Examining Tribal Environmental Law

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INTRODUCTION

Since the revolution of environmental law began roughly forty years ago, scholars have wrestled with the complex interactions of the states and federal government, but they have largely ignored tribal governments.[1] Although some scholarship exists regarding the suggested development of tribal environmental law,[2] little is known about the extent to which tribes nationwide have enacted such laws. This Article fills that vacuum by taking a first look at existing tribal environmental law and exploring the laws of one tribal nation that has enacted several environmental laws. The Article also proposes some initial norms to guide the development of tribal environmental law.

The time has never been better for an examination of tribal environmental laws.[3] Historically, Indian country[4] has experienced

1. The federalization of environmental law is generally traced back to enactment of the National Environmental Policy Act in 1970. ROBERT V. PERCIVAL ET AL., REGULATION: LAW, SCIENCE AND POLICY 94 (6th ed. 2009).

2. *See, e.g.*, DEAN B. SUAGEE, TRIBAL ENVIRONMENTAL POLICY ACTS AND THE TEPA TEMPLATE POLICY (2001), *available at* Westlaw SG026 ALI-ABA 229 (explaining that there appears to be interest in adopting tribal environmental policy acts but that nothing is known regarding the extent to which tribes have actually adopted these laws).

3. This Article views the adoption of environmental laws as positive for tribal communities, in that such laws protect the land and environment that are so important to many Indians. However, enactment of environmental laws is not without consequence, as enactment may slow natural resource extraction and use within Indian country. Accordingly, each tribe must choose the appropriate balance of extraction and use versus environmental regulation itself. Some tribes have gone so far as to ban extractive industries from their reservations. For example, the Turtle Mountain Band of Chippewa Indians banned hydraulic fracturing within its reservation for fears that "fracking" would lead to environmental contamination. *Turtle Mountain Tribal Council Bans Fracking*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Nov. 27, 2011), http://indiancountrytodaymedianetwork.com/2011/11/27/turtle-mountain-tribal-council-bans-fracking-64866. Alternatively, some tribal nations have welcomed extractive industries to their reservations. For example, the Crow Nation has worked extensively on its coal-to-liquid project. Terri Hansen, *9 Billion Tons of Coal: The Crow Coal-to-Liquids Project*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Oct. 28, 2013), http://indiancountrytodaymedianetwork.com/2013/10/28/crow-coal-liquids-project-moves-ahead-atni-and-ncai-support-151949. It may therefore be that there is no consensus

substantial environmental contamination, suggesting persistent under-regulation.[5] Similarly, today Indian country possesses substantial potential for natural resource development. For example, Indian country could generate an estimated $1 trillion if it fully develops its energy potential, which is inclusive of both traditional energy sources[6] and alternative and renewable energy development.[7] Additionally, two recently enacted federal laws, the Indian Tribal Energy Development and Self-Determination Act of 2005 (specifically the Tribal Energy Resource Agreement or TERA provisions)[8] and the Helping Expedite and Advance Responsible Tribal Homeownership Act (HEARTH Act),[9] include provisions that could potentially encourage tribal environmental laws. To take advantage of "streamlined" development under both the TERA provisions and the HEARTH Act, tribes must enact certain

within Indian country as to what constitutes the optimum balance between natural resource extraction and use and environmental law development.

4. The term "Indian country" is a legal term of art, as defined in 18 U.S.C. § 1151 (2012):

> Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

5. For example, uranium development and mining caused pervasive environmental contamination in the Navajo Nation. Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics and Human Rights*, 87 WASH. L. REV. 1133, 1170–71 (2012). For a general discussion of environmental harms in Indian country, *see* James M. Grijalva, CLOSING THE CIRCLE: ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY (2008).

6. "Traditional energy sources" refers to non-renewable sources of energy, including nuclear energy and energy derived from fossil fuels. *Energy Sources*, U.S. DEP'T OF ENERGY, http://energy.gov/science-innovation/energy-sources (last visited Jan. 21, 2014).

7. *See* Jefferson Keel, President, Nat'l Cong. of Am. Indians, State of Indian Nations Address: Sovereign Indian Nations at the Dawn of a New Era (Jan. 27, 2011) ("Tribes care for approximately ten percent of America's energy resources, including renewable energy, worth nearly a trillion dollars in revenue.").

8. 25 U.S.C. § 3504(e)(2)(C) (2012). For a full discussion of the TERA provisions, see Elizabeth Ann Kronk, *Tribal Energy Resource Agreements: The Unintended "Great Mischief for Indian Energy Development" and the Resulting Need for Reform*, 29 PACE ENVTL. L. REV. 811 (2012).

9. HEARTH Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150 (July 18, 2012). For a full discussion of the HEARTH Act, *see* Elizabeth Ann Kronk, *Tribal Renewable Energy Development Under the HEARTH Act: An Independently Rational, but Collectively Deficient Option*, 55 ARIZ. L. REV. 1031 (2014).

environmental review provisions.[10] In addition, some tribes may choose to codify existing tribal environmental ethics or to protect strong cultural and spiritual connections to the land and environment.[11] Finally, enacting robust environmental laws will promote tribes' inherent sovereignty. Overall, these factors indicate that the time is ripe for tribes to enact environmental laws.

Tribes need to develop their respective bodies of environmental law to reduce pollution, develop their tribal natural resources in a manner consistent with tribal culture, and promote their inherent tribal sovereignty. Yet little scholarship examines what laws tribes have enacted to date or provides a roadmap to guide the development of such laws. This Article fills the scholastic gap. It does so by describing existing tribal environmental law and by offering some initial thoughts on norms that should ground new tribal environmental laws. In Part I, the Article examines facts that may drive the development of tribal environmental law today. In addition to the fact that many tribes have historically faced substantial environmental contamination, modern factors likely to impact most tribal nations include the promotion of tribal sovereignty and also the need to respond to emerging environmental concerns. Next, in Part II, the Article provides an introduction to environmental law that is applicable in Indian country, establishing a foundation from which to explore the development of tribal environmental law. The Article then surveys and classifies the environmental laws of seventy-four federally recognized tribes. A significant number of federally recognized tribes have no publicly available tribal environmental laws. In light of this finding, Part IV examines the existing laws of one tribal nation, the Navajo Nation, which has a robust framework of environmental law that could serve as a model for other tribes. Part IV also proposes some norms for the development of tribal environmental law in the future. This Article lays the foundation for a robust examination of tribal environmental law. Close scrutiny of tribal environmental law offers exciting and expansive applications now and well into the future.

10. TERA § 3504(e)(2)(C) (2012); HEARTH Act of 2012.

11. See *infra* section II.A discussing the unique spiritual and cultural connection many tribes have with their environments and land.

I. CATALYSTS FOR TRIBAL ENVIRONMENTAL LAW DEVELOPMENT: PROMOTING TRIBAL SOVEREIGNTY AND RESPONDING TO EMERGING ENVIRONMENTAL CONCERNS

This part explores reasons that may drive tribes to adopt environmental laws. Every tribal nation is different, so there may be a myriad of reasons why various tribes will enact environmental laws. However, this Article limits its exploration to two modern motivations shared by many tribes: (1) the promotion of tribal sovereignty and environmental ethics; and (2) the need to respond to emerging natural resource and environmental challenges.[12]

A. Tribal Sovereignty and Related Tribal Environmental Ethics

First, tribes may enact environmental laws to promote tribal sovereignty and codify existing tribal environmental ethics.[13] Sovereignty is important to Indian tribes because its existence allows tribes to enact laws and be governed by them.[14] The development and enactment of laws are fundamental expressions of sovereignty.[15] In this regard, the enactment of any tribal law

12. Notably, like other environmental justice communities, many tribes have historically endured the brunt of environmental contamination. For a discussion of environmental justice in Indian country, see GRIJALVA, *supra* note 6. On the basis of this historical contamination alone, tribes may have a substantial motivation to enact environmental laws.

13. *See infra* Part II.B–C.

14. *See generally* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ("Although no longer possessed of the full attributes of sovereignty, [Indian tribes] remain a separate people, with the power of regulating their internal and social relations." (internal quotation marks omitted)); Williams v. Lee, 358 U.S. 217, 223 (1959) (prohibiting "the exercise of state jurisdiction" over the controversy at issue because it "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the rights the Indians to govern themselves.").

15. Tribal laws incorporate several different types of law, including treaties, constitutions, customary and traditional laws, legislative enactments, and administrative rulemaking. For a general discussion of the various categories of tribal laws, *see* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW (2011); JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES (2d ed. 2010). Different types of law may express tribal sovereignty in different ways. For example, tribal constitutions establish basic tribal powers and governmental structure. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.05[3] (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2012]. Some tribal constitutions also explicitly reference the inherent sovereignty of the tribe. *See, e.g.*, ROSEBUD SIOUX TRIBE CONST. art. IV, § 3, *available at* http://www.rosebudsiouxtribe-nsn.gov/government/tribal-laws/constitution/44-article-iv. Tribal customary law may also be developed to recognize the tribe's important cultural ties to the past and the significance of tribal culture in the future. *See generally* Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287, 287

would buttress tribal sovereignty. Yet environmental laws may be particularly important for tribes with cultural and spiritual connections to their environment and land.[16] Tribal nations are sovereign nations, yet "[t]ribal sovereignty is . . . a paradox. It transcends, and therefore requires no validation from, the U.S. government. At the same time, tribal sovereignty is vulnerable and requires vigilant and constant defense in our [American] legal and political forums."[17] Expressions of tribal sovereignty, such as enactment of environmental laws, may therefore help reduce this vulnerability.

However, as Professor Christine Zuni Cruz notes, "not every sovereign act undertaken by an indigenous nation necessarily promotes [its] sovereignty . . . . Adoption of western law can create a gap between the adopted law and the people . . . . In this respect, an Indian nation's government can . . . [alienate] its own people."[18] Accordingly, environmental law must be developed consistent with the tribal community's existing environmental ethics. "[U]ltimately, an indigenous nation's sovereignty is strengthened if its law is based upon its own internalized values and norms."[19]

Although not always true, enacting environmental laws to protect the tribal environment may be consistent with the environmental ethics of many tribal nations. Native cultures and traditions are often tied to the environment and land in a manner that

(1998) (comparing "distinctively Indian social norms" across multiple tribes' courts). Overall, "[i]n recent decades, the scope of tribal law has been widening to meet the needs of tribal self-government and contemporary self-determination. This explosion in both tribal common law decision making and positive law reflects the growing demand on Indian nations to address a wide array of matters . . . ." COHEN'S HANDBOOK ON FEDERAL INDIAN LAW 2012, *supra*, § 4.05[2].

16. For a general discussion of the close spiritual and cultural connection that many tribes and individual Indians have with their tribal environments, *see* SARAH KRAKOFF ET AL., TRIBES, LAND, AND THE ENVIRONMENT (Sarah Krakoff & Ezra Rosser eds., 2012).

17. Sarah Krakoff, *Tribal Sovereignty and Environmental Justice*, *in* JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 161, 163 (Kathryn M. Mutz et al. eds., 2002).

18. Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 1 (2000) (citations omitted), *available at* http://tlj.unm.edu/tribal-law-journal/articles/volume_1/zuni_cruz/.

19. *Id.*; *see also* Wenona Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL'Y 357, 358–59 (2006) (discussing common conflicts between tribal "incorpor[ation] of non-Indian law" and "tribes' efforts to represent their histories and existence using their own terms.").

traditionally differs from that of the dominant society.[20] For a variety of reasons, including cultural and spiritual reasons, many tribal nations are "land-based."[21] For example, in the author's own experience as a citizen of the Sault Ste. Marie Tribe of Chippewa Indians, spiritual ceremonies are held at certain places and at certain times during the year. Spiritual ceremonies are intimately connected to place. This is not unique to the author, as many Native people possess a spiritual connection with land and the environment.[22] As a result, the spiritual connection between many tribes and their surrounding environment is crucial to the sovereignty of these tribal nations.[23]

Where these connections to the environment exist, it may be important to codify the environmental ethic of the tribal community.[24] Not only would such statutes express the tribal community's values, but codification will make tribal law more transparent and may also assuage concerns of the external community.[25] By codifying and publishing their environmental

20. The author recognizes that each Native nation has a different relationship with its environment and is hesitant to stereotype a common "Native experience," recognizing that there is a broad diversity of thought and experience related to one's relationship with land and the environment. In particular, the author would like to avoid traditional stereotypes of American Indians as "Noble Savages" or "Bloodthirsty Savages." *See* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 270 (1996) ("The problems of cross-cultural interpretation and the attempt to define 'traditional' indigenous beliefs raise a common issue: the tendency of non-Indians to glorify Native Americans as existing in 'perfect harmony' with nature (the 'Noble 'Savage' resurrected) or, on the other hand, denounce them as being as rapacious to the environment as Europeans (the 'Bloodthirsty Savage' resurrected).").

21. *Id.* at 274.

22. *Id.* at 282–83 (citation omitted) ("American Indian tribal religions . . . are located 'spatially,' often around the natural features of a sacred universe. Thus, while indigenous people often do not care when the particular event of significant in their religious tradition occurred, they care very much about where it occurred.").

23. Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENVTL. L. REV 373, 424 (2008) ("Trust concepts therefore help to provide tribes with two essential tools of traditional Native self-determination: access to sacred lands and the ability to sustainably use the natural resources on those lands. These were, and remain today, vital tools of nation-building.").

24. For a discussion of the important role environmental ethics may play for a community, see generally Tsosie, *supra* note 21.

25. *See, e.g.*, Dean B. Suagee, *Tribal Environmental Policy Acts and the Landscape of Environmental Law*, NAT. RESOURCES & ENV'T, Spring 2009, at 13 ("Justice Souter's concurring opinion in *Nevada v. Hicks* . . . sets out some of his concerns regarding assumed lack of fairness in the exercise of tribal authority over nonmembers, including uncertainty

laws, tribes can provide notice to outsiders of tribal norms and laws. Outsiders would then have less reason to fear the arbitrary application of these laws.[26]

B. Emerging Environmental Challenges: Adopting Environmental Protection Laws in Light of Natural Resource Development[27] and Climate Change

In addition to promoting tribal sovereignty through the codification of the community's environmental ethic, tribal nations may also develop environmental laws in response to emerging environmental challenges. These modern challenges include climate change and pollution related to natural resource development.

Although there is substantial opportunity for natural resource development in Indian country, pollution from such development is a significant concern. "Energy and mineral production on Native American lands is substantial, representing over 5% of domestic oil production, 8% of gas, 2% of coal, and substantial renewable energy production."[28] Given that tribal reservation land accounts

about the law that tribal courts apply, especially when drawing on tribal oral traditions and different standards for procedural fairness. A transparent TEPA process is a constructive response, codified as positive law, to such judicial fears that tribes will not treat nonmembers with basic fairness.").

26. An example of this "fear" of the application of tribal law to non-Indians can be found in then-Justice Rehnquist's decision in *Oliphant v. Suquamish Indian Tribe* when he explains the concern associated with allowing tribal courts to try non-Indians for criminal offenses. Such tribal court action is troubling, according to the *Oliphant* Court, because "'[i]t tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception.'" Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) (quoting Ex Parte Crow Dog, 109 U.S. 556, 571 (1883)), *superseded by statute as recognized in* United States v. Lara, 541 U.S. 193 (2004).

27. This Article uses the term "natural resource development" broadly, as the term encompasses both resource extraction and processing that may occur within Indian country.

28. Lynn H. Slade, *Mineral and Energy Development on Native American Lands: Strategies for Addressing Sovereignty, Regulation, Rights, and Culture*, 56 ROCKY MTN. MIN. L. INST. 5-A1 (2010) (citation omitted); *see also Tribal Energy Self-Sufficiency Act and the Native American Energy Development and Self-Determination Act: Hearing on S. 424 and S. 522 Before the S. Comm. on Indian Affairs*, 108th Cong. 961 (2003) (statement of Vicky Bailey, Assistant Sec'y for Policy and Int'l Affairs, Dep't of Energy) ("Native American reservations contain large reserves of oil and gas. There are an estimated 890 million barrels of oil and natural gas liquids, and 5.65 trillion cubic feet of gas on tribal lands."); 149 CONG. REC. S5,751 (daily ed. May 6, 2003) (statement of Sen. Jeff Bingaman) ("[E]nergy resources on Indian land in the U.S. have not been as extensively developed as they might be. According to the Bureau of Indian Affairs, over 90

for approximately 2% of land within the United States, a disproportionate portion of energy and mineral production comes from Indian country.[29] According to the Office of Indian Energy and Economic Development, "Indian lands contain up to 5.3 billion barrels of yet undeveloped oil reserves, 25 billion cubic feet of undeveloped gas reserves, 53.7 billion tons of undeveloped coal reserves, and prime target acreage for wind, geothermal, solar, and other renewable energy resources."[30] Because of this potential opportunity for financially successful natural resource development in Indian country, both private developers[31] and tribal nations themselves[32] are increasingly exploiting these opportunities.

However, natural resource development often presents significant environmental challenges.[33] For example, the

Indian reservations have significant untapped energy resource potential. That includes oil and gas, coal, coalbed methane, wind and geothermal resources."); DOUGLAS C. MACCOURT, RENEWABLE ENERGY DEVELOPMENT IN INDIAN COUNTRY: A HANDBOOK FOR TRIBES 1 (2010); Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065, 1066–67 (2008) ("The tribal mineral resource base is extensive. Nearly two million acres of Indian lands are subject to mineral leases . . . [and]15 million additional acres of energy resources lie undeveloped . . . . Production of energy resources on Indian lands represents more than ten percent of the total of federal on-shore energy production.") (citations omitted).

