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ENVIRONMENTAL PROTECTION IN INDIAN COUNTRY: EQUITY OR SELF-DETERMINATION?

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The 1990 United States Census indicated that there were approximately two million persons of American Indian descent who live in the United States.¹ Of these people, approximately one million lived on or near fifty four million acres of land defined as "Indian Country."² When residing on lands under the jurisdiction of a federally-recognized tribal government³ within Indian Country, tribal members enjoy certain rights and privileges and incur certain obligations that arise from their status as Indians. These rights, privileges, and obligations are recognized by treaties, statutes, court decisions, and policies which exist at the federal, tribal, and, in some cases, state levels of government.

While a significant number of the one million American Indians who reside outside of Indian Country live in the inner city, and are exposed to many of the environmental risks experienced by other low income inner city residents of numerous racial and ethnic origins, the direct application of the concepts of either environmental equity or environmental justice to Indians living in Indian Country would overlook an important element of Indian life. Tribal governments are sovereign entities which have, among their various powers, jurisdiction over both lands and people, and police powers.⁴ Simply stating that tribal members have the right as American citizens to be equally protected from the risks of expo-

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¹ See U.S. DEPT OF COMMERCE, ECONOMICS, AND STATISTICS ADMINISTRATION, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES—1994 17 (1994).

² See 18 U.S.C. § 1151 (1984). Pursuant to section 1151, "Indian Country" includes: "(a) all land with the limits of any Indian reservation . . . (b) all dependent Indian communities within the borders of the United States . . . , and all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. *Id.*; see also AMERICAN INDIAN LAWYER TRAINING PROGRAM, INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 34 (1988) [hereinafter INDIAN TRIBES].

³ 58 Fed. Reg. 54,364 (1993) (listing federally-recognized Indian governments).

⁴ INDIAN TRIBES, *supra* note 2, at 36-39.

sure to environmental pollution resulting from the execution of America's domestic and foreign policy programs is not sufficient. Respect for federal law and the more than six hundred treaties that have been made with the various tribes⁵ requires that they be provided equal protection in a manner which does not diminish their rights as Indians or the sovereignty of their tribal governments. For this reason, representatives of tribal governments insist that the Environmental Protection Agency ("EPA" or "Agency") work with them on a "government-to-government" basis to assure that individual Indian citizens living on lands under tribal jurisdiction are equitably protected from the health and environmental risks posed by pollution.

I. EPA'S INDIAN POLICY

On January 23, 1983, President Reagan issued an Indian policy which reaffirmed the principles of Indian self-government and the strengthening of the "government-to-government" relationship between the federal and tribal governments.⁶ This policy can be seen as a direct outgrowth of the Nixon Indian Policy of July 8, 1970,⁷ which paralleled the findings of congressional committees chaired by Senators Samuel Ervin and Robert Kennedy.⁸ These findings were echoed in President Nixon's call for "a new era in which the Indian future would be determined by Indian acts and Indian decisions."⁹ This bipartisan support for the development of a new relationship between the federal government and Indian tribes led to the adoption of the Indian Self-Determination and Education Assistance Act of 1975,¹⁰ under which tribal governments could directly contract federal programs that were provided for the benefit of their members.

On November 8, 1984, the EPA was the first federal agency to adopt its own Indian policy in response to President Reagan's

⁵ See VINE DELORIA, JR. ET AL., *AMERICAN INDIANS*, AMERICAN JUSTICE 4 (1983).

⁶ See Memorandum from the White House Office of the Press Secretary on the Presidential Indian Policy (Jan. 24, 1983) (on file with the EPA's American Indian Environmental Office).

⁷ See President's Message to Congress on American Indians (on file with the U.S. Dep't of the Interior) (July 8, 1970) [hereinafter *Nixon Indian Policy*].

⁸ See SPECIAL COMM. ON INVESTIGATIONS, SELECT COMM. ON INDIAN AFFAIRS, 101ST CONG., 1ST SESS., FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS 56-60 (Comm. Print 1989).

⁹ *Nixon Indian Policy*, *supra* note 6.

¹⁰ 25 U.S.C. § 450-1300 (1991).

clearly stated support for tribal self-government.¹¹ In its policy statement, the EPA adopted a number of basic principles which guide its interaction with tribal governments. These include:

1. Working directly with tribal governments on a "government-to-government" basis, rather than dealing with tribes as subdivisions of states or other governments.
2. Recognizing tribal governments as the primary parties for setting standards, making environmental policy decisions, and managing environmental programs within their reservations.
3. Taking affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands.
4. Working to remove existing legal and procedural impediments to working directly with tribal governments.
5. Assuring that tribal interests and concerns are considered whenever EPA takes action on Indian Lands.

