Indian Tribal Sovereignty and Waste Disposal Regulation

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NOTES

INDIAN TRIBAL SOVEREIGNTY AND WASTE DISPOSAL REGULATION

INTRODUCTION

Commercial waste management companies and the nuclear industry have recently started negotiating with Indian tribes for the use of their lands to store hazardous and nuclear waste. It is their hope that such a measure will provide a solution to the 900 million tons of municipal garbage, toxic waste and sewage sludge generated annually, in the face of more and more landfill closings. Nuclear waste generators, in particular, have the even more difficult task of finding a temporary storage facility for 20,000 tons of high-level, toxic, radioactive materials until permanent repositories are established.1 There are complex social, political and financial reasons which motivate tribal decisions to enter into waste projects. While most tribes are rejecting offers to develop commercial waste projects, some are welcoming them because they bring the promise of hundreds of millions of dollars.2 Since few development opportunities exist and tribes suffer exorbitantly high unemployment rates, especially for unskilled or semi-skilled

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1. Michael Satchell, Trashing the Reservations? Native Americans are Tempted to Take Waste Others Don't Want, U.S. NEWS & WORLD REP., Jan. 11, 1993, at 24 (criticizing plans to build temporary facilities on reservations). See Edward Lippmann, On Apache Homeland, Nuclear Waste Seen as Opportunity, WASH. POST, June 28, 1992, at A3 (pointing out that by the time permanent sites are ready, 40,000 tons of waste will have accumulated). A discussion of jurisdiction over regulation of nuclear waste disposal is beyond the scope of this Note.

2. Mathew L. Wald, Pile of Cash Awaits Site for Fuel Rods Indian Tribes Bid For Nuclear Wastes, N.Y. TIMES, Aug. 27, 1993, at B11 (finding that the nuclear industry is so desperate to find temporary nuclear storage sites that a tribe or county willing to rent its land for temporary storage could collect up to fifty million dollars per year, for a lease of twenty years). Wald emphasizes that the poor financial situation of tribes makes them especially vulnerable to offers, since land is one of the few resources with which tribe members have left to negotiate. Id. There are authorities, however, who are in strong disagreement with this position. See SELECT COMMITTEE ON INDIAN AFFAIRS, WORKSHOP ON SOLID WASTE DISPOSAL ON INDIAN LANDS, S. REP. NO. 370, 102d Cong., 2d Sess. 3 (1992) (finding that the media has displaced public attention on commercial project development, and that the number of tribes considering such projects has been grossly overstated); Jana L. Walker & Kevin Gover, Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands, 10 YALE J. ON REG. 229, 229 (1993) (finding that “the media has created a steady drumbeat of misinformed stories claiming that Indian tribes and reservations alone have been targeted by waste companies”); Catherine Baker Stetson & Kevin Gover, CERCLA Liability and Regulation of Hazardous Waste on Indian Lands, 7 NATURAL RESOURCES AND ENV’R 24 (1993) (finding that only a few proposals have been acceptable by tribes).
workers, it is not surprising that economic benefits weigh heavily into decision-making.3

As of January 1993, sixteen tribes had applied for grants from the Department of Energy to study the possibility of hosting nuclear waste sites.4 There are currently more than 650 sites where solid waste is stored on Indian lands5 and proposals to construct hazardous waste facilities on those reservations are under way. Significantly, few, if any, of the current waste sites are maintained in a manner consistent with the Resource Conservation and Recovery Act (RCRA),6 the federal regulatory program which provides a comprehensive scheme for the treatment, storage and disposal of hazardous wastes.7 Under the recent RCRA amendments, almost all waste sites on reservations are classified as open dumps.8 Part of the reason tribes have been unable to remedy waste problems or comply with standards is their lack of eligibility for the type of support which states receive for implementing and enforcing environmental laws.9 Current estimates indicate that it would take more than $167 million to clean-up the existing open dumps,10 but without specific authorization by Congress for environmental clean-up, it is difficult to determine where the money will come from.11 Tribes are not the only communities dealing with the host of environmental and social problems associated

3. Rep. Bill Richardson, Beating Drums Shameful History Must End; Accord Native Americans Justice, Reform, PHOENIX GAZETTE, Apr. 12, 1993, at A13 (finding that conditions on reservations are increasingly disturbing). For instance, the unemployment rate on reservations typically exceeds 80%, the teen suicide rate is four times that of other ethnic groups and the Bureau of Indian Affairs estimates that 93,000 Indian people either live in substandard housing or are homeless. Id. See also SOLID WASTE DISPOSAL ON THE PINE RIDGE INDIAN RESERVATION, OVERSIGHT HEARING, REPORT BEFORE THE COMM. ON INTERIOR AND INSULAR AFFAIRS, 101st Cong., 2d Sess. 21 (1990) (testimony of Bill F Pearson, Associate Director, Office of Environmental Health and Engineering, Indian Health Service) (finding that Indians and Alaskan natives are suffering from some of the highest unemployment rates in the world, with the highest levels of poverty).

4. Satchell, supra note 1, at 25.

5. S. REP. No. 370, supra note 2, at 2.


7 Id.

8. S. REP. No. 370, supra note 2, at 2 (finding that because of new congressional standards enacted in 1991, "only 2 of 108 tribal landfills complied with EPA requirements"). However, the members of the Committee on Indian Affairs found it unlikely that any tribal landfills comply with new regulations which went into effect in October 1993. Id.


10. S. REP. No. 370, supra note 2, at 2 (the Committee estimated that clean-up costs would be so high on reservations because the new EPA criteria could lead to closure of many disposal sites causing an increase in the maintenance costs for existing sites).

11. Gover & Walker, supra note 9, at 934.
with disposal projects, which include diminishing landfill capacity and the "not-in-my-backyard" (NIMBY) syndrome. Clearly, one must acknowledge that many communities across the nation are grappling with health and safety problems posed by open dumps. However, when dealing with reservations, the issues of tribal sovereignty and federal and state jurisdiction over environmental regulation also come into play. The development of commercial and non-commercial waste facilities has also created some confusion as to what the scope of environmental liability on reservations is, as well as who has jurisdiction over the enforcement of environmental laws. Although tribes have the right to regulate waste disposal on their lands, they have neither been required nor permitted to do so until recent court decisions. Under RCRA, states presently do not have authority to regulate tribal country. However, the tribes themselves do not have express authority either. The need to resolve confusion about environmental regulation on tribal lands is further exacerbated by the proliferation of open, illegal dumping on reservations. Without clarity about the scope and applicability of environmental laws on reservations, tribes which are already destitute will find it increasingly difficult to clean up existing and future sites, or to target illegal waste dumpers.

