

# Environmental Law and Native American Law

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## Key Words

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## Abstract

This review seeks to engage two bodies of scholarship that have typically been analyzed as discrete areas of enquiry—environmental law and American Indian law. In the twenty-first century, native peoples' involvement in environmental politics is becoming more assertive. In this context it is necessary to think about the impact indigenous involvement may have in shaping future U.S. environmental agendas and regulations. After briefly discussing the rise of environmental movements and environmental law in the United States, I turn to the historical treatment of native peoples and in particular the treatment of their natural resources. This historical backdrop is essential to understanding tribal status today under the Environmental Protection Agency, and the challenges some tribal governments now present to environmental exploitation and degradation by states and corporations. The review concludes by reflecting on the future of U.S. environmental law in the context of increasing pressure being exerted by international environmental law and global indigenous politics.

## INTRODUCTION

This review seeks to engage two bodies of scholarship that have typically been analyzed as discrete areas of enquiry—environmental law and American Indian law.<sup>1</sup> It is no longer tenable to cordon off American Indians and American Indian law as marginal to mainstream environmental law and policy. Native peoples' involvement in environmental politics is becoming more assertive in the twenty-first century, and in this context it is necessary to think about the impact indigenous engagement may have in shaping future U.S. environmental agendas and regulations. Moreover, this review discusses how indigenous communities may present alternative ways of thinking about sustaining natural resources that differ from dominant Western paradigms. These alternative ways may—or may not—prove insightful in meeting the challenges of global environmental degradation. For these reasons, both realpolitik and potentially self-serving, this review explores some of the main issues at the intersection of environmental law and American Indian law. After briefly discussing the rise of environmental movements and environmental law in the United States, I turn to the historical treatment of native peoples and in particular the treatment of their natural resources. This historical backdrop is essential to understanding tribal status today under the Environmental Protection Agency (EPA) and the challenges some tribal governments now present to environmental exploitation and degradation by states and corporations. Notably, the EPA is not the only governmental agency engaged in tribal-U.S. relations over the environment. For instance, the Fish and Wildlife Service within the Department of the Interior, not the EPA, administers the Endangered Species Act. However, the EPA is the focus of this review because it is by far the largest governmental agency charged with protecting human health and environment, and it has made the greatest

impact in terms of influencing some tribes' sovereign status and capacity to be involved in mainstream environmental policy. I conclude by reflecting on the future of U.S. environmental law in the context of increasing pressure being exerted by international environmental law and global indigenous politics.

## INTERSECTIONS AND CONNECTIONS

A vast body of literature exists on U.S. environmental law, politics, and policy with respect to both natural and built environments (e.g., Rosenbaum 2008, Stell et al. 2003, Salzman & Thompson 2003, Sussman et al. 2001, Vaughn 2006). This literature deals almost exclusively with intergovernmental relations, whether between federal, state, county or local governments within the U.S. domestic arena, or between nation-states in international environmental treaties and standards. Anglo-American legal norms pervade these discussions and analyses of environmental law-making, implementation, and enforcement. The literature also focuses almost exclusively on regulation, or a top-down, state-centered approach that has people and companies responding to/resisting regulatory dictates. This focus tends to ignore the multiple perspectives that inform negotiations over environmental management, and the active roles various state and nonstate parties play in the performance of environmental policy.

A glaring omission within most of the literature on environmental law is an acknowledgment of the increasing role of Native American governments in shaping environmental standards and regulations on and off reservation lands. This omission reflects dominant attitudes toward native peoples that assume that tribes are peripheral, if not irrelevant, to mainstream society. In the vast body of writing on environmental law and policy, native peoples typically warrant, at best, a brief mention (e.g., Layzer 2006, p. 2). In contrast to most environmental legal scholars, scholars of Indian law as well as anthropologists, sociologists, and

<sup>1</sup>Native American law is the more politically correct term; American Indian law is the term used in legal practice.

