in the first place, ostensibly, the tribe still would have the regulatory power they lost. And losing sovereignty is a monumental incident for tribes. Without sovereignty they are not a tribe; they're just a minority.

So the question becomes whether a court battle for SWM authority is worth fighting for compared to other contentious issues tribes face. Is regulating how non-Indian household wastes are collected, or issuing a civil citation to the few people per year caught illegally dumping a high priority? For the tribe in question, no. To most tribes, probably not, given that only one case having to do with SWM jurisdiction struggles has been brought to federal courts, and that was lost[284].

The Local Specific Transformed To The Global Indefinite

This was the best chance for our tribe to get a compact with the state

--Robert Smith, Chairman of the Pala Band of Mission Indians in reference to a gambling compact agreement with the State of California[285]

No tribe is an island...As [the Pala Band of Mission Indians] sovereignty goes, so does ours.

--Mark Macarro, Chairman of the Pechanga Band of Luiseño Indians[286]

There are several considerations in deciding whether to use tribal authority in situations with a questionable jurisdiction. One of the odd quirks of how FIP is formed is that local and specific issues of one tribe are made to delineate global and broadly defined corollaries for all tribes[287]. Tribes are treated *en masse* when it comes to the law. No real acknowledgment is given to the fact that they are separate and distinct nations.

If a jurisdiction case is brought before a federal court, all tribes will be affected by the outcome. If the outcome supports authority of the tribe in question, all tribes win. But if the outcome is unfavorable, and some aspect of sovereignty is lost, all tribes suffer a similar loss of sovereignty[288]. Again taking Montana for example, the case is about the Crow Nation's right to regulate fishing and hunting on its fee lands. But the decision is used as a general rule of thumb for regulatory authority over non-Indians for all tribes.

And the issues that come before the federal courts are almost always local and specific[289]. The several reasons for this situation boil down to the fact that tribes are governing bodies responsible for their own people's most pressing problems[290]. And the leaders making up the governing body live in the same community as everyone else. They're also politicians that need to get elected[291]. So they're

concerned with what most immediately impacts their lives. And what impacts their reservation. The issues that make it to the courts are mostly concerned with agriculture, water rights, funding, and getting more reservation land back to the tribe-- not sovereignty and trust general issues[292]. And because there is no real consensus on general FIP to otherwise protect tribes from court decisions based on another tribe's circumstances, the ruling is applied to everyone.

The Burden of Local-Global Responsibility in Indian County

> What did they go and do that for?
>
> *-- Tribal elder from a Nevada tribe in reference to the Campo Band of Kumeyaay Indians upon hearing of the BAD court case*

Again, inherent sovereignty provides tribes a legitimate claim to tribal authority already. Tribes can stand to lose a lot more than they can gain if an issue is brought to court. If they don't go to court, they know they can preserve their authority to exercise in future situations that may be more important.

The question of whether it is worth it is asked not just by the tribe considering a court challenge, but by all tribes. Because of the global way in which rulings are applied, a sense of common and intense interest in which tribes and what cases are brought before the federal court pervades Indian Country[293]. And tribes likewise are aware of the impact their actions can have on others. Whether all tribes feel a sense of responsibility for it is unclear. But attesting to the sense of common destiny and duty of the majority are numerous intertribal organizations[294].

Other Considerations in Going to Court

There are other reasons tribes may not want to go to court. For some tribes, having to go to a court to decide jurisdictional questions at all conflicts with the idea of what their sovereignty should be[295]. Deferring to the federal court system is seen as deference to FIP in general, and fighting against individuals, counties, or states can be seen as acknowledging an equality of status that really isn't there. Tribes *are* nations, after all-- dependent, but still accorded under law that distinction from states[296].

Cases Falling Under Tribal Court Jurisdiction

Where the case is such that the tribal court has jurisdiction[297], the above objections disappear. Because the tribal court is not federal, there is no danger that opinion against the tribe will be parlayed into a global and broad legal policy[298]. And tribal courts are more sensitive to and knowledgeable about the cultural considerations that often are intertwined in reservation disputes[299]. But there are even problems with pursuing a tribal court alternative when it is possible. There is something called judicial review[300]. A federal court reviews the decision by the tribal court and rules whether the process was fair. The Supreme Court has ruled that such review where non-Indians are involved is within federal court jurisdiction, once all tribal remedies are exhausted[301].

When the issue is a non-Indian committing a crime, for example willfully dumping hazardous wastes, tribes are able to prosecute only under civil code, if they are lucky enough to get the offender to court. And of course even Indians can be jailed only for one year and fined only $5,000. Either tribes let someone go with only a fine they may never collect, or they must give the matter over to the federal government for prosecution.

What Determines the Outcome of a Court Battle

> If there is no law, if it comes down to pure political power, the tribes cannot hold onto their land bases, and their sovereignty...Without those things, Indian culture as a distinct culture will wither. It will die.
>
> *-Charles Wilkinson, American Indian law scholar*[302]

Things are not all bleak for tribes in court. Increasingly, one factor that determines the outcome of Court, and Congressional and Executive, decisions on FIP is that tribes are actively advocating what they want -- through their rising political influence and activism[303], an increasing strength and capability of tribal litigation, and development of sophisticated tribal courts[304].

And while there is a hesitancy in taking issues to federal court, there are still more cases ending up there[305]. A combination of factors explains the increase. Again, any cases dealing with tribal sovereignty issues are automatically constitutional matters because of their foundation in the Constitution. And some tribes, mainly the larger or resource-rich ones, have begun to take advantage of this circumstance by entering the legal arena to argue for their tribal sovereignty[306]. At the same time, development of reservation land, resources, and business ventures is increasing[307]. So there are more situations where tribal and non-tribal interests clash.

The capability of these tribes to win litigation has increased dramatically for a number of reasons, including improved financial resources[308]. They can hire talented legal expertise, including experienced Native American legal advocacy groups that weren't available before[309]. Another reason that tribes have become more capable, again mainly the larger ones, are the defunct anti-poverty programs of the 60's and 70's[310]. While largely a failure in rural non-Indian America, the daily exposure to accomplished bureaucrats provided tribes with an increased sophistication in running a government and in dealing with politicians and agency heads in Washington.

The capability to win in court has been enhanced enough that tribes increasingly are able to negotiate settlements, rather than go to court and risk losing. Given the great disadvantages to all tribes of losing a case, this new avenue of compromise, when available, is seen by some as the best action, and may be more common in the future[311].

A Look at Non-Indian Resident Dumping on Trust Land: Back Again to the Unused Free Transfer Station

At the risk of beating a dead horse, it is worthwhile to take a look at how both a practical inability to enforce, and sovereignty legal considerations can come into play on a single reservation. In the last chapter, some of the open dumping behind the Unused Transfer Station was explained by various cultural considerations. Another main cause is that much of the dumping (estimated at 50 to 90 percent) at this particular site is carried out by non-Indian residents from an isolated non-Indian community on the reservation[312]. They dump there for a variety of reasons, including the assurance of no enforcement from the tribe.

Recall that, situated in a storm gully and one-half mi long, this particular dump is an environmental nightmare. But even though the dump is on trust land, it is difficult to enforce against the non-Indians who dump there. First, like many tribes, the tribe's SWM ordinance does not cover open dumping by non-Indians. The federal government (or state or county if the tribe desired) is needed to prosecute anyone. And then tribal sovereignty, of course, gets impacted.

Why would a tribe opt not to have a comprehensive ordinance if it was able to? Because of the jurisdiction problems that would result, and the accompanying risk of some sovereignty loss again. In the case of this tribe, the problem is the county takes an active interest in the services it provides to its reservation non-Indian residents, including how SWM is carried out. The county is unable to carry out enforcement at the dump because it is on trust land. But the county wants to be the SWM authority on fee lands. It has a presence there and even has built a modern, gated transfer station for its reservation residents that is far superior to the tribe's. In addition, it operates the county landfill that is the tribe's main disposal facility.

If the tribe pushes for tribal civil authority over non-Indians it would almost certainly be challenged by the county or one of many individuals hostile to tribal control. And because of the well-established and responsible county presence, a court loss is quite possible. But the tribe is in a poor negotiating position because the county can bar the tribe from using the county landfill. That move would cost the tribe dearly in extra disposal and hauling costs. So the tribe's options on handling the non-Indian dumping problem are limited. The primary alternative is to clean up a mess that isn't theirs.

5.8 PRACTICAL OBSTACLES TO TRIBAL JURISDICTION: BRINGING IN THE OUTSIDE

We're not about to do that.

-- Environmental representative for a California area tribe, in reference to allowing EPA personnel access to their reservation [313]

Tribes can get federal or county help in enforcement[314]. For example, the tribe with the unenforced program could have asked for federal marshals to enforce RCRA or other federal environmental statutes against non-Indians at the larger dumps on fee or trust lands, or county police to cite non-Indians at any of the fee land dumps under county law. Other possibilities include cross-deputization and reciprocal agreements[315]. With cross deputization, tribal and county police are deputized as county and tribal agents, respectively. So a tribal officer could arrest a non-Indian committing a county (or state) crime and turn them over for county prosecution.

