The Origins of EPA's Indian Program

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"The elders say when we don't know our history, we stand on false ground."

—Carol Jorgensen, Director
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I. Introduction

For over thirty years, the Environmental Protection Agency (EPA) has recognized Indian tribes as local governments appropriately responsible for environmental management in Indian country. In the last decade,[2] EPA's Indian Program actions have increasingly come under fire; EPA has been directly challenged in court no fewer than ten times, most commonly by states and their agencies and subdivisions seeking to avoid federal and/or tribal control. States have objected that EPA improperly retained program responsibilities in Indian country rather than delegate them to states,[3] erroneously interpreted Congress' treatment of tribal program responsibility,[4] erroneously interpreted

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[1] Interview with Carol Jorgensen, Director, American Indian Environmental Office, in Washington D.C. (Nov. __, 2004).

[2] EPA's modern Indian Program began in 1994 with the creation of the American Indian Environmental Office. *See* EPA-1994-1 Memorandum from Carol M. Browner, Administrator, EPA, to Assistant Administrators, et. al (July 14, 1994) (on file with author) (announcing multiple actions for "strengthening EPA's Tribal operations" including the creation of a new Office of Indian Affairs); EPA-1994-2 Letter from Carol M. Browner, Administrator, EPA, to Tribal Leaders (Aug. 19. 1994) (on file with author) (announcing the new Office of Indian Affairs as "an extremely important and historic turning point in [EPA's] government-to-government relationship with tribes"); Improving EPA's Indian Program Operations, 59 Fed. Reg. 38,460 (July 28, 1994) (soliciting comments on Agency Indian program enhancements including the creation of a new national office devoted to Indian affairs).

[3] *See* State of Washington, EPA, 752 F.2d 1465 (9th Cir. 1985) (federal implementation of the Resource Conservation and Recovery Act hazardous waste program); State of Michigan v. EPA, 268 F.3d 1075 (D.C. Cir. 2001) (federal implementation of the Clean Air Act federal operating permits program).

[4] *See* Arizona Public Service Comm'n v. EPA, 211 F.3d 1280 (D.C. Cir. 2000) (tribal implementation of Clean Air Act programs).

federal Indian law's treatment of inherent tribal sovereignty,[5] and erred in approving tribal program actions or incorporating them into federal actions.[6] Non-Indian companies and organizations have made similar claims.[7]

Without exception, the EPA actions challenged in those cases can be traced directly to the Agency's 1984 Indian Policy,[8] which the current Administrator recently reaffirmed,[9] and which is consistent with President George W. Bush's Executive Order on government-to-government relations with tribes.[10] For its time, and perhaps still today, EPA's 1984 Indian Policy was an unparalleled endorsement of tribal self-determination. EPA promised to work with Indian tribes on a government-to-government basis despite Congress' near total silence on tribal governmental roles as well as federal program implementation in Indian country. EPA pledged attention to those statutory limitations, assistance for tribal capacity development, and a commitment to full tribal regulatory roles. Tribes' roles would be the same or similar to state roles in the federalist system, carrying the same burdens and the same benefits, including potential influence over actions taken outside tribal territories but causing transboundary pollution.

The recent spate of litigation triggered by EPA's actions actualizing the 1984 Indian Policy has caught the attention of both federal Indian law and environmental law scholars.[11] But to date, there has been no detailed analysis of the 1984 Indian Policy itself, or the Agency's deliberative development of it. That leaves open questions like how did a new federal agency, with no experience in Indian country or with Indian tribes, and no mandated responsibility for tribal trust assets, become the first federal agency to adopt an official Indian Policy? What motivated EPA to adopt the Policy? What was the

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[5] *See* Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998) (tribal implementation of the Clean Water Act water quality standards program); Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) (same).

[6] *See* Administrator, State of Arizona v. EPA, 151 F.3d 1205 (9th Cir. 1998) (tribal air quality redesignation); City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) (inclusion of tribal water quality conditions in federal discharge permit).

[7] *See* HRI, Inc. v. EPA, 198 F.3d 1224 (10th Cir. 2000) (federal regulation of Indian country under the Safe Drinking Water Act); Phillips Petroleum Company v. EPA, 803 F.2d 545 (10th Cir. 1986) (same); Backcountry Against Dumps v. EPA, 100 F.3d 147 (D.C. Cir. 1996) (tribal regulatory roles for solid waste management under the Resource Conservation and Recovery Act).

[8] EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984) at http://www.epa.gov/indian/policyintitvs.htm.

[9] Memorandum from Stephen L. Johnson, Administrator, EPA, to All EPA Employees (Sept. 26, 2005), available at http://www.epa.gov/indian/policyintitvs.htm (follow the hyperlink for "Reaffirmation Memorandum of the 1984 Indian Policy").

[10] Memorandum from George W. Bush, President, United States, to the Heads of Executive Departments and Agencies (Sept. 23, 2004), available at http://www.epa.gov/indian/policyintitvs.htm (follow the hyperlink for "George W. Bush's Indian Policy") (pledging his strong support for the government-to-government relationship with tribes and tribal self-determination).

[11] *See, e.g.,* JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS (2002); DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, CASES AND MATERIALS ON FEDERAL INDIAN LAW 820-33 (4th ed. 1998) (Section B. Federal Environmental Regulation in Indian Country: Treating Tribes as States); ROBERT N. CLINTON, CAROLE E. GOLDBERG, REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS ANMD THE FEDERAL SYSTEM: CASES AND MATERIALS 1416-46 (2003) (Section C. Environmental Controls and Economic Development); WILLIAM H. RODGERS, ENVIRONMENTAL LAW IN INDIAN COUNTRY (2005).

Agency attempting to accomplish? A historical analysis of the Policy's development, including its little known predecessor, the 1980 Indian Policy, and EPA's initial program-specific actions in the 1970s, sheds light on these and related questions.

This Article identifies and analyzes the motivations, assumptions and goals of EPA's nascent Indian program, which served as the foundation for the Agency's modern Indian Program. Section II briefly notes the circumstances surrounding EPA's origin and the rise of modern federal environmental law. Section III applies that foundation to Indian country, explaining how Congress inadvertently created a significant regulatory gap in national environmental coverage, and describing EPA's first program-specific experiments treating tribal governments much like states in an attempt to fill the gap. Section IV explores the premises and terms of the Agency's first cross-program Indian Policy in 1980, and Section V explains why the 1980 Indian Policy failed and the events leading EPA to develop a second policy. Finally, Section VI analyzes in detail EPA's 1984 Indian Policy and its accompanying Implementation Guidance.

II. **EPA Opens** (1970-1972)

EPA was born in 1970, the year of the Nation's first Earth Day. Earth Day represented a growing national consciousness of the fundamental importance of the environment to the health and welfare of a human society clearly capable of destroying it. Public awareness was spiked in no small measure by Rachel Carson's 1962 seminal work on the impacts and risks of unregulated pesticide use by American farmers and others,[12] and her untimely death in 1964.[13] Carson's work reflected a growing body of intellectual work across academic disciplines on public health impacts and illnesses, ecology, and wildlife.[14] The public was exposed to increasing news reports on the environmental consequences of human actions, seeing rivers on fire and coastlines fouled by spilled crude oil, and hearing of swimming beaches and fishing areas closed because of pollution.[15] In 1966, the Supreme Court characterized American lake and river pollution as a "crises" and remarked this was "a time in the Nation's history when there is greater concern than ever over pollution."[16]

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[12] RACHEL CARSON, SILENT SPRING (1962).

[13] EPA-1970-3xc Jack Lewis, *The Birth of EPA,* EPA Journal (Nov. 1985), at www.epa.gov/history/topics/epa/15c.htm. (asserting the Nation's early views on the environment first "crystallized" in 1962 with the publication of Rachel Carson's Silent Spring.

[14] Carson's book has been described as "an epochal event in the history of environmentalism … helping launch a new decade of rebellion and protest," but there were numerous other contemporary and preceding works supporting the public's broader awareness. *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 51-52, 58 (2005); Dinah Bear, *The National Environmental Policy Act: Its Origins and Svolutions,* 10 Nat. Res. & Env't 3 (1995).

[15] LAZARUS, *supra* note __, at 58-59; Bear, *supra* note __, at 3.

[16] United States v. Standard Oil Co., 384 U.S. 224, __ (1966) (applying the 1899 Rivers and Harbors Act's prohibition on the discharge of "refuse matter" into navigable waters to an accidental discharge of commercially valuable aviation gasoline into the St. John's River).

Federal enforcement cases in the 1960s were rare, however.[17] Early efforts at federal environmental law were largely directed at federal research and funding for technical assistance to states,[18] but Congress' faith in state enforcement was on the wane. States generally failed to develop regulatory programs adequate to protect the public's interests,[19] and Congress soon expanded the federal role in environmental protection boldly.[20] In 1969, Congress passed the National Environmental Policy Act (NEPA), which proclaimed a new national policy of harmony between humans and the environment.[21] NEPA created the Council on Environmental Quality to advise the president and implement the new requirement that all federal agencies analyze the environmental impacts of their proposed actions.[22] Nixon signed the bill on January 1, 1970, symbolically beginning the environmental year[23] of the environmental decade.[24]

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[17] *See* EPA-1970-6 *William D. Ruckelshaus: Oral History Interview, Environment before EPA,* at www.epa.gov/history/publications/print/ruck.htm (Jan. 1983) [hereinafter *Ruckelshaus Interview*] (responding to the question how the government regulated the environment before EPA by answering "[t]he federal role was fairly peripheral … there really was no overall federal enforcement to speak of"); *Oversight of Existing Program; Hearing on Water Pollution Control Act Legislation—1971, Before the House Comm. on Public Works*, 92nd Cong. 10 (1971) (statement of Elmer B. Staats, Comptroller General) (characterizing federal enforcement to abate water pollution as a "back-up" to the states' primary responsibility, and noting the cumbersome federal enforcement process).

[18] EPA-1970-3xc Lewis, *supra* note __ (noting history of the pre-EPA federal air and water programs as focused on research and technical assistance, with no regulatory power); EPA-1970-7 Paul G. Rogers, *The Clean Air Act of 1970*, EPA Journal (Jan./Feb. 1990), at www.epa.gov/history/topics/epa/15c.htm (noting the Air Quality Act of 1967 authorized the Secretary of Health, Education and Welfare to designate air quality regions where states would have primary responsibility for adopting and enforcing pollution control standards); John C. Chambers and Mary S. McCullough, *From the Cradle to the Grave: An Historical Perspective of RCRA*, 10 Nat. Res. & Env't 21 (1995) (noting President Lyndon B. Johnson's 1965 message to Congress regarding the need to seek solutions to solid waste management, and urging federal research and assistance to states to develop comprehensive programs).

[19] *See, e.g.,* EPA-1970-7 Rogers, *supra* note __ (noting no state developed regulatory programs under the Air Quality Act of 1967, which envisioned primary state responsibility).

[20] *Id*. at 3 (asserting that an "almost complete lack of enforcement" of the 1967 Air Act was part of its failure leading Congress to enact the 1970 Clean Air Act, which authorized the establishment of national ambient air quality standards). Additionally, states and their political subdivisions were often the polluters. See EPA-1970-4xc *The Guardian: EPA's Formative Years, 1970—1973>Drawing the Line* (Dec. 2004), at www.epa.gov/history/publications/formative4.htm (last updated Dec. 13, 2004).

[21] National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 2, 83 Stat. 852 (Jan. 1, 1970) (codified at 42 U.S.C. § 4321).

[22] *Id*. at § 202, 854 (to be codified at 42 U.S.C. § 4341); see also Bear, *supra* note __, at 4 (discussing the development of NEPA and its predecessors).

[23] The Council on Environmental Quality speculated "[h]istorians may one day call 1970 the "year of the environment." ENVIRONMENTAL QUALITY: THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 20 (Aug. 1970).

[24] One observer later characterized Nixon's decision to make his "first official act of the decade" the signing of NEPA as a "show of visionary statesmanship"). *See* Lewis, *supra* note __. Nixon followed NEPA's signing with a State of the Union address to Congress on January 3, 1970 emphasizing the 1970s as an historic time because of humans' conscious choice to redefine their relation to the land, and a February 10, 1970 environmental action program buttressing federal air and water pollution regulation. *Id*. Interestingly, President Nixon was perceived by EPA as having little personal interest in environmental protection, seeing the cause as associated with anti-Viet Nam war protestors, and having potentially

Four months later some 20 million Americans went out into the spring sunshine in a massive show of public support for the health of mother earth.[25] Whether heard as affirmation of NEPA's policy and approval of the new duties of the federal government, or as a clamor for further and more substantive federal action, the scale of the first Earth Day events suggested a level of public awareness elected leaders ignore at their peril.[26] One of Nixon's potential election rivals was developing a reputation as committed to environmental protection, and perhaps Nixon was motivated to show his interest in the subject in part to stave off a perceived threat for the 1972 presidential election.[27] In the summer of 1969, President Richard Nixon created a citizens' advisory committee, and a cabinet-level environmental advisory council,[28] but these initiatives were criticized as little more than public relations campaigns.[29] In December 1969, Nixon charged a committee with assessing the need for a single independent federal environmental agency, thus implying past federal failures were in part attributable to diffuse and disjointed responsibilities spread among multiple agencies.[30] At nearly the same time as Earth Day 1970, Nixon's Committee recommended the creation of a new independent federal agency with overall responsibility for coordinating the administration's environmental initiatives.[31]

Within three months, Nixon presented Congress with a plan consolidating the federal government's diffuse environmental responsibilities into one agency, the new

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significant negative impacts on the Nation's economic development. *See, e.g., Ruckelshaus Interview, President Nixon*; LAZARUS, *supra* note __, at 75-76.

[25] *See* LAZARUS, *supra* note __, at 43-44 (noting some commentators' characterization of the first Earth Day as a "'republican movement,'—an 'outburst of democratic participation and ideological politics'—created by widespread and then-rising public demand for environmental protection").

[26] *See, e.g., Ruckelshaus Interview, President Nixon* (characterizing public opinion on the environment in 1970 as "outrage," and suggesting Nixon created EPA "because he didn't have any other choice"). Gallup polls taken in 1960 and 1970 reported the percentage of Americans who viewed pollution and ecology as an important issue rose from 1% to 25%. LAZARUS, *supra* note __, at 53.

[27] EPA-1970-4xc *The Guardian: EPA's Formative Years, 1970—1973> Taking to the Air*, at www.epa.gov/history/publications/formative5.htm (last updated Dec. 13, 2004) (quoting Nixon's first EPA Administrator as asserting Nixon created EPA in response to his perceived election rival Senator Edmund Muskie (D-Maine), who supported the 1970 Clean Air Act and was becoming known as an environmental crusader); *Ruckelsaus Interview, Congress and EPA* (noting, that by the time of Ruckelshaus' confirmation as EPA's first administrator, it was generally felt that Muskie was the top Democratic contender for the presidency). *See also* LAZARUS, *supra* note __, at 75-76 (noting Nixon's concern for the possibility the Democrats might gain political advantage on environmental issues).

[28] EPA-1970-3xc Lewis, *supra* note __; Establishing the Environmental Quality Council and the Citizens' Advisory Committee on Environmental Quality, 34 Fed. Reg. 8,693 (May 29, 1969); Bear, *supra* note __, at 3-4 (discussing the executive and legislative dueling proposals over whether EPA would be an independent agency).

[29] Lewis, *supra* note __.

[30] *Id*. *Accord* THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY at 26 (attributing a lack of effective federal response to some environmental problems arise from jurisdictional gaps between various federal agencies with diffuse powers or from the absence of a lead federal agency).

[31] Lewis, *supra* note __.

Environmental Protection Agency.[32] EPA was new in name only; its primary functions, and its staff, came with existing programs from other agencies.[33] One of the two core components of the Nation's regulatory apparatus—its water quality functions—came from the Department of the Interior,[34] which had long-standing responsibility for supervising Indian interests. Two years later, EPA's inherited water program would set the foundation for EPA's modern Indian program.[35]

EPA opened its doors for business December 2, 1970,[36] and it came out strong. EPA's first leader was Assistant Attorney General William D. Ruckelshaus. Ruckelshaus had been a deputy state attorney general in Indiana representing the state's environmental agency, and had experience prosecuting industrial and municipal water polluters.[37] Ruckelshaus attributed EPA's creation to the dramatic shift in public opinion on the environment, which he viewed as "absolutely essential" to overcome the "automatic and endemic" economic impacts of governmental regulation.[38] Ruckelshaus believed the Agency's credibility was vital to the public's support for its environmental mission.[39] He adopted an Agency goal of strong federal enforcement,[40] embracing it repeatedly in

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[32] Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970) ("condensed version" also available at www.epa.gov/history/org/origins/reorg.htm).

[33] *Id*. at 15,623-25.

[34] *Id*. at 15,623.

[35] *See* text *infra* accompanying notes __-__ (explaining EPA's position that federal water quality programs delegated from EPA to states would not include authority to issue discharge permits to Indian facilities). This wasn't the first time, though, that the memory of EPA's predecessors might have been reflected in EPA policy. EPA's initial hesitance to ban the pesticide DDT was influenced by staff inherited from the Department of Agriculture who "preached the advantages of effective pesticides and minimized discussion of debatable health risks." EPA-1970-4xc *The Guardian: EPA's Formative Years, 1970—1973>Pesticides and Public Health*, at

www.epa.gov/history/publications/formative6.htm (last updated Dec. 13, 2004). Interestingly, Nixon's Reorganization Plan implicitly justified its call for a new agency by highlighting a practical tension between the substantive missions and the existing agencies' and environmental considerations. *See* Reorg. Plan No. 3, 35 Fed. Reg. at ____ (also available at www.epa.gov/history/org/origins/reorg.htm).

[36] *See* Lewis, *supra* note __. There were in fact multiple doors to EPA at that time. It wasn't until four months later that the General Services Administration was able to combine all of EPA offices in one physical location. *Id.*

[37] EPA-1970-5 *William D. Ruckelshaus: First Term*, at

www.epa.gov/history/admin/agency/ruckelshaus.htm (last updated Dec. 13, 2004).

[38] See EPA-1970-6 *Ruckelshaus Interview, Environment before EPA* (Jan. 1983), at www.epa.gov/history/publications/print/ruck.htm [hereinafter *Ruckelshaus Interview*].

[39] See *Ruckelshaus Interview, Personal expectations of EPA* (recalling his view it was important for EPA "to *advocate* strong environmental compliance, back it up, and *do* it; to actually show we were willing to take on the large institutions in the society which hadn't been paying much attention the environment") (emphasis in original).

[40] *See* Lewis, *supra* note __. *See also Oversight of Existing Program: Hearing on Water Pollution Control Act Legislation—1971, Before the House Comm. on Public Works*, 92nd Cong. 10 (1971) (statement of John R. Quarles, Asst. Admin. For Enforcement) (noting President Nixon's and Administrator Ruckelshaus' views of EPA as a regulatory enforcement agency).

highly visible public speeches[41] and aggressive, publicly announced enforcement actions before the year's end.[42] In its first year, EPA would refer over 150 pollution discharge cases to the Justice Department for prosecution.[43]

Congress' enactment of the Clean Air Act (CAA) at the end of EPA's first month in business was a "perfect bookend" to the Year of the Environment.[44] The CAA complemented the first Administrator's strong federal tone by greatly expanding federal authority over air quality management nationwide, yet it also acknowledged the primary authority of states in the arena.[45] The new federal-state relationship set out in the 1970 CAA "marked a significant departure from prior approaches and stamped federal regulatory policy with major features that it retains today."[46]

This new model—later denominated cooperative federalism—envisioned a structured federal-state partnership acknowledging both the national interest in environmental management as well as states' historic responsibility over public health and welfare. Congress and EPA would establish federal management programs, which states would generally implement consistent with federal standards and requirements. EPA would have implementation authority until it delegated the program to a state, and would retain supervisory authority after delegation. EPA later summarized cooperative federalism thusly:

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[41] *See* EPA-1970-4xc *The Guardian: EPA's Formative Years, 1970—1973>Drawing the Line* (Dec. 2004), at www.epa.gov/history/publications/formative4.htm (last updated Dec. 13, 2004) (describing Ruckelshaus' surprise announcement during a speech to the annual Congress of Cities that EPA had begun civil enforcement actions against several local governments for water pollution); Lewis, *supra* note __ (quoting Ruckelshaus' December 7, 1970 speech to the International Air Congress that EPA's work would be done with "no obligation to promote commerce or agriculture"). *Cf.* THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 20 (Aug. 1970) (observing that qualitative factors related to federal agencies' substantive mandates "usually overshadow adequate consideration of a project's environmental impact such that environmental concerns "are often slighted").

[42] EPA-1970-4xc *The Guardian: EPA's Formative Years, 1970—1973>Drawing the Line* (Dec. 2004), at www.epa.gov/history/publications/formative4.htm (last updated Dec. 13, 2004) (describing Ruckelshaus' surprise announcement during a speech to the annual Congress of Cities that EPA was at that moment serving on three American cities notices to cease violating water quality standards within 180 days); *id*. (describing EPA's politically-charged enforcement action against Armco Steel over water pollution discharges to Galveston Bay as a major challenge EPA won over how much enforcement power EPA would wield); Lewis, *supra* note __ (describing a public confrontation between EPA and Union Carbide in Ohio over air compliance).

[43] EPA-1970-4xc *The Guardian: EPA's Formative Years, 1970—1973>Drawing the Line* (Dec. 2004), at www.epa.gov/history/publications/formative4.htm (last updated Dec. 13, 2004) (noting these were primarily water pollution cases). In reference to 1970 as the year of the environment, the Council on Environmental Quality called 1971 "the environmental year of action". ENVIRONMENTAL QUALITY: THE SECOND ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 3 (Aug. 1971).

[44] Lewis, *supra* note __. (referring to NEPA as the other bookend); see also EPA-1970-7 Paul G. Rogers, *The Clean Air Act of 1970*, EPA Journal (Jan./Feb. 1990), at (www.epa.gov/history/topics/epa/15c.htm (equating enactment of the Clean Air Act of 1970 with the significance of Earth Day in turning American consciousness about the environment).

[45] Lewis, *supra* note __.

[46] ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 495 (2003). *Accord* THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 73-74 (Aug. 1970) (describing the new "regional" approach to air pollution control).

> EPA and the states have been given joint responsibility by Congress for national environmental programs. EPA and the states must develop a workable partnership in which each performs different activities that are based on the partner's unique strengths. The resulting division of labor must be both coordinated and mutually reinforcing. States are best placed to address specific local problems as they arise on a day-to-day basis, while EPA is best able to address generic problems: long-range issues; inter-state, national, and international issues; and to strengthen and assist state agencies as components of the nation's operational field network for environmental protection. Delegation puts the state in the role of primary implementors [sic] of environmental programs, allowing them to tailor national programs to fit local conditions and needs within bounds that ensure reasonable consistency and equity among states.[47]

Four months after Congress enacted the 1970 CAA, Ruckelshaus issued EPA's first national air quality standards, significantly constraining states' historic responsibility for balancing economic development and activity against environmental protection.[48] Sounding his popular public theme, Ruckelshaus asserted EPA set new "tough" standards on the view that EPA's statutory mandate to protect public health depended upon protecting the most sensitive populations.[49] Recognizing the inherent tension between environmental protection and economic development, he commented laconically "[i]f we have erred at all in setting these standards, we have erred on the side of pubic health."[50]

Ruckelshaus' strong tone emphasized the predictable awkwardness inherent in Congress' arranged marriage between EPA and states. EPA's existence was a constant reminder of the public's lack of confidence in state governments' ability and willingness

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[47] EPA-1983-5 EPA Memorandum, Draft Policy on Federal Oversight of Environmental Programs Delegated to States (Nov. 25, 1983), 14 Envt. Rptr. 1449 (Dec. 16, 1983).

[48] EPA-1971-1 Press Release, EPA, EPA Sets National Air Quality Standards (April 30, 1971), at http://www.epa.gov/history/topics/caa70/01.htm.

[49] Later, Ruckelshaus would confess that EPA had little to do with developing the new CAA standards. See *Ruckelshaus Interview, Important Issues* (reporting that "three or four days before the [statutory] deadline" for EPA's promulgation, Ruckelshaus received air quality criteria "six feet high" from the Department of Health, Education and Welfare's Air Pollution Control Agency, made minor modifications, and then announced them).

[50] Air Quality Standards Press Release, *supra* note __. Perhaps taking the public rhetoric one step further than a modern EPA administrator might, Ruckelshaus dramatized the boldness of EPA standards affecting automobile usage by noting internal EPA disagreement over whether the perceived health effects were scientifically defensible. *Id*. A year later EPA banned the pesticide DDT despite its staff's earlier view that the predicted health benefits were debatable and outweighed by the costs to the agricultural industry. *See* EPA-1970-4xc *The Guardian: EPA's Formative Years, 1970—1973>Pesticides and Public Health*, at www.epa.gov/history/publications/formative6.htm

(last updated Dec. 13, 2004) (suggesting EPA's DDT decision fostered the "activist" image Ruckelshaus sought to create for EPA). The DDT ban may also have been reflective of a culture shift beginning to occur at the agency. EPA's pesticide program came from the Department of Agriculture, which viewed pesticides as an important tool in realizing its mission of promoting agriculture. The Department's staff scientists, who EPA inherited in the reorganization, had just the year before the ban downplayed DDT's environmental risks in light of its agricultural benefits. *Id*.

to protect human health and the environment.[51] Ruckelshaus, the former state deputy attorney general, knew from practical experience that local economic interests intrinsically affected state value judgments about environmental quality.[52] But he believed a strong centralized federal oversight and enforcement machine could level the national playing field.[53]

States would continue to play their primary regulatory roles, but within the confines of federally-dictated programs and subject to EPA's preemptory power ensuring recognition of national environmental quality interests.[54] Ruckelshaus urged states to develop credible pollution control programs.[55] EPA assisted states extensively in creating the infrastructure necessary for their assumption of the federal air and water programs.[56] The working relations formed during this time "set the pattern for federal-state relations for years to come,"[57] but Ruckelshaus viewed this initial federal oversight over states' realignment with national priorities as "a *very very* difficult period between the EPA and the states."[58] Complicating the growing pains of a new institutional partnership was one

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[51] EPA-1970-6 *Ruckelshaus Interview, State Governments* (asserting beginning relations between EPA and state governments were "terrible" in part because "the very *existence* of EPA itself symbolized to state environmental agencies the lack of appreciation the public had for their 'laboring in the darkeners for lo these many decades'") (emphasis in original); EPA-1970-4xc *The Guardian: EPA's Formative Years, 1970—1973>Drawing the Line* (Dec. 2004), at www.epa.gov/history/publications/formative4.htm (last updated Dec. 13, 2004).

[52] *See* EPA-1970-6 *Ruckelshaus Interview, Road to EPA* (relating that his early aggressive enforcement efforts against industry polluters at the state level resulted in "occasional calls" from the governor reminding the agency that companies "would leave the state if pressed too hard," and indicating Ruckelshaus' impressions then that "pollution was essentially a problem caused by competition among the states for the location of industry within their borders"). *Cf. Oversight of Existing Program: Hearing on Water Pollution Control Act Legislation—1971, Before the House Comm. on Public Works*, 92nd Cong. 266 (1971) (Statement of Daniel J. Evans, Governor, Washington State (asserting the development of federal standards and federal programs has minimized water quality pollution caused by competition among states for new industry).

[53] EPA-1970-6 *Ruckelshaus Interview, Road to EPA* (recalling his early conviction that "if you simply centralized all of this oversight and enforcement activity, you could bring such states and governors in line because there wouldn't be any place for them to run and hide").

[54] *See* Train v. NRDC, 421 U.S. 60, 65, 79 (1975) (noting the 1970 CAA's cooperative federalism approach allows a state to use whatever mix of air pollution controls it desires, but subject to federal implementation if the state's controls fail to comply with national standards). *See also Oversight of Existing Program: Hearing on Water Pollution Control Act Legislation—1971, Before the House Comm. on Public Works*, 92nd Cong. 269 (1971) (Statement of Daniel J. Evans, Governor, Washington State (asserting a "fully coordinated and complementary joint [federal-state] effort" was the best approach to water pollution).

[55] Lewis, *supra* note __ (summarizing Ruckelshaus' December 15, 1970 comments to a conference of state governors).

[56] EPA-1970-6 *Ruckelshaus Interview, State Governments*.

[57] Lewis, *supra* note __ (quoting Alvin Alm, Deputy Administrator during Ruckelshaus' second term at EPA).

[58] EPA-1970-6 *Ruckelshaus Interview, State Governments* (emphasis in original) (asserting state governments see value in having EPA play the role of the strong federal enforcer or the "gorilla in the closet", but quickly lose their fondness when EPA enforces against state facilities). In addition, although sporadic, federal enforcement up to this time was generally done without notice to or coordination with parallel state programs. *See, e.g., Oversight of Existing Program: Hearing on Water Pollution Control Act*

partner's potential status as a regulated entity, and EPA's willingness to take formal enforcement actions against governmental polluters.[59] But even where the polluter was private and the state stood as a potential enforcer of federal requirements, EPA made clear it would initiate federal enforcement action if necessary to break "the logjam of [local governmental] inertia."[60] That preemptory tenor federal enforcement power was consistent with Nixon's view of EPA's role under the CAA.[61]

States thus faced a situation oddly reminiscent of Indian tribes. Suddenly, with little warning, and certainly without consultation, states found themselves bound to respect (and implement) federal mandates in a subject area they formerly governed with little outside interference. And like the Bureau of Indian Affairs. EPA understood the importance of keeping a close eye on its adopted new ward; within four months of EPA's beginning, Ruckelshaus established "field" offices in 10 regions.[62] In theory, regional offices could increase EPA's sensitivity to local issues in aid of its co-partner state governments.[63] But a regional presence could also facilitate more active federal enforcement,[64] and thus stand as a testament to the increasing role of the federal government in environmental matters.[65] So, like the federal-tribal relation, despite the respectful rhetoric the relationship between EPA and state and municipal governments "started off turbulently and stayed that way."[66]

Legislation—1971, Before the House Comm. on Public Works, 92nd Cong. 10 (1971) (statement of Elmer B. Staats, Comptroller General) (noting industry confusion and state frustration with federal water pollution enforcement conducted independently of state regulators).

[59] *See, e.g.*, Lewis, *supra* note __. (noting EPA civil actions against Atlanta, Cleveland and Detroit for violations of federally-approved state water quality standards); EPA-1970-4xc *The Guardian: EPA's Formative Years, 1970—1973>Drawing the Line,* at www.epa.gov/history/publications/formative4.htm (last updated Dec. 13, 2004) (same).

[60] EPA-1970-4xc *The Guardian: EPA's Formative Years, 1970—1973>Drawing the Line,* at www.epa.gov/history/publications/formative4.htm

(last updated Dec. 13, 2004) (quoting a December 10, 1970 address Ruckelshaus made to the Annual Congress of Cities in Atlanta, Georgia).

[61] Lewis, *supra* note __ (reporting Nixon warned states that federal enforcement against violators would be "swift and sure" if states failed to make good faith efforts implementing the 1971 CAA standards).

[62] *Id*.

[63] EPA-1970-4xc *The Guardian: EPA's Formative Years, 1970—1973>Building an Agency*, at www.epa.gov/history/publications/formative3.htm

(last updated Dec. 13, 2004) (characterizing EPA's regional organization as part of Nixon's "New Federalism", where federal agencies were more responsiveness to constituent needs through a better understanding of regional problems and local priorities).

[64] EPA-1970-4xc The Guardian: EPA's Formative Years, 1970—1973>Building an Agency, at www.epa.gov/history/publications/formative3.htm

(last updated, Dec. 13, 2004) (noting regional offices could collect pollution information, investigate and prepare enforcement cases to refer to Justice in Washington D.C.).

[65] Lewis, *supra* note __ (suggesting EPA's regional offices were "important because of the activist role the new Administrator had in mind for them in his new regime").

[66] EPA-1970-4xc *The Guardian: EPA's Formative Years, 1970—1973>Drawing the Line,* at www.epa.gov/history/publications/formative4.htm (last updated Dec. 13, 2004).

III. **Testing the Waters** (1972-1980)

Ruckelshaus' strong and disquieting approach to EPA's state partners in the early 1970s[67] inadvertently coincided with an historic and fundamental theme of Indian law as espoused by federal courts: the original relations between tribal nations and the colonizing European nations implied a broad federal power over Indian affairs that preempted or limited state authority.[68] The legitimacy of a colonial federal power over tribes continues to be debated today,[69] but in the early 1970s its assertion was reflected in hundreds of federal laws compiled in Volume 25 of the United States Code, entitled simply "Indians." Perhaps because of the plethora of Indian-specific federal laws, at one time it was thought that "[g]eneral acts of Congress [do] not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[70] But a decade before EPA came into existence, the Supreme Court reversed its view, opining instead that general federal statutes "in terms applying to all persons includes Indians and their property interests."[71]

This switched position was no academic matter for EPA. In 1970, no federal environmental law mentioned Indian tribes or Indian country. As an administrative agency, EPA's authority in Indian country depended wholly on legislative powers delegated by Congress.[72] If congressional silence meant a statute did not apply to Indian

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[67] As the Watergate scandal expanded in the spring of 1973, Ruckelshaus left EPA to serve as Acting Director of the Federal Bureau of Investigation and then Deputy Attorney General. In October 1973, President Nixon fired Ruckelshaus for refusing to fire Special Watergate Prosecutor Archibald Cox. See *Ruckelshaus Interview, Biography, supra* note __. Ruckelshaus would later return to EPA, and sign the 1984 Indian Policy, but in his first term it seemed clear he made a lasting impression of the importance of a strong federal voice in the environmental arena. *See* EPA-1970-4xc *The Guardian: EPA's Formative Years, 1970—1973>Changing Captains*, at www.epa.gov/history/publications/formative7.htm

(last updated Dec. 13, 2004) (noting that EPA's second administrator, Russell Train, took over an agency with "credibility" and "an activist image"); EPA-1970-3xc Lewis, *supra* note __ (finding it "impressive that EPA was able to take the strong positions it did during its early days").

[68] *See e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (barring state law from Indian country as an unacceptable interference with federal-tribal relations); Rice v. Olson, 324 U .S. 786, 789 (1944) (noting "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history"); Williams v. Lee, 358 U.S. 217, 220 (1959) (barring on-reservation state action that "infringed on the right of reservation Indians to make their own laws and be ruled by them").

[69] Robert Odawi Porter *The Inapplicability Of American Law To The Indian Nations*, 89 Iowa. L. Rev. 1585 (2004).

[70] Elk v. Wilkins, 112 U.S. 94, 99-100 (1884).

[71] Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960). This statement appears to be dicta, *see* COHEN, HANDBOOK OF FEDERAL INDIAN LAW 284 (1982 ed.), but modern courts accepted it without question. For a criticism of Tuscarora as interpreted by federal courts is defensible, *see* Wenona T. Singel, *Labor Relations And Tribal Self-Governance*, 80 N.D. L. Rev. 691, 695-98, 702-07 (2004).

[72] The scope of delegated administrative power in Indian country was not an unfamiliar topic to the federal courts at that time. *See, e.g.,* Seneca Nation of Indians v. Brucker, 262 F.2d 27 (D.C. Cir. 1958) (addressing whether Congress delegated to the Corps of Engineers authority to flood certain Indian lands), *cert denied* 360 U.S. 090 (1959); Tuscarora, 362 U.S. at 116 (addressing whether Congress delegated to the Federal Power Commission authority to allow licensees to condemn Indian lands).

country, then the Agency lacked authority to implement the program there, even if the resulting regulatory gap significantly undermined program efficacy. If, on the other hand, the court assumed Congress intended a statute apply to Indian country unless otherwise indicated, then the Agency had all the power it otherwise possessed to implement the program nationwide.[73] In perhaps the first court case fairly called an Indian country environmental case, the court followed this reasoning in concluding that NEPA applied to federal actions in Indian country despite the Act's silence on the question.[74]

A. Federal Program Implementation in Indian Country

Congress imported the CAA's cooperative federalism model into the water pollution context by enacting the Federal Water Pollution Control Act (FWPCA) in 1972.[75] The FWPCA recited states' basic responsibility for water pollution control, but imposed minimum requirements for federal approval of pre-existing and future state water quality standards (WQS) for surface waters like rivers and lakes. The FWPCA also provided for federal uniform technology-based effluent limitations set by category of discharger. State WQS and federal effluent limitations would become the main conditions of permits for discrete "point sources" of water pollution.[76] Responsibility for managing the permit program fell initially to EPA, but Congress clearly expected EPA would delegate it to states desiring control.[77]

But, like NEPA, the 1972 FWPCA was a statute of general applicability reflecting no clear congressional intention on its application in Indian country. The Act did mention Indian tribes; in the general definitions section, the term "municipality" was defined by a list of governmental bodies including "an Indian tribe or an authorized Indian tribal organization."[78] The Act's extensive legislative history is curiously silent on the impetus or purpose of this characterization. It was probably not recognition of tribal sovereignty, since municipalities played no regulatory role under the Act. EPA believed it simply represented Congress' intent to make tribes eligible for financial and technical assistance for constructing wastewater treatment facilities and planning for their discharges.[79]

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[73] Subject, of course, to the difficult task of reconciling Congress' consistent recitation of the primary responsibility of states in environmental management schemes with the complex and convoluted principles of federal Indian law. *See* State of Washington, Department of Ecology v. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985) (deferring to EPA's reconciliation of statutory language reciting states' primary authority with Congress' silence on Indian country program implementation).

[74] Davis v. Morton, 469 F.2d 593 (10th Cir. 1972).

[75] Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (Oct. 18, 1972).

[76] EPA 1972-1xc *The Challenge of the Environment: A Primer of EPA's Statutory Authority-December 1972* (http://www.epa.gov/history/topics/fwpca/05.htm, visited March 19, 2005).

[77] Pub. L. No. 92-500, § 2, 86 Stat. 880 (codified at 33 U.S.C. § 1342(b), (c)).

[78] *Id*. at 502(4) (codified at 33 U.S.C. § 1362(4)).

[79] *See* EPA REPORT TO CONGRESS: INDIAN WASTEWATER TREATMENT NEEDS AND ASSISTANCE 5 (Jan. 1989) (noting that prior to 1987, the FWPCA defined tribes as municipalities "for the purpose of receiving [wastewater] construction grants and technical assistance from EPA under Title II" of the Act). *Accord*,

EPA established procedures for state assumptions of FWPCA delegable programs in 1972, but like Congress, EPA said nothing about Indian country implementation.[80] The following year, EPA proposed rules for federal direct implementation (DI) of the point source and sewage sludge permit programs in states without delegated permit programs.[81] EPA's DI was generally expected to be temporary while states developed satisfactory programs.[82] But even after state program assumption, EPA proposed itself as the "exclusive source" of permits for for discharges from federal agencies and instrumentalities.[83]

EPA's first Indian program action appeared unexpectedly in the final 1973 FWPCA Rule. The proposed rule iterated Congress' municipality definition (including tribes), but was otherwise silent on Indian country implementation. The final rule, however, added Indian facilities to the list of dischargers excluded from state regulation. "State programs do not cover agencies and instrumentalities of the Federal Government and Indian activities on Indian lands under the jurisdiction of the United States."[84] EPA would thus retain federal authority over discharges "from any Indian activity on Indian lands under the jurisdiction of the United States."[85]

Curiously, the Federal Register notice offered no explanation for the new reference to Indian facilities. The notice reported neither public comments nor additional

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EPA-1979-2 Letter from Elmer D. Shannon, Indian Coordinator, Office of Federal Activities, to tribal representatives of the Indian Work Group (June 6, 1978) (on file with author) (informing tribes of possible funds for wastewater construction and planning grants). Congress could also have rendered tribes eligible for these grants and assistance by defining them as states. *See* 33 U.S.C. § 1281(g) (authorizing wastewater treatment facility construction grants to states, municipalities and other governmental bodies).