In order to implement this policy, EPA's deputy administrator issued an Indian Policy Implementation Strategy ("Implementation Strategy") on the same day that the EPA issued its Indian Policy.¹² This strategy called for the establishment of an Indian Work Group to support the EPA's development of guidance for implementing the policy.¹³ The Indian Work Group was placed under the management of the Director of the EPA Office of Federal Activities ("OFA") and was composed of representatives from the EPA's program and regional offices, and its Office of General Counsel.

In addition to chartering an Indian Work Group, the Implementation Strategy required the EPA to reach out to the tribes and set aside resources at the headquarters and at regional levels to enhance tribal knowledge of contemporary environmental issues and begin the process of developing programs on Indian lands. This strategy called for the development of informed tribal input into agency decisionmaking and program management activities, including enforcement.

¹¹ U.S. E.P.A., INDIAN POLICY (1984).

¹² U.S. E.P.A., POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984).

¹³ *Id.*

II. EPA'S INDIAN POLICY IMPLEMENTATION FROM 1984-1994

Ten years have passed since EPA first issued its Indian Policy and the Implementation Strategy. While there have been many accomplishments during the program's first decade, many questions remain to be resolved. A review of EPA's report of Environmental Activities on Indian Reservations for Fiscal Years 1985-1993¹⁴ indicates that over \$141 million in assistance has been provided by EPA to Indian tribes over those nine years. Annual funding provided to Indian tribes from the Agency has increased approximately 600 percent, from \$5.5 million in Fiscal Year 1985 to \$34.7 million in Fiscal Year 1993. Furthermore, these reports indicate that the Agency's media programs¹⁵ (Air and Radiation; Water, Drinking Water, Solid and Hazardous Waste; Superfund; and Prevention, Pesticides, and Toxics) have supported tribal environmental protection activities in all nine EPA Regions where there are federally-recognized Indian tribes.¹⁶ During this time, close to 300 tribal governments have initiated multimedia capacity development programs through EPA's Multi-Media/General Assistance Program for Indian Tribes. As of the date of publication, eighty tribal governments have qualified for "treatment-as-a-state" status; seventy three tribal wastewater treatment facilities are under development with funds provided by EPA; more than twenty tribes have developed solid waste management plans with EPA assistance; at least nine tribes and tribal organizations have developed Superfund Memoranda of Agreement with EPA; twenty-three EPA-Tribal Pesticide Enforcement Cooperative Agreements have been signed with tribes; and three tribes have developed federally-approved water quality standards for portions of the Rio Grande River. In Fiscal Year 1993, 149 tribes received individual grants from EPA and over 120 other tribes received EPA funds through tribal consortia.

This record of accomplishment is the direct outgrowth of the Agency's Indian Policy and the cooperative relationship which has developed between Congress, tribal governments, and the EPA,

¹⁴ See generally U.S. E.P.A., ENVIRONMENTAL ACTIVITIES ON INDIAN RESERVATIONS (Annual Reports 1985-93).

¹⁵ The term "media" is a term of art within EPA which is used to denote an environmental program area such as air programs, water programs, etc. Hence, EPA Office of Water is considered a "media program" by EPA.

¹⁶ EPA Region 3 does not contain any federally-recognized Indian Tribes.

with respect to its implementation. Congress, the tribes, and the EPA have cooperated in developing amendments and issuing regulations that have significantly expanded the role which tribal governments may assume in the implementation of the Comprehensive Environmental Response, Compensation, and Liability Act;¹⁷ the Emergency Planning and Community Right-to-Know Act;¹⁸ the Safe Drinking Water Act;¹⁹ the Clean Water Act;²⁰ and the Clean Air Act,²¹ on lands under tribal jurisdiction.

In addition, EPA, Congress, and the tribes have worked together to pilot an entirely new type of environmental legislation, the Indian Environmental General Assistance Program Act of 1992.²² This statute provides federal assistance for tribal governments and intertribal consortia to develop basic capacity to operate environmental programs. This program is unique because it provides funding on a multimedia basis, and allows tribal governments to investigate and define their environmental protection needs across media (air, water, solid waste, etc.). It also allows eligible recipients the opportunity to develop plans for program development before they apply for EPA media-specific funding and initiate the process of regulatory program implementation.