29. Tribal reservations compose approximately 55 million acres within the United States. JOE MITCHELL, U.S. FOREST SERV., FS-600, FOREST SERVICE NATIONAL RESOURCE GUIDE TO AMERICAN INDIAN AND ALASKA NATIVE RELATIONS, APPENDIX D: INDIAN NATIONS (1997), *available at* http://www.fs.fed.us/people/tribal/tribexd.pdf. Approximately 2.3 billion acres comprise the United States. Ruben N. Lubowski et al., *Major Uses of Land in the United States*, U.S. DEP'T OF AGRIC. (2002), http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib14.aspx#.UmMrJvm-2uI. Accordingly, tribal reservation lands comprise approximately 2% of the United States. *See* U.S. DEP'T OF ENERGY, DEVELOPING CLEAN ENERGY PROJECTS ON TRIBAL LANDS: DATA AND RESOURCES FOR TRIBES 3 (2012), *available at* http://www.nrel.gov/docs/fy13osti/57048.pdf.

30. Slade, *supra* note 28 (citations omitted).

31. WALTER STERN, DEVELOPING ENERGY PROJECTS ON FEDERAL LANDS: TRIBAL RIGHTS, ROLES, CONSULTATION, AND OTHER INTERESTS (A DEVELOPER'S PERSPECTIVE) (2009), *available at* http://www.modrall.com/files/1436_developing_energy_projects_federal_lands.pdf.

32. PAUL E. FRYE, DEVELOPING ENERGY PROJECTS ON FEDERAL LANDS: TRIBAL RIGHTS, ROLES, CONSULTATION, AND OTHER INTERESTS (A TRIBAL PERSPECTIVE) (2009), *available at* Westlaw 2009 No. 3 RMMLF-Inst. Paper No. 15B.

33. Because this Article focuses on the development of tribal environmental law related to air quality, water quality, and solid waste disposal, the examination of the environmental impacts of natural resource development is limited to these categories. However, natural resource development may have further negative impacts not examined in this Article. For a general discussion of the potential impacts of natural resource development from a legal perspective, see JAN G. LAITOS, SANDI B. ZELLMER & MARY C. WOOD, NATURAL RESOURCES LAW (2d ed. 2012).

increasing use of hydraulic fracturing to develop natural gas resources throughout the United States has stoked concerns related to groundwater contamination.[34] As a result, scholars encourage sovereigns, including tribal nations, to put extensive regulations into place to prevent water pollution.[35] Many states have already enacted such regulatory safeguards.[36] More generally, a significant nexus exists between water and energy and mineral production, as 40% of the freshwater withdrawals in developed nations are made by these industrial sectors.[37]

Natural resource development also has the potential to generate significant amounts of solid waste. For example, mining often produces hazardous wastes, some of which are benign but some of which present substantial risks to the environment.[38] Mining may generate dangerous substances, such as heavy metals, and mining tailings have significant implications for the environment.[39] Ultimately, natural resource development, such as mining, may have lasting economic and environmental impacts that may not be easily remediated.[40]

Tribes may also develop environmental laws to mitigate and adapt to the impacts of climate change.[41] Climate change affects tribal nations on a daily basis. Because of their location and, in

34. *See* Asjylyn Loder, *Fracking Pushes U.S. Oil Output to Highest Since 1992*, BLOOMBERG (Jul. 10, 2013), http://www.bloomberg.com/news/2013-07-10/fracking-pushes-u-s-oil-output-to-highest-since-january-1992.html; Mark Fischetti, *Groundwater Contamination May End the Gas-Fracking Boom*, SCI. AM. (Sept. 12, 2013), http://www.scientificamerican.com/article.cfm?id=groundwater-contamination-may-end-the-gas-fracking-boom.

35. *See Risky Gas Drilling Threatens Health, Water Supplies*, NATURAL RES. DEF. COUNCIL, http://www.nrdc.org/energy/gasdrilling/ (last visited Jan. 24, 2014); Meg Handley, *Fracking Might Be Worse for the Environment than We Think*, U.S. NEWS & WORLD REPORT (May 17, 2013), http://www.usnews.com/news/articles/2013/05/17/fracking-might-be-worse-for-the-environment-than-we-think.

36. David Neslin, *Hydraulic Fracturing: A Comparison of Regulatory Approaches and Trends for the Future*, 2013 NO. 2 ROCKY MTN. MIN. L. RMMLF-INST. PAPER NO. 20 (2013).

37. Bart Miller & Michael Hightower, *Environmental Impacts of Water Use for Energy and Mineral Production*, 2012 NO. 3 ROCKY MTN. MIN. L. RMMFL-INST. PAPER NO. 122, 12-4 (2012).

38. *Id.* at 12–20.

39. *Id.*

40. *Id.*

41. Notably, some tribes, such as the Swinomish Tribe, Jamestown S'Klallam, Mescalero Apache, Karuk Tribe, Confederated Salish and Kootenai Tribes and Nez Perce, are already adopting such laws under their inherent tribal sovereignty. Terri Hansen, *8 Tribes That Are Way Ahead of the Climate Adaptation Curve*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 15, 2013), http://indiancountrytodaymedianetwork.com/2013/10/15/8-tribes-are-way-ahead-climate-adaptation-curve-151763.

many instances, increased reliance on the environment, many tribal communities are particularly vulnerable to the impacts of climate change. For example, starting in 1998, tribal nations in the Pacific Coast and Rocky Mountain regions reported the following related to climate change: increased and more constant winds; violent weather changes where storms wiped out intertidal shellfish; declining salmon runs; deformed fish; significant decreases in the life spans of individual Natives due to the unavailability of traditional foods; air pollution due to burning forests; minimum river flows necessary for native fish species; and erosion due to rising sea levels.[42] Tribal nations in other regions of the United States are also experiencing profound changes to their environments.[43] Tribes also face increased adverse health effects related to climate change, including emerging mental health problems resulting from the loss of homes and cultural resources.[44] Moreover, climate change may harm traditional tribal industries, such as hunting and fishing,[45] and modern industries, such as tourism.[46]

Because climate change threatens tribal environments, industries and the health of tribal members, tribal nations may be motivated to attempt to mitigate the impacts of climate change by enacting environmental laws that regulate pollution contributing to climate change. Tribal nations adopting environmental laws at least in part

42. U.S. GLOBAL CHANGE RESEARCH PROGRAM, NATIVE PEOPLES – NATIVE HOMELANDS CLIMATE CHANGE WORKSHOP: FINAL REPORT 43–44, 49 (Nancy G. Maynard ed., 1998) [hereinafter NATIVE PEOPLES], *available at* http://www.usgcrp.gov/usgcrp/Library/nationalassessment/native.pdf.

43. *See generally* NAT'L TRIBAL AIR ASS'N, IMPACTS OF CLIMATE CHANGE ON TRIBES IN THE UNITED STATES (2009), *available at* http://www4.nau.edu/tribalclimatechange/resources/docs/res_ImpactsCCTribesNUS.pdf (compiling responses of tribal nations to a request from EPA Assistant Administrator Gina McCarthy concerning tribal experiences of climate change).

44. *Id.*

45. NATIVE PEOPLES, *supra* note 42, at 10 ("Native peoples today feel increasingly vulnerable to significant environmental changes because they are no longer able to cope easily with changes by relocating. Few contemporary tribes can afford the purchase of large tracts of new land, and federal laws hinder the transfer or expansion of Tribal jurisdiction. Tribes therefore see their traditional cultures directly endangered by the magnitude of the projected climate change.").

46. Based on the impacts to Indian country detailed above, it is a natural conclusion that tourists would be less likely to visit Indian country because of such impacts. For a general discussion of the impacts of climate change on tourism, see Bas Amelung et al., *Implications of Global Climate Change for Tourism Flows and Seasonability*, 45 J. TRAVEL RES. 285 (2007).

for this reason will not be alone as many nations across the world regulate environmental pollution to help mitigate the effects of climate change.[47]

There may be a vast number of reasons why tribal nations adopt environmental laws, including significant historical environmental pollution within tribal communities. Moreover, today, tribes across the nation may enact such laws in order to promote tribal sovereignty and protect tribal environments from the impacts of natural resource development and climate change.[48]

II. INTRODUCTION TO ENVIRONMENTAL LAW APPLICABLE IN INDIAN COUNTRY

This section situates the environmental laws tribes could adopt within the framework of existing federal, state, and tribal law.[49] The purpose of this section is to establish the baseline of tribal sovereignty and to briefly introduce the application of both federal and state environmental law to Indian country.

In many instances, tribes are treated the same as states for purposes of implementing federal environmental laws. Tribes possess the ability to develop environmental laws due to either their undiminished inherent tribal sovereignty or delegated authority from the federal government.[50] However, where federal laws and, in rare instances, state laws apply in Indian country, a tribe may lack the authority to adopt environmental laws inconsistent with applicable federal and state laws.[51]

47. For a complete discussion of global efforts to regulate climate change, see CHRIS WOLD ET AL., CLIMATE CHANGE AND THE LAW, ch. 4–6, 8, 9 (2010).

48. *See id.*

49. For a fuller discussion of the application of federal and state environmental law in Indian country, see Gregory P. Crinion & Tracey Smith Lindeen, *Environmental Law & Indian Lands*, 69 WIS. LAW. 14 (1996); Kevin Gover & James B. Cooney, *Cooperation Between Tribes and States in Protecting the Environment*, 10 NAT. RESOURCES & ENV'T 35 (1996). For a general discussion of jurisdiction in Indian country, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2005].

50. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2012, *supra* note 15, § 10.01.

51. *See generally id.* § 10 (discussing how federal and state laws may apply in Indian country).

A. Tribal Sovereignty and Jurisdiction

Before discussing the application of federal and state law, this section starts with a brief introduction to tribal sovereignty. Tribes may enact environmental laws as a result of their inherent tribal sovereignty.[52] Prior to colonization by foreign sovereigns, most tribes existed as independent, self-governing communities.[53] Contact with foreign sovereigns certainly influenced tribal governments.[54] Despite this contact, however, tribal governments retain the status of independent, sovereign governments. As the United States Supreme Court acknowledged in *Worcester v. Georgia*, tribes are "distinct, independent political communities."[55] The federal government recognized tribal sovereignty through the Indian Commerce Clause of the United States Constitution,[56] which acknowledges that Indian tribes are legally distinct from federal or state governments.[57]

Today, inherent tribal sovereignty persists. "Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice."[58] Unless federal law divests a tribe of its inherent sovereignty, the tribe's sovereignty remains intact.[59] Tribes maintain sovereign authority over their members and territory to the extent not limited by federal law.[60] "Indian tribes are neither states, nor part of the

52. *Id.*

53. *Id.* § 4.01[1][a] ("Most Indian tribes were independent, self-governing societies long before their contact with European nations, although the degree and kind of organization varied widely among them.") (citing STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 72–76 (1988)).

54. For example, the Anglo court systems of the federal government and state governments influenced the development of tribal courts following first contact. *See generally* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983).

55. Worcester v. Georgia, 31 U.S. 515, 559 (1832). The *Worcester* Court went on to explain that even though the Court had described tribes as "domestic dependent nations" in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), that tribal sovereignty still existed and tribes were not dependent on federal law. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2012, *supra* note 15, § 4.01[1][a] (citations omitted).

56. U.S. CONST. art. 1, § 8, cl. 3.

57. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2005, *supra* note 49, § 4.01[1][a].

58. *Id.*

59. *Id.*

60. *Id.* § 4.01[1][b] (citations omitted); Fisher v. Dist. Court, 424 U.S. 382, 388–89 (1976) (finding exclusive tribal jurisdiction over an adoption proceeding in which all parties were members of the tribe and residents of the reservation); *Ex parte* Crow Dog, 109 U.S. 556, 568–69 (1883) (finding exclusive tribal authority to impose criminal penalties on tribal

federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate."[61]

Tribes are generally free to constitute their own governments.[62] Tribes are not required to comply with the U.S. Constitution in structuring their tribal governments or laws, as tribes are extra-constitutional.[63] Tribes generally have the authority to enact legislation affecting their citizens within their territories.[64] "In fact, tribal governments are the only nonfederal entities that have plenary jurisdiction over Indians on Indian reservations."[65] Tribes also generally have the authority to adjudicate criminal and civil matters involving their citizens and arising in Indian country.[66] Accordingly, tribes are free to develop their own environmental laws.

Nonetheless, the nature of tribal sovereignty has changed over time, largely as a result of tribes' interactions with the federal government. Today, tribes maintain those aspects of sovereignty that have not been removed by virtue of treaty, statute or "by implication as a necessary result of their dependent status."[67] Accordingly, any examination of tribal authority should start with the presumption that the tribe in question possesses sovereignty,

members in the absence of contravening federal law); *Worcester*, 31 U.S. at 555 (holding that in the absence of tribal or federal approval "[t]he Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have not force"); *see also* 25 U.S.C. § 1911(a) (2012) (reinforcing the *Fisher* holding by declaring exclusive tribal jurisdiction over certain child custody matters involving children who are tribal members or eligible to be tribal members, so long as the children are domiciled or residing on the reservation, or wards of a tribal court).

61. Nanomantube v. Kickapoo Tribe in Kan., 631 F.3d 1150, 1151–52 (10th Cir. 2011) (quoting NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1192 (10th Cir. 2002) (en banc)).

62. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62–63 (1978).

63. Talton v. Mayes, 163 U.S. 376, 382–84 (1896). Although the United States Constitution does not apply to tribal nations, a majority of the protections of the Bill of Rights apply through the Indian Civil Rights Act of 1968. 25 U.S.C. §§ 1301–03 (2012). For a discussion of the application of the Indian Civil Rights Act in Indian country, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2012, *supra* note 15, § 14.04[2].

64. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2005, *supra* note 49, § 4.02. As discussed more fully below, tribes' general authority to legislate and tax may be limited by the federal government.

65. Gover & Cooney, *supra* note 49, at 35.

66. *See supra* notes 58–61 and accompanying text (discussing extent of tribal authority).

67. United States v. Wheeler, 435 U.S. 313, 323 (1978).

unless the tribe has been divested of its sovereignty by the federal government.[68]

In addition to inherent tribal sovereignty, Congress may also delegate federal authority to tribes through either a treaty or statute.[69] The ability of Congress to delegate authority to tribes is especially important in the context of environmental law. Because federal environmental laws are usually considered to be laws of general application, they apply in Indian country, unless their application would directly interfere with tribal sovereignty.[70] As a result, the federal Environmental Protection Agency (EPA) has the authority to implement federal environmental laws in Indian country.[71] However, the EPA has interpreted some federal environmental statutes, such as the Clean Water Act, "not as delegating or conferring federal power on tribes, but as authorizing tribes to implement federal programs within the scope of their inherent [tribal] powers."[72] Conversely, the EPA interprets the Clean Air Act as a delegation of authority to tribes.[73] Therefore, under several federal environmental statutes, tribes may choose to administer the federal environmental programs and standards through tribes-as-states ("TAS") mechanisms.[74] The TAS provisions of major federal environmental statutes, such as the Clean Air Act,[75]

68. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2005, *supra* note 49, § 4.01[1][a].

69. *Id.* "Whether such statutes actually delegate federal power, as opposed to affirming or recognizing inherent power, is a matter of congressional intent." *Id.*

70. *See* Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960) (explaining that federal laws of general application apply to Indian country); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2012, *supra* note 15, § 10.01[2][a]. However, the application of federal environmental laws does not displace the ability of tribes to enact environmental laws. *Id.* § 10.01[2][b].

71. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2012, *supra* note 15, § 10.01[2][a].

72. *Id.* § 10.03[2][a] (citing 56 Fed. Reg. 64,876, 64,880 (1991)). Moreover, tribal inherent sovereignty to enact environmental laws is not displaced by federal environmental law. For example, the Safe Drinking Water Act states that nothing in the Act's 1977 Amendments "shall be construed to alter or affect the state of American Indian lands or water rights nor to waive any sovereignty over Indian land guaranteed by treaty of statute." 42 U.S.C. § 300j-6(c)(1) (2012).

73. *See, e.g.*, Wayne Nastri, Regional Administrator, Envtl. Prot. Agency Region 9, Eligibility Determination for the Navajo Nation for Treatment in the Same Manner as a State for Purposes of the Clean Air act Title V, 40 CFR Part 71 Program (Oct. 15, 2004), *available at* http://www.epa.gov/region9/air/permit/pdf/navajotas.pdf.

74. JUDITH V. ROYSTER, MICHAEL C. BLUMM & ELIZABETH ANN KRONK, NATIVE AMERICAN NATURAL RESOURCES LAW 227 (3d ed. 2013).

75. 42 U.S.C. § 7601 (d)(2) (2012).

Clean Water Act,[76] and Safe Drinking Water Act,[77] allow tribes to act as states for purposes of implementing the statutes under the cooperative federalism scheme.