Under less formal reciprocal agreements, county (or state) and tribe agree to recognize the laws (statutes or judgments) of the other government. For example, one Washington tribe has an agreement with the county prosecutor to prosecute non-Indians cited by the tribe for dumping on tribal land[316]. The Omaha Tribe arranged with a county prosecutor to prosecute both Indians and non-Indians on fee lands for open dump waste disposal[317]. Why doesn't the tribe with the unenforced program use federal or county assistance? Why aren't such arrangements in Indian County commonplace?

Getting assistance may not be possible. Relatively few federal officers are available[318]. Given they must deal with major crimes such as murder, ordinary offenses do not rate much federal enforcement priority[319], so that open dumping is not likely to rate high on their list either. And state/county governments can be hostile or indifferent to tribes, or difficult to work with[320]. They may not want tribal officers to cite their citizens for reasons discussed in the previous and subsequent chapters. For their part, tribes may not want to give outside officers authority on their lands.

> The primary problem [with tribal/state environmental cooperative agreements]seems to be that states simply will not relinquish their jurisdictional claims over Indian reservations, and Tribes are equally unwilling to compromise their jurisdictional authority
>
> *-- Gover, Stetson and Williams*[321]

Bringing Outside Influence

If the decision *is* within a tribe's control, the reason not to involve outside help has to do with ramifications from bringing the outside into the reservation. Fundamentally, bringing in any aspect of the non-tribal world can establish a presence of that world within the tribal community, and that is a threat to the tribe's sovereignty[322]. The presence can be imperceptible or not. But the tribe needs to weigh whether inviting (or accepting) each potential incursion is going to degrade their community in a significant way-- and if so, whether the benefits are worth it.

And what should be weighed in this decision is rarely going to be clear. One insignificant incursion can lead to another, so that the outside presence can expand to become a big problem. For example, the problem with cross-deputization is that it can't be confined to just SWM matters. Once tribal deputy powers are bestowed, deputy powers are granted for SWM and for everything else. Giving deputy powers to an outside government agent for day-to-day tribal goings-on will bring tribal sovereignty issues into play. And giving tribal officers state deputy powers gives the state clear authority over them in exercising their duties[323], a rather threatening proposition, given U.S. government's history of overstepping their authority on reservations.

Reciprocal agreements still bestow to the county reservation influence it didn't have before. This influence will not be confined tidily to a single issue[324]. So if the county recognizes tribal SWM laws on fee lands, and the tribe recognizes county SWM laws on trust land, the county can be incorporated more prominently into people's consciousness as an authority on the reservation in general. The tribe is recognizing the county as a legitimate governmental force. The same type of predicament exists with federal help. Additional jurisdiction is not being forfeited, but influence is being brought in, just the same.

Legal Curtailment of Tribal Jurisdiction

There are larger issues than outside enforcement help. *Brendale* gave a county the right to zone reservation fee lands in an area that was about half tribal land simply because non-Indian and county influence was considered predominate, and thus tribal sovereignty "diminished". So increased outside influence *can* lead to legal curtailment of tribal jurisdiction.

Impact on the Holistic Community

Increased outside influence also can lead to a slow corruption and/or assimilation of tribal culture[325]. Not only can this process lead potentially again to a *Brendale* scenario but, as described from the last chapter, ultimately to tribal dissolution itself. Disintegration of the tribal community from an "outside solution" may be far-fetched for a given SWM problem. But , again, consider the tribal community perspective. Tribes know Federal Indian Law and Policy; knowledge of the subject is surprisingly deep throughout the tribal membership[326], possibly because the existence of the tribe and its powers depends on the legal climate[327]. So tribes know the practical potential for losing sovereignty. And they know the history of policy fluctuations from which they have largely been on the losing end. So there is a general mistrust, or wariness, on whether outside interactions will indeed turn out to tribal advantage[328].

Back To The Lakota-Sioux: The Decision To Not Site A Corporate Landfill

In light of the above discussion, the Lakota-Sioux's decision to reject a corporate landfill is well explained. Not only are there direct cultural factors, there is an awareness of law, its consequences, and its omnipotence in how reservation society changes in the future. The tribe realizes the corporate landfill will bring increased non-Indian influence along with the money. The expected economic benefits of the landfill will increase jobs in the area and non-Indian traffic. So there is an actual loss of tribal authority over the landfill site together with a potential loss of authority, or increased county influence, from more non-Indian residents and visitors. Cultural assimilation can occur with increased non-Indian presence and influence, further endangering tribal sovereignty. From this perspective, given the considerations described in the last chapter, the decision in the tribe's best interest appears to be the "unconventional" one, to not site a corporate landfill.

5.9 CONCLUSIONS

For the last two centuries, Indian Tribes have been forced to give up their original full sovereignty and climb on board the wild roller coaster ride that is FIP. Basic affirmative concepts like inherent sovereignty are championed, and then discarded for ideas like implicit divestiture. At the top, full sovereignty is almost reached again. At the bottom, tribal rights are ended. In the last few decades, while the ride has sped up, tribes have gained some measure of control. It is difficult still to tell where and when the ride will end, much less exactly how far up or down the coaster car is now. A great uncertainty exists as to how FIP translates to existing tribal authority.

So in terms of SWM, tribes start with a different legal situation and have a different route by which they must make their decisions. Conventional SWM practice requires full practical authority over the lands a government is responsible for. Because tribes are a “tribe”, they lack the necessary and accustomed authority to support conventional SWM. Their authority defined by FIP is different and more limited. What is more, their continued survival "as tribe" depends on solving SWM problems without adversely impacting tribal sovereignty. But tribal sovereignty *can* be impacted because direct and indirect jurisdictional considerations result from both the broadness and uncertainty of FIP. So tribes operate on a different mechanism. And when SWM concerns are weighed against those of tribal sovereignty, the latter generally predominates.

As a result, like cultural concerns, jurisdictional and legal concerns mean that SWM strategies in a tribe's best interests may be quite different from those of a conventional government. Yet another issue separating tribal and conventional government SWM program is infrastructure, examined in the following chapter.

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1 U.S. Senate,*Workshop on solid waste disposal on Indian Lands*, Hearings before the 102nd Congress July 29, 1991, Select Committee on Indian Affairs, S.R. 102-72, 1992.

2 From Deloria, V., Jr., " The application of the Constitution to American Indians", in Mohawk, J., S. Lyons, V. Deloria, L. Hauptman, H. Berman, D. Grinde, C. Berkey, R. Venables, *Exiled in the land of the free*, Clear Light Pub. Santa Fe, NM, 1992.

3 Tribal authority in general in this text is meant to suggest legal tribal powers under prescribed or interpreted federal law, unless otherwise noted. The convention is not meant to suggest that tribal power that is not strictly legal under federal law is not founded in legitimacy.

4 Cohen, F., "The erosion of Indian rights, 1950-1953: A case study in bureaucracy", *Yale Law Journal.,* Vol. 60, 348-390, 1953.

5 See generally for example, Deloria, V. *Behind the trail of broken treaties: An Indian declaration of independence*, University of Austin Press, Austin, 1985, or V. Deloria, and C. Lytle, *The nations within: The past and future of American Indian sovereignty*, Pantheon, New York, 1984.

6 See generally for reference Washburn, W. (ed.) *Handbook of North American Indians 4*: *History of Indian-white relations*, Smithsonian Institution Press, Wash. D.C., 1988, Kehoe, A., *North American Indians: A comprehensive account*, Prentice-Hall, Englewood Cliffs, NJ, 1981, Gibson, A., *The American Indian: prehistory to the present*, D.C. Heath and Co., Lexington , MA, 1980, Olson, J. and R. Wilson, *Native Americans in the Twentieth Century,* Univ. of Illinois Press, Urbana, 1984.

7 Cohen, F., *Felix Cohen's Handbook of Federal Indian law*, Strickland, R. (ed.), Charlottesville, VA, 1982.

8 Art. II, § 2, cl. 2, (the President is authorized to make treaties with the advice and consent of the Senate).

9 Art. I § 8, cl. 3 (Congress has the power to "regulate commerce... with the Indian Tribes").

10 Ragsdale, J., Jr., "Indian reservations and the preservation of tribal culture: Beyond wardship to stewardship", *UMKC Law Review*, Vol. 59-8, 503 - 554, 1991.

11 Johnson v. McIntosh, 21 U.S. (8 Wheat) 543(1823).

12 Cherokee Nation v. Georgia, 30 U.S.(5 Pet.) 1 (1831).

13 See generally American Indian Lawyer Training Program, *Indian tribes as sovereign governments*, American Indian Resource Institute (AIRI) Press, Oakland, CA, 1991. The concept of trust responsibility has been upheld numerous times in Court rulings and is quite broad, including fiduciary duty and required representation by the U.S. attorney in litigation.

14 Chambers, Judicial enforcement of the federal trust responsibility to Indians, 27 *Stan. L. Rev.* 1213, 1975.

[15] For example, the 23 tribes of the Nevada Indian Environmental Coalition have challenged the application of RCRA to tribal lands and believe that federal agencies are responsible even if RCRA were applicable, Madison, M., C. Burbee, and D. Crohn, *Solid and hazardous waste on California Indian land: A Review of Technologies, Law, Enforcement, and Resources,* Univ. of Calif., Div of Ag and Nat. Res., Waste Management Workgroup. Pub. No. 1, 1994.