In addition to the above, the EPA, the Bureau of Indian Affairs ("BIA"), the Indian Health Service ("IHS"), and the Department of Housing and Urban Development ("HUD"), have developed a four party *National Memorandum of Understanding*, in which each of the four agencies defines its environmental interests and responsibilities on Indian lands and agrees to cooperate in areas where those interests and responsibilities overlap. On the national level, interagency cooperation has already led to a number of important benefits for the environment on Indian reservations. IHS has provided field oversight of EPA wastewater treatment facility construction projects on Indian lands. HUD has agreed to allow the funding of solid waste management facility improvements and/or construction with funds reserved for sanitary facility construction for HUD housing projects on reservations. BIA has adopted a pol-

¹⁷ 42 U.S.C. §§ 9601-9675 (1983 & Supp. 1993).

¹⁸ 42 U.S.C. §§ 11,001-11,050 (1986 & Supp. 1993).

¹⁹ 42 U.S.C. § 300(f)-(j) (1991 & Supp. 1993).

²⁰ 33 U.S.C. §§ 1251-1387 (1986 & Supp. 1993).

²¹ 42 U.S.C. §§ 7401-7671 (1983 & Supp. 1993).

²² 42 U.S.C. § 4368(b) (1993).

icy that requires an Environmental Impact Statement ("EIS") be performed on all commercial waste treatment/disposal facilities constructed by tribal governments on Indian lands under BIA's jurisdiction. In addition, there has been considerable cooperation among the four agencies on the regional-area levels where more limited agreements among these agencies, the tribes, and, at times, the states, have led to cooperative efforts in the areas of training, emergency response, and enforcement.

III. COOPERATION: A CASE EXAMPLE

Perhaps the best example of where government-to-government cooperation between the tribes and federal agencies has produced environmental benefits can be found in the area of commercial waste disposal on Indian lands. Beginning in approximately 1989, it was evident that private corporations engaged in the business of hazardous and solid waste disposal had become aware of the fact that state governments did not generally have jurisdiction over lands within the boundaries of many Indian reservations. Therefore, state standards generally did not apply on Indian lands.

This situation led representatives of the waste management industry to make approximately one hundred overtures to tribes for the construction of commercial waste treatment disposal facilities on Indian lands. EPA worked directly with BIA (which holds large tracts of tribal lands either in trust or restricted status) to initiate a policy by which tribes could exercise their sovereign rights to develop their lands for the benefit of their members and assure the performance of the federal responsibility to protect the integrity of tribal resources.

The policy developed by EPA and BIA was one of informed consent. EPA's Office of Solid Waste ("OSW") developed a Native American Network publication which periodically informs identified tribal leaders, environmental program directors, and staff, of the responsibilities that tribal governments have for solid and hazardous waste management under the Resource Conservation and Recovery Act of 1976 ("RCRA").²³ OSW also joined with OFA, the National Congress of American Indians, and the Council of

²³ 42 U.S.C. §§ 6901-6991 (1983 & Supp. 1993).

Energy Resource Tribes to hold several training sessions on solid waste management for tribal officials. This was followed by a second series of training sessions developed by OSW in cooperation with Americans for Indian Opportunity. The Cherokee tribe of North Carolina and OSW also took the lead in joining with other EPA program offices, BIA, and IHS in developing two national tribal conferences on environmental management. In addition, OSW funds a number of solid waste circuit riders in several EPA regions. Their job is to provide hands-on technical assistance. OSW initiated a similar project with VISTA in Alaska. Many tribes have benefited from OSW's solid waste management demonstration projects. In addition, OFA funded a multitribal solid waste management planning effort by the Inter-Tribal Council of Arizona through a special congressional appropriation to EPA's Multi-Media/General Assistance Program.

In addition to these efforts to inform tribes of proper waste management techniques and their responsibilities under RCRA, BIA developed a policy concerning the construction of commercial facilities built by tribal governments and corporations on Indian lands. As mentioned above, BIA requires that all proposals for commercial waste treatment/disposal facilities sited on lands under their jurisdiction have an approved EIS before construction can be initiated. In addition, BIA reserves the option to require additional relevant safeguards above those in an EIS's preferred alternative as a precondition to BIA approval of a lease which it countersigns for commercial development on Indian lands it holds in trust.