This Note neither criticizes nor endorses the creation of hazardous waste disposal facilities on Native American reservations. It does, however, address the need for clarity of environmental regulation and how it applies to tribal lands. The decision to build waste disposal facilities should be left entirely to the tribes themselves. To condemn

12. Stetson & Gover, supra note 2, at 24.
13. Gover & Walker, supra note 9, at 934.
14. Walter E. Stern, Environmental Regulation on Indian Lands: A Business Perspective, 7 Nat. Resources and Envt’t 20, 22 (1993) (although federal, state and tribal governments each have regulatory power, states have been given the authority to tax non-Indian business on reservations, but it is unclear whether states will be given the power to generally regulate such businesses). See generally Walker & Gover, supra note 2; Mary Beth West, Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal Jurisdiction, 17 Am. Indian L. Rev 71 (1992).
15. Stetson & Gover, supra note 2, at 25.
16. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (holding that Congress must expressly intend for tribal rights to be abrogated); Washington Dep’t of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (holding that Washington State did not have jurisdiction to regulate tribal environmental problems on reservations within its borders because states had not been given express authority); infra Section IIa. See also Robert Laurence, American Indians and the Environment: A Legal Primer for New Comers, 7 Nat. Resources and Envt’l 3, 4 (1993) (finding that tribal "sovereignty is lost through voluntary surrender by tribes, through unilateral diminishment by Congress, and by implication as found by the Courts") citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
17. Gover & Walker, supra note 9, at 934 (finding that for most Indian communities, the problem of open dumping on tribal lands is of much greater concern than the prospects of building a commercial waste site).
the decision to build facilities would be unduly paternalistic and would deny what many call one of the few options for development and employment on reservations.\textsuperscript{18} Still, the decision to enter the waste management business requires assurance that compliance with environmental laws will be stringent. Without sufficient safeguards, these economic endeavors may pose severe threats to the future well-being of already dwindling Indian populations and to the health of the environment in general.

Part I of this Note discusses the historic development of the federal trust relationship with Indian tribes and the doctrine of tribal sovereignty. It concludes that tribal governments historically possessed a greater degree of freedom from state governmental interference than they do today, and, as such, had significantly more control over their internal affairs. Part II analyzes the impact of two recent Supreme Court decisions on federal, state and tribal jurisdiction of land-use and the limitations on tribal sovereignty today. This section describes how modern courts have increasingly ignored sovereignty and eroded related principles, despite the intentions of Congress and the executive branch to encourage tribal independence. Part III discusses the applicability of federal environmental laws to Indian lands and Indian tribes. This section considers the gap created by both Congress' and EPA's treatment of Indian governments under RCRA, and the resulting problems which have ensued. Part IV considers several recent cases involving environmental liability on reservations and concludes that RCRA must be amended to clarify the extent of Indian jurisdiction in order to protect reservation residents from the hazards of open dumping and allow them to properly deal with potential liabilities associated with building commercial waste facilities. Lastly, Part V considers the charge that locating waste facilities on reservations is an issue of environmental racism. This section explores the possibility that building facilities on reservations is motivated by industries which desire to exploit the economic situation of tribes and the current loopholes in environmental law regarding regulation of the tribal environment. This section concludes that tribes should retain the ability to make informed decisions about commercial waste industry development and should receive the proper technical support and guidance from the federal government.

I. Historic Division of Power Over Reservations

The development of successful waste management projects on reservations, whether commercial or non-profit, depends upon the proper identification of the roles and interests of all governing parties involved — the tribes themselves, the federal government, and the states. Each party clearly has an interest in being the controlling

\textsuperscript{18} See generally Gover & Walker, supra note 9.
Indian tribes maintain a unique relationship with the United States government. Tribes purportedly retain sovereign status, yet are subject to substantial regulation by Congress. Thus, tribal governments are not sovereign, in any traditional sense, over their ability to regulate activities within their borders. The extent of tribal sovereignty has also dramatically changed over the course of the last 150 years, with promises of recognition of tribal self-determination today juxtaposed against the broad federal regulatory power of the past. The evolution of the federal/Indian relationship reveals how the motivations and impacts of the law have often been contradictory and inconsistent, usually resulting in harm to the tribes.

A. Evolution of Tribal Sovereignty

The limitations on tribal sovereignty and on federal and state governments were spelled out in the beginning of the nineteenth century, when Chief Justice John Marshall devised the jurisdictional grants of power in three pivotal cases: Johnson v. McIntosh, Cherokee Nation v. Georgia, and Worcester v. Georgia. These cases, which have
come to be known as the "Marshall trilogy," recognized the sovereignty of Indians under traditional principles of international law. The trilogy simultaneously delegated some regulatory power over tribal lands to the federal government, and restricted the power of states to interfere with tribal governance.26

In Johnson v. McIntosh, a group of plaintiffs claimed that they had acquired title to a tract of land in Illinois which they had purchased directly from the Piankeshaw Indians.27 The defendant also claimed title to the same land which it purchased from the federal government.28 The United States claimed that it had properly obtained the land through a treaty with the Indians, and thus retained exclusive power to confer title to the land.29 The issue before the Court in Johnson was whether Indian tribes retained authority to convey legal title to land. The Court found in favor of the defendant, but set forth a significant opinion about Indian property rights.30

See McSloy, supra note 18, at 225 (finding that native American sovereignty, as a legal matter, was more respected by colonizers than it has been for the last 150 years by the U.S. government).

After the Revolutionary War, establishing peace with Indians was even more important to the founding government. In a letter by George Washington to James Duane, September 7, 1783, Washington called for a U.S. policy which would minimize bloodshed and fighting between Indians and colonists and peaceful purchase of their lands. In addition, the government embarked upon a series of treaties with tribes to regulate Indian affairs. Congress passed the Trade and Intercourse Act in 1790; and amended it 1802; the government also established Government Trading Houses to facilitate trade with tribes. In addition to economic motivations for a special relationship with tribes, the government had some humanitarian reasons for supporting a special relationship with Indians: "The principle of the Indian right to the lands they possess being thus conceded, the dignity and interest of the nation will be advanced by making it the basis of the future administration of justice towards the Indian tribes"). Report of Henry Knox, Secretary of War, on the Northwestern Indians, June 15, 1789.

An additional motivation for U.S. policy toward Indians was to encourage assimilation of Indians into Western society. Politicians hoped that by increasing friendly relations, Indians would abandon their way of living: "In leading them [Indians] thus to agriculture, to manufactures, and civilization; in bringing together their and our sentiments, and in preparing them ultimately to participate in the benefits of our Government, I trust and believe we are acting for their greatest good." President Jefferson on Indian Trading Houses, Jan. 18, 1803.

While there has been thorough historic investigation regarding the recognition of Indian sovereignty, it is important to keep in mind that despite legal recognition of the rights of Indians, the various colonizers and colonial governments were also responsible for the demise of thousands of Indians. See DOCUMENTS OF UNITED STATES INDIAN POLICY (Francis Paul Prucha ed. 1975).

26. PRICE & CLINTON, supra note 19, at 5. See Mary Beth West, Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal Jurisdiction, 17 AM. INDIAN L. REV. 71 (1992) (finding that greater legal protection was afforded to tribes by the Marshall Court than today).

27. 21 U.S. at 572.

28. Id.

29. Id.

30. Id.
The Court held that while discovery and conquest by white settlers gave the government the "exclusive right to extinguish the Indian title of occupancy," it concurrently gave the Indians some degree of sovereignty. Marshall explained that conquest gives the conqueror title which cannot be denied. However, Marshall says, under principles of "humanity" and where it is practicable, "the rights of the conquered to property should remain unimpaired . . . ." Thus, according to Marshall, Indians maintained some control over their land, while the federal government retained ultimate control over conveyance of title. Marshall's analysis indicated that one of the reasons why Indians were afforded some degree of sovereignty was that it was "impracticable" that Indians, as "fierce savages," would assimilate into white society.

The Court clarified the extent of tribal sovereignty in the two succeeding Cherokee cases. In *Cherokee Nation v. Georgia*, decided in 1831, the Court considered the ability of the Georgia government to extend its laws over the Cherokee territories. Writing for the majority, Marshall reasoned that since tribes were not foreign states in the sense of the Constitution, the Court, under Article III, lacked jurisdiction to redress the plaintiff's claims. More importantly, however, Marshall's opinion stated that the Constitution gave the federal government, and not the states, the power to regulate Indian affairs. He also characterized Indian territory as being protected by the federal

31. *Id.* at 574, 583.