[80] State Program Elements Necessary for Participation in National Pollution Discharge Elimination System, 37 /Fed. Reg. 28,389 (Dec. 22, 1972).

[81] Policy and Procedures for Federally-Issued NPDES and Sewage Sludge Permits, 38 Fed. Reg. 1,362 (proposed January 11, 1973).

[82] *Id*. at 1363 (to be codified at 40 C.F.R. § 125.2).

[83] *Id*. at 1362.

[84] Final Rules, National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,530 (May 22, 1973) (codified at 40 C.F.R. § 125.2(b)) [hereinafter 1973 FWPCA Rule]. In its explanation of the final rule, EPA explicitly stated "permit issuing authority for federal facilities *cannot* be delegated to the states," *see id*. at 13,528 (emphasis added), but did not make a similar statement in regard to tribal facilities. EPA repeated that omission in specifically providing federal facilities need not obtain section 401 certification from states of compliance with state WQS, *see id*. at 13,533 (codified at 40 C.F.R. § 125.15(c)), without mentioning tribes.

[85] Final Rules, National Pollutant Discharge Elimination System, 38 Fed. Reg. 13,528, 13,530 (May 22, 1973) (to be codified at 40 C.F.R. § 125.2(a)(2)). EPA did not define "Indian activities." Logically, these would seem to encompass water discharges from facilities owned by tribes or individual Indians. But they could also include facilities jointly owned by non-Indians and a tribe (or individual Indians), and facilities owned wholly by non-Indians, but whose operations implicate development of Indian lands or other tribal natural resources under some business arrangement with the tribe or individual Indians. EPA also did not define "Indian lands," which left ambiguous whether federal DI applied to water pollution discharges only on lands owned by tribes or individual Indians, or on all lands (including those owned by non-Indians) within Indian country. Years later under a different statutory program, EPA would equate "Indian lands" with "Indian country." *See* Washington, Department of Ecology, 752 F.2d 1465 (noting EPA's treatment of Indian lands under the Resource Conservation and Recovery Act).

Agency deliberation on the matter. Perhaps the impetus came by way of two Supreme Court decisions issued between the time when EPA proposed the 1973 FWPCA Rule and finalized it.[86] In one case, the Court barred state taxation laws from reaching the on-reservation income of a tribal citizen, emphasizing that the "policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."[87] In the other case, the Court allowed state taxation of off-reservation Indian commercial activities, declining to immunize the tribe by considering it a federal instrumentality.[88] Those cases may have signaled to EPA a need for the 1973 FWPCA Rule to address control of Indian facilities separately from federal facilities.

Within a decade, the twin principles set out in the 1973 FWPCA Rule—retained federal regulatory responsibility for Indian facilities, and exclusion from state delegations—would become cornerstones of the Agency's official Indian Policy and program supporting modern EPA-tribal partnerships. For the moment, though, the 1973 FWPCA Rule treated tribes as regulated entities, not as governmental regulators. But that perspective would flip just one year later.

B. Tribal Implementation of Federal Programs

The 1970 CAA's cooperative federalism model required states develop and obtain EPA approval of state implementation plans (SIPs) controlling air pollution sources to the extent necessary to satisfy federally established national ambient air quality standards.[89] The Act did not specify how SIPs should treat regions already attaining the national standards, but a 1972 case held the Act required that EPA prevent "significant deterioration" of existing air quality in such areas.[90] Pursuant to the court's order, EPA disapproved all existing SIPs[91] and proposed regulations for the prevention of significant deterioration (PSD).[92]

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[86] EPA neither cited nor referred to federal Indian law in support of its implicit legal conclusion that states lacked jurisdiction over Indian facilities.

[87] McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168 (1973). Supporting EPA's position more directly, the Court stated broadly "[s]tate laws generally are not applicable to tribal Indians or an Indian reservation except where Congress has expressly provided that State laws shall apply." *Id*. at 170-71.

[88] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 150-55 (1973). *Accord* Martinez v. Southern Ute Tribe of the Southern Ute Reservation, 249 F.2d 915, 919 (10th Cir. 1957) (noting two U.S. Solicitor's opinions treating tribes as federal agencies for certain purposes, and observing the Supreme Court had disagreed with that approach as early as 1896).

[89] 42 U.S.C. § 7410(a) (state plans for national ambient air quality standards).

[90] Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D. D.C. 1972), aff'd per curiam, 4 ERC 1815 (D.C. Cir 1972), *aff'd by an equally divided Court, sub nom*. Fri v. Sierra Club, 412 U.S. 541 (1973).

[91] *See* Approval and Promulgation of Implementation Plans, Prevention of Significant Air Quality Deterioration, 37 Fed. Reg. 23,836 (Nov. 9, 1972).

[92] Prevention of Significant Air Quality Deterioration, 38 Fed. Reg. 18,986 (proposed July 16, 1973) (to be codified at 40 C.F.R. pt. 52).

EPA first proposed four alternatives, each focused on state implementation roles.[93] Although the proposal came two months after the 1973 FWPCA Rule, it did not mention Indian country or Indian facilities. Nor did EPA invite or seek the views of tribes or tribal organizations on the proposal, despite extensive consultations with state and local governments and officials.[94] The state consultations and public comment raised "conceptual issues such as the roles of federal and state/local governments,"[95] but EPA reported no comments from tribes or on Indian country issues. Nonetheless, much like the 1973 FWPCA Rule, tribal references appeared without explanation in a second PSD proposal,[96] which became the final 1974 PSD Rule.[97]

The 1974 PSD Rule split geographic areas with air quality already meeting the national standards into three classifications (I-III). Each class carried a different and descending level of air quality deterioration considered significant, so that more deterioration was allowed in Class III areas than Class II, and more deterioration was allowed in Class II than Class I.[98] Nearly all areas of the country were initially designated as Class II, but particular areas could be "redesignated" as Class I or Class III. The redesignation factors set out in the rule implicated local (and highly political) considerations,[99] so EPA identified states as the point of initiation.[100]

But, following the precedent set by the 1973 FWPCA Rule, EPA treated Indian reservations separately. EPA implicitly assumed states lacked authority to run the PSD

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[93] *Id*. at 18,990 (offering four PSD alternatives "promulgated as federal regulations to be enforced by the States until such time as each State possesses authority to enforce similar State regulations"). EPA focused on state implementation presumably because the case challenged EPA's approval authority over state plans, but also in light of the CAA's cooperative federalism approach, and the PSD program's potential for dramatic impacts on local land use patterns. *See id*. at 18,986 (noting that a national PSD policy would substantially impact future growth and development patterns making the "usual rulemaking procedures of putting forth a single proposal is clearly inadequate").

[94] *See* Prevention of Significant Air Quality Deterioration, 38 Fed. Reg. 31,000, 31,000 (proposed Aug. 27, 1974) (to be codified at 40 C.F.R. pt. 52).

[95] *Id*. at 31,001 (noting specifically EPA went beyond the normal public comment process by holding "additional consultations" with state governors, mayors, local government agencies, members of Congress, state and local air pollution control officials, environmental groups, industry, and other federal agencies. *See id*. at 31,000.

[96] *Id*.

[97] Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510 (Dec. 5, 1974) (codified at 40 C.F.R. pt. 52) [hereinafter 1974 PSD Rule].

[98] In Class I areas, nearly any negative change in air quality would be considered significant. In Class II areas, deterioration accompanying moderate well-controlled growth would be considered insignificant. In Class III areas, deterioration up to the national standard would be considered insignificant. *See id*. at 31,003. A preconstruction review process would determine if new major sources would comply with the applicable deterioration increment.

[99] 1974 PSD Rule, *supra* note __, at 42,515 (codified at 40 CFR 52.21(d) (redesignation proposal must show local government's consideration of anticipated area growth, the expected social, environmental and economic effects of redesignation on the area, and impacts on the region; also any national effects); *see also* 38 Fed. Reg. at 30,001 (to be codified at 40 C.F.R. pt. 52) (noting the traditional prerogative of state and local governments over land use decisions, and concluding the PSD program's potential impact on land use patterns, and the "necessarily subjective nature" of those issues, made the local role "very important").

[100] 1974 PSD Rule, *supra* note __, at 42,515 (codified at 40 C.F.R. § 52.21(c)(3)(i)).

program on Indian reservations.[101] Rather than fill the gap through federal DI as it did for the water programs, however, EPA decided instead that "Indian Governing Bodies"[102] would administer the PSD program on Indian reservations.[103]

The idea of a tribal governmental role in federal programs was not entirely novel, but in this context it was fairly bold.[104] In the year that Ruckelshaus became EPA's first leader, President Nixon called for turning national policy away from direct federal operation of Indian programs.[105] Nixon derided prior Presidents' rhetoric lauding tribal self-determination while federal agencies made all decisions on Indian programs without tribal input or involvement.[106] Nixon suggested that delegating implementation responsibilities to tribes who desired them would result in programs better tailored to tribal needs and priorities, as well as increased tribal infrastructure and governmental capacity.[107]

Congress responded in 1972 by authorizing tribal implementation of federal Indian education programs,[108] but those programs focused on providing educational services in Indian country, and offered tribes no regulatory role analogous to the capacity of PSD redesignation to affect business and industry in and near Indian country. A federal criminal statute governing Indian country liquor transactions suggested a tribal role closer to the regulatory realm, but a federal appellate court had just invalidated its application to a non-Indian reservation business.[109] And the 1970 CAA differed

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[101] *Cf. id*. at 42,515 (to be codified at 40 C.F.R. § 52.21(c)(3)(v) (noting that the redesignation provisions were not "intended to convey authority to the States over Indian Reservations where States have not assumed such authority under other laws…"). In using the term "reservations," EPA went beyond the 1973 FWPCA Rule's limited focus on "Indian activities on Indian lands," but still left non-reservation portions of Indian country potentially unprotected.

[102] An Indian Governing Body meant "the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government." 1974 PSD Rule, *supra* note __, at 42,514 (to be codified at 40 C.F.R. § 5252.21(b)(5)). Later EPA policy pronouncements and regulations used the more common phase "tribal government" or simply "tribe."

[103] 1974 PSD Rule, *supra* note __, at 42,515 (to be codified at 40 C.F.R. § 52.21(c)(3)(v) (providing "[w]here a State has not assumed jurisdiction over an Indian Reservation [pursuant to "other laws"] the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III").

[104] The Agency's public announcement of the regulations specifically noted states' redesignation authority, as well as provisions addressing state-to-state cross-boundary issue, but made no mention of tribes' similar roles. *See EPA Issues "Significant Deterioration" Regulations*, EPA Press Release (Nov. 27, 1974), http://www.epa.gov/history/topics/caa70/13.htm.

[105] Special Message to Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970) (President Nixon). Coincidentally, the next day Nixon proposed the reorganization that led to EPA's creation. *See supra* note __. [section II EPA Opens]

[106] *Id*. at 567.

[107] *Id*. at 567-68. Yet, earlier in the year Nixon tasked federal agencies with responsibility for assisting and consulting with state and local governments on environmental matters without mentioning tribes. *See* Exec. Order 11,514, 35 Fed. Reg. 4247 (March 7, 1970).

[108] *See* Indian Education Act of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972).

significantly from the education and liquor statutes in its silence on Indian country implementation and delegation to tribes.[110]

Without congressional affirmation,[111] tribes' authority to regulate non-Indians rested wholly on the scope of inherent tribal sovereignty as defined by federal common law.[112] Yet, the 1974 PSD Rule cited no federal Indian law case, nor did it acknowledge the abject lack of modern cases suggesting inherent tribal regulatory authority reached non-Indian reservation activity.[113] Instead, EPA implicitly assumed tribes possessed the authority EPA assumed states lacked.[114] EPA established no requirement that tribes demonstrate authority over the reservation as part of the redesignation process.[115]

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[109] *See* United States v. Mazurie, 487 F.2d 14 (10th Cir. 1973), *rev'd,* 419 U.S. 544 (1975). At issue in *Mazurie* was a federal law prohibiting liquor sales in "Indian communities" unless done in conformity with state and tribal law. (This is somewhat analogous to the PSD rule in that a tribal redesignation would partially animate the federal review process for new sources.) The non-Indian tavern owner was convicted under the federal law for not possessing a tribal liquor license as required by tribal law. The Tenth Circuit reversed the conviction, holding Congress may not delegate federal authority over non-Indian lands to "a private, voluntary organization, which is obviously not a governmental agency." *Id*. at 19. A year after the 1974 PSD Rule was issued, however, the Supreme Court reversed the Tenth Circuit, characterizing Indian tribes as "possessing unique attributes of sovereignty over both their members and their territory" and being "a good deal more than 'private voluntary organizations.'" 419 U.S. at 557.

[110] At that time, only one environmental statute specifically referred to Indian tribes, and it treated tribes as municipalities rather than regulatory partners. *See* notes __ to __ *supra* (FWPCA). Just days after the PSD rule was published, Congress repeated its treatment of tribes as municipalities in the Safe Drinking Water Act, Pub. L. No. 93-523, sec. 2(a)(10), 88 Stat.1660 (Dec. 16, 1974) (codified at 42 U.S.C. § 300f(10)).

[111] Congress could also exercise its broad powers over Indian affairs to restrain tribal sovereignty, but a noted Indian law scholar concluded the year before that Congress had never explicitly deprived tribes of jurisdiction over non-Indians. *See* MONROE E. PRICE, LAW AND THE AMERICAN INDIAN 173 (1973).

[112] A 1976 report to the American Indian Policy Review Commission concluded that federal common law supported a "general proposition" that tribes possess inherent civil authority over non-Indians, even where Congress legislated in the field and/or allowed state jurisdiction. *See* REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION, TASK FORCE FOUR: FEDERAL, STATE, AND TRIBAL JURISDICTION, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 93 (GPO 1976).

[113] See, e.g., Russell L. Barsh and James Youngblood Henderson, *Tribal Administration of Natural Resource Development*, 52 N.D. L. Rev. 307, 321 (1975) (observing the Supreme Court's inconsistency and lack of clarity on the issue of inherent tribal authority in Indian country). There also was no litigation at this time on the related question of state authority to implement federal environmental programs in Indian country. *See* Schnidman, *supra* note __, at 28 n. 123.

[114] 1974 PSD Rule, *supra* note __, at 42,515 (to be codified at 40 C.F.R. § 52.21(c)(3)(v) (noting that the redesignation provisions were not "intended to convey authority to the States over Indian Reservations where States have not assumed such authority under other laws…"); accord REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION, *supra* note __, at 52 (noting EPA's view of the 1970 CAA as not delegating reservation jurisdiction to states). EPA's conclusion was something of an ipse dixit of the 1973 FWPCA rule. There, EPA accepted the relatively inarguable proposition that absent congressional permission states lack regulatory authority over *Indian facilities* in Indian country. EPA repeated that concept in the 1974 PSD rule. *See* 1974 PSD Rule, *supra* note __, at 42,513 (treating tribe-state cross-boundary problems similarly to state-state problems because that approach is "consistent with the independent status of Indian lands not subject to State laws"). But the focus of the 1974 PSD Rule was not regulation of Indian facilities but the setting of environmental quality standards for the entire reservation environment, which often includes non-Indian lands. The precise question (left unaddressed) was whether Indian country should be considered a unitary territory or split between tribes and states depending on land ownership. Interestingly, EPA did not mention the Supreme Court's 1959 hint that, even without explicit Congressional delegation, a

Despite the unanswered legal questions[116] and the potentially significant precedent being set for the implementation of federal environmental programs in Indian country, public response to the proposal was surprisingly limited.[117] EPA reported only one comment on the proposed tribal role. The State of New Mexico claimed EPA's decision "appeared to take authority away from the States to regulate air pollution over Indian lands."[118] EPA's response was political and practical: the 1974 PSD Rule was "not intended to alter the present legal relationships between the States and Indian reservations within the States."[119] Thus, states with reservation authority under "other laws" could propose reservation redesignations.[120]

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state's inherent power might apply to Indian country if such extension did not "infringe[] on the right of reservation Indians to make their own rules and be governed by them." *See* Williams, 358 U.S. at 220. Perhaps EPA assumed the imposition of delegated state environmental programs would always infringe on tribal sovereignty and thus fail the Williams test. *Accord* REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION, *supra* note __, at 54 (finding Congress inadvertently trenched on tribal sovereignty by enacting federal regulatory laws delegating authority to states without clearly indicating their applicability to tribes). Or, maybe EPA viewed the 1974 PSD Rule's reference to "other laws" as including federal common law on state power in Indian country such that a state could propose redesignation of a reservation if it could convince EPA such action would not unduly interfere with tribal self-government.

[115] EPA later described the regulation as allowing states and tribes to reclassify "areas under their jurisdiction". *See* Redesignation of Northern Cheyenne Indian Reservation for Prevention of Significant Deterioration, 42 Fed. Reg. 40,695, 40,695 (August 11, 1977).

[116] The year before, two commenters suggested, "the exercise of tribal jurisdiction over non-Indians is … one of the most important issues in Indian law today." William R. Baldassin and John T. McDermott, *Jurisdiction Over Non-Indians: An Opinion of the Opinion*, 1 Am. Ind. L. Rev. 13, 13 (1973). Three years later, as EPA was addressing the first tribal redesignation proposal, another commenter suggested "the most troublesome issues" of contemporary relevance were "the extent of permissible Indian initiative to define, regulate and monitor resource management on Indian lands; the interplay between federal regulatory programs and the state and tribal jurisdictional conflicts; and the role of state police power over Indian lands." Frank Schnidman, *Indians and the Environment: An Examination of Jurisdictional Issues Relative to Environmental Management*, 4 Colum. J. Envt'l L. 2 (1977).

[117] That silence was noteworthy apart from the pure legal questions; "[p]erhaps no other issue in Indian law raises the emotional response from the non-Indian community as does the actuality of or the prospect of Indian tribe exercising jurisdiction over non-Indians. The issue, however, regardless of the terminology utilized, is not a strict legal issue but often a political one." REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION, *supra* note __, at 96. That federal report, issued less than two years after the 1974 PSD Rule was promulgated, noted widespread apprehension in the non-Indian community over potential tribal regulation, *id*. at 88, and observed the issue "has generated much hostility and emotionalism in both the non-Indian community and Indian communities," *id*. at 100.

[118] 1974 PSD Rule, *supra* note __, at 42,513.

[119] *Id*. at 42,513. Of course, EPA had no authority to alter that relationship even if it so desired. Federal Indian Law as established by Congress and the courts defines the contours of state and tribal power in Indian country, and EPA has no delegated authority to alter those rules. *Cf*. Montana v. EPA, 137 F.3d 1135, 1140 (9th Cir. 1998) (declining to defer to EPA's view of the scope of inherent tribal sovereignty because Congress did not charge EPA with responsibility for making such delineation). Nonetheless, EPA revised the regulation stating its intention explicitly: "Nothing in this section is intended to convey authority to the States over Indian Reservations where States have not assumed such authority under other laws nor is it intended to deny jurisdiction which States have assumed under other laws." 1974 PSD Rule, *supra* note __, at 42,515 (to be codified at 40 C.F.R. § 52.21(c)(3)(v)). One commenter viewed EPA's reference to "other laws" as meaning Public Law 280, perhaps the singular instance of broad federal delegation of Indian country authority to states. *See* J. Kemper Will, *Indian Lands Environment: Who*

General state disinterest was apparently matched on the tribal side. Although this marked the first time EPA had proposed a tribal regulatory role, not a single tribe or tribal organization reportedly commented. Maybe tribes were simply unaware of the opportunity presented;[121] EPA made no effort to inform tribes or invite their views.[122] Perhaps other issues were more pressing. Whatever the reason, there was no concerted, public tribal effort urging EPA recognize a tribal role in the PSD program, much less one that accorded tribes state-like status.

The 1974 PSD Rule necessarily implied a sense of governmental equivalency as between states and tribes. For areas over which states possessed governmental responsibility, states would weigh the social, environmental, and economic factors relevant to redesignation decisions; for areas over which tribes possessed authority, tribes would weigh these factors. Based on this analysis, either the state or the tribe would elect to remain Class II, or propose redesignation to Class I or Class III.

Several other aspects of the 1974 PSD Rule evidenced the state-like status accorded tribes. EPA would handle tribal-state cross-boundary issues in the same manner as issues arising between two states.[123] EPA would require states and tribes consider the effects of proposed redesignations on the other,[124] and allow tribes and states to object to redesignations proposed by the other.[125] Where the federal preconstruction review process indicated significant effects on tribal lands, EPA would notify tribes just as it would states for impacts to state lands.[126] Under the 1974 PSD Rule, then, tribes

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Should Protect It?, 18 Nat. Res. J. 465, 479 (1978). That may have been true, but in 1976 the Supreme Court held that Public Law 280 did not confer civil regulatory authority over Indian reservations to states. *See* Bryan v. Itasca County, 426 U.S. 373 (1976).

[120] Presumably, a state seeking reservation redesignation approval would bear the burden of establishing its jurisdiction.

[121] *See* AMBLER, *supra* note __ at 183 (noting the Northern Cheyenne Tribe—the first and only government to redesignate under the 1974 PSD Rule—began the redesignation process in 1976 once "Tribal members learned of" EPA's 1974 PSD Rule).

[122] EPA specifically noted it went beyond the normal public comment process by holding "additional consultations" with state governors, majors, local government agencies, members of Congress, state and local air pollution control officials, environmental groups, industry, and other federal agencies. *See* 39 Fed. Reg. at 31,000. But those consultations followed the first proposal, which offered no tribal role. Tribal redesignation authority first appeared in the second proposal, and EPA conducted no additional consultations following the second proposal.

[123] 1974 PSD Rule, *supra* note __,. at 42,513 (noting that under the new rule "[b]oundary problems between Indian and State lands are dealt with in the same way that boundary problems between two States are dealt with").

[124] *Id*. at 42,513 ("a State or Indian Governing Body must take into account the effect of proposed redesignation on other States, [and] Indian Reservations…").

[125] *Id*. at 42,515 text of 52.21(c)(3)(vi)(e) (indicating that upon objection by a state, tribe or federal land manager, the Administrator may only approve the proposed redesignation if convinced the proposing government has balanced certain factors). Note that in the 1977 Amendments to the Clean Air Act, Congress removed the Administrator's discretion to second-guess a proposing government's consideration of those factors. *See* Administrator, State of Arizona v. EPA, 151 F.3d 1205, __ (9th Cir. 1998) (citing legislative history indicating Congress intended to delete EPA's PSD regulations and substitute a system giving greater deference to the local government's decision to propose redesignation).

[126] 1974 PSD Rule, *supra* note __, at 42,516 text of 52.21(e)(1)(iii).

could play a state-like role in implementing federal environmental law: as the local government whose value judgments and discretion would animate the minimum federal expectations. Within a decade, according tribal governments a programmatic status much like state governments would become a hallmark of EPA's Indian programs and policies.[127]

EPA's 1974 decision to treat tribes as states in the PSD program was bold, especially in light of Congress' abject silence on the issue,[128] but its significance could be overstated. Unlike the complex regulatory programs EPA offered to tribes in the 1990s,[129] PSD redesignation by itself was neither regulatory nor self-implementing. A tribe's governmental decision to redesignate its reservation airshed certainly evidenced the tribe's value judgments about the proper balance between development and environmental protection,[130] but it did not automatically constrain any particular existing or future pollution source. Any conditions or limitations imposed on a source as a result of redesignation would be designed and imposed by EPA or states though the New Source Review process.[131] So while the state-like role of tribes in implementing the PSD program was pathmarking, it did not represent a clear federal decision authorizing direct

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[127] The concept was known initially as "treatment as a state" (or by its obligatory acronym "TAS"), but tribal concern for the Agency's recognition of the unique sovereign status of tribes led EPA later to disavow the phrase. *See* Indian Tribes; Eligibility for Program Authorization, 59 Fed. Reg. 64,339, 64,339 (Dec. 14, 1994). The TAS term is still used, however, as a convenient shorthand reference, and where an applicable statute uses it. EPA also uses "treatment in substantially the same manner as a state," "eligible Indian tribe," and "treatment in the same manner as a state."

[128] A related congressional red flag was raised by the 1972 FWPCA, which included tribes in the definition of municipality, a governmental body with no regulatory authority under the Act. *See* 42 U.S.C. § 1362(4). Coincidentally, one week after the 1974 PSD Rule issued, Congress again treated tribes as non-regulatory municipalities in amendments to the Safe Drinking Water Act (SDWA). *See* Pub. L. No. 93-523, § 2(a) 88 Stat.1660 (Dec. 16, 1974) (codified at 42 U.S.C. § 300f(10) (defining municipality as including an "Indian tribal organization authorized by law"). In 1986 SDWA amendments, Congress replaced the term "Indian tribal organization" with "Indian Tribe," separately defined as a federally recognized tribe carrying out substantial governmental duties over any area. *See* Pub. L. No. 99-339, §302(b)(1), (2), 100 Stat. 665 (June 19, 1986) (codified at 42 U.S.C. § 300f(10) (def of municipality), § 300f(14) (definition of Indian Tribe).

[129] *See, e.g.,* Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the Clean Water Act, 58 Fed. Reg. 67,966 (Dec. 22, 1993) (codified in 40 C.F.R. pts. 122-124, and 501); Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254 (Feb. 12, 1998) (codified at 40 CFR pts. 9, 35, 50, and 81, and adding a new part 49).

[130] Cf. Redesignation of Northern Cheyenne Indian Reservation for Prevention of Significant Deterioration, 42 Fed. Reg. 40,695, 40,695 (Aug. 11, 1977) (describing EPA's 1974 PSD regulations as allowing states, federal land managers and tribes to redesignate their lands in order to "accommodate the social, economic, and environmental needs and the desires of the local population").

[131] *See* 1974 PSD Rule, *supra* note __, at 42,516 text of 52.21(d)(4)(ii) (indicating that new and modified sources "located on Indian Reservations" are subject to federal procedures for preconstruction review and public participation), and *id*. at 42,517 text of 52.21(f)(4) (noting that Administrator's authority for new source review "shall not be redelegated" other than to EPA regional offices "for new or modified sources on Indian reservations" except where state has assumed jurisdiction over "such lands"). EPA conceived the implementation of the PSD program would be through a federal preconstruction review process for 16 categories of new and expanded major sources that could cause significant air quality degradation. *See* 39 Fed. Red. at 31,000. A PSD redesignation, then, would not directly affect existing facilities or minor sources. *See* Northern Cheyenne Redesignation, supra note __, at 40,695.

tribal regulation of non-Indian pollution sources in Indian country.[132] Nonetheless, within the cooperative federalism model, these tribal value judgments animated and constrained implementation by other governments with direct regulatory authority over non-Indians inside and adjacent to Indian country.

C. The First TAS Challenge: The Northern Cheyenne Experience

Despite tribes' silence on the 1974 PSD Rule, EPA might have inferred tribal interest in environmental management from popular public perceptions of American Indians as the continent's first conservationists. The Council on Environmental Quality's first annual report, issued in the aftermath of the first Earth Day in 1970, contained a generalized view of Indians as more respectful and protective of the environment than the European immigrants.[133] In 1971, on the second Earth Day, a powerful anti-pollution public service television announcement capitalized on this view by featuring the "Crying Indian" surveying the consequences of an industrial and consumer society, and nearly instantly Indian and environmental concern became synonymous.[134] Public opinion was spurred by a 1972 documentary that portrayed, inaccurately, an 1854 speech in which a famous Indian leader allegedly espoused a native conservation land ethic, berated pre-modern society for disrespecting the Earth as "Mother," and warned its poor habits would come home to roost.[135] Facing the crises presumed prophesized, public discussion

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[132] One year later EPA would make its first such decision in a different program-specific context. In 1975 regulations promulgated under the Federal Insecticide Fungicide, and Rodenticide Act, EPA explicitly required that non-Indian commercially applying restricted use pesticides on Indian reservations not subject to state jurisdiction obtain certification from the tribe. *See* Certification of Pesticide Applicators, 40 Fed. Reg. 11,697 (March 12, 1975) (codified at 40 C.F.R. § 171.10(a)(2)(c)).

[133] *See, e.g.,* ENVIRONMENTAL QUALITY: THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 165 (1970) (asserting "[the first [humans] upon this land, the American Indians, treated it with reverence, blended with it, used it, but left hardly a trace upon it").

[134] *See* Pollution: Keep America Beautiful -- Iron Eyes Cody (1961 - 1983), at

http://www.adcouncil.org/campaigns/historic_campaigns_pollution/ (describing popular response to the PSA, and numerous awards and accolades, including earning the actor a star on the Famous Walk of Fame on Hollywood Boulevard). One apt description of the PSA reads:

> In that enduring minute-long TV spot, viewers watched an Indian paddle his canoe up a polluted and flotsam-filled river, stream past belching smokestacks, come ashore at a litter-strewn river bank, and walk to the edge of a highway, where the occupant of a passing automobile thoughtlessly tossed a bag of trash out the car window to burst open at the astonished visitor's feet. When the camera moved upwards for a close-up, a single tear was seen rolling down the Indian's face as the narrator dramatically intoned: "People start pollution; people can stop it."

http://www.snopes.com/movies/actors/ironeyes.htm. Just before the dramatic conclusion, the narrator invoked the popular Native-Euro comparison, saying "some people have a deep abiding respect for the natural beauty that was once this country, and some people don't." *See* http://www.adcouncil.org/campaigns/historic_campaigns_pollution/ (follow "Indian in Canoe (1974)" hyperlink).

[135] *See The Little Green Lie*, 143 Reader's Digest 100 (July 1993) available at http://www.lib.washington.edu/business/guides/lgl.html (reporting the 1972 documentary "Home" attributed to Duwamish Chief Seattle (Sealth) environmentally sensitive comments actually written in 1971 by Ted Perry, a professor of film at the University of Texas at Austin, and noting the immediate and dramatic impact of the fictional speech on popular views of Indians and the environment); Jerry L. Clark,

naturally turned in part to whether America might somehow tap native wisdom in solving the environmental problems facing Mother Earth.[136] EPA may have viewed these common perceptions as consistent with its view that working with tribes would be more effective than states.

Also consistent with EPA's view was the burgeoning commercial development of tribal natural resources in the late 1960s and 1970s. In an effort ostensibly aimed at fostering tribal economic self-sufficiency, the federal government, state governments, non-governmental organizations and some tribes were pressing for increased economic development on Indian reservations, particularly in the area of natural resource development.[137] As trustee for most tribal natural resources, the Department of the Interior adopted a policy of encouraging tribal mineral development in the late 1960s, while acknowledging a need to consider environmental impacts associated with development.[138] Yet the perception of Indian country as a haven for polluters because of

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Thus Spoke Chief Seattle: The Story of An Undocumented Speech, 18 Prologue Magazine 58 (Spring 1985) available at

http://www.archives.gov/publications/prologue/1985/spring/chief-seattle.html (noting repeated unsuccessful searches of the National Archives for written evidence of the environmental comments popularly attributed to Sealth).

[136] *See e.g.,* Douglas H. Strong, *The Indian and the Environment,* 5 J. Envt'l. Ed. 49 (1973) (noting that "recently, however, a lively controversy has arisen among conservationists, anthropologists, geographers, and historians as to whether the American Indian was a true conservationist, and whether we would benefit from embracing Indian beliefs and following Indian practices"); Daniel A. Guthrie, *Primitive Man's Relationship to Nature*, 21 BioScience, 721 (1971) (criticizing the view represented by much recent literature of Indians as more ecologically minded than European immigrants). Modern scholars continue to explore the nature and extent of an indigenous land ethic, and its relation to European ecological perspectives. *See e.g.,* CHRISTOPHER VECSEY AND ROBERT W. VENABLES, AMERICAN INDIAN ENVIRONMENTS: ECOLOGICAL ISSUES IN NATIVE AMERICAN HISTORY (1980) (collection of essays comparing native and European attitudes toward the relationship between humans and the natural environment); DAVID SUZUKI AND PETER KNUDTSON, WISDOM OF THE ELDERS: SACRED NATIVE STORIES OF NATURE (1992); DONALD A. GRINDE AND BRUCE E. JOHANSEN, ECOCIDE OF NATIVE AMERICA: ENVIRONMENTAL DESTRUCTION OF INDIAN LANDS AND PEOPLES 23-44 (1995) (discussing issues surrounding the questions of whether American Indians were the first North American ecologists); DAN MCGOVERN, THE CAMPO INDIAN LANDFILL WAR: THE FIGHT FOR GOLD IN CALIFORNIA'S GARBAGE xv-xx1(1995) (emphasizing in the Prologue a perceived "role reversal" of an Indian proponent of a large commercial landfill on the Campo Band's reservation, and a white born-again environmentalist seeking to avoid the landfill being sited in her backyard); Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 Vermont L. Rev. 225 (1996) (exploring "traditional indigenous environmental ethics" in the context of self-determination); SHEPARD KRECH III, THE ECOLOGICAL INDIAN: MYTH AND HISTORY (1999) (arguing the perception of American Indians as traditionally living in perfect harmony with the environment is a romanticized and idealized myth).

[137] *See* S. Lyman Tyler, A History of Indian Policy 212-213 (1973). *See also* REPORT ON RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION, TASK FORCE SEVEN: RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 130-31 (GPO 1976) (noting a general contemporary agreement that reservation economic development "is the most promising means to overcoming American Indian poverty"). In January 1978, the Carter administration promised increased attention to tribal natural resource management and development. See 1 Pub. Papers 112 (1979).

[138] *See* David H. Anderson, *Strip Mining on Reservation lands: Protection of the Environment and the Rights of Indian Allotment Owners*, 35 Mont. L. Rev. 209, 216 (1974). It was well understood by Congress

the existing regulatory gap, and mounting evidence of air and water contamination from mining and other development led some tribes in the 1970s to halt or postpone development projects out of concern for environmental protection.[139]

One example of increasing tribal concern over mineral development, which set an enduring legal and political precedent for Indian country environmental law, developed at the Northern Cheyenne Reservation in Montana about this time. Western coal, and particularly western Indian coal, attracted little industry attention in the late 1960s and early 1970s.[140] But the 1970 CAA's new air pollution requirements, which had the effect of making low sulfur western coal more competitive with the high sulfur eastern coal,[141] and technological advances in the strip mining techniques needed to access western coal, sparked industry interest in Indian reservations.[142] At Northern Cheyenne, the federal trustee, no doubt proceeding in perfect good faith, agreed to lease the Tribe's coal to non-Indian commercial interests for a fraction of market value, and negotiated royalties less than the Tribe received for its gravel resource.[143] Outraged over BIA's mismanagement, and concerned for the growing evidence of the environmental impacts from strip mining,[144] in 1974 the Tribe successfully petitioned DOI Secretary Roger Morton to declare a moratorium on further lease development pending environmental analyses.[145]

But next door and upwind of Northern Cheyenne, the coal-rich Crow Tribe was also under pressure to develop its coal resources.[146] Also adjacent to the Northern

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and others at this time that the federal government had done a fairly poor job discharging its trust responsibilities in this regard. *See* REPORT ON TRUST RESPONSIBILITIES AND THE FEDERAL–INDIAN RELATIONSHIP, INCLUDING TREATY REVIEW, TASK FORCE ONE, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION (GPO 1976). *See also* THE FEDERAL-INDIAN RELATIONSHIP, INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW 14 (1981) (on file with author).

[139] *See* MARJANE AMBLER, BREAKING THE IRON BONDS 172 (1990). *Accord* RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION, *supra* note __, at 49 (asserting that 1976 laws leave Indians unable to prevent environmental degradation, and reserving judgment on whether tribal laws could effectively control development); Barsh *and* Henderson, *supra* note __, at 333 (asserting "environmental externalities may pose an unusually serious threat" in the context of "severely limited" tribal land bases). Development pressures, as well as increased public awareness of environmental concerns at that time, "accentuated the conflicting jurisdictional claims" between states, tribes and the federal government. *See* Schnidman, *supra* note __, at 2.

[140] AMBLER, *supra* note __, at 62.

[141] *See* Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981). In addition, there was growing concern at this time over the Nation's dependence on foreign oil and a call for energy self-sufficiency, increasing interest in western coal. *See* Sierra Club v. Morton, 514 F.2d 856, 862 (D.C. Cir. 1975), *rev'd* Sierra Club v. Kleppe, 427 U.S. 390 (1976).

[142] GRINDE AND JOHANSEN, *supra* note __, at 122-124.

[143] AMBLER, *supra* note __, at 63-64.

[144] *Id*. at 64 (noting data collected by the Northern Cheyenne Research Project, a federally funded group of independent scientists).

[145] Gross, *supra* note __, at 338 (describing 1980 congressional hearings on coal leasing at Northern Cheyenne).

[146] AMBLER, *supra* note __, at 84 (noting the Wall Street Journal observed the Crow coal reserve was so large the Tribe could qualify as the ninth largest coal-owning country in the world). In the early 1970s, the Crow Tribe (along with a number of coal mining concerns) intervened in opposition to litigation brought by the Sierra Club seeking an injunction against further coal development in the northern Great Plains until

Cheyenne Reservation was a large coal-fired power plant owned by the Montana Power Company, which proposed expanding its capacity in 1976,[147] and other proposals for new power plants in the area were expected. So, the Northern Cheyenne Tribe turned to administratively-created PSD program,[148] exercising its inherent responsibility over public health and welfare by proposing to redesignate the Northern Cheyenne Indian Reservation from Class II to Class I.[149] The Tribe's proposal expressed concern over adverse health effects associated with air quality deterioration, and noted reservation residents suffered a high rate of respiratory illnesses. The Tribe invoked the redesignation process to address these health risks, as well as potential impacts to reservation vegetation and visibility, in order to preserve the lifestyle and culture of the Northern Cheyenne people.[150]

When EPA announced its intention to approve the redesignation, interested parties submitted 62 comments, generally described by EPA as opposed to approval.[151] Curiously, they neither challenged the Tribe's inherent authority to redesignate nor EPA's statutory authority to approve a tribal redesignation.[152] Those omissions were particularly noteworthy for this first and unique assertion of tribal governmental authority, carrying significant potential impacts on a broad range of economic development on and near Indian reservations, and taken pursuant to an administratively created program lacking specific congressional authorization. Just one year earlier, the D.C. Circuit dismissed those precise questions as unripe since no tribal redesignation had yet been made.[153]

Nonetheless, commenters ignored the major dispositive arguments and took issue instead with the specific manner in which the Tribe exercised its inherent authority, or with the extent to which the PSD program would affect existing and planned future activities in the area. One group of comments sought more process—specifically more

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additional evaluation of the environmental impacts was conducted. *See* Sierra Club v. Morton, 514 F.2d 856.

[147] The Montana Power Company and four northwestern utilities proposed constructing two 760-megawatt, coal-fired power plants proposed in Colstrip, Montana, thirteen miles from the Northern Cheyenne reservation. *See* ARNOLD REITZE, JR., AIR POLLUTION LAW 233-34 (1995) (citing a 1978 Washington Post article reporting local concerns over the potential impacts of the Tribe's redesignation on the proposed facilities).

[148] *See* AMBLER, *supra* note __ at 183 (noting the Tribe's earlier objections to Montana Power Company's proposals for expanding facilities in Colstrip, Montana, and reporting that the Tribe sought redesignation once "Tribal members learned of" EPA's 1974 PSD Rule).

[149] 42 Fed. Reg. at 40,696.

[150] *Id*. The proposed development at Colstrip was very likely the primary impetus for the Tribe's decision to seek redesignation.

[151] 42 Fed. Reg. at 40,696.

[152] The State of Montana did not object to the Tribe's proposal. *See* Nance v. EPA, 645 F.2d 701, 716 (9th Cir. 1981). Several years later, in Nance, industry petitioners would argue (unsuccessfully) the silent CAA did not authorize EPA's TAS regulation.