Despite inherent tribal sovereignty, jurisdictional uncertainty sometimes arises in relation to a tribe's authority over the actions of non-members and non-Indians acting within the tribe's territory. In the civil context, this is because tribes have been divested of their inherent sovereignty over non-citizens on non-Indian land unless certain conditions exist.[78] In *Montana v. United States*, the United States Supreme Court considered the extent of the Crow Nation's inherent sovereignty over non-Indians.[79] Specifically, the Crow Nation wished to regulate the hunting and fishing of non-Indians on non-Indian land located within the Nation's territory.[80] Ultimately, because of implicit divestiture of the tribe's inherent sovereignty,[81] the Court determined that tribes do not have authority to regulate the hunting and fishing of non-Indians owning fee land[82] within the Crow Nation's reservation boundaries.[83]

However, despite the implicit divestiture of tribal inherent sovereignty over non-Indians on non-Indian fee land within reservation boundaries, the Court acknowledged that tribes may

76. 33 U.S.C. § 1377(e) (2012).

77. 42 U.S.C. § 300j-11(b)(1) (2012).

78. Montana v. United States, 450 U.S. 544 (1981). Tribes' criminal jurisdiction is generally limited to Indians. Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978).

79. *Montana*, 450 U.S. 544.

80. *Id.* at 547.

81. *Id.* at 564; *see also* Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN. L. REV. 353 (1994). "According to this theory, courts can rule that, in addition to having lost certain aspects of their original sovereignty through the express language of treaties and acts of Congress, tribes also may have been divested of aspects of sovereignty by implication of their dependent status." Gover & Cooney, *supra* note 49, at 35.

82. Since *Montana*, the Supreme Court has also considered the ability of tribes to regulate the conduct of non-members and non-Indians on other types of lands. For example, in *Strate v. A-1 Contractors*. 520 U.S. 438 (1997), the Court held that the Indian tribe did not possess the inherent sovereignty to adjudicate a civil complaint arising from an accident between two non-Indians on a state highway within the tribe's reservation boundaries. The *Strate* Court explained that "[a]s to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.* at 453.

83. *Montana*, 450 U.S. at 564–65 (holding that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.").

regulate the activities of such individuals under two circumstances. First, tribes may regulate the activities of individuals who have entered into "consensual relationships with the tribe or its members."[84] Second, a tribe retains the "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[85]

Notably, the *Montana* decision involved the actions of non-Indians living on non-Indian owned land within the Nation's territory. It may therefore be argued that tribes have more authority to regulate the activities of non-members and non-Indians on tribally-controlled land within the tribe's territory. However, the United States Supreme Court's decision in *Nevada v. Hicks* casts doubt on this assumption.[86] In *Hicks*, the Court considered whether the Fallon Paiute-Shoshone Tribes had jurisdiction over Mr. Hicks's civil claim against Nevada game wardens in their individual capacities.[87] Hicks, a tribal citizen, alleged that when searching his on-reservation property, the wardens violated certain tribal civil provisions (in addition to violating federal law).[88] In concluding that the tribal court did not have jurisdiction to hear the tribal-law based claims, the Court found that the *Montana* exceptions did not apply.[89] It may therefore be argued that the Court implicitly suggested in *Hicks* that *Montana* applied to the actions of non-members and non-Indians within Indian country regardless of the status of land where the activity occurred.

Accordingly, tribes generally have regulatory jurisdiction over their citizens within their territories, but not over non-citizens owning fee land within the same territory. Because of their inherent sovereignty, tribes generally have regulatory authority over their citizens within their physical territory.[90] Tribes generally do not have inherent sovereignty over and therefore lack

84. *Id.* at 565.
85. *Id.* at 566.
86. Nevada v. Hicks, 533 U.S. 353 (2001).
87. *Id.*
88. *Id.* at 356.
89. *Id.* at 355–69, 374–75.
90. *See supra* notes 58–61 and accompanying text (discussing extent of tribal authority).

jurisdiction over non-Indians acting within tribal territory,[91] unless one of the two *Montana* exceptions applies. Tribes may have regulatory authority in such circumstances if the non-Indians or non-members in question have consented to tribal jurisdiction or if the non-Indian conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[92] However, through delegated authority, such as the TAS provisions of many federal environmental statutes, tribes may have jurisdictional authority over non-members and non-Indians.

As the foregoing makes clear, the federal government plays an important role in the development of law within Indian country. It is therefore helpful to explore the boundaries of federal environmental law as applied in Indian country.

B. Application of Federal Environmental Law to Indian Country

In the 1970s, Congress dramatically expanded the role of the federal government in regulating environmental risks, including air pollution, water pollution, solid waste disposal, and chemical production.[93] In addition to its pervasive role in environmental regulation, the federal government also plays a substantial role in Indian country by virtue of Congress' plenary power. *United States v. Kagama* established the plenary, subject matter authority of Congress over tribes.[94] Courts have generally upheld Congress's ability to legislate in Indian country,[95] subject to certain limitations, including due process and equal protection guarantees.[96] Accordingly, unlike in its relationship with the states where Congress must act under an enumerated authority granted to it by

91. Although *Montana* involved the activities of non-Indians on non-Indian fee land suggesting that the status of the land plays a role in the determination of jurisdiction, *Nevada v. Hicks* muddies the analysis of tribal jurisdiction. This is because the *Hicks* Court applied the *Montana* exceptions to a situation where the alleged wrongful activity occurred on property owned by a tribal member. *Hicks*, 533 U.S. at 357–58.

92. *Id.* at 371 (citing Montana v. United States, 450 U.S. 544, 565–66 (1981)).

93. PERCIVAL ET AL., *supra* note 1, at 94 (noting that Congress enacted the National Environmental Policy Act, Clean Air Act, Clean Water Act, Resource Conversation and Recovery Act, and Comprehensive Environmental Response Compensation and Liability Act between 1970 and 1980).

94. United States v. Kagama, 118 U.S. 375 (1886).

95. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (upholding Congress's ability to abrogate a treaty without tribal approval).

96. Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams'* Algebra, 30 ARIZ. L. REV. 413, 418–19 (1988).

the United States Constitution, Congress has greater leeway to regulate in Indian country.

As an important aside, although the federal government has enacted extensive environmental law covering major categories of environmental contamination, gaps remain in existing federal law. For example, the federal Clean Water Act does not extensively regulate non-point source pollution.[97] Furthermore, federal environmental statutes do not contemplate the regulation of pollution in order to protect cultural resources closely connected to the environment. These and other gaps in the federal environmental scheme provide opportunities for tribes to enact their own environmental laws under their inherent sovereignty.

Yet, in the areas where the federal government has regulated extensively, the question arose as to how to implement such regulation in Indian country. In 1984, the EPA released a policy statement related to Indian country.[98] In relevant part, the policy states that "the Agency will recognize Tribal Governments are the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations."[99] Further, in 1987, Congress acknowledged the right of tribes to enforce their own environmental standards within their territorial boundaries when it adopted "tribal amendments" to several federal environmental statutes.[100] Assuming tribes meet certain established criteria, these amendments let tribes assume TAS status under federal environmental statutes, allowing the tribes to establish environmental quality standards and to issue permits.[101]

97. William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 593 (2004) ("The CWA has never addressed non-point source pollution in a straightforward comprehensive way. Instead, it has been treated as something of an afterthought, a troublesome area to be primarily left in the hands of state and local government.").

98. *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, http://www.epa.gov/superfund/community/relocation/policy.htm (last accessed Jan. 21, 2014).

99. *Id.*

100. Safe Drinking Water Act, 42 U.S.C. § 300j-11 (2012); Clean Water Act, 42 U.S.C. § 1377 (2012); Clean Air Act, 42 U.S.C. § 7474 (2012); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9626 (2012).

101. 42 U.S.C. § 300j-11; 42 U.S.C. § 1377; 42 U.S.C. § 7474; 42 U.S.C. § 9626. .

Many federal environmental statutes center on the concept of cooperative federalism.[102] One mechanism already mentioned for incorporating tribal nations into this cooperative federalism scheme is through the TAS provisions that have been included in several of the major federal environmental statues.[103] Even if the statute does not specifically include TAS provisions, it may include language suggesting that the tribe should be treated like a state.[104] If a federal environmental statute does not specifically speak to the role of tribes, the EPA may determine whether tribes may be treated similarly to states under the statute.[105] Therefore, under the federal environmental statutes, the EPA regulates in Indian country unless tribes have assumed regulatory authority under TAS provisions or the EPA is treating the tribe similarly to a State.

However, tribes may not be treated like states for purposes of all major federal environmental statutes. For example, "[t]he Resource Conservation and Recovery Act (RCRA), the only major federal environmental law that has not been amended to accord tribes primary regulator status, defines tribes as municipalities for purposes of the statute."[106]

In sum, the federal government maintains a pervasive role in environmental regulation throughout the United States. In many instances, tribes may develop their own environmental laws under the federal scheme similar to states if tribes possess TAS status or the EPA agrees to treat tribes like states under the environmental statute in question.

102. PERCIVAL ET AL., *supra* note 1, at 116 ("Under this model [cooperative federalism], federal agencies establish national environmental standards and states may opt to assume responsibility for administering them or to leave implementation to federal authorities.").

103. *E.g.*, Safe Drinking Water Act, § 1451, 42 U.S.C. § 300j-11(b)(1) (2012); Clean Water Act, § 518(e), 42 U.S.C. § 1377(e) (2012); Clean Air Act, § 301, 42 U.S.C. § 7601(d)(2) (2012).

104. COHEN'S HANDBOOK ON FEDERAL INDIAN LAW 2012, *supra* note 15, § 10.02[2].

105. For example, although both the Emergency Planning and Community Right-to-Know Act and the lead-based paint program under the Toxic Substance Control Act are silent as to how tribes are to be treated, the EPA treats tribes as states under both programs. *Id.* § 10.02[2].

106. *Id.* (citing Resource Conservation and Recovery Act, 42 U.S.C. § 6903(13) (2012)). Accordingly, although the federal government generally delegates authority to tribes so that they may regulate under the cooperative scheme like states, this generalization is not true in every instance, as the RCRA example demonstrates.

C. Application of State Environmental Law to Indian Country

Having considered how federal environmental laws may apply in Indian country, it is now helpful to look at the application of state environmental laws within Indian country. To begin with, states are generally precluded from regulating Indians acting within Indian country unless Congress has expressly given a state the authority to do so.[107] "Under principles of federal preemption, state regulatory laws cannot be applied to Indian reservations if their application will interfere with the achievement of the policy goals underlying federal laws relating to Indians."[108] In terms of environmental regulation, the states' role in Indian country is severely limited.[109] "State primacy over Indian lands requires congressional authorization, but nothing in the environmental statutes provides a grant of jurisdiction to the states."[110]

As a result of the EPA's 1984 policy statement,[111] the agency generally requires states to show jurisdictional authority over their entire territory, including Indian country, before granting the state authority under federal environmental statutes.[112] Most states have opted to participate under the federal environmental scheme without trying to regulate in Indian country because they generally lack the authority to do so.[113] In other words, states regularly exclude Indian country from their area of regulatory jurisdiction, as the states acknowledge that they do not possess the authority to regulate within Indian country.

107. Wash. Dep't of Ecology v. E.P.A., 752 F.2d 1465 (9th Cir. 1985).

108. Gover & Cooney, *supra* note 49, at 35–36 (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)).

109. COHEN'S HANDBOOK ON FEDERAL INDIAN LAW 2012, *supra* note 15, § 10.02([1)] ("In general, states may exercise jurisdiction over Indians and Indian lands only as authorized by Congress, and state jurisdiction over nonmembers on fee lands is constrained both by tribal rights to regulate nonmembers in order to protect core tribal governmental interests and by federal preemption of state authority.").

110. *Id.* (citing U.S. ENVTL. PROT. AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984), *available at* http://www.epa.gov/tp/pdf/indian-policy-84.pdf and *Wash. Dep't of Ecology*, 752 F.2d at 1470–73).

111. U.S. ENVTL. PROT. AGENCY, *supra* note 110.

112. Gover & Cooney, *supra* note 49, at 36 ("Accordingly, before a state may assume primary enforcement responsibilities for federal environmental laws on reservations, the state must demonstrate to EPA's satisfaction that is has jurisdiction.").

113. *See, e.g.*, *Wash. Dep't of Ecology*, 752 F.2d 1465 (rejecting the state of Washington's attempt to regulate in Indian country).

As the foregoing discussion suggests, the enforcement of federal and state environmental law in Indian country is a "cumbersome, frustrating undertaking" because of its piecemeal nature.[114] This is because tribes may have regulated in some instances under their inherent sovereign authority, the federal government has legislated in some additional areas, and, for the most part, the states do not regulate environmental matters arising in Indian country. As a result, regulatory gaps have emerged and will continue to be a challenge for tribes.[115]

Tribal environmental law has the potential to fill regulatory gaps left by both federal and state environmental law. As suggested above, existing environmental statutes do not address certain categories of environmental contamination, such as non-point source water pollution, and do not provide the regulatory structure necessary to protect tribal cultural and spiritual resources closely connected with the environment. More generally, enacting environmental laws promotes tribal sovereignty and tribal environmental ethics while protecting the tribal environment from pollution.

III. EXISTING TRIBAL ENVIRONMENTAL CODES[116]

Having established that tribes have the authority to enact environmental laws and may also have strong reasons to do so,[117] this Article now explores existing tribal environmental law.[118] To date, no scholarship exists examining what types of environmental laws have been broadly adopted by federally recognized tribes around the country. This Article is a first look at the existing environmental laws of seventy-four federally recognized tribes.[119]

114. Gover & Cooney, *supra* note 49, at 35.

115. *Id.*

116. Notably, this Article focuses solely on tribal environmental codes. It is possible that other sources of tribal environmental law exist, such as tribal common law, traditional environmental knowledge, and intertribal laws. Future articles will explore the existence of environmental law outside of tribal environmental codes.

117. *See supra* Part I.

118. The laws examined include both environmental laws adopted pursuant to tribal inherent sovereignty and also laws adopted pursuant to delegated authority from the federal government under one of the federal environmental statutes.

119. For a summary of this research, please see the attached appendix, which includes all of the tribal nations examined organized by the state in which the tribal nation is located.

As of August 2012, the federal government recognized 566 tribal nations.[120] This Article surveys the existing environmental laws of federally recognized tribes in four states representing different geographical regions: Arizona, Montana, New York and Oklahoma.[121] There are twenty-one federally recognized tribal nations/reservations located within Arizona.[122] There are seven federally recognized tribal nations/reservations located within Montana.[123] There are eight federally recognized tribal nations/reservations located within New York.[124] There are thirty-eight federally recognized tribal nations located within

120. Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 47,868 (Aug. 10, 2012).

121. For a summary of these results, please see the Appendix at the end of the Article.

122. *American Indian Environmental Office Tribal Portal: Region 9*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/tp/whereyoulive/region9.htm (last updated Feb. 10, 2014). These tribal nations include: Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Cocopah Indian Tribe, Colorado River Indian Tribes of the Colorado River Indian Reservation, Fort McDowell Yavapai Nation, Fort Mojave Indian Tribe, Gila River Indian Community of the Gila River Indian Reservation, Havasupai Tribe of the Havasupai Reservation, Hopi Tribe, Hualapai Indian Tribe of the Hualapai Indian Reservation, Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Navajo Nation, Pascua Yaqui Tribe, Quechan Tribe of the Fort Yuma Indian Reservation, Salt River Pima-Maricopa Indian Community of the Salt River Reservation, San Carlos Apache Tribe of the San Carlos Reservation, San Juan Southern Paiute Tribe, Tohono O'odham Nation, Tonto Apache Tribe, White Mountain Apache Tribe of the Fort Apache Reservation, Yavapai-Apache Nation of the Camp Verde Indian Reservation, and Yavapai-Prescott Tribe of the Yavapai Reservation. *Id.*

123. *American Indian Environmental Office Tribal Portal: Region 8*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/tp/whereyoulive/region8.htm (last updated Feb. 10, 2014). These tribal nations include: Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Blackfeet Tribe of the Blackfeet Indian Reservation, Chippewa-Cree Indians of the Rocky Boy's Reservation, Confederated Salish & Kootenai Tribes of the Flathead Reservation, Crow Tribe, Fort Belknap Indian Community of the Fort Belknap Reservation, and the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation. *Id.* Notably, although the federal government officially recognizes seven tribes in Montana, the number is actually greater as several tribes are located within one reservation. For example, the Confederated Salish and Kootenai Tribes of the Flathead Reservation are counted as one tribe on the federal list. However, the Flathead Reservation is home to three tribes: the Salish, the Kootenai, and the Pend d'Oreille. CONFEDERATED SALISH & KOOTENAI TRIBES, http://www.cskt.org/ (last visited Jan. 24, 2014). This phenomenon is not limited to Montana and is true of other tribes surveyed in this Article. However, for purposes of counting the number of tribes surveyed, the federal numbers are used in this Article.