32. But see Francis Jennings, *The Invasion of America. Indians, Colonialism and the Cant of Conquest* 15-16, 32 (1975) (harshly criticizing Marshall's characterization of the Indians as fierce savages and the idea that white colonizers discovered and conquered a wild land). As Jennings says: "Incapable of conquering true wilderness, the Europeans were highly competent in the skill of conquering other people, and that is what they did. They did not settle a virgin land. They invaded and displaced a resident population." *Id.*

33. Johnson, 21 U.S. at 588.

34. *Id.* at 602. Marshall stated: "It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned." *Id.* at 603.

35. *Id.* at 588. See Sarah P Campbell, Note, *Indian Tribal Sovereignty and the Environment*, 27 U. Rich. L. Rev. 371, 373 (1993) (discussing Marshall's reasoning that white man discovered America ignores the fact that Indians first lived here and they had no voice in the decisions of white colonizers to take what they wanted.) This author believes that the Court could have rejected principles of discovery and afforded greater protection to Indian rights.

36. 30 U.S. 1 (1831).

37. This case arose while the federal government was pursuing a policy to force Indians to move westward. The Georgia legislature passed the laws at issue to harass Cherokees who refused to voluntarily move west. Cohen, *supra* note 19, at 81.

38. *Cherokee Nation*, 30 U.S. at 18. The Court acknowledged that Indians have "been uniformly treated as a state," but that they were not a domestic or foreign state in any traditional sense. *Id.* at 15.

39. *Id.* at 16.
government from intrusions and likened it to "domestic dependent nations." Marshall explained that:

They occupy a territory to which we assert a title independent of their will, which we must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian.” They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.41

Marshall stated that the relationship of Indians to the federal government was “unlike that of any other two people in existence.”42

A year later, in Worcester v. Georgia,43 the Court held that an Indian tribe’s dependent status did not extinguish preexisting tribal power to govern over its internal affairs.44 In Worcester, Georgia was attempting to enforce a law which forbade non-Indians from living in tribal territory without first obtaining a permit from the state.45 However, the Court held that Indian nations are distinct and “the laws of [a state] can have no force” within the reservation boundaries.46 Worcester thus placed a huge limitation on state powers to regulate within Indian territory. The decision reinforced the idea that tribes were dependent on the federal government, while recognizing that tribes had exclusive power to govern internal affairs as nations unless the power was otherwise delegated by Congress or treaty.47

Marshall’s opinions laid the groundwork for future treatment of tribes and established a framework which left tribes somewhat autonomous, and placed constitutional limitations on federal and state government powers.48 While these cases clearly furthered the ability of

40. Id. at 17.
41. Id. (emphasis added).
42. Id. at 15.
43. 31 U.S. 515 (1832).
44. Id. at 581.
45. Id. at 537.
46. Id. at 557. Chief Justice Marshall explained:
From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate all these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries which is not only acknowledged, but guarantied [sic] by the United States.
47. Id. This decision caused a great deal of political clamor, as there was enormous opposition to the tribe. Historians have found some evidence that President Jackson scorned the decision, saying “John Marshall made his law now let him enforce it.” Cohen, supra note 19, at 83 (quoting Horace Greely, American Conflict 106 (1865)).
48. See West, supra note 26 (providing an analysis of the early Supreme Court decisions regarding tribes, and the historical development of caselaw in this field).
colonizers to impose their own values and rules on Indians in their native lands, they afforded some legal protection of Indian rights.\textsuperscript{49} The opinions developed the principles that the federal government had a trust relationship with tribes, and that tribes were separate entities, over which jurisdiction was limited. In addition, these cases, along with the Commerce Clause\textsuperscript{50} and the Trade and Intercourse Act of 1790,\textsuperscript{51} codified federal power to conduct relations with Indians and prohibited states from interfering or regulating without federal approval.\textsuperscript{52}

**B. U.S. Policy Following the Marshall Opinions**

Following the decisions by the Marshall Court, the federal government embarked on a path toward maintaining separation of tribes from states or settled territories.\textsuperscript{53} Relations with Indians were conducted primarily through treaty-making under principles of international law.\textsuperscript{54} The government passed scores of treaties with Indian nations, partly to push tribes westward, so they would not interfere with white claims to land\textsuperscript{55} and partly to strengthen white trade.\textsuperscript{56} In addition, Congress passed the Indian Removal Act in 1830,\textsuperscript{57} which

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\textsuperscript{49} McSloy, *supra* note 19, at 220 (finding that early treatment of Native Americans accorded much greater respect for their sovereignty). This commentator points out that "[f]or the greater part of American history, Native nations were treated by the United States as separate nations with whom treaties must be made." Id. But see *Indian Tribal Sovereignty and the Environment*, *supra* note 35, at 373 (the author argues that Marshall’s opinions may have recognized that tribes have some legal rights, but he ignored how Indians would be affected by the rulings and the fact that Indians were not given much choice about the demise of their freedom in their own lands).

\textsuperscript{50} U.S. CONST. art. I, § 8, cl. 3.

\textsuperscript{51} Ch. 33, 1 Stat. 137 (1790).

\textsuperscript{52} McSloy, *supra* note 19, at 236.


\textsuperscript{54} McSloy, *supra* note 19, at 236-37.

\textsuperscript{55} 7 *COHEN*, *supra* note 19, at 66. See generally Laurence Schmeckbier, *The Office of Indian Affairs* (Baltimore: Johns Hopkins Press, 1927) (reports that the government did not honor many of these treaties which created a great deal of friction and bloodshed). In President Andrew Jackson’s annual message before Congress on December 7, 1835, he called for removal of Indians, saying: [i]t seems now to be an established fact that they cannot live in contact with civilized community and prosper Independently of the treaty stipulations into which we have entered with the various tribes for the usufructuary rights they have ceded to us, no one can doubt the moral duty of the Government of the United States to protect and if possible to preserve and perpetuate the scattered remnants of this race which are left within our borders.


\textsuperscript{56} McSloy, *supra* note 19, at 229.

\textsuperscript{57} Ch. 148, 4 Stat. 411 (1830).
authorized the President to exchange eastern tribal Indian land for western lands.\textsuperscript{58}

The push westward, despite the promise of land, did not guarantee Indians their own territory. By the mid-1800's, as white settlers moved west, treaties granting Indians specific reservation areas were also passed.\textsuperscript{59} Some officials argued that an allotment of land would benefit Indians by protecting their rights, while accustoming them to Western ideas about property rights, thus fostering their assimilation into white society.\textsuperscript{60} However, these treaties were accorded little respect, to the eventual detriment to Indians.\textsuperscript{61}

Accordingly, the treaties did little to settle unrest or determine land boundaries. Instead, aggression between white settlers and Indians escalated, making assimilation of Indians even more implausible. In the Report of the Doolittle Committee, January 26, 1867, Congress acknowledged the declining American Indian population and attributed this decline to war, disease and the destruction of game, all caused by the emigrating whites.\textsuperscript{62} These problems culminated in the passage of one of the most detrimental pieces of legislation aimed at eroding any semblance of tribal sovereignty. The General Allotment Act\textsuperscript{63} was "a comprehensive attempt to create a new role for the Indian in American society."\textsuperscript{64} The Act granted the President the power to allot reservation lands in severalty to tribal members. Under the Act, tribal lands were held in trust for twenty-five years, but after that time, tribe members received fee patents and could transfer the land or sell it to non-Indians.\textsuperscript{65} In addition, American citizenship was made available to Indians after completion of the allotment process or when the restraints or alienation expired.\textsuperscript{66}