[16] The term inherent originates from an opinion by the Solicitor of the Department of Interior in 1934, Op. Sol. M27781, 55 I.D. 14, 19 (25 Oct. 1934).

[17] Cohen, F., *Handbook of Federal Indian law*, U.S. Government Printing Office, Washington D.C., 1942.

[18] Collins, R. "Indian consent to American government", 31 *Ariz L. Rev.* 365, 383 (1989).

[19] Andrew Jackson was responsible for a number of egregious acts against Indians during his administration and has been referred to as the "Indian Killer" president. See for example, Zinn, H., *A People's History of the United States,* Harper and Row, New York, 1980.

[20] Removal Act of May 28, 1830, 4 Stat. 411, R.S. § 2114, 25 U.S.C. 174s, The Act authorized the President to negotiate with selected tribes to induce them to exchange their homelands for substitute reservations lying to the west of the Mississippi.

[21] See generally Foreman, G., *Indian Removal*, Univ. of Oklahoma Press, Norman, OK, 1972, Prucha, F., "United States Indian policies: 1815-1860", in Washburn, W. (ed.), *Handbook of North American Indians 4, supra* note 6.

[22] Ragsdale, J., Jr., *Indian reservations and the preservation of tribal culture, supra* note 10.

[23] The Appropriations Act of March 3, 1871, ch. cxx, 16 Stat. 544 (1871) (codified as amended at 25 U.S.C.A. § 71). Most of the reservations established subsequent to this time until 1927 were created by unilateral executive order. Tribal recognition subsequent to 1927 has been conducted through federal statutes. Cessation of treaty making not only affected how tribes were treated, but also resulted in different "classes" of tribes. Those with treaties have a binding legal agreement with the U.S., several of which contain broader authority, jurisdiction, or "favors" that other tribes do not possess (e.g., in perpetuity fishing rights). See generally, Prucha, F*., American Indian treaties: the history of a political anomaly*, University of Calif. Press, Berkeley, 1994.

[24] From p. 233, Nabokov, P. (ed.), *Native American testimony: A chronicle of Indian-White relations from Prophecy to the Present, 1492 - 1992,* Penguin Books, New York, 1991.

[25] Known as the Dawes Act, The Allotment Act of 1887, 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381. See generally Washburn, W. (ed.), *Handbook of North American Indians 4, supra* note 6. At the close of the last century, there were a growing number of "assimilationists" who believed that total incorporation into white society was in the best interests of the tribes. The "Doolittle Commission" compiled a report that documented widespread mismanagement and crime on reservations, where rations and supplies were often kept by the administrator or sold to settlers. The Indian charges were left with inferior goods or none at all. In one case blankets were knowingly distributed contaminated with the small pox. In another, rotten meat was knowingly distributed.

Condition of the Indian Tribes, S.R. 156, 39th Congress, 2d. session, Govt. Printing Office, Wash. D.C., 1867. Assimilationist believed Indians could (1) rise out of poverty and what were considered inferior, non-Christian tribal lifestyles, (2) escape the graft and corruption of the reservation administrations, and (3) ultimately assimilate into white society as 'happier citizens. In opposition to this group were those who wished simply to gain access to the Indian lands for settlement and resource exploitation. The Dawes Act satisfied the aims of both groups.

[26] See Philip, K., *John Collier's crusade for Indian reform*, *1920-1954*, Univ. of Ariz. Press, Tucson, 1977.

[27] Ibid.

[28] See for example, Olson, J. and R. Wilson, *Native Americans in the Twentieth Century, supra* note 6.

[29] See for example, Strickland, R., "Genocide and law: a historic and contemporary view of the Native American experience", 34 *U. Kansas Law Rev.* 713, 1986.

[30] Ragsdale, J., Jr., *Indian reservations and the preservation of tribal culture, supra* note 10.

[31] Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401). In Ch. 572, 48 Stat. 984. (1934) (codified as amended at 25 U.S.C.A. § § 461-79), the "ward" status of Indians was found to be congruous with U.S. citizenry. Note tribes in NM and AZ were not given the right to vote until 1956. Like the IRA, granting of citizenship was viewed by many tribes as having strings attached that continued their severing from their sovereignty and heritage. For brief discussion see Hauptman, L., "Congress, Plenary Power, and the American Indian, 1870 - 1992", in Mohawk, J. et al., *Exiled in the land of the free, supra* note 2.

[32] 25 U.S.C. §§ 461-479.

[33] See Philip, K., *John Collier's crusade for Indian Reform*, *1920-1954*, *supra* note 26.

[34] See for example, Pommersheim, F., and T. Pechota, "Tribal immunity, tribal courts, and the federal system: emerging contours and frontiers", *South Dakota Law Review*, vol. 31, 553- 582, 1986. Tribes had the choice of establishing themselves as a charter "corporation" or as a government. During the two-year period within which tribes could vote on the IRA, 258 elections were held. 181 tribes accepted it and 77 tribes, rejected the IRA. The IRA also applies to fourteen tribes who did not hold elections. Within 12 years, 161 constitutional charters and 131 corporate charters had been adopted.

[35] Hauptman, L., *Congress, Plenary Power, and the American Indian, 1870 - 1992,* in Mohawk, J. et al., *Exiled in the land of the free, supra* note 2.

[36] The "paradoxes and inconsistencies" of IRA and the bureaucratically derived tribal councils it spawned led eventually to the takeover of Wounded Knee in 1973 and became the focus of the Red Power militant movement. Ibid.

[37] HR Con. Res. 108, 83rd. Cong, 1st Sess. 67 Stat. B132. See generally, Fixico, D., *Termination and relocation: Federal Indian policy,* Univ. of New Mexico Press, Albuquerque, 1986. As with Allotment, assimilation into larger society provided a point of agreement for those holding conflicting sentiments towards Indians. For some in Congress, Termination was meant to give Indians the opportunity to take part fully in the "American Dream", and hence become fully "Americanized", by owning property,

accumulating wealth, and carrying out other rights and responsibilities of taxes and citizenship. On the other hand, some proponents believed the time had come to end what they perceived as unfair advantages associated with tribal sovereignty and the trust responsibility. Particularly for those tribes that achieved a measure of economic wealth, the federal trust responsibility was seen not as a legal or moral obligation, but as a handout to people who no longer needed it, nor deserved it.

[38] Ragsdale, J., Jr., *Indian reservations and the preservation of tribal culture, supra* note 10, for case history of Klamath and Menominee trial termination and subsequent tribal and social collapse, see, for example, V. Deloria, Jr. , *Custer died for your sins*: *An Indian manifesto*, Macmillan, New York, 1969.

[39] Fixico, D., *Termination and relocation: Federal Indian policy, supra* note 37.

[40] Nabokov, P. (ed), *Native American testimony, supra* note 24.

[41] Ibid.

[42] See generally Cornell, S., *The return of the native*, Oxford Univ. Press, New York, 1988.

[43] Kroeber, K., "American Indian resistance and renewal", in Kroeber, K.(ed.), American Inidan persistence and resurgence, Duke Univ. Press, Durham, 1994.

[44] See Josephy, A., Jr., *Red Power: the American Indians' fight for freedom*, American Heritage Press, New York, 1971.

[45] See Cornell, S., *The return of the native, supra* note 42.

[46] For example, Ragsdale, J., Jr., *Indian reservations and the preservation of tribal culture, supra* note 10.

[47] In Price, M., *Law and the American Indian: Readings, notes and cases*, Bobbs-Merrill Co., Indianapolis, 1973.

[48] PL 93-638, 25 U.S.C. §§ 450-451n, 455-458e, see American Indian Lawyer Training Program, *Indian tribes as sovereign governments*, *supra* note 13.

[49]. The Indian Financing Act of 1974, PL 93-262, 88 Stat. 77, amended by PL 98-449, 98 Stat. 1725, Indian Gaming Regulatory Act of 1988, 102 Stat. 2467, The Indian Child Welfare Act of 1978, PL 95-608, 25 U.S.C. §§ 1901-1963, The Indian Religious Freedom Act of 1978, PL 95-341, 92 Stat. 469.

[50] Ragsdale, J., Jr., *Indian reservations and the preservation of tribal culture, supra* note 10.

[51] For example, Ibid., Harvey, E., "The aftermath of Duro v. Reina: a congressional attempt to reaffirm tribal sovereignty through criminal jurisdiction over nonmember Indians", *Thomas M. Cooley Law Review*, Vol. 8, 573-6-7, 1991, Ulmer, M., "Tribal Property: defining the parameters of the federal trust relationship under the non-intercourse act: Catawba Indian Tribe v. South Carolina", *American Indian Law Review*, Vol. 12, 101 - 140, 1984, Core, A., "Tribal sovereignty: Federal court review of tribal court decisions -- judicial intrusion into tribal sovereignty", *American Indian Law Review*, Vol. 13-2, 175-192, 1984, Pommersheim, F., and T. Pechota, *Tribal immunity, tribal courts, and the federal system, supra* note 34.