124. *American Indian Environmental Office Tribal Portal: Region 2*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/tp/whereyoulive/region2.htm (last updated Feb. 10, 2014). These tribal nations include: Cayuga Nation, Oneida Nation, Onondaga Nation, Saint Regis Mohawk Tribe, Seneca Nation, Shinnecock Indian Nation, Tonawanda Band of Seneca Indians NY, and the Tuscarora Nation. *Id.*

Oklahoma.[125] As such, this Article surveys a total of seventy-four federally recognized tribal nations.[126]

The survey sample was not random. Although the tribes surveyed represent 13% of federally recognized tribes located within the United States, the states where the tribes are located represent a significant portion of the population of American Indians and Alaskan Natives nationally. As of 2010, there were approximately 2.9 million American Indians and Alaskan Natives in the United States.[127] Of the states surveyed, two are in the top three states in terms of largest American Indian populations, Oklahoma with 406,492 American Indians and Alaskan Natives and Arizona with 359,841 American Indians and Alaskan Natives.[128] Furthermore,

125. *American Indian Environmental Office Tribal Portal: Region 6*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/tp/whereyoulive/region6.htm (last updated Feb. 10, 2014). These tribal nations include: Absentee-Shawnee Tribe of Indians, Alabama-Quassarte Tribal Town, Apache Tribe, Caddo Nation, Cherokee Nation, Cheyenne-Arapaho Tribes, Chickasaw Nation, Choctaw Nation, Citizen Band Potawatomi Tribe, Comanche Nation, Delaware Nation, Delaware Tribes of Indians, Eastern Shawnee Tribe, Fort Still Apache Tribe, Iowa Tribe, Kaw Nation, Kialegee Tribal Town, Kickapoo Tribe, Kiowa Indian Tribe, Miami Tribe, Modoc Tribe, Muscogee (Creek) Nation, Osage Tribe, Ottawa Tribe, Otoe-Missouria Tribe of Indians, Pawnee Nation, Peoria Tribe of Indians, Ponca Tribe of Indians, Quapaw Tribe of Indians, Sac & Fox Nation, Seminole Nation, Seneca-Cayuga Tribe, Shawnee Tribe, Thlopthlocco Tribal Town, Tonkawa Tribe of Indians, United Keetoowah Band of Cherokee Indians, Wichita and Affiliated Tribes, and Wyandotte Nation. *Id.*

126. The survey, however, is incomplete. Environmental law materials for the tribes in the identified regions were gathered using publicly available resources, such as library databases and online materials. Also, most of the tribes identified were individually approached to request any environmental law materials that may be available to the public. Many tribes generously supplied the materials requested. Some tribes, such as the Iowa Tribe of Oklahoma, indicated that such materials were not currently available to the public. E-mail from Tell Judkins, Envtl. Scientist, Iowa Tribe of Oklahoma, to Ashly Basgall, Servs. Senior Researcher, Univ. of Kan. Sch. of Law Faculty (April 4, 2013) (on file with author). And, in some cases, tribal representatives were unable to find any applicable environmental laws, such as in the case of the Osage Nation. E-mail from Jeff S. Jone, Osage Nation, to Ashly Basgall, Servs. Senior Researcher, Univ. of Kan. Sch. of Law Faculty (Jan. 25, 2013) (on file with author). In other instances, tribes, such as the Delaware Tribe, may be actively in the process of developing environmental laws, but such laws are not yet completed. E-mail from Jimmie Johnson, Envtl. Programs Dir., Del. Tribe of Indians, to Allyson Manny, Research Assistant, Univ. of Kan. Sch. of Law (Aug. 9, 2013) (on file with author). Accordingly, although every effort was made to obtain as much information from the identified tribes as possible, the author acknowledges that the information reviewed is more than likely incomplete for a variety of reasons.

127. *See American Indians by the Numbers*, INFOPLEASE, http://www.infoplease.com/spot/aihmcensus1.html (last visited Jan. 24, 2014) (compiling 2010 U.S. Census data).

128. *Id.* For purposes of this Article, these population statistics are over-inclusive in that they include American Indians located outside of Indian country, and, therefore not subject

approximately 195,703 American Indians and Alaskan Natives live in New York.[129] In Montana, American Indians and Alaskan Natives constitute 6.5% of the overall population, or approximately 65,334 people.[130] In sum, these states include approximately 29% of the entire population of American Indians and Alaskan Natives nationally. Moreover, the survey includes the two largest tribes by population, the Navajo Nation and Cherokee Nation.[131]

For purposes of this survey, environmental law refers to tribal laws related to air pollution, water pollution, solid waste disposal and/or management, environmental quality provisions, and provisions similar to the federal National Environmental Policy Act.[132] The categories were broadly construed, so that if a tribal law related to one of the established categories, that law was included within the survey.[133] For example, many tribes have enacted anti-littering provisions within their hunting and gaming codes.[134]

to tribal environmental laws. However, the statistics are helpful for explaining how the various territories were selected.

129. *State & County Quick Facts: New York*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/36000.html (last updated Jan. 6, 2014).

130. *State & County Quick Facts: Montana*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/30000.html (last updated Jan. 6, 2014).

131. *See Ten Largest American Indian Tribes*, INFOPLEASE, http://www.infoplease.com/ipa/A0767349.html (last visited Jan. 25, 2014) (compiling 2010 U.S. Census data). The survey in this Article also includes several of the tribal nations listed as among the top ten largest American Indian tribes. These tribes include the Chippewa, Choctaw, Apache, Iroquois, Creek and Blackfeet.

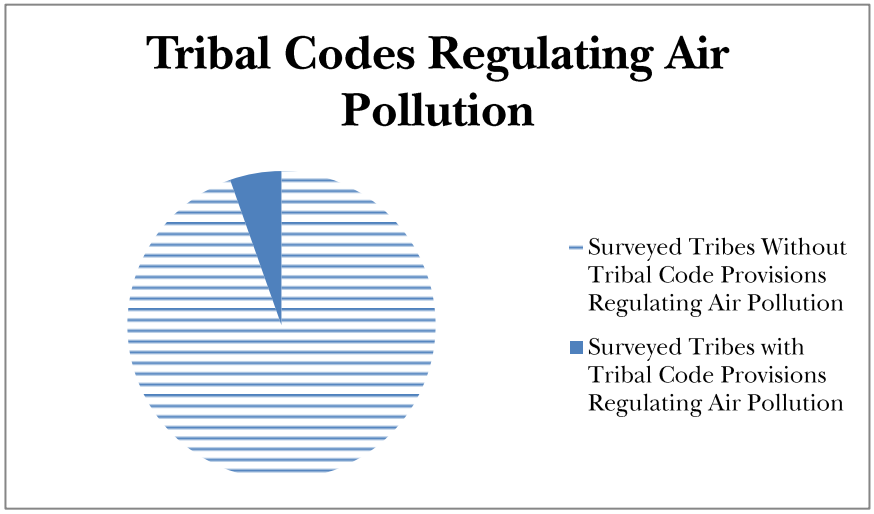
132. 42 U.S.C. §§ 4321–4370 (2012) (establishing procedures that must be followed to determine the environmental impact of a major federal action).

133. The four categories were selected so as to mirror categories where the federal government has also regulated, such as with the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and National Environmental Policy Act. Future articles will examine more closely the similarities and differences between federal and tribal environmental regulation, so these categories will aid future research. Once the categories were established, all tribal codes that could potentially relate to the four categories were collected. A tribal code was considered to "relate" to the designated category if it regulated the type of pollution being considered. For example, code provisions addressing littering were included with solid waste codes examined. Once collected, the tribal codes were reviewed to determine whether any provision relates to the regulation of air, water or solid waste. Additionally, provisions generally speaking to the tribe's desire for environmental quality or similar to the federal government's NEPA were also collected. Because this is a first look at the existing data, categorization was liberal, so as to allow for overrepresentation rather than underrepresentation. That being said, however, no tribal code provision was "double counted" (i.e. included in more than one category).

134. This Article constitutes a first look at this empirical data. Accordingly, this is a broad look at where tribes have enacted laws even generally speaking to the categories studied.

These anti-littering provisions were included in the survey as either related to water or solid waste management depending on the focus of the specific provision.[135]

This section summarizes existing environmental laws of seventy-four federally recognized tribes located in Arizona, Montana, New York, and Oklahoma. When environmental laws were identified, they were categorized into one of four categories that align with the areas where the federal government has regulated: 1) laws related to the control of air pollution; 2) laws related to the control of water pollution; 3) laws related to the management or disposal of solid waste; and 4) laws related to environmental quality generally or similar to the federal National Environmental Policy Act.[136]

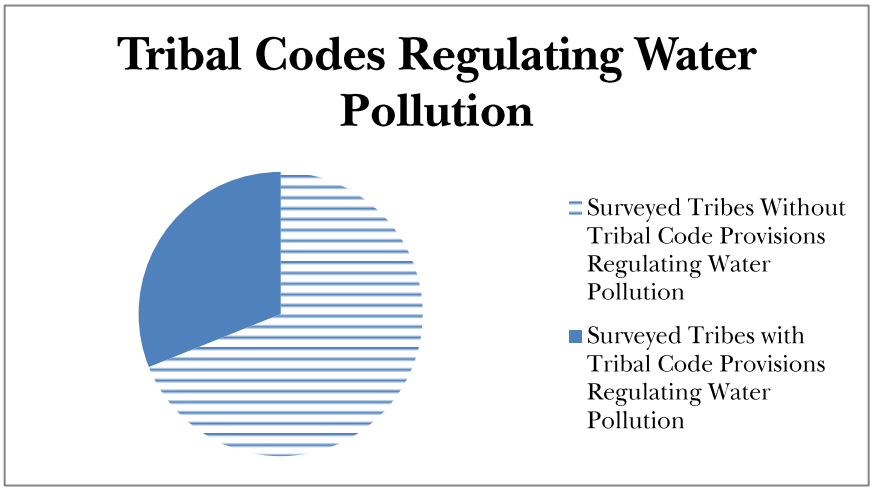


Future articles will examine more closely the structure of the enacted environmental laws to better compare similar regulations.

135. *See, e.g.*, Fish and Wildlife Code of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community, tit. X, § 7.05 ("No person shall deposit, place or throw into any Reservation waters . . . or other solid waste material . . . ."); Sac and Fox Nation, Criminal Offenses, ch. 5, § 517 (1985); Civil and Criminal Law and Order Code of the Tonto Apache Tribe, ch. 7, § 7.1 (1999) ("M. For any person to deposit litter, garbage, debris or other waste on Reservation land or waters except in places so designated for this purpose . . . .").

136. The studied categories certainly do not cover all of the types of tribal regulations related to the environment that could be enacted. For example, excluded from this survey are regulations related to how natural resources shall be extracted. Also, some tribes have enacted regulations related to climate change, which are not considered here. Hansen, *supra* note 41. Rather, this Article focuses on the tribal regulation of pollution.

Of the federally recognized tribes surveyed, only four nations—the Cherokee Nation of Oklahoma, the Gila River Indian Community, the Navajo Nation, and the St. Regis Mohawk Tribe, or approximately 5% of the survey group—enacted tribal laws related to the regulation of air pollution.[137] The Cherokee Nation of Oklahoma is located in Oklahoma, the Navajo Nation (in part) and Gila River Indian Community are located in Arizona, and the St. Regis Mohawk Tribe is located in New York.



137. *See, e.g.*, Cherokee Nation Air Quality Act (2004); Navajo Nation Air Pollution Prevention and Control Act, NAVAJO NATION CODE ANN. tit. 4, § 1101–1162 (2010); St. Regis Mohawk Tribe, Tribal Implementation Plan (2004), *available at* http://www.srmtenv.org/pdf_files/airtip.pdf; Gila River Indian Community Air Quality Management Program, GILA RIVER INDIAN COMMUNITY CODE, Title 17, Chapter 9, *available at* http://www.epa.gov/region9/air/actions/pdf/gila/gric-part1-general-provisions.pdf. Although the Kaw Nation has obtained approval for TAS status under Section 505(a)(2), it appears that the Nation is currently focused on air emissions monitoring, and the author was unable to obtain any related code provisions. *See* Kaw Nation Air Quality Program, *available at* http://www.epa.gov/region9/air/actions/pdf/gila/gric-part1-general-provisions.pdf (last visited Jan. 31, 2014). Similarly, the Salt River Pima-Maricopa Indian Community also has TAS status under Section 505(a)(2) and appears engaged in air quality monitoring. *See* Salt River Pima-Maricopa Indian Community, 2010 Air Monitoring Network Review (April 2011), *available at* http://www.srpmic-nsn.gov/government/epnr/files/airquality/2010NetworkReview.pdf. Although the Indian Community's website makes mention of the possibility of tribal codes provisions related to the regulation of air, the author was unable to obtain a copy of such code provisions. *See* Salt River Pima-Maricopa Indian Community, Air Quality Program, *available at* http://www.srpmic-nsn.gov/government/epnr/aqhome.asp (last visited Jan. 31, 2014).

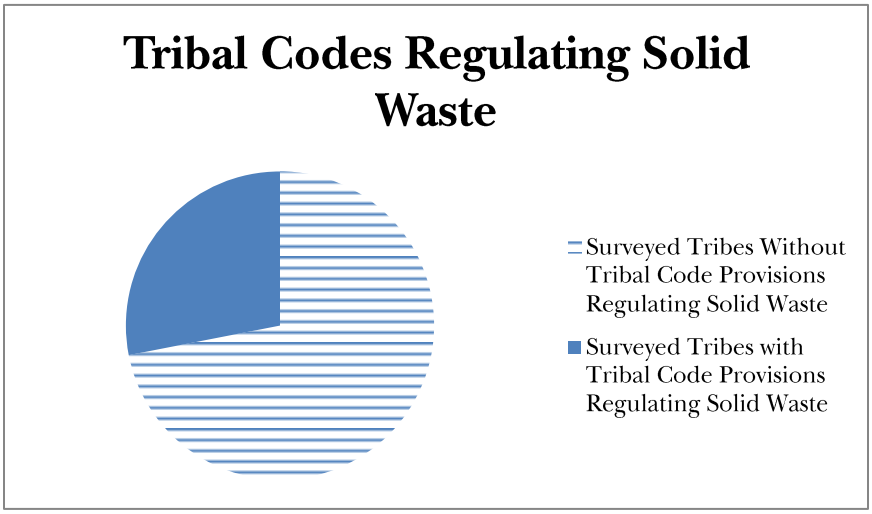
Twenty-three of the federally recognized tribes surveyed—or approximately 31% of the survey group—enacted at least one law related to the regulation of water pollution. Of these, six are located within Montana,[138] three are located within Oklahoma,[139] thirteen are located within Arizona,[140] and one is located within New York.[141]

138. Final Regulations for the Aquatic Lands Conservation Ordinance of the Confederated Salish and Kootenai Tribes, §§ 1.1–5.9 (1986); Confederated Salish and Kootenai Tribes Shoreline Protection Regulations, §§ 1.1–8.18 (2007); Confederated Salish and Kootenai Tribes Tribal Water Quality Management Ordinance, §§ 1-1-101–1-3-214 (1993); Confederated Salish and Kootenai Tribes Surface Water Quality Standards and Antidegradation Policy, §§ 1.1.1–1.9.6 (2006); Fish and Wildlife Code of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community, tit. X, § 7.05; Crow Nation, Water and Waste Water, tit. 22, art. I–IX (2004); Northern Cheyenne Tribe Surface Water Quality Standards, ch. 1, §§ 1.1.1–1.9.1 (2013); Blackfeet Tribe Surface Water Quality Standards and Antidegredation Policy, Part II, §§ 1.0-15.16 (2010); Assiniboine and Sioux Tribes, *available at* http://water.epa.gov/scitech/swguidance/standards/upload/2008_11_04_standards_wqslibrary_tribes_fort_peck_8_wqs.pdf (last visited Jan. 31, 2014).

139. Cheyenne Arapaho, Water Quality Control Ordinance, §§ 100–08; Sac and Fox Nation, Criminal Offenses, ch. 5, § 566 (1985); Seminole Nation of Oklahoma, tit. 12, ch. 1, §§ 101–11 (1991). Although the Pawnee Nation of Oklahoma possesses TAS status under Section 303 of the Clean Water Act, the Nation apparently has yet to promulgate water quality standards for approval by the EPA. *See* U.S. EPA, Indian Tribal Approvals, *available at* http://water.epa.gov/scitech/swguidance/standards/wqslibrary/approvtable.cfm (last visited Jan. 31, 2014).

140. Law and Order Code of the Maricopa Ak-Chin Indian Community Arizona, ch. VI, §§ 6.5–6.6 (1975); Colorado River Indian Tribes, Reg. No. AG-88-1, §§ 101–502 (1988); Fort McDowell Yavapai Nation Health and Sanitation, ch.13, art. I, § 13-2 (2000); Gila River Indian Community Code tit. 15, ch. 1–5 (2000) ("Water and Resources"); Hualapai Tribe Code § 9.2 ("Domestic Water"); Navajo Nation Clean Water Act, NAVAJO NATION CODE ANN. tit. 4, §§ 1301–1394 (2010); Navajo Nation Water Code, tit. 22, ch. 7, §§ 101–1405 (1984); Salt River Pima Maricopa Indian Community Code ch. 13, art. I, § 13-2; Salt River Pima Maricopa Indian Community Code ch. 18, art. II, IV (1995) ("Groundwater Management" and "Surface Water Management"); San Carlos Apache Tribe Code tit. 4, § 1-7 (1993) ("Water Pollution Code") (amended 2000); San Carlos Apache Tribe Code tit. 9, § C (1966) ("Domestic Water Supplies and Waste Disposal Facilities"); Tohono O'odham Nation Water Code tit. 25, ch. 3 (2007); Civil and Criminal Law and Order Code of the Tonto Apache Tribe ch. 8, § 8.1 ("Domestic Water"); White Mountain Apache Tribe Environmental Code ch. 3, § 3.1-3.3 (2000) ("Pollution and Poisons"); Yavapai Prescott Tribe Law and Order Code ch. 9, § 9.2 (1979) ("Domestic Water"); Hopi Water Quality Standards (Rev. Nov. 2010), *available at* http://water.epa.gov/scitech/swguidance/standards/wqslibrary/upload/hopitribe.pdf. The Havasupai Tribe has TAS approval under Section 303 of the Clean Water Act, but the Tribe has yet to promulgate water quality standards for the EPA's approval. *See* U.S. EPA, Indian Tribal Approvals, *available at* http://water.epa.gov/scitech/swguidance/standards/wqslibrary/approvtable.cfm (last visited Jan. 31, 2014).