The results of the General Allotment Act were devastating for tribes. While the Act remained in force, some 90 million acres, approximately two thirds of the lands originally held by tribes, were lost through the sale of "surplus" land or alienated through allotments.\textsuperscript{67} As a result of the land sales, and fee holdings by non-Indians, the

\textsuperscript{58} Cohen, supra note 19, at 81.
\textsuperscript{59} Id. at 78-92. As Cohen notes, this policy appeared to promote voluntary removal, but military force was often used to accomplish the goal under Jackson's policy. Id. at 91-92.
\textsuperscript{61} McSloy, supra note 19, at 243.
\textsuperscript{64} Cohen, supra note 19, at 130. See Price & Clinton, supra note 19, at 77-81.
\textsuperscript{65} Cohen, supra note 19, at 130-31.
\textsuperscript{66} Price & Clinton, supra note 19, at 81.
\textsuperscript{67} Cohen, supra note 19, at 614.
power of tribal governments over reservations was severely diminished and their culture and customs came under attack.\textsuperscript{68}

After widespread recognition of the failure of the General Allotment Act in incorporating Indians into white society, the policy was reversed under the Indian Reorganization Act in 1934,\textsuperscript{69} but the damage was already done. The Indian Reorganization Act attempted to revitalize tribal governments and granted “Indians living under Federal tutelage the freedom to organize for purposes of local self-government and economic enterprise.”\textsuperscript{70} However, a major impediment to success of the policies remained unremedied — the new policy did not return any of the lands alienated under the General Allotment Act. Tribal power could not be regained if reservations were no longer exclusively Indian country.

The gains of the Indian Reorganization Act were short-lived\textsuperscript{71} and the assimilationist and racist policies of the past were conjured up again by the late 1940s, with members of the federal government calling for total assimilation of Indians once again.\textsuperscript{72} Thus, the call for assimilation was silenced and repudiated again during the 1960s under the Kennedy administration, when the President promised “[t]here would be no change in treaty or contractual relationships without the consent of the tribes concerned. No steps would be taken to impair the cultural heritage of any group.”\textsuperscript{73} During the early portion of this period, Indians benefitted from federal programs which provided financial assistance and from the passage of the Indian Civil Rights Act.\textsuperscript{74} The period of self-determination which began in the 1960s continues to be the dominant paradigm today; however, problems and inequalities are rampant.\textsuperscript{75}

In addition, the concepts of tribal sovereignty and self-determination have undergone a complete change as a result of the flux in federal Indian law over the last century and a half.\textsuperscript{76} As one commentator has noted, tribal sovereignty is no longer a concept with much meaning:

\begin{itemize}
\item \textsuperscript{68} \textit{Id.}
\item \textsuperscript{70} \textit{PRICE \& CLINTON, supra note 19, at 284.}
\item \textsuperscript{71} \textit{Id. at 85.}
\item \textsuperscript{72} \textit{Id. (COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT: INDIAN AFFAIRS: A REPORT TO CONGRESS 77-80 (1949)).}
\item \textsuperscript{73} \textit{Id. at 86.}
\item \textsuperscript{74} \textit{Id. at 85-88 (briefly discussing Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 (1988)). A more detailed discussion of these policies is beyond the scope of this Note.}
\item \textsuperscript{75} \textit{See Richardson, supra note 3 (conditions on reservations are intolerable, with the overwhelming poverty, mismanagement by federal agencies, insufficient aid and homelessness).}
\item \textsuperscript{76} \textit{McSloy, supra note 19, at 223.}
\end{itemize}
This vision of the separate, sovereign status of Native nations no longer describes the place of Indian peoples in American law. In derogation of their long-recognized powers of inherent sovereignty, Native Americans are today subject to the unlimited legislative authority of Congress to pass any law it pleases, including those which restrict or eliminate the powers of Native governments. Due to the "plenary" nature of this power and the Supreme Court's concomitant judicial deference, the Court has rarely if ever limited the power of Congress since its first attempts to exert legislative power over Native people in the late nineteenth century.\footnote{\textit{Id}. (footnotes omitted).}

It is ironic that Indian tribes are called sovereign today, and that for the last thirty years the federal government has pledged to encourage policies of self-determination. Given Congress' unchecked power over reservations, it may be difficult for tribal governments to regain strength. However, by specifically delegating certain powers to tribes, such as environmental regulation, tribes can begin to emerge as self-governing bodies. The next section explores the challenges to sovereignty caused by Supreme Court decisions concerning the government's regulatory power over reservations.

\section*{II. Land-Use Court Decisions}

\subsection*{A. Erosion of Tribal Power}

The modern Court has set forth several opinions which further erode the power of tribal governments.\footnote{\textit{See} Rice v. Rehner, 463 U.S. 713 (1983) (Court held that Congress authorized the regulation of the sale of liquor on reservations and in the process found that the federal government is traditionally responsible for the uniform regulation of alcohol); Duro v. Reina, 495 U.S. 676 (1990) (Court held that Indians are not full sovereigns and do not have jurisdiction over a criminal action against a non-Indian who killed an Indian on a reservation).} These decisions have found that the "checkerboard" nature of reservations,\footnote{This term has been used to describe the character of reservations since the policies of the General Allotment Act which led to the break-up of reservations into areas with Indian and non-Indian ownership.} with huge non-Indian areas, means that Native Americans have less governing power over the uses of reservation land, because their title is no longer exclusive.

There have been no Supreme Court decisions to date involving environmental regulation of reservations, but two recent rulings regarding land use may foreshadow how the Court could decide a case on solid or hazardous waste regulation on reservations.\footnote{Montana v. United States, 450 U.S. 544 (1981); Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989).} While there is a difference between land use planning and environmental regulation, limiting the ability of tribes to control land use creates hurdles for tribes attempting to exert primary enforcement over the reservation.
environment. This is because "a government that has lost the authority to zone its lands — the authority to control land use planning — has lost as well the full capacity to control environmentally harmful land uses." In addition, the cases indicate that the Court's view about the federal/tribal relationship is somewhat contrary to the principles of tribal self-determination, which has been a widely recognized objective of the federal government for the past three decades.

In *Montana v. United States*, the court held that tribes retain inherent sovereign power to exert civil jurisdiction over non-Indians on reservations. However, that power exists only in limited situations. In *Montana*, the issue before the Court was whether the Crow Indian tribe had the power "to regulate hunting and fishing by non-Indians on lands within its reservation lands owned in fee simple by non-Indians." The Court reversed a decision by the United States Court of Appeals for the Ninth Circuit and ruled against the Crow Indians. The Supreme Court found that the Crow Indians had no authority under the treaties creating the tribe's reservation to regulate the conduct of non-Indians, and that their inherent power was very restricted. The Court indicated that the tribe, nonetheless, retained power to regulate activities of non-Indians in such areas as taxation or contractual relations.

Justice Stewart set forth the test to determine whether a tribe retained regulatory power or lost it to the state or federal government. Under the test, the tribe retained power to regulate the conduct of non-Indians on lands within the reservation owned in fee simple by non-Indians if the "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." The test creates some confusion because there is no bright line rule to determine what type of conduct falls within tribal regulation. The Court found that regulating hunting and fishing activities of non-Indians on non-Indian land within the reservation did

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82. Id.

83. See discussion infra Section III, footnotes 115-25 and accompanying text.


85. Id. at 547.

86. Id. at 558-59. The Court referred to the 1868 Fort Laramie Treaty, 15 Stat. 649, but interpreted it much more narrowly than the lower court did. It found that the treaty "arguably conferred upon the Tribe the authority to control fishing and hunting on those lands. But that authority could only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation.'" Id. (footnote omitted).