historians who study Native Americans have long been involved in discussions of native peoples' relationship to the environment, particularly with respect to natural resources. These scholars have documented the role the environment plays in tribal jurisdictional authority, social organization, cultural property, religion, health, and economic and cultural stability (for example see Grijalva 2008, 2006; Brown 1999; Abramson & Theodossopoulos 2001). In addition, these scholars underscore the differences between native and non-native understandings of nature, highlighting the variety of possible human-environmental relationships that exist among native and non-native communities and the "culturally constructed nature of environmentalism itself" (Nadasdy 2005, p. 311; Tsosie 1996; Ghua & Martinez-Alier 1997; Grinde & Johansen 1995, p. 23). A few legal scholars working on Indian environmental justice issues, such as Williams (1994), note the dominant Western vision in U.S. environmental law that excludes native perspectives and have called for this legal arena's "decolonization."

When talking about Native Americans, it is important not to treat all native peoples as one homogenous category or to consider their thinking about nature as consistent across all tribes and individuals. However, in broad ways, across the diversity of tribal associations, native peoples have historically thought of and interacted with nature very differently from Western societies. "Written and oral histories of many Native American peoples indicate that their cultures evolved over thousands of years largely in symbiosis with the earth that sustained them." They "linked the welfare of the earth to the survival of the people who lived upon it" (Grinde & Johansen 1995, p. 52). This does not mean that native peoples did not use natural resources in strategic ways for survival, such as fishing, hunting, and irrigating crops (Hays 2000, p. 6; Harkin & Lewis 2007). However, whether past or present, most native peoples do not think of nature in exclusively economic terms, as a commodity to be exploited at will. This native perspective can be contrasted to the prevailing dominant capitalist paradigm that tends

to approach the environment as something to be conquered and controlled (White & Cronon 1989, Cronon 2003).

Different worldviews held by native and non-native peoples with respect to the environment have long created conflict over land and resource management. Who owns what, who controls what, and how control is exercised have become questions involving friction between Indians and non-Indians, and within Indian tribes as well, particularly when economic value is attached to natural resources. Tribal governments, with their own systems of law and governance (Goldberg et al. 2003, Richland & Deer 2009), do not always operate according to the same logic prescribed by federal and state legislation and governmental agencies (Espeland 1998, Tsosie 2003, Argyrou 2005). Moreover, tribal governments may—or may not—side with environmental activists and nongovernmental organizations (NGOs) against multinational corporations, and there may be division within tribes as well (Gedicks 1993; Muehlmann 2009; Dombrowski 2001; Igoe 2004; Nadasdy 2005, p. 292). This has led, across particular cases, to differences of opinion on how best to approach respective rights to water, land, forests, rivers, fish, seeds, animals, and human remains (Coombe 1998, Oguamanam 2006, Mihesuah 2000, Fine-Dare 2002, Brown 2004, Soderland). Analyzing these conflicts, scholars of indigenous peoples point out that multiple systems of knowledge and legal consciousness are in play in these often tense negotiations over what constitutes natural and man-made environments and the relations between them (Espeland 1994, Brown 1999, Richland 2008, Nesper & Schlender 2007, Buchanan 2009).

The legal fact of tribal laws and governments and the consequent requirement for federal, state, county, and local governments to take tribal governments into account are barely acknowledged in the prevailing literature on environmental law and politics. However, this oversight cannot be indefinitely sustained. Over the past two decades, some tribes have been able to assert their sovereign authority

and become powerful political and economic players in mainstream society. With respect to environmental issues, tribes are now involved as participants in the regulatory process with the EPA and the Fish and Wildlife Service, not simply acting defensively through ad hoc court challenges. This shift toward tribal participation is largely a result of the introduction of gaming enterprises on several reservations in the 1980s and 1990s. In some cases, these operations yielded abundant revenues, bringing better health and education to tribal members and financial security through economic diversification into a range of commercial ventures. Today, native peoples can no longer be kept out of sight and mind on distant reservations (Cornell 2008; Darian-Smith 2002, 2003; Cattellino 2008, 2007; Light & Rand 2005; Harvard Project 2008, pp. 145–58). To the contrary, many native peoples now hire lobbyists, contribute to political campaigns, and employ highly experienced lawyers and scientists to represent their interests. As one scholar notes, “With renewed assertions of tribal ‘sovereignty’ in recent years . . . tribes like the Mountain Ute and Havasupai, granted more self-government than in days past, are now able to be heard at the national level. The growing political trend toward self-government has made many tribes more self-assertive” (Burnham 2000, p. 14).