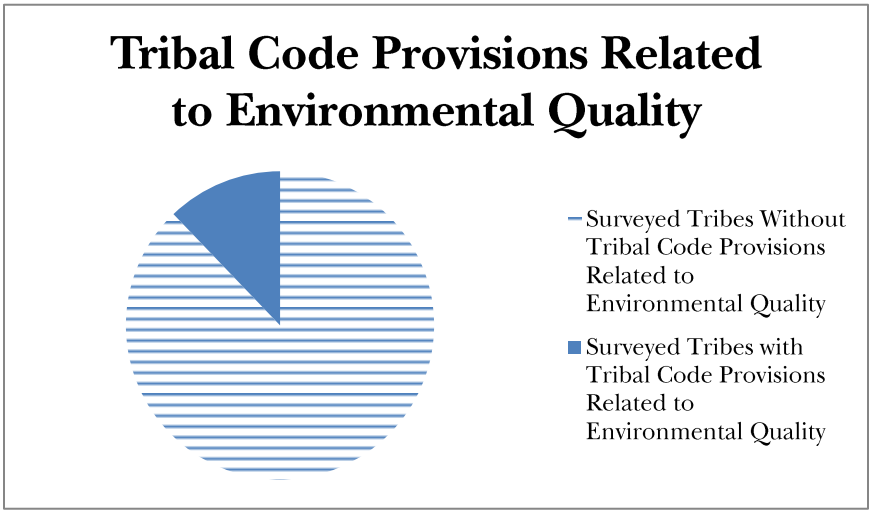
141. *See Water Quality Standards*, ST. REGIS MOHAWK TRIBE ENV'T DIV., http://www.srmtenv.org/index.php?spec=wrp_WaterQuality_Std (last updated Dec. 19, 2013) ("In September 2007 the Saint Regis Mohawk Tribe became the first tribe in Region 2 (NY, NJ, and Puerto Rico) to implement EPA approved water quality standards.").



Twenty-seven of the federally recognized tribes surveyed—or approximately 36%—have enacted at least one law related to the management or disposal of solid waste. Of these, six are located within Montana,[142] five are located within Oklahoma,[143] fifteen are located within Arizona,[144] and one is located within New York.[145]

142. Fort Peck Assiniboine and Sioux Tribes Code tit. XXII, ch. 2 (1995) ("Environmental Quality–Underground Injection Control"); Fort Peck Assiniboine and Sioux Tribes Code tit. XIV, ch. 2 (1997) ("Health and Sanitation–Waste Disposal and Sewage Facilities"); Fort Peck Assiniboine and Sioux Tribes underground Storage Tank Code tit. XXII; Fort Peck Assiniboine & Sioux Tribes Solid Waste Code tit. XXII, ch. 3 ("Protection of the Environment"); Chippewa Cree Tribe, Ordinance 01_62 (1962) ("Operation and Maintenance of Federally Financed Sanitation Facilities"); Chippewa Cree Tribe, Ordinance 02_62 (amended Nov. 9, 1962) ("Waste Disposal"); Crow Tribal Landfarm Act tit. 24, ch. 1 (relating specifically to contaminated soil from farming); Confederated Salish and Kootenai Tribes, Ordinance No. 106(A) (1986) ("Tribal Solid Waste Management Ordinance"); Northern Cheyenne Tribe Solid Waste Code; Blackfeet Solid Waste Ordinance No. 105 (2009), *available at* http://www.blackfeetenvironmental.com/blackfeet_solid_waste_ordinance_105.pdf.

143. Fort Peck Assiniboine and Sioux Tribes Code tit. XXII, ch. 2 (1995) ("Environmental Quality – Underground Injection Control"); Fort Peck Assiniboine and Sioux Tribes Code tit. XIV, ch. 2 (1997) ("Health and Sanitation–Waste Disposal and Sewage Facilities"); Fort Peck Assiniboine and Sioux Tribes Code tit. XXII (underground storage tank provisions); Fort Peck Assiniboine & Sioux Tribes Solid Waste Code tit. XXII, ch. 3 ("Protection of the Environment"); Chippewa Cree Tribe, Ordinance 01_62 (1962) ("Operation and Maintenance of Federally Financed Sanitation Facilities"); Chippewa Cree Tribe, Ordinance 02_62 (1962) ("Waste Disposal"); Crow Tribal Landfarm Act tit. 24, ch. 1



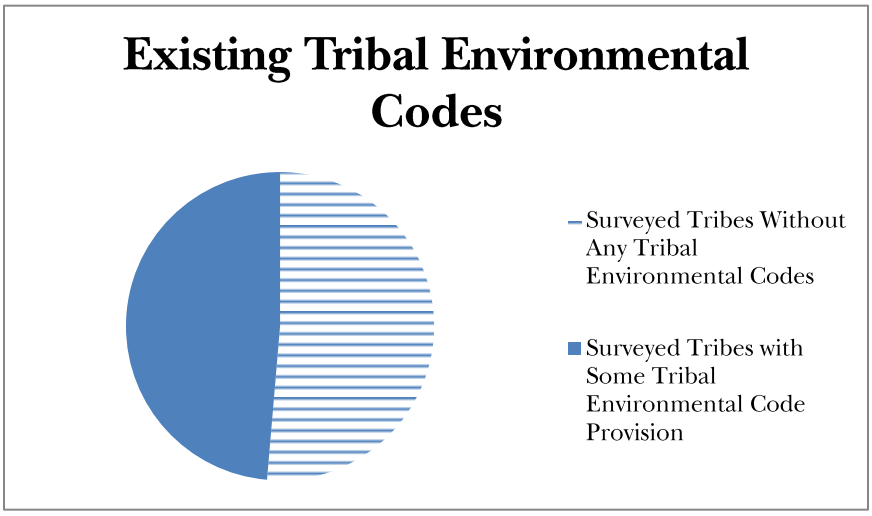
And, finally, nine of the federally recognized tribes surveyed—or approximately 12%—have enacted laws related to environmental quality generally or laws similar to the federal National Environmental Policy Act. Of these nine tribes, one is within Montana,[146] one is within New York,[147] three are within Arizona,[148] and four are located within Oklahoma.[149]

(relating specifically to contaminated soil from farming); Confederated Salish and Kootenai Tribes, Ordinance No. 106(A) (1986) ("Tribal Solid Waste Management Ordinance"); Northern Cheyenne Tribe Solid Waste Code; Blackfeet, Ordinance No. 105 ("Solid Waste").

144. Law and Order Code of the Maricopa Ak-Chin Indian Community, ch. VI, §§ 6.3, 6.5, 6.6 (1975) ("Health and Sanitation Code"); Cocopah Indian Tribe: Law and Order Code, art. III, ch. F, § 362; Colorado River Tribal Codes Health and Safety Code, art. VIII (2002); Fort McDowell Yavapai Nation, ch. 23, § 23-1; Hopi Nation, ch. 8, § 3.8.7; Hualapai Tribe, ch. 9, § 9.4; Navajo Nation Solid Waste Act, NAVAJO NATION CODE ANN. tit. 4, §§ 101–162 (2010); Navajo Nation Underground Storage Tank Act, NAVAJO NATION CODE ANN. tit. 4, §§ 1501–1575 (2010); Navajo Nation Comprehensive Environmental Response, Compensation and Liability Act, NAVAJO NATION CODE ANN. tit. 4, §§ 2101–2805 (2010); Pascua Yaqui Tribe Reg. Code tit. 8, § 5.2; Salt River Pima Maricopa Indian Community, ch. 13, § 13-3 ("Illegal dumping") San Carlos Apache Tribe Solid Waste Ordinance (1993); Tohono O'odham Nation tit. 15, § 1 (1997) ("Solid Waste Management"); Tonto Apache Tribe ch. 7, § 7.1 ("Game Violations – Prohibited Acts"); Tonto Apache Tribe ch. 8, § 8.2 ("Illegal Dumping"); 13) White Mountain Apache Tribe Environmental Code § 2 (2012); Yavapai Prescott Indian Tribe ch. 9, § 9.4 (1979) ("Illegal dumping"); Fort Mojave Indian Reservation Environmental Code (2009).

145. St. Regis Mohawk Tribe Solid Waste Management Code; (1989); LAURA J. WEBER, ST. REGIS MOHAWK TRIBE—ENV'T DIV., SOLID WASTE HANDBOOK (2002), *available at* http://www.srmtenv.org/pdf_files/swhandbk.pdf.

146. Crow Tribal Environmental Policy Act, tit. 24, ch. 2.



Of all the federally recognized tribes surveyed, perhaps only one nation—the Navajo Nation, which is located partially within Arizona—has enacted laws related to all four categories studied.[150] By contrast, it appears that thirty-eight of the seventy-four federally recognized tribes studied—or approximately 51%—do not have any publicly available tribal environmental laws.

147. Oneida Nation Environmental Protection Ordinance No. 0-98-07 (1998).

148. Grand Canyon National Park Enlargement Act, 93 Ariz. Sess. Laws 620 (1976); Navajo Nation Environmental Policy Act, NAVAJO NATION CODE ANN. tit. 4, §§ 901–906 (2010); Salt River Pima Maricopa Indian Community, ch. 18, § 18-3 (1976).

149. Absentee Shawnee Environmental Code § 1 (2010); Cherokee Nation Environmental Quality Code Amendments Act (2004); Muscogee Nation tit. 22, § 7; Modoc Tribe of Oklahoma, Ordinance for Adoption of Clean Air and Pollution Codes.

150. Navajo Nation Solid Waste Act, NAVAJO NATION CODE ANN. tit. 4, §§ 101–162 (2010); Navajo Nation Air Pollution Prevention and Control Act, NAVAJO NATION CODE ANN. tit. 4, §1101–1162 (2010); Navajo Nation Clean Water Act, NAVAJO NATION CODE ANN. tit. 4, §§ 1301–1394 (2010); Navajo Nation Underground Storage Tank Act, NAVAJO NATION CODE ANN. tit. 4, §§ 1501–1575 (2010); Navajo Nation Comprehensive Environmental Response, Compensation and Liability Act, NAVAJO NATION CODE ANN. tit. 4, §§ 2101–2805 (2010); Navajo Nation Water Code, tit. 22, ch. 7, §§ 101–1405 (1984). Notably, the Cherokee Nation of Oklahoma may also have enacted environmental laws consistent with the four categories studied, but this could not be confirmed. Although the author found references to a Cherokee tribal water quality code, she was unable to obtain a copy of the code before publication of this Article.

Of these tribes with no publicly available environmental laws, four are within Arizona,[151] six are located within New York,[152] and twenty-eight are located within Oklahoma.[153] Notably, it appears that tribal nations within the Mountain West (e.g., Montana) and Southwest (e.g., Arizona) are more likely to have enacted some environmental laws, as approximately 86%, or twenty-four out of twenty-eight, of the tribes from these geographic areas have done so.[154] Although speculative, the fact that more tribes in the western United States seem to have developed environmental laws may be because the majority of natural resource development in Indian country is occurring in the western United States.[155]

IV. A DESCRIPTION OF EXISTING TRIBAL ENVIRONMENTAL LAWS AND INITIAL THOUGHTS ON POTENTIAL NORMS

As established by Part III, based on the seventy-four federally recognized tribes studied, it appears that the majority of federally recognized tribes have not enacted environmental laws. Moreover, most tribal nations have not enacted environmental laws in any of the four of categories studied.[156] On the other hand, of the tribes

151. These four tribal nations are: Kaibab Paiute Tribe, Quechan Tribe, San Juan Southern Paiute Tribe, and Yavapai-Apache Nation.

152. These seven tribal nations are: Cayuga Nation, Onondaga Nation, St. Regis Mohawk, Seneca Nation, Shinnecock Tribe, Tonawanda Tribe, and Tuscarora Nation.

153. These nations include: Alabama-Quassarte, Caddo Nation, Chickasaw Nation, Choctaw Nation, Citizen Potawatomi Tribe, Comanche Nation, Delaware Nation, Delaware Tribe, Eastern Shawnee, Fort Sill Apache Tribe, Iowa Nation, Kaw, Kialegee Tribal Town, Kickapoo Tribe, Kiowa Tribe, Miami Tribe, Osage Nation, Ottawa Tribe, Otoe-Missouria, Pawnee Nation, Peoria Tribe of Indians, Ponca Tribe of Oklahoma, Quapaw, Shawnee Tribe, Thlopthlocco, United Keetoowah Band of Cherokee Indians, Wichita & Affiliated Tribes, and Wyandotte Nation.

154. Except for four tribal nations in Arizona—the Kaibab Band of Paiute Indians, Quechan Tribal of the Fort Yuma Reservation, San Juan Southern Paiute Tribe, and Yavapai-Apache Nation of the Camp Verde Indian Reservation— all of the tribal nations in Arizona or Montana have adopted at least some environmental law, as defined in this Article.

155. Tracey A. LeBeau, *The Green Road Ahead: Renewable Energy Takes a Stumble but Is on the Right Path, Possibly Right Through Indian Country*, FED. LAW., Mar./Apr. 2009, at 38, 42 ("The road to an area of great promise for a sustainable renewable energy market leads directly to–and through–Indian Country. Indian reservations, especially throughout the western United States, are rich in conventional energy resources that remain largely undeveloped.").

156. Given the author has not asked each of the tribes why they have failed to enact environmental laws, any discussion as to why this is the case is speculation. However, some possibilities exist. Given some tribes lack adequate financial and human resources, some tribes may not have the finances or human resources to develop environmental laws. For a

studied, perhaps only the Navajo Nation enacted laws falling within all established categories.[157] This is an interesting result given the importance of developing environmental law, as discussed in Part II of this Article. Accordingly, this section describes the existing environmental law of one tribal nation that has been particularly active in the field, the Navajo Nation.[158] The section also goes on to offer some initial thoughts regarding potential development of norms to guide tribes as they enact environmental laws.

A. An Initial Starting Point: The Navajo Nation Code

Because the Navajo Nation has enacted a broad array of environmental statutes, closer inspection of the Navajo Nation's environmental law is a helpful starting point in considering elements to be included in tribal environmental law.[159] The Navajo Nation is the largest tribe in the United States, both in terms of

discussion of poverty within Indian country, see John Koppisch, *Why are Indian Reservations so Poor? A Look at the Bottom 1%*, FORBES (Dec. 13, 2011), http://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/. Alternatively, tribes wanting to avoid jurisdictional conflicts with states or the federal government may avoid promulgating environmental regulations. Also, as noted previously, this Article does not explore existing tribal customary or intertribal laws. In some instances, tribes may be effectively regulating the environment through either customary law or intertribal law. Relatedly, some smaller tribes may not have a large enough territory to warrant expansive environmental regulation.

157. *See supra* note 150 and accompanying text.

158. In general, sovereign nations should avoid wholesale adoption of foreign law that does not take into consideration the nation's unique needs, customs and traditions. Accordingly, the Navajo Nation's environmental law may be an interesting starting point for tribes interested in enacting environmental law to consider, but it is likely not appropriate for whole-scale adoption by a majority of tribal nations. For a discussion of the role transplanted "foreign" law may play within tribal nations, see Singel, *supra* note 19.

159. Using the Navajo Nation's Code as a template for further tribal law development is not a novel concept. For example, the HEARTH Act allows tribes whose leasing regulations have been approved by the Secretary of the Interior to utilize a "streamlined" process to lease tribal lands for home ownership and development, such as renewable energy development. The HEARTH Act of 2012, Pub. L. No. 112-151, 126 Stat. 1150 (2012). The HEARTH Act requires interested tribes to develop environmental review procedures applicable to lease approvals. *Id.* In considering the development of these tribal environmental review procedures, it was suggested that tribes might consider the Navajo Nation's leasing provisions in developing their own tribal environmental review procedures. H.R. REP. NO. 112-417 (2012), *reprinted in* 2012 U.S.C.C.A.N. 453, 459 ("It is the expectation that tribes with environmental review processes already in place, such as the Navajo Nation and the Tulalip Tribes, could provide models for those tribes that seek to engage in similar leasing activities.").

population[160] and land.[161] The Navajo Nation's tribal government is divided into three branches: executive, judicial, and legislative.[162] At the local level, the Navajo Nation is governed by chapters, "which are geographically subdivided populations of tribal members. Each of the Navajo Nation's 110 chapters is centered near a population center."[163]

The Navajo Nation has enacted several environmental statutes, including the Air Pollution Prevention and Control Act, the Clean Water Act, and the Solid Waste Act.[164] Notably, however, some of these code provisions are enacted under the Nation's TAS status.[165] The Nation therefore is modeling some of its environmental code development on federal environmental statutes. Although the Nation's environmental laws may not be organic, they still are demonstrative of how one tribe has approached the development of environmental law.[166] Each of the Nation's environmental laws is discussed in turn.

1. Navajo Nation Air Pollution Prevention and Control Act[167]

Natural resource extraction and use can produce air emissions with significant negative impacts on the environment. For example, coal development can result in the release of nitrogen oxide, sulfur dioxide, particulate matter, and carbon monoxide.[168]

160. *Ten Largest American Indian Tribes*, *supra* note 131.