[153] Sierra Club v. EPA, 540 F.2d 1114, 1138-39 (D.C. Cir. 1976), *vacated and remanded*, 434 U.S. 809 (1977).

opportunity for public participation—before a final decision was made.[154] Other commenters expressed fears the changed regulatory environment could have adverse impacts on existing coal strip mines and farming activities in the area.[155] Comments specifically targeted the redesignation's potential to affect construction of coal-fired energy facilities near the reservation,[156] and rasised more general concerns over possible impacts on regional and national energy interests.[157]

EPA addressed and dismissed both the procedural and substantive concerns. EPA noted the Tribe complied with the same procedural requirements states and federal land managers must follow,[158] and that EPA offered subsequent public process.[159] EPA thus declined to require "extensive public hearings" before taking final action, noting the unfairness of asking the Tribe to take more time and offer more process than the regulations required.[160]

EPA also found little merit in comments raising the specter of dramatic changes in air quality regulation on and near the reservation. EPA concluded concerns over existing sources in the area were ill founded simply because the PSD program did not apply to the identified sources.[161] EPA disagreed the redesignation would have a significant impact on regional and national energy interests, primarily on its view that the PSD preconstruction review process was not triggered by strip mining activities, and partly on its observation of the relatively small size of the Reservation.[162] EPA agreed with commenters that two energy facilities planned to be constructed off-reservation would violate the Class I increment applicable if the Tribe's redesignation was approved.

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[154] The Tribe held a public hearing within the area to be redesignated, held the record open for 30 days following the hearing for additional public comment, and then responded to comments received in its final analysis. *See* 42 Fed. Reg. at 40,696. EPA solicited public input on EPA's tentative decision to approve the Tribe's proposal for 30 days, and then extended the comment period for another 30 days. *Id*.

[155] *Id*. The Crow Tribe's later plans for a coal-classification plant and a coal-burning power plant were abandoned in part due to increased pollution control costs associated with the Northern Cheyenne Tribe's redesignation. *See* AMBLER, *supra* note __, at 184, 84 (citing a 1982 feasibility by the Council of Energy Resource Tribes that the Class I status of the Northern Cheyenne Reservation designation increased the expected cost of the Crow power plant by $282 million, or 24% of the total cost).

[156] *Id*.

[157] 42 Fed. Reg. at 40,696.

[158] *Id*.

[159] EPA solicited public input on EPA's tentative decision to approve the Tribe's proposal for 30 days, and then extended the comment period for another 30 days. *Id*.

[160] *Id*.

[161] Comments expressed concerns over increased regulation resulting from the redesignation on coalmines and farm activities. As originally designed and later modified, EPA would not include the large fugitive (non-point) air pollutant emissions from coalmines in determining whether such sources met the PSD threshold of over 250 tons of air pollutants annually. *Id*. at 40,697; *see also* Nance, 645 F.2d at 707 (noting the CAA requires EPA engage in rulemaking before including fugitive emissions in PSD calculations, and that EPA's proposed rule did not include strip mines). Similarly, farming activities are not major sources of industrial air pollution and thus are not affected by the PSD program. *See* 42 Fed. Reg. at 40,696.

[162] 42 Fed. Reg. at 40,697 (citing the Reservation size as 700 square miles, and noting the Tribe's analysis and conclusion that a Class I redesignation could affect major sources within 10-30 miles of reservation boundaries).

EPA nonetheless concluded redesignation would not preclude construction because the facilities could comply with the more stringent increment though the use of currently available control technologies.[163]

EPA approved the Tribe's proposal and prophetically a portion of Indian country thus became the Nation's first area redesignated from Class II to Class I under the PSD program.[164] More importantly, the Northern Cheyenne redesignation constituted the first time EPA delegated a federal program role to a tribal government, the sine qua non of EPA's modern Indian program.[165] The Agency's respect for the Tribe's legislative value judgment about desired reservation air quality actualized the 1974 PSD Rule's implicit promise that EPA would treat tribal governments on a par with state governments. Despite substantial off-reservation and non-Indian concern, EPA rejected pleas for additional process and accepted without question the legitimacy of likely transboundary impacts in areas clearly outside the Tribe's inherent jurisdiction.[166]

At nearly that precise moment, and with full awareness of the Agency's pending decision at Northern Cheyenne, Congress remedied the 1970 CAA's Indian country silence in favor of EPA's TAS experiment. Congress had been pressed to take action on the PSD program EPA created under court order in the absence of congressional directive,[167] and in the 1977 CAA amendments, Congress modified but largely adopted EPA's PSD program including its historic treatment of tribes like states.[168] The

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[163] *Id*. at 40,696. EPA's modeling analysis indicated available control technologies would reduce the facility's SO_2 emissions by 90%, thus ensuring compliance with the Reservation's Class I increment. *Id*. Ultimately, the power plants were redesigned with improved emission controls complying with the Tribe's redesignation. *See* REITZE, *supra* note __, at 233-34 (citing a 1980 Christian Science Monitor article, also noting the joint permits issued to the plants by the State and EPA required cooperation with the Tribe, which in turn helped create a tribal air quality monitoring network for the reservation).

[164] Nance, 645 F.2d at 706; *accord* H.R. RPT. NO. 95-127 at 8 (1977) (noting that no state had yet assumed responsibilities under EPA's PSD program).

[165] With this precedent in place, a number of tribes in Montana and elsewhere initiated redesignation processes and/or developed environmental management capacity. *See* AMBLER, *supra* note __, at 184-85 (noting tribal program initiation in late 1978 and thereafter at Fort Peck, Flathead, Spokane, and Wind River); Patrick Smith and Jerry D. Guenther, *Environmental Law: Protecting Clean Air: The Authority of Indian Government to Regulate Reservation Airsheds*, 9 Am. Ind. L. Rev. 83, 87-88, 99 (1981) (noting redesignation processes at Fort Peck and Flathead, and the creation of the Navajo Environmental Protection Commission in 1978).

[166] 42 Fed. Reg. at 40,696. The opportunity for tribe to have real influence over environmentally damaging activities taken outside Indian country—that is, in areas where the tribe has no claim of inherent sovereignty—remains one of the most valuable aspects of EPA's modern Indian program. *See, e.g.,* Albuquerque, 97 F.3d 415 (upholding EPA-imposed conditions on the City's water discharge permit designed to comply with downstream tribal water quality standards). Four years after EPA approved the Northern Cheyenne redesignation, the Ninth Circuit would uphold that action and EPA's interpretation of the silent 1970 CAA. *See* Nance, 645 F.2d 701 *and infra* text accompanying notes __ to __. [section V.B.]

[167] *See* H.R. RPT. NO. 95-127 at 11 (noting that the Committee on Environment and Public Works was presented with arguments ranging from taking no action to repealing the program entirely, and concluding the policy and procedures implications of the PSD program were "too vast to be left to the administrative and judicial process").

[168] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, title I, sec. 127(a), 91 Stat. 733 (Aug. 7, 1977) (codified at 42 U.S.C. § 7474(c)) (authorizing reservation airshed redesignations by Indian governing bodies).

legislative history reflects relatively little consideration of the tribal role. One committee matter-of-factly reported the amendments gave tribes the same redesignation role as states, and that redesignation disputes arising between tribes and states would be handled in the same manner as disputes between states.[169] Lest challengers misunderstand, one representative noted the dispute resolution provisions were not designed to become line-item vetoes for tribal redesignations:

> But it is intended that the Administrator's review of such determinations by tribal governments be exercised with utmost caution to avoid unnecessarily substituting his judgment for that of the tribe. *The concept of Indian sovereignty over reservations is a critical one, not only to native Americans, but to the Government of the United States. A fundamental incident of that sovereignty is control over the use of their resources. Some statutes, I imagine, have encroached upon Indian sovereignty, eroding treaty rights negotiated at an earlier time. This is not such a bill….*[170]

Congress held no hearings focused on whether and how tribes should be accorded state-like roles, but one tribe submitted testimony on TAS: the Northern Cheyenne Tribe. The Tribe urged Congress to preserve tribes' "traditional control" over reservation air quality by authorizing tribal redesignation, suggesting without such authority states might initiate reservation redesignation against the will of a tribe.[171] The Tribe also sought to grandfather its pending redesignation.[172] Congress incorporated both suggestions, adopting the Tribe's TAS proposal nearly verbatim,[173] and explicitly acknowledging the

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[169] Congress did not use the phrase "treatment as a state," although the Senate Committee on Environment and Public Works noted that under the provision "Indian tribes are given the same powers as States." *See* H.R. RPT. NO. 95-127 at 35. Tribes' state-like stature was also reflected in the amendments' dispute resolution provision. The provision was specifically addressed to conflicts arising between tribes and states over proposed redesignations, but could be invoked by either a state or a tribe in objection to the other's proposal, *see* 42 U.S.C. § 7474(e), and, the Senate Committee explicitly characterized it as "the same authority that exists for resolving any classification dispute among States," *see* H.R. RPT. NO. 95-127 at 36.

[170] 123 CONG. REC. H8665 (1977) (statement of Rep. Rogers) (emphasis in original). Congress' desire that EPA not second-guess tribal redesignation value judgments in the face of state protest was pivotal in a contemporary case. *See* Administrator, State of Arizona v. EPA, 151 F.3d 1205 (9th Cir. 1998) (rejecting state arguments that EPA erred in not requiring a more detailed tribal analysis of possible off-reservation impacts arising from redesignation to Class I).

[171] *Suggested Language for Inclusion in Proposed Amendments to the Clean Air Act: Hearing on S. 252 Before the S. Comm. on the Environment and Public Works*, 95th Congress 862 (1977) (letter from Lonnie C. Von Renner for the Northern Cheyenne Tribal Council).

[172] *Id*. at 864 (asking that Class I redesignations approved under the 1974 PSD Rule be unaffected by the 1977 Amendments). The Northern Cheyenne Tribe began the resdesignation process in May 1976, Nance, 645 F.2d at 704, held a public hearing in January 1977, 42 Fed. Reg. at 40,696, and would submit its application to EPA in March 1977, *id*. EPA would ultimately approve the Tribe's redesignation just four days before President Carter signed the 1977 CAA amendments into law. Pub. L. No. 95-95, Title I, § 127(a), 91 Stat.733 (Aug. 7, 1977).

[173] The Tribe proposed modifying the provision for state redesignation authority to read "except that lands within the exterior boundaries of reservations of federally recognized Indian tribe may be so designated only by the appropriate Indian governing body." Von Renner, *supra* note __, at 863. Congress opted instead to caveat state redesignation authority by reference to a separate subsection entitled "Indian reservations" that provided "lands within the exterior boundaries of reservations of federally recognized Indian tribe may be redesignated *only* by the appropriate Indian governing body." 42 U.S.C. § 7474(c)

Tribe's pending redesignation in describing a provision preserving the Class I status of areas redesignated before the effective date of the 1977 amendments.[174]

The 1977 CAA amendments, along with 1977 amendments to the FWPCA, also indirectly endorsed a key premise of EPA's emerging Indian program—the absence of any congressional delegation to states. In 1976, the Supreme Court found neither the 1970 CAA nor the 1972 FWPCA contained clear congressional intent that federal facilities be subject to state permitting programs run under federal delegation from EPA.[175] Congress responded by amending both statutes so that federal facilities were required to comply with state and local substantive and procedural requirements.[176] But, tellingly, Congress made no similar extension of state authority to Indian or other facilities in Indian country, although it must have been aware of the Court's recent decision treating tribal and federal facilities separately,[177] and EPA's similar view in the 1973 FWPCA Rule and the 1974 PSD Rule.

D. Expanding on the Indian Program Foundation: Pesticides Management

Congress' clear affirmation of the TAS model in the 1977 CAA and other contemporary legislation[178] cast a positive light on the Agency's second program-specific TAS experiment, taken in 1975. Like the 1970 CAA, the 1972 Federal Insecticide Fungicide, and Rodenticide Act (FIFRA) embraced cooperative federalism but said

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(emphasis added). This provision was arguably a stronger endorsement of tribal authority than the 1974 PSD Rule, which provided for tribal redesignations only where a state had not assumed jurisdiction over the reservation. 39 Fed. Reg. at 42,515 (codified at 40 C.F.R. § 52.21(d)(v).

[174] *See* 42 U.S.C. § 7472(a) (providing that areas redesignated Class I under the 1974 PSD Rule would remain Class I after enactment of the 1977 amendments, but could be later redesignated to another class).

[175] *See* Hancock v. Train, 426 U.S. 167 (1976) (Clean Air Act); EPA v. State Water Resources Control Board, 426 U.S. 200 (1976) (Federal Water Pollution Control Act).

[176] *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 116, 91 Stat. 685 (Aug. 7, 1977) (amending 42 U.S.C. § 1857f); Clean Water Act of 1977, Pub. L. No. 95-217, §§ 60, 61(a), 91 Stat. 1597, 1598 (Dec. 27, 1977) (amending 33 U.S.C. § 1323).

[177] *See* Mescalero Apache Tribe, 411 U.S. at 150-55 (1973). The Supreme Court had also recently decided that Public Law 280, the most dramatic example of congressional authorization of state authority in Indian country, did not encompass civil regulatory authority as would be at issue in environmental programs. Bryan v. Itasca County, 426 U.S. 373 (1976).

[178] Days before the 1977 CAA amendments were enacted, Congress used the TAS term in amending the Surface Mining Control and Reclamation Act (SMCRA). Congress specifically provided "Indian tribes having within their jurisdiction eligible lands … shall be considered as a 'State'" under SMCRA's reclamation of abandoned mines program. Pub. L. No. 95-87, § 405, 91 Stat. 459 (codified at 30 U.S.C. § 1235(k)). Congress also directed DOI study regulation of surface mining on Indian lands, consult with tribes, and propose legislation "designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands." *Id*. at § 710, 91 Stat. 523 (Aug. 3, 1977) (codified at 30 U.S.C. § 1300(a). These new provisions gave additional credence to EPA's view that Congress understood tribal self-determination as encompassing more than assuming federal services programs.

nothing about Indian tribes or Indian country.[179] As it did with the CAA, EPA remedied FIFRA's omission by offering tribes a role similar to states. EPA's 1975 FIFRA Rule authorized tribal programs for certifying commercial pesticide applicators on Indian reservations not subject to state jurisdiction.[180] Unlike the PSD program, however, FIFRA's applicator certification program carried direct regulatory force: for the first time, EPA explicitly acknowledged approved tribal programs would govern non-Indians on reservations.[181] That incremental but stark extension of the 1974 PSD Rule clearly foreshadowed the Agency's program direction as well as the potentially dramatic impact of the TAS approach, but again, comments on the proposed regulations missed the dispositive issues.[182]

In late 1977, EPA's Office of Pesticide Programs (OPP) awarded grant funds to a nonprofit organization, Americans for Indian Opportunity (AIO), to inform tribes about programs for certifying and regulating reservation pesticide applicators.[183] At that time, AIO was a relatively new national non-profit organization advocating for Indian concerns in the areas of natural resource development, environmental protection, and jurisdiction.[184] AIO's primary actions under the OPP grant were coordinating six

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[179] *See* Pub. L. No. 92-516, sec. 2, 86 Stat. 996-97 (Oct. 21, 1972) (codified at 7 U.S.C. § 136u (State training), 136v (Authority of States)).

[180] Certification of Pesticide Applicators, 40 Fed. Reg. at 11,704 (codified at 40 C.F.R. § 171.10(a)). As it did in the PSD rulemaking, EPA noted its regulation was not intended "either to confer or deny jurisdiction to States over Indian Reservations not already conferred or denied under other laws or treaties." *Id*. (codified at 40 C.F.R. § 171.10(a)(2)(d)).

[181] *Id*. (codified at 40 C.F.R. § 171.10(a)(2)(c)) (providing "[n]on-Indians applying restricted use pesticides on Indian reservations … shall be certified … under the Indian reservation certification plan").

[182] EPA reported several state objections to the TAS proposal, but none apparently raised the question whether EPA possessed authority to treat tribes as states in the face of FIFRA's silence, nor whether tribes' inherent sovereignty reached non-Indian pesticide activities on reservations. *See id.* at 11,702. Some state officials suggested that non-Indians who lived off-reservation but applied pesticides on-reservation should be subject to state certification, but EPA squarely rejected that approach on a clear territorial view of tribal sovereignty: "it is the Agency's position that in those instances where a State has not assumed jurisdiction over a reservation under other Federal laws, that the Indian Governing Body should have the opportunity to chose a certification plan covering all applicators on the reservation." *Id*. (emphasis added). EPA provided no legal authority for its assumption tribes possessed the jurisdiction states lacked, although support could be found in a Supreme Court decision issued two months earlier. In United States v. Mazurie, 419 U.S. 544 (1975), the Court found inherent tribal authority over non-Indians adequate to accept congressional delegation of a regulatory-like role within a federal liquor control program.

[183] EPA-1978-3 Johnson, *supra* note __, at 2 (encouraging regional support for six tribal meetings to be coordinated by AIO under the OPP grant). This informational purpose seemed aimed at an Agency goal of tribal program implementation. *See* EPA-1978-2/5 Letter from Mitchell J. Wrich, Chief, Pesticide Branch, Region V, to Lenore Sweet, Winnebago Tribe (Aug. 7, 1978) (on file with author) (asserting "EPA is firmly committed to assist all Indian tribal governments in establishing a pesticide applicator certification program" for applicators on Indian lands).

[184] EPA-1978-2/2 Jan. 5, 1978 Letter from LaDonna Harris, President, Americans for Indian Opportunity, to George Alexander, Regional Administrator, Region V 2 (Jan. 5, 1978) (on file with author). AIO exists today, with a similar but broader focus. *See* http://www.aio.org/ (describing the organization's founding in 1970, drawing "upon traditional Indigenous values to foster enlightened and responsible leadership, inspire stakeholder-driven solutions, and convene visionary leaders to probe contemporary issues and address challenges of the new century").

regional meetings with tribal and EPA representatives, focused on the dangers of pesticides, the details of EPA's pesticides program, and states' and other federal agencies' involvement.[185] While structured as informative as compared to consultative meetings, this would be EPA's first official programmatic tribal outreach, laying a key cornerstone for the Agency's emerging Indian Program.[186]

The OPP-AIO meetings also foreshadowed the imminent broadening of the Indian Program. OPP saw these meetings as creating a forum at which EPA and tribal officials could discuss other EPA programs. Barbara Blum, the Deputy Administrator who would sign the Agency's first Indian Policy two years later, supported this approach.[187] About twenty percent of the time set for these two-day pesticide meetings was thus allocated to EPA programs for air, water quality, solid waste, noise, and drinking water.

Similarly, one of AIO's express purposes was improving the two-way street of EPA-tribe communication: tribes would become more knowledgeable about EPA programs, and EPA would "learn more about tribes as governmental entities and become more sensitive to Indian concerns—sovereignty, jurisdiction, cultural integrity, treaty rights, etc."[188] AIO knew established EPA-tribe working relationships would be critical to effective pesticide regulation in Indian country, which AIO expressly viewed as a jurisdictional issue.[189] AIO also indirectly endorsed the 1975 FIFRA Rule's TAS approach by expressly focusing on the development of model tribal pesticide codes "adapted to the "special cultural and sociological needs of each tribe."[190]

Just months later Congress would, as it did with the PSD program, legitimate EPA's independent initiative. Congress amended the FIFRA in September 1978, effectively codifying EPA's 1975 FIFRA Rule, which EPA promulgated without express Congressional authority. The 1978 Amendments added tribes to an existing provision authorizing cooperative agreements and grants for pesticide management programs between EPA and states, thus directly authorizing EPA's 1975 approach offering tribes governmental implementation responsibility.[191] And, as importantly, this was the second

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[185] *See, e.g*., EPA-1978-2/3 Letter from Maggie Gover, Project Director, Americans for Indian Opportunity, Valdas V. Adamkus, Acting Regional Administrator, Region V (June 12, 1978) (on file with author) (attaching an agenda from a prior meeting as an example of the structure of the meetings).

[186] AIO's late 1970s pesticide meetings would later be cited as an important step increasing tribal awareness of federal programs and improving relations with EPA. *See* EPA-1983-4 Memorandum from Pasquale A. Alberico, Acting Director, Office of Federal Activities, to Josephine Cooper, Special Asst. to the Administrator for the Office of External Affairs 4 (August 15, 1983) (on file with author) (recommending EPA follow a key 1983 study on Indian country environmental programs with tribal outreach through some Indian liaison organization as the Pesticides Office did with AIO in the late 1970s).

[187] EPA-1978-3 Johnson, *supra* note __, at 1 (noting the Deputy Administrator had expressed interest in the AIO meeting approach).

[188] EPA-1978-2/2 Harris, *supra* note __, at 2.

[189] EPA-1978-2/2 *Id*. at 1-2.

[190] EPA-1978-2/2 *Id*. at 1.

[191] Federal Insecticide, Fungicide and Rodenticide Act, Pub. L. No. 95-396, 92 Stat. 834 (1978) (codified at 7 U.S.C. § 136u(a)). Congress did not, as EPA had, explicitly state that trial programs would govern non-Indians, but Congress did provide federal assistance to tribes to train and certify applicators "consistent with the standards the Administrator prescribes." *Id* at (a)(2).

time in just over one year that Congress explicitly associated tribes and states in the context of cooperative federalist environmental programs.

E. Building on the Indian Program Foundation: Developing a Cross-Program Agency Indian Policy

The trend toward tribal treatment as a state now had a solid foothold in EPA's consciousness, and EPA began a broader institutional inquiry into its approaches to Indian country implementation. In 1978, the Office of Federal Activities (OFA) coordinated the first meeting of an agency-wide "Indian Work Group" tasked with "developing agency policy regarding environmental programs as they relate to Indian lands."[192] Following that meeting, OFA sought to gauge whether tribes could "develop a tribal capability to respond to priority environmental needs similar to the capability of that promoted by the States and sustained by EPA" in several identified categories.[193] Meanwhile, Indian issues continued to arise and consume Agency resources on an ad hoc basis. As environmental pressures associated with natural resource development mounted, so did tribal interest in developing baseline data and regulatory programs.[194] As part of its study of pesticide management, AIO pressed EPA Regional Offices for data showing Agency actions supporting tribal program development.[195] AIO also issued a report on agricultural issues that described multiple EPA grants to tribes across the country for water quality planning activities.[196] Enforcement needs and tribal compliance issues also entered the Agency's consciousness.[197]

At the same time, other federal agencies were also encouraging and respecting tribal governmental roles in federal environmental programs. In 1979, the Council for Environmental Quality (CEQ) promulgated regulations implementing NEPA's environmental analysis requirements.[198] The CEQ required federal agencies invite the

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[192] [attached to EPA-1979-2] Letter from Elmer Shannon, Indian Coordinator. Office of Federal Activities, to tribal representatives 1 (June 16, 1978) (on file with author).

[193] [attached to EPA-1979-2] Shannon, *supra* note __, at 1.

[194] *See, e.g.,* EPA-1980-2 Assiniboine and Sioux Tribes' Air Quality Control Program Grant for Fiscal Year October 1, 1979 through September 30, 1980 (Jan. 24, 1980) (seeking quality monitoring grant to establish baseline data in the face of several proposed off-reservation coal-fired power plants); [attached to EPA-1980-3] Memorandum from Gerald F. Regan, Chief, Technical Support Branch, Region V, to Connie Hinkle, Minnesota State Coordinator (July 23, 1980) (on file with author) (noting technical assistance to Mole Lake Reservation concerning possible impacts from a proposed mining operation).

[195] *See, e.g.,* EPA-1980-3 Letter from LaDonna Harris, President, Americans for Indian Opportunity, to John McGuire, Regional Administrator, Region V (June 27, 1980) (on file with author) (requesting information on the Region's interactions with tribes for the development of pesticide programs).

[196] EPA-1980-5 JOSHUA MUSKIN, THE ENVIRONMENTAL SOCIO-ECONOMIC AND CULTURAL IMPACTS OF AGRICULTURAL ACTIVITIES, AMERICANS FOR INDIAN OPPORTUNITY (Aug. 1980).

[197] *See, e.g.,* Memorandum from A.H. Manzardo, Chief, Permit Branch, Region V, to Sandra Gardebring, Director, Enforcement Division 1 (March 28, 1980) (on file with author) (noting that the Agency's lack of a national policy contributed to a lack of enforcement action in the face of data showing only one of fifteen regional tribes possessed water discharge permits).

[198] National Environmental Policy Act Regulations, 43 Fed. Reg. 55,978 (Nov. 29, 1978) (codified at 40 C.F.R. pts. 1500-1508).

participation of "any affected Indian tribe" in the scoping process,[199] request tribal comments on draft environmental impact statements,[200] and evaluate possible conflicts between the proposed action and tribal land use laws and policies.[201]

The Bureau of Indian Affairs officially recognized that "the protection and enhancement of environmental quality is within the retained sovereign authority of the Indian tribes."[202] Speaking at one of AIO's regional pesticides meetings, the sixth Indian U.S. Commissioner of Indian Affairs, William Hallet, echoed that sentiment and promised BIA support and cooperation for tribes and EPA.[203] Hallet asserted tribes' very cultural survival depended upon the issue:

> Together, only together, will we [tribes and federal agencies] successfully preserve the natural environment. Not only do we need the strength of common effort, but the doctrines of tribal sovereignty and the federal trust responsibility can and should complement each other in our effort to preserve the natural environment. And only if we preserve our natural environment, only then, will future generations of Indian people have the opportunity to choose to follow traditional ways.…
>
> When we talk today about sovereignty and self-determination, we mean that Indians must first decide for themselves how they wish to use the earth, and then they will carry on the dialogue with the non-Indian world, whether it be with the BIA, Anaconda, or the Sierra Club.[204]

In May 1980, Deputy Administrator Barbara Blum assigned the Director of the Office of External Review, William Hedeman, responsibility for the Indian Work Group, whose policy-making efforts had apparently stalled.[205] Over the summer Hedeman met with administrators and program directors and discerned a general consensus for an Agency-wide Indian policy "involving tribal governments in a more significant, central role in the regulatory process."[206] Consistent with the specific roles established in the 1974 PSD Rule and the 1975 FIFRA Rule, the Agency consensus viewed tribal

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[199] *Id*. at 55,993 (codified at 40 C.F.R. § 1501.7(a)(1)).

[200] *Id*. at 55,997 (codified at 40 C.F.R. § 1503.1(a)(2)(ii)).

[201] *Id*. at 55,996 (codified at 40 C.F.R. § 1502.16(c)).

[202] EPA-1980-12 Letter from William Hallett, Commissioner of Indian Affairs, Dept. of the Interior, to Douglas Costle, Administrator, U.S. Environmental Protection Agency (Dec. 24, 1980) (on file with author) (quoting 30 BIAM 2.3).

[203] EPA-1980-7c Remarks of William Hallet, Commissioner of Indian Affairs, Americans For Indian Opportunity, Milwaukee, Wisconsin 3 (Oct. 15, 1980) (on file with author).

[204] EPA-1980-7c *Id*. at 1, 3.

[205] [attached to EPA-1980-10] Memorandum from William N. Hedeman, Director, Office of Environmental Review, to Ass't Administrators et al. (Oct. 2, 1980) (on file with author) (citing his May 16, 1980 memorandum reconstituting the IWG). About this time an influential member of Congress suggested to EPA a need for an Indian policy. *See* FR-1984-1 Letter from Morris Udall, Chairman, House Committee on Interior and Insular Affairs, to Bruce F. Vento, House of Representatives 1 (Feb. 19, 1985) (noting a letter Udall sent to EPA during the Carter Administration endorsing the need for an EPA Indian Policy).

[206] [attached to EPA-1980-10] Hedeman, *supra* note __, at 1. Agency leaders hoped an Agency-wide policy unifying activities taken by the various programs and regions would address existing confusion and inconsistencies across programs and regions, which the IWG's previous work revealed. *See id*. at 2.

governments as EPA's appropriate local regulatory partner on Indian reservations, just as it viewed states as its off-reservation partner.[207] The primary proffered rationale was the same conclusion that implicitly motivated the early air and pesticide tribal programs: states were ineffective EPA partners for managing reservation environmental quality because they generally lacked regulatory jurisdiction on Indian reservations.[208]

In September 1980, Hedeman officially designated Leigh Price, an attorney in the Office of Federal Activities, as the IWG Coordinator, and delegated to Price and a task force of the IWG responsibility for drafting an Agency policy.[209] Within days, Price prepared and circulated to the task force a draft Policy[210] and a list of "hard questions" encountered by the Agency in the preceding years.[211] The task force reviewed Price's draft Policy within a week and Hedeman sent it to administrators ten days later, requesting comments within three weeks.[212] The full IWG met in late November 1980 to consider the comments and "redraft the Policy as appropriate," but it made no substantive changes to the draft circulated in October.[213] Hedeman circulated the final draft Policy

[207] *Id*. Hedeman stressed to the Deputy Administrator that tribal governmental sophistication had grown significantly in recent years, and that Congress and recent Presidential administrations had endorsed tribal self-determination. Hedeman translated tribal self-determination in the context of EPA's mission as "allowing and encouraging tribes to play a role for reservation lands similar in significance and effect to that now played by States for non-reservation lands." *Id*.

[208] *Id*. EPA articulated that position several months earlier in promulgating rules governing state program delegations under the CWA, the SDWA and the RCRA. The new rules required states seeking authority for Indian lands submit an attorney general's statement analyzing the state's jurisdiction over such lands. *See* State Program Requirements, 45 Fed. Reg. 33,456, 33,458 (May 19, 1980) (codified at 40 C.F.R. § 123.5(b) (CWA and SDWA programs), 33,480 (codified at 40 C.F.R. § 123.125(c) (Interim RCRA hazardous waste program). For the first time, EPA explicitly noted its presumption that states lack adequate regulatory jurisdiction on Indian reservations. *Id*. at 33,378.

[209] EPA-1980-9 Memorandum from William N. Hedeman, Director, Office of Environmental Review, to Roger Williams, Regional Administrator, Region VIII (Sept. 12, 1980) (on file with author). Price would remain central to the evolution of EPA's Indian Program as the IWG Coordinator through the development of the 1984 Indian Policy.

[210] EPA-1980-8 Memorandum from Leigh Price, Coordinator, Indian Work Group, to IWG subgroup members (Sept. 16, 1980) (on file with author) (transmitting a draft Indian Policy and list of "Special Issues and Problems"). Price characterized the draft Policy as "talking points" modeled on the Small Community and Rural Development Policy, adopted by the Carter administration in December 1979. That Policy envisioned federal-local partnerships addressed to long-neglected rural problems and needs. *See* http://www.janda.org/politxts/State%20of%20Union%20Addresses/1978-1981%20Carter%20T/JEC81e.htm. Three months later, the Deputy Administrator would adopt a nearly identical version as the Agency's first Indian Policy.

[211] EPA-1980-8 Price, *supra* note __, at 1 (referring to attached document on "Special Issues and Problems"). Twenty years later, the issues Price identified in 1980–state backlash, checkerboard jurisdiction, concurrent jurisdiction, economies of scale for small tribes, federal resource limitations, tribal resource limitations, and tribal election not to participate–continued to confront and confound the Agency. *See e.g.,* Conference Proceedings, 5th National Tribal Conference on Environmental Management 424-66 (May 9-11, 2000) (transcribed remarks of nine presenters on the "Jurisdiction/Sovereignty: New Strategies" panel), id. at 480-99 (transcribed remarks of five presenters on the "Court Decisions Affecting Tribes and Their Natural Resources" panel).

[212] [attached to EPA-1980-10] Hedeman, *supra* note __, at 4.

[213] EPA-1980-11 Memorandum from William N. Hedeman, Director, Office of Environmental Review, to Ass't Administrators et al. 2 (Dec. 8, 1980) (on file with author).

for administrators' concurrences in early December 1980.[214] Ten days later, EPA Deputy Administrator Barbara Blum signed the Policy,[215] making EPA the first federal agency to adopt an official Indian Policy officially embracing the new self-determination era.[216]

IV. EPA's First Official Indian Policy: A Creative Solution to the Indian Country Regulatory Gap

Although EPA capped the environmental decade with an unparalleled deliberative plan for filling a significant remaining regulatory gap in national environmental protection, there was no public announcement or fanfare on the adoption of the 1980 Indian Policy. Instead, EPA Deputy Administrator Barbara Blum announced the Policy internally by a memorandum directed to regional and assistant administrators and others.[217] Blum explained the 1980 Indian Policy "reflected the experiences and lessons learned" by the Agency in implementing federal programs in its first 10 years.[218] Beyond its policy statements and principles for agency action, its central thrust was an Agency-wide institutional commitment to taking a different approach aimed at the special legal status of tribes and Indian country, an approach to be "reflected in actions taken with responsiveness, intelligence and initiative at all levels of the Agency."[219]

The memo characterized the "heart" of the Policy as EPA's view that tribal governments should play "a key role in implementing pollution control programs affecting their reservations."[220] Although by this time Congress had expressly provided

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[214] EPA-1980-11 Hedeman, *supra* note __. Hedeman stated the draft Policy had been circulated "to a number of tribal and state officials and national organizations for comment," and he indicated their "universal support," though he did not identify them. *See id.* at 2. He also candidly admitted the final draft did not depart substantially from the first draft, suggesting either that no substantive critical comments were received, or that any submitted were not incorporated.

[215] EPA-1980-1c EPA Policy for Program Implementation on Indian Lands (Dec. 19, 1980) (on file with author) [hereinafter 1980 Indian Policy].

[216] In 1980 and 1981, AIO identified three federal departments and over 25 federal agencies the organization viewed as important to Indian country, and surveyed them on their statutory purposes, "Specific Indian Impacts," "Indian Set Aside Money," and "Indian Policy." AIO reported EPA as the sole federal agency confirming an official agency policy, citing the 1980 Indian Policy. *See* EPA-1981-1 AMERICANS FOR INDIAN OPPORTUNITY, HANDBOOK OF FEDERAL RESPONSIBILITY TO INDIAN COMMUNITIES IN AREAS OF ENVIRONMENTAL PROTECTION AND INDIVIDUAL HEALTH AND SAFETY 85 (1981). It is not uncommon, however, to see references to the later 1984 Indian Policy as the Nation's first federal agency Indian policy. *See, e.g.,* ROYSTER & BLUMM, *supra* note __, at 220 (2002) (reporting that in 1984 "EPA became the first federal agency to issue an Indian policy"); Johnson, supra note __ (stating that "[i]n 1984, EPA became the first federal agency to adopt a formal Indian Policy"); Memorandum from Carol M. Browner, Administrator, to All [EPA] Employees (March 14, 1994), available at http://www.epa.gov/indian/policyintitvs.htm (same).

[217] Memorandum from Barbara Blum, Deputy Administrator, to Regional Administrators et. al (Dec. 19, 1980) (on file with author) (transmitting the 1980 Indian Policy).

[218] *Id*. at 1.

[219] *Id*. at 2.

[220] *Id*. at 1.

tribal regulatory roles in only two limited program contexts,[221] EPA did not caveat its conviction. EPA offered a broad programmatic approach in the spirit of the national Indian policy of tribal self-determination, and the national environmental policy of federal programs responsive to local needs.[222]

A. The 1980 Blum Memorandum

By format, EPA's 1980 Indian Policy was organized into several pages of introductory text, two policy statements, six principles, and five implementation tasks. The introductory text offered a forum for a wider exploration by the Agency of the larger issue implicated by the implementation of federal programs in Indian country. Up to this time, EPA's pronouncements on Indian country issues came in the context of discrete functions within specific media programs, and were thus understandably narrow.

The introduction cited as the larger context spawning the 1980 Policy EPA's sense that Congress expected "full and equal protection of the environment of the entire nation without exception or gaps."[223] Nationwide coverage surely required EPA's attention to Indian reservations,[224] whose collective land mass EPA envisioned as larger than the six New England states plus New Jersey, Delaware and Maryland.[225] Rural and urban Indian reservations both suffered many of the same environmental problems associated with non-tribal territories, EPA noted, including the prospects of impacts associated with large-scale natural resource development activities on or near reservations.[226]

But EPA recognized the lands that make up Indian reservations, and the tribes that inhabit them, occupy a unique place in the federal system. EPA noted the historic federal-tribal relationship evidenced by treaties and other actions, and the resulting conception of federal Indian power as guided by a trust responsibility to foster and protect tribal interests and welfare.[227] EPA perceived one consequence of the federal authority and trust responsibility as a general preclusion of state regulatory authority on

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[221] *See supra* text accompanying notes __ to __ (discussing Congress' 1977 amendments to the CAA authorizing tribal air redesignations), and *supra* text accompanying notes __ to __ (discussing Congress' 1978 amendments to FIFRA authorizing tribal certification programs for pesticide applicators). Congress did not authorize a broader program-wide tribal role under the CAA until 1990, *see* Pub. L. No. 101-549, 104 Stat. 2464 (codified at 42 U.S.C. § 7601(d) (1990), and has not expanded the tribal program role under FIFRA since 1978.

[222] Blum, *supra* note __, at 1.

[223] 1980 Indian Policy, *supra* note __, at 3.

[224] Indian reservations comprise a large part but not the whole of Indian country, yet EPA did not explain why it focused only on reservations here. Perhaps it was simply following Congress' lead in the 1977 CAA amendments, which authorized tribal air quality redesignations over "lands within the exterior boundaries of reservations." *See* 42 U.S.C. § 7474(c).

[225] 1980 Indian Policy, *supra* note __, at 1.

[226] *Id*. at 1.

[227] *Id*. at 2.

Indian reservations absent Congressional authorization.[228] EPA also observed that Congress rarely provides for state assumptions of regulatory power over reservations.[229]

For EPA, the extent of state regulatory power in Indian country was no academic dilemma. "This [issue] is particularly important to EPA because most of our statutes include a regulatory design utilizing state governments as entities for implementing, at the local level, coordinated Federal-state programs for the attainment of nationally-set goals and standards."[230] If states lacked independent governmental authority on Indian reservations, then by definition they would be incapable of implementing federal programs complying with federal standards. EPA would therefore lack authority to delegate reservation programs to states. As conceived by Congress, then, the cooperative federalism model was doomed to fail on Indian reservations:

> [W]ithout some modification, our programs, as designed, often fail to function adequately on Indian lands. This raises the serious possibility that, in the absence of some special alternative response by EPA, the environment of Indian reservations will be less effectively protected than the environment elsewhere. Such a result is unacceptable.[231]

EPA's "special alternative" was simply to use the cooperative federalism approach, but with a different partner.[232] Like states, tribes were "local governments" with site-specific knowledge of their territories, and governmental responsibility for protecting legitimate local interests.[233] And EPA viewed tribal jurisdiction claims over reservation pollution sources as much stronger than states' claims.[234]

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[228] *Id*. (asserting one consequence of the special position of tribes in the federal system is "states generally have only limited authority to regulate activities conducted on Indian reservations"); id. at 3 (asserting "states usually lack, on Indian reservations, the kind of power and regulatory authority they enjoy off-reservation"). The Policy cited no cases, but these general legal conclusions were in reasonable accord with Indian law decisions at the time, though there were three cases to the contrary. *See* Dean B. Suagee, *The Supreme Court's Whack-A-Mole Game Theory in Federal Indian Law, A Theory that has no Place in the Realm of Environmental Law*, 7 Great Plains Nat. Res. J. 90, 127-30 (2002) (arguing for narrow readings of three pre-1984 Supreme Court decisions that "ran counter to the long-standing presumptions of federal Indian law" regarding state authority in Indian country absent an express congressional grant).

[229] 1980 Indian Policy, *supra* note __, at 3.

[230] *Id*. at 2.

[231] *Id*. at 3.

[232] A different alternative was raised obliquely and rejected summarily. The Bureau of Indian Affairs (BIA) and the Indian Health Service (HIS) had substantial experience implementing federal programs in Indian country, but these programs were for the delivery of services to Indian people and were not regulatory in nature. Hence, EPA concluded these agencies were inappropriate candidates for running regulatory programs under EPA's statutes. *Id*. at 3.