[52] Ibid.

[53] See Deloria, V., Jr., *American Indian policy in the Twentieth Century*, University of Oklahoma Press, Norman, OK, 1985.

[54] See for example, Bee, R., "Riding the paper tiger", in *State and reservation: new perspectives on federal Indian policy*, Castile, G. and R. Bee (eds.), Univ. of Arizona Press, AZ, 1992.

[55] See ibid. for example, or more generally, Wilkinson, C., *American Indians, time and the law,* Yale Univ. Press, New Haven, CT, 1987, Cohen, F., *Felix Cohen's handbook of federal Indian law*, *supra* note 7.

[56] Ibid.

[57] For example, *President's Statement of January 24, 1983 on Federal Indian Policy* directed federal agencies to promulgate government-to-government relationships with tribes, resulting in EPA Policy for the Administration of Environmental Programs on Indian Reservations, Nov. 8, 1984.

[58] Cohen F., *Felix Cohen's handbook of federal Indian law*, *supra* note 7.

[59] See generally Deloria, V., Jr., *American Indian policy in the Twentieth Century*, *supra* note 53; Wilkinson C., *American Indians, time and the law, supra* note 55.

[60] Cohen F., *Felix Cohen's handbook of federal Indian law.*, *supra* note 7.

[61] For example, Ragsdale, J., Jr., *Indian reservations and the preservation of tribal culture, supra* note 10.

[62] U.S. Const. art. I § 8, cl. 3.

[63] Cohen F., *Felix Cohen's handbook of federal Indian law.*, *supra* note 7.

[64] Menominee Tribe v. United States, 391 U.S. 404 (1968).

[65] Senate Select Committee on Indian Affairs, House of Representatives Subcommittee on Native American Affairs of the Committee on Natural Resources.

[66] For example, U.S. House of Representatives*, Hearing before the Subcommittee on Native American Affairs of the Committee on Natural Resources 103rd Congress, 2nd Session, on S. 720, To clean up open dumps on Indian Lands, and for other purposes*, July 26, 1994, #103-102, 1994; U.S. Senate, *Workshop on Solid Waste Disposal on Indian Lands, supra* note 1.

[67] See Wilkinson C., *American Indians, time and the law, supra* note 55.

[68] 362 U.S. 99 (1960)(Application to tribes of federal law was found to be consistent regardless of whether tribes were explicitly included in the wording, based on tribes' status as dependent nations). Several exceptions to this rule exist, notably actions guaranteed by treaty (unless explicitly abrogated by Congress) and those that affect solely the internal governance over member affairs.

[69] 112 U.S. 94 at 100 (1884).

[70] Ibid.

[71] See Canby, W., *American Indian law in a nutshell,* West, St Paul, MN, 1988.

[72] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978).

[73] Ibid.

[74] For example, United States v. Wheeler 55L. Ed. 2d 303, at 312 (1978).

[75] Berkey, C., “Indian nations under legal assault: New restrictions on Native American sovereignty: Are they constitutional? Are they moral?” in Wells, R. (ed.), *Native*

American resurgence and renewal: a reader and bibliography, The Scarecrow Press, Inc. Metuchen, N.J. 1994, as in United States v. Wheeler 55L. Ed. 2d 303, at 312 (1978).

[76] Bee, R., *Riding the paper tiger, supra* note 54,, see generally Wilkinson C., *American Indians, time and the law, supra* note 55.

[77] Ibid., Deloria, V., Jr., "The evolution of federal Indian policy making", in Deloria, V., Jr., *American Indian policy in the Twentieth Century*, *supra* note 53.

[78] Ibid.

[79] For example, in Duro v Reina, 110 S. Ct. 2053 (1990), tribes were found to not have criminal jurisdiction over nonmember Indians. In reaction, Congress passed a law that allows criminal jurisdiction over nonmember Indians, PL 102-124, 105 Stat. 616 (1991). See Harvey, E., *The aftermath of Duro v. Reina, supra* note 51.

[80] Menominee Tribe v. United States, 391 U.S. 404 (1968). The tribe's termination was reversed.

[81] Ragsdale, J., Jr., *Indian reservations and the preservation of tribal culture, supra* note 10.

[82] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), emphasis added.

[83] Bee, R., *Riding the paper tiger, supra* note 54, Wilkinson C., *American Indians, time and the law, supra* note 55.

[84] For example, ibid., Ragsdale, J., Jr., *Indian reservations and the preservation of tribal culture, supra* note 10.

[85] Bee, R., *Riding the paper tiger, supra* note 54.

[86] Castile, G., "Hegemony and symbolism in Indian policy", in *State and reservation: new perspectives on federal Indian policy*, Castile, G. and R. Bee (eds.), Univ. of Arizona Press, AZ, 1992.

[87] Core, A., *Tribal sovereignty: Federal court review of tribal court decisions, supra* note 51.

[88] For example, Harvey, E., *The aftermath of Duro v. Reina*, *supra* note 51.

[89] Ragsdale, J., Jr., *Indian reservations and the preservation of tribal culture, supra* note 10. For example, there is disagreement about whether the Indian Reorganization Act of 1934 (25 U.S.C. §§ 461-479), the Indians' "New Deal", was beneficial and a step toward self-determination, or a another Congressional attempt at assimilation, primarily through forcing tribes to drop their traditional decision-making structures.

[90] For example, Pommersheim, F., and T. Pechota, *Tribal immunity, tribal courts, and the federal system*, *supra* note 34.

[91] See generally Wilkinson C., *American Indians, time and the law, supra* note 55, Canby, W., *American Indian law in a nutshell, supra* note 71, Berkey, C., *Indian nations under legal assault, supra* note 75.

[92] Ibid. There are a number of reasons why tribal authority is unresolved, see McGuire, T., "Federal Indian policy: A framework for evaluation", *Human Organization* , Vol. 49-3, 1990; Bee, R., *Riding the paper tiger, supra* note 54; Deloria, V., Jr., *American Indian Policy in the Twentieth Century*, *supra* note 53. For one, the past has essentially caught up to th epresent period. Relying on all the cumulative conflicting or hedging past precedents associated with the various political and judicial mood swings has resulted in

a Policy quagmire. Another explanation is that there is no policy focus as in past periods. Other historical periods were dominated by either an assimilationist or government-to-government tendency. But the Self-Determination period is the first where both policies have been exercised. Also the Court has begun to respond to increasingly diverse social circumstances that were not of concern in the past., and thus were not part of the scope or original intent of the established laws and precedents. Such situations involve disputes between non-Indians and tribes and so are inexorably linked to tribal authority issues. They have increased as a result of growing reservation non-Indian populations, resource extraction, and an increasing number of tribal business ventures. When non-tribal interests are present, concerns with tribal authority mount in the Court to protect those interests. As a result, the absoluteness of inherent sovereignty has repeatedly given way to the weighted subjectivity of implicit divestiture. Whether tribal authority is valid in a given specific situation is not certain until the answer is wrung from Court opinion.

[93] A host, if not the bulk of articles concerned with Indian law state in the introduction that Federal Indian Policy is uncertain, evolving, or fluctuating. For example, note the titles in the following example of scholarly argument: Compare Williams, R., "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence , 1986 *Wis. L. Rev.* 219 with Laurence, "Learning to Live With The Plenary Power of Congress Over the Indian Nations: An Essay in Relation to Professor William's' Algebra, 30 *Ariz. L. Rev.* 413, 421-30 (1988), and then, Williams' reply, "Learning to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live With The Plenary Power of Congress Over the Indian Nations, 30 *Ariz. L. Rev.* 439, 451-52, 457 (1988), and next, Laurence's rejoinder, " On Eurocentric Myopia, The Designated Hitter Rule and "The Actual State of Things", 30 *Ariz. L. Rev.* 459 (1988).

[94] See for example, Berkey, C., *Indian nations under legal assault supra* note 75.

[95] For example, in Harvey, E., *The aftermath of Duro v. Reina*, *supra* note 51, "the Court's continued use of the implicit divestiture theory has impinged upon Congressional legislative authority... perhaps the Court may construe this as a warning to keep their statutory analysis within the scope of congressional intent and reserve any definition of inherent limitation to the express dictates of Congress".

[96] Core, A., *Tribal sovereignty: Federal court review of tribal court decisions, supra* note 51.

[97] Ibid.

[98] Ragsdale, J., Jr., *Indian reservations and the preservation of tribal culture, supra* note 10; Bee, R., *Riding the paper tiger, supra* note 54. For example, "I just want everybody in the Federal government to know this. The answer is yes. We have Federal trust responsibility for these lands and this Congress and this subcommittee will make sure that responsibility is carried out", Congressman Richardson, Chairman, House Subcommittee on Native American Affairs, in U.S. House of Representatives, *H.R. 103-102, supra* note 66.

[99] Pommersheim, F., and T. Pechota, *Tribal immunity, tribal courts, and the federal system, supra* note 34.

[100] For example, Wilkinson C., *American Indians, time and the law, supra* note 55.

[101] Ibid.