87. Id. at 565.

88. Id. at 566.

89. Id. (citations omitted).
not pose a threat to the integrity of the tribe. However, by losing the right to regulate such activities, a tribe is divested of physical control of land it has relied on for subsistence over the centuries.

In addition, the majority of the Court held that Congress could have expressly extended tribal jurisdiction over non-Indians by including such power when it defined "Indian country" in 18 U.S.C. section 1151. The Court found that without such an expression, the tribe's dependent status led to a divestiture of sovereignty. However, the majority's interpretation of history was harshly criticized in Justice Blackmun's dissenting opinion. Blackmun contended that the history and language used in negotiating dealings all indicated that the territory in question was exclusively subject to Indian jurisdiction.

B. The Court's Ever-Narrowing Construction of Tribal Sovereignty

The Montana decision was affirmed and tribal sovereignty was even more narrowly construed eight years later by the Court in Brendale v. Confederated Tribes and Bands of the Yakima Nation. In Brendale, the Court held that the Yakima tribes had lost the authority to zone fee lands in a reservation's open area which had significant ownership by non-Indians. The case involved two independent proposed developments on the Yakima reservations by non-Tribe members and the county board of commissioners' conclusions that neither project required an environmental impact statement (EIS). The Tribe brought an action to assert exclusive authority to zone reservation territory.

The Court held that tribes cannot have extensive governing power over non-Indians because they are dependents of the United States government. Justice White found, like the Court in Montana, that tribes had been divested of the power to govern non-Indians since the conquest by European settlers and the subsequent treaties which limited their jurisdiction. Justice White followed the Montana conclusion that "[the Tribe's] treaty rights must be read in light of the subsequent alienations of those lands," and that it was unlikely that "Congress would intend that non-Indians purchasing allotted lands

90. Id.
91. Id. at 564. But see West, supra note 14, at 79 (finding that the Court's view "is certainly a far cry from Marshall's model in which the 'external sovereignty' lost by tribes involved the power to establish relations with foreign nations").
92. Montana, 450 U.S. at 569-81 (Blackmun, J., dissenting).
93. 492 U.S. 408 (1989). See also West, supra note 14, at 82 (finding that Justice White's majority opinion stated the Montana test more rigorously than this case).
94. The non-Indians had acquired significant portions of the Yakima reservation under the General Allotment Act. See Brendale, 492 U.S. at 422.
95. Id. at 419.
96. Id.
97. Id. at 422-23.
98. Id. at 422 (quoting Montana, 450 U.S. at 561).
would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. Justice White explained that although the Court recognized that discrimination was a motivation of the General Allotment Act, its ruling intensified its discriminatory effect by reducing tribal power over non-Indians within the reservation territory. The Court also rejected the argument that the Indian Reorganization Act restored tribal rights to exclusive use of their lands.

It would not have been implausible for the Court to disavow the policies of the past which called for complete assimilation of Indians and to recognize the Indian right to regulate within the boundaries of tribal territory. As the dissenting opinion by Justice Blackmun points out, the Court's decision undermines the explicit federal government policy to promote tribal autonomy.

Justice Blackmun rejected the Court's analysis that Congress must expressly delegate tribal authority, saying that until the Montana decision, the Court had adhered to Chief Justice John Marshall's construction of tribal sovereignty. Justice Blackmun wrote:

> Time and again we stated that, while Congress retains authority to abrogate tribal sovereignty as it sees fit, tribal sovereignty is not explicitly divested except in those limited circumstances principally involving external powers of sovereignty where the exercise of tribal authority is necessarily inconsistent with the tribes' dependent status.

Justice Blackmun also criticized Justice White's interpretation of United States v Wheeler, that tribal regulatory authority regarding non-Indians was necessarily divested, and concluded that Wheeler held that only "specific aspects of inherent sovereignty . . . have been divested . . . ." The Brendale Court used a more narrowly defined test in determining whether tribes have a protectable governing interest over reservation territory than did the Montana Court. Justice White wrote that the prefacing of the Montana opinion's exception recognizing sovereignty by the word "may" "indicates . . . that a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on

99. Id. at 423 (quoting Montana, 450 U.S. at 560 n.9).
100. Id. at 423-24.
101. Id. at 423.
102. Id. at 448 (Blackmun, J., dissenting).
103. Id. at 451-52 citing United States v. Wheeler, 435 U.S. 313, 326 (1978); Colville, 447 U.S. at 153-54 (emphasis added).
105. Id. at 452 n.3.
106. Id. at 449-50. See also West, supra note 14, at 82 (finding that the Brendale Court required that an interest "must be demonstrably serious and must imperil the political integrity, economic security or the health and welfare of the tribe," whereas the Montana Court's ruling was not as rigid).
the political integrity, the economic security, or the health or welfare of the tribe," but instead depends on the circumstances.\textsuperscript{107}

C. Implications of Land Use Decisions on Environmental Decisions

Many environmentalists have pointed out the dangerous implications of the \textit{Montana} and \textit{Brendale} decisions.\textsuperscript{108} These two cases together are a full frontal attack on tribal sovereignty and make it impossible for a government to engage in comprehensive long-term planning and development because there is no way to control how land is used within its territory.\textsuperscript{109} By restricting tribal power to areas which are predominantly Indian, the Court is really creating the potential for "checkerboard jurisdiction" — meaning that states or counties would have jurisdiction over certain patches of reservations where there is a significant non-Indian population.\textsuperscript{110} Also, this may mean that within an area of a few miles, there could be state land use regulation interspersed with tribal regulation, which from a practical standpoint creates a very ineffective and inefficient model, with no uniformity of governance.\textsuperscript{111}

By having more than one body with power to determine proper uses of land, comprehensive long-range planning is extremely difficult.\textsuperscript{112} As the dissent in \textit{Brendale} points out, zoning power should have fallen within the interests protected by the majority test since it threatens the tribe's ability to effectively plan or prevent harmful uses of land.\textsuperscript{113} The uncertainties about which land uses are deemed appropriate also create distrust between the governing bodies. For example, state hunting regulations may be far less stringent or disruptive to Indian practices. Indeed, it would be difficult for tribes to feel that their power is more than nominal.

Another problem posed by the Court's land use decisions is that they make the possibility of business developments on reservations difficult. According to one commentator:

Loss of tribal authority over non-member lands can also affect the economy and health of a tribe. Indian reservations contain rich mineral deposits and large amounts of oil, gas, and low-sulfur coal. Development of these resources is important to Indian tribes for improving their economic situation. The potential impact on Indian health and welfare which development of these resources can cause

\textsuperscript{107} \textit{Brendale}, 492 U.S. at 429.
\textsuperscript{108} See generally West, \textit{supra} note 14; \textit{Royster}, \textit{supra} note 81; Gover & Walker, \textit{supra} note 9.
\textsuperscript{109} \textit{Royster}, \textit{supra} note 81, at 91.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Brendale}, 492 U.S. at 458 (Blackmun, J., dissenting) ("This fundamental sovereign power of local governments to control land use is especially vital to Indians, who enjoy a unique historical and cultural connection to the land.") (citations omitted).
greatly exceeds the effects of subdivisions such as those at issue in Brendale.\textsuperscript{114}

The \textit{Montana} and \textit{Brendale} cases together reveal the reluctance of the current Supreme Court in recognizing a tribe's inherent authority to regulate its internal affairs. By handing down such restrictive decisions, the Court has created a setting which could make environmental regulation very difficult. While environmental concerns could arguably fall under the protected interests of tribes since such regulation affects both the health and economy of tribes, the Court may still be reluctant in affirming the Tribe's ability to regulate given its apparent resistance to the issue of Indian sovereignty. In addition, since most reservations today have substantial non-Indian populations, the Court may also limit the tribe's regulatory authority for the same reasons set out in \textit{Brendale} — that the Indians lost the power to regulate over non-Indian areas.