[233] *Id*. at 2 (implying tribal tendency to elevate future cultural survival over economic benefit), *and* 4 (suggesting tribal concern for environmental quality stems from historic losses of tribal lands combined with "a long-standing cultural respect for the earth and its environment"). Cf. EPA-1981-1 AMERICANS FOR INDIAN OPPORTUNITY, HANDBOOK OF FEDERAL RESPONSIBILITY TO INDIAN COMMUNITIES IN AREAS OF ENVIRONMENTAL PROTECTION AND INDIVIDUAL HEALTH AND SAFETY 4 (1981) (asserting reservation environmental protection was vitally significant for Indian cultural and religious survival).

[234] 1980 Indian Policy, *supra* note __, at 4 (stating tribes have "the fundamental legal jurisdiction, generally lacked by state governments, to regulate both Indian and Non-Indian pollution sources on the reservations").

To EPA, public dialogue over the concept of tribal assumptions of federal programs was increasingly common. EPA viewed tribes as exercising their relatively new national political presence, calling for increased authority "to overcome their long-standing, historical exclusion from Federal decision-making."[235] EPA noted that presidents from both parties as well as Congress appeared supportive,[236] and observed Congress was considering an enhanced role for tribes in regulating mining activities in tribal territories.[237] EPA viewed tribes' experiences with natural resource development, and its attendant environmental consequences, as reflective of a governmental commitment to avoiding long-term impacts even at the expense of short-term economic benefits.[238]

> These factors–the Federal and tribal affirmations of the principle of tribal self-determination, the unique legal status of reservation lands and corresponding jurisdictional limits of state governments, and the special trust responsibility to safeguard reservation lands which the Supreme Court has placed upon the Federal establishment—all affect our Federal regulatory and programmatic responsibilities on Indian reservations in a manner that is unique.[239]

EPA's response to this unique challenge was to apply the program-specific precedent it set in the 1974 PSD Rule to the Agency's entire operation. The 1980 memorandum thus set the Agency's policy of promoting "an enhanced role for tribal government in relevant decisionmaking and implementation of federal environmental programs on Indian reservations."[240] The Agency also pledged as a policy matter to "adapt and manage" federal programs so they are effective and responsive to the special circumstances of Indian reservations.[241]

These twin policy "goals" were supported by six "principles" guiding EPA program managers as they ran their respective programs. Principle 1 articulated the Nation's self-determination policy in EPA's language: EPA would promote opportunities for tribes to "assume a central role in implementing EPA's delegable Federal environmental programs and activities."[242] Principle 2 set out EPA's expectation that tribes meet the same standards as states, demonstrating the central tribal role was akin to that played by states in the cooperative federalism model.[243] Principle 6 anticipated the predictable political controversy by expressing a federal hope for tribal-state cooperation. True to the spirit of self-determination, Principle 3 explained the tribal role was optional;

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[235] *Id*. at 1.

[236] *Id*. (noting recognition from recent republican and democratic presidents, and Congress through the 1975 Indian Self-Determination Act).

[237] *Id*. at 3. In 1977, Congress added a TAS provision to SMCRA's reclamation of abandoned mines program and directed DOI propose legislation for full tribal regulatory authority over surface mining on Indian lands. *See supra* note __ [III 71-80].

[238] 1980 Indian Policy, *supra* note __, at 2.

[239] *Id*. at 3-4.

[240] *Id*. at 5.

[241] *Id*.

[242] *Id*. at 6.

[243] *Id*.

among the various EPA programs, tribes could elect a state-like role, some "other, more appropriate role" (Principle 5), or no role at all.[244] Where a tribe elected not to assume a delegable program (as a state might), Principle 4 indicated EPA would directly implement the program unless the state had authority and exercised it.[245]

Following the principles were five bulleted concepts under the heading "Implementation." Two of these encouraged immediate action by program managers to respond earnestly to tribal requests and problems, and to conduct outreach enabling a meaningful tribal voice in federal program implementation.[246] The Policy's concluding paragraph noted the critical importance of increased EPA-tribal interaction leading to a climate of "ongoing, institutionalized follow-up."[247] Another immediate implementation activity was a cabinet-level review of EPA's legal mandates and authority affecting assumptions by tribes of regulatory roles in implementing federal programs.[248] Regular periodic reviews of program implementation activities would follow the initial legal review. Those activities would arise as a consequence of a formal implementation plan listing specific actions for the "orderly and effective realization" of the policy,[249] and addressing perennial issues like state-tribal relations and the involvement of other federal agencies.

B. Laying the Foundation of EPA's Indian Program

The substantive direction set by the 1980 Indian Policy expanded upon the Agency's earlier program-specific pronouncements and formed a more complete picture of the Agency's assumptions and expectations. It embraced tribal self-determination as an Agency working assumption manifesting itself in partnerships with tribes as cooperating governments, not as public interest groups. The form of the partnership would vary not on EPA's commitment, but on tribal interest. At its fullest, tribes would play a state-like role implementing federal programs, and exercising substantial discretion under EPA's supervision. As such, tribes would be expected to comply with federal mandates just as states must.

Where tribal priorities fit lesser roles, EPA would work with the tribe nonetheless as EPA directly implemented programs on the tribe's behalf. Official consultation with tribes on program matters could help EPA discharge its environmental mandates consistent with the federal trust responsibility. The trust responsibility necessitated a federal presence on reservations that relegated states to the status of neighboring sovereigns accorded an indirect influence over reservation activities, and limited in its

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[244] *Id*.

[245] *Id.*

[246] *Id*. at 7.

[247] *Id*.

[248] *Id*. Fundamental institutional culture changes like this one seem natural junctures for an agency's global review of statutory mandates for opportunities and obstacles. President Nixon set this precedent in the environmental realm 10 years earlier when he tasked federal agencies with reviewing their mandates and regulatory schemes for hindrances to accomplishing NEPA's national policy of human harmony with the environment. *See* Exec. Order 11,514, 35 Fed. Reg. 4247 (March 7, 1970).

[249] *Id*. at 7.

own development activities by that same power wielded by tribes. EPA presumed, then, it would rarely have occasion to delegate reservation programs to states. States would receive program delegation for reservations only where they could show Congressional authorization. This order of governmental preference constituted the core of the 1980 Policy, and would be reaffirmed in the 1984 Policy.

The tone set by the 1980 Policy was curiously strong and committed to a concrete substantive direction. No doubt policy statements lacking the force of law often contain lofty rhetorical claims and promises never intended to be realized. Indian country has certainly seen its share of those. But EPA faced no imminent action requiring this policy decision. The "serious possibility" that reservations were not fully protected was an important federal epiphany, but the possibility had existed for some time. Tribes had been raising concerns over health and associated environmental impacts for years.[250] And, to the extent the serious possibility was truly imminent, the quickest and most effective means for protecting reservations available at that moment were state regulatory programs, created through a decade of federal technical and financial assistance.

Nor was the national political scene clamoring for EPA's Policy. Tribal involvement in national politics was increasing, as was tribal pressure for increased self-determination, but there was no concerted tribal call specifically for control of reservation pollution sources.[251] Congress had spoken on the reservation environment in two narrow program-specific contexts, and in both instances supported EPA's view of tribes playing state-like roles in the cooperative federalism mode.[252] But Congress had not yet considered a broader view nor announced a general statement of national policy on the implementation of federal environmental law on reservations.

Congress' ambiguous position also complicated federal Indian law's uncertainty over the extent of state and tribal power on Indian reservations. In the absence of congressional direction, the Supreme Court's Indian common law controlled.[253]

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[250] Ambler, supra note __, at 130 (citing remarks of Fred Johnson, Coalition for Navajo Liberation, before the U.S. Commission on Civil Rights, objecting to sales and leases of Indian lands for environmentally damaging natural resource development).

[251] What was more certain, though, was the predictably negative reaction EPA could expect from states perceiving EPA's Indian Policy as inconsistent with state sovereignty over public health and welfare. States would in fact mount a defensive effort in the late 1980s once the policy aspirations of EPA's Indian program began to affect states, s*ee e.g.,* Washington Dept. of Ecology, 752 F.2d 1465 (challenging EPA's rejection of Washington's application for delegation of RCRA's hazardous waste program for Indian lands), but hints of this came via New Mexico's comments the 1974 PSD Rule's treatment of tribes like states curtailed state sovereignty, *see supra* text accompanying notes __ to __ [Section III.B.]. In addition, several prominent state tax cases around this time evidenced states' willingness to assert state civil regulatory authority on reservations. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980).

[252] *See supra* text accompanying notes __ to __ (discussing the 1977 CAA amendments ratifying EPA's 1974 PSD Rule treating tribes as states for redesignation purposes), and text accompanying notes __ to __ (discussing the 1978 FIFRA amendments treating tribes as states for operating pesticide applicator certification programs).

[253] Williams, 358 U.S. at 220 (applying, in the absence of "governing acts of Congress," the court-made rule whether "state action infringed on the right of reservation Indians to make their own laws and be ruled by them").

Although the Court had recently said tribes were "unique aggregations possessing attributes of sovereignty over both their members and their territory,"[254] it decided at the same time tribes' original sovereign power to maintain law and order did not apply to non-Indians committing tribal crimes because that power was "inconsistent with their [tribes'] status" as defined by the colonizer's common law.[255] That subjective[256] and invariably unpredictable view of tribal sovereignty was mirrored by the lack of a "rigid rule" for deciding when federal law preempted state law on Indian reservations.[257] Instead, the court conducted a "particularized inquiry into the nature of the state, federal and tribal interests at stake."[258] And, as is true today, in 1980 no Supreme Court opinion directly addressed these issues in an environmental regulatory context.

In this atmosphere EPA might understandably have hesitated longer, awaiting clearer instructions from the President or Congress or the Court, perhaps promising to consult with tribes in the interim. Or EPA could have sounded a more cautionary tone, expressing a willingness to consider tribal applications for program delegation, but presuming neither that tribes have nor that states lack authority adequate for federal program implementation. Instead, EPA confidently and unambiguously announced its policy decision that tribes and not states are the appropriate federal partners for Indian reservations, and pledged federal assistance for tribes desiring partnerships.[259]
The legitimacy of the Agency's position depended almost wholly on answers federal Indian had not yet made clear, so EPA did what lawyers do in those situations; it identified relevant general propositions and extended them to the specific subject of EPA's interest.[260] In doing so, EPA took a rather liberal interpretation and made a broad

[254] *See* United States v. Wheeler, 435 U.S. 313, 323 (1978).

[255] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978) (divesting tribes of inherent criminal authority over non-Indian violators because that power was "inconsistent with their status").

[256] *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*. 84 Cal. L. Rev.1573 (1996).

[257] White Mountain Apache Tribe, 448 U.S. at 142.

[258] *Id*. (holding federal law preempted application of state transportation taxes to non-Indian contractors for on-reservation work); *see also* McClanahan, 411 U.S. at 173-181 (holding federal law and tribal sovereignty precluded application of state tax to income earned on-reservation by Indians).

[259] Perhaps EPA simply believed tribes and states desired and were entitled to a direct answer, even if unfavorable. In a later interview, then Administrator Douglas Costle commented on federal-state relations (not in the context of Indian reservations) and implied states preferred a clear negative answer to an ambiguous one with a positive potential:

"I think what they need most, in most instances—and what they most appreciate—is probably the same operating principle as business seeks. "Give me a red light or a green light. But not a flashing yellow; that drives me crazy." Make a decision, and understand that time is money and resources. In a free market economy, that is literally truth. Delays in getting decisions can be terribly expensive for everybody involved, and that wins you few friends." *Interview with Douglas M. Costle>State Governments* (Aug. 1996), at http://www.epa.gov/history/publications/costle/26.htm [hereinafter *Costle Interview*].

[260] Nowhere did the Policy cite or refer to cases or statutes. Perhaps legal citations were deemed inappropriate for an agency policy statement. Unlike a rule making where the agency must explain its legal basis for acting, or an Agency court brief arguing the legality of a challenged agency action, case analysis might be beyond the level of useful detail. Nonetheless, given the significance of the decision and its practical consequences despite its hortatory policy nature, one might expect a reference to a legal analysis documented somewhere. The Policy makes no such reference.

application, making the Policy read more like creative advocacy than an agency explanation of a determined course of action.

For example, the Policy characterized the then over 250 federally recognized tribes residing on Indian reservations as "tribal governments with authority over reservation affairs." If "reservation affairs" meant the internal relations between tribal citizens, that was a fairly unremarkable statement; the Court acquiesced in this view at the beginning of Federal Indian law,[261] and has not backed away from it since. The real question, of course, was whether inherent tribal power could reach non-Indian polluters. The Policy's sole support for EPA's affirmative answer was "[tribal] court systems have the underlying civil jurisdiction to regulate on-reservation activities of non-Indians as well as tribal members."[262] Even accepting the characterization of court jurisdiction as regulation of the parties, as an analogy for complex environmental regulatory programs it seems less than compelling. In a 1976 Indian law case, the Court made clear civil adjudicatory jurisdiction was not synonymous with civil regulatory power.[263] And the Court had more recently upheld application of a tribe's civil regulatory laws to non-Indians in the tax arena.[264]

EPA was similarly creative on other important foundation aspects of the Policy. EPA cited the general rule of federal liability for mismanaging tribal natural resources and lands, and implied it supported a specific federal trust responsibility for the protection of the environmental quality of Indian lands.[265] EPA cited Congress' general expectation that federal programs be responsive to local needs, and implied it justified tribal implementation despite Congress' general silence.[266] EPA asserted an

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[261] Worcester v. Georgia, 31 U.S. 6 et.) 515, 553-54 (1932) (concluding treaty language providing federal authority for "managing all their [Cherokee Tribe's] affairs did not surrender the Tribe's power of internal self-government).

[262] 1980 Indian Policy, *supra* note __, at 1.

[263] *See* Bryan v. Itasca County, 426 U.S. 373 (1976) (holding that P.L. 280's federal grant of civil adjudicatory jurisdiction over Indian country claims to states was not also a grant of civil regulatory authority to states). Years later the Court would squarely reject this distinction. *See* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (holding "[a]s to nonmembers … a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction").

[264] *See* Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 152 (characterizing tribal taxation of non-Indian cigarette purchases at tribal smokeshops as "a fundamental attribute" of retained tribal sovereignty). Colville was a double-edged sword, however, because the Court also upheld state taxation of the same non-Indian purchasers, and more importantly, allowed the state to impose a regulatory burden directly on Indian retailers to collect the tax for the state, despite the lack of any congressional authorization. *Id*. at 154-60. That holding undercut the major premise of EPA's Indian program that states lacked regulatory authority in Indian country absent special authorization from Congress.

[265] 1980 Indian Policy, at 2 (reciting that "[m]ore often, the trust responsibility is discussed in connection with a specific Federal responsibility with regard to Indian land, to protect its value, and, inherently, its environmental quality.") *See* Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 183 (1980) (indicating a federal fiduciary relationship exists when the federal government "takes on or has control or supervision over" tribal property). *Cf.* United States v. Mitchell, 445 U.S. 535 (1980) (Mitchell I) (holding the "bare trust" over tribal lands created by the General Allotment Act insufficient for tribal money claims against the United States for mismanagement of timber resources), *with* United States v. Mitchell, 463 U.S. 206 (1983) (Mitchell II) (holding federal Indian timber statutes imposing full management responsibility on the federal government created an actionable breach of trust).

[266] Blum, *supra* note __, at 1.

"unmistakable affirmation" by the public and Executive for tribal implementation of federal Indian service programs, and implied it supported EPA's view of tribes in state-like regulatory roles.[267]

The 1980 Indian Policy's special alternative approach to the unique problem of Indian reservations established the foundation cornerstones of the Agency's entire Indian program, firmly anchored later in the 1984 Policy. In format, direction and tone, the 1980 Indian Policy foreshadowed a course of decisions and actions leading naturally into the modern Indian program. But there was still much work ahead before EPA would arrive there with a program truly modeled on tribal self-determination.

V. Evolving the 1984 Indian Policy (1981-1984)

EPA's 1980 Indian Policy was stimulated by the national policy of tribal self-determination, but its viability relied fundamentally on the Agency's legal conclusions that states lacked, and tribes possessed, the civil regulatory authority necessary for effective implementation of federal environmental programs on Indian reservations. Those conclusions stretched but were arguably consistent with federal Indian law at the time. Then, shortly after the Policy issued, the Supreme Court decided *United States v. Montana,*[268] which directly attacked tribal sovereignty on multiple levels. Ironically, Montana's ostensible rationale indirectly confirmed the 1980 Indian Policy's central assumptions regarding tribal and state regulatory power on Indian reservations.

A. The *Montana* Health and Welfare Test

The primary issue in *Montana* was whether the Crow Tribe possessed civil regulatory authority over nonmember hunters and fishers within the exterior boundaries of the Crow Reservation. The Court had no trouble finding such authority over nonmember activities on Indian lands, although its rationale treated the Tribe as a landowner rather than a government.[269] As to lands over which the Crow Tribe had no ownership claim, the Court concluded the hunting and fishing activities undertaken by nonmembers there did not affect the Tribe's interests, and so the Tribe's inherent

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[267] 1980 Indian Policy, *supra* note __, at 3 (asserting EPA "must administer its programs in the context of public and community realities and of Federal policy towards program administration on Indian lands. In both respects, there is an unmistakable affirmation that Indian people … should have a primary role in the implementing decisions of Federal programs which affect the future of reservation life"). That statement was probably exaggerated in its own right, but even if true, it did not logically support a conclusion of public support for tribal regulatory roles potentially affecting non-Indian interests directly. The 1970s had witnessed bitter court and political battles over the public's perception of Indian rights as "special rights" out of step with a color-blind society. *See, e.g.,* Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 Wis. L. Rev. 375 (describing the six-part litigation involving the Lac Courte Oreilles Band, beginning in the late 1970s); GETCHES, WILKINSON & WILLIAMS, *supra* note __, AT 876-97 (discussing the 14-year history of Indian fishing rights litigation in Washington). The country had yet to see the groundswell of public opposition to tribal regulation seen later in the 1990s, but the writing was on the wall.

[268] 450 U.S. 544 (1981).

[269] *Id*. at 556 (holding that on lands owned by the Tribe or held in trust for the Tribe, the Tribe could prohibit non-Indian entry, or allow such entry upon regulatory-like conditions).

sovereignty did not reach those activities.[270] Pulling *Oliphant's* 1978 implicit divestiture approach to criminal jurisdiction over the wall, the Court announced a new "general proposition" that American Indian tribes lack inherent civil authority over nonmembers.[271]

The Court's tortured and internally inconsistent rationale has been criticized extensively,[272] but compelling or not, it affected EPA directly. The "general proposition" seemingly vitiated the 1980 Indian Policy's assumption that tribes inherently possessed territorial sovereignty. Yet, *Montana* cited *Wheeler's* recognition of the line of Supreme Court decisions characterizing tribes as sovereigns with authority over "both their members *and their territory*."[273] *Wheeler*, though, also repeated *Oliphant's* literal characterization of tribal self-government as governance of the self, distinguishing between (tolerable) tribal control over relations among tribal members and (intolerable) tribal control over "external relations" with nonmembers.[274]

Yet, the Court did not absolutely preclude tribal control over external nonmember relations. Inherent tribal self-government, the Court said, included power over nonmembers where "necessary to protect tribal self-government,"[275] implicitly defined by the Court as applying to two categories of nonmembers. Nonmembers engaged in consensual agreements with the tribe or its members were potentially subject to tribal regulation by "taxation, licensing, or other means."[276] And tribes might have authority over nonmembers whose on-reservation conduct impacted important tribal self-government interests: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within it 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*."[277]

Public health and welfare is the sine qua non of federal environmental law, and provides the substantive content legitimating congressional delegations of environmental

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[270] *Id*. at 563-67.

[271] *Id*. at 565.

[272] *See, e.g.,* Russel Lawrence Barsh and James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 Minn. L. Rev. 609 (1979); N. Bruce Duthu, Implicit Divestiture of Trial Powers: locating Legitimate Sources of Authority in Indian Country, 19 Am. Ind. L. Rev. 353 (1994); Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers, 109 Yale L J. 1 (1999).

[273] Wheeler, 435 U.S. at 323 (emphasis added).

[274] *Id*. at 326.

[275] Montana, 450 U.S. at 564.

[276] *Id*. at 565. This "consensual relations" exception to Montana's general proposition may have independent value to tribes facing environmental degradation from natural resource development conducted by non-Indians on lands owned by the tribe or tribal members. *Accord* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (affirming inherent tribal taxation authority over tribal business partners developing tribal mineral assets); Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (upholding tribal taxation authority over non-Indian purchases from smokeshops owned by tribes and by tribal members).

[277] Montana, 450 U.S. at 565 (emphasis added).

program responsibility to EPA.[278] The cooperative federalism model envisioned a federal-state partnership directly predicated on state police powers protecting the general health and welfare within the constraints of national interstate commerce interests. *Montana's* infamous "health or welfare" exception to the general proposition of no tribal power over nonmembers thus sounded like a judicial affirmation of the heart of EPA's 1980 Indian Policy. If tribal sovereignty included regulatory power over nonmembers to protect tribal health and welfare, then tribes' governmental authority was eligible for delegation of federal environmental programs designed to protect public health and welfare on Indian reservations.

But, reflecting the asymmetry of federal Indian law,[279] the Court did not view tribal health and welfare authority as broadly as state health and welfare authority. Long ago the Court sanctioned state wildlife management regimes as legitimate exercises of state police power, deferring to state value judgments on wildlife management without insisting on detailed explanations of the connection of bird hunting, for instance, to the general welfare.[280] *Montana* found instead that the Crow Tribe's health and welfare interests were not affected by nonmembers hunting and fishing on-reservation. That finding necessarily rejected the Crow Tribe's contrary legislative judgment, but the Court showed no interest in exploring its legislative history, let alone deferring to it.[281]

Ignoring the obvious and historically respected governmental interest in effective management of natural resources within a government's territory, the Court demanded specific evidence of significant impacts on a much narrower set of health and welfare interests. The Court noted the absence of allegations that non-Indian hunting and fishing on non-Indian lands "imperil[ed] the subsistence or welfare of the Tribe," implying that anything less than actual jeopardy to tribal members' physical survival was an insufficient impact on tribal self-government.[282]

Illogically, the bulk of the Court's limited analysis on the health and welfare test focused not on risks presented by non-Indian activities to legitimate tribal interests, but rather on the extent and nature of the competing state regulation of those activities.[283]

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[278] *See, e.g.*, Whitman v. American Trucking Ass'n, 531 U.S. 457, 472-76 (2001) (finding the Clean Air Act's mandate that EPA set air quality standards "requisite to protect public health with an adequate margin of safety" an intelligible principle validating Congress' delegation of legislative authority to EPA).

[279] *Cf.* Robert Laurence, *Symmetry And Asymmetry In Federal Indian Law*, 42 Ariz. L. Rev. 861 (2000).

[280] *See* Geer v. Connecticut, 161 U.S. 519, 535 (1896) (finding state police power extends to the regulation of bird hunting "subject to the conditions which [the state] may deem best to impose for the public good")

[281] Montana, 450 U.S. at 548-49 (noting the Crow Tribe's enactment of multiple laws regulating hunting and fishing as simple historical facts without discussion of the tribal interests sought to be served thereby).

[282] *Id*. at 566. Presumably, the United States on behalf of the Tribe did not make any such allegation because no prior court decision required or suggested them. Had the Court been genuinely concerned for the governmental interests of the Crow Tribe, it could have remanded the case for findings specific to the newly announced health and welfare test, as it did later in South Dakota v. Bourland, 508 U.S. 679, 698-99 (1993).

[283] The Court did not explain why it believed the State's presence in the Tribe's territory bore logically on the question whether nonmember hunting and fishing implicated tribal self-governance. The question whether the Tribe's interests were at stake seems logically distinct from the question whether the State's interests were also at stake. *Cf*. Washington v. Confederated Tribes of the Colville Indian Reservation, 447

The Court implied tribal self-government might be implicated where state regulation of on-reservation activities was ineffective, discriminatory, precluded tribal regulation on Indian lands, or impaired tribal treaty rights.[284] But, again, there were no such allegations in the case.[285] More damaging and carrying even less logical force, the Court converted the trial court's inference that historically "all parties [including the Tribe and the United States] understood that nonmember hunting and fishing regulation was a power belonging to the state"[286] into an "express finding, left unaltered by the Court of Appeals, that the Crow Tribe had traditionally accommodated itself to the State's 'near exclusive' regulation … on fee lands within the reservation."[287] The Supreme Court thus assumed the tribal self-government interests at stake were insufficient to justify tribal regulation.

U.S. 134 (1980) (finding the separate governmental interests of both the State and the Tribes sufficient to justify both governments' taxation of on-reservation commercial activity).

[284] Montana, 450 U.S. at 566-67, n. 16.

[285] The Court's repeated criticism of the United States' failures of proof, and its preoccupation with the state's regulatory assertions in the Crow Tribe's territory, portended federal Indian law's shifting presumptions and burdens of persuasion. Worcester presumed exclusive tribal authority and preemption of state authority in Indian country without requiring a tribal showing of state interference with the federal-tribal relationship. *See* 31 U.S. (6 Pet.) at 561-62. Williams limited the presumption of exclusive tribal authority by suggesting state law applied in Indian country where it did not infringe on tribal sovereignty. *See* 358 U.S. at 272. But Williams could be fairly read as leaving the burden of showing non-infringement on the state (or party challenging tribal authority), *see* James M. Grijalva, *Where are the Tribal Water Quality Standards and TMDLs?,* 18 Nat. Res. & Envt. 63, 65 (Fall 2003), although some state courts saw it as presuming state authority and imposing a burden on tribes to show infringement, *see* GETCHES, WILKINSON & WILLIAMS, JR., *supra* note __, at 421 n. 2. Oliphant, however, made clear the Court's expectation that tribes justify any assertion of authority over non-Indians, either pursuant to a congressional affirmation or as consistent with tribes' so-called dependent status. *See* 435 U.S. at 208-10. Montana completed the circle by carrying that shifted burden into the civil arena. *See* COHEN, at 245 n. 38 (explaining the Crow tribe lost because it "had not shown" impacts to its interests). Any doubt on this question was resolved in Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001), where the Court concluded:

Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory," but their dependent status generally precludes extension of tribal civil authority beyond these limits. The Navajo Nation's imposition of a tax upon nonmembers on non-Indian fee land within the reservation is, therefore, presumptively invalid. Because respondents [members of the Navajo Tax Commission] have failed to establish that the hotel occupancy tax is commensurately related to any consensual relationship with petitioner or is necessary to vindicate the Navajo Nation's political integrity, the presumption ripens into a holding.

Id. at 659 (citation omitted).

[286] United States v. Montana, 457 F. Supp. 599, 610 (D. Mont. 1978). The district court cited no direct evidence of either the United States' or the Crow Tribe's subjective "understanding" of the legal status of the State's intrusion into Crow Territory. Indeed, the fact that the Tribe sought to prohibit through tribal law what state law allowed, and the fact that the United States sued to enjoin state regulation, plainly suggested the opposite conclusion. Additionally, the district court noted on previous occasions the Tribe expressed dissatisfaction with state regulation. *Id*. Nonetheless, the court inferred tribal and federal "accommodation" from the simple facts that the State asserted authority in the Tribe's territory for many years without objection from either the Tribe or the federal government. Even if true, of course, the parties' beliefs of their jurisdiction could not bind the court's determination. *Accord* California v. LaRue, 409 U.S. 109, 112 n. 3 (noting parties' stipulations could not confer jurisdiction on the Supreme Court, nor the District Court).

[287] Montana, 450 U.S. at 566.

Montana's result could reasonably have dampened EPA's eagerness for tribes as regulatory partners, but legitimate distinctions between the hunting and fishing context and EPA's arena arguably limited *Montana's* negative aspects. Although historically both wildlife management and environmental control have been matters of local control, the host of programmatic federal environmental laws reveals a substantial federal interest that dwarfs federal involvement in wildlife management. So while the federal presence in environmental regulation is substantial through the cooperative federalism model, there is little federal programmatic presence in wildlife management nationwide, which *Montana* confirmed by its silence on the limited federal wildlife management presence on the Crow Reservation.[288]

Another distinction relevant to EPA's 1980 Indian Policy approach was the apparent significance of the regulatory history. Key to *Montana* was the State's reservation wildlife management (by stocking fish) long before the Tribe began exerting its governmental control over their management.[289] When the Tribe sought to make its authority clear, the Court's treated the Tribe's failure to object earlier as acquiescence to state regulation, which the Court viewed as proof that tribal self-government was not threatened by state regulation.[290]

Perhaps inadvertently, EPA anticipated this argument in the Clean Water Act context by its 1973 determination not to delegate to states the NPDES program for Indian lands and facilities. States could not show a history of implementing federal environmental programs, and thereby defeat tribal claims for the same role, if EPA did not delegate the programs to states in the first instance. The 1980 Indian Policy supported that view across EPA's media programs; EPA's determination of limited state authority on Indian reservations necessarily compelled the conclusion EPA lacked authority to delegate reservation programs to states. So, unlike the wildlife management arena where states might establish some sort of reliance claim by virtue of repeated unchallenged regulatory assertions, EPA's view of tribal and state authority theoretically meant states would not get that opportunity in the context of on-reservation federal environmental programs.[291]

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[288] The Supreme Court made no mention of the district court's findings that in 1970 the federal Bureau of Sports Fisheries and Wildlife agreed to provide technical assistance in fisheries management to the Tribe and to stock reservation waters with fish. *See* 457 F. Supp. at 604. But the district court's observation that a federal fisheries biologist was not assigned to the reservation until 1973, which the court compared to the State's "extensive fish-stocking program" since 1928, reflected its sense of a minimal federal presence. *Id*. at 604-05. The comparative importance of a substantial federal presence was shown two years later in New Mexico v. Mescalaro Apache Tribe, 462 U.S. 324 (1983), which preempted state hunting and fishing laws on an Indian reservation with "a comprehensive fish and game management program" jointly administered by the tribe and the federal government). Justice Stewart, who wrote the Montana opinion, joined the Mescalaro majority in part because he concluded the Mescalaro Tribe "had a much greater investment and interest in wildlife" than the Crow Tribe). Getches, *supra* note __, at 1613 (citing the Papers of the late Justice Thurgood Marshall).

[289] Montana, 450 U.S. at 548-49, 564-67.

[290] *Id*. at 564 n. 13.

[291] The theory, though, often gives way to practical reality. Facing a continued regulatory gap in Indian country years later, EPA undermined its commitment by "assuming without deciding" that state water quality standards and state-issued discharge permits applied to Indian country until tribes assumed these

So notwithstanding its result, EPA could have reasonably read *Montana* as supporting a territorial view of inherent tribal sovereignty over non-Indian polluters adequate to justify EPA delegation of federal environmental programs for reservations to tribes.[292] To be sure, that view apparently applied only to nonmember activities substantially threatening important tribal health and welfare interests, and implied a tribal burden of that factual showing, but that burden seemed perfunctory in the environmental arena. [293] The existence of federal environmental law was a testament to Congress' conclusion that pollution and environmental degradation was directly connected to human health and welfare.[294] The tribe's governmental interest in pollution control would be buttressed by EPA's co-management, which would increase the federal environmental management presence on-reservation and reflect a federal interest in tribal pollution control. Tribal-federal cooperation thus strengthened tribal sovereignty claims and additionally, under the Indian preemption cases emerging then, also undermined competing state claims over reservation activities.[295]

B. The First Big Win for EPA's Indian Program: Nance v. EPA

Oddly, the Crow Tribe's loss and EPA's arguable gain in *Montana* was repeated just two months later in the first reported Indian country environmental law case

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roles. *See* Grijalva, *supra* note __, at 68-69 (suggesting EPA's decisions, which allow the state regulatory machine to "creep" into Indian country, potentially weaken tribal claims over non-Indian polluters).

[292] An additional argument, though perhaps not persuasive to the Supreme Court, might be found in cultural anthropology. For indigenous societies, communal efforts directed at achieving a culturally appropriate goal can have self-determining value independent of whether the goal is actually achieved. *See e.g.*, VERONICA STRANG, UNCOMMON GROUND: CULTURAL LANDSCAPES AND ENVIRONMENTAL VALUES (1997). In observing the decision of the Kowanyama aborigines of Northern Queensland in Australia to assume management of a former white mission cattle station, Strang suggested:

> Though the people are keen to manage the cattle business and extend it on to the newly regained land at Oriners, the objective is not primarily to make money–though the advantages of economic independence are certainly appreciated–but rather to reframe it as a communal activity containing multiple social and cultural concerns.
>
> Economic relations are also, invariably, social and environmental relations. If the perceived environment is a cultural artefact [sic], the explicit economic 'affordances' or qualisigns' assigned to it are only the tip—the most accessible values—of an iceberg. They may be far outweighed by implicit or less easily articulated values, and undercurrents of symbolic meaning.

Id. at 96, 83.

[293] Lower courts initially treated that burden as insubstantial, finding inherent tribal power over non-Indian riparian rights, *see* Confederated Salish and Kootenai Tribes v. Namen, 665 F. 2d 951 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982), and non-Indian building construction, see Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982).

[294] *See* Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878-79 (Dec. 12, 1991) (making a "generalized finding" that Congress' viewed water pollution as intrinsically related to health and welfare).

[295] *See, e.g.*, White Mountain Apache, 448 U.S. at 145-52 (holding state tax laws preempted as to on-reservation timber harvest activities by non-Indians in the face of comprehensive federal and tribal timber management program activities taken pursuant to Indian forest legislation and federal agency regulations).

addressing the state-like role of tribal governments.[296] In *Nance v. EPA*,[297] numerous mining interests including the Crow Tribe[298] unsuccessfully challenged EPA's 1977 approval of the Northern Cheyenne Tribe's air quality redesignation of its reservation, which is adjacent to the Crow Reservation.

Nance confronted and rejected a veritable barrage of legal arguments, loosely grouped around agency authority, substantive matters, and administrative procedure. One set of authority arguments raised due process and related constitutional concerns over the possible extraterritorial impacts of the Tribe's redesignation on property owners and air pollution emitters near but not on the Northern Cheyenne Reservation.[299] The Ninth Circuit reframed the extraterritorial issue as the "dumping" of pollutants on the reservation from off-reservation lands, and rejected the constitutional arguments as inconsistent with federal Indian law's characterization of tribes as possessing aspects of territorial sovereignty comparable to states. Inherent tribal sovereignty was the independent subject matter authority necessary for constitutional federal program delegation.[300] Non-Indian rights were protected from arbitrary tribal actions by the checks contained in statutory and administrative standards and procedures for redesignations.[301] Noting neither the States of Montana nor Wyoming challenged EPA's action, the court dismissed the companies' assertion that EPA's decision infringed state sovereignty, effectively placing tribal-state cross-boundary issues squarely within the realm of state compromises intrinsic in a federalist system.[302]

The industry petitioners also challenged EPA's statutory authority to treat the Northern Cheyenne Tribe as if it was Montana. The petitioners pointed to the CAA's

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[296] A few years earlier, EPA's authority to treat tribes as states under the CAA was challenged, but the court dismissed it as untimely. *See* Sierra Club v. EPA, 540 F.2d 1114 (D.C. Cir. 1976), vacated and remanded, 434 U.S. 809 (1977) (dismissing as unripe claims over tribal redesignation authority in the absence of an actual tribal redesignation proposal).

[297] 645 F.2d 701 (9th Cir. 1981).

[298] Nance is notable for a number of "firsts." It was occasioned by the first tribal exercise of a state-like role in federal program implementation, which was also the Nation's first PSD redesignation. *See supra* text accompanying note __,. It was the first reported Indian country environmental law case addressing the state-like role of tribal governments, and the first sanctioning EPA's policy decision to treat tribes like states. It was also the first time an Indian tribe challenged another tribe's governmental decision to protect human health and environmental quality through implementation of federal environmental programs in partnership with EPA. Due to their proximity, Crow economic interests and Northern Cheyenne's environmental interests would clash again. *See* Clair Johnson, *Conservationists, Tribes Urge Caution In Coalbed Methane Development*, Billings Gazette, January 5, 2004, http://www.billingsgazette.com/index.php?display=rednews/2004/01/05/build/state/30-cbmboom.inc (noting the Northern Cheyenne Tribe's objections to coalbed methane development on environmental grounds, and the Crow Tribe's concern but also interest in such development).

[299] Presumably because the challengers were off-reservation entities, the question whether the Tribe had inherent authority over nonmember polluters on the reservation was not raised.

[300] Nance, 645 F.2d at 714-15 (citing United States v. Mazurie, 419 U.S. 544, 556-57 (1975)).

[301] *Id*.

[302] *Id*. at 716. The court's analysis focused on the off-reservation impacts of the Tribe's redesignation, and referred to no argument presented that states and not tribes had regulatory authority over nonmember activities on the Northern Cheyenne Reservation.

general reference to states' primary air quality authority,[303] but strangely, did not apparently raise the more compelling question posed by Congress' complete silence on the matter. Relying on standard administrative law principles, the court gave "great weight" to EPA's interpretation that the (silent) statute did not clearly express a congressional intent to "subordinate the tribes to state decisionmaking."[304] The court found EPA's view consistent with the backdrop of tribal sovereignty and traditional notions of constrained state authority on Indian reservations, and noted Congress explicitly authorized tribal redesignations in the 1977 CAA amendments.[305] *Nance* thus affirmed a federal environmental regulatory structure envisioning states and Indian tribes standing on "substantially equal footing."[306]

The court's treatment of the petitioners' substantive and procedural arguments also reflected a judicial affirmation of EPA's approach according tribes' state-like status in federal environmental programs.[307] The court summarily brushed aside petitioners' protestations of inadequate tribal analysis of a range of broadly related concerns, concluding without discussion that the Northern Cheyenne Tribe considered the required

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[303] *See* 42 U.S.C. § 7407(a) (providing that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising the State").

[304] Nance, 645 F.2d at 714.

[305] *Id*.

[306] *Id*.

[307] *Id*. The Ninth Circuit noted EPA's regulations, which the court upheld, granted tribes "the same degree of autonomy to determine the quality of their air as was granted to the states" by the CAA. *Id*. One significant impact of tribes' state-like status was that tribal program decisions generally should not be invalidated for reasons that would not invalidate a similar state program decision. Even where a statute contained provisions governing objections by affected jurisdictions, EPA would not subject tribal decisions to stricter scrutiny simply because states or non-Indians objected. *See, e.g.,* Redesignation of the Yavapai-Apache Reservation to a PSD Class I Area: State of Arizona; Dispute Resolution, 61 Fed. Reg. 56,450 (Nov. 1, 1996) (explaining a state-invoked dispute resolution process in which EPA rejected the state's demand for a more extensive tribal analysis on the impacts of the tribe's proposed air quality redesignation); Administrator, State of Arizona v. EPA, 151 F.3d 1205 (9th Cir. 1998) (upholding EPA's approval of the Yavapai-Apache redesignation).

factors.[308] The court treated as harmless a procedural irregularity,[309] acknowledging in part the Tribe's interest in a fair and prompt resolution of the controversy.[310]

In addition to tribal state-like status, *Nance* also implicitly endorsed EPA's view of the federal trust responsibility, though it did so in a backhanded way. The Crow Tribe viewed Northern Cheyenne's redesignation request as a threat to development of its mineral resources, which were tribal assets clearly subject to the federal government's "full" fiduciary relationship with tribes.[311] Curiously, the federal agency charged with that fiduciary duty and possessing substantial experience with Indian mineral development—the Department of the Interior—suggested EPA discharge DOI's obligation to the Crow Tribe by considering the Northern Cheyenne's redesignation and possible impacts on the Crow Tribe as "interrelated actions."[312] EPA declined DOI's invitation on state-like principles.[313] EPA reviewed tribal governmental regulatory

[308] Nance, 645 F.2d at 712. This conclusion alone represented an invaluable victory for tribes and EPA. From its inception, federal Indian law's characterization of tribes as unique in the federalist system resulted in rules not used in similar conflicts not involving tribes. At a basic level, EPA's 1980 Indian Policy was a special response to tribes' unique status. But the Policy's treatment of tribes as states rejected a tribal-state double standard for delegation and operation of federal programs. EPA would generally hold tribal programs to the same standards and requirements for state programs, including provisions for resolving cross-boundary conflicts. Nance supported this view by affirming EPA's acceptance of the Tribe's redesignation analysis in the face of public calls for more detailed and qualitative explanations. EPA's respect for the Tribe's legislative determinations on the proper balance between environmental protection and economic development accorded with Congress' intent in the 1977 CAA amendments. *See* Administrator, State of Arizona, 151 F.3d at 1211 (holding 1977 CAA amendments set a "relatively low threshold" for state and tribal redesignation analyses precluding EPA's authority to override local value judgments on air quality).