[102] Collins, R. *Indian consent to American government, supra* note 18.

[103] See generally Canby, W., *American Indian law in a nutshell, supra* note 71.

[104] Bee, R., *Riding the paper tiger, supra* note 54.

[105] Deloria, V., Jr., *American Indian Policy in the Twentieth Century*, *supra* note 53.

[106] Pommersheim, F., and T. Pechota, *Tribal immunity, tribal courts, and the federal system, supra* note 34.

[107] Ragsdale, J., Jr., *Indian reservations and the preservation of tribal culture, supra* note 10.

[108] Deloria, V., Jr., and C. Lytle, *The nations within, supra* note 5.

[109] U.S. Senate, *Workshop on Solid Waste Disposal on Indian Lands, supra* note 1, p. 68.

[110] Tribes are subject to all federal environmental laws, with minor exceptions, such as the Bald Eagle Protection Act, Madison, M., C. Burbee, and D. Crohn, *Solid and hazardous waste on California Indian land, supra* note 15.

[111] *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, Nov 8, 1984.

[112] Ibid. "EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace....Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Government , EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments. " [italics added]. Note, under the Clean Air Act, Federal Indian reservations are defined as "all lands 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".

[113] The problem is recognized in the *Introduction to the EPA Policy* in ibid. "In many cases, [effective implementation of regulatory programs] will require changes in applicable statutory authorities and regulations."

[114] See for example, Allen, M., "Native American control of tribal natural resource development in the context of federal trust and tribal self-determination", in Wells, R. (ed.), *Native American resurgence and renewal: a reader and bibliography*, The Scarecrow Press, Inc. Metuchen, N.J. 1994. Note, states have already met identical requirements for program responsibility.

[115] Note current EPA policy recognizes the term TAS as being offensive to some tribes and TAS is no longer in official use. However, TAS is currently still in widespread informal use among tribes and agencies.

[116] In Gover, Stetson, and Williams, P.C., *Survey of tribal actions to protect water quality and the implementation of the tribal amendments to the Clean Water Act ,* National Indian Policy Center (NIPC), The George Washington Univ., Wash,. D.C., 1995. The most common program that tribes have delegated authority (i.e. TAS) for is the general program funding provision of the Clean Water Act (§ 106). However, the Isleta Pueblo broke new ground in 1993 when the tribe's water quality standards were approved pursuant § 518 to of the Act.

[117] For example, under the Tribal Amendments to the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988)(December 12, 1991, Final Rule), EPA is authorized to treat Indian Tribes as

states in developing water quality standards and if the following criteria are met: (1) the Tribe must have a governing body carrying out substantial powers and duties, (2) the functions to be exercised by the Tribe must be within its jurisdiction, and (3),the Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

[118] *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, Nov 8, 1984. Unless the State has an express grant of jurisdiction from Congress, Allen, M., *Native American control of tribal natural resource development culture*culture*,* *supra* note 114.

[119] Ibid.

[120] Not including the right to block access to public right-of-ways, roads built with federal moneys, or privately -held land from the owners. Cohen, F., *Felix Cohen's Handbook of Federal Indian law*, *supra* note 7.

[121] § 7003 of RCRA (42 U.S.C §6973).

[122] Madison, M., C. Burbee, and D. Crohn, *Solid and hazardous waste on California Indian land, supra* note 15*:*

[123] Ibid., personal communication, Bob Shelnutt, Circuit Rider, Tribal solid waste management, EPA Region IX, *,* Oct 15, 1996.

[124] Backcountry Against Dumps et al. v. EPA (1996), District of Columbia Circuit No. 95-1343., U.S.C. § 6903(13).

[125] 40 C.F.R. § 258.1 (b).

[126] Not having delegated enforcement and regulation responsibility for a federal program does not remove a tribe's responsibility for complying with federal environmental law (Mattie Blue Legs et al. v. United State Environmental Protection Agency , et al. Civ. No. 85-5097, Slip Opinion (D. South Dakota, September 3, 1987] and subsequent t cases in Eighth Circuit Court of Appeals). Also, landfill owners and operators (including tribes) must comply "with or without a regulatory authority". 40 C.F.R. § 258.1 (b), tribes are included per Opinion for the Court, Circuit Judge Tatel, Backcountry Against Dumps et al. v. EPA, *supra* note 124.

[127] Washington Dept. of Ecology v. EPA , 752 F. 2d 1465 (9th Cir. 1985). (The state of Washington was denied the right to implement a state RCRA plan on a reservation).

[128] For example, Brendale v. Confederated Bands and Tribes of Yakima Indian Reservations, 109 S. Ct. 2994 (1989), Montana v. United State, 450 U.S. 544 (1981). See text below.

[129] *National Tribal Environmental Review Final Report*, National Tribal Environmental Council, May 17, 1994.

[130] For example, Cardin v. De La Cruz, 671 F. 2d 363 (9th Cir.), Cert. denied, 459 U.S. 967 (1982) (The Quinalt Nation’s tribal health and safety regulations were held valid for a grocery store on non-Indian owned reservation land). See also text below.

[131] U.S. Senate, *Workshop on Solid Waste Disposal on Indian Lands, supra* note 1.

[132] Discussion notes, Affiliated Tribes of Northwest Indians (ATNI) Winter Conference, Natural Resource Committee, Spokane, Feb 1994; discussion notes, Indian Health Service, *Workshop on assessment of open dumping and solid waste management planning on Indian lands,* Red Lion Inn, Redding, Sacramento IHS Office, Sacramento, Double Tree Highland Resort, Rancho Bernardo, CA, Oct 10-11, 16-17, 22-23, 1996; notes for Zender, L., and G. Tchobanoglous, "Manual on open dumping assessment on Indian Lands: Site closure and management", *Bureau of Indian Affairs Report*, Portland Area Branch, Dec 1996*:*

[133] Panel presentation, Annual Tribal Environmental Conference, EPA Region IX, Nov 1996.

[134] The case was appealed in 1989 at the Eighth Circuit Court, without the EPA as one of the defendants, and the decision affirmed the District Court finding.

[135] Mattie Blue Legs et al. v. United State Environmental Protection Agency , et al. Civ. No. 85-5097, Slip Opinion (D. South Dakota, September 3, 1987) and subsequent t cases in Eighth Circuit Court of Appeals, (Blue Legs v. US Bureau of Indian Affairs et al. , 867 F. 2d. 1094 (1989), decision Feb 9, 1989. Plaintiffs also sought relief under the Snyder Act, 25 U. S. C. 13; the Indian Health Care Improvement Act, 25 U.S.C. 1601 et seq., and the Federal Government's trust responsibility to Indians.

[136] Ibid. The Court noted that while IHS does provide tribes *assistance* in carrying out solid waste operation and management responsibilities, they do so only at tribal request and do not perform any daily operation or oversight functions. However, in an unrelated reason, by generating wastes ultimately disposed at the open dumps from on-site field offices (in violation of RCRA 42 U.S.C. 6964), both the BIA and IHS were found to be partially responsible for the sites . In addition, the Circuit Court also found that IHS and BIA had not met their trust responsibilities to the Tribe and were obligated to participate in compliance efforts under the Snyder Act.

[137] While the plaintiffs in this case were tribal members, the ruling made clear that any U.S. citizen could seek redress under the same statute.

[138] *Solid Waste Disposal on the Pine Ridge Reservation: Oversight hearing before the Committee on Interior and Insular Affairs, House of Rep., 101st Cong., 2nd Sess.,* H.R. 101-58, 1992.

[139] U.S. Senate, *Workshop on Solid Waste Disposal on Indian Lands, supra* note 1, U.S. House of Representatives, *H.R. 103-102*, *supra* note 66; U.S. Senate, *Hearing before the Committee on Indian Affairs, 103rd Congress, 1st Session, on S. 720 to clean up open dumps on Indian Lands,* Nov 3, 1993, Washington D.C., S. Hrg. 103-460, 1994, and U.S. House of Representatives,*Oversight Hearing before the Subcommittee on Native American Affairs of the Committee on Natural Resources, 103rd Congress, 1st Session, on abandoned and leaking underground storage tanks and open dump sites on Indian Reservations*, Oct 14, 1993, H.R. 103-50, 1994.

[140] *Indian Lands Open Dump Cleanup Act of 1994,* 103rd Congress, 2nd session, S. R. 103-253, Apr 25, 1994.

[141] Backcountry Against Dumps et al. v. EPA.(1996), *supra* note 124.

[142] Opinion for the Court, Circuit Judge Tatel, Backcountry Against Dumps et al. v. EPA., *supra* note 124.

[143] In EPA's Final Determination of Adequacy for Campo Band of Mission Indians submitted program, 60 Fed. Reg. 21191 (1995).

[144] Opinion for the Court, Circuit Judge Tatel, Backcountry Against Dumps et al. v. EPA , *supra* note 124. Reasoning was largely based on Nance v. EPA (1981), 645 F. 2d. 701, 713-714 (9th Cir. 1981) (Absent any definition to contrary, tribes can be treated as states for purposes of Clean Air Act.) An amendment to treat tribes as states was subsequently inserted in 1994.