161. The Navajo Nation's reservation encompasses over 16 million acres. *Frequently Asked Questions,* U.S. DEP'T OF INTERIOR, INDIAN AFFAIRS, http://www.bia.gov/FAQs/ (last updated Jan. 24, 2014).

162. *Tribal and Local Government*, THE NAVAJO NATION, http://www.navajobusiness.com/fastFacts/Government.htm (last visited 1/22/2014) ("The Executive Branch is headed by the President and Vice President. Elected officials serve a four-year term by the popular vote of the Navajo people. The Judicial Branch is headed by the Chief Justice of the Navajo Nation, is appointed by the President, and is confirmed by the Navajo Nation Council. The Legislative Branch is comprised of 88 members called council delegates or the Navajo Nation Council. Legislators serve a four-year term and are elected by the registered voters of all 110 chapters, the smallest administrative units of the Navajo Nation.")(underlining removed).

163. *Id.*

164. *See supra* note 150 and accompanying text.

165. *See supra* notes 69–77 and accompanying text.

166. Future articles will examine environmental laws enacted wholly as a result of tribal inherent sovereignty, as opposed to delegated federal authority.

167. It appears the Navajo Nation enacted its Air Pollution Prevention and Control Act as a result of delegated authority under the Clean Air Act. *See* Nastri, *supra* note 73.

168. James A. Holtkamp & Emily C. Schilling, *Air Quality Impacts Associated with Extraction and Burning of Western Coal*, 2013 NO. 1 RMMLF-INST. PAPER NO. 7 (2013).

Moreover, as developed in Part II above, natural resource development can also result in the release of greenhouse gases, such as carbon dioxide and methane, which in turn contribute to climate change.[169] Given the potential for natural resource extraction and use to cause air pollution, tribes should consider adopting tribal environmental code provisions that regulate air pollution. The Navajo Nation's Air Pollution Prevention and Control Act ("NN APPCA") is an example of such a provision.

Section 1102 of the NN APPCA explains that:

> The Navajo Nation Council, by enacting this Chapter [NN APPCA] is creating a coordinated program to control present and future sources of air pollution on the Navajo Nation. This Chapter provides for the regulation of air pollution activities in a manner that ensures the health, safety and general welfare of all the residents of the Navajo Nation, protects property values, and protects plant and animal life . . . .[170]

The NN APPCA requires reports and designations of air quality that are helpful in determining where air pollution is (or will be) particularly prevalent within the Nation's territory. For example, Navajo agencies wishing to "carry out or approve a Navajo-funded project relating to transportation that may have significant impact on air quality"[171] must complete and file with the Nation an air quality report.[172] Notably, the air quality report must describe

169. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS (S. Solomon et al. eds., 2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf.

170. Navajo Nation Air Pollution Prevention and Control Act, NAVAJO NATION CODE ANN. tit. 4, § 1101–1162 (2010).

171. *Id.* § 1104. Note, however, that this provision is limited to projects "relating to transportation." Tribes interested in developing environmental laws to curb air pollution related to natural resource development are encouraged not to limit their environmental laws in this way, as air pollution may derive from many sources outside of the transportation sector. Furthermore, the NN APPCA limits this provision to any "Navajo agency." *Id.* Because there is a strong possibility that non-tribal actors may be involved in the development of natural resources within Indian country, tribes are strongly encouraged to apply such provisions more broadly. For a discussion of the role of third parties in natural resource development in Indian country see LeBeau, *supra*, note 155, at 40–41; Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285 (2009).

172. NAVAJO NATION CODE ANN. tit. 4, § 1104.

whether the proposed project will have "any significant impact on air quality."[173] Requiring natural resource developers to report to the tribal nation whether the proposed development will have "any significant impact on air quality" may prove tremendously helpful to both the Navajo Nation and other tribes in determining potential sources of air pollution within the Nation's territory.

Beyond requiring air quality reports, the NN APPCA also contains several provisions that are consistent with the Navajo Nation's TAS status under the Clean Air Act.[174] For example, Section 1111 of the NN APPCA requires the Nation to designate air quality regions and report these designations to the federal Environmental Protection Agency.[175] A region[176] is designated as being in "nonattainment,"[177] "attainment,"[178] or "unclassifiable."[179] As with the air quality reports, regional air quality designations help tribal leaders determine where air pollution problems exist. In developing environmental laws related to air quality and pollution, tribal leaders are therefore encouraged to incorporate tools, such as air quality reports and the development of air quality regions, that will help determine where air pollution problems exist (or will exist).

In addition to providing tools to help the Nation determine where pollution problems already exist or may exist in the future, the NN APPCA also contains permitting requirements. For

173. *Id.*

174. Nastri, *supra* note 73. As a general introduction, several federal environmental statutes, such as the Clean Air Act, allow tribes to be treated in the same manner as states for purposes of implementing the statute. 40 C.F.R. § 49 (2013). In other words, tribes meeting the established requirements may implement or develop tribal implementation plans under the Clean Air Act within their territories. ENVTL. PROT. AGENCY, DEVELOPING A TRIBAL IMPLEMENTATION PLAN (2002), *available at* http://www.epa.gov/oar/tribal/tip2002/index.html. For more information on TAS provisions, *see* ROYSTER, BLUMM & KRONK, *supra* note 74, at 227–33.

175. NAVAJO NATION CODE ANN. tit. 4, § 1111.

176. Notably, the NN APPCA also goes on to provide direction as to how regions are to be originally classified and how areas may be reclassified if conditions change. *Id.* §§ 1115, 1117.

177. *Id.* § 1115(A)(1) (indicating an area is in "non-attainment" if "it does not meet (or contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant.").

178. *Id.* § 1115(A)(2) (indicating an area is deemed an "attainment" area "if it meets the national primary or secondary ambient air quality standard for the pollutant.").

179. *Id.* § 1115(A)(3) (indicating an area is deemed an "unclassifiable" area "if it can not be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.").

example, no "major emitting facility" may be constructed without a preconstruction permit, which includes air emissions limitations.[180] The Navajo Nation's pre-construction permits require that the facility uses the "best available control technology"[181] and that "[t]here has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility."[182] These provisions work together to ensure that further air pollution is limited.[183] Tribal nations interested in limiting air pollution resulting from natural resource development within their territories are therefore encouraged to adopt similar provisions.

Moreover, the Nation's Code also includes provisions allowing for the enforcement of the NN APPCA. When the Navajo Nation's Executive Director of the Navajo Nation Environmental Protection Agency ("Director") determines that the NN APPCA has been violated or is being violated, the Director may: 1) issue an order to comply;[184] 2) issue an administrative penalty;[185] 3) bring a civil

180. *Id.* § 1118. Before construction may begin, a permit must be issued to each new major emitting facility built after August 7, 1977 that contains the air emissions limitations for that facility. *Id.* In addition to Section 1118, the Nation's Code also includes additional permit requirements for "permits to construct and operate a proposed new or modified major stationary source." *Id.* § 1124. Furthermore, Section 1134 allows for the development of additional permit programs, and Section 1135 spells out the requirements for permit applications. *Id.* §§ 1134, 1135.

181. *Id.* § 1118(A)(4). According to the NN APPCA, the best available control technology (BACT):

> means, with respect to each pollutant subject to regulation under this Chapter, an emission limitation based on the maximum degree of emission reduction from a major emitting facility which the permitting authority, on a case-by-case basis, taking into account energy, environmental and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems and techniques, include fuel cleaning or treatment or innovative fuel combination techniques for control of such pollutant . . . .

Id. § 1101(A)(14).

182. *Id.* § 1118(A)(6).

183. In addition to the limitation requirements included in Sections 1118 and 1124, the Nation's Code also includes a section specific to emission standards. *Id.* § 1128.

184. *Id.* § 1152(C) ("An order to comply issued under this Section shall state with reasonable specificity the nature of the violation, shall state that the alleged violator is entitled to a hearing pursuant to regulations promulgated by the Direction under § 1161 of this Chapter, if such hearing is requested in writing within 30 days after the date of issuance of the order, and shall specify a time for compliance that the Director determines is as expeditious as practicable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.").

185. *Id.* § 1155(A) ("The Director may issue against any person an administrative order assessing a civil administrative penalty of up to ten thousand dollars ($10,000) per day per

action;[186] and 4) pursue a criminal action.[187] Not only does the NN APPCA provide several methods of enforcing the Act, but also potential penalties from noncompliance are substantial. Under the administrative penalty provision of the Act, the Director may assess a penalty of up to $10,000 per day of the violation.[188] Under the civil judicial enforcement provisions of the Act, several remedies are available to the Nation, including "a temporary restraining order, a preliminary injunction, a permanent injunction or any other relief provided by law, including the assessment and recovery of civil penalties."[189] Given that the potential fines applicable under either the administrative penalty or civil judicial enforcement provisions of the Act accrue on a daily basis, it is possible that a potential violator could be liable to the Nation for a substantial sum of money.[190] With such massive possible fines, it is less likely that a potential polluter would violate the NN APPCA because the cost of pollution (i.e. violating the NN APPCA) would foreseeably exceed the cost of compliance.[191] In this regard, tribal

violation whenever the Director finds that a person has violated, or is in violation of, any provision, requirement or prohibition of this Chapter, including, but not limited to, a regulation or plan adopted pursuant to this Chapter, a permit or order issued pursuant to this Chapter or a fee assessed under this Chapter.").

186. *Id.* § 1154(A).

187. *Id.* § 1154(B). As noted, tribal nations and their courts do not have criminal jurisdiction over non-Natives. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

188. NAVAJO NATION CODE ANN. tit. 4, § 1155(A) (2010).

189. *Id.* § 1154(A).

190. Under the administrative penalty provisions, the Director's authority is limited to total penalties of up to $100,000. *Id.* § 1155(A).

191. In other words, the assumption here is that polluters are generally rational and will not pollute if it is too costly. David Spence explained that the federal environmental statutes, for example, the Clean Air Act and the Clean Water Act, are generally premised on the belief that polluters are rational. *See* David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Act Models in Environmental Law*, 89 CAL. L. REV. 917 (2001). As he explained:

> For example, the civil enforcement provisions of the major pollution control statutes follow the rational polluter model of enforcement by assuming that prospective violators of environmental laws make compliance decisions using an expected value calculation, as follows:
> E(NC) = [S-pF]
> where E(NC) = the expected value of noncompliance,
> S = the economic benefit (or savings) associated with noncompliance, such as the money saved by taking fewer steps to minimize pollution, failing to monitor, or failing to report as required by law,
> pF = the expected costs of noncompliance, since
> p = the probability that a violation will be detected, and

nations developing their environmental laws are encouraged to include enforcement provisions into these laws and also to consider whether such provisions are stringent enough to promote compliance.[192]

In terms of enforcement, the NN APPCA also allows for citizen suits.[193] Citizen suits add another layer of protection against pollution, as citizens may bring suit against the polluter under certain conditions.[194] Accordingly, to ensure effective enforcement

> F = the expected penalty (or fine) imposed if detected. If the expected value of noncompliance is negative, we expect the rational polluter to comply with the law; if it is positive, we expect the rational polluter to violate the law.
> Using this rational polluter model of firm behavior, the Clean Air Act ("CAA"), the Clean Water Act ("CWA"), and the Resource Conservation and Recovery Act ("RCRA") set civil penalties at high levels, typically $25,000 per violation. Each day of noncompliance constitutes a separate violation in most instances. The statutes also (i) make use of extensive self-monitoring and reporting requirements, which are designed to increase the probability of detecting violations; and (ii) specify that in assessing civil penalties, both the economic benefit of the noncomplying activity to the violator and the seriousness of the offense should be taken into consideration. The statutes are designed to maximize the likelihood that the expected value of noncompliance will be negative by making noncompliance as expensive as possible.

Id. at 920–21. Notably, however, Mr. Spence goes on to explain that the rational polluter model may not always accurately predict polluter behavior, as motivating factors are often complex. *Id.* at 960–96.

192. The NN APPCA may seem strikingly similar to the federal Clean Air Act. Future articles will explore the similarity between tribal environmental laws and federal environmental laws.

193. NAVAJO NATION CODE ANN. tit. 4, § 1156(A)(1) (2010) ("Except as provided in Subsection (B) of this Section [an alleged polluter, the Navajo Nation, and the Director must have 60 days notice before a citizen suit can be commenced], a person may commence a civil action in the Navajo Nation District Court in Window Rock on his/her own behalf against any person (except the Navajo Nation or any instrumentality of the Navajo Nation, but not excepting Tribal enterprises) who is alleged to be in violation of an emission standard or limitation under this Chapter, an order issued by the Director or the President with respect to such a standard or limitation, or a permit of requirement to have a permit issued under this Chapter."). Notably, the NN APPCA excludes the Navajo Nation from suit under its citizen suit provisions. *Id.* Whether or not to exempt the tribal government is something that tribal nations should carefully consider when adopting a citizen suit provision. On the one hand, exempting tribal governments may be crucial to protect tribal assets and maintain tribal sovereign immunity. On the other hand, however, tribal governments, and governments generally, are sometimes polluters themselves and such exemptions would shield the government. *See generally* JAMES GRIJALVA, *Tribal Sovereignty and Environmental Justice for Native America*, *in* TRIBES, LAND & THE ENVIRONMENT (Ezra Rosser & Sarah Krakoff eds., 2012).

194. *See generally* Scott M. Palatucci, *The Effectiveness of Citizen Suits in Preventing the Environment from Becoming a Casualty of War*, 10 WIDENER L. REV. 585 (2004) (discussing effectiveness of citizen suits).

environmental laws, tribal nations may want to incorporate citizen suit provisions into such laws.

2. Navajo Nation Clean Water Act[195]

Like air pollution, water pollution raises significant environmental concerns, as explained in Part II of this Article.[196] Given the substantial nexus between natural resource development, especially for energy purposes,[197] and water usage, tribes should consider adopting environmental laws to protect tribal water resources. In addition to the NN APPCA, the Navajo Nation has enacted its own Clean Water Act ("NN CWA").[198] In explaining the purpose of the NN CWA,

> The Navajo Nation Council finds and declares that discharges of pollutants into the waters of the Navajo Nation from point and non-point sources, introduction of pollutants by industrial users into publicly owned treatment works and improper management of sewage sludge are potential hazards to the health, welfare, and environment of the Navajo Nation and its residents and need to be addressed.[199]

Notably, the NN CWA justifies enactment of the Act because of potential impacts to the Nation's "health, welfare and environment." The use of this language may have been deliberate in order for the Nation to assert civil jurisdiction over non-Indians under the second *Montana* exception. In *Montana v. United States*, the United States Supreme Court considered whether the Crow Nation had the regulatory authority to oversee hunting and fishing of non-Indians living on non-Indian land within the Nation's territory.[200] The Court held that generally tribes do not have regulatory authority over non-Indians living on non-Indian land

195. The Navajo Nation has also adopted a Water Code. Navajo Nation Water Code, tit. 22, ch. 7, §§ 101–1405 (1984). The Code primarily addresses the ownership of water within the Nation's territory and is therefore beyond the scope of this Article.

196. *See, e.g.*, NATURAL RES. DEF. COUNCIL, *supra* note 35; Handley, *supra* note 35.

197. *See generally* Miller & Hightower, *supra* note 37.

198. Navajo Nation Clean Water Act, NAVAJO NATION CODE ANN. tit. 4, §§ 1301–1394 (2010).

199. *Id.* § 1303(A)(1).

200. Montana v. United States, 450 U.S. 544 (1981); *see also* supra notes 79–92 and accompanying text.

within a tribe's territory.[201] However, the Court carved out two exceptions to this general rule. In relation to the second exception, the Court explained that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[202] The Navajo Nation may therefore have used the phrase "health, welfare, and environment" to mirror the second *Montana* exception, that tribes have regulatory authority over non-Indians threatening "the political integrity, the economic security, or the health or welfare of the tribe."[203] Given that environmental pollution does threaten the economic security, health and welfare of tribes, tribes should have authority to regulate non-Indians under the second *Montana* exception when non-Indian activities within tribal territories are likely to result in environmental pollution.[204] Accordingly, tribes enacting any environmental laws should consider including language into such statutory provisions that mirrors the second *Montana* exception, just as the Navajo Nation apparently did in the NN CWA.

Importantly, the NN CWA includes a provision calling for the development of water quality standards.[205] These standards are designed to "protect the public health or welfare, enhance the quality of water and generally serve the purposes of this Act [NN CWA]."[206] The water quality standards include designated uses[207]

201. *Id.* at 563–64.

202. *Id.* at 566.

203. *Id.*

204. *But cf.* Strate v. A-1 Contractors, 520 U.S. 438 (1997). In *Strate*, the Court considered whether a tribal court had jurisdiction over an accident occurring between two non-Indians on a state highway located within the tribe's reservation. Notably, the Court rejected the tribe's assertion that it possessed jurisdiction under the second *Montana* exception because "even though careless driving on a reservation highway threatens the health and safety of tribal members, the availability of state civil litigation is sufficient to deter and compensate for dangerous driving." COHEN'S HANDBOOK ON FEDERAL INDIAN LAW 2012, *supra* note 15, § 4.02[3][c] 233 (citing *Strate*, 520 U.S. at 457–58). Accordingly, tribes considering this strategy should be prepared to discuss why tribal jurisdiction in instances of environmental contamination is crucial to protect the health and safety of tribal members.

205. NAVAJO NATION CODE ANN. tit 4, § 1311. These standards are also subject to review at least once every three years. *Id.* § 1312.