[309] The court was not troubled when EPA overlooked its regulatory requirement that the Department of the Interior approve tribal redesignation requests. Nance, 645 F.2d at 709-10.

[310] In context, the court's concern for prompt resolution was interesting. EPA made the Tribe's redesignation effective immediately upon approval, saying it wished to avoid prejudice to the Tribe and allow EPA to respond to a pending preconstruction permit request. Although the court observed those reasons were likely pretextual, *see id*. at 709 (observing EPA "neglected to mention what was undoubtedly its primary motivation: to assure that the redesignation was effective prior to enactment [of the 1977 CAA amendments] and thus remained effective under the amendments"), it upheld EPA's approval nonetheless.

[311] *See* Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. Rev. 327, 332-33 (1995) (discussing three "tiers" of federal trust responsibility).

[312] Nance, 645 F.2d at 710-11 (citing a 1977 letter from James A. Joseph, DOI Undersecretary, to EPA Administrator Douglas Costle raising concerns of the Crow Tribe and stating "[i]nasmuch as EPA has the necessary technical expertise to review the impacts on both Tribes as interrelated actions, this Department feels that the United States' obligation to the Tribes would best be satisfied by such review").

[313] Nance, 645 F.2d at 710-11 (citing a 1977 letter from Costle to Joseph). EPA inferred DOI believed EPA could disapprove or impose conditions on the Northern Cheyenne redesignation if necessary to prevent significant impacts on Crow mineral interests. Because EPA's review role was statutorily circumscribed, EPA could not impose additional requirements in the name of the federal trust responsibility. It seems more likely, however, that DOI was thinking of the government's more general trust responsibility to tribal interests. Federal accountability for trust violations has historically been limited to federal mismanagement of economic assets like mineral resources, *see* United States v. Navajo Nation, 537 U.S. 488 (2003), timber resources, *see* Mitchell v. United States, 463 U.S. 206 (1983), and cash, *see* Seminole Nation v. United States, 316 U.S. 286 (1942). The proposition that implementation of a federal environmental program

requests neither broader nor narrower than other governments' requests.[314] The Crow Tribe did not submit an official objection available to invoke an expanded review process.[315] And, EPA respected the Northern Cheyenne Tribe's consideration and determination the redesignation would have insignificant impacts on the Crow Tribe.[316]

The Crow Tribe argued EPA's approval of Northern Cheyenne's redesignation was arbitrary and capricious because it violated the federal trust obligation to Crow. The Ninth Circuit agreed that EPA possessed a trust responsibility to Crow, as well as to Northern Cheyenne,[317] thus confirming the 1980 Indian Policy's acceptance of the federal trust obligation in the context of environmental program implementation on Indian reservations. But the court found EPA's obligation satisfied by statutorily required procedures for public participation, at least in the face of no official Crow objection, and the Agency's substantive conclusion that the mining at Crow would not be regulated by the redesignation.[318] Thus, the Crow Tribe's economic interests[319] gave way to the Northern Cheyenne Tribe's sovereign on-reservation public health interests,[320] rationally articulated though a federally prescribed and supervised process.

Despite the Crow Tribe's case-specific loss, *Nance* was a substantial victory for Indian tribes and EPA. It directly validated EPA's bold 1974 experiment according tribes a state-like regulatory role in the federal PSD program. It also indirectly confirmed the Agency-wide policy direction announced in the 1980 Indian Policy. With clear judicial deference to the Agency's reconciliation of federal Indian and environmental policies, EPA was primed to begin implementation in earnest.

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could create an actionable trust responsibility violation because it decreased the value of tribal natural resources is tenuous at best.

[314] EPA extended this limited authority argument to reject state and non-Indian suggestions EPA consider tribal regulatory impacts on non-Indian interests not affected by redesignation. See Administrator, State of Arizona, 151 F.3d 1205 (upholding Yavapai-Apache Tribe's redesignation over state objections).

[315] EPA's approach here—asking neither more nor less from tribes than states—was a cornerstone of the 1980 Indian Policy protecting tribal program decisions from complaints on factors other than mandatory ones. So EPA appropriately declined disapproval authority on the Crow Tribe's economic interests, but surely EPA could have facilitated informal meetings on the two tribes' interests and concerns, perhaps leading to proposal amendments. In this sense EPA arguably overlooked its policy commitment to government-to-government tribal relations, albeit for the policy-related reason of respecting tribal environmental program decisions over tribal economic interests.

[316] Nance, 645 F.2d at 710-11.

[317] *Id*. at 711.

[318] *Id*. A number of Nance's conclusions rested on EPA's view that PSD requirements for major sources did not include fugitive emissions resulting from strip mining, which was the basis for the Crow Tribe's concern. *See id*. at 706-07.

[319] *See* FEDERAL AND STATE INDIAN RESERVATIONS AND TRUST AREAS 283 (U.S. Dept. Commerce, 1994) (noting the Crow Tribe's primary revenue sources in the early 1970s as surface leases for coal mining).

[320] Interestingly, the Northern Cheyenne Tribe also owned mineral resources and derived revenue from their development. *See* FEDERAL AND STATE INDIAN RESERVATIONS at 283 (noting the majority of the Northern Cheyenne Tribe's annual income in the early 1970s came from mineral development). The possibility that the Tribe's redesignation might also affect its own development activities demonstrated the Tribe's balancing of the community's economic and public health interests, a quintessential aspect of governmental sovereignty in the environmental arena.

C. A More Deliberative Program Development Approach

The Nation's first PSD redesignation occurring in Indian country portended increasing tribal governmental interest in air quality assessment and management.[321] But, although the 1977 CAA amendments authorized tribal redesignations, tribes were not eligible for federal grants for studying the causes, effects, and control of air pollution under section 103 of the CAA.[322] Nonetheless, in the spirit of the 1980 Indian Policy's commitment to assist tribes in assuming a governmental environmental protection role s despite existing legal barriers, Region VIII awarded the Southern Ute Tribe a section 103 grant.[323] The Region and the Tribe agreed to coordinate their air quality efforts with the Tribe's immediate neighbor to the south, the Jicarilla Tribe, and EPA Region VI. The Jicarilla Tribe asked Region VI for a grant similar to Southern Ute's grant, and Region VI in turn requested EPA Administrator Anne Gorsuch delegate tribal grantmaking authority to it under CAA section 103.[324]

In a one-page memorandum lacking any reference to the CAA's silence on tribal 103 grants, federal Indian law, or the 1980 Indian Policy, Gorsuch's staff summarily recommended she approve the delegation request.[325] The only caveats suggested were the unremarkable conditions that grants be limited to tribal projects within the scope of section 103 and tribal grantees follow the requirements of general grant regulations.[326] Gorsuch, a Colorado lawyer then on the job four months, appeared sympathetic to the Tribe's request, but balked at the general delegation.

Through her Chief of Staff John Daniel, Gorsuch expressed concern "that we currently have no overall picture of the requirements for Tribal lands or of all Indian Tribes in this area, and no overall strategy for dealing with these needs within the available resources or statutes."[327] Thus, before any further air pollution control grants were awarded, Gorsuch desired "a thorough evaluation of the need, an assessment of the

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[321] *See* AMBLER, *supra* note __, at 184-85 (reporting "a flood of tribal initiatives to protect research airsheds" following the Northern Cheyenne's success in Nance).

[322] *See* Pub. L No. 95-95, section 101(b) (codified at 42 U.S.C. § 7403(b)(3) (defining local air pollution control agencies eligible for federal grants). In 1990, Congress defined tribes as air pollution control agencies eligible for 103 grants. *See* Pub. L. No. 101-549, section 107(a)(3), (b) (codified at 42 U.S.C. § 7602(b)(5) (definition of air pollution control agency) and 7602(r) (definition of Indian tribe)).

[323] *See* EPA-1981-2 Memorandum from Dr. John P. Hortch, Assistant Administrator for Administration, to Administrator Anne Gorsuch (Sept. 23, 1981) (on file with author) (seeking authorization for a tribal grant to the Jicarilla Tribe for coordinated efforts with the Southern Ute Tribe under a previously awarded 103 grant).

[324] *Id*.

[325] *Id*. The summary nature of the memorandum's recommendation may have been due to pressing time constraints. The memo reported the availability of sufficient FY-81 funds for the Jicarilla request, but noted the Region's access to the funds would close seven days later. *Id.*

[326] *Id*.

[327] EPA-1981-3 Memorandum from John E. Daniel, EPA Chief of Staff, to William Hedeman, Director, Office of Federal Activities (October 7, 1981) (on file with author) (relaying the Administrator's reaction to Region VI's (incorrectly referred to as Region VIII) request for delegation or tribal air grant making authority).

available resources, and the development of some of the options for most equitably and cost/effectively apportioning those resources and assuming legal authority."[328] To that end, Gorsuch tasked the Director of the Office of Federal Activities, William Hedeman, with creating a "taskforce to assess the air pollution control resources and legal requirements of the various Native American Indian Tribes and their lands."[329]

Gorsuch's Task Force could be seen as a media-specific action implementing the more general agency-wide 1980 Indian Policy. The Task Force arose in the context of a tribe's narrow request for available funds set aside for a particular aspect of EPA's air program. The Daniel memo did not refer to the 1980 Indian Policy, and so the new Administrator's observations of no overall picture or overall agency strategy might have been limited to technical aspects of the air program rather than expressing some general discomfort with the 1980 Indian Policy. The Task Force's assignment was surely focused on tribal 103 grants for baseline monitoring and planning. Yet, Daniel explicitly wondered whether the Task Force's review "should be limited to air pollution programs?"[330]

Daniel made his negative conclusion clear four months later. In March 1982, a new OFA Director, Paul Cahill reported he was forming the Task Force to study "funding options for Indian tribes under the Clean Air Act."[331] Daniel's terse handwritten reply was clear:

> Don't just look at funding issue under CAA. Address funding and delegation issues under all of our statutes. Review: EPA's past Indian Policies; the President's campaign promises; and Adm's [sic] answers to Q's [sic] re Indians at her confirmation. We need a broad look at all these things and considered recommendations for agency-wide policy.[332]

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[328] *Id*. Even before she became Administrator, Gorsuch indicated her belief that such a study was necessary. During her confirmation hearing, Gorsuch was asked whether she supported a policy similar to the 1980 Indian Policy. She evaded the question by claiming only passing familiarity with the 1980 Indian Policy, and asserting a need for a careful study of it in light of all the Agency's programs before making any decisions. *See Nominations of Anne M. Gorsuch and John W. Hernandez, Jr.: Hearing to consider the nominations of Anne M. Gorsuch to be Administrator, EPA, and John W. Hernandez to be Deputy Administrator. Before the S. Comm. On the Environment and Public Works*, 97th Cong. 246, 248 (1981) (questions for Ms. Gorsuch regarding EPA policy toward Indian tribes).

[329] Daniel Memorandum, *supra* note __.

[330] *Id*. And like her assignment to OFA without reference to the 1980 Indian Policy's similar assignment to the Office of Environmental Review (OER), Gorsuch directed the creation of a new taskforce without reference to the Indian Work Group, which addressed these issues in developing the 1980 Indian Policy.

[331] EPA-1982-5 Memorandum from Paul C. Cahill, Director, EPA Office of Federal Activities, to John Daniel, Chief of Staff, EPA Administrator's Office (March 2, 1982) (on file with author). *See also* EPA-1982-4 Memorandum from Leigh Price, EPA Indian Work Group Coordinator, to Paul Cahill, Director, EPA Office of Federal Activities (Feb. 25, 1982) (on file with author) (outlining steps for studying tribal and EPA needs related to air programs).

[332] EPA-1982-5 *Id*. (emphasis in original) (handwritten comments by John Daniel, EPA Chief of Staff). That month OFA prepared a draft plan in response, listing an ambitious timeline for a draft report, Task Force meeting, and final report to the Administrator in less than two months. *See* EPA-1982-6 OFA Draft Plan of Study: EPA Indian Program (March 1982) (on file with author). In fact, it would be fifteen months before EPA completed the study. *See* EPA-1983-4 Administration of Environmental Programs on Indian Lands, EPA Indian Work Group 1983 Discussion Paper, Office of Federal Activities (July 1983) [hereinafter 1983 1983 Discussion Paper] (on file with author); EPA-1983-4 Memorandum from Pasquale

Again, the lack of any mention of the late 1980 Indian Policy in the context of a 1981 call for an agency-wide policy is notable. By title and content, the 1980 Indian Policy purported to be the Agency's overall strategy for Indian reservation program implementation. *Nance*, issued two days before Gorsuch was sworn in as Administrator, directly supported (albeit in a media-specific context) the central tenets of the 1980 Indian Policy. And, at least two of the 1980 Indian Policy's implementation tasks—a review of EPA's existing legal charter for tribal issues, and development of an implementation plan for achieving the Policy's goals within the Agency's resource constraints—arguably made Gorsuch's 1981 requests, as expounded by Daniels in 1982, duplicative.[333]

Gorsuch's requests were not duplicative, however, because EPA never attempted to implement the 1980 Indian Policy. The Policy was adopted just four weeks before Ronald Reagan succeeded Carter as President,[334] and was signed by EPA's Deputy Administrator Barbara Blum, not Administrator Douglas Costle,[335] Over the course of four months, Reagan appointed two Acting Administrators[336] and then Gorsuch, who assumed control of the Agency on May 20, 1981.[337] Gorsuch became familiar with the 1980 Indian Policy during her confirmation process, where both she and at least one

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A. Alberico, Acting Director, Office of Federal Activities, to Josephine Cooper, Special Asst. to the Administrator for the Office of External Affairs (August 15, 1983) (reporting OFA "has completed its assigned study [that] analyzes the Agency's special problems in managing our delegated programs on Indian lands").

[333] *See* 1980 Indian Policy*, supra* note __, at 7-8 (describing similar implementation tasks). Hence, Gorsuch could naturally have declined to act on the Region's delegation request until the agency-wide review and/or implementation plan assigned to OER by the 1980 Indian Policy were complete. Instead, without reference to that process, Gorsuch essentially assigned these tasks in the air context to OFA.

[334] During the 1980 election and after, Reagan showed little interest in federal management of the environment, which he viewed as unnecessary, burdensome, and an intrusion on local prerogatives. *See* LAZARUS, supra note __, at 99-100.

[335] No statement by Administrator Costle was released when the 1980 Indian Policy was adopted, and in a later interview Costle made no reference to the Policy, *see Costle Interview>Carter Era at EPA, supra* note __, at http://www.epa.gov/history/publications/costle/07.htm, so it is unclear what Costle thought of Blum's solution to the Indian country problem. In that interview, though, Costle expressed his strong confidence in Blum's effectiveness at organizing cross-program agency initiatives addressing complex problems and her positive relationship with the White House, noting President Carter suggested Blum for Costle's Deputy Administrator.)

[336] *See EPA History>Administrators*, at http://www.epa.gov/history/admin/index.htm (last updated Dec. 13, 2004) (listing Steve Jellinek as Acting Administrator from January 20, 1981 to January 25, 1981, and Walter Barber, Jr. as Acting Administrator from January 25, 1981 to May 19, 1981). Barber, Gorsuch's immediate predecessor, was clearly aware of the 1980 Indian Policy. *See* EPA-1981-1 AMERICANS FOR INDIAN OPPORTUNITY, HANDBOOK OF FEDERAL RESPONSIBILITY TO INDIAN COMMUNITIES IN AREAS OF ENVIRONMENTAL PROTECTION AND INDIVIDUAL HEALTH AND SAFETY 85 (1981) [hereinafter AIO HANDBOOK] (citing a letter from Walter Barber, Jr., EPA Acting Administrator, to AIO (April 13, 1982) (including the 1980 Blum Memorandum as EPA's "Indian Policy").

[337] Press Release, EPA, Anne M. Gorsuch Sworn in as EPA Administrator (May 20, 1981), at http://www.epa.gov/history/admin/agency/gorsuch.htm (including biographical information on Gorsuch, including her training and practice as a lawyer). Gorsuch was also a former state legislator known for her dislike of federal intrusions on local matters like environmental protection and her sympathy for industry complaints of regulatory burdens. *See* LAZARUS, *supra* note __, at 101.

senator implied the 1980 Indian Policy was likely to be reevaluated and perhaps changed by the new Administration.[338]

Political circumstance and institutional instability during administration changes were exacerbated by the relative weakness of the 1980 Indian Policy's implementation provisions. The Policy expressly noted that policy-level aspirations alone were insufficient and committed the Agency to develop an implementation plan. But, two years later the Agency had issued neither detailed guidance nor an implementation plan, so program staff lacked uniform direction when confronted with tribal issues.[339] Nor did the Agency incorporate the Policy's principles into its planning and budgeting processes,[340] leaving inadequate resources for policy implementation.[341]

D. A Growing Tribal Awareness and Interest in Federal Program Roles

Outside the Agency, however, a growing tribal interest in environmental protection and federal management programs took note of EPA's 1980 Indian Policy and echoed its key themes. In 1981, the Council of Energy Resource Tribes, representing 37 resource-rich tribes, adopted a resolution calling for federal delegation to tribes of the same federal programs delegated to states, as well as provision of technical assistance provided to states.[342] In 1981, Americans for Indian Opportunity published a tribal "handbook" describing the responsibilities of several federal departments and over 25 federal agencies for environmental protection and individual safety.[343] AIO's stated objective was to increase tribal management of environmental health impacts associated with development activities,[344] and thus plainly fell in step with EPA's view of tribes as

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[338] *See Nomination of Anne M. Gorsuch, supra* note __, at 246, 248 (reporting Senator Domenici's question whether Gorsuch as EPA Administrator would support a policy "similar" to the 1980 Indian Policy, and Gorsuch's response that she needed to "study it carefully" and "assess it in light of all the Agency's programs" in order to determine "whether policy changes are needed"). Gorsuch did indicate her belief that the government closest to the point of pollution control is best suited to implement regulatory policies. *Id*.

[339] *See* 1983 1983 Discussion Paper, *supra* note __, at 8 (suggesting the lack of guidance was partly why the 1980 Indian Policy "did not exert significant influence on Agency behavior)").

[340] *See* EPA-1983-2 Memorandum from Valdas V. Adamkus, Regional Administrator Region V, to Pasquale Alberico, Acting Director, Office of Federal Activities (July 20, 1983) (on file with the author) (suggesting the Agency's credibility was strained by its failure post-1979 to integrate the 1980 Indian Policy into planning and budgeting cycles) .

[341] *See* EPA-1983-2 Memorandum from Steven J. Durham, Regional Administrator for Region VIII, to Paul Cahill, Director, EPA Office of Federal Activities 2 (February 4, 1983) (on file with the author) (expressing the belief that the Agency's continued difficulties with tribes arose from a lack of resources and clear legal authority).

[342] EPA-1983-2 COUNCIL OF ENERGY RESOURCE TRIBES RESOLUTION NO. 81-7, APPROPRIATE RECOGNITION OF TRIBAL GOVERNMENTS (October 28. 1981).

[343] AIO HANDBOOK, *supra* note __.

[344] *Id*. at 4 (stating "the primary objective of this project is that Indian tribes develop their own systems for incorporating environmental and health concerns in all their decision making processes"). That objective also motivated AIO the following year to publish a directory of federal agency personnel and others familiar with environmental and health issues in Indian country. *See* AMERICANS FOR INDIAN OPPORTUNITY, RESOURCE DIRECTORY IN THE AREAS OF ENVIRONMENTAL PROTECTION & INDIVIDUAL

regulatory partners rather than special interest groups relegated to public participation processes.[345] AIO also offered an important independent verification of a sort for EPA's potentially ethnocentric view of Indian land ethics:

> Indian people not only have a special relationship with the Federal government, but also with the environment. The land, the air, the water, the wildlife, the river and sealife, and the plantlife—all are important to Indian people, not only for esthetic values but also for religious reasons. Indian lands have diminished to a fraction of what they originally were, and these remaining reservations are the only ones for the future. The quality of the environment, then, is extremely important. Indian people cannot sell these lands once they become polluted and move elsewhere. The importance of the environment cannot be thought of in terms of singular issues and actions, but rather as a "whole." This "whole" defines Indian people. Consequently, separation of one ingredient; culture, religion, environment, and development cannot be successfully achieved without adversely affecting reservation and community life.[346]

This introductory tone revealed an additional intention beyond AIO's representation the Handbook was written for tribal leaders. The Handbook called out for increased federal attention to tribal environmental interests. It explicitly asserted the federal trust responsibility extended beyond BIA to every federal agency, and observed matter-of-factly that many agencies had not lived up to that duty.[347] AIO expressed concern that Reagan's deregulation policies favoring increased local control could lull federal agencies into ignoring their special responsibilities to Indian health and reservation environmental quality. And it reminded federal bureaucrats of Reagan's public support of tribal self-determination in a government-to-government relation with the federal government.[348]

More specifically, but still implicitly, the AIO Handbook called on federal agencies to develop official Indian policies guiding their program decisions and actions. AIO specifically and intentionally highlighted the near total absence of official Indian policies in over two dozen federal agencies with trust responsibilities for Indian health and Indian country environments.[349] Of those surveyed, only one agency reported an official policy; the agency was EPA, and the policy cited was the 1980 Blum Memorandum.

HEALTH & SAFETY (Jan. 1982). The Directory was intended in part to assist with developing communication networks between tribes and sister governments, and with environmental experts.

[345] AIO HANDBOOK 84-85 (noting initial EPA grants to tribes for air quality management, tribal plans for pesticide management awaiting EPA approval, the availability of EPA grants for tribal wastewater treatment facilities, and an agreement between EPA and one tribe for enforcement under the SDWA).

[346] *Id*. at 4.

[347] *Id*. at 3.

[348] *Id*.

[349] After the Introduction, the Handbook described each agency through a common template following these headers: Name; Purpose; Specific Indian Impacts; Indian Set-Aside Money; Indian Policy; History; Creation; Other Statutory Responsibilities. Despite nearly unanimous negative response, AIO retained the template's Indian Policy header, listing for each agency (other than EPA) "none," "none specifically," or "no response received." That glaring silence not so subtly suggested federal action.

Beyond simply confirming the existence of at least one federal agency Indian policy, tribal enthusiasm for the content of EPA's 1980 approach could be inferred from the Handbook. The Handbook explicitly envisioned a shared federal-tribal responsibility for environmental protection,[350] which mirrored the cooperative federalism approach. The Handbook's objective of developing tribal environmental management schemes would increase tribal capacity for implementing federal programs. The Handbook also supported EPA's Policy commitments to affirmative tribal outreach, education, and assistance by cautioning EPA that differences in tribal capacity (and interest) could mean that some tribal lands would be well managed while others were left unprotected.[351]

AIO's Handbook meshed nicely with the growing tribal interest in environmental management at this time. Perhaps a "core" of a dozen or so tribes were actively engaged in developing air, water and pesticide programs,[352] and another dozen or more tribes were conducting air and water assessment and inventory initiatives under CAA and CWA grants.[353] These and other tribes had approached EPA "with problems and solutions in virtually every program area."[354] As a result, "virtually every program and every Region with federally-recognized tribes has made some effort to respond to reservation problems."[355]

E. Program Fits and Starts: Lacking a Guiding Principle

But the relative obscurity of the 1980 Indian Policy within the Agency meant that the various Agency responses were reactive program-specific actions taken without

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[350] *Id*. at 3 (suggesting that President Reagan's support for tribal self-determination "places the responsibility for protection of tribal people and their environments directly on the backs of tribal decisionmakers and their trustee, the Federal government–exactly where it ought to be"). The Handbook also described tribal roles available in federal programs for air, solid waste, pesticides, surface water, and drinking water.

[351] *Id*. at 3 (asserting "[t]he trend toward relaxing the Federal government's role in the protection of environment and health areas in favor of local government regulation … can be a very favorable move for the Indian community for those tribes who are ready and able to assume those responsibilities … [o]r it could mean that Indians are left with no protection mechanisms in place"). AIO attempted to stimulate tribal program development with its 1982 Resource Directory, *supra* note __, whose stated objective was establishing communication networks between and among the federal, tribal and state governments.

[352] *See* EPA-1982-4 Memorandum from Leigh Price, EPA Indian Work Group Coordinator, to Paul Cahill, Director, EPA Office of Federal Activities 3 (Feb. 25, 1982) (predicting a small but increasing extent of tribal interest in environmental management if the TAS approach was taken).

[353] *See* 1983 Discussion Paper, *supra* note __, at 10-13 (listing in Tables 1-3 tribes with current air and water initiatives).

[354] *Id*. at 10.

[355] *Id*. Much of EPA and tribal attention up to that point had been in the pesticides area. *Id*. at n. 4. This probably had less to do with the relative risks posed than with the fact that the Office of Pesticide Programs had early congressional authorization to make grants available to tribes, *see supra* text accompanying notes __ to __ [Section III.D.], the comparatively less complex pesticide applicator program, and AIO's pesticide work in the late 1970s and early 1980s, *see* EPA-1983-4 Alberico, *supra* note __, at 4 (indicating the conferences sponsored by AIO were "very successful" in opening EPA-Tribal communication lines and increasing tribal awareness of federal environmental program regulatory roles).

reference to a coherent organizing agency-wide policy.[356] Often, EPA's response was consistent with the broad themes of the 1980 Indian Policy, but on occasion EPA's creative solutions to Congress' silence on Indian country overlooked the governmental status of tribes in a manner undermining tribal sovereignty.

For example, EPA continued to follow what was the impetus for the 1980 Indian Policy and indeed the Agency's entire Indian program: a conclusion that federal Indian law generally limited state civil regulatory jurisdiction in Indian country absent congressional authorization.[357] Contemporary Supreme Court decisions[358] were in accord, as was the recently released seminal treatise on federal Indian law.[359]

The conclusion that states lack civil regulatory jurisdiction absent congressional authorization led necessarily to EPA's continued insistence that states specifically demonstrate authority for Indian lands when seeking program delegations,[360] but none of the federal environmental laws specifically extended state jurisdiction over Indian country. On that analysis, EPA rejected the State of Washington's 1982 request for RCRA interim hazardous waste responsibility throughout the State including Indian reservations.[361] States' limitations were spawning additional difficulties in implementing

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[356] *Cf.* EPA-1983-4 Alberico, *supra* note __, at 3 (explaining a proposed Agency-wide strategy for a coherent Indian program was "[b]ased on past EPA experience in trying to implement Indian policy without a structured follow-through").

[357] *See, e.g.,* EPA Underground Injection Control Program, 47 Fed. Reg. 17,578 (proposed April 23, 1982) (stating "EPA will assume that a State lacks authority"); EPA Rules for State Programs under CWA, SDWA, RCRA, 48 Fed. Reg. 14,149, 14249 (April 1, 1983) [hereinafter State Program Delegation Rules] (stating "in many cases States will lack authority to regulate activities on Indian lands"); EPA-1982-7 Memorandum from Leigh Price, OFA, to Martha Nicodemus, Region VIII Office of Management and Systems (March 10, 1982) (on file with author) (attaching document entitled "Issue: American Indians: Tribal Regulatory Programs Under the Clean Air Act," and asserting states have no authority on reservations except pursuant to "a special jurisdictional statute").

[358] *Cf.* Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982) (preempting state tax on non-Indian contractor building reservation Indian school in light of pervasive federal role in Indian education), *and* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (preempting state hunting and fishing regulation of non-Indians on reservation in light of joint federal-state wildlife management program), *with* Rice v. Rehner, 463 U.S. 713 (1983) (upholding state regulatory authority over tribal reservation liquor sales pursuant to an explicit congressional authorization).

[359] COHEN, *supra* note __, at 379 (stating that "a federal law establishing a federal-state program should not be held to extend state jurisdiction in Indian country absent a clear statutory purpose to override conflicting Indian rights").

[360] *See, e.g*., FR-1983-2 State Program Delegation Rules, 48 Fed. Reg. at 14,206 (requiring states desiring delegation of the SDWA UIC program on Indian lands to state affirmatively its authority supported by legal analysis from the Sate Attorney General); *id*. at 14217 (same for CWA dredge and fill permit program); *id*. at 14179-80 (same for CWA point source discharge permit program). These requirements implicitly incorporated EPA's earlier statements in other contexts that EPA approvals of state programs did not include Indian country authority unless expressed explicitly.

[361] *See* 48 Fed. Reg. 34,954. Washington's required analysis of reservation authority asserted simply that Congress expressed in RCRA a preference for state over federal implementation and made no exception for Indian reservations. In contrast, EPA interpreted Congress' silence as failing specifically to authorize state implementation on reservations. Since Washington offered no other basis for its assertion of authority, it failed to meet EPA's delegation requirements, and thus EPA denied the request. Three months after EPA's 1984 Indian Policy issued, the Ninth Circuit Court of Appeals found EPA's action and its interpretation of RCRA reasonable. *See* Washington, Department of Ecology, 752 F.2d 1465.

Congress' cooperative federalism model in other RCRA programs,[362] as well as the SDWA's underground injection program,[363] the CAA's national standards implementation program,[364] and CERCLA's hazardous substance response program.[365]

On the other side of the issue, EPA continued to acknowledge the status of tribes as limited sovereign governments, engaging in discussions across programs and with the Indian Work Group focused on program-specific options for addressing tribes' anomalous status.[366] For the SDWA UIC program, EPA elected direct federal implementation but with "special consideration" paid to tribal governments' views "in keeping with the special 'government to government relationship.'"[367] In addition to direct federal implementation, EPA contemplated a regulatory role for tribes akin to states' roles in evaluating options for CERCLA and the CAA; these deliberations appear to be the first times EPA characterized its approach as treating tribes as it treats states, the foundation for the common reference to "treatment as a state" or "treatment in substantially the same manner as a state."[368]

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[362] See State Program Delegation Rules, 48 Fed. Reg. at 14,249 (addressing whether the regulatory prohibition on state applications for partial RCRA programs barred states unable to show jurisdiction on Indian reservations). In a 1982 report on solid waste management on reservations, EPA noted high rates of noncompliance in Indian country and suggested tribal solid waste management lagged behind states and municipalities in part because states' lack of authority hindered tribal participation in state plans. EPA-1982-2c SOLID WASTE MANAGEMENT ON INDIAN RESERVATIONS 1-3 (Aug. 1982). As early as 1980, RCRA's silence on tribal access to federal funds set aside for state solid waste management activities resulted in tribal-state litigation. *See* EPA-1985-8 Memorandum from Deborah W. Gates, Asst. Regional Counsel, to Charles Findley, Director, Hazardous Waste Division 12 n. 14 (Nov. 1, 1985) (on file with author) (noting Lummi Indian Tribe v. Hallauer, 8 Indian L. Rptr. 3001 (W. Wash 1980), a suit by the Lummi Tribe seeking release of state-administered EPA funds for construction of a reservation sewer system).

[363] *See* EPA-1982-1 EPA Underground Injection Control Program, 47 Fed. Reg. 17,578 (proposed April 23, 1982) (raising issue whether EPA, in directly implementing the UIC program on Indian lands, would be required to follow certain technical requirements in every case or would be able to exercise the flexibility Congress provided to state programs in recent SDWA amendments).

[364] *See* EPA-1982-7 Memorandum from Leigh Price, Office of Federal Activities, to Kathleen Bennett, Asst. Administrator for Air, Noise and Radiation 1 (July 10, 1981) (on file with author) (exploring options for amending the CAA to address the shortcoming of State Implementation Plans as to Indian lands).

[365] *See* EPA-1982-3c Memorandum from William N., Hedeman, Jr., Director, Office of Emergency and Remedial Response, to Anne Gorsuch, EPA Administrator (Dec. 6, 1982) (on file with author) (noting CERCLA's 1980 provision requiring certain assurances by states before Superfund money could finance remedial action was problematic for releases on Indian lands where states generally lack jurisdiction).

[366] *See, e.g.,* Hedemen, *supra* note, at __ (discussing options for tribal roles under CERCLA); EPA-1982-7 Price, *supra* note __ (discussing options for tribal roles under CAA); Underground Injection Control proposal, *supra* note __, at __ (promising to give special attention to tribal governments' views on federal program implementation).

[367] State Program Delegations Rule, 48 Fed. Reg. at 14,190. As an interim step toward tribal program assumption, federal DI was also consistent with the 1980 Indian Policy, and with EPA's view of the trust responsibility. *See* EPA-1985-8 Gates, *supra* note __ (asserting that Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982) illustrated that federal trust principles require, where several reasonable policy choices exist, the Agency select the one that is in the best interest of the tribe).

[368] *See* EPA-1982-7 Price, *supra* note __ (attaching a proposed section 110(f)(1) of the CAA, providing tribes may file notices of intent "to act as a State" and after EPA approval the "tribal government submitting [an implementation plan] shall be deemed a State"); Hedemen, *supra* note __, at 3 (listing under

EPA rejected the TAS option in the non-regulatory remedial CERCLA context,[369] but adopted it for the CAA's regulatory programs.[370] EPA persuaded the White House to include specific TAS provisions within the draft intended to be the President's proposal for CAA reauthorization in the summer of 1981.[371] When the Administration decided not to propose a CAA bill, Gorsuch promised her support if tribal representatives could obtain TAS amendments in committee.[372]

Not all of EPA's actions during this time were consistent with the 1980 Indian Policy however. EPA wholly ignored the governmental status of tribes in treating tribes "as any other entity" under CERCLA.[373] Unlike the UIC program, EPA made no promise of special consideration for tribal interests, and more surprisingly, required tribes obtain from states certain assurances of responsibility for sites on Indian lands in order to

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"Policy Considerations" the question "Should Native American tribes be treated as States?"). The TAS approach arguably was conceived in the 1974 PSD Rule that began the Agency's Indian Program, *see supra* text accompanying notes __-__, [Section III.B.] but the phrase "treatment as a state" did not become part of the Agency's regular vernacular until after Congress added explicit TAS provisions to CERCLA in 1986, *see* Pub. L. No. 99-499, Title II, § 207(e), 100 Stat. 1706 (Oct. 17, 1986) (codified at 42 U.S.C. § 9626), and the SDWA, *see* Pub. L. 99-339, Title III, § 302(a) 100 Stat. 665 (June 19, 1986) (codified at 42 U.S.C. § 300j-11. In 1981, the Nance court did not use the TAS phrase but noted that EPA's PSD regulations put tribes on "substantially equal footing" with states. 645 F.2d at 714. A decade later, EPA dropped the phrase in favor of "treatment in substantially the same manner as a state," reporting some tribal dissatisfaction with being referred to as "states". *See* Indian Tribes; Eligibility for Program Authorization, 59 Fed. Reg. at 64,339.

[369] Hedemen, *supra* note __, at 7 (signature of John Daniels indicating Gorsuch's election to treat tribes "as any other entity" is treated under CERCLA); *accord* EPA-1982-10 Memorandum from Joan LaRock, Program Analyst, Office of Management Systems and Evaluation, to Joseph Foran, Deputy Chief of Staff 1 (Dec. 30, 1982) (on file with author) (arguing that federal case law precluded treatment of tribes as states under CERCLA). Four years later Congress would directly authorize TAS under CERCLA. *See supra* note __.

[370] The National Commission on Air Quality supported amending the CAA so EPA would have explicit authority to delegate program responsibilities to tribes for air quality management coordinated with adjacent state programs. *See* EPA-1982-7 Price, *supra* note __, at 1.

[371] *See* EPA-1982-8 Memorandum from Leigh Price, OFA, to Pat Alberico, OFA (April 7, 1982) (describing congressional interest in Indian issues related to the CAA, and the development of TAS provisions). In 1990, Congress added an explicit TAS provision to the CAA. *See* Pub. L. No. 101-549, Title I, §§ 107(d), 108(i) 104 Stat. 2464 (Nov. 15, 1990) (codified at 42 U.S.C. § 7601).

[372] *See* EPA-1982-8 Price, *supra* note __. Congress ultimately did not consider a bill for CAA reauthorization in 1982.

[373] Hedemen, *supra* note __, at 7 (stating the position of EPA's Office of Emergency and Remedial Response for treating tribes as any other entity under CERCLA). There was intra-agency disagreement over this approach. *See* EPA-1982-9 Memorandum from Paul C. Cahill, Director, Office of Federal Activities, to Administrator Anne Gorsuch (Dec. 29, 1982) (on file with author) (stating the Office of Federal Activities' recommendation that EPA treat tribes and Indian sites on a case by case basis since "fixed solutions are rarely likely to be appropriate in every circumstance due to wide variations between reservations, tribes and tribal/state relations," and noting OERR's differing recommendation); EPA-1982-10 LaRock, *supra* note __ (stating the Office of Management Systems and Evaluation's recommendation that EPA treat tribes and Indian sites on a case by case basis, and noting OERR's differing recommendation).

access the federal Superfund for site cleanup.[374] EPA justified this requirement in part by noting hazardous substance releases and their effects are not strictly limited to Indian lands. EPA also repeated this uncharacteristic emphasis on state interests in the UIC program.[375] One CAA option EPA contemplated (but rejected) was to support legislation offering tribes a window of time (two to four years) to assume regulatory responsibilities, leaving states with the express authority to do so where tribes failed or elected not to seek program delegation.[376]

Despite the overall tenor of these agency program-specific responses as consistent with the 1980 Indian Policy principles, they were problematic. The lack of a coherent organizing policy direction necessarily presented the risk of contrary or conflicting program actions. Compounding that risk was the Agency's apparent failure to communicate actions taken across programs so that other agency components would have the benefit of those examples.[377] Lack of information spawned further inconsistencies between regions and programs, resulting in confusion for tribes and those subject to regulatory programs.[378] Confusion, unpredictability and the Agency's failure to institutionalize the 1980 Indian Policy negatively affected the Agency's credibility on

[374] Hedemen, *supra* note __, at 4. Rather than a rejection of the 1980 Indian Policy's central tenet, this option was conceived to get around CERCLA's requirement that EPA obtain certain state assurances for site maintenance in order to access the Superfund for site remediation. *See* § 104(c)(3), 42 U.S.C. § 9604. EPA noted this approach was problematic since "states generally lack jurisdiction over [Indian] lands," *id*. at 2, but none of the commenting offices explicitly grappled with the logical question whether EPA then had authority to accept state assurances for such sites.

[375] *See* Underground Injection Control Program, 47 Fed. Reg. 17578, 17,579 (April 23, 1982) (proposed rules) (expressing concern that differences in state and federal well requirements might create undue burdens on oil and gas producers); State Program Delegation Rules, 48 Fed. Reg. at 14,190 (listing as one factor affecting EPA's decision to provide alternative UIC program requirements for Class II wells on Indian lands "consistency" between alternate program and "any program in effect in an adjoining jurisdiction").