The new, improved economic status enjoyed by a growing number of Native Americans means that there is greater potential for conflict between natives and non-natives over natural resource management. Armed with Western legal and scientific expertise, tribes are increasingly fighting back and exerting pressure on mainstream society to accommodate various perspectives regarding environmental issues that do not necessarily correlate with Western logics or values (Gedicks & Grossman 2001, Buchanan 2008, Nesper 2010). Furthermore, environmental lawyers have to navigate complex legal systems that increasingly include tribal courts and governments. According to two environmental law practitioners, “As tribes’ regulatory muscles grow—often with the blessing of the federal government—the regulated

community must learn to adapt not only to different regulatory standards and procedures, but also to a different legal system” (Slade & Stern 1995). In this context, the intersections between environmental law and American Indian law with respect to natural resources present new legal challenges and new policy strategies that can no longer be ignored or dismissed by the dominant non-native society.

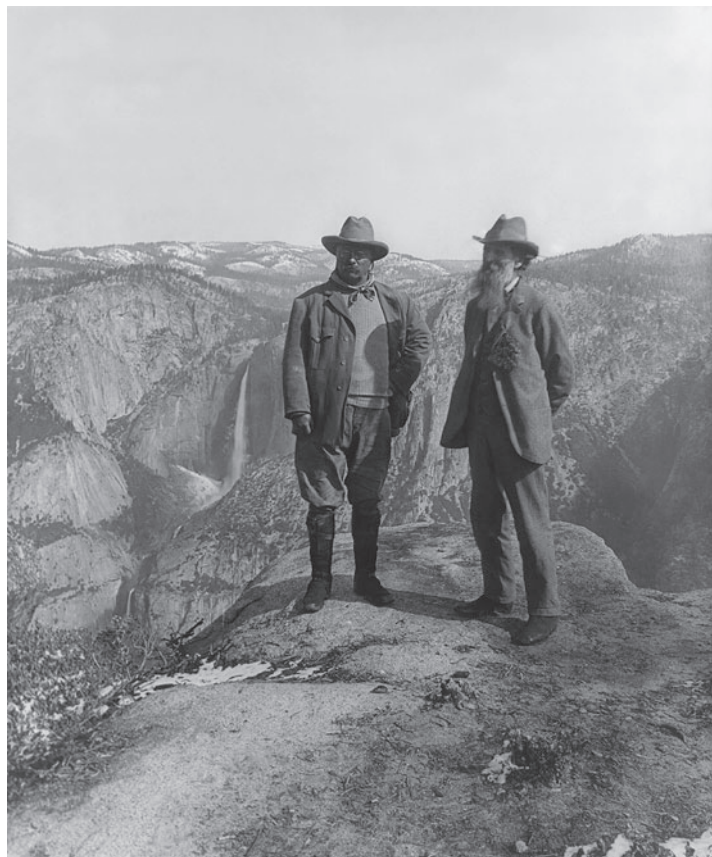
## ENVIRONMENTALISM IN THE UNITED STATES

Concern for the environment has a long history in the United States. Environmental policies reflect historical periods associated with the values and norms of the country’s early colonial history, the transition from an agricultural to industrial society in the nineteenth century, and the trend toward a postindustrial service-based society in the later half of the twentieth century (Stell et al. 2003). In the early historical period up until the 1900s, the environment was typically thought of as something to be conquered, controlled, and exploited in order to improve one’s quality of life. This prevailing attitude was closely linked with ideas of manifest destiny and westward frontier expansion, which saw white settlers gradually populating and managing the frontier’s natural environment, including the removal of Native American communities from their original homelands. The United States witnessed “resource exploitation by a rising industry, during which time natural resources were subordinated to political objectives of industrial development, homestead settlement, and the promotion of free enterprise” (Costain & Lester 1995, pp. 22–23).