[145] For example, under the Clean Air Act, the EPA administration is authorized to "treat tribes as states", 42 U.S.C. 7601(d) (1994). Similar language is employed in the Safe Drinking Water Act 42 U.S.C. 300j-11 (1994) and Clean Water Act, 33 U.S.C. 1377(a) (1994).

[146] Opinion for the Court, Circuit Judge Tatel, Backcountry Against Dumps et al. v. EPA, *supra* note 124.

[147] Ibid.

[148] Personal communication, Bob Shelnutt, Circuit Rider, Tribal solid waste management, EPA Region IX, Oct 15, 1996.

[149] Discussion (unscheduled) on Backcountry Against Dumps et al. v. EPA, *supra* note 124 at Annual Tribal Environmental Conference EPA Region IX, Nov 1996.

[150] Opinion for the Court, Circuit Judge Tatel, Backcountry Against Dumps et al. v. EPA, *supra* note 124.

[151] Gover, Stetson, and Williams, P.C., *Survey of tribal actions to protect water quality*., *supra* note 116.

[152] Discussion (unscheduled) on Backcountry Against Dumps et al. v. EPA, *supra* note 124, at Annual Tribal Environmental Conference EPA Region IX, Nov 1996.

[153] Personal communication, Bob Shelnutt, Circuit Rider, Tribal solid waste management, EPA Region IX, Oct 15, 1996.

[154] Note at the time of the ruling, the Navaho Nation had been working for, and was believed to be eligible for RCRA 3011 funding. It would have been the first tribe to receive such treatment.

[155] USEPA, *Site-Specific flexibility requests for municipal solid waste landfills in Indian Country, Draft Guidance*, Office of Solid Waste and Emergency Response (5306W), EPA530-R-97-016, Aug 1997. Site specific permitting rule - approval by the non-Indian communities affected is one criterion.

[156] Discussion notes, ATNI Winter Conference, Natural Resource Committee, Spokane WA, Feb 1994, discussion notes for *Workshop on assessment of open dumping, supra* note 132; notes for Zender, L., and G. Tchobanoglous, *Manual on open dumping assessment, supra* note 132.

[157] Discussion (unscheduled) on Backcountry Against Dumps et al. v. EPA, *supra* note 124, at Annual Tribal Environmental Conference EPA Region IX, Nov 1996. The month-old case opinion was discussed by a panel of Campo and EPA representatives. In contrast to

the morning's previous presentations where one or two questions were proffered, more than a dozen questions were asked by tribal representatives. All of them related to the idea that tribal sovereignty had been negatively impacted, or was in danger of being impacted in the future by the implications of the ruling.

[158] Cohen, F., *Felix Cohen's Handbook of Federal Indian law, supra* note 7 (discussing United States v. Wheeler).

[159] Ibid.

[160] See generally, for example Pommersheim, F., and T. Pechota, *Tribal immunity, tribal courts, and the federal system, supra* note 34. In 1940, the Supreme Court ruled that Indian nations were exempt from suit and it "is as though the immunity which was theirs as sovereigns passed to the United States for their benefit", 309 U.S. 506 (1940).

[161] Pommersheim, F., and T. Pechota, *Tribal immunity, tribal courts, and the federal system, supra* note 34.

[162] Bee, R., *Riding the paper tiger, supra* note 54.

[163] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978).

[164] Berkey, C., *Indian nations under legal assault*, *supra* note 75, also see generally for example, Canby, W., *American Indian law in a nutshell, supra* note 71.

[165] In U.S. Senate, *Workshop on Solid Waste Disposal on Indian Lands, supra* note 1.

[166] For example, in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978), the Court ruled the federal government had an overriding interest in protecting its non-Indian citizens.

[167] The first three classes are discussed in Harvey, E., *The aftermath of Duro v. Reina, supra* note 51, Resident versus non-resident court treatment is discussed briefly in Pommersheim, F., and T. Pechota, *Tribal immunity, tribal courts, and the federal system*, *supra* note 34.

[168] Cohen, F., *Felix Cohen's Handbook of Federal Indian law*,, *supra* note 7. See also generally Canby, W., *American Indian law in a nutshell, supra* note 71, and Wilkinson C., *American Indians, time and the law, supra* note 55.

[169] Ibid.

[170] Ibid.

[171] Ibid.

[172] Ibid.

[173] Testimony of Gleason,U.S. Senate, *Workshop on Solid Waste Disposal on Indian Lands, supra* note 1.

[174] McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 179 (1973).

[175] Some tribes have assumed jurisdiction over civil cases involving an Indian plaintiff and Indian defendant. However, concurrent jurisdiction is held by the state.

[176] For example, Williams v. Lee, 358 U.S. 217 (1959), where a debt was owed to a non-Indian plaintiff.

[177] Cohen, F., *Felix Cohen's Handbook of Federal Indian law*, *supra* note 7.

[178] Indians are state citizens and residents of the state in which the reservation lies and may exercise these rights as long as such activities do not interfere with tribal self-government.

[179] Act of Feb 15, 1929, ch 216, 45 Stat. 1185 (codified as amended at 25 U.S.C. §231).

[180] Op. Sol. Int., Feb. 7, 1969 (M 36768), italics added.

[181] 25 U.S.C. §§ 398, 398c.

[182] County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Reservation, 112 S. Ct. 683 (1992).

[183] 25 U.S.C. §§ 398, 398c.

[184] Cohen, F., *Felix Cohen's Handbook of Federal Indian law*., *supra* note 7. For example, 4 U.S.C. § 666. Note that several states now have compacts with tribes owning gambling casinos that gives them a significant percentage of revenues.

[185] Discussion notes, *Workshop on assessment of open dumping, supra* note 132*;* notes for Zender, L., and G. Tchobanoglous, *Manual on open dumping assessment, supra* note 132.

[186] Madison, M., C. Burbee, and D. Crohn, *Solid and hazardous waste on California Indian land, supra* note 15*:* On one hand, the Court has balanced state and tribal interests (Moe v. Confederated Salish and Kootenai Tribes of Flathead Indian Reservation, 425 U.S>463 (1976)), with tribal sovereignty as a "backdrop" (White Mountain Apache Tribe v. Bracker, 448 U.S> 136 (1980)), and determined whether the tribe's ability to function as a government is adversely affected. ("Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws, and be ruled by them", Williams v. Lee, 358 U.S. 217 (1959)),. Or there has been no "balancing of interests" and the decision is based solely on whether Congress has preempted state taxation in that area. For example, County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Reservation.*,* 112 S. Ct. 683 (1992).

[187] American Indian Lawyer Training Program, *Indian tribes as sovereign governments, supra* note 13.

[188] Cohen, F., *Felix Cohen's Handbook of Federal Indian law*., *supra* note 7.

[189] Moe v. Confederated Salish and Kootenai Tribes of Flathead Indian Reservation, 425 U.S. 463 (1976).

[190] American Indian Lawyer Training Program, *Indian tribes as sovereign governments*, *supra* note 13.

[191] Cohen, F., *Felix Cohen's Handbook of Federal Indian law*., *supra* note 7.

[192] Ibid.

[193] Act of Aug. 15, 1953, ch. 505, 67 Stat. 58 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360) For details see Goldberg, C., "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians", Vol. 22, 535, *U.C.L.A.. Law Review* , 1975.

[194] Five states, California, Minnesota(except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), Wisconsin (except Menominee Reservation) were

included in the 1953 statute. Alaska Territory was added in 1958 (Act of Aug. 8, 1958, Pub. L. 85-615, § 1, 72 Stat. 54 (codified at 18 U.S.C. § 1162(a), 28 U.S.C. § 1360(a)). After Alaska became a state, the statute was amended to include concurrent criminal jurisdiction over the Metlakatla Indian Community .

[195] American Indian Lawyer Training Program, *Indian tribes as sovereign governments, supra* note 13.

[196] For example, Washington State accepted full 280 jurisdiction only over non-Indians and Indians on non-trust land, and jurisdiction over Indians on trust lands in eight subject areas. Idaho accepted jurisdiction over seven subject areas. Iowa accepted civil jurisdiction over two reservations.

[197] American Indian Lawyer Training Program, *Indian tribes as sovereign governments, supra* note 13.

[198] Bryan v. Itasca County 1976 (a state property tax on unrestricted Indian property under 280 jurisdiction was invalidated by the Supreme Court (426 U.S. 373 (1976)).

[199] Cohen, F., *Felix Cohen's Handbook of Federal Indian law*., *supra* note 7.

[200] American Indian Lawyer Training Program, *Indian tribes as sovereign governments, supra* note 13. California v. Cabazon Band of Mission Indians (1987), U.S. 107 S. Ct. 1083 (U.S. Sup. Ct. 1987) (If the "conduct at issue" generally is permitted by state law, it is not in violation of the "State's public policy" and laws impacting the conduct are regulatory only and thus do not apply to tribal lands, otherwise they are prohibitory and generally do apply).

[201] Ibid., Santa Rosa Band v. Kings County 532 F. 2d 655 (9th Cir. 1975), cert denied, 429 U.S. 1038 (1977).