[376] EPA-1982-7 Price *supra* note __, at 4. This window option, transferring Indian country jurisdiction to states after a short period of tribal inaction, reappeared as an option for an agency-wide policy in the 1983 1983 Discussion Paper. Both of the Indian organizations EPA consulted on the 1983 Discussion Paper objected strongly to any transfer of jurisdiction to states without tribal consent. Such an approach, they argued, was inconsistent with the Nation's historic relations with tribes, antithetical to Reagan's call for a national policy of self-determination, and likely to result in tribes developing ineffective "paper programs" in order to hold their place. *See* EPA-1983-2 Letter from Wilfred Scott, Chairman, Council of Energy Resource Tribes, to Paul C. Cahill, Director, Office of Federal Activities 3 (March 25, 1983) (on file with author); EPA-1983-2 Letter from Philip S. Deloria, Director, Comm'n on State-Tribal Relations, to Paul C. Cahill, Director, Office of Federal Activities 2 (March 23, 1985) (on file with author).

[377] EPA-1983-2 Memorandum from Jane B. Werholtz, Region VII Indian Coordinator, to Paul C. Cahill, Director, Office of Federal Activities (January 26, 1983) (suggesting that a lack of intra-agency communication on agency responses to tribal issues had led to a "body of interim Indian policy" of which the Regions are not aware).

[378] *See* 1983 1983 Discussion Paper, *supra* note __, at 8 (observing that consistency problems between regions and offices stemming from the lack of detailed agency-wide policy and guidance have contributed to confusion for tribes and the regulated community).

Indian matters,[379] and put pressure on EPA to take real action implementing any future agency-wide policy.[380]

Additional pressure came from the Chief Executive. In January 1983, Reagan issued an Indian Policy Statement pledging the Executive Branch's respect for tribal self-government and a commitment to dealing with tribes on a government-to-government basis.[381] Reagan derided the Nation's historic practice of federal employees implementing federal Indian programs animated by federal decisions lacking tribal input. He noted that tribal governments knew their people and issues and priorities better than the federal government, and thus should have "primary responsibility" for meeting their needs.[382] Reagan imposed on federal agencies the goals of encouraging tribal self-government and decreasing federal interference, "restor[ing] tribal governments to their rightful place among the governments of this nation."[383]

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[379] *See, e.g.,* EPA-1983-4 Alberico, *supra* note __, at 6 (asserting the Agency's need to show implementation results "in order to regain credibility and offset the skepticism generated by past, unimplemented policy efforts"); [EPA-1983-2 1983 Discussion Paper Comments] Werholtz, *supra* note __ (implying Region VII elected to not share the draft 1983 Discussion Paper with its tribes because of its similarity to the 1980 Indian Policy, for which tribes were still awaiting implementation).

[380] *See, e.g.,* EPA-1983-6 Memorandum from Josephine S. Cooper, Ass't Admin for External Affairs, to Ass't Administrators et al. (Dec. 22, 1983) (on file with author) (forwarding draft Operating Year Guidance for fiscal years 1985 and 1986 that asserted EPA's past Indian efforts were ineffective because of a lack of "consistency, focus, and national direction"); EPA-1983-3 Alberico, *supra* note __, at 3 (expressing concern the Agency will lose credibility with tribes and others "if we repeat what we did in 1980, that is, issue a policy that is not seriously and expeditiously implemented to bring tribal programs on line"); EPA-1983-2 Memorandum from Valdus V. Adamkus, Regional Administrator Region V, to Paul C. Cahill, Director, Office of Federal Activities (January 24, 1983) (on file with author) (asserting EPA's "credibility will remain tenuous until we have institutionalized that commitment by incorporating Indian concerns into our Agency's internal processes, such as the Annual planning and budgeting process"). *See also* COUNCIL OF ENERGY RESOURCE TRIBES, ANALYSIS OF EPA INDIAN POLICY (October 1984) (noting tribes have long awaited a "true" Indian policy from EPA).

[381] *Statement on Indian Policy*, 1 Pub. Papers 96 (January 24, 1983). That same month Reagan created a Presidential Commission on Indian Reservation Economies, whose charges included identifying and recommending changes to address "existing federal legislative, regulatory and procedural obstacles to the creation of positive economic environments on Indian reservations." Exec. Order 12,401, 48 Fed. Reg. 2309 (Jan. 14, 1983). EPA could have easily perceived the regulatory uncertainty over which governments had environmental authority in Indian country as one significant obstacle to large scale reservation development. *Accord* REPORT ON RESERVATION AND RESOURCE DEVELOPMENT AND PROTECTION, *supra* note __, at 12, 25 (noting jurisdiction as an obstacle to reservation development, and relatively few instances where tribes were able to enforce tribal laws including environmental codes).

[382] Reagan, *supra* note__, at 96.

[383] Reagan, *supra* note__, at 99. Reagan's motivation here appeared clearly to be encouraging tribes to become economically self-sufficient, thus reducing dependence on the federal fisc. But he noted that the lack of tribal administrative and regulatory infrastructure could hinder tribal natural resource development. *Id*. at 98. That observation suggested EPA's TAS approach could contribute (albeit indirectly) to economic development on reservations, thus striking an additional chord in common. *Cf* EPA-1983-8 Memorandum from Leigh Price, Coordinator, Indian Work Group, to Paul Cahill, Director, Office of Federal Activities 4 (Feb. 25, 1983) (on file with author) (noting an example of one tribe's moratorium on major resource projects pending development of tribal management programs).

Reagan's themes meshed naturally with the core aspects of EPA's Indian program.[384] EPA shared the President's desire to increase tribal input and participation in federal program administration. Reagan referred to the similar but unfulfilled promises of earlier administrations, reminiscent of EPA's failed 1980 Indian Policy. Like Reagan, EPA also expressed a desire for federal program delegation to tribes. Importantly, Reagan referred several times to potential tribal roles by noting similar state roles, thus implicitly endorsing EPA's TAS approach.[385] More generally, Reagan's commitments resounded nicely against the backdrop of EPA's core value of local control as envisioned by the cooperative federalism model.

Beyond the affirming content, the timing of Reagan's statement was fortuitous for EPA. While not an explicit mandate for federal agencies to develop Indian policies, the Statement surely reflected the President's expectation that agencies consider the issues in the context of their substantive mandates. And, at that moment, EPA was nearing completion of a two-year program-wide study of these very issues, ultimately enabling it to respond comprehensively to the President within six months.[386]

F. The 1983 Discussion Paper on EPA Program Administration on Indian Reservations

During her confirmation in May 1981, Administrator Anne Gorsuch indirectly promised Congress the Agency would conduct a thorough study of Indian issues before making or affirming any agency-wide Indian policy.[387] Ten months later Gorsuch tasked EPA's Office of Federal Activities with conducting that study.[388] In just two months, OFA had a draft in hand,[389] and after a seven-month consultation process with EPA's

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[384] *Accord*, EPA-1983-8 Price, *supra* note __, at 1(concluding Reagan's 1983 Statement paralleled the core concepts of OFA's December 22, 1983 1983 Discussion Paper).

[385] On its face, Reagan's commitment to tribal program delegation appears as an unqualified endorsement of EPA's Indian program. But in context, Reagan's program focus was on federal services like health, education and housing and not on regulatory programs potentially affecting non-Indians.

[386] *Cf.* EPA-1983-9 Memorandum from Pasquale A. Alberico, Acting Director, Office of Federal Activities, to Josephine Cooper, Special Asst. to the Administrator for the Office of External Affairs (Aug. 24, 1983) (on file with author) (noting EPA's 1983 Discussion Paper was one of a few affirmative proposals showing responsiveness to the national policy of tribal self-determination, helping offset criticism of the Reagan administration's poor record of actualizing its rhetoric).

[387] *See supra* text accompanying note __ (re Domenici question to Gorsuch on 1980 Indian Policy).

[388] EPA-1982-5 Cahill, *supra* note __.

[389] *See* EPA-1982-11 Letter from Paul C. Cahill, Director, Office of Federal Activities, to Steve Durham, Regional Administrator Region VIII 1 (undated) (on file with author) (thanking Durham for his May 21, 1982 memorandum covering a draft study entitled "EPA Program Administration on American Indian Reservations, Policy Options)." Interestingly, this initial draft was credited not to the Indian Work Group, but to three EPA staffers: Martha Nicodemus, Region VIII Office of Management Systems and Analysis; Leigh Price, Office of Federal Activities and Indian Work Group Coordinator; and Sue Ellen Harrison, Region VIII Office of Regional Counsel. *Id.* It is clear, however, that the content of the May 21, 1982 draft was drawn directly from the IWG's work in 1980 under Price's leadership, and the 1980 Indian Policy itself. *Cf.* EPA-1980-8 Memorandum from Leigh Price, Coordinator, Indian Work Group, to four IWG members (Sept. 16, 1980) (on file with author) (attaching a proposed policy draft for an upcoming IWG meeting) *and* EPA-1980-1c Memorandum from Barbara Blum, Deputy Administrator, to Regional

Office of Planning and Resource Management and the Office of Intergovernmental Liaison, OFA circulated broadly within the Agency a December 23, 1982 draft report entitled *EPA Program Administration on American Indian Reservations, Policy Options.*[390]

Perhaps this broad internal distribution was designed to increase agency-wide awareness of Indian issues and "buy-in" in light of the 1980 Indian Policy's abject failure to change EPA's culture. Strangely, however, OFA initially sought no input from other federal agencies, the states or tribes.[391] An Agency staffer independently forwarded the Discussion Paper to Indian Health Service, which commented,[392] and following the suggestion of the Chief of Staff[393] OFA sought comments from one Indian organization,[394] and one organization of state and tribal representatives.[395] OFA's decision to seek limited tribal input through representatives chosen by the federal government was reminiscent of traditional federal protocols, but inconsistent with EPA's 1980 Indian Policy encouraging tribal consultation and communication on key federal decisions affecting reservations.[396] OFA's failure was noted by at least one Region,

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Administrators (Dec. 19, 1980) (EPA Policy for Program Implementation on Indian Lands), *with* EPA-1983-1 1983 Discussion Paper. The speed with which the May 21, 1982 draft was prepared was no doubt due in large part to Price's extensive experience with the issues through his leadership on the IWG, and the similarity of the draft to the 1980 Indian Policy and its supporting documents. In that sense, the 1980 Indian Policy played a key role in EPA's Indian program despite its lack of direct implementation.

[390] *See* EPA-1983-3 Memorandum from Pasquale A. Alberico, Acting Director, Office of Federal Activities, to Josephine Cooper, Special Asst. to the Administrator for the Office of External Affairs (July 19, 1983) (on file with author) (reviewing comments on the Dec. 23, 1982 1983 Discussion Paper draft); EPA-1983-2 Attachment, Comments to the 1983 Discussion Paper: Administration of Environmental Programs on Indian Lands (Dec. 23, 1982 Draft) (on file with author) (including comments from eight EPA program offices and eight regional offices).

[391] *See* EPA-1983-4 Alberico, *supra* note __, at 1 (noting distribution of the draft 1983 Discussion Paper to "all major Agency offices and Regions" but only "a small distribution to selected external organizations and Federal Agencies." In fact, OFA did not seek input from any other federal agency, and received comments from the Indian Health Service only because an EPA staffer independently sought IHS input. *See* EPA-1983-2 Memorandum from Virginia Lathrop, Environmental Scientist, EPA State Program Management Section, to Leigh Price, Coordinator Indian Work Group (Feb. 23, 1983) (on file with author) (noting distribution to John Cofrancesco, Chief, Indian Health Service Environmental Management Branch, for comments). Region VIII characterized OFA's failure to discuss EPA coordination with IHS and BIA as a "serious omission" since the existing presence of those federal agencies on reservations could assist environmental program continuity. *See* EPA-1983-2 Durham, *supra* note __, at 2.

[392] See EPA-1983-2 Letter from John A. Cofrancesco, Chief, Indian Health Service Environmental Management Branch, to Virginia Lathrop, Environmental Scientist, EPA State Program Management Section (January 24, 1983) (on file with author) (expressing surprise that the 1983 1983 Discussion Paper nearly ignored other federal agencies with experience in Indian country and failed to consider working with those agencies in some cooperative fashion).

[393] EPA-1983-3 Alberico *supra* note __, at 1.

[394] *See* EPA-1983-2 Scott, *supra* note __ (Commission on State-Tribal Relations).

[395] *See* EPA-1983-2 Deloria, *supra* note __ (Council of Energy Resource Tribes).

[396] Inadvertently, EPA's omission reflected the state-like status of tribes in EPA's view. Shortly after issuing the 1983 1983 Discussion Paper, EPA issued a draft policy on federal-state relations relating to delegated programs, but sought state reaction through a single organization rather than by direct invitation to states. *See* EPA-1983-5 EPA Draft Policy on Federal Oversight 14 Envt. Rptr. At 1449 (noting

which suggested OFA address this shortcoming by ensuring that any work groups established to develop implementation strategies include tribal and state representatives.[397]

Following OFA's consideration of comments received on the Discussion Paper, the IWG met to make final changes to the Paper.[398] OFA then transmitted it to the Administrator's Special Assistant, summarizing its contents, and seeking her consent to forward the Paper to the Administrator.[399] Shortly before issuing the final Discussion Paper in July 1983, OFA notified the Administrator's Special Assistant that its purpose was to offer the Administrator an overview of the Indian issues and provide a "structured approach" for addressing them in an Indian policy.[400] OFA, of course, was originally tasked with conducting a study, not developing policy, and so its document did "not state or recommend a policy except in the broadest terms."[401]

The Discussion Paper began with a short introduction identifying Reagan's 1983 Statement and Gorsuch's 1981 assignment as stimuli for the Paper. A background section noted the not insignificant geographic extent of Indian country and its mounting environmental pressures, as well as a growing tribal interest in environmental management, the jurisdictional uncertainties, and past EPA reactions to them. The foundation of the Discussion Paper was an evaluation of three alternative management options—program implementation by EPA, by tribes, and by states—and the perceived advantages and disadvantages of each. Two appendices prepared by the Office of Legal and Enforcement Counsel, one a legal analysis of federal environmental law as it related to Indian issues, and the second a legal analysis of jurisdiction on Indian reservations, supported the option evaluations.[402] The Discussion Paper closed with conclusions and recommendations focused on implementing whatever policy the Administrator selected.

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distribution of draft policy "throughout the Agency, and to the States through the National Governors' Association"). In the context of tribes, this practical approach also helped the Agency avoid any discomforting tribal questions about EPA's past (unimplemented) commitments to tribes. *Accord* EPA-1983-2 Werhoiltz, *supra* note __ (noting Region VII did not distribute the 1983 Discussion Paper to tribes in the Region because "it does not go beyond the policy statement issued by EPA in December 1980" and the "tribes in this Region are waiting for the implementation strategy promised" in 1980 Indian Policy).

[397] *See* EPA-1983-2 Durham, *supra* note __, at 2 (noting the 1983 Discussion Paper's silence on how the Agency would obtain tribal input on the implementation strategy, and suggesting the Agency ensure state and tribal representation in future with strategy development). The IWG Coordinator proposed a broader distribution list, *see* EPA-1983-7 Memorandum from Leigh Price, Coordinator, Indian Work Group, to Paul Cahill, Director, Office of Federal Activities (Feb. 1, 1983) (on file with author) (proposing external distribution of the 1983 Discussion Paper beyond CERT and CSTR to seven "key Washington-based organizations representing state and tribal governments" rather than tribes because of the practical logistical difficulties), but OFA did not follow this recommendation.

[398] EPA-1982-11 Cahill, *supra* note __.

[399] EPA-1983-4 Alberico, *supra* note __, at 6.

[400] *Id*. at 2 n.1.

[401] *Id*.

[402] EPA-1983-14 Memorandum from Robert M. Perry, Assoc. Administrator and General Counsel, to Paul Cahill, Director, Office of Federal Activities (March 24, 1983) (on file with author) (transmitting OLEC's legal analysis on tribal jurisdiction for inclusion in the 1983 Discussion Paper). This was the first time EPA's evaluation of Indian issues included a separate analysis of federal Indian law's treatment of Indian country jurisdiction, arguably the lynchpin issue of EPA's Indian program.

The Discussion Paper ultimately made four recommendations. Fundamentally, it recommended the Administrator adopt an official Indian policy explicitly stating the Agency's position on reservation program management. But rather than propose one of the three options evaluated, the Paper urged instead a policy with "sufficient flexibility" so that decisions on "the most appropriate party or cooperating parties to manage reservation programs" would be made on a case-by-case basis.[403] Those individual decisions would be guided by national criteria approved by the Administrator as part of the implementation process.

The Discussion Paper proposed four such criteria, which collectively reflected a favored management approach despite the Paper's disclaimer: on reservations, EPA should treat tribes like states by delegating implementation responsibility for federal environmental programs to tribes who sought delegation. Of course, this was the 1980 Indian Policy's TAS approach, and not surprisingly, it was based on the same straightforward analysis.

As laws of "general applicability," federal environmental laws applied with equal force in Indian country, so EPA had authority there.[404] Additionally, the federal trust responsibility for Indian interests counseled federal management. But EPA was not configured and had no intention of managing local programs on a permanent basis. Hence, one of the Discussion Paper's proposed criteria emphasized the temporary nature of direct federal implementation by establishing the "major objective" of delegating program management to local governmental levels.[405]

Delegation is fruitless, however, if the recipient is impotent, so a second proposed criterion required the local managing government have adequate authority over "all reservation pollution sources."[406] States might possess the requisite authority pursuant to specific congressional delegation,[407] but none of the environmental statutes contained

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[403] EPA-1983-1 1983 Discussion Paper, *supra* note __, at 34. Reagan's 1983 Statement similarly called for flexibility in federal actions, observing the wide variation among tribes and reservations. *See* Reagan, *supra* note __, at 96.

[404] EPA-1983-1 1983 Discussion Paper, *supra* note __, at 87.

[405] *Id*. at 39. Outside the context of Indian country issues, EPA iterated the delegation objective as an Agency policy goal for state delegations, asserting that local implementation under federal oversight provided "the best way to ensure excellence in the job of environmental protection". *See* EPA-1983-5 Federal Oversight of Environmental Programs Delegated to States, *supra* note __, at 1450.

[406] EPA-1983-1 1983 Discussion Paper, *supra* note __, at 35.

[407] *Id*. at 89 n. 2 (referring to a special jurisdiction statute conferring authority to the State of Oklahoma over oil and gas wells operated by the Five Civilized Tribes). *See also* EPA-1984-43 Memorandum from Josephine S. Cooper, Asst. Administrator for External Affairs, to William D. Ruckelshaus, EPA Administrator (Oct, 22, 1984) (on file with author) (noting the views of the States of Maine and New York that their Indian land settlement acts conferred reservation jurisdiction on the states). A more recent example is the Puyallup Land Claims Settlement Act, Pub. L. No. 101-41, 103 Stat. 83 (June 21, 1989) (codified at 25 U.S.C. § 1773) (confirming jurisdictional allocation of responsibility agreed to in the Puyallup Land Claims Settlement Agreement (1988), which provided for state authority over non-trust lands within the 1873 Survey Area). In a relevant context, EPA suggested "[s]tates must independently obtain such authority expressly from Congress or by treaty." Washington; Phase I and Phase II, Components A and B, Interim Authorization of the State Hazardous Waste Management Program, 48 Fed. Reg. 34,954 (Aug. 2, 1983) (declining to delegate RCRA authority over Indian lands to the state).

such an authorization.[408] Notwithstanding congressional silence, however, states might have regulatory jurisdiction on reservations if not preempted by federal law, so long as the state regulation did not infringe on tribal self-government.[409]

No reported case then (or since) squarely addressed these key questions in the environmental context, but the separate legal analysis in Appendix C disposed of them in five sentences.[410] It "appeared" to the lawyer-authors of the Appendix that the pervasiveness of "at least some" federal environmental programs on reservations preempted state reservation programs.[411] State implementation also "appeared" to

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[408] EPA-1983-1 1983 Discussion Paper, *supra* note __, at 89. EPA had recently rejected a state's application for Interim RCRA status on Indian lands, concluding that RCRA contained no specific authorization for state authority. *See* Washington Interim Authorization, 48 Fed. Reg. at 34,954

[409] Although the 1983 Discussion Paper did not cite it, the Court had recently stated these two concepts as related but independent barriers to state encroachment in Indian Country. *See* White Mountain Apache Tribe, 448 U.S. at 143.

[410] The sole case noted was Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982), cited (in a footnote) for the proposition that a more "liberal" preemption test applies when state law affects tribes directly. More accurately, and more supportive of the argument here, Ramah held that "comprehensive and pervasive" federal regulation of Indian schools barred the application of state regulatory (tax) laws to non-Indian school contractors. *Id*. at 839-45. Even more analogous, White Mountain held that a pervasive federal statutory and regulatory scheme for Indian timber harvests preempted state taxation of the on-reservation activities of non-Indian timber contractors. 448 U.S. at 145-52. The strongest support for OFA's preemption conclusion, however, came the month preceding the final 1983 Discussion Paper's release. On June 13, 1983, the Court issued New Mexico v. Mescalaro Apache Tribe, 462 U.S. 324 (1983), which found the application of state hunting and fishing laws to the Mescalaro Reservation preempted by a pervasive on-reservation federal presence in the hunting and fishing arena. Unlike the tax cases, where the "interference" of state taxes with substantive regulatory regimes is arguably negligible, this timely case presented perhaps the first clear instance of the very real conflict created by concurrent state and tribal civil regulatory schemes. The Appendix asserted a recent judicial dislike for concurrent state and tribal regulation in areas other than taxation, suggesting the need for an "either/or" decision on state or tribal implementation, but did not address Mescalaro. EPA-1983-1 1983 Discussion Paper, *supra* note __, at 90. The Appendix noted a federal policy against checkerboard regulation, where the state and tribe independently regulate activities on intermixed parcels of land, equating it with concurrent regulation (two sovereigns regulating the same activities on the same lands) and asserting courts would strike such an approach. EPA staff would later rely on the 1983 Discussion Paper's assertion of an anti-checkerboarding policy in support of a "unitary management" approach to RCRA implementation on Indian reservations. *See* EPA-1985-8 Memorandum from Deborah W. Gates, Asst. Regional Counsel, to Charles Findley, Director, Hazardous Waste Division 5-6 (Nov. 1, 1985) (on file with author). Partly on the perceived need for unitary management, EPA rejected a state's application for Indian reservation primacy under RCRA, *see* 48 Fed Reg. 34,954 (1983) (Washington), which a federal court upheld as consistent with EPA's 1980 Indian Policy, *see* Washington, Department of Ecology, 752 F.2d 1465.

[411] EPA-1983-1 1983 Discussion Paper, *supra* note __, at 89-90. The Appendix did not specify which environmental programs were preemptive, nor why. At this time, only the CAA PSD and FIFRA pesticide applicator programs had Indian-specific provisions; it wasn't until 1986 and later that Congress enacted TAS provisions in other environmental statutes. EPA's prior uncoordinated responses to Indian country problems and its miscellaneous grants to tribes for water and air quality inventories seem far short of a pervasive federal presence on Indian reservations. Even with the breadth of EPA's Indian Program today, state preemption remains a debatable proposition, though strong arguments exist for preemption. *See* Suagee, *supra* note __, at 134-60 (2002) (evaluating possible preemption arguments under multiple environmental statutes).

infringe on tribes' inherent powers over reservation health and welfare.[412] Hence, the only safe way for EPA to partner with states for reservation programs would be to seek statutory amendments explicitly authorizing state reservation programs, which OFA rejected as politically infeasible and impractical.[413]

On the other hand, OFA perceived Indian country's state counterpart—tribal governments—capable of meeting the second criterion without statutory amendments. Again with little or no analysis, the Appendix came to the critical conclusion that tribes' inherent sovereignty extended to "control environmental activities of all people on all lands within reservation boundaries."[414] That conclusion rested wholly on the Supreme Court's 1981 statement that tribes might retain inherent civil regulatory authority over non-Indian activities affecting tribal health and welfare,[415] and the Court's 1982 decision upholding tribal taxation of non-Indians as a core governmental function.[416] But three paragraphs earlier the Appendix distinguished taxation cases as inapposite examples for environmental management decisions.[417] And any comfort EPA found in *Montana's* reference to health and welfare was undermined by its status as dicta, its qualification that tribes "may" retain that inherent power, and the case's result: whereas the Court had long seen wildlife management as a legitimate aspect of a local government's power over the public's general welfare, the Court denied the Crow Tribe that power despite the health and welfare standard.

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[412] The source for this conclusion was the negative implication of Montana's second exception, which said tribes' inherent powers of self-government may include regulation of tribal health and welfare risks. The Appendix articulated the logical extension that state regulation of matters affecting tribal health and welfare then infringe tribal self-government. *Id*. at 90. This makes sense because environmental management involves a host of governmental value judgments, which naturally vary among governments. "Reservation needs and priorities as perceived by the tribal governments may not adequately be reflected in the state's environmental policies, funding and program implementation." *Id*. at 29. But, like the preemption issue, no reported case had (or has) addressed this specific question, nor whether such infringement would be adequate to bar state law.

[413] *Id*. at 28-29 (noting the option's inconsistency with Congress' support for tribal self-determination, and asserting "many" states do not want reservation jurisdiction). An interesting asymmetry in the 1983 Discussion Paper supports the view that it preferred tribal over state implementation. The 1983 Discussion Paper supported its assertion of an increasing tribal interest with tables of specific data showing particular tribal initiatives and EPA grants received. *Id*. at 11-14. For states, the 1983 Discussion Paper asserted states' general lack of interest, citing a single meeting where the views of state representatives varied between desiring and not desiring reservation programs. *Id*. at 27 n. 6. In contrast to tribes, the 1983 Discussion Paper offered no data on states' presence, justifying that omission because "[p]resent practice varies widely and exact details of the degree to which states are or are not presently committing resources and attention to reservation concerns are difficult to obtain." *Id*. at 27. EPA's acknowledgement that some states have an environmental management presence in Indian country despite EPA's repeated insistence it will not delegate reservation programs to states, and its unwillingness to investigate the kind and extent of state efforts, would later become a theme of EPA's Indian program antithetical to EPA's Indian policies. *See, e.g*., Grijalva, *supra* note __, at 68-69 (arguing EPA has turned its cheek to state creep in the CWA despite EPA's official policies supporting tribal implementation and disclaiming state responsibility).

[414] 1983 Discussion Paper, *supra* note __, at 91 (emphasis in original).

[415] Montana, 450 U.S. at 565.

[416] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

[417] 1983 Discussion Paper, *supra* note __, at 90 (dismissing Supreme Court decisions allowing dual taxation by tribes and states as not applicable to the environmental management context).

These distinctions along with a dearth of on-point cases might understandably have led OFA to take a more qualified position. The Court's near immediate extension of the 1978 *Oliphant* decision denying tribes criminal jurisdiction over non-Indians to the civil regulatory arena in *Monana* appeared to later commenters as clear evidence of the modern Court's increasing judicial activism limiting tribal power.[418] Yet, OFA took the *Montana* court at face value, supporting its view with lower federal court decisions finding tribal welfare power over non-Indian water[419] and land uses.[420]

Perhaps OFA took a broader view of tribal power in the spirit of its third proposed criterion that EPA's decisions on delegable programs "endeavor" to give tribal governments "the primary role in environmental program management and decision-making.[421] This concept came, of course, directly from Reagan's 1983 Statement, and EPA's 1980 Indian Policy. But as a decision-making criterion, it surely tilted the balance in favor of tribal implementation. To be sure, EPA qualified the criterion by noting a primary tribal role may not be appropriate in a particular case; in that event, EPA endorsed "intermediate" tribal roles like acting as cooperating or contracting agencies.[422] But the Agency's guiding principle was to enhance tribal roles, so EPA viewed those lesser roles as steps toward eventual full program responsibility for tribes.[423] Since *Montana* made clear an existing state regulatory presence on-reservation presented a significant obstacle to future tribal program administration, this criterion directly conflicted with the option of state implementation as one of the Administrator's policy choices.[424]

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[418] From the perspective of hindsight, the 1983 Discussion Paper's failure to identify this trend, or at the very least to wonder aloud about the possible future of relevant federal Indian law doctrines, was notable. *See e.g.,* Getches, *supra* note __, at 1595-99, 1608-13 (1996) (arguing Oliphant and Montana are pivotal cases demonstrating the Court's new Indian law subjectivism); Suagee, supra note __, at 97-99, 115-120 (2002) (arguing Oliphant and Montana demonstrate the Court's inability or unwillingness to decide Indian law cases on principled bases).

[419] *See* Namen, 665 F. 2d 951; Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981).

[420] *See* Knight v. Shoshone and Arapahoe, 670 F.2d 900 (10th Cir. 1982).

[421] EPA-1983-1 1983 Discussion Paper, *supra* note __, at 37.

[422] *Id*. at 36.

[423] *Id*. at 37.

[424] The exception might be EPA's "modified window" approach. The original window approach offered tribes a specified period of time to seek program delegation, and if they did not, states would assume implementation responsibility. *See* EPA-1982-7 Price, *supra* note __, at 4. The modified window approach offered tribes a later opportunity to seek retrocession of program responsibility from states. *See* EPA-1983-11983 Discussion Paper, *supra* note __, at 23-24. In theory, just as EPA's temporary federal implementation option awaited the development of tribal programs, interim state responsibility under the modified window concept might not be inconsistent with the tribal self-government criterion. In reality, however, the Supreme Court's tendency to attribute legal significance to the presence of state regulatory regimes inside Indian country undermines that argument. *See supra* text accompanying notes __ to __. [Montana discussion in V.A.] Both of the Indian organizations EPA consulted on the 1983 Discussion Paper objected strongly to any transfer of jurisdiction to states without tribal consent. Such an approach, they argued, was inconsistent with the Nation's historic relations with tribes, antithetical to Reagan's call for a national policy of self-determination, and likely to result in tribes developing ineffective "paper programs" in order to hold their place. *See* EPA-1983-2 Scott, *supra* note __; EPA-1983-2 Deloria, *supra* note __, at 2.

The final proposed criterion was simply for the development of viable, effective programs.[425] That necessity would seem equally applicable to states, tribes and EPA, but the text supporting the criterion focused solely on tribal programs. OFA noted a need for increased EPA technical assistance, for emphasis on factors of economy, and for creative assistance arrangements, all directed at enhancing tribal program roles. Where the criterion text referred to states at all, it was in the context of using existing state programs as technical assistance to tribes who would retain responsibility for making policy level decisions.[426] There was no discussion nor suggestion that state programs independent of tribal involvement could be effective.

The Discussion Paper's remaining three recommendations, like the recommendation for an Agency Indian policy, were implicitly based on an expectation the Agency would adopt the tribal implementation option. The Paper recommended determining an appropriate Agency resource reallocation to show a credible response to Indian country environmental protection without unduly disrupting existing programs.[427] Rather than set a specific figure,[428] the Discussion Paper proposed the Administrator set a clear "target" with reference to the extent of tribal concern over specific existing environmental problems.[429] For whatever resource level was finally determined, the Discussion Paper recommended allocation by regional administrators based on tribal requests measured against criteria approved by the Administrator. Even more than the criteria proposed for deciding among implementation options, the allocation criteria made sense only if tribal implementation was the option selected.[430]

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[425] EPA-1983-1 1983 Discussion Paper, *supra* note __, at 37.

[426] Twice, the 1983 Discussion Paper raised the idea of a tribal-state cooperative relationship where the tribe made policy level decisions and the state conducted technical activities implementing the tribal policies. *See id*. at 38-39, 34 n. 10. OFA offered the example of an agreement where the Rosebud Sioux Tribe regulated on-reservation pesticide applicators trained and certified by the State of South Dakota. OFA suggested this type of technical state assistance, which left certain policy decisions to the tribe, did not interfere with tribal self-government. *Id*.

[427] Id. at 42. The 1983 Discussion Paper offered neither an estimate nor a reference to the resource issue if states implemented reservation programs. Instead, it made clear an intention that Agency resources be awarded to tribes primarily for developing delegable programs. *Id*. at 44 n. 19. The 1983 Discussion Paper offered a qualifiedly optimistic estimate of eventual program delegation interest by 40 tribes, a more conservative estimate of a dozen tribes seeking full state-like status, and a table showing past EPA resource allocations.

[428] The IWG initially proposed setting a fixed figure for a tribal programs set-aside, but concern by the Office of the Comptroller resulted in the December 1982 draft 1983 Discussion Paper containing a target range of 1-1/2 to 2-1/2% of the Agency's allocation for Abatement, Control and Compliance activities instead. *See* EPA-1983-10 Memorandum from Paul Cahill, Director, Office of Federal Activities, to John E. Daniel, Chief of Staff 1 (Feb. 9, 1983) (on file with author). The Agency's Office of Policy and Resources Management balked at the target range in the draft, and Cahill replaced the target range with a suggestion the Administrator establish a clear target figure. *Id*. (suggesting even the target range was too controversial to succeed).

[429] 1983 Discussion Paper, *supra* note __, at 42. While perhaps more realistic than a fixed sum, the necessary implication was that some of Indian country, perhaps a large part, would continue for the indefinite future to suffer the status quo of no effective regulatory presence protecting the health and welfare of tribal members, despite EPA's acknowledgement of its a trust responsibility.

[430] *See* 1983 Discussion Paper at 47-48 (proposing allocation "among competing Indian tribes" on tribal initiative, tribal institutional capability, likelihood of tribal delegation and eventual tribal self-sufficiency).

The policy goals inherent in these three recommendations—adoption of a program management approach, determining the level of agency resource commitment, and establishing criteria for allocating limited resources among tribal recipients—formed the Discussion Paper's substantive core. OFA recognized these goals were essentially the same as those of the 1980 Indian Policy, which it believed failed for a lack of structured follow-through. [431] OFA urged prompt implementation results "in order to regain credibility and offset the skepticism generated by past, unimplemented policy efforts."[432] The Discussion Paper thus concluded with a detailed Implementation Strategy "to ensure the full realization" of the policy goals.[433] OFA's Acting Director Pat Alberico called the Implementation Strategy's six phased steps "the real crux of the Discussion Paper."[434]

What OFA did not acknowledge, however, was that the 1980 Indian Policy also contained an "implementation" section listing specific actions for institutionalizing the policy principles. And, at a fundamental level, the 1983 Discussion Paper's Implementation Strategy was strikingly similar to the 1980 Indian Policy's Implementation section. Both designated a lead Agency office for Indian issues, and charged it with developing policy implementation plans and reviewing EPA's legal mandates for needed changes. Both documents also expected a near-immediate increase in the responsiveness of regional offices to pending and future tribal requests for assistance in light of the adoption of an official Indian policy.

There were differences in the two documents' implementation sections. The 1983 Implementation Strategy called on the Administrator to make a basic policy decision, whereas the 1980 document constituted such a policy decision. The 1980 Implementation section called for increased EPA outreach to tribes and increased cooperation with other federal agencies and states; the 1983 Implementation Strategy did not mention these.[435] The 1980 call for on-going periodic reviews of Indian issues was replaced by the 1983 proposal for identifying ways to incorporate Indian issues into the Agency's management processes for developing budgets, employee performance standards, legislative packages, and operating guidance.

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[431] EPA-1983-4 Alberico, *supra* note __, at 6.

[432] *Id*. (urging the Agency show credible implementation results within a year). OEA's Director also argued the "Agency needs to act expeditiously 'across the board,' in almost all media." *Id*. Later that fall, the Office of External Affairs' proposed Operating Year Guidance said "it is expected that in FY 84 and FY 85, program managers throughout the Agency will begin in a stepwise fashion to implement the [Indian] Policy…." *See* EPA-1983-6 Memorandum from Josephine S. Cooper, Ass't Administrator for External Affairs, to Ass't Administrators et al. (Dec. 22, 1983) (on file with author). One familiar with federal policy promises might naturally wonder whether a directive for "stepwise" implementation means "take immediate concrete actions methodically moving the agency toward full achievement of the new policy goal," or "re-characterize current activities as being carried out in furtherance of the new policy goal and devote no additional time or resources to it."

[433] 1983 Discussion Paper, *supra* note __, at 50.

[434] EPA-1983-4 Alberico, *supra* note __, at 2-3.

[435] OFA saw EPA outreach to tribes as part of the last of three implementation stages. The first stage was the Administrator's policy decision. The second stage involved the "house cleaning" activities identified in the Implementation Strategy. The third stage would see the first tribal programs coming on-line following formal outreach to tribes. *See* EPA-1983-4 Alberico, *supra* note __, at 4.

The 1983 Implementation Strategy was also different in its level of detail. The 1980 document's call for a legal review of EPA's statutes and regulations was expanded in 1983 to distinguish among areas where statutory changes were needed, where regulatory changes were needed, and where EPA could act defensibly without such changes.[436] The 1983 document also tasked EPA with the next step of developing proposals for any changes identified as necessary. The 1980 version of an Implementation Plan simply sought the identification of activities that might lead to the Policy's realization; the 1983 Work Plan was to execute five enumerated tasks by identifying lead offices, contributing offices, overall and component objectives, and a timetable for task completion.[437] The 1980 Implementation urged programs to respond to tribal requests during the interim period while EPA was undertaking implementation tasks, but offered no direction for those actions beyond the general policy principles. In contrast, the 1983 Implementation Strategy detailed a process for issuing interim Agency guidance addressing how programs could move forward during the time EPA was considering statutory and regulatory changes.[438]

G. EPA Commits to Moving Forward

The critical decision point presented by the 1983 Discussion Paper, however, preceded implementation. Despite the 1980 Indian Policy, the Paper assumed that tribes and EPA program offices and regions and others were awaiting a clear policy direction set by the Administrator.[439] But, as OFA considered the Discussion Paper comments in the spring of 1983, Agency turmoil was resulting in leadership changes. Gorsuch, who called for the study leading to the Discussion Paper, became embroiled in agency controversy and left the Administrator's Office March 16, 1983. An Acting Administrator led the Agency for two months until when a new Administrator was sworn in May 1983.[440] The new Administrator was William D. Ruckelshaus, President Nixon's 1970 choice for EPA's first leader, whom President Reagan asked to return and address EPA's internal difficulties.[441]

Ruckelshaus' experience with the Agency at its inception arguably made him a likely ally for the core concepts of the Discussion Paper. Ruckelshaus' public endorsements of federal control and enforcement accorded with the historical backdrop of direct federal-tribal relations and the trust responsibility. His sense that local

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[436] EPA-1983-1 1983 Discussion Paper, *supra* note __, at 52.

[437] *Id*. at 50-51.

[438] *Id*. at 53-55.

[439] *See* EPA-1983-4 Alberico, *supra* note __, at 5 (noting the "immediate decision" to be made was the Administrator's on a program management option).

[440] *See EPA History/Administrators*, http://www.epa.gov/history/admin/agency/index.htm (last updated December 13th, 2004).

[441] *Ruckelshaus Interview, Press, White House and Congress, supra* note __ (describing Agency morale as "terrible" in the wake of Gorsuch's administration). During Ruckelshaus' Senate confirmation hearings, one senator expressed disbelief that Ruckelshaus would return "to this jungle, with all the problems it will bring to him." *Nomination of William D. Ruckelshaus, S. Hrg. 98-124, before the Committee on Env't and Public Works* 172 (1983) (statement of Pete V. Domenici).

governments like states favored economic development over environmental protection might have been assuaged by OFA's sense that tribal interest in developing regulatory programs was growing precisely because of threats posed by increasing reservation economic development.[442] His high expectations for effective credible state programs in the face of the states' poor environmental management history might have been reaffirmed by the Paper's tone that states had no real interest in the reservation environment.[443] Ruckelshaus' experience assisting states as they developed programs had clear relevance to the new Indian program, and Agency resources were becoming available as states' programs came of age.[444] And the more mature Ruckelshaus returned to Washington ready to meet "new realities, new challenges, and try different approaches."[445]

The emerging Indian program seemed to fit the bill nicely, and importantly, it came along at a perfect time. Ruckelshaus' new boss, President Reagan, had only months earlier publicly proclaimed an executive branch commitment to tribal self-determination,[446] and was about to be taken to task for not actualizing it.[447] Congressional concern over historic inattention to the Indian country environment and interest in prompt affirmative action was brought home to Ruckelshaus during his confirmation.[448] And no other federal agency (including perhaps BIA) had EPA's

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[442] *See* 1983 Discussion Paper, *supra* note __, at 7; EPA-1983-8 Price, *supra* note __ , at 4.