In the later nineteenth and early twentieth centuries, the dominant attitude of conquering nature was countered by a growing environmental philosophy that centered on resource conservation and protection for the good of the greater society and economy. During President Theodore Roosevelt’s administration, more than 100 new national forests were added to the national forest system, and legislation was introduced to govern environmental

issues (Brinkley 2009, Duncan & Burns 2009). The U.S. Forest Service was formally set up in 1905, and its first chief forester, Gifford Pinchot, established a regime whereby lands were managed scientifically through federal regulation and oversight. Pinchot was not interested in preserving public lands for their own sake, however, but in sustaining them for maximum commercial benefits and economic efficiency (Hays 1999).

In a roughly concurrent development, a distinct but related environmental philosophy emerged in the form of preservation. Perhaps the most enduring public manifestation was the establishment of national parks in Yellowstone in 1872, Yosemite in 1890, and Mt. Rainer in 1899. These parks were explicitly created to provide for the well-being of the nation, providing outdoor leisure and recreation as well as aesthetic and spiritual renewal. Importantly, the prevailing assumption of the preservation movements was that natural wilderness was pristine and unpopulated when in fact native peoples were forcibly removed from these national parks to create the impression of nonhabitation (Spence 1999, Keller & Turek 1999, Jacoby 2003). John Muir, a Scottish-born American naturalist, was a leader in the preservation movement and took issue with Pinchot's conservationist position (Holmes 1999). Muir argued that wilderness should be protected on the basis of its intrinsic beauty and spiritual elements. Although the two men had initially been friends, their respective positions created much tension between them. Muir was widely respected as a scientist and ecologist. He was also instrumental in convincing Theodore Roosevelt, who spent nights camping in Yosemite with Muir in 1903, that wilderness should be preserved for the benefit of all society (**Figure 1**). Muir helped establish a nonutilitarian attitude to natural resources and forged a new appreciation for the nation's natural wonders that supported groups such as the Sierra Club, which he cofounded in 1892 (Cohen 1988), and the National Audubon Society, established in 1905 (Graham 1990). Muir's—at the time—unique attitude to



**Figure 1**

Theodore Roosevelt and John Muir on Glacier Point, Yosemite Valley, California, in 1903. In the background are the upper and lower Yosemite Falls. The land is depicted as a pristine natural wonderland, uninhabited by local Paiute natives. Library of Congress, Digital ID: cph 3a11256.

wilderness characterized the beginnings of a new environmental philosophy (Nash 2001).

In a sense, the different conceptions of the environment presented by Gifford Pinchot and John Muir characterize the main conservationist and preservationist debates throughout the twentieth century. These debates tend to locate people along a narrowly constructed spectrum—a person is either more or less environmental according to Euro-North American determinations of what environmentalism means (Nadasdy 2005). On the one end of the spectrum, Pinchot's utilitarian perspective considers the environment a commercially viable product, to be used to better peoples'

quality of life. People in this camp favor resource extraction and commercial exploitation, and thus environmental protection is about long-term economically sustainable use. On the other end of the spectrum, Muir's perspective sees all creatures, human and nonhuman, as intimately involved in a holistic and interdependent existence. People in this camp favor resource preservation and nonintervention by humans. Although these two environmentally conscious groups differed in their respective constructions of the environment, what they held in common throughout the twentieth century was a homogeneous ethnic base. Members of environmental organizations such as the Sierra Club and the Wilderness Society were almost exclusively white middle- and upper-class Protestants who were reluctant to open their membership to eastern and southern European immigrants, Catholics, Jews, or Blacks. As one commentator has noted, this suggests that "conservation amounted to a nativist [white] ethnic movement" (Fox 1981, p. 349). So whether a person identified as being conservationist or preservationist, the common denominator among people concerned about the environment throughout the twentieth century was a middle-class socioeconomic status and white Protestant ethnicity.