206. *Id.* § 1311(A). Here again the Navajo Nation seems to incorporate language similar to the second *Montana* exception by using the phrase "that protect the public health or welfare." *Id.*

and water quality criteria.[208] By designating the uses of specific bodies of water and establishing the water quality criteria used to ensure such designations are met, the Nation ensures that development will occur in appropriate areas. Instead of making development decisions on an *ad hoc* basis, these tools help to promote development in appropriate areas. Tribes interested in developing regulations to protect against water pollution are encouraged to incorporate similar provisions into their tribal laws.

The Nation also specifies at several places within Section 1311 that the water quality standards should be designed so as to protect the "cultural value" of the Nation's water.[209] Such a provision might be of particular value to tribes, as many have a special relationship with water that may include cultural and spiritual dimensions.[210] As noted above, such considerations are important to avoid transplanting foreign law without considering the unique dimensions of each tribal nation.[211]

Similar to the NN APPCA, the NN CWA also contains permitting provisions allowing for discharges into the Nation's surface waters

207. *Id.* § 1311(B) ("The water quality standards shall establish designated uses for waters of the Navajo Nation, or segments thereof, taking into consideration their use and value for public water supplies, protection and propagation of fish and wildlife, recreational purposes, and agricultural (including livestock watering), industrial, and other purposes, and also taking into consideration their use and value for navigation and the cultural value and use of the water.").

208. *Id.* § 1311(C) ("The criteria established by the Director shall protect the designated uses, be based on sound scientific rationale (which may include criteria documents of the Administrator), and include sufficient parameters or constituents to protect the designated use."). The water quality criteria shall include both "narrative criteria" and "numerical criteria." *Id.*

209. *See, e.g.*, *id.* § 1311(A).

210. As Professor Judith V. Royster explains:

> "[t]ribes' relationship to water is not only economic, but cultural and spiritual. Water drives the economy for many tribes, supporting agriculture, energy production, fisheries, grazing, towns and communities. Water is also central to the culture of many tribes, providing habitat for the fish, wildlife and native plant species that are important sources of food, medicines and rituals. And water is sacred, embodying a spiritual dimension beyond its uses."

JUDITH V. ROYSTER, *Climate Change and Tribal Water Rights: Removing Barriers to Adaptation Strategies*, *in* CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES (Randall S. Abate & Elizabeth Ann Kronk eds., 2013). *See also, e.g.*, Jacqueline Phelan Hand, *Protecting the World's Largest Body of Fresh Water: The Often Overlooked Role of Indian Tribes' Co-Management of the Great Lakes*, 47 NAT. RESOURCES J. 815, 815–16 (2007).

211. Singel, *supra* note 19, at 362.

under certain circumstances.[212] The Nation prohibits discharges of "a pollutant from a point source into waters of the Navajo Nation" without a permit.[213] After notice and opportunity for public hearing, the Director may issue a permit for discharges into surface waters "upon condition that such discharge meets or will meet, subject to authorized schedules of compliance, all applicable Navajo Nation, adjoining tribe or state, and federal water quality standards and effluent standards and all other requirements of this Act."[214] Such permits may not be issued for more than five years.[215] The permits must also contain effluent limitations, explicitly limiting the amount of pollutant that may be discharged.[216] In addition to these general permits, the NN CWA also includes standards for conditions for permits issued for publicly owned treatment works,[217] and permits specific for the discharge of sewage sludge into such treatment works.[218]

This section of the NN CWA may prove helpful to tribes interested in developing laws to regulate water pollution for a variety of reasons. First, the general prohibition against discharges from point sources[219] establishes a clear bright line for potential natural resource developers. Second, the permit requirement also allows the Nation to determine whether development in the

212. NAVAJO NATION CODE ANN. tit 4, § 1321. This provision of the NN CWA specifically applies to discharges into surface waters. Given the interconnected nature of ground water and surface waters, tribes considering similar provisions may develop permitting requirements for all tribal waters. For a discussion of the connection between surface water and ground water, see *Natural Processes of Ground-Water and Surface-Water Interaction*, U.S. GEOLOGICAL SERVS., *available at* http://pubs.usgs.gov/circ/circ1139/htdocs/natural_processes_of_ground.htm (last visited updated Jan. 11, 2013).

213. NAVAJO NATION CODE ANN. tit 4, § 1321(A)(1)–(2).

214. *Id.* § 1321(C).

215. *Id.*

216. *Id.* § 1322.

217. *Id.* § 1328.

218. *Id.* § 1332.

219. Under the NN CWA, "point source" refers to:

> "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, landfill leachate collection system, container, rolling stock (except to the extent excluded from the NPDES program by Section 601 of the National and Community Service Act of 1990, P.L. 101-610, 104 Stat. 3185), concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges or return flows from irrigated agriculture."

Id. § 1302(26).

proposed area would be consistent with the established designated areas, which take into consideration cultural uses of water. Such a tool is essential for controlling development and avoiding overly destructive water pollution from natural resources development. Finally, it is notable that the Nation limits the issuance of discharge permits to no more than five years. Regular review of permits and designated uses of water ensures that tribal resources do not become overly polluted.

In addition to requiring permits for discharges from point sources, the NN CWA also calls for a nonpoint source[220] assessment report. The report should identify "those waters of the Navajo Nation which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this Act [NN CWA] or the [federal] Clean Water Act."[221] In addition to the nonpoint source pollution assessment report, the NN CWA also calls for the development of a nonpoint source management program.[222] The program should identify "the best management practices and measures which will be undertaken to reduce pollutant loadings resulting from each category, subcategory, or particular nonpoint source designated under [the NN CWA]."[223]

Effectively controlling nonpoint source pollution is key to a successful regulatory scheme designed to protect or promote water quality. In the United States generally, the federal Clean Water Act has been fairly successful at reducing the amount of pollution discharged from point sources.[224] However, the statute has been generally unsuccessful in regulating nonpoint sources of water pollution. "Today, nonpoint source (NPS) pollution remains the Nation's largest source of water quality problems. It's the main reason that approximately 40 percent of our surveyed rivers, lakes, and estuaries are not clean enough to meet basic uses such as

220. The NN CWA defines "non-point source" as "any source of water pollution that is not a point source" as defined in the statute. *Id.* § 1302(24).

221. *Id.* § 1351(A)(1).

222. *Id.* § 1352.

223. *Id.* § 1352(B)(1).

224. *Nonpoint Source Pollution: The Nation's Largest Water Quality Problem*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/polwaste/nps/outreach/point1.cfm (last updated Aug. 22, 2012).

fishing or swimming."[225] By specifically addressing nonpoint source pollution and calling for the development of a program to address such pollution, the Navajo Nation will hopefully avoid the regulatory lapses that have plagued the federal Clean Water Act. Given the problems facing the federal government as a result of nonpoint source pollution, tribes should consider and address nonpoint source pollution when developing laws regulating water pollution.

Similar to the NN APPCA, the NN CWA gives the Nation extensive enforcement authority. The Nation may enforce the NN CWA through: 1) a compliance order;[226] 2) administrative penalty;[227] 3) civil action;[228] and 4) criminal enforcement.[229] The NN CWA also allows for citizen suits if adequate notice (60 days) has been given.[230] As discussed in relation to the NN APPCA, effective enforcement is an important piece of effective environmental regulation and tribes are encouraged to consider enforcement when drafting environmental laws.

In sum, the NN CWA may prove a helpful template for other tribal nations looking to regulate water pollution because the Act contains: 1) language similar to the second *Montana* exception; 2) water quality standards; 3) a permitting regime; 4) consideration of nonpoint source pollution; and 5) effective and multiple enforcement mechanisms.

3. Navajo Nation Solid Waste Act[231]

As explained in Part II, natural resource development, such as mining, has the potential to result in solid waste, some of which may be exceptionally hazardous.[232] Within the United States, such

225. *Id.*

226. NAVAJO NATION CODE ANN. tit. 4, § 1382(B).

227. *Id.* § 1384. Similar to the NN APPCA, administrative penalties may be assessed at up to $10,000 per day per violation. The total administrative penalty may not exceed $100,000. *Id.*

228. *Id.* § 1383(A).

229. *Id.* § 1383(B).

230. *Id.* § 1385.

231. Related to solid waste management and disposal, the Navajo Nation has also adopted a Comprehensive Environmental Response, Compensation and Liability Act, NAVAJO NATION CODE ANN. tit. 4, §§ 2101–2805 (2010) and an Underground Storage Tank Act, NAVAJO NATION CODE ANN. tit. 4 §§ 1501–1575 (2010).

232. *Mining Waste*, EUROPEAN COMM'N, http://ec.europa.eu/environment/waste/mining/ (last updated Jan. 24, 2014).

wastes are extensively managed through a complex regulatory scheme that involves both state governments and the federal government.[233] For example, the United States has enacted the Resource Conservation and Recovery Act[234] and Comprehensive Environmental Response, Compensation and Liability Act.[235] Given that state laws may or may not apply in Indian country,[236] a potential vacuum may exist where neither federal nor state law applies. Accordingly, tribes should develop environmental laws related to the management and disposal of solid wastes.[237]

The Navajo Nation has done exactly this by enacting the Navajo Nation Solid Waste Act (NN SWA).[238] The NN SWA defines "solid waste" as "any garbage, refuse or sludge from a wastewater treatment plant, water supply treatment plant or air pollution control facility and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from residential, industrial, commercial, mining, and agricultural

233. *See generally* John D. Fognani & Michael T. Hegarty, *An Overview of Mine Waste Regulation in the United States*, 2003-2 RMMLF-INST 19B (2003).

234. 42 U.S.C. §§ 6901 (2012).

235. 42 U.S.C. §§ 9601 (2012). As previously mentioned, the Navajo Nation has also enacted a Comprehensive Environmental Response, Compensation and Liability Act ("NN CERCLA"). *See supra* note 231 and accompanying text. In enacting the NN CERCLA, the Nation determined:

> that contamination from hazardous substances, pollutants and contaminants exists with varying degrees of severity within the Navajo Nation. Releases or threatened releases of these hazardous substances, pollutants and contaminants can endanger the public health and the safety of its residents, by causing physical discomfort, disability, and injury; can cause injury to property and property values; can discourage recreational uses of the Nation's resources; and can discourage economic development, including by halting and hindering economic use and re-use of contaminated or affected business and industrial areas within the Nation.

Id. § 2102 (A)(1). The purpose of the NN CERCLA is to create a "coordinated program to control present and future contamination by hazardous substances, pollutants and contaminants." *Id.* § 2102(A)(2).

236. A full discussion of state regulatory authority in Indian country is beyond the scope of this Article, however, generally, "states may not assert civil jurisdiction over the conduct or property of non-Indians in Indian country if it would cause interference with tribal self-government or . . . conflict with federal laws and policies." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2012, *supra* note 15, § 6.01[1]. For a complete discussion of the relationship between tribes and states, see *id.* § 6.

237. Notably, many tribes seem to recognize the importance of developing laws regulating solid wastes. Of all the categories of environmental laws examined in Part IV of this Article, the largest percentage of tribes studied, or 35%, have enacted laws related to the management of solid waste.

238. NAVAJO NATION CODE ANN. tit. 4, §§ 101–162 (2010).

operations and from community activities."[239] In adopting the NN SWA, the Nation declared that:

> Disposal of solid waste in or on the land without careful planning and management can present a danger to public health and the environment; that open dumping is particularly harmful to public health, potentially contaminates drinking water from underground and surface sources, and pollutes the air and the land; and that potentially recoverable material that could be recycled is needlessly buried each year, using scarce land resources, even though methods are available to separate usable materials from solid waste.[240]

At its heart, the NN SWA regulates the disposal, collection, transportation and processing of solid waste on the Navajo Nation's reservation.[241] The NN SWA provides that it shall be unlawful for any person to "[d]ispose of any solid waste in a manner that will harm the environment, *endanger the public health, safety, and welfare* or create a public nuisance."[242] In addition to generally prohibiting the unsafe disposal of solid waste, this provision also mirrors the language of the second *Montana* exception.[243] As discussed above in

239. *Id.* § 102(16). Specifically exempted from the definition of "solid waste," however, is "[w]aste from extraction, beneficiation and procession of ores and minerals, including phosphate rock and overburden from the mining of uranium ore, coal, copper, molybdenum and other ores and minerals." *Id.* § 102(16)(c). Accordingly, although other Navajo Nation code provisions, such as the NN CERCLA, may cover all mining wastes, it appears that the NN SWA does not. In defining "solid waste" for purposes of developing effective environmental regulation, tribes should consider what wastes are likely to be generated within the tribe's territory and make sure those potential wastes are covered by the regulation.

240. *Id.* at § 103(A). The NN SWA's declaration of policy also uses language similar to the second *Montana* exception. *See* Montana v. United States, 450 U.S. 544, 566 (1981) ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."). Specifically, the Nation intended the NN SWA to "protect the health, safety, welfare and environment of the Navajo Nation." NAVAJO NATION CODE ANN. tit. 4, § 103(B). As previously discussed in this section of the Article, incorporating language mirroring the second *Montana* exception into tribal environmental laws may prove helpful to tribal nations if the tribes wants to regulate the conduct of non-Indians on non-Indian land within the tribe's territory.

241. NAVAJO NATION CODE ANN. tit. 4, § 121.

242. *Id.* § 121(A)(1) (emphasis added).

243. *Montana*, 450 U.S. at 566 ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that

relation to the NN CWA, this language supports the Nation's authority to assert regulatory jurisdiction over non-Indians on non-Indian land within the Nation's territory.

The NN SWA goes on to specify that solid waste may only be disposed of in facilities that comply with the Act's provisions.[244] Solid waste disposal facilities complying with the NN SWA must obtain a permit from the Director before solid waste may be collected.[245] One of the potential conditions that may be included in a permit is that "[t]he permittee, his agents, employees, lessees, sublessees, successors and assigns shall consent to the jurisdiction of the Navajo Nation and shall agree to abide by all laws of the Navajo Nation."[246] As mentioned above, following the United States Supreme Court's decision in *Montana*,[247] some ambiguity exists over when a tribe has regulatory jurisdiction over non-Indians within the tribe's territory, especially non-Indians acting on non-Indian owned land. By requiring permittees to consent to the Navajo Nation's jurisdiction, the NN SWA removes any potential ambiguity surrounding the Nation's authority over non-Indians.

conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.").

244. NAVAJO NATION CODE ANN. tit. 4, § 121(A)(2). The NN SWA does, however, create an exception for the "on-site disposal of on-site generated solid waste" from family ranches, camps, or farms. *Id.* § 121(B).

245. *Id.* § 122. Again, the on-site disposal of waste generated on-site by family ranches, camps, or farms is exempted from this requirement. *Id.* Such permits may include conditions, such as allowing for inspections. *Id.* § 143(B). Importantly, the NN SWA also gives the Director the authority to revoke a permit for failure to comply with its conditions, "fraud, deceit or submission of inaccurate information to the Director; or failure to comply with the [NN SWA]." *Id.* § 144. To the author's knowledge, no scholarly works exist regarding the number of existing permits under the NN SWA, or other Navajo environmental laws. Accordingly, future research and articles will focus on gathering such information in an effort to have a better understanding of tribal enforcement of such laws.

246. *Id.* § 143(B)(3). In fact the NN SWA includes language that shall be included in the permit. The permitee must agree to the following language:

> "Permittee consents to the jurisdiction of the Navajo Nation with respect to those activities conducted pursuant to this permit issued by the Director pursuant to the provisions of the Navajo Nation Solid Waste Act. This consent shall be effective when a permit is issued and may not be withdrawn. This consent shall extend to and be binding upon all successors, heirs, assignees, employees and agents, including contractors and subcontractors or permittee whose activities fall within the scope of the issued permit."

Id.

247. *Montana*, 450 U.S. 544.

Under the first *Montana* exception,[248] tribes may regulate the activities of nonmembers who enter into a "consensual" relationship with tribe through contracts.[249] Because the NN SWA would require potential permittees to agree to the Nation's jurisdiction over activities related to solid waste management, the Nation would have jurisdiction over both Indian and non-Indian permittees (and their employees, lessees, sublessees, successors and assigns) under the first *Montana* exception. Tribes interested in developing environmental laws should consider adopting similar provisions in any environmental law, so as to increase certainty regarding the tribe's regulatory jurisdiction over non-Indians and non-members acting on the reservation.[250]

Moreover, the NN SWA prohibits the open burning of solid waste at any solid waste facility[251] and the open dumping of waste.[252] Moreover, the Act provides that the Director is authorized to develop regulations for facilities managing solid waste.[253] These regulations may address siting criteria, design requirements, ground water monitoring, closure criteria, and financial responsibility.[254] The Director also has the authority to inspect vehicles being used in the transportation of solid waste.[255]

As with both the NN APPCA and the NN CWA, the NN SWA also provides multiple methods of enforcing its provisions. The NN SWA may be enforced through compliance orders, administrative

248. The first *Montana* exception provides that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565.

249. *Id.*

250. Tribes are further encouraged to combine such permit requirements with language mirroring the second *Montana* exception, as previously discussed.