[202] Cohen, F., *Felix Cohen's Handbook of Federal Indian law*., *supra* note 7.

[203] Ibid.

[204] Ibid. Both because some states have singled out reservations for exclusion or inclusion and because tribes have differing treaties and/or agreements or statutes with the federal government that may restrict state jurisdiction in certain areas.

[205] Ex Parte Crow Dog 109 U.S. 556 (1883) (The Supreme Court denied authority of federal government in a case involving a murder committed by an Indian against Indian). The case was largely responsible for the passing of the Major Crimes Act of 1885 (18 U.S.C. § 1153). Also seminal, United States v Wheeler, 435 U.S. 313 (1978) (The absence of a means of enforcing tribal rules or tribal court decrees does not take away a tribe's exclusive jurisdiction).

[206] Cohen, F., *Felix Cohen's Handbook of Federal Indian law*., *supra* note 7. General exceptions can include disputes and offenses relating to ownership, probate, alienation of allotted land, and incursion of overriding state interests on fee lands.

[207] Ibid.

[208] Ibid. Even though federal liquor laws for reservations do not extend to fee lands or right of ways, some tribes have enforced them against their own members.

[209] Ibid. For example, in some cases where hunting or fishing treaty provisions involve off-reservation lands. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341.

[210] Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341.

[211] Major Crimes Act of 1885 (18 U.S.C. § 1153)

[212] Hertzberg, H., *The search for an American Indian identity,* Syracuse Univ. Press, Syracuse, NY, 1971.

[213] Harvey, E., *The aftermath of Duro v. Reina*, *supra* note 51.

[214] PL 102-137

[215] Duro v Reina, 851 F. 2d 1136, 1144-45 (9th Circuit), St. Cloud v. United States 702 F. Supp. 1456 (S.D., 1988).

[216] Harvey, E., *The aftermath of Duro v. Reina, supra* note 51.

[217] Discussion notes, *Workshop on assessment of open dumping, supra* note 132.

[218] A prime example of delegated authority is United States v. Mazurie, 419 U.S. 544 (1975), see text below.

[219] 435 U.S. 191, 209 (1978).

[220] Harvey, E., *The aftermath of Duro v. Reina*, *supra* note 51, for example, the Salt River Pima Maricopa Indian Community Constitution. art. II, ch. 2 § 2-5 states that "any person not a member of the... Community who within the community commits any act which is a crime under community, federal or state law may be prosecuted under community law, forcibly ejected from the community by any police officer, officer of the United States Indian Service or community police officer, and or may be turned over to the custody of the United States marshal or sheriff or other officer of the State of Arizona for prosecution under federal or state law. .

[221] An interesting case that demonstrates how extreme might be the need and justification to grant criminal jurisdiction over non-Indians occurred on the Salt River Pima Maricopa Reservation. The tribe had problems with non-Indian commuters traveling through their reservation, speeding, using alcohol., and littering, and wished to gain authority to cite and prosecute them Although the tribe seemed to demonstrate a competent and developed police and court system, and the local governments involved supported the move, authority was not granted. See U.S. Senate, *Administration of justice within the Salt River Pima-Maricopa Reservation: Hearing before the Select Committee on Indian Affairs, 99th Cong., 2nd Sess. on S. 2564, July 1986*, S.R. 99-853.

[222] Ortiz-Barraza v. United States, 512 F. 2d 1176 (9th Cir. 1975).

[223] Gover, Stetson, and Williams, P.C., *Survey of tribal actions to protect water quality.*, *supra* note 116.

[224] Core, A., *Tribal sovereignty: Federal court review of tribal court decisions, supra* note 51.

[225] For example, ibid.

[226] See generally Wilkinson, C., *American Indians, time and the law, supra* note 55, Cohen, F., *Felix Cohen's handbook of federal Indian law*, *supra* note 7, Canby, W., *American Indian law in a nutshell, supra* note 71.

[227] For example, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (ICRA does not grant jurisdiction to federal courts for a civil action by a tribal member against the tribe), see text below. Also for example, City of Albuquerque v. Browner, No. 93-2315 (10th Cir.

Nov. 17, 1993) (Water quality standards set by the Pueblo of Isleta on upstream discharges from the City of Albuquerque were legal).

[228] Cohen, F., *Felix Cohen's handbook of federal Indian law*, *supra* note 7.

[229] Ibid.

[230] Ibid. "The breadth of retained power over non-Indians in civil matters has not been finally resolved. The issues are most acute on those reservations where non-Indian fee land exists within reservation boundaries"

[231] Zender, L., and G. Tchobanoglous, *Manual on open dumping assessment, supra* note 132.

[232] U.S. Senate, *Workshop on Solid Waste Disposal on Indian Lands, supra* note 1.

[233] 419 U.S. 544 (1975).

[234] The Mazuries, denied a liquor permit by the tribe, were arrested by federal officials and convicted in a federal district court when they proceeded with operating their bar. For a detail account, see Bordewich, F., "Revolution in Indian Country", *American Heritage,* 34-46, Aug 1996.

[235] Johnson, R. and J. Madden, "Sovereign immunity in Indian tribal law", *American Indian Law Review,* Vol. 12, 153 - 197, 1984.

[236] Cardin v. De la Cruz, 671 F. 2d 363 (9th Cir.), cert. denied, (1982).

[237] Confederated Salish and Kootenai Tribes of Flathead Indian Reservation v. Namen, 665 F. 2d. 951 (9th Cir) cert. denied 459 U.S. 977 (1982)

[238] Lummi Indian Tribe v. Hallauer, 9 Ind. L. Rep. 3025 (W.D. Wash. 1982).

[239] Nance v. EPA, 645 F. 2d. 701 (9th Cir. 1981).

[240] Knight v. Shoshone Arapahoe Indian Tribe, 670 F. 2d 900, 903 10th Cir. (1982).

[241] Except in the case of Executive Orders . Also Executive Branch agencies, like EPA, may write law provisions and detailed regulations, but the law must be passed by Congress.

[242] See for example, McGuire, T., *Federal Indian policy : A framework for evaluation*, *supra* note 92. Also for example, "over all lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of deterring the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business", Opinion of the Interior Solicitor, 55 Interior Dec. 14, 50 (1934). The Department of Interior has also approved tribal ordinances and leases authorizing the regulatory jurisdiction over non-Indians. e.g., Op Sol. Int., Oct 13, 1976 (Cohen, F., *Felix Cohen's handbook of federal Indian law*., *supra* note 7).

[243] 56 Fed. Reg. 64, 876, 64,878 (1991).

[244] Ragsdale, J., Jr., *Indian reservations and the preservation of tribal culture, supra* note 10.

[245] Madison, M., C. Burbee, and D. Crohn, *Solid and hazardous waste on California Indian land, supra* note 15.

[246] American Indian Lawyer Training Program, *Indian tribes as sovereign governments, supra* note 13, Montana v. United States, 450 U.S. 544 (1981).

[247] See for example Berkey, C., *Indian nations under legal assault, supra* note 75.

[248] See Gover, Stetson, and Williams, P.C., *Survey of tribal actions to protect water quality.*, *supra* note 116. EPA "believes that activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare".

[249] Harvey, E., *The Aftermath of Duro v Reina, supra* note 51. For example, Dissent opinion in Duro v Reina 110 S. Ct. 2053 in reference to Oliphant v. Suquamish Indian Tribe 435 U.S. 191 (1978), United States v. Wheeler 435 U.S. 313 (1978), Washington v. Confederated Tribes of Colville Indian Reservation 447 U.S. 134 (1980).

[250] 109 S. Ct. 2994 (1989).

[251] See for discussion, Madison, M., C. Burbee, and D. Crohn, *Solid and hazardous waste on California Indian land, supra* note 15. There were actually two areas that the tribe wished to regulate, the second was dominated by tribal members. Four of the justices thought that the tribe could not regulate either area, deciding that the "tribe has no authority, by way of tribal ordinance or actions in the tribal courts, to regulate the use of [non-members (including non-Indians)] fee lands". A tribe could ask for a court order to stop non-member activity that had serious impacts on tribal health and welfare. Three justices believed that the tribe could regulate both areas, stating that Montana was an exception and tribes keep their inherent sovereign powers over throughout reservation lands unless it is inconsistent with federal overriding interests. Two justices wrote the deciding opinion that the state or county has jurisdiction to zone areas where a tribe is unable to exclude non-Indians.

[252] Relinquishment of authority can be due to federal law or in this case by "voluntary surrender".

[253] Pommersheim, F., "The reservation as place: A South Dakota essay", *South Dakota Law Review*, vol. 34, 246-260, 1989.

[254] Ibid., Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

[255] South Dakota v. Bourland 113 S. Ct. 2309 (1993). The majority opinion was that when ownership of tribal lands is conveyed to non-Indians by a tribe, " it loses any former right of absolute and exclusive use and occupation of the conveyed lands". This loss also "implies the loss of regulatory jurisdiction over the use of the lands by others".

[256] 18 U.S.C § 1161 (1953)(Authorizes tribes to regulate import of liquor when not conflicting with state law).

[257] Cohen, F., *Felix Cohen's handbook of federal Indian law, supra* note 7.