Although conservation organizations throughout the 1950s and 1960s actively resisted opening up their membership to ethnic minorities, they did embrace native peoples in the sense that they believed Native American Indians could teach whites how to live harmoniously with nature. This perspective on natives was first promoted by John Muir in his many writings in the later nineteenth and early twentieth centuries (Fox 1981, p. 350). In Muir's travels in the Sierra Nevada Mountains, California, and in Yosemite, he had come into contact with tribal communities. Initially describing them as "lazy," "cruel," and "fearful" (Fleck 1978, 1985; Worster 2008, p. 227), over time Muir's perception of native peoples changed, particularly after his visits to Alaska in the 1880s where he became familiar with the Tlingit Indians. Muir came to appreciate

native respect for the land and their minimal impact upon it. Muir noted that, in contrast to non-native Americans, indigenous peoples were far superior in their nontechnological capacity to work harmoniously with the environment (Fleck 1985, Worster 2008).

Descriptions of natives as enjoying a special relationship to nature prevailed among environmentalists of all types through much of the twentieth century (see Harvey 2003). For instance, as described by Fox (1982), in 1947, Pinchot wrote of Algonquin hunting practices, "Centuries before the Conservation policy was born, here was Conservation practice at its best." In 1963, then Secretary of the Interior Stewart Udall stated "Today the conservation movement finds itself turning back to ancient Indian land ideas, to the Indian understanding that we are not outside of nature, but part of it." And in 1974, Supreme Court Justice and board member of the Sierra Club William Douglas observed, "Although the Indians took their living from the wilderness, they left that wilderness virtually intact" (cited in Fox 1981, p. 350). This last quote is telling. Native Americans were embraced by environmentalist groups precisely because Indians no longer offered resistance to white society and were widely thought to have been either eradicated or assimilated. Indians had "left" public consciousness, as summed up by Lyndon B. Johnson in his address to Congress on March 6, 1968, when he talked about native peoples as "forgotten" Americans (Clarkin 2001).

In short, the political and social conditions of the time, which placed Indians out of mind on distant reservations, made it safe to idealize, romanticize, and naturalize native peoples' way of life. This idealization stood in sharp contrast to the conditions of extreme poverty that actually existed on many American Indian reservations. The prevailing romanticized sentiment, it should be noted, was exactly what the American Indian Movement (AIM) challenged. Founded in the same year as Johnson's speech, AIM was anxious to bring native issues to the public's attention and aggressively sought media publicity for their stunts that included the

occupation of Alcatraz in 1969, the taking of Mount Rushmore in 1971, the occupation of the Bureau of Indian Affairs headquarters in Washington, DC, in 1972, and the occupation of Wounded Knee on the Pine Ridge Reservation in 1973 (Smith 1997, Deloria & Lytle 1983, Banks & Erdoes 2005).

Throughout the 1960s, environmental issues became increasingly politicized (Hays 1989, 2000). The public started to demand that the federal government get involved and regulate industrial pollution and human waste in addition to managing national parks. Events such as the Santa Barbara oil spill in 1969 created widespread concern far beyond California. Many people—more than just white middle and upper classes—joined mainstream environmental organizations such as the Environmental Defense Fund. With broader support and public notice, these advocacy groups began to exert increasing political influence. “Underlying these shifts was a greater visibility of environmental problems (thanks to increased scientific research and greater media coverage) and a shift toward ‘postmaterialist’ or ‘postindustrial’ values among an increasingly affluent and well-educated American public” (Kraft 2002, p. 32). By 1970, the American environmental movement had clearly arrived when 20 million American people reportedly participated in Earth Day on April 22 (Grijalva 2008, p. 14). On this day across the country, huge rallies and teach-ins brought widespread attention to collective concerns about oil spills, toxic dumps, endangered animals, polluting factories, and waste from sewerage and power plants. By the end of 1970, the EPA was established.