251. NAVAJO NATION CODE ANN. tit. 4, § 123 (2010). This prohibition may be because the open burning of solid waste creates significant health hazards. For example, "[b]urning trash creates dangerous toxic smoke. . . . The smoke typically contains 'dioxins' which are highly toxic pollutants known to cause cancer, as well as hundreds of other contaminants which may cause or aggravate lung problems." U.S. ENVTL. PROT. AGENCY, ALASKA NATIVE VILLAGE AIR QUALITY FACT SHEET SERIES: SOLID WASTE BURNING (2010), *available at* http://www.epa.gov/region10/pdf/tribal/anv_waste_burning_aug2010.pdf.

252. NAVAJO NATION CODE ANN. tit. 4, § 124 (2010).

253. *Id.* § 131.

254. *Id.* § 131(A)(1)–(5).

255. *Id.* § 131(B).

penalties, civil enforcement, and criminal enforcement.[256] The Act also authorizes citizen suits when certain conditions are met.[257]

4. Environmental Quality or Policy Acts

Natural resource extraction and use, while positive in that it creates economic opportunities for tribes, is also problematic because of the environmental pollution created from such development. Accordingly, tribes interested in moving forward with natural resource development may want to create a statement of environmental quality or policy. For example, the Navajo Nation enacted the Environmental Policy Act (NN EPA).[258]

In adopting the NN EPA, the Nation explained that

> [i]t is the policy of the Navajo Nation to promote harmony and balance between the natural environment and people of the Navajo Nation, and to restore that harmony and balance as necessary. To this end, the Navajo Nation Council declares that the protection, restoration and preservation of the environment is a central component of the philosophy of the Navajo Nation; that the quality of life of the Navajo People is intimately related to the quality of the environment within the Navajo Nation; that all persons and entities, including agencies, departments, enterprises and other instrumentalities of the Navajo Nation itself and agencies of other governments, can and do affect the environment; and that it is the policy of the Navajo Nation to use all practicable means to create and maintain conditions under which humankind and nature can exist in productive harmony.[259]

The NN EPA goes on to describe the purposes of the Act, which include: 1) protecting the environment for future generations; 2) providing a safe and healthy environment; 3) promoting recycling and renewable resources; 4) minimizing development's impact on the environment; 5) remediating past environmental damage; 6)

256. *Id.* § 152(A)(1)–(4).

257. *Id.* § 155.

258. NAVAJO NATION CODE ANN. tit. 4, § 901 (2010).

259. *Id.* § 901. It may be argued that this provision of the Navajo Code is a codification of the Nation's environmental ethic. Codifying the tribe's environmental ethic may be preferable, even if the ethic is widely understood and accepted within the tribal community. Such transparency may assuage fears from the external, non-tribal community regarding the law applied by the tribe. *See supra* note 25 and accompanying text (discussing concerns that the exercise of tribal authority over non-members may involve a lack of basic fairness).

promoting a diverse environment; and 7) "[t]o preserve important cultural, religious, historic, and natural aspects of the Navajo Nation."[260] The NN EPA grants the Navajo Nation's Environmental Protection Agency[261] the authority to "regulate, monitor, and enforce performance with appropriate environmental standards throughout all of the Navajo Nation."[262] Furthermore, the NN EPA requires that "all agencies, department, enterprises and other instrumentalities of the Navajo Nation" review their policies, procedures and methods of decision making to determine whether they are in compliance with the Act.[263]

The NN EPA is an example of what may be called a tribal environmental policy act or TEPA.[264] In addition to the NN EPA, other models of TEPA exist.[265] Dean Suagee has written extensively on the topic of TEPAs, and has developed several reasons why tribes should enact TEPAs. These reasons include: 1) codifying existing tribal environmental ethics; 2) increasing transparency of tribal decision making and encouraging community participation in such decision making; 3) using the federal NEPA process to better serve tribal interests; and 4) increasing regulatory

260. NAVAJO NATION CODE ANN. tit. 4, § 903 (2010). In comparison, Congress declares that the purpose of the federal National Environmental Policy Act (NEPA) is:

> [t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4321 (2012). Absent from NEPA is any discussion of the importance of culture, religion, or historic values of the environment. Accordingly, inclusion of such language into environmental law is likely appropriate where the cultural, historic and religious aspects of the tribe's environment are important.

261. It is notable that the NN EPA locates all authority within the Navajo Nation's Environmental Protection Agency. Granting such authority to one tribal agency may be preferable. As Dean Suagee explained, "Vesting a single agency with authority to review proposed actions of other agencies for environmental compliance will generally be a more efficient and effective use of available resources. If tribal lawmakers want the TEPA to cover persons and entities other than tribal agencies, a permit requirement [makes sense]." Suagee, *supra* note 25, at 15.

262. NAVAJO NATION CODE ANN. tit. 4, § 902 (2010).

263. *Id.* § 904.

264. Suagee, *supra* note 25, at 12 ("One way to create a legal framework for facilitating informed decisions by tribal officials is the enactment and implementation of a kind of law generically known as a Tribal Environmental Policy Act (TEPA) . . . . a tribal counter-part to the kind of state laws often called "little NEPAs.").

265. *Id.* (citations omitted).

coordination over natural resources.[266] For tribes interested in asserting environmental regulatory authority over non-Indians or non-member Indians, Suagee also encourages tribes to enact a TEPA that is buttressed by federal laws "that affirm tribal authority over nonmembers."[267] Tribes choosing to adopt TEPAs, like the NN EPA, should consider: 1) which agencies are responsible for overseeing the TEPA; 2) whether a permitting process should be put in place for non-tribal actors; and 3) the appropriate enforcement mechanism(s).[268]

5. Additional Considerations

Given that this Article has focused on pollution resulting from natural resource development, it is also notable that the Navajo Nation created an Energy Development Administration (NEDA), located within the Executive Branch of the Nation.[269] "The basic purpose of NEDA is to plan energy related projects and to spin off actual project development to the Commercial and Industrial Departments of the Economic Development Division."[270] Specifically, the NEDA oversees the development of energy, minerals, coal, oil and gas.[271] The NEDA is charged with developing these resources in "a manner which is consistent with Navajo social and environmental concerns."[272] In order to carry out its mandate, the NEDA is required to prepare an energy development plan for the Nation and must also inventory the Nation's resources that could be used for energy production.[273]

Creating an agency similar to the NEDA may prove beneficial for tribes interested in natural resource extraction and use. Such tribes may want to mimic the NEDA structure. For example, the NEDA centralizes all energy development into one agency and requires the creation of an energy development plan. This allows

266. Suagee, *supra* note 25.

267. *Id.* at 14. Suagee goes on to caution however that "[i]f a tribe chooses to enact a TEPA that applies to nonmembers and to lands that are no longer in Indian trust or restricted status, it will need to give serious consideration to recent U.S. Supreme Court decisions regarding the limits on inherent tribal sovereignty . . . ." *Id.* at 16.

268. SUAGEE, *supra* note 2.

269. NAVAJO NATION CODE ANN. tit. 4, § 701 (2010).

270. *Id.* § 702(A).

271. *Id.* § 702(A)(1)(a–c).

272. *Id.* § 702(3).

273. *Id.* § 703(A)(1–2).

the Navajo Nation to have a clear picture of what resources are available for development, where those resources are and when, if at all, development of the identified resources should occur. Moreover, because the NEDA must carry out its mandate in a way that is "consistent with Navajo social and environmental concerns," the NEDA helps to ensure that development will occur without unnecessary environmental contamination.[274]

B. Some Initial Thoughts on Developing Tribal Environmental Law Norms

Although this Article constitutes a first look at tribal environmental law and later articles will explore what norms should guide future development, some initial thoughts about these norms are appropriate now. Therefore, this subsection provides a first look at some potential best practices in the development of tribal environmental law.

First, it is important to note that some tribes may not currently be in a position to enact tribal environmental laws.[275] This may be for financial reasons or perhaps because regulating the tribal environment may not be a priority. The Navajo Nation, for example, may have enacted several environmental laws as a result of its large land mass and existing natural resources. Other tribes, perhaps those with significantly smaller land bases or few natural resources, may not feel similarly pressured to develop a full panoply of tribal environmental laws now.

As a first step, it may, therefore, be helpful to simply codify the tribal community's environmental ethic without developing a full environmental code. For example, the Onondaga Nation, located within the boundaries of New York, adopted a vision statement for the treatment of the Onondaga Lake.[276] The Nation explained that

274. This likelihood is further promoted by the fact that the Navajo Nation has enacted the NN APPCA, NN CWA, NN SWA, and NN EPA. Accordingly, centralization of energy development decision-making works well when tribal environmental laws are applicable as well.

275. For a discussion of both historical and modern obstacles affecting the ability of tribal governments to regulate, *see* SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS (1993).

276. *The Onondaga Nation's Vision for a Clean Onondaga Lake*, ONONDAGA NATION (2010), *available at* http://www.onondaganation.org/news/2010/onondaga_lake_vision.pdf. Notably, this statement was not included in the number of tribes with environmental code

this vision statement was important because "[f]rom time immemorial, our ancestors lived near Onondaga Lake. The lake, its waters, plants, fish, shore birds, and animals are an intrinsic part of our existence."[277] The vision statement goes on to explain how the lake was traditionally used and the importance of keeping the lake waters clean. Although not legally binding, statements like this are helpful because they codify the community's environmental ethic, and they may be used in the future as the basis for water quality standards and designated uses. Accordingly, even if a tribal nation is not currently in a position to enact a complete environmental code provision, statements as to the tribe's environmental ethics are helpful in the interim.

For those tribes interested in developing environmental regulations, the tribe's jurisdiction over potential polluters is a key consideration. As developed above in Part II, it is clear that one potential obstacle to effective regulation of the tribal environment is jurisdictional uncertainty. Because environmental pollution, especially air and water pollution, freely moves and does not respect land boundaries, tribes may want to ensure that their tribal environmental laws apply to non-Indians or non-member Indians acting on non-Indian land within the tribe's boundaries. Under *Montana*, tribes are generally prohibited from regulating the activities of non-Indians acting on non-Indian land within the tribe's territory, unless one of two exceptions applies. Tribal environmental law can potentially incorporate both exceptions. First, permits allowing for the discharge of pollution can contain provisions requiring the permittee to consent to tribal jurisdiction, as seen in the example of the NN SWA.[278] Such provisions would meet with the first *Montana* exception.[279] Second, language mirroring the second *Montana* exception, where tribes are able to regulate actions affecting the health and welfare of the tribal

provisions related to water quality management. This is because the vision statement is not a regulation within a tribal code.

277. *Id.* at 1.

278. NAVAJO NATION CODE ANN. tit. 4, § 101 (2010).

279. The first *Montana* exception provides that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Montana v. United States, 450 U.S. 544, 565 (1981).

community,[280] also reinforces the tribe's jurisdiction over the actions of non-Indians and non-member Indians. Examples of this technique were identified in the NN CWA and NN APPCA.

Finally, because the environmental ethic of individual tribal communities may differ, tribes may want to make room in their tribal environmental laws for consideration of tribal customs, traditions and spirituality. As demonstrated above, the Navajo Nation's laws take these considerations into consideration.[281] Regulation of the environment for the purpose of protecting cultural and spiritual resources is generally not something contemplated by federal environmental laws. As such, this constitutes a regulatory gap that tribes may wish to fill by utilizing their inherent sovereignty to regulate.

V. CONCLUSION

Because of the enactment of federal statutes like the TERA provisions and HEARTH Act, the need to promote tribal sovereignty, and the interest in protecting the tribal environment from pollution related to natural resource development, tribes who have not yet enacted tribal environmental laws have a strong impetus to do so. Yet, a void exists as to what tribal laws currently exist and what norms should be adopted when considering the development of tribal environmental law. This Article is a first step in filling the void. First, unlike previous scholarship that makes normative judgments as to what tribes should do in terms of developing environmental laws without establishing the status quo, this Article delves into tribal environmental law as it actually exists. Yet, a slim majority of the surveyed tribes have yet to enact such laws.[282] In addition to providing this helpful information, this Article also described the existing environmental laws of the largest federally recognized tribe within the United States, the Navajo Nation. In other words, the Article establishes a baseline from

280. *Id.* at 566 ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.").

281. For example, the NN EPA takes calls for the consideration of "important cultural, religious, historic, and natural aspects of the Navajo Nation." NAVAJO NATION CODE ANN. tit. 4, § 903 (2010).

282. *See supra* Part IV.

which a more complete understanding of existing tribal environmental law is possible. Furthermore, based on this description, this Article developed some initial thoughts on potential norms for tribal environmental law.

This Article is the first of what will hopefully be several articles exploring tribal environmental law more closely. Future articles will carefully consider what types of environmental laws tribes are enacting. For example, are tribal environmental laws generally being developed as a result of delegated federal authority or inherent tribal authority? Also, articles may explore why some tribes have developed environmental laws and some have not. Future articles may also present fully developed normative suggestions for enactment tribal environmental law. It may also be helpful to explore what, if anything, the federal government and state governments may learn from organic tribal environmental law enacted under inherent tribal sovereignty.

The federal government has accomplished a great deal in terms of environmental regulation over the past forty plus years. In comparison, tribal governments have existed for centuries and, in many instances, amassed vast knowledge about their environments. By exploring tribal environmental law, there may be a great deal that practitioners and governments, including federal and state governments, can learn regarding regulating the environment. This Article marks the first set of observations and descriptions of what will hopefully be many regarding the development of tribal environmental law.

Appendix I

Tribe	Located Within	Type of Environmental Law			
		Air	Water	Solid Waste	Envtl. Qual.
Ak Chin Indian Community of the Maricopa Indian Reservation	Arizona		X	X	
Cocopah Indian Tribe	Arizona			X	
Colorado River Indian Tribes of the Colorado River Indian Reservation	Arizona		X	X	
Fort McDowell Yavapai Nation	Arizona		X	X	
Fort Mojave Indian Tribe	Arizona			X	
Gila River Indian Community of the Gila River Indian Reservation	Arizona	X	X		

Havasupai Tribe of the Havasupai Reservation	Arizona				X
Hopi Tribe	Arizona		X	X	
Hualapai Indian Tribe of the Hualapai Indian Reservation	Arizona		X	X	
Kaibab Band of Paiute Indians of the Kaibab Indian Reservation	Arizona				
Navajo Nation	Arizona	X	X	X	X
Pascua Yaqui Tribe	Arizona			X	
Quechan Tribe of the Fort Yuma Indian Reservation	Arizona				
Salt River Pima-Maricopa Indian Community of the Salt River Reservation	Arizona		X	X	X

San Carlos Apache Tribe of the San Carlos Reservation	Arizona		X	X	
San Juan Southern Paiute Tribe	Arizona				
Tohono O'odham Nation	Arizona		X	X	
Tonto Apache Tribe	Arizona		X	X	
White Mountain Apache Tribe of the Fort Apache Reservation	Arizona		X	X	
Yavapai-Apache Nation of the Camp Verde Indian Reservation	Arizona				
Yavapai-Prescott Tribe of the Yavapai Reservation	Arizona		X	X	
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation	Montana		X	X	

Blackfeet Tribe of the Blackfeet Indian Reservation	Montana		X	X	
Chippewa-Cree Indians of the Rocky Boy's Reservation	Montana			X	
Confederated Salish & Kootenai Tribes of the Flathead Reservation	Montana		X	X	
Crow Tribe	Montana		X	X	X
Fort Belknap Indian Community of the Fort Belknap Reservation	Montana		X		
Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation	Montana		X	X	
Cayuga Nation	New York				
Oneida Nation	New York				X
Onondaga Nation	New York				

Saint Regis Mohawk Tribe	New York	X	X	X	
Seneca Nation	New York				
Shinnecock Indian Nation	New York				
Tonawanda Band of Seneca Indians NY	New York				
Tuscarora Nation	New York				
Absentee-Shawnee Tribe of Indians	Oklahoma			X	X
Alabama-Quassarte Tribal Town	Oklahoma				
Apache Tribe	Oklahoma			X	
Caddo Nation	Oklahoma				
Cherokee Nation	Oklahoma	X		X	X
Cheyenne-Arapaho Tribes	Oklahoma		X		
Chickasaw Nation	Oklahoma				
Choctaw Nation	Oklahoma				
Citizen Band Potawatomi Tribe	Oklahoma				

Comanche Nation	Oklahoma				
Delaware Nation	Oklahoma				
Delaware Tribes of Indians	Oklahoma				
Eastern Shawnee Tribe	Oklahoma				
Fort Still Apache Tribe	Oklahoma				
Iowa Tribe	Oklahoma				
Kaw Nation	Oklahoma				
Kialegee Tribal Town	Oklahoma				
Kickapoo Tribe	Oklahoma				
Kiowa Indian Tribe	Oklahoma				
Miami Tribe	Oklahoma				
Modoc Tribe	Oklahoma				X
Muscogee (Creek) Nation	Oklahoma				X
Osage Tribe	Oklahoma				
Ottawa Tribe	Oklahoma				
Otoe-Missouria Tribe of Indians	Oklahoma				
Pawnee Nation	Oklahoma				
Peoria Tribe of Indians	Oklahoma				

Ponca Tribe of Indians	Oklahoma				
Quapaw Tribe of Indians	Oklahoma				
Sac & Fox Nation	Oklahoma		X	X	
Seminole Nation	Oklahoma		X		
Seneca-Cayuga Tribe	Oklahoma			X	
Shawnee Tribe	Oklahoma				
Thlopthlocco Tribal Town	Oklahoma				
Tonkawa Tribe of Indians	Oklahoma				
United Keetoowah Band of Cherokee Indians	Oklahoma				
Wichita and Affiliated Tribes	Oklahoma				
Wyandotte Nation	Oklahoma				