[443] Additionally, although the growing pains associated with federal oversight of state program development had eased under the air and water statutes, they were heating up again in the hazardous waste arena. See *Ruckelshaus Interview, State Governments*, *supra* note __.

[444] *See, e.g.,* EPA-1983-3 Alberico, *supra* note __ (noting that EPA personnel experienced in working on program design and delegation with states were being reassigned to other tasks, and suggesting they shift to working on the same issues with tribes); EPA-1983-2 Memorandum from Dick Whittington, Regional Administrator, Region VI, to Pasquale A. Alberico, Acting Director, Office of Federal Activities (April 14, 1983) (on file with author) (suggesting a high quality staff for the Indian program could be obtained without a need for new allocations by reassigning staff freed by state delegations).

[445] *See Ruckelshaus Interview, Press, White House and Congress.* Ruckelshaus saw the "special status and circumstances" of tribes and Indian country as requiring "a new and somewhat different EPA approach." *See Nomination of William D. Ruckelshaus, supra* note __, at 280.

[446] *Accord* EPA-1983-8 Price, *supra* note __ , at 2 (asserting "[t]he Administrator has an excellent opportunity here to demonstrate responsiveness to the President's Indian Policy"). Ruckelshaus declared his full support for Reagan's statement on tribal self-determination during his confirmation process. *Nomination of William D. Ruckelshaus, supra* note __, at 278.

[447] EPA-1983-9 Memorandum from Pasquale A. Alberico, Acting Director, Office of Federal Activities, to Josephine Cooper, Special Asst. to the Administrator for the Office of External Affairs (Aug. 24, 1983) (on file with author) (discussing an Aug. 19, 1983 Wall Street Journal article criticizing Regan's administration for lack of follow-through on its tribal self-determination rhetoric).

[448] *Nomination of William D. Ruckelshaus, supra* note __, at 277-80. An EPA-generated draft of Ruckelshaus' answers to senate questions on the Agency's Indian Policy initially promised a final Policy "as soon as possible this summer [1983], with a following implementations effort to be carried out the next year to two years." *See* FR-1983-4 *William D. Ruckelshaus Confirmation Hearings, May 4, 5 and 6, 1983, Senator Domenici: Indian Reservation Programs* (undated) (on file with author) (draft answers to questions on Indian policy posed by Domenici). The final answers officially submitted promised instead an Indian Policy "which I hope to issue soon, with an implementation effort to be carried out consistent with the Policy." *Nomination of William D. Ruckelshaus, supra* note __, at 279.

experience in working out how self-determination affected agency programs and mandates. That extensive experience had just been brought to bear on a two-year study directed specifically at these questions. It was no surprise, then, in fall 1983, when Administrators of Regions with tribes were informed the Agency was moving forward to develop an official Indian policy.[449]

H. Developing the 1984 Indian Policy

EPA's past program experience and work leading up to the Discussion Paper set the stage for a relatively quick initial policy draft.[450] The Discussion Paper envisioned the Administrator signing a "brief" statement of policy "based largely" on the Discussion Paper's concepts, which were a natural extension of the 1980 Indian Policy. Within a month of its release, OFA distilled the 92-page Discussion Paper into six "broad principles" in preparation for the policy drafting exercise.[451] Two months later, OEA had refined and expanded those principles into nine related "policy points,"[452] and circulated them to Regional Administrators in EPA Regions with federally recognized tribes. With uncommon speed, OEA obtained RAs' initial reactions on the policy points in four days, converted the policy points into a draft policy in seven days, and distributed the draft policy to RAs three days later.[453]

The tone of the October 1983 Draft Policy was set by references in the introductory text to Reagan's pledge for tribal self-determination and EPA's previous policy statements favoring tribal governmental roles in the implementation of federal environmental programs. A general statement of policy followed the Introduction:

In carrying out our responsibilities on Indian lands, the keynote of our efforts will be to give special consideration to tribal interests and the close involvement of tribal governments in making decisions and managing environmental programs affecting reservation lands.[454]

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[449] *See* EPA-1983-11 Memorandum from Josephine Cooper, Asst. Administrator for External Affairs, to Regional Administrators (Regions V, VI, VII, VIII, IX, X) 1 (Oct. 17, 1983) (announcing Deputy Administrator Alvin Alm had approved the development of an Agency Indian Policy and guidance for implementing it). Alm became Ruckelshaus' Deputy Administrator in early August 1983, just after the final 1983 Discussion Paper was released. See *Alvin A. Alm, Biography,* http://www.epa.gov/history/admin/deputy/alm.htm; *see also* EPA-1983-12 Memorandum from Josephine Cooper, Asst. Administrator for External Affairs, to Regional Administrators (Regions V, VI, VII, VIII, IX, X) 1 (Oct. 31, 1983) (on file with author) (reporting that Administrator Ruckelshaus, Deputy Administrator Alm, and OEA Director Cooper all desired an Agency policy addressing this "serious" issue).

[450] *Accord* EPA-1983-8 Price, *supra* note __, at 2 (asserting once the Administrator made a decision "we should be able to issue such a Policy quickly" because of EPA's work on the 1983 Discussion Paper).

[451] EPA-1983-4 Alberico, *supra* note __, at 2.

[452] EPA-1983-11 Cooper, s*upra* note __, at 2-3.

[453] EPA-1983-12 Cooper, *supra* note __, at 1 (acknowledging RAs' responsiveness and quick reviews of the nine policy points, and seeking comments on the Oct. 28, 1983 Draft Indian Policy within a week); *see also id*. at 2 (proposing "a tight schedule of actions" intended to produce a draft policy within one month "[b]ecause we are most anxious to see some forward motion on this issue, which has been under discussion for so long").

[454] [attached to EPA-1983-12] Draft EPA Policy for the Administration of Environmental Programs on Indian Reservations 1 (Oct. 28, 1983) (on file with author). As before, EPA continued its geographic

This general policy statement was animated by nine detailed principles, each supplemented by one to three paragraphs of explanatory text, which constituted the heart of the draft. The nine principles repeated OEA's suggested nine policy points almost verbatim. And substantively, the nine principles and their textual justifications were nearly identical to the 1980 Indian Policy's six principles.[455]

The Draft Policy embraced Reagan's twin self-determination themes of working with tribes on a government-to-government basis (Principle 1) and offering tribes opportunities to assume governmental roles in federal programs affecting reservation life (Principle 2). EPA's preferred role for tribes was as a full cooperative federalism partner (Principle 2), and toward that end the Draft Policy pledged a "special emphasis" on building tribal institutional capacity (Principle 7). More specifically, the Draft Policy proposed providing technical and other assistance to tribes seeking full program roles (Principle 3) and resolving legal and other barriers to tribal assumptions (Principle 4). The Draft Policy also sought EPA's commitment to tap the expertise and resources of other federal agencies present on reservations in helping tribes assume program roles (Principle 8). Anticipating one natural consequence of tribal program roles–differing value judgments leading to differing environmental standards for adjacent lands and waters–the Draft Policy called for EPA endorsement of state-tribe cooperation and playing a facilitator-type role when conflicts arose (Principle 6).

True to the spirit of self-determination, the Draft Policy nonetheless recognized tribes should be free to elect some "lesser" governmental role, or no role at all, and in that event, EPA should maintain program responsibility through direct implementation unless the state had authority and exercised it (Principle 3). As EPA implemented reservation programs, the Draft Policy suggested the federal trust responsibility counseled special consideration for tribes' governmental priorities and concerns (Principle 5). The final proposed principle set a goal of an agency-wide institutional culture change so that management processes and accountability mechanisms reflected the preceding principles.

But as the 1983 Discussion Paper emphasized, policy principles alone were not likely to result in significant changes in Agency behavior. So along with the Draft Policy, OEA also prepared a draft Implementation Guidance. The Guidance was in the form of a supervisor's mandate assigning lower administrators specific tasks directed at beginning policy implementation. Tracking the Discussion Paper, the Guidance designated a lead office, continued the IWG, and instructed administrators to provide their IWG representatives with resources, seek tribal input on program decisions, provide technical assistance to tribes, reallocate existing resources to Indian activities, and incorporate policy principles into long-range planning processes.[456]

The Draft Implementation Guidance and Draft Policy were in the Deputy Administrator's hands in early December 1983, less than two months after he requested

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schizophrenia, referring here in one sentence to both Indian lands and reservation lands. Editing on the final 1984 Indian Policy would resolve this internal inconsistency in favor of references to reservations and reservation lands.

[455] *See supra* text accompanying notes __ to __. [Section IV.A.].

[456] *See* EPA-1983-13 Memorandum from Terrell Hunt, Office of the Administrator, to Alvin L. Alm, Deputy Administrator (Dec. 7, 1983) (on file with author) (transmitting OEA's Draft Policy and Draft Implementation Guidance).

OEA develop them "as soon as possible."[457] But when those documents arrived in the Office of the Administrator, policy aspirations for immediate implementation were confronted by practical reality: the Agency's budgeting process for Fiscal Years (FY) 1984 and 1985 was complete. Any additional program activities taken pursuant to a new Indian Policy would be unfunded until FY 1986, unless Agency resources were internally reallocated.[458] Because reallocation typically upsets established expectations, and could be expected here to draw state criticism, one member of the Administrator's staff predicted program and regional administrators would not alter their existing program plans absent a clear showing by the Agency's Administrator and Deputy Administrator of the Indian Policy's relative priority in the Agency.[459]

Deputy Administrator Alvin Alm[460] discussed these concerns with the directors of OEA and OFA in the first week of 1984. While maintaining support for the Draft Policy's direction, Alm was wary the Agency not open itself to the criticisms of rhetoric leveled at the 1980 Indian Policy and Reagan's 1983 Statement. He directed OEA "tighten" up the Policy and Guidance language so "that we do not appear to promise more than we are likely to deliver."[461] He also desired an identification of "concrete opportunities" for progress, and asked OEA to prepare for his signature a directive that RAs identify Indian activities possible within existing resources for FY 84 and 85.[462]

Alm's memo to RAs went out mid-February 1984, requesting responses in three weeks.[463] Alm also sent a memo to AAs asking for reaction to the revised Draft Policy in that same timeframe.[464] Dependably, the responses recited general support for the Policy's self-determination spirit, but as for concrete results the programs' responses were "tentative, uneven and show[ed] only a minimal increase above existing activity

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[457] EPA-1983-12 Cooper, *supra* note __, at 1 (giving RAs only one week to review and comment on the draft Indian Policy in order to meet Deputy Administrator Alm's recent request for a policy "as soon as possible)".

[458] EPA-1983-13 Hunt, *supra* note __, at 2.

[459] *Id*. (noting "it has been suggested" the Indian Policy be listed somewhere on the Agency's 1984 Priority List). Hunt recommended against listing the Indian Policy, however, asserting that regardless of priority all programs needed to consider the Policy. *Id*. at 3.

[460] Alm was confirmed as Deputy Administrator in May 1983, but he was EPA's Assistant Administrator for Planning and Management from 1973 to 1977. See http://www.epa.gov/history/admin/deputy/alm.htm (visited November 1, 2005). In that latter capacity, he worked on the same water discharge permit program that spawned the 1973 FWPCA Rule constituting EPA's first Indian program action. Alm also worked on the 1974 PSD Rule, where EPA articulated the TAS approach for the first time, and the Agency's position on the 1977 CAA amendments, where Congress codified the TAS approach for the first time. *See Alvin L. Alm: Oral History Interview>Expectations of EPA in mid-1970s*, at http://www.epa.gov/history/publications/alm/10.htm (April/June 1993).

[461] EPA-1984-5 Memorandum from Alvin L. Alm, Deputy Administrator, to Josephine Cooper, Director, Office of External Affairs (Jan. 4, 1984) (on file with author).

[462] EPA-1984-5 *Id*. OEA was also to develop a Communications Plan for obtaining external input on the draft documents and publicizing the final Policy.

[463] EPA-1984-8 Memorandum from Alvin L. Alm, Deputy Administrator, to Regions V-X (Feb. 13, 1984) (on file with author).

[464] EPA-1984-7 Memorandum from Alvin L. Alm, Deputy Administrator, to Asst. Administrators & General Counsel (Feb. 13, 1984) (on file with author).

levels."[465] The reason, of course, was Alm's directive to use only existing resources, but without specifying a level or target. And "widespread uncertainty regarding the level of Agency commitment to carrying out the Indian Policy" was reflected in administrators' "reluctance" to reassign resources from other priorities.[466] One Program Director openly wondered how administrators should view the Guidance's call for voluntary resource reallocations in the face of unchanged existing priority lists, management systems, and performance standards.[467]

In short, in mid-April 1984, the overall tenor across the Agency was dour: "It appears that we can expect very little concrete results from our Indian Policy until the priority/resource issue is satisfactorily addressed."[468] At an April 1984 meeting of AAs, Alm asked them "again to take a hard look" at the issues in order to propose a credible implementation plan.[469] Administrators were assured they need not show "a major increase" in funding; the Agency's objective was simply to take "a credible step forward, principally by funding a few carefully chosen pilot projects" as precedents for other tribes.[470] In the absence of a plan for taking concrete action, Alm implied he would recommend the Administrator not adopt the draft Policy.[471]

Perhaps fortuitously, some important external pressure arose at that moment, helping break the Agency's inertia of indifference. Several tribal governments raised concerns in Congress that EPA's lack of a clearly defined Indian policy resulted in very few tribes receiving EPA assistance.[472] A then-recent Congressional Research Service study noted the Agency's 600-page FY 85 budget justification made no mention of technical assistance or grants to tribes.[473] The Chair of the Senate Select Committee on Indian Affairs took notice, and in late May 1984 asked Ruckelshaus directly for an explanation of the Agency's current policy and its plans for the future. About this same time, the House Appropriations Committee instructed EPA to adopt an official Indian Policy.[474]

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[465] [attached to EPA-1984-6] Discussion Outline, EPA Indian Policy and Implementation: Status 2 (April 12, 1984). Only the Office of Water, "nonconcurred" with the Policy because of resource implications. *Id*. at 1-2.

[466] *Id*. at 4.

[467] *Id*. at 1-2 (quoting Jack Ravan, Director, Office of Water, as saying "[i]f we are to meet current Agency priorities, we simply cannot assume the additional responsibility of implementing the Indian Policy").

[468] *Id*. at 4.

[469] EPA-1984-6 Memorandum from Josephine Cooper, Asst. Administrator, Office of External Affairs, to Asst. Administrators and General Counsel 1 (April 12, 1984) (on file with author).

[470] *Id*.

[471] *See* EPA-1984-10 Memorandum from Josephine S. Cooper, Asst. Administrator, Office of External Affairs, to Alvin L. Alm, Deputy Administrator 1 (June 8, 1984) (on file with author) (referring to Alm's expressed concern whether EPA had adequate substantive activities to justify issuing the Policy).

[472] *See* [attached to EPA-1984-14] Letter from Mark Andrews, Chair, United States Senate Select Committee on Indian Affairs, to William D. Ruckelshaus, EPA Administrator (May 21, 1984) (on file with author).

[473] *See id*.

[474] *See* EPA-1984-10 Cooper, *supra* note __, at 4 (noting a "recent instruction" from the House Committee as an "additional impetus" for proceeding with policy issuance).

So, when not one program responded to Alm's April 1984 "hard look" request by volunteering resources for pilot projects, OEA Director Josephine Cooper stepped up in June 1984 and offered to reprogram $500,000 of OFA's FY 84-85 extramural funds for tribal pilot projects, expanded technical assistance for tribes, and a national survey of environmental issues on reservations.[475] Cooper proposed that these three concrete activities, plus maintaining existing operations benefiting tribes and developing a legislative strategy for making statutory changes, constitute the Agency's specific implementation activities for FY 84-85.[476] While "not as substantial an effort as we would like, in my judgment it does make a reasonable start on implementing the Policy."[477]

Ruckelshaus committed the Agency to Cooper's proposed course of action on July 2, 1984, when he notified the Senate Select Committee EPA was nearing release of a draft Indian Policy.[478] On July 16, 1984, Alm notified programs and offices he had specifically approved Cooper's June 1984 proposal, authorized some reprogramming of OFA funds, and directed execution of a proposed Communications Plan.[479] He again asked administrators to pledge some "modest" amount of FY 85 resources, and directed their upcoming budget proposals for FY 86 include increases beyond FY 85 levels. Alm also made a significant substantive change in the Draft Policy, adding a new policy principle that EPA's enforcement approach for Indian facilities would be akin to that for other governmentally-owned facilities.[480]

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[475] *Id*. at 3 (characterizing OFA's pledged resources as "seed money" to get implementation started, but noting responsibility for pilot projects and technical assistance was more properly the responsibility of the regions and programs). Within days of her proposal, Cooper pledged additional OEA FY 84 funds for a tribal clean lakes pilot project, *see* EPA-1984-46 Memorandum from Josephine S. Cooper, Assistant Administrator for External Affairs, to Jack Ravan, Assistant Administrator for Water, and Howard Messner, Asst. Administrator for Administration 1 (Jun. 13, 1984) (on file with author) (characterizing the Acoma Pueblo Clean Lakes project as "an especially productive 'case study' for problem solving"), and one month later Cooper promised seed money for a tribal water quality monitoring and management program, *see* EPA-1984-47 Memorandum from Josephine S. Cooper Assistant Administrator for External Affairs, to Ernesta Barnes, Region X Administrator 1 (July 13, 1984) (on file with author) (characterizing the Colville Confederated Tribes' Water Quality Management Program as "an excellent candidate for a pilot project under the forthcoming Indian program").

[476] EPA-1984-10 Cooper, *supra* note __, at 1-3.

[477] *Id*. at 4.

[478] EPA-1984-14 Letter from William D. Ruckelshaus, EPA Administrator, to Mark Andrews, Chair, United States Senate Select Committee on Indian Affairs (July 2, 1984) (on file with author).

[479] EPA-1984-12 Memorandum from Alvin L. Alm, Deputy Administrator, to Ass't Administrators et al. (July 16, 1984) (on file with author). The Communications Plan resulted in briefings and materials being distributed to the White House, the Office of Management and Budget, five federal departments, key congressional committees, Washington D.C.-based state and tribal organizations, and state and tribal governments. *See* EPA-1984-41 Memorandum from Leigh Price, EPA Indian Coordinator, to Marty Carroll, Special Ass't to the Deputy Administrator (Oct. 5, 1984) (on file with author) (giving status update on policy development).

[480] EPA-1984-12 Alm, *supra* note __, at 2. The Principle—described in more detail *infra* at __ [Section VI.A.8. section on substance and process of including the enforcement principle—pledged EPA cooperation and compliance assistance before official enforcement action would be initiated against non-complying tribal facilities.

Alm's decision to execute the Communications Plan could reasonably have been cause for anxiety within the Agency. This would be EPA's first systematic attempt to gauge outside reaction to the Policy, particularly with tribes.[481] While the staff of one Indian organization had suggested tribal support for the similar 1983 Discussion Paper concepts,[482] and scattered tales from regional offices were in accord, EPA well knew its credibility with tribes was strained from years of not implementing lofty policy aspirations. And the Agency's resource limitations had substantially pared down the Policy Implementation Strategy despite its awareness that the "unaddressed environmental problems of Indian Reservations … number in the hundreds."[483]

On the other side, EPA might have hoped for positive state comments. One state-tribal organization had endorsed intergovernmental cooperation,[484] and the Discussion Paper asserted states generally had little interest in assuming reservation programs. Yet, in 1982, the State of Washington sought RCRA authorization over its twenty-seven Indian reservations,[485] and then filed suit challenging EPA's denial.[486] Washington was also seeking authority to issue water pollution discharge permits on reservations, sparking a formal tribal request that EPA immediately assume direct implementation of the CWA program on reservations in Washington.[487]

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[481] It would surely be anomalous for an agency policy seeking greater tribal participation in agency decisions to be developed by the agency without tribal consultation. *See* EPA-1984-2x Analysis of EPA Indian Policy, Council of Energy Resource Tribes 1 (Oct. 1984) (on file with author) (noting EPA did not include tribes in the Policy development, but expressing hope for participation in its implementation; *accord* EPA-1984-33 Letter from John R. Lewis, Executive Director, Intertribal Council of Arizona, to Loretta Kahn Barsamian, Chief, Region IX Federal Activities Branch (Sept. 17, 1984) (on file with author) (recommending EPA include tribal representatives in review of existing and proposed statutes and regulations for barriers to tribal delegation). A few years earlier a court held that BIA's failure to follow its announced policy of consulting with tribes on certain personnel decisions violated the federal trust responsibility. Oglala Sioux Tribe v. Andrus, 603 F.2d 707, 721 (8th Cir. 1979). More regular and deliberative tribal consultation would later become a hallmark of EPA's Indian program, but up to this point EPA made little effort beyond program-specific activities, often initiated by tribes, to seek tribal views.

[482] *See* Scott, *supra* note __.

[483] EPA-1984-42 Memorandum from Leigh Price, Office of Federal Activities, to Allan Hirsch, Director, Office of Federal Activities 1 (Oct. 4, 1984) (on file with author).

[484] *See* Deloria, *supra* note __.

[485] Washington Interim Authorization, 48 Fed. Reg. at 34,954.

[486] *See* Washington Department of Ecology, 752 F.2d 1465 (upholding EPA's rejection of the State's application). Perhaps not coincidentally, EPA Region X's later briefing for tribes and states on the near-final 1984 Indian Policy occurred in the same city on the same day as oral argument in the Washington DOE case. *See* EPA-1984-18 Memorandum from Deborah W. Gates, Ass't Regional Counsel, Region X, to Leigh B. Price, Indian Policy Coordinator (Sept. 7, 1984) (on file with author) (attaching Sept. 6, 1984 comments of Lou Stone, Chair, Colville Environmental Quality Comm'n, requesting EPA adjourn the Policy briefing for three hours to enable participants to attend the oral argument).

[487] EPA-1984-32 Letter from Lou Stone, Chair, Colville Environmental Quality Comm'n, to Ernesta Ballard Arnes, Regional Administrator, Region X (Aug. 13. 1984) (on file with author) (enclosing a Commission resolution urging EPA reject the State's application for CWA authority on reservations). Stone later characterized Washington's sudden interest in reservation programs, and its willingness to litigate EPA disapprovals, as the "backlash" for cooperative efforts between EPA and Tribes. *See* EPA-1984-3 OUR INALIENABLE RIGHTS: TREATIES, LAND, CULTURE, SOVEREIGNTY., GOVERNMENT, REPORT OF

Some of the uncertainty inherent in going outside the Agency was ameliorated by the focus of the Communications Plan on informational briefings rather than stimulating reactions. Although EPA would "welcome and accept any comments" offered, "we are not formally or officially soliciting comments."[488] EPA's express justification for this approach was its desire to move forward expeditiously, and its view of the Draft Policy as a simple extension of Reagan's 1983 Statement, for which EPA perceived the major issues as having "already been debated and settled."[489] So despite the Draft Policy's express spirit of government-to-government relations, EPA followed the time-honored federal tradition of tribal "consultations" on major policy decisions; EPA developed its Policy with little deliberative effort to solicit suggestions from those most affected, electing instead to offer briefings announcing to tribes EPA's conclusions how best to serve their interests.

Understood in this light, it is not surprising that EPA was not overwhelmed by comments, although Cooper expressed mild surprise at the lack of reaction.[490] Those that did comment were almost uniformly favorable. Tribes expressed enthusiastic support for the Policy materials,[491] showed interest in working closer with EPA and assuming delegable programs,[492] and made specific implementation recommendations.[493] Not

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THE 41ST ANNUAL CONVENTION, NAT'L CONGRESS OF AMERICAN INDIANS 75 (Sept. 9-14, 1984) (on file with author) (suggesting Washington sued EPA over its RCRA disapproval as an "indirect attack" on the Colville Tribe for pursuing enforcement against a non-Indian company polluting tribal groundwater). Perhaps reflecting this animosity, two tribes later accused Washington of hypocrisy in seeking RCRA delegation over non-Indians on reservations, asserting that Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982), showed that while the State asserted exclusive regulatory authority on the Quinault Reservations it completely abdicated any responsibility for clear building code violations. *See* EPA-1985-8 Memorandum from Deborah W. Gates, Asst. Regional Counsel, to Charles Findley, Director, Hazardous Waste Division 11-12 n. 14 (Nov. 1, 1985) (on file with author) (quoting amicus brief filed by the Colville and Tulalip Tribes objecting to the State's application for RCRA authority over non-Indians on reservations).

[488] EPA-1984-48 Memorandum from Josephine S. Cooper, Assistant Administrator for External Affairs, to Regional Administrators 1 (Aug. 13, 1984) (on file with author) (directing the start of regional informational meetings for tribes and states).

[489] *Id*. at 1.

[490] *See* EPA-1984-43 Cooper, supra note __, at 2 (characterizing tribal and state responses to the draft Policy as "generally sparse," and reporting that despite "widespread" distribution there was not a "high level" of tribal and state attendance at EPA briefings).

[491] *See, e.g.,* EPA-1984-18 Gates, *supra* note __ (summarizing tribal and other responses during a Region X briefing as "extremely supportive"); EPA-1984-19 Memorandum from Charles W. Murray, Jr., Ass't Regional Administrator, Region IX, to Allan Hirsch, Director, Office of Federal Activities (Sept. 13, 1984) (on file with author) (reporting that all Region IX tribes commenting were positive); EPA-1984-37 Letter from Merle L. Garcia, Governor, Acoma Pueblo, to Allan Hirsch, Director, Office of Federal Activities (Oct. 17, 1984) (on file with author) (congratulating EPA).

[492] *See, e.g*., EPA-1984-17 Letter from Warner K. Reeser, Principal Environmental Scientist, Council of Energy Resource Tribes, to Deborah W. Gates, Asst. Regional Counsel, Region X 1 (Sept. 10, 1984) (on file with author) (reporting Region X tribes' excitement over "the prospects for tribal environmental program development"); EPA-1984-20 Memorandum from Valdus V. Adamkus, Regional Administrator, Region V, to Leigh Price, Office of Federal Activities (Sept. 10, 1984) (on file with author) (reporting that the Menominee and Oneida Tribes of Wisconsin are awaiting final approval and implementation).

[493] *See, e.g*., EPA-1984-18 Gates, *supra* note __ (attaching Sept. 6, 1984 comments of Lou Stone, Chair, Colville Environmental Quality Comm'n, urging EPA not to seek an omnibus TAS law covering all

unexpectedly, a number of tribes highlighted the acknowledged connection between concrete implementation activities and realization of the Policy's goals.[494] Tribal support and concerns along the same lines were offered by two tribal organizations,[495] and by tribal representatives during the contemporaneous annual meeting of the National Congress of American Indians.[496]

States' reactions were understandably more muted, but with two limited exceptions they supported EPA's commitment to tribal self-determination and promised cooperative efforts.[497] The National Association of Counties supported the Draft Policy, though it recommended changes recognizing existing day-to-day interactions between tribes and counties.[498]

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programs but instead to treat each program separately); EPA-1984-16 Letter from Peterson Zah, Chair, Navajo Tribal Council, to Allan Hirsch, Director, Office of Federal Activities 2 (Sept. 4, 1984) (on file with author) (suggesting a need for interim funding and program implementation pending legislative changes).

[494] *See, e.g.,* EPA-1984-15 Memorandum from Clinton B. Spotts, Chief, Region VI Federal Activities Branch, to Allan Hirsch, Deputy Director, Office of Federal Activities (Sept. 14, 1984) (on file with author) (reporting tribal concerns in Region VI in the form of the question "[w]hat can we expect in the way or recourses; or, is this just more rhetoric?"); EPA-1984-16 Zah, *supra* note __ (describing the Navajo Nation's chief concerns as related to Policy implementation); EPA-1984-21 Letter from Ronnie Lupe, Chair, White Mountain Apache Tribe, to Loretta Kahn Barsamian, Chief, Region IX Federal Activities Branch 1 (Sept. 19, 1984) (on file with author) (recommending EPA establish "an Indian desk" and a "structured framework for tribal involvement in legislative and regulatory changes).

[495] *See* EPA-1984-33 Lewis, *supra* note __ (on behalf of the Intertribal Council of Arizona); EPA-1984-2x CERT Analysis of EPA Indian Policy, *supra* note __.

[496] EPA-1984-3 OUR INALIENABLE RIGHTS, *supra* note __, at 69-84 (transcribing a briefing on the Policy by Anne Miller, OFA, and NCAI delegates' reactions and questions).

[497] *See, e.g.,* EPA-1984-20 Adamkus, *supra* note __ (reporting Wisconsin's promise of "full support"); EPA-1984-22 Memorandum from John G. Welles, Regional Administrator, Region VIII, to Josephine S. Cooper, Asst. Administrator, Office of External Affairs (Sept. 20, 1984) (on file with author) (reporting the support of North Dakota and South Dakota "as long as" the Indian program did not reduce state funding); EPA-1984-23 Letter from Stanley J. Pac, Comm'r, State of Connecticut Dept. of Envt'l Protection, to David Pickman, Indian Coordinator, Region I Office of Public Affairs (Sept. 4, 1984) (on file with author) (finding the Policy in accord with long-standing state-tribe relations); EPA-1984-24 Letter from Sandara J. Borbridge, Special Staff Ass't to the Governor, State of Alaska, to Ernesta B. Barnes, Regional Administrator, Region X (Sept. 7, 1984) (on file with author) (commending EPA for its emphasis on the involvement of tribal governments). The States of Maine and New York took exception with the Draft Policy insofar as it contemplated tribal delegations in their states where special land claims settlement acts conferred state authority over reservations. *See* EPA-1984-43 Memorandum from Josephine S. Cooper, Asst. Administrator for External Affairs, to William D. Ruckelshaus, EPA Administrator 3 (Oct, 22, 1984); *see also* EPA-1984-25 electronic mail message from David Pickman, Region I, Office of Public Affairs, to Leigh Price Indian Coordinator, Office of Federal Activities (Sept. 10, 1984) (on file with author) (relating comments of Maine that a settlement act conferred state authority over the Penobscot Nation and the Passamaquoddy Tribe and thus "ruled out the possibility of delegating any programs to the tribes)."

[498] *See* EPA-1984-26 Letter from Geoffrey G. Trego, Director of Community Services, Nat'l Assoc. of Counties, to Allan Hirsch, Director, Office of Federal Activities (Aug. 30, 1984) (on file with author) (asking for Policy recognition of counties). EPA accepted this suggestion and added "local governments" to Principle 6's call for tribal and state cooperation on matters of mutual concern.

EPA received additional supportive comments and pledges of cooperation from the Department of the Interior,[499] the Department of Justice,[500] the Department of Energy,[501] the Department of Health and Human Services,[502] the Indian Health Service,[503] and the Bureau of Indian Affairs.[504] Interior and Justice also made detailed comments, resulting in meetings with OFA and negotiated Policy revisions.[505]
Following receipt of most of the comments submitted, OFA convened a meeting of the Indian Work Group, but not for the purpose of considering the comments. IWG members were briefed generally on the comments and Policy revisions OFA independently made in response, but they did not specifically evaluate either the comments or the responses.[506] OEA Assistant Administrator Cooper indirectly explained this striking omission by noting the main issues raised by the comments were either considered extensively in the development of the Draft Policy, or concerned implementation actions to be taken after an official Policy was adopted.[507] Curiously, although the IWG meeting focused on Policy implementation activities,[508] the members did not consider those latter comments either.

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[499] *See* EPA-1984-34 Letter from Frank K. Richardson, Solicitor, U.S. Dept. of the Interior, to Josephine S. Cooper, Asst. Administrator for External Affairs (Sept. 6, 1984) (on file with author).

[500] *See* EPA-1984-35 Letter from F. Henry Habicht II, Ass't Att'y Gen., Land and Natural Resources Division, Dept. of Justice, to Josephine S. Cooper, Asst. Administrator, Office of External Affairs (Sept. 11, 1984) (on file with author).

[501] *See* EPA-1984-28 Letter from Jan W. Mares, Ass't Sec'y for Policy, Safety and Environment, U.S. Dept. of Energy, to Allan Hirsch, Director, Office of Federal Activities (Aug. 28, 1984) (on file with author).

[502] *See* EPA-1984-29 Letter from Dorcas R. Hardy, Ass't Sec'y for Human Development Services, U.S. Dept. of Health and Human Services, to Allan Hirsch, Director, Office of Federal Activities (Aug. 30, 1984) (on file with author).

[503] *See* EPA-1984-27 Letter from Everett R. Rhoedes, Director, Indian Health Service, to Allan Hirsch, Director, Office of Federal Activities (Aug. 27, 1984) (on file with author).

[504] *See* EPA-1984-30 Memorandum from Charles R. Jeter, Regional Administrator, Region IV, to Josephine S. Cooper, Asst. Administrator, Office of External Affairs (Sept. 7, 1984) (on file with author) (noting Aug. 31, 1984 letter from Thomas Bond, Acting Director, Bureau of Indian Affairs).

[505] *See* EPA-1984-36 Letter from Allan Hirsch, Director, Office of Federal Activities, to Mary L. Walker, Deputy Solicitor, Dept. of the Interior (Sept. 28, 1984) (on file with author) (enclosing a revised Draft Policy following a September 20, 1984 DOI-EPA meeting); EPA-1984-40 Memorandum from Allan Hirsch, Director, Office of Federal Activities, to Richard Mayes, Senior Enforcement Counsel, Office of Enforcement and Compliance Monitoring (Oct. 4, 1984) (on file with author) (describing EPA-DOJ meeting resolving draft Policy issues).

[506] *See* EPA-1984-39 Memorandum from Josephine S. Cooper, Asst. Administrator for External Affairs, to Ass't Administrators et al. (Oct. 24, 1984) (on file with author) (covering a summary report of the Oct. 10, 1984 IWG meeting).

[507] See EPA-1984-43 Memorandum from Josephine S. Cooper, Asst. Administrator for External Affairs, to William D. Ruckelshaus, EPA Administrator 3 (Oct, 22, 1984) (on file with author) (transmitting final Draft Policy and Implementation Guidance for approval).

[508] *See* EPA-1984-38 Memorandum from Allan Hirsch, Director, Office of Federal Activities, to Indian Work Group Representatives (Sept. 27, 1984) (on file with author) (transmitting an agenda for the upcoming October 1984 IWG meeting). In this regard, OFA anticipated the Administrator's approval of the Implementation Guidance, which designated the IWG's initial task as recommending specific

On October 22, 1984, Cooper forwarded the final package to Ruckelshaus. After years of work toward this moment, Cooper was surprisingly laconic: "Attached for your review and approval is an EPA Indian Policy … which reflects the special legal rules and Presidential policy guidelines that apply to Indian reservations."[509] She very briefly described the history of the Policy and Implementation Guidance development, the broad internal and more limited external review processes, comments received, and the changes they evoked. She referred to Indian reservation jurisdiction, but with a tone and level of generality suggesting ultimately the issue had only minimal effect on the Policy and Implementation Guidance.[510] Then, with neither fanfare nor trepidation, Cooper simply recommended approval.[511]

Two weeks later, on November 8, 1984, EPA Administrator William Ruckelshaus signed the EPA Policy for the Administration of Environmental Programs on Indian Reservations.[512] The United States Environmental Protection Agency thus became the first federal agency to issue an official statement of policy on Indian affairs following Reagan's 1983 Statement.

VI. EPA's 1984 Indian Policy and Implementation Guidance

EPA's 1984 Indian Policy was issued as a package of three documents. The first document was a one-page cover memo from EPA's Office of External Affairs, announcing the Agency's adoption of the 1984 Indian Policy.[513] The second document was the 1984 Indian Policy proper, signed by Administrator Ruckelshaus.[514] The 1984 Indian Policy was four pages long, with three paragraphs labeled "Introduction," one paragraph labeled "Policy," and nine supporting "principles," each with some brief explanatory text. The third document was a seven-page memorandum to Assistant Administrators from Deputy Administrator Alm labeled as "Implementation Guidance."[515] The Implementation Guidance translated the 1984 Indian Policy into specific near-term actions.

OEA's cover memo identified the "cornerstones" of the 1984 Indian Policy and Implementation Guidance as EPA respect for tribal self-determination and a commitment to working with tribes on a government-to-government basis. The memo emphasized the 1984 Indian Policy's core approach of treating tribes like states by noting the Agency's long-range objective of "including Tribal Governments as partners in decision-making

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prioritized implementation actions for the first year of operations under the Policy. *See* EPA-1984-1(C) Memorandum from Alvin L. Alm, Deputy Administrator, to Ass't Administrators et al. 3 (Nov. 8, 1984).

[509] EPA-1984-43 Cooper, *supra* note __ at 1.

[510] *See infra* text accompanying note __ [re Cooper's 10/22/84 description of jx to Ruck in 84P section P1]

[511] The Implementation Guidance was written for Deputy Administrator Alm's signature.

[512] EPA-1984-1 EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984) [hereinafter 1984 Indian Policy], at http://www.epa.gov/indian/policyintitvs.htm.

[513] EPA-1984-1(A)xc Memorandum, Indian Policy, U.S. Environmental Protection Agency, Office of External Affairs 1 (undated) (on file with author).

[514] 1984 Indian Policy, *supra* note __.

[515] EPA-1984-1(C) Alm, *supra* note __.

and program management on reservation lands, much as we do with State Governments off-reservation."[516]

A. The 1984 Indian Policy

The 1984 Indian Policy's Introduction section explained the federal-tribal partnership would take form through "keynote" efforts giving "special consideration to Tribal interests in making agency policy," and ensuring "close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands."[517] But lest these commitments be misunderstood, the 1984 Indian Policy highlighted EPA's paramount and overriding concern: "In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment."[518] That is, notwithstanding the 1984 Indian Policy's aspiration for an effective federal-tribal partnership, EPA retained responsibility and final authority for decisions affecting human health and the environment in any particular instance. EPA would presumably disregard tribal interests and objections perceived in conflict with human health and/or environmental interests.

The nine principles of the Policy were aimed at achieving the Agency's general objectives of partnering with tribes, considering tribal interests, and protecting human health and the environment. These Principles came, of course, directly from the policy drafts in fall 1983, which were based on the concepts identified in the summer 1983 Discussion Paper, which expanded the themes of the 1980 Policy.

1. **Principle 1:**[519] The Agency stands ready to work directly with Indian Tribal Governments on a one-to-one basis (the "government-to-government relationship"), rather than as subdivisions of other governments.

This Principle obviously responded to President Reagan's expectation that federal-tribal interactions occur in a government-to-government relationship, which necessarily acknowledged the governmental status of tribes. Tribes are not private commercial entities or special interest groups; tribes are local governments with responsibility for public welfare, and thus have a stake in environmental management different than the public at large. Working directly with tribes as governments respects that reality; relying solely on indirect efforts like general publication in the Federal Register disrespects tribes' governmental status.

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[516] EPA-1984-1(A)xc OEA Memorandum, *supra* note __, at 1.

[517] 1984 Indian Policy, *supra* note __. at 1.

[518] *Id*. The final 1984 Indian Policy thus picked up a threshold issue noted in the 1980 Indian Policy, *see* 1980 Indian Policy, *supra* note __. at 5 (promising reservation program adaptations in order to protect human health and the environment), but dropped in the 1983 Draft Policy, *see* 1983 Draft Policy, *supra* note __. at 1.

[519] "Principle" subheadings in this section recite the 1984 Indian Policy Principles verbatim.