One consequence of the widespread environmental movement of the 1970s in the United States was its endorsement of long-established stereotypes of Native Americans as having a special relationship to nature (Krech 2000, Harkin & Lewis 2007, Mihe-suah 1996). Prevailing stereotypes are illuminated by Keep America Beautiful’s advertising campaign against polluting, launched in 1971. In a much publicized television commercial, a car was shown throwing trash out its window

at the feet of Iron Eyes Cody, a traditionally dressed Native American that entered the commercial paddling a canoe. As Cody contemplates the trash, he slowly turns to the camera to reveal a single tear rolling down his cheek (**Figure 2**). The viewer is left with an ambiguous message—is the Indian crying about pollution or about his own demise? By being deliberately unclear, the ad reinforced a romanticized view that all native peoples share a special affinity with nature and, moreover, are passive observers of their own fate. Perhaps more significantly, the advertisement underscored the sense that native peoples are not part of mainstream society, their difference racialized and articulated through stylized Indian paraphernalia.

## THE DEVELOPMENT OF ENVIRONMENTAL LAW

The widespread environmental movement in the 1970s was accompanied by rapid development of environmental law and legislation. Laws governing natural resources, such as mining, forestry, and water, had developed in a somewhat ad hoc fashion throughout the nineteenth century with the westward frontier expansion and the rise of big industrial cities (Mendelsohn 2008, Heinzerling 2003). However, a uniform system of federal laws governing environmental quality, such as air pollution, water contamination, and animal extinction, did not exist prior to the 1970s; efforts to deal with such issues were typically dealt with at state and local levels. In short, environmental law, as a discrete and explicit body of federal laws and administrative processes with respect to environmental quality, did not exist. This quickly changed with the passing of the National Environmental Policy Act (1970), the Clean Air Act amendment (1970), the Federal Water Pollution Control Act amendment (1972), the Endangered Species Act (1973), and the Safe Drinking Water Act (1974). Alongside sweeping new legislation, the Environmental Protection Agency and the White House Council on Environmental Quality were

established, both in 1970. Ironically, it was under the administration of President Nixon (1969–1974) that these innovative environmental protections were promulgated, such that by the summer of 1971 the *New York Times* praised Nixon for his environmental agenda (Shannon 1971). Such innovation was largely a pragmatic response to a democratic majority in Congress and popular support for environmental issues. Still, the groundbreaking environmental legislation was in keeping with Nixon's other relatively progressive initiatives, which included financing programs against illegal drugs and cancer, improving foreign relations with China and the USSR, and increasing the budget of the Bureau of Indian Affairs and strengthening the status of tribal governments (see Kotlowski 2001, Perlstein 2009, Small 2003).

With the boom in environmental legislation in the 1970s, environmental law began to be taught as a topic in its own right in law schools (Brooks 2009, pp. 178–93). Law school teaching conventionally views the environment “through an orthodox scientific paradigm which upholds a universal, objective reality,” separate from society and human experience. The environment “is seen as inert and passive: humans can ‘manage’ it, use it as a ‘resource’ or degrade it without fearing the after-effects” (Kapoor 2001, p. 270). According to the sociolegal scholar Goodie (2001, p. 80), “When thinking about the environment as a legal subject, it is necessary to move beyond the idea of the environment as a physical space. From the legal perspective, the environment is a contingent and instrumental object.” In contrast to environmentalist philosophy, which maintains that protecting the environment is essential as a long-term investment for the good of society, environmental law is shaped by an instrumental perspective that works on the basis of the environment's commoditization. This distinction underlies the different logics and values distributed among parties in environmental legal battles (Brooks et al. 2002).

The boom in environmental law in the 1970s was temporarily set back in the early

1980s under Ronald Reagan (Hays 1989, pp. 491–526). Reagan sought the deregulation of environmental legislation and reduction of funds for federal environmental agencies, such as the EPA. Reagan's agenda to deregulate and privatize was in part a response to pressures from business groups and conservatives over the rising costs associated with federal regulation of health, safety, and the environment (Kraft 2002, p. 37). Reagan's conservative political agenda was reversed in the late 1980s and into the 1990s, and today environmental legislation has increased tremendously to cover an enormous range of issues such as water pollution, asbestos control, genetically modified organisms, public health, mineral extraction, as well as wilderness and animal protection. However, no matter what the specific legal arena, all environmental law is plagued by conflict over enforcement and compliance (Manheim 2009). This is largely due to the vulnerability of EPA and other environmental agencies to partisan party politics that results at times in reduced staff and economic resources. This reduced support occurred under Ronald Reagan and again under the George H. W. Bush administration. Both presidents were subject to forceful opposition to environmental regulation from business and industrial associations who saw compliance as requiring expenditure and reducing profits. To this day, regulatory constraints imposed on companies by federal or state governments are typically opposed and seen as undue interference in a free-market economy. This opposition sits comfortably with a corporate view of nature as a resource to be exploited at will with no need for governmental oversight.