\textbf{III. CONGRESS AND EPA'S TREATMENT OF TRIBES}

Despite the Supreme Court's reluctance in upholding tribal sovereignty, Congress and the Environmental Protection Agency have increasingly upheld policies encouraging self-determination and tribal sovereignty in dealing with environmental issues.\textsuperscript{115} In addition, in 1983, President Ronald Reagan affirmed that U.S. policy would encourage tribal self-determination and he stated that the United States would work in a government-to-government relationship with tribes.\textsuperscript{116} In 1984, EPA echoed this statement, saying it recognized tribes as sovereign governments with exclusive power over their territories, and pledged that it would also help tribes create proper standards and develop management bodies for reservations.\textsuperscript{117}

However, until 1986, there was no mention of Indian tribes, or how they should be regulated, in environmental statutes passed by Congress.\textsuperscript{118} Thus, these laws which set up national regulations and delegate power to states to take the lead in enforcement, did not make any provisions for treatment of tribal governments and did not give states primary authority for enforcement either. The omission has had major implications for tribes, since constitutionally Congress is required


\textsuperscript{115} See infra notes 117, 125 and accompanying text.

\textsuperscript{116} See McSloy, supra note 19, at 220 n.16 citing President Reagan's Policy Statement on Indian Policy, 1 RONALD REAGAN PUB. PAPERS 96, 96 (Jan. 24, 1983). This statement was reaffirmed by the Bush Administration as well. President Bush's Proclamation 6407 — Year of the American Indian, 28 WKLY. COM. PRES. DOC. 384, 385 (Mar. 2, 1992).

\textsuperscript{117} EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 4, 1984).

\textsuperscript{118} Gover & Walker, supra note 9, at 934.
to explicitly intend, either through express provisions in laws or through the legislative history, to abrogate tribal sovereignty in order for states to extend jurisdiction over them. Without proper provision for tribes, uniform enforcement of environmental laws faced an enormous challenge since most Indian nations are located within state borders and generally include portions of cities or towns within their borders as well. Thus, states could not claim power to exert environmental control, because Congress had not expressed an intention to allow states this power; and tribal governments could not exert control — at least practically, because they did not receive appropriate funding or guidance. In addition, most regulations require states to establish standards which the EPA would review; since there were no similar provisions for tribes, it was unclear as to how tribal regulations would be reviewed.

Since 1986, most major environmental regulations have been amended with provisions specifically addressing tribes. The Federal Water Pollution Control Act (or the Clean Water Act), Safe Drinking Water Act, and Clean Air Act all grant EPA authorization to treat tribes as states for the purposes of the regulation. In addition, by including tribes as states in the statutes, tribes are eligible to receive grant money as a participant in these programs. Funding for enforcement and implementation of programs is essential for meaningful regulation. Without funding, tribes have no way of developing proper standards or monitoring the health of the environment.

119. See Stetson & Gover, supra note 2, at 25.
121. Gover & Walker, supra note 9, at 934 (“[T]ribal amendments will be necessary before tribes will be eligible under RCRA for any federal grant or contract assistance to deal with their waste problems.”).
125. Under these statutes, the EPA Administrator is authorized to treat tribes as states if:
1. The Indian tribe has a governing body carrying out substantial government duties and powers;
2. The functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for the Indians
3. The Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.
126. Walker & Gover, supra note 2, at 236.
Under CERCLA, tribes are treated like states as well. However, CERCLA differs from the other statutes because it confers upon EPA greater power to assist tribes. It provides the power "to enter into cooperative agreements with, and provide financial assistance to, tribes, [and] authorizes tribes to recover costs incurred in carrying out response actions from persons responsible for R 5.3(b)(iii) releases . . . ."127 Tribal liability also seems to be limited, since tribes are treated as states but are not expressly liable under the statute.128 However, there is some disagreement among commentators whether tribal liability will be recognized by the courts.129

By treating tribes as states under the law, tribes regain the ability to regulate and govern over their own lands despite the courts' reluctance to recognize sovereignty. Thus, environmental regulations favoring sovereignty assure the tribes that if they do undertake waste projects, they have the full authority to proceed without fear of liability.

B. RCRA's Ambiguities

Unlike other environmental regulations, the Resource Conservation and Recovery Act (RCRA)130 has not yet been amended to include specific treatment of tribes. Several attempts have been made in the last few years to amend the Act in Congress, but these attempts have failed.131

RCRA was originally passed in 1976, making it one of the first comprehensive environmental regulatory schemes.132 RCRA devises a "cradle to grave" scheme for the storage, disposal, treatment and transport of hazardous waste.133 In addition, it defines hazardous waste and the properties of waste which would classify it as such,
along with requirements for generators, transporters and waste managers to identify whether their waste is hazardous. 134

Under RCRA, states apply for EPA approval of their regulatory programs but the final authority over regulation remains vested in EPA. 135 Thus, states are given the power to take the lead in regulating hazardous waste under RCRA, but are required to meet the minimum standards set out by EPA. 136 In addition, EPA reviews state initiatives and may attempt to enforce more stringent standards. On the other hand, states are given much more exclusive control over solid waste as compared to hazardous waste. 137 EPA does not serve as a backup enforcer if a state fails to regulate solid waste properly. 138

While RCRA provides a framework for dividing state and federal power, it does not provide any detailed explanation or authorization to treat tribes as states. Thus, technically there is no body vested with primary governing power over reservations. Without explicit treatment of tribes within the statute, it remains unclear who has jurisdiction over reservations. RCRA applies to Indians only through its definition of municipalities. 139 A major implication of this omission is that there is a gap in regulating tribal lands because of the statute's ambiguities. As one commentator explains:

Because state standards and permitting procedures do not apply to Indian reservations and RCRA does not anticipate tribal regulatory programs, there is effectively a regulatory void on many reservations. Other than federal court enforcement of the open dumping prohibition, the statute does not offer any means for the enforcement of substantive standards on Indian reservations. 140

Thus, RCRA imposes liability on the tribe without giving it the type of money granted to states under the Act. 141

IV. COURT CONFUSION OVER RCRA’S APPLICATION TO TRIBES

A. Liability Issues Under RCRA

An exploration of case law reveals judicial confusion and the extent of intervention and liability for tribes as a result of the confusion. The first major case dealing with liability under RCRA was Washington Department of Ecology v. EPA. 142 In this case, the Ninth Circuit Court of Appeals affirmed EPA’s decision that states could not assert

134. Walker & Gover, supra note 2, at 237.
135. Stetson & Gover, supra note 2, at 26.
136. Id.
137 Id.
138 Id.
139. Walker & Gover, supra note 2, at 243.
140. Stetson & Gover, supra note 2, at 26.
141. See supra notes 10-11.
142. 752 F.2d 1465 (9th Cir. 1985).
jurisdiction to regulate under RCRA on reservations. However, the holding was limited to the question of whether states can regulate Indians on reservations and did not answer whether non-Indians were subject to state regulation. Another problem with the decision is that while it recognized the limits of a state's ability to regulate hazardous waste on reservations, it did not remedy the void left by the statute.

In Washington, the state sued for RCRA control over the reservations within its borders to ensure uniform treatment of waste. EPA pronounced that RCRA grants states the authority to implement their own regulatory programs; however, this power did not provide express authority to regulate reservations. The court also upheld the EPA Administrator's finding that RCRA does not authorize states to regulate on reservations.