[258] 436 U.S. 49 (1978).

[259] 358 U.S. 217 (1959).

[260] 449 U.S. 118 (1981), see discussion in Core, A., *Tribal sovereignty: Federal court review of tribal court decisions., supra* note 51.

[261] For example, Washington v. Confederated Colville Tribes 100 S. Ct. 2069 (1980). (The Supreme Court upheld the right of the Tribes to tax non-Indians through cigarette sales on trust land). See Berkey, C., *Indian nations under legal assault, supra* note 75 for example.

[262] Cohen, F., *Felix Cohen's handbook of federal Indian law, supra* note 7.

[263] Pommersheim, F., and T. Pechota, *Tribal immunity, tribal courts, and the federal system, supra* note 34. Examples are Poitra v. DeMarrias 502 F. 2d 23 (8th Cir. 1974)and Bethel v. Janis 597 F. Supp. 56 (D.S.D. 1984).

[264] For tribal civil laws to apply to non-Indians, ordinances must explicitly specify their inclusion. For example, the Rosebud Sioux Tribal Code is explicitly directed to all residents of the reservation. Pommersheim, F., and T. Pechota, *Tribal immunity, tribal courts, and the federal system, supra* note 34. Some tribes have included non-residents in their criminal ordinances to state that tribal officers can arrest and turn them over to state or federal officers for prosecution under those respective laws (see endnote 221).

[265] In PL 280 states, authority may be legislated for a variety of circumstances, but .280 covers state prohibitory laws only. California v. Cabazon Band of Indians, 480 U.S. 202, 107 S. Ct. 1083 (1987).

[266] See for example, Berkey, C., *Indian nations under legal assault*, *supra* note 75.

[267] Discussion Notes, *Workshop on assessment of open dumping, supra* note 132.

[268] Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes 623 F. 2d. 682 (10th Cir. 1980), cert denied, 449 U.S. 1118 (1981) (The non--Indian plaintiff sued for access to their land within the reservation, even though access involved crossing a member's trust allotment).

[269] Discussion notes, *Workshop on assessment of open dumping, supra* note 132.

[270] Notes for Zender, L., and G. Tchobanoglous, *Manual on open dumping assessment,s supra* note 132.

[271] Ibid.

[272] See for example, Gorman, T., "Neighbors blockade sludge mountain", *LA Times*, A3, Oct 21, 1994, Mydons, S., "Tribe smells sludge and bureaucrats", *NY Times*, A18, Oct. 20, 1994.

[273] Notes for Zender, L., and G. Tchobanoglous, *Manual on open dumping assessment, supra* note 132.

[274] Recreational use is confirmed because the large part of the wastes are what can be expected from an average "family picnic"-- potato chip bags, soft drink cans and bottles, etc.

[275] Dumping by commercial businesses is determined by a large number of white goods dumped apparently at one time.

[276] Notes for Zender, L., and G. Tchobanoglous, *Manual on open dumping assessment, supra* note 132.

[277] Discussion notes, *Workshop on assessment of open dumping, supra* note 132.

[278] Ibid.

[279] Zender, L., and G. Tchobanoglous, *Manual on open dumping assessment, supra* note 132.

[280] Ibid.

[281] Ibid.

[282] Notes for Zender, L., and G. Tchobanoglous, *Manual on open dumping assessment, supra* note 132.

[283] U.S. Senate, *Workshop on Solid Waste Disposal on Indian Lands, supra* note 1.

[284] Backcountry Against Dumps et al. v. EPA, *supra* note 124. There are two cases if *Blue Legs* is included, but this case had more to do with the tribe not wanting the responsibility for their open dumps. It was also an tribal member that brought suit.

[285] In Vellinga, M. "Tribal gambling pact draws big protest", *Sacramento Bee* ,April 7 1998.

[286] Ibid.

[287] Bee, R., *Riding the paper tiger, supra* note 54.

[288] Except in cases where the Court opinion stipulates the ruling only affects the single tribe. Even at the District or Circuit level, tribes outside the region are affected because judgments are weighed heavily in deciding similar issues in other districts.

[289] Bee, R., *Riding the paper tiger, supra* note 54.

[290] Ibid.

[291] See Bee, R., "To get something for the people: The predicament of the American Indian leader", *Human Organization*, Vol. 38-3, 239-247, 1979, Bee, R., "The predicament of the Native American leader: A second look", *Human Organization*, Vol. 49-1, 56-63, 1990.

[292] Ibid. and Bee, R., *Riding the paper tiger, supra* note 54.

[293] For example, at a presentation on the *Backcountry Against Dumps* decision by a Campo Band representative and EPA lawyers, attention was so keen and the questions so numerous, discussion was extended over lunch. The questions centered not only on the poor outcome of the decision, but also on why the tribe had thought it necessary to site a landfill that would draw opposition in the first place. Discussion (unscheduled) on Backcountry Against Dumps et al. v. EPA, *supra* note 124, at Annual Tribal Environmental Conference EPA Region IX, Nov 1996.

[294] For example, Council of Energy Resource Tribes, Inter-Tribal Council of Arizona.

[295] Pommersheim, F., and T. Pechota, *Tribal immunity, tribal courts, and the federal system, supra* note 34.

[296] Worcester v. Georgia 31 U.S. (6 Pet.) 515, 8 L. Ed. 483(S. Ct. 1832). See Chapter 6 for further discussion on tribal reluctance to deal with local governments.

[297] See text above for case types.

[298] In fact, with the exception of the Navaho Nation *Reports of the Navajo Court*, few tribal trial or appellate court decisions are published. Johnson, R. and J. Madden, *Sovereign immunity in Indian tribal law, supra* note 235.

[299] See for example, Brandfon, F., "Tradition and Judicial Review in the American Indian tribal court system", *UCLA Law Review*, vol. 38, 991-1018, 1991.

[300] See for example, Core, A. *Tribal sovereignty: Federal court review of tribal court decisions, supra* note 51.

[301] Ibid. National Farmers Union Insurance Co. v. Crow Tribe 471 U.S. 845 (1985).

[302] In Patterson, E., " A time of reckoning: Courtroom warriors are gaining ground for Native Americans", *Flatirons*, Spr/Sum, 8-16, 1995.

[303] See for example, Castile, G., *Hegemony and symbolism in Indian policy, supra* note 86.

[304] See for example, Johnson, R. and J. Madden, *Sovereign immunity in Indian tribal law, supra* note 235.

[305] See Patterson, E., *A time of reckoning, supra* note 305.

[306] See ibid., Bee, R., *Riding the paper tiger, supra* note 54,, Pommersheim, F., and T. Pechota, *Tribal immunity, tribal courts, and the federal system*, *supra* note 34.

[307] See Allen, M., *Native American control of tribal natural resource development culture*culture*, supra* note 114.

[308] Bee, R., *Riding the paper tiger, supra* note 54.

[309] See Patterson, E., *A time of reckoning, supra* note 305.

[310] Wilkinson, C., *American Indians, time and the law, supra* note 55.

[311] Ibid., Bee, R., *Riding the paper tiger, supra* note 54.

[312] The community, along with a few non-Indian ranches, is home to the only real population in the area. Other well-used dumps are much more convenient, and at least 10 miles closer, to the bulk of Indian homes. It is also general knowledge on the reservation who dumps where; the dump is unofficially named after the non-Indian community.

[313] Discussion Notes, *Workshop on assessment of open dumping, supra* note 132.

[314] Possibly state assistance as well, but it is more unlikely that tribes would request such assistance.

[315] American Indian Lawyer Training Program, *Indian tribes as sovereign governments, supra* note 13.

[316] Zender, L., and G. Tchobanoglous, *Manual on open dumping assessment, supra* note 132.

[317] Environmental Protection Agency, *Native American Network*, Spr 1994.

[318] National Public Radio broadcast, *All Things Considered*, Mar 18, 1998.

[319] Ibid.

[320] Solomon, S., "Tribal-County Cooperation: Making it work at the local level", *Cultural Survival,* vol. 19-3, 56-60, 1995.

[321] In Gover, Stetson, and Williams, P.C., *Survey of tribal actions to protect water quality.*, *supra* note 116.

[322] For example, see Ragsdale, J., Jr., *Indian reservations and the preservation of tribal culture, supra* note 10, and McGuire, T., *Federal Indian policy : A framework for evaluation*, *supra* note 92.

[323] See text above on state authority.

[324] Influence in a society is gained from perceptions of power, prestige, wealth, and authority, among other factors. See for example, Turner, J., *Social Influence*, Open Univ. Press, Milton Keynes, England, 1991.

[325] See Ragsdale, J., Jr., *Indian reservations and the preservation of tribal culture, supra* note 10, and McGuire, T., *Federal Indian policy : A framework for evaluation, supra* note 92.

[326] Biolsi, T., "Bringing the law back in: Legal rights and the regulation of Indian-White relations on Rosebud Reservation", *Current Anthropology*, Vol. 36-4, 543 - 571, Aug-Oct 1995.

[327] See text quote at note 302.

[328] See for example, Biolsi, T., *Bringing the law back in, supra* note 326.