In the 1970s and 1980s, a corporate view of nature started to be challenged by a rising environmental justice movement (Dunlap & Mertig 1992). Activists in this movement thought of the environment as intimately connected to people in a holistic sense. They were concerned that environmental exploitation and degradation affected peoples' social relations and quality of life, arguing that such impacts disproportionately harmed women and



ethnic minorities, particularly indigenous peoples. Some critics called these unequally distributed social impacts on minorities “environmental racism” and the corresponding corrective policies “environmental justice” (Westra & Lawson 2001, Viegas & Menon 1989, Gadgil & Ghua 1993, Braidotti 1994, Agarwal 1997, Brush & Stabinsk 1996). The social justice movement promoted bottom-up approaches to environmental management, taking into account local community input and participation on the unforeseen and long-term effects of environmental exploitation (Cole & Foster 2000). The decentralized and community-oriented approach of participatory environmentalism has been warmly received by many legal scholars, practitioners, NGOs, and community organizations (Sandler & Pezzullo 2007, Schlosberg 1999). However, participatory environmentalism has also come under severe attack from people such as Dowie (1995) in his book *Losing Ground*. To what degree participatory environmentalism is an effective management strategy remains open to debate (Kapoor 2001, p. 276).

Notwithstanding questions over its effectiveness, the participatory environmentalism movement that started in the 1970s and 1980s has gained momentum in recent decades. On the U.S. domestic front, politicians and corporations are increasingly keen to be seen as green by acting responsibly about the environmental dimensions of their political and economic activities. Some companies engage with local consultants and community representatives purportedly to take local environmental issues into consideration when making business decisions. Whether companies acting green translates into significant qualitative and sustainable change remains uncertain (Morgenstern & Pizer 2007). Corporations, after all, are primarily about making profits. As noted by U.S. environmental law historian Brooks (2009, p. 208), the participatory environmental movement inevitably falls short of its aims given that environmental law helps corporations to exploit resources and encourages ordinary people to ignore the consequences of such exploitation. Writes Brooks:

Environmental law’s character flaws confound political, social, and economic efforts to discipline American citizens. . . . [E]nvironmental law preserved customary freedoms and accepted economic and political structures. Environmental law enabled citizens to drive big private cars, subdivide open green spaces, build huge houses that require vast amounts of energy to heat and cool and light, entertain themselves with devices powered by rising electricity demands, patronize businesses that transform natural resources into consumer goods on a global scale, and demand an ever ascending level of material comfort. Instead of making Earth’s health every American’s duty, the structure of environmental law has attenuated civic responsibility. . . . Rather than using law to discipline themselves, Americans hope their governments will somehow devise solutions. Time and again, however, citizens have failed to empower their governments to impose the restraints they themselves fail to observe (Brooks 2009, p. 204; see also Manheim 2009).

## A NEW ERA OF ENVIRONMENTALISM IN THE UNITED STATES

Despite the limits of U.S. environmental law to effect substantial change, today there is greater awareness among citizens and governments that environmental issues have ramifications for all people at local, national, and global levels. This recognition in turn requires greater emphasis on the inclusion of local perspectives from both the Global North and Global South in shaping the future of the global commons (Lee & Stokes 2008, Holder & Flessas 2008, Martello & Jasanoff 2004, Carrier 2004). This more inclusive way of thinking is reflected in the Obama administration’s policies, which seek to reverse many of the regressive governmental strategies implemented by George W. Bush (Smith 2009, p. 20; Manheim 2009). At the end of Obama’s first 100 days, he had, among other things, declared carbon dioxide and greenhouse gases a threat to public health and welfare,

protected more than two million acres of wilderness with the Omnibus Public Land Management Act (2009), and restored protections under the Endangered Species Act (1973) that had been revoked in the last days of the Bush administration. Perhaps most importantly, Obama affirmed that business interests would not be allowed to dominate environmental policymaking. According to Sierra Club Executive Director Carl Pope, "President Obama has done more to lay the foundation for the clean energy future in three months than has been done in the previous three decades" (cited in Environ. News Serv. 2009).