For example, BIA placed additional environmental restrictions on a waste-to-energy project which was developed on the Cabazon Reservation in Riverside County, California. With respect to that project, BIA required that the tribe meet applicable air quality standards in Southern California before BIA would agree to the lease of tribal trust lands for construction of the project. Further, where a tribe desires to construct a hazardous waste treatment/disposal facility, BIA requires the tribe and contractor obtain all applicable federal permits before the facility can begin operating.

The result of this policy of informed consent has been dramatic. Of the approximately one hundred overtures for the construction of commercial facilities, fewer than seven are currently under development. Of these, those that are being developed by tribal gov-

ernments have undergone environmental review.²⁴ In addition, numerous tribes have begun working with EPA, IHS, and BIA headquarters and regional area offices in an attempt to either close tribal landfills or upgrade them in response to the deadline for meeting the new Part 258 landfill criteria under RCRA. In general, the policy of informed consent has been a success.

IV. THE NEXT DECADE

EPA's Indian Program has grown dramatically during its first decade. This growth has produced many successes, and, like all growth processes, it has generated questions about the future. A number of important issues concerning environmental protection in Indian Country need to be resolved by the tribes, the Administration, the courts, and Congress as the contours of environmental regulation continue to take shape on Indian lands. These questions include such important areas as the longterm financing of environmental programs operated by tribal governments; the interface of state, federal, and tribal jurisdiction in Indian Country (especially on fee lands held by non-Indians within the boundaries of Indian Reservations); the structure of Indian environmental programs within the EPA, BIA, IHS, and other federal agencies which have environmental responsibilities on Indian lands; and the management of the environmental impacts of fast-paced economic development on reservations in the areas of mining, gaming, and light industry.

At present, it is not possible to forecast when programmatic changes may occur and what shape they will assume. However, it is clear that there will be significant changes in tribal, federal, and state environmental programs in response to the development of environmental protection activities that have already taken place on Indian lands. Over 300 tribes are currently working with the EPA, other federal agencies, and in some cases, state agencies to promote the development of contemporary environmental regulatory and management practices on Indian lands, and significant improvements for the protection of human health and the environment both on and off the reservation are beginning to be realized.

²⁴ At present, EPA and BIA are discussing the environmental review process as it relates to commercial waste developments which are established on lands within reservations which are held as individual allotments. These lands represent a complex regulatory problem, as BIA generally does not have lease approval authority over such allotments.

It is unlikely that any constituency, at any level of government, will desire to have conditions returned to the way they were ten years ago when environmental protection on Indian lands was often minimal and in some cases, woefully inadequate. However, the achievement of this next step in the development of the process of extending contemporary environmental regulatory and management techniques to Indian Country will require a great deal of cooperative effort by the Administration, tribal governments, Congress, and state environmental agencies in the planning and implementation of programs on Indian lands. EPA has created an American Indian Environmental Office to work on this issue, and prospects for further developments are encouraging.

V. EQUITY OR SELF-DETERMINATION?

Although American Indians are minority "People of Color," who maintain cultural practices that are significantly different from the American mainstream, those Indians who live in Indian country enjoy indigenous rights and maintain traditional tribal obligations which must be included within the concepts of environmental equity and justice. Indian tribes retain their own sovereign governments which are responsible for over fifty four million acres of land held for them by the federal government in trust and restricted status. On these lands and in other areas where tribes are afforded protection by statute, executive order, caselaw, or treaty, the special relationship between Indians and the federal government requires that the special legal status of tribal governments be considered when providing protection from the risks to health and environment caused by environmental pollution on or near Indian lands. The sovereign status of tribal governments requires that a government-to-government relationship be maintained between the federal and tribal governments and that this relationship lead to a federal-tribal partnership in environmental regulation, management, and enforcement. In the past, the lack of such a partnership has led to serious environmental consequences, such as the pollution of Navajo lands from uranium mining.²⁵

²⁵ Exposure to radionuclides has led to the death of a number of Navajo Indians who were uranium miners and has left abandoned tailings piles which, to date, have cost nearly \$30 million to remediate.

CONCLUSION

In the final analysis, much has been done to begin the process of providing Indians living in Indian Country with equal protection under our nation's environmental laws. However, the process is far from complete. In the end, tribes will achieve equal protection from environmental risk, but they must achieve it in a manner that is appropriate to their special status under the law.