Similarly, tribes are not state subdivisions, and the Principle's express acknowledgment to that end made clear the Agency's cooperative federal relations with states would at best constitute an indirect and therefore inappropriate method of outreach to tribes. More fundamentally, the Principle effectively equated tribes with states, opening additional possibilities for tribal program assumption at a state-like level. It suggested EPA expected tribal value judgments might differ from states', and implied EPA's respect by not assuming tribal values would be compromised where conflicts with states arose.

Consistent with its earlier policy pronouncements, the decision whether tribes embraced the opportunity offered was left to tribes. In contrast to the direct mandatory language of the remaining eight Principles, Principle 1 said EPA "stands ready" to work with Indian Tribes. Rather than evidencing a failed opportunity to have shown a true commitment to federal-tribal partnerships,[520] this language modeled the overall self-determination tenor of the 1984 Indian Policy. The government-to-government relationship is predicated on the notion EPA and the tribes draw their authority from independent sources, and in that sense are independent sovereigns electing or not electing to partner with others.

Tribal independence, however, raised the fundamental question of tribal jurisdiction. In the drafting process, Principle 1 was a focus of comments from the Departments of Justice and the Interior because of its indirect reference to the jurisdictional question. The draft explanatory text for Principle 1 asserted "EPA recognizes Tribal Governments as independent sovereigns with primary authority and responsibility for the reservation populace."[521] Justice reacted by noting that "[g]eneralizations about jurisdiction over lands and activities on Indian reservations are particularly dangerous."[522] But surprisingly, Justice—the Agency's lawyer—ignored what was arguably the most fundamental question governing the 1984 Indian Policy: whether tribes have inherent jurisdiction over non-members in Indian country. Nor did Justice evaluate or comment on the Discussion Paper's separate legal analysis on Indian country jurisdiction.

The Department of the Interior, on the other hand, directly challenged EPA's broad legal generalization about inherent tribal sovereignty:

> The draft [Policy] statement refers to tribes as "independent sovereigns." The context indicates that the draft statement is referring to the relationship of tribes to State governments. Although tribes are independent of State governments, they are characterized as "domestic dependent nations" with respect to the Federal government. The statement also asserts that tribal governments have "primary authority and responsibility for the reservation populace." While that statement is certainly true with respect to the portion of the reservation populace who are tribal members, tribal authority over non-Indian conduct depends on the effect that conduct has on tribal interests.[523]

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[520] *Cf.* EPA-1984-2 CERT Analysis of EPA Indian Policy, *supra* note __, at 2 (asserting that "stands ready" implies a need for tribal initiation and suggesting that EPA initiate instead).

[521] *See* EPA-1983-12 Cooper. *supra* note __.

[522] *See* EPA-1984-35 Habicht, *supra* note __, at 1.

[523] EPA-1984-34 Richardson, *supra* note __, at 1-2 (citations omitted).

As it did with Justice, EPA met with Interior on these and related issues, and revised the Draft Policy as a result.[524] EPA dropped the draft's characterization of tribes as "independent sovereigns," referring instead to tribes as "sovereign entities."[525] But EPA did not, as Interior had, explicitly equate authority over "the reservation populace" with jurisdiction over non-Indians. In fact, EPA made no other change addressing DOI's obvious conclusion that EPA had exaggerated federal Indian law's treatment of tribal sovereignty. Nonetheless, Interior promptly concurred in the revised document.[526]

> **2. Principle 2:** The Agency will recognize Tribal Governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations.

Principle 2 specifically applied the national policy of government-to-government relations with tribes to the federal environmental program context. The cooperative federalism approach posited national programs animated by local governmental value judgments. The explanatory text promised that "[j]ust as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments."[527] This "lead role" conjoined with the Principle's reference to the "primary" status of tribes made clearer Principle 1's implicit association of tribes and states as independent EPA partners.

There were at least two key consequences to tribes' state-like status, necessarily implied by the Principle's reference to the cooperative federalism model. Fundamentally, as it did for states, EPA would respect tribes' inherent general welfare authority to establish environmental value judgments more stringent than federal ones. That respect was first implied in the narrow program-specific context of EPA's 1974 PSD Rule, and was demonstrated in EPA's 1977 approval of the Northern Cheyenne Tribe's decision to depart from EPA's initial classification of airshed quality, despite objections from off-reservation economic interests. Principle 2 promised a similar commitment across programs, represented most notably by EPA's later CWA regulations and its approval of tribal water quality standards several orders of magnitude more stringent than relevant federal ones.[528]

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[524] EPA-1984-36 Hirsch, *supra* note __ (enclosing a revised Policy following a September 20, 1984 DOI-EPA meeting).

[525] 1984 Indian Policy, *supra* note __, at 2.

[526] EPA-1984-40 Memorandum from Allan Hirsch, Director, Office of Federal Activities, to Richard Mayes, Senior Enforcement Counsel, Office of Enforcement and Compliance Monitoring 2 (Oct. 4, 1984) (on file with author).

[527] 1984 Indian Policy, *supra* note __, at 2.

[528] *See* EPA Final rule on Water Quality Standards, 56 Fed. Reg. 64,876 (December 12, 1991) (codified at 40 C.F.R. pt. 131); City of Albuquerque v. Browner, 865 F. Supp. 733 (D.N.M. 1993) (upholding EPA's inclusion of conditions in City's water discharge permit designed to comply with downstream tribal water quality standards for Arsenic 1,000 times more stringent than federal drinking water standards).

3. **Principle 3:** The Agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands.

Few tribes had developed environmental standards or made policy decisions under the auspices of federal environmental law by 1984. Although EPA had assisted the states financially and technically for years, federal assistance for tribes was limited and a relatively recent phenomenon. And given the sad history of paternalistic federal programs for Indians, it was unlikely tribes would suddenly seek EPA's help simply because EPA desired a governmental relationship. So, in Principle 3, EPA pledged not to wait but instead seek out tribes, actively encouraging them to assume governmental roles in the implementation of federal environmental programs.

The explanatory text again emphasized the TAS concept. EPA's encouragement would focus on tribal assumption of management responsibilities historically delegated to states.[529] Federal assistance would be of a kind offered states, including grants and technical assistance.[530] Tribal delegations would occur under standards and terms similar to those for state delegations. Where tribes elected not to assume full program roles, EPA would nonetheless encourage them to take on other lesser governmental roles in partnership with EPA.

Until tribes assumed full program roles, EPA would implement federal programs directly. Federal DI necessarily echoed EPA's very first Indian program decision in the 1973 FWPCA Rule: EPA would not delegate reservation program authority to states "unless the state has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government."[531] This was the 1984 Indian Policy's second (oblique) generalization on reservation jurisdiction, and its appearance in an earlier draft drew criticism from Interior:

> The draft statement announces that EPA will not delegate program responsibility to a State on an Indian reservation in the absence of an express grant of jurisdiction. When no significant tribal interests are affected, however, the State—not the Tribe—has jurisdiction over conduct by non-Indians on a reservation. The State will frequently have jurisdiction simply because no significant tribal interests are involved even though there is no express statutory grant of jurisdiction to the State.[532]

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[529] 1984 Indian Policy, *supra* note __, at 2.

[530] Not surprisingly, the explanation qualified EPA assistance in this regard, noting it would be offered "[w]ithin the constraints of EPA's authority and resources." *Id*. The Policy did not acknowledge the significance of those constraints.

[531] 1984 Indian Policy at 2.

[532] EPA-1984-34 Richardson, *supra* note __, at 2 (citations omitted). As a generalization, Interior's assumption of "frequent" state jurisdiction because of limited tribal interests had little applicability here. The 1983 1983 Discussion Paper made clear that significant tribal interests in health, welfare and environmental quality were at stake, and thus presumed tribes could meet Montana's health and welfare test for jurisdiction over non-members. Interior did not analyze that determination, nor did it address the 1983 Discussion Paper's corresponding conclusion that federal and tribal interests preempted state law. *Accord* EPA-1984-45 Memorandum from Cathy O'Connell and Mark Charles, Permits Division, Office of Water, to Betsy La Roe, Office of Water Enforcement and Permits 2 (Aug. 31, 1984) (on file with author)

EPA rejected Interior's suggestion of dropping the reference to a specific grant of state authority in favor of more general language on whether state jurisdiction was adequate to support delegation. That decision effectively left states with a substantial burden of proof. As it did on Principle 1, however, Interior concurred in the final draft despite EPA's rejection.

4. **Principle 4:** The Agency will take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs.

Principle 3's pledge of encouragement for tribal primacy rested on a glaring but unstated assumption that EPA had or would soon obtain express authority to delegate such roles to tribes. It would be pointless to encourage tribes to seek governmental roles EPA lacked authority to approve. And, in 1984, the majority of its major statutory mandates lacked such authorization.

EPA could take some comfort from its 1977 victory in *Nance*, where the Ninth Circuit found reasonable EPA's interpretation that the silent 1970 CAA allowed for tribal PSD redesignations. But EPA was at that moment before the Ninth Circuit again, this time defending its view that the 1976 RCRA, which defined tribes as municipalities but was otherwise silent on Indian country implementation, did not authorize state delegations for reservations.[533] A similar suit under SDWA was imminent in the Tenth Circuit.[534]

Congress had specifically authorized tribal delegations in only two narrow instances by this time: airshed redesignation within the CAA PSD program, and certification of pesticide applicators under FIFRA. But, the CAA and FIFRA amendments sounded a congressional tone supportive of EPA's TAS approach, amplified by their timing: the amendments were in effect post hoc authorizations for Agency regulations previously promulgated. So Principle 4, like the 1980 Indian Policy, pledged the Agency's effort to obtain clearer authorization for working directly with tribes.[535] Principle 4 did not, however, specifically incorporate the Intertribal Council of Arizona's

(asserting the "draft policy implies that States have more authority over reservation lands that [sic] they actually do").

[533] EPA would also prevail on this interpretation, but the decision would not be issued for three months. *See* Washington Department of Ecology, 752 F.2d 1465.

[534] *See* Phillips Petroleum, 803 F.2d at 549 (noting tension between the Agency and Phillips Petroleum over EPA's direct implementation of the SDWA UIC program on the Osage Reservation in May 1984, and Phillips suit challenging EPA's authority filed January 10, 1985). As the Ninth Circuit did for EPA's interpretation of RCRA, the Tenth Circuit found reasonable EPA's similar interpretation of SDWA.

[535] The focus here would be on forming a formal legislative strategy to accomplish program changes already identified. *See* EPA-1984-45 O'Connell and Charles, *supra* note __, at 2 (recommending that the Office of General Counsel get serious about developing program by program amendments identified years earlier).

recommendation the legislative effort be guided by a joint committee of EPA and tribal staff.[536]

5. **Principle 5:** The Agency, in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments.

The federal trust responsibility has been anomalous since its creation, when it was first invoked to obfuscate the imperial assertion of federal power over Indians.[537] In theory, it posits in Congress broad "moral obligations of the highest responsibility and trust … judged by the most exacting fiduciary standards."[538] But, at least as to Congress, courts at this time generally viewed these as moral (not legal) obligations lacking justiciable enforcement standards.[539] Courts would occasionally scrutinize federal agency actions, however, assuming unless otherwise indicated Congress intended the executive branch's adherence to the trust responsibility.[540]

The year before EPA issued the 1984 Indian Policy, the Supreme Court decided *Mitchell v. United States*,[541] which held extensive federal laws and regulations governing Indian timber harvests imposed a trust duty on the BIA enforceable in suits for money damages. EPA's programs were different in that they did not specifically manage tribal assets like real property and money. And, of course, EPA's presence in Indian country at this time was minimal if not non-existent, a failure the 1984 Indian Policy sought to remedy. Nonetheless, Justice balked when EPA's draft trust Principle read, "the Agency,

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[536] *See* EPA-1984-33 Letter from John R. Lewis, Executive Director, Intertribal Council of Arizona, to Loretta Kahn Barsamian, Chief, Region IX Federal Activities Branch 1 (Sept. 17, 1984) (on file with author).

[537] *See generally* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[538] *See generally* Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). Although Seminole was a fact-specific case involving federal mis-management of tribal cash assets, its broad language supports a not uncommon view of tribal officials that where more than one policy option exists, the trust responsibility suggests a preference for options benefiting or at least not injuring Indian interests. *See, e.g.,* EPA-1984-32 Stone, *supra* note __ (objecting to the State of Washington's application for CWA program delegation for reservations, and urging EPA implement the permit program directly with the assistance of the Colville Confederated Tribes "in accordance with EPA's trust responsibility owed to the Tribes"). *Accord* Pyramid Lake Paiute Tribe of Indians v. Morton 354 F. Supp. 252 (D. D.C. 1972) (finding DOI's "judgment call" balancing the competing interests of an Indian tribe and adjacent water users as an abuse of discretion and a failure to discharge the federal trust responsibility).

[539] *See generally* Reid Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213 (1975).

[540] *Id*. at 1226-27. A notable but isolated example of this view was the Pyramid Lake Paiute Tribe decision, 354 F. Supp. 252, where the court concluded DOI violated the federal trust responsibility by treating tribal interests equally with other competing interests). *Accord* Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982) (applying the canon of construction for liberal interpretation of statutes and treaties favoring tribal interests to administrative regulations governing notices of proposed mineral leases in Indian country).

[541] 463 U.S 206 (1983).

in recognition of its federal trust responsibility, will assure that tribal concerns and interests are fully considered."[542]

For Justice, fresh from the extensive Mitchell trust litigation, EPA's trust principle read like an explicit admission that the Agency owed such a duty, inviting all manner of future breach of trust suits.[543] Justice recommended changing the Principle, and adopting an accounting system for staff and financial resource allocations to Indian issues so that the Agency had evidence of its implementation in the event of trust suits. In response, EPA revised the final Principle so that EPA would act "in keeping with the Federal trust responsibility."[544]

6. **Principle 6:** The Agency will encourage cooperation between tribal, state and local governments to resolve environmental problems of mutual concern.

This Principle implicitly recognized the simple fact that jurisdictional and ecosystem boundaries are often incongruous. Pollution migrates across state and reservation lines. Difficulties can also arise when neighboring jurisdictions set differing standards for similar media. As a practical matter, EPA encouraged early communication and cooperation between tribes and states (and their subdivisions) to minimize such conflicts.[545]

EPA claimed its encouragement for intergovernmental cooperation favored neither party, though the 1984 Implementation Guidance issued with the 1984 Indian Policy noted EPA facilitation would track the federal trust responsibility and the 1984 Indian Policy.[546] Neutral or not, the Principle underscored EPA's view of tribes as legitimate program managers, stressing the importance of "comity between equals and neighbors" in resolving shared environmental problems.[547] In the rubric of cooperative federalism, such equality implied that state-tribe conflicts would not be resolved by forcing differing tribal values to compromise.

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[542] EPA-1984-35 Habicht, *supra* note __, at 2-3 (emphasis added by Justice).

[543] EPA-1984-35 *Id*. at 2-3 (suggesting EPA was "committing itself, in a knowing manner, to perform specific 'trust responsibilities'," and warning "the Agency should be prepared for breach of trust litigation").

[544] 1984 Indian Policy, *supra* note __, at 3 (emphasis added). EPA also deleted the adjective "fully" from the consideration promised tribal interests, and replaced the explanatory text's promise of "a special effort to protect" the environmental interests of Indian Tribes with a pledge to "endeavor to protect" them. *Id*.

[545] EPA added a reference to local governments at the suggestion of the National Association of Counties, which noted existing working relations with tribes. *See* EPA-1984-26 Trego, *supra* note __, at 1.

[546] *See infra* text accompanying notes __ to __. [section VI.B. on Implementation Guidance]

[547] 1984 Indian Policy, *supra* note __, at 3. Perhaps EPA intended to suggest equality between tribes and counties, a concept surely supported by the several statutory references to tribes as municipalities. Yet, the expectation of "comity between equals" appeared in the first Policy draft in the fall of 1983, when the Principle focused on state-tribe cooperation, long before the National Association of Counties suggested including other local governments. *See* EPA-1983-12 Cooper, *supra* note __, at 4; *accord* 1980 Indian Policy, *supra* note ___, at 6 (including a principle of encouraging "intergovernmental cooperation" between states and tribes with no mention of counties).

7. **Principle 7:** The Agency will work with other federal agencies which have related responsibilities on Indian reservations to enlist their interest and support in cooperative efforts to help tribes assume environmental program responsibilities for reservations.

Principle 7 evidenced perhaps some maturation of the Agency's Indian program. The 1980 Indian Policy made no specific commitment to work with other federal agencies, despite EPA's relative inexperience in Indian country. EPA viewed the long history of IHS and BIA in delivering services on Indian reservations as largely irrelevant to EPA's regulatory mission.[548] The 1983 Discussion Paper repeated the 1980 Indian Policy's omission, making no reference to the possible contributions of other federal agencies.

One internal Discussion Paper commenter called that a "serious omission," suggesting interagency consultation would result in better continuity for reservation programs.[549] An IHS representative expressed surprise that despite years of IHS-EPA cooperative work on reservation drinking water quality, the IWG failed to include a federal consultation principle.[550]

OEA responded, introducing a new principle of federal interagency cooperation in the 1983 Draft Policy, which became Principle 7 in the 1984 Indian Policy.[551] Like Principle 6, Principle 7 assumed that effective responses to complex challenges required assistance from and coordination with others. Both Principles saw the fundamental challenge as effective protection of health and environment. EPA saw value in tapping whatever existing health and environmental data IHS and BIA possessed.[552] Those agencies also had an established presence in Indian country, and importantly, experience with tribal program development.[553]

In that vein, Principle 7 addressed the additional challenge of actualizing tribal self-determination; EPA's interest in federal cooperation was directed specifically at tribal program development and implementation. EPA's goal was echoed by BIA's comment on the Draft Policy that "fragmented, individual agency approaches" were less

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[548] EPA thus concluded that these other agencies could not "fulfill a direct regulatory role" under EPA's statutes. 1980 Indian Policy, *supra* note __, at 3. EPA did not consider whether other agencies might play a supporting or cooperating role.

[549] EPA-1983-2 Durham, *supra* note __ (comments of Region VIII staff on the 1983 Discussion Paper); *accord* Sonia F. Crow, Acting Regional Administrator, Region IX, to Paul C. Cahill, Director, Office of Federal Activities (Jan. 23, 1983) (on file with author) (comments of Region IX staff on the 1983 Discussion Paper).

[550] EPA-1983-2 Cofrancesco, *supra* note __.

[551] EPA-1983-12 Cooper, *supra* note __. at 5 (labeled Principle 8).

[552] *See* [attached to EPA-1984-39] Report of the Indian Work Group Meeting 5 (Oct. 10, 1984) (asserting IHS' and BIA's experience and information "can be extremely useful"); *id*. at 2 (asserting that IHS "should be an excellent source of [environmental] data").

[553] *See* EPA-1983-2 Cofrancesco, *supra* note __ (noting the sizable presence of BIA and IHS on reservations relative to EPA); EPA-1984-42 Price, *supra* note __, at 3 (suggesting BIA and IHS and Administration for Native Americans (ANA) personnel and funds could supplement EPA's efforts).

likely to support the national policy of Indian self-determination.[554] IHS also favored an interagency cooperative approach.[555] Interior suggested EPA establish official mechanisms like formal memoranda of agreement for consultation with DOI and BIA,[556] which the IWG took up in October 1984 as one of its proposed short-term implementation activities.[557]

One tribal commenter, perhaps more familiar with federal consultation than EPA, suggested the 1984 Indian Policy "include a statement assuring tribes that EPA will not work unilaterally with federal agencies, but with the cooperation and consent of Indian governments."[558] Another tribal commenter suggested EPA request that BIA and IHS designate environmental officers responsible for coordinating EPA, BIA and tribal activities.[559] Neither of these concepts was incorporated in the final 1984 Indian Policy.

8. Principle 8: The Agency will strive to assure compliance with environmental statutes and regulations on Indian reservations.

On its face, this Principle simply restated the 1984 Indian Policy's fundamental objective of protecting human health and the environment. Yet, the explanatory text made clear the Administrator's expectation that federal enforcement activities on reservations occur in a manner consistent with the government-to-government relationship with tribes. EPA would cooperate with tribal governments when it proceeded against private facilities affecting tribes. Where a tribe managed or owned a substantial interest in a noncompliant facility, EPA would begin with education and assistance in recognition of the tribe's governmental status, and use direct judicial or administrative enforcement as a last resort.[560]

EPA's promise to honor the 1984 Indian Policy even in the difficult times of tribal noncompliance reflected well on the Agency's commitment, but this narrow focus on one EPA function was an awkward fit with the other more global and general principles. Its relatively short history might have also contributed to its palpable difference; enforcement was the only substantive concept in the 1984 Indian Policy that did not appear in some form in the 1980 Policy. Nor was it a prominent feature of the 1983 Discussion Paper, and thus the first Draft Policy in 1983 contained neither a principle nor text referring to enforcement issues.

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[554] EPA-1984-30 Jeter, *supra* note __, at 1 (quoting letter comments of Thomas Bond, Acting Director, Bureau of Indian Affairs).

[555] *See* EPA-1984-27 Letter from Everett R. Rhoedes, Director, Indian Health Service, to Allan Hirsch, Director, Office of Federal Activities 1 (Aug. 27, 1984) (on file with author).

[556] EPA-1984-34 Richardson, *supra* note __, at 3 (enclosing as an example a recent Memorandum of Agreement between BIA and the U.S. Fish and Wildlife Service).

[557] EPA-1984-39 Cooper, *supra* note __ (covering a summary report of the Oct. 10, 1984 IWG meeting).

[558] EPA-1984-21 Lupe, *supra* note __, at 2.

[559] EPA-1984-37 Letter from Merle L. Garcia, Governor, Acoma Pueblo, to Allan Hirsch, Director, Office of Federal Activities 3 (Oct. 17, 1984) (on file with author).

[560] EPA-1984-44 Memorandum from Josephine S. Cooper, Asst. Administrator for External Affairs, and Courtney Price, Asst. Administrator for Enforcement and Compliance Monitoring, to Al Alm, Deputy Administrator 1-2 (March 14, 1984) (on file with author).

EPA's Office of Enforcement and Compliance Monitoring pointedly raised the issue in its comments on the Draft Policy.[561] OEA's initial reaction was to leave this for later supplemental guidance, but pressure from the regions persuaded it to propose a new Policy Principle.[562] Deputy Administrator Alm added Principle 8 to the Draft Policy in July 1984, after the Agency's internal review and just as external review was beginning.[563]

Reaction to the new Principle varied with the interests represented. The Permits Divisions of EPA's Office of Water read the Principle as implying EPA would "bend over backwards" to treat reservation noncompliance differently,[564] while tribal commenters pushed EPA to go farther.[565] The Affiliated Tribes of Northwest Indians proposed more moderate language underscoring the Principle's spirit of cooperation, which EPA adopted nearly verbatim.[566]

Justice expressed several concerns over the enforcement Principle. The most pressing was Justice's inference that the explanatory text established preconditions potentially hindering the Attorney General's "plenary authority" over criminal matters.[567] In an October 1984 meeting, Justice and EPA representatives agreed to revisions clarifying the 1984 Indian Policy had no such effect.[568] Justice also saw the text's pledge that EPA enforcement against non-tribal facilities would occur "in concert" with tribes suggested a tribal veto power not shared by states.[569] The final 1984 Indian Policy

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[561] Discussion Outline, *supra* note __, at 2 (noting OECM's "extensive input on the specific issue of enforcement against Tribal facilities" but no comments on the general policy).

[562] EPA-1984-44 Cooper, *supra* note __, at 1. Curiously, the Council of Energy Resource Tribes wondered ambiguously whether there was a need for this Principle. *See* EPA-1984-2x CERT Analysis of EPA Indian Policy, *supra* note __, at 8.

[563] EPA-1984-12 Alm, *supra* note __, at 2.

[564] EPA-1984-45 O'Connell and Charles, *supra* note __, at 2.

[565] *See* EPA-1984-37 Garcia, *supra* note __, at 4 (expressing Acoma Pueblo's recommendation that EPA enforcement occur in "a way acceptable to the Tribe"); EPA-1984-21 Lupe, *supra* note __, at 3 (expressing White Mountain Apache Tribe's recommendation that EPA enforcement exhaust tribal administrative and judicial processes).

[566] *Cf.* EPA-1984-3 OUR INALIENABLE RIGHTS, *supra* note __, at 84 (reporting Joe De La Cruz presented a resolution of the Affiliated Tribes of Northwest Indians suggesting EPA say "and in these cases where facilities owned or managed by tribal governments are not in compliance with federal environmental statutes, EPA will work cooperatively with tribal leadership to develop means to achieve compliance or agreement on alternatives, providing technical support and consultation, as necessary, to enable tribal facilities to comply", *with* 1984 Indian Policy, *supra* note __, at 4 (including all of this language except the phrase "or agreement on alternatives").

[567] EPA-1984-35 Habicht, *supra* note __, at 4.

[568] *See* EPA-1984-40 Hirsch, *supra* note __ (noting DOJ's concurrence with revised policy materials following meeting resolving draft Policy issues). The revision Justice accepted was less than clear though. EPA revised the enforcement Principle to control only "direct EPA action through the judicial or administrative process." *See* 1984 Indian Policy, *supra* note __, at 4.

[569] *See* EPA-1984-35 Habicht, *supra* note __ at 5-6 (noting EPA "consults" with states when initiating federal enforcement action, but does not offer them approval authority).

promised instead that EPA "will endeavor to act in cooperation with the affected Tribal Government" for private facilities enforcement.[570]

> **9. Principle 9:** The Agency will incorporate these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system and ongoing policy and regulation development processes.

This Principle spoke directly to EPA's perception that the 1980 Indian Policy failed to change the Agency's culture across programs and offices. Principle 9 pledged EPA would apply the concepts and goals of the preceding eight Principles into the management systems regulating Agency behavior. Agency managers were expected to plan and budget for specific long-term Indian program activities, identify and resolve barriers to tribal program roles, and consider Indian issues when developing policies and regulations. In theory, institutionalizing the Agency's conscious awareness of unique Indian issues could lead to a day when a specific Indian program was unnecessary because its aspects would be assimilated into the Agency's operations and culture.

> So what we are trying to do is get [the Indian Policy] totally meshed into our institutional programs so that the long term goal obviously is that it will no longer be a separate program, we don't have a Nevada program, we don't have a Minnesota program, so eventually, we hope, it won't be necessary to have an Indian Program, that we will work directly with [tribes] and have the programs going just as we do now with the state governments.[571]

B. The 1984 Indian Policy Implementation Guidance

Principle 9 implicitly acknowledged EPA's failure to institutionalize the 1980 Indian Policy. A related concern for limited implementation of the 1980 Indian Policy was the likely reason EPA issued the Implementation Guidance[572] as a companion to the 1984 Indian Policy.[573] Nearly from the inception of the policy drafting exercise in fall 1983, each draft of the 1984 Indian Policy was accompanied by a draft Implementation Guidance. The 1984 Indian Policy espoused broad parameters for EPA's relations with tribes and its approaches to program management on reservations. The Guidance established an action plan for actualizing the 1984 Indian Policy Principles in the near term.

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[570] 1984 Indian Policy, *supra* note __, at 4. EPA did not address Justice's observation that the draft text's distinction between tribal and private facilities was ambiguous and potentially inconsistent with EPA's regulatory programs.

[571] *See* EPA-1984-3 OUR INALIENABLE RIGHTS, *supra* note __, at 72 (quoting remarks by Anne Miller, Director, Special Programs & Analysis Division, Office of Federal Activities, to tribal representatives at the 1984 annual meeting of the National Congress of American Indians).

[572] EPA-1984-1(C) Alm, *supra* note __.

[573] The 1980 Indian Policy's Implementation section had called for an Implementation Plan to be developed later. *See* 1980 Indian Policy, *supra* note __, at 7.

In contrast to the format of the 1984 Indian Policy—essentially a public announcement of policy adoption—the Implementation Guidance was constituted as a memorandum directive to the Agency's middle management from their immediate supervisor, the Deputy Administrator.[574] The Guidance "instruct[ed] program managers and regional administrators to specifically incorporate the Indian Policy into their respective operations."[575] The Guidance focused on initial implementation efforts; later guidance would be developed as needed.[576]

The Guidance kept national issues and agency-wide coordination of the Agency's Indian program at the headquarters level in the Office of External Affairs. OEA would utilize the IWG to identify and address legal and regulatory barriers to tribal program assumption, and recommend pilot projects. Programs and regions would assist in the national work by designating IWG representatives "authorized to speak for [their] office," and supporting them with time and resources adequate for significant support for the IWG.[577]

In addition to supporting the IWG, administrators of programs and regions were also directed to undertake a handful of concrete but relatively minor activities directed at beginning the "front-end investment" necessary for increasing tribal participation in program management. The Guidance expected AAs and RAs would establish tribal liaisons through "direct, face-to-face contact (preferably on the reservation) with Tribal Government officials."[578] As they had for states, administrators would make "a special effort" to notify tribes and affirmatively seek their views on EPA decisions directly or indirectly affecting tribal territories. Where necessary to facilitate "informed" tribal input, administrators would provide tribes with information and briefings. Tribal program development would also be fostered by administrators' use of staff experienced in assisting state program development. In the specific context of non-complying tribally owned or managed facilities, the Guidance required administrators obtain approval from headquarters before initiating formal enforcement action.[579]

Deputy Administrator Alm's Guidance did not, however, confront directly a fundamental implementation concern expressed by administrators months earlier: unless their existing performance standards and the Agency's accountability measures were changed to recognize this new Agency priority, they were unlikely to reallocate resources or readjust priorities. Alm had been similarly advised that "[i]f we are serious about changing program behavior, you will need a means of tracking performance and

[574] The Guidance memo was initially drafted for the Administrator's signature. *See* EPA-1983-11 Cooper, *supra* note __, at 1; EPA-1984-6 Cooper, *supra* note __ (covering an April 11, 1984 draft Implementation Guidance).

[575] *See* EPA-1983-13 Hunt, *supra* note __, at 1.

[576] EPA-1984-1(C) Implementation Guidance, *supra* note __ at 3.

[577] *Id*. Additionally, the Office of General Counsel was to have an IWG representative.

[578] *Id*.

[579] *Id*. at 6.

identifying success."[580] Alm was encouraged to require RAs to file semi-annual reports on their Region's progress in implementing the 1984 Indian Policy.[581]

Alm's final Guidance memo did not require progress reports, nor did it purport to establish new or change existing performance standards or accountability measures. It explicitly noted the need for such changes, but did not specifically assign to OEA or the IWG responsibility for recommending performance evaluation processes.[582] To be sure, their expectations for face-to-face meetings, specific notice, briefings, and reassignment of personnel were quantifiable, but the Guidance identified no threshold for satisfactory effort.[583] Even more amorphous were the Guidance's policy-like directives that administrators make "a special effort" to inform tribes of pending decisions, give "full consideration and weight" to tribal policies and priorities, "utilize" tribal input, and moderate state-tribe conflicts following the 1984 Indian Policy and trust responsibility but without "lend[ing] Federal support to any one party in its dealings with the other."[584]

In many respects, the detail and sophistication of Alm's 1984 Guidance memo reflected a maturation of the concepts set forth in Blum's 1980 Implementation Plan. But as with Blum's memo, an experienced observer could predict that Alm's nonspecific aspirational suggestions would not cause a sea change in EPA's culture. But neither Blum nor Alm expected such a result. Their memos were intended only to start the momentum, with additional strategies and actions to be determined later.[585] Alm knew the world would not change overnight. What he wanted was what Blum failed to accomplish: evidence that the Agency had made and was making a good faith effort to implement a new Agency-wide approach on a complex subject.

> As we begin the first year of operations under the Indian Policy, we cannot expect to solve all of the problems we will face in administering programs under the unique legal and political circumstances presented by Indian reservations. We can, however, concentrate on <u>specific</u> priority problems and issues and proceed to address these systematically and carefully in the first year. With this general emphasis, I believe that we can make respectable progress and establish good precedents for working effectively with Tribes. By working within a manageable scope and pace, we can develop a coordinated base which can be expanded, and, as appropriate, accelerated in the second and third years of operations under the Policy.[586]

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[580] EPA-1983-13 Hunt, *supra* note __, at 3 (emphasis in original). Hunt's emphasis is probably explained by the following sentence that indicated Hunt's view that the IWG was not an appropriate means for monitoring the Agency's progress in implementing the Policy.

[581] *Id*.

[582] Performance standards and accountability measures were neither listed in the agenda for or report of the IWG's October 10, 1984 meeting.

[583] The Guidance could, for example, have imposed the modest requirement that each RA meet one time personally with representatives from every tribe in the Region within a set period of time.

[584] EPA-1984-1(C) Implementation Guidance, *supra* note __, at 5.

[585] *See id.* at 3; EPA-1980-1 1980 Indian Policy, *supra* note __, at 7.

[586] EPA-1984-1(C) Implementation Guidance, *supra* note __, at 2 (emphasis in original).

Alm's modest but methodical approach, then, was aimed at showing "significant and credible progress" in Policy implementation within a year, not effecting long-term institutional change. He recognized the impracticality of attempting a global change immediately, explaining that full and effective implementation would require "a phased and sustained effort over time," just as it had for states. That long-term effort would be better embraced two years hence when EPA's budget process could specifically consider Indian program activities, rather than at present when they would require reallocation of funds already designated for state programs.

Yet, the Implementation Guidance was significant in that it made clearer the Administrator's expectation Agency personnel at every level treat tribal governments as they treated state governments. Tribes are not public interest groups, and thus Agency notices to tribes, and protocols for meetings with tribes should be treated and approached as intergovernmental relations. EPA would consider and accord weight to tribes' value judgments just as it did for states' local priorities and interests. Where tribes' and states' values differed, EPA would address any unreasonable consequences cooperatively, without expectation that solutions would come by forcing tribal values to yield to state values.

This last commitment—essentially to respect tribes' independent authority and responsibility to make value judgments about the proper balance of economic development and environmental quality that differ from neighboring jurisdiction—was perhaps more telling than any other substantive 1984 Indian Policy concept. Respect is not demonstrated by high-sounding proclamations that risk nothing. The true test comes when one's self interests are at stake. EPA could reasonably expect that in particular cases, state officials would point to the cooperative federalism model (created by state congressional representatives) and demand EPA respect state value judgments by forcing tribes to modify or compromise conflicting values. But, to EPA's credit, its later Indian program would center on the idea first raised in the 1974 PSD Rule: as neighboring local sovereigns, both states and tribes are competent to make value judgments different from each other and EPA. Where such differences raise difficulties in federal program implementation, EPA would facilitate governmental cooperation rather than elevate state judgments above tribal ones. In the years to come, this view of the federal role would become a litigated centerpiece of EPA's Indian Program.[587]

VII. Conclusion

EPA's 1984 Indian Policy could be fairly characterized as one of the strongest policy statements endorsing tribal self-determination ever made by a federal agency. Yet, the Policy was the culmination of a decade of Indian Program development born simply of practical necessity. In the early 1970s, Congress made the dramatic shift to the cooperative federalism model of environmental management, which relied on federal-state partnerships, but completely neglected Indian country. Contemporary Indian law cases suggested Congress' silence meant states lacked regulatory authority in Indian

[587] *See, e.g.,* Albuquerque, 97 F.3d 415 (upholding EPA's rejection of the City's argument that downstream tribal water quality standards should not apply to the City's off-reservation pollution discharges); Arizona v. EPA, 151 F.3d 1205 (upholding EPA's rejection of State complaints that a proposed tribal redesignation of airshed quality would have undue off-reservation economic impacts).

country. To EPA, that meant the new partnership with states might be ineffective in Indian country, raising the real, but unacceptable, possibility of a regulatory void for a collectively large area of the Nation.

EPA's first Indian Program cornerstone was a straightforward response to the problem: EPA would retain authority over Indian lands and facilities rather than delegate responsibility to (impotent) states. Federal DI was consistent with the historic exercise of federal power over Indian affairs to the exclusion of states, but in the modern era, it was an outmoded approach. National Indian policy was shifting away from federal control and toward tribal implementation of federal programs; coincidentally, the new environmental cooperative federalism preferred local to federal implementation. Federal Indian law had always recognized Indian tribes as local governments with aspects of civil sovereign authority over their territories, so EPA simply substituted tribes for states as its cooperative partner.

EPA's first experiment with according tribes a state-like status envisioned a regulatory program run by EPA, but animated by tribal environmental quality standards. Although it offered tribes no direct regulatory control, this role represented perhaps the most significant aspect of EPA's emerging Indian program: once approved by EPA, tribal value judgments balancing environmental quality and economic development become federally enforceable, constraining actors both inside and adjacent to tribal territories irrespective of whether the tribe possesses inherent authority over such actors. EPA's second TAS action took the next logical step, directly confronting tribal jurisdiction and presupposing direct tribal regulatory control over Indian and non-Indian polluters on Indian reservations.

When these early program-specific actions drew relatively little objection from states and non-Indians, garnered a growing tribal interest, and stimulated Congressional support, the stage was set for a more ambitious cross-program Agency approach. The 1980 Indian Policy explicitly acknowledged the Indian country regulatory gap, and proclaimed a commitment for solving it through government-to-government relations with Indian tribal governments. That was the Agency's first official endorsement of tribal self-determination, and though the 1980 Indian Policy was never implemented, it clearly established the primary elements of the 1984 Indian Policy and EPA's modern Indian program.

Tribal awareness of the 1980 Indian Policy, and growing concern for the environmental consequences of tribal natural resource development, pressed EPA to go beyond rhetoric. But the resulting program-specific actions occurred largely without regard to the guiding principles of the 1980 Indian Policy, multiplying confusion and inconsistency. Congressional concern led to a two-year Agency study detailing the challenges and alternatives, whose completion coincided with the President's announced support for tribal self-determination, and the return of EPA's first Administrator who believed state environmental programs were inherently suspect. In the face of substantial external pressure and the study's undeniable tenor favoring tribal state-like roles, EPA adopted its second Indian Policy in 1984.

Like the 1980 Indian Policy, the 1984 Indian Policy espoused a commitment to tribal self-determination. The Agency was prepared to encourage and assist tribes in developing institutional capacity adequate for accepting full delegations of federal programs. Where necessary, EPA would seek statutory and regulatory changes enabling

such tribal roles. If tribes elected not to assume full regulatory roles, EPA would retain implementation responsibility rather than delegate to states, and work with tribes directly through some form of cooperating governmental role. Cognizant of the 1980 Indian Policy's failure, the 1984 Indian Policy promised more concrete implementation tasks, aimed specifically at demonstrating near-term progress as well as a long-term institutionalization of the Policy's tenets in the Agency's culture.

Some twenty years later, the difficult work of actualizing an institutional sea change within EPA continues. But the plethora of recent litigation[588] makes clear EPA has done more than simply proclaim a rhetorical commitment to tribal self-determination; but for Agency decisions delegating program primacy to tribes, denying primacy to states, and retaining federal authority—all primary aspects of the 1984 Indian Policy—those legal objections simply would not be lodged. Additionally, the existence of the 1984 Indian Policy arguably represents a reasoned and reasonable accommodation of competing interests in a complex and technical regulatory scheme, entitling EPA to claim judicial deference for Agency actions taken in the absence of clear congressional intent.[589] In these senses, EPA's 1984 Indian Policy continues to have direct effects on the Agency's modern Indian Program.
[end]

[588] *See supra* text accompanying notes __ to __ [Section I].

[589] Cf. Chevron U.S.A. Inc., v. NRDC, 467 U.S. 837, 865 (1984) (holding that "a reasonable accommodation of manifestly competing interests [] is entitled to deference [where] the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies"). *Accord* Washington Dept. of Ecology, 752 F.2d at 1471 (deferring to EPA's interpretation of Congress' silence as not amounting to a state delegation partly on the basis of EPA's 1980 Indian Policy's commitment to tribal self-determination).