On the international scene, Obama has also made an impact by affirming that the United States is now willing to take a leading role in shaping international/transnational environmental agendas. Despite the much publicized disappointments of the UN Climate Change Conference in Copenhagen in December 2009, the failure of the 190 nations present to officially endorse the Copenhagen Accord to limit greenhouse gas and carbon emissions, and the explicit tensions expressed between developed and developing countries in agreeing on how best to move forward, the environment is very much at the forefront of U.S. domestic and international affairs. Among environmental activists, scientists, concerned citizens, and progressive politicians, there is a sense that environmental issues are finally being taken seriously, and efforts are being made to engage with the challenges presented by global warming, climate change, reduction of natural resources, and inequities in resource development.

Implementing and enforcing new environmental standards will take time, political negotiation, and resources. Policy and political influence are disproportionate to the negative consequences that will ensue from global climate change, and, according to the best scientific efforts, time is short before irreparable damage occurs (see C-Learn models at <http://forio.com/simulation/climate-development>). For the United States, the economic recession and the costs of the ongoing wars in Afghanistan and Iraq create serious economic obstacles to

environmental engagement and policy enforcement. Moreover, because many environmental issues are global in nature and not contained within national borders, dealing with environmental regulation requires delicate interstate relations and diplomacy. National governments must act in concert, yet distrust by the Global South of the Global North permeates debate and hampers advancement in institutionalizing effective collective solutions (Bestsill et al. 2006). Within the United States, the complex federal system also creates overlapping and often competing jurisdictions between federal, state, county, and city governments over environmental issues (Selin & VanDeveer 2009). Vast, complicated, and bureaucratic environmental regulations demanding heavy implementation costs exacerbate environmentalists' frustrations.

## NATIVE AMERICANS, LAW, AND THE ENVIRONMENT

Compounding difficulties with respect to U.S. environmental law is the presence of new parties in legal, political, and economic debates. For the first time, lawsuits are being mounted by Native Americans against corporate exploitation and degradation of the environment. Against the prevailing ethos of corporate America, indigenous communities, often supported by NGOs and environmental activists and lawyers, are beginning to take a stand. For instance, Kivalina, an Inupiat Eskimo (Inuit) village of 400 people on a small island off the coast of Alaska, is suing ExxonMobil, Shell Oil, and other fuel and utility companies for helping to cause climate change and accelerate the island's erosion. This case sits alongside two other major lawsuits in Connecticut and Mississippi filed by environmental groups against companies that produce emissions linked to climate change (Schwartz 2010).

Indigenous involvement in Western law courts over environmental issues is a relatively recent phenomenon. For hundreds of years, Native Americans have been shut out of the court system by public policy and judicial

denial of indigenous and civil rights (Williams 2005). They have been forced to move away from their ancestral lands (Cronon 2003, Banner 2005, Robertson 2007, Wilkins 2008), routinely denied access to natural environments and resources, and in the process prevented from practicing their historic systems of cultivation, conservation, and ecological knowledge (Nabhan 1989, Anderson 2006, Stewart 2009, Lightfoot & Parrish 2009). As mentioned above, the early environmental movement of the late-nineteenth century that established the national parks such as Yosemite and Yellowstone were hostile to the local native communities living in those areas. Natives were forcibly driven from the lands being designated as protected zones for the good of all Americans (Spence 1999, Keller & Turek 1999).

At the same time that national parks were being established, the Allotment Act of 1887 (also known as the Dawes Act after its sponsor, U.S. Senator Henry L. Dawes of Massachusetts) further diminished native peoples' access to land. By parceling out