The state may make a strong argument that it needs control over the reservation environment given the current environmental problems on tribal lands and because regulation on tribal lands affects the neighboring areas within a state's borders. However, as the tribes in Montana indicated, Indians have serious concerns about state intrusion because they fear state control could lead to even more dumping on tribal grounds.

Following the decision in Washington, two RCRA cases involving tribes have produced even more confusing results. These cases held that tribes are liable for cleaning up and protecting the reservation environment despite RCRA's ambiguities and the omission of tribes from the statute.

In Blue Legs v. United States Bureau of Indian Affairs, the Eighth Circuit upheld a lower court decision that the BIA, Indian Health Service and Ogalala Sioux Tribe were liable for failure to bring the Pine Ridge Indian Reservation dump sites into compliance with the requirements of RCRA. In this case, two tribe members brought suit against the tribe, among others, for failing to supervise over a dozen hazardous sites on the reservation and for creating a serious health and environmental threat. The complaint alleged that most of the dump sites were located near houses, schools, streams or springs, with twelve sites unfenced, six without sanitary trenches and that fires had

143. Id. at 1466.
144. Id. at 1468.
145. Id. at 1467.
146. Id. at 1469.
147 Id. at 1467.
148. See id.
149. Id. at 1470.
150. 867 F.2d 1094 (8th Cir. 1989).
151. Id. at 1095.
152. Id.
occurred on all the sites.\textsuperscript{153} In addition, it charged that there was an enormous threat of contamination to tribe members and that this exposure to waste posed a great danger to humans and wildlife.\textsuperscript{154}

The tribe argued that it was immune to suit since there was no express provision within RCRA abrogating tribal sovereignty.\textsuperscript{155} However, the Court found that sovereign immunity was waived because Congress’ intent in passing RCRA was to provide uniform enforcement of environmental laws.\textsuperscript{156} In addition, the court held that RCRA applies to Indians through the citizen suit provision,\textsuperscript{157} saying that citizen suits are permitted against any person alleged to be in violation of the statute. The court also noted that the definition of “person” under the statute includes municipalities, which in turn includes tribes.\textsuperscript{158}

The court also found that although tribes have jurisdiction over civil actions, the plaintiffs were not required to commence the lawsuit in tribal court because RCRA does not require the exhaustion of tribal remedies.\textsuperscript{159} Instead, the court stated that RCRA provides federal court jurisdiction over such claims. Thus, the court ignored principles of tribal sovereignty and the need for express treatment of Indians by Congress to waive immunity.

The court apportioned seventy-five percent of the clean-up costs to the Bureau of Indian Affairs and Indian Health Service, and twenty-five percent of the costs to the tribe.\textsuperscript{160} The court refused to excuse tribal liability since the tribe operated the sites in conjunction with the two federal agencies. The federal agencies were primarily liable for clean-up, according to the court, because of “the existence of the general trust relationship between these agencies and the Tribe.”\textsuperscript{161}

A federal judge similarly held that Indian sovereign immunity is waived under provisions of the Clean Water Act and RCRA in a case last year. \textit{Atlantic States Legal Foundation v. Salt River Pima-Maricopa Indian Community}\textsuperscript{162} may be the most far reaching case to find environmental liability for tribes under a citizen suit.\textsuperscript{163}

\begin{thebibliography}{99}
\bibitem{153} Id. at 1096.
\bibitem{154} Id.
\bibitem{155} Id.
\bibitem{156} Id. at 1096-97
\bibitem{157} Id. at 1097 citing 42 U.S.C. § 6972(a)(1)(A).
\bibitem{158} Blue Legs, 867 F.2d at 1097 citing 42 U.S.C. § 6903(15).
\bibitem{159} Id. at 1097-98.
\bibitem{160} Id. at 1100. \textit{See also} Mark J. Connot, Note, \textit{Blue Legs v. United States Bureau of Indian Affairs: An Expansion of BIA Duties Under the Snyder Act}, 36 S.D. L. REV 382, 387 (1990-91).
\bibitem{161} Blue Legs, 867 F.2d at 1100.
\bibitem{162} 827 F Supp. 608 (D. Ariz. 1993).
\end{thebibliography}
The case was brought by two citizen groups after five truckloads of debris from the Indian-run Tri-City landfill washed into the Salt River in Arizona after heavy rains in January 1992. Environmental groups charged that the debris caused severe groundwater contamination and would cost up to four million dollars to clean up. In addition, plaintiffs charged that the landfill was being operated in violation of RCRA and sought injunctive relief to prevent use of the landfill until it complied with environmental standards.

Despite the defendant's argument that "no remedy may be sought against an Indian tribe 'unless Congress has explicitly and unambiguously waived the sovereign immunity of the Indian tribal government," the court followed the analysis of the Blue Legs court and held that tribes can be sued under RCRA.

B. Need to Clarify and Amend RCRA

The Blue Legs and Salt River courts held that Indian tribes are subject to suit despite the fact the RCRA does not expressly treat tribes as states which can undertake management programs. However, these decisions, along with the Washington decision, leave many unanswered questions. The Washington court denied state jurisdiction, but did not acknowledge tribal jurisdiction as did the later two cases. In addition, these cases seem unduly harsh, given the enormous liabilities and the implications for tribal immunity. By finding RCRA applicable to tribes, modern courts are further eroding sovereignty principles and the requirement that Congress expressly waive sovereign immunity.

These decisions may be necessary to protect the environment and to ensure that dumping on reservations does not go unpunished, but their impact is very harsh. Tribes are quickly loosing ground for self-governance, and these decisions are hastening the process. However, by amending RCRA and giving tribes the authority to govern waste problems, tribal power may actually be bolstered. Indians would then gain greater governing power over their lands because they would be the bodies responsible for regulation and could decide more easily whether to undertake waste projects.

Further, without amendments to RCRA, tribes will not receive the benefits which states currently receive, but will be subject to the same

165. Pamela Manson, Tribe Loses Bid to Avoid Lawsuit, Ariz. Republic, July 16, 1993 at B3 (estimates that cost of cleaning up debris and any groundwater contamination from the area may cost between two and four million dollars).
166. Id. at 608.
167. Id. at 610 (quoting Defendant's Reply at 6).
168. Id. at 610-11.
169. See Royster, supra note 81, at 96.
liability.170 Tribes are not provided the same funds for cleaning up sites or devising standards. If EPA and Congress are truly committed to improving tribal government regulation and promotion of the health of Indians and those who live in neighboring communities, they must take the lead in helping tribes establish standards and the means to enforce them. Without the support of EPA, it will be difficult for tribes to engage in meaningful business arrangements because they will not have the ability to assure businesses or the surrounding communities that they can protect the environment.

V. SHOULD COMMERCIAL WASTE PROJECTS ON RESERVATIONS BE SUPPORTED?

A. The Question of Environmental Racism

Environmental racism is a broad-ranging issue of which our society is slowly becoming more conscious. Environmental racism includes conscious industrial decision-making which may place certain poor or minority communities at a greater risk of exposure to toxins like lead, air pollution or waste.171 It also includes the inability of environmental regulators, legislators and conservation groups to effectively deal with issues which affect predominantly minority groups. Whether such harmful environmental decisions are conscious or unconscious, it is clear that greater attention needs to be paid to the fact that certain groups bear unfair and unhealthy burdens.

Generally, when we speak of environmental racism, the target group or community has had little or no choice in decision-making which adversely affects them. Many environmental justice crusaders have discussed how political or economic disempowerment has left some communities particularly vulnerable to harmful practices of industry and city planners. It is more difficult to determine whether racism is involved in cases where the target group has made an affirmative and informed decision to undertake an environmentally controversial project. Thus, the decision by some tribes to host hazardous or nuclear waste storage facilities poses some difficult questions which some activists believe boil down to issues of environmental racism. Others claim that racism is not a factor in commercial waste management development on reservations, and that tribes should have the right to choose whether to undertake such projects because they are economically beneficial, and because tribes are sovereign and can make decisions free from outside judgments.172

170. See supra text accompanying note 9.
172. The issue of open dumps on reservations and the failure of Congress to allocate proper funding and to help tribes develop regulatory bodies on reservations may be a clearer case of environmental racism. The next section, however, is limited to a
B. Commercial Waste Projects as Another Blow to Indians

One critic of commercial waste projects has charged that Indians are being deceived by the waste industry, as their ancestors were deceived by colonialists. “Corporate waste brokers proposing landfill and disposal factories on 20th century tribal reservations are not unlike the caravans of English, French, and Spanish traders in the 18th and 19th centuries who were led into town by Indian leaders on horseback.”173 This commentator believes Indians are being lulled into a false sense of security about what really awaits them in entering into waste projects.174

The media has also charged that Indians are being lured into accepting the waste which no one else in the country wants. Some accounts claim that the NIMBY syndrome has so pervasively affected most Americans that toxins, nuclear waste and landfills have become taboo topics.175 By turning to Indians, waste producers can take advantage of communities which want, and need economic stimulus without encountering much political opposition. Critics also claim that industry, looking to dispose of waste finds reservations especially appealing because disposal on tribal lands is not subject to stringent regulatory standards by either state or tribal regulatory bodies.176 Some opponents of tribal waste facilities believe that there may not even be a substantial benefit from business dealings with the commercial waste industry; that gains accrue only to industry and the tribal leaders who have the power to arrange the deals, and not to the tribe as a whole.177

Representative Bill Richardson (D-New Mexico), Chairman of the House Subcommittee on Native American Affairs, has stated that federal and private programs which are aimed at building nuclear, solid and hazardous waste facilities on reservations should not be continued.178 Instead, he has called for the institution of Indian develop-


174. Id. at 377.
175. Gover & Walker, supra note 9, at 935.
176. One commercial waste consultant, who proposed a $90 million deal with the Tohono O'odham Indians in Phoenix, said that he sought the reservation location because his client did not want to “have to go through the headaches of city and county zoning regulations.” Edythe Jensen, Waste Plant Proposed as Landfill Sub Reservation Site Stirs Opposition, ARIZ. REPUBLIC/PHOENIX GAZETTE, Sept. 7, 1990, at B1.
177. Some authors have criticized tribal leaders and governments for being less democratic and improperly motivated. See Morrison & Howe, supra note 173, at 371-72 (finding that “[t]oday the Chief pulls up in a black Cadillac with tinted windows flanked by his non-Indian financial manager).
178. Richardson, supra note 3, at A13.
ment banks and enterprise zones, programs that create industry without posing environmental and health risks. Senator Thomas Daschle (D-South Dakota) concurs, saying that developing waste industries does not address the long-term problems facing tribes. Daschle finds that problems like poverty, poor governance and education, and unemployment on reservations need to be immediately addressed. "The real irony is that those on the reservation are willing to give up what has been most sacred throughout history for the sake of economic development . . . show[ing] . . . how desperately they want to find jobs."

C. Waste Projects Promote Needed Development

Proponents of Indian waste projects respond to these charges by arguing that critics are unduly paternalistic and simplistic in their analyses. These authors argue that those who undermine a tribe's ability to make such choices are racist for assuming that tribal governments are too incompetent to decide for themselves. In addition, they point out that while few options for business development are available to tribes, not many tribes are considering such projects. These proponents argue that the waste industry is not singling out tribes, but that the NIMBY phenomenon and the fear of waste problems have created media hype that tribes will be irresponsible in treating waste. They also point out that very little media attention is paid to the far more significant problems of open and illegal dumping on reservations.

Some proponents have put forth plans which would allow tribes to build facilities which would minimize environmental harm. If these facilities are built, critics should be put at ease, because the truth is that facilities to handle waste are essential, and the country cannot continue to provide makeshift responses to waste. Thus, if tribes maintain environmentally sound facilities, they will be providing a long overdue, invaluable service.

The Mescalero Apache Indian Tribe, in New Mexico, is one tribe which is considering hosting an interim nuclear waste facility.

179. Id.
180. See Lippman, supra note 1, at A3.
181. Gover & Walker, supra note 9, at 942.
182. Id. They believe that the implication of criticism of tribal waste projects is "that Indians lack the intelligence to balance and protect adequately their own economic and environmental interests. This is clearly a racist assumption; the same assumption that guided the federal policies that very nearly eradicated Indian people in the late nineteenth and early twentieth centuries." Id.
183. Id. at 935 (also noting that these projects are good development opportunities since they do not require tribes to put forth capital to develop the project).
184. Id. at 934.
185. Id. at 936-41 (providing a detailed description of the plans of the Campo Band of Mission Indians of California for a commercial solid waste project).
186. See Lippman, supra note 1, at A3.
Indian Tribal Sovereignty

Under current plans, the tribe would devote approximately one square mile of its 720 square mile area to store 10,000 metric tons of irradiated fuel rods in sealed containers above ground. In making their decision to proceed with plans for the facility, tribe members have dealt both with internal conflicts and external political pressures. However, leaders seem certain to move forward with plans, hoping that such a facility would provide the necessary economic stimulus to “continue the tribe into perpetuity.”

The Mescaleros charge outside environmentalists and neighboring communities who oppose the project with undue paternalism and “condescension.” Tribal members do not want to be pressured by outsiders, and give little weight to non-Indian views. They contend that as long as the tribe achieves consensus, they alone should have the power to decide whether to proceed.

Tribal members contend that building the two billion dollar facility would benefit the tribe, and society in general, without compromising the environment. “Nuclear energy is a fact of life for all of us,” said the Tribal President, Wendall Chino.

We all have to deal with it in one way or another. This time, we as [sic] tribe have chosen to meet it on our terms. Like our lands, our integrity is sacred to us. We believe that our values can help create a new approach to one of the nuclear problems facing our government and country.

There are complex issues involved in choosing to develop facilities. While it may be true that attacking poverty and providing other services are important priorities which must be addressed, Indian nations cannot afford to wait until the U.S. government does so. Not all tribes may think the waste industry is appropriate, but tribes should not be denied that choice if proper safeguards exist.

Conclusion

Federal Indian law has undergone constant change, culminating today in limited recognition of tribal self-determination. Congress'
sweeping power over reservations has grown to cover most affairs and has been virtually unchecked by the courts, making promises for Indian sovereignty token words with little substance behind them.

Environmental management on reservations may actually be a way to strengthen tribes and to accord the sovereignty recognized by the framers of the Constitution and the Marshall Court. By amending laws like RCRA to treat tribes as states, tribes would be given the money and support they need to remedy their environmental problems, and the opportunity to engage in commercial development without lingering questions of liability. If Congress is truly committed to promoting tribal self-sufficiency, federal Indian policy must address the need for business developments, like commercial waste projects, and facilitate such opportunities by clarifying RCRA. This power must be granted, if not to allow business development, then to avert future open and illegal dumping on tribal lands. Without the right to regulate their environment, tribes will continue to be unable to protect their members from severe health and environmental hazards, and their political integrity will be further compromised.

A. Cassidy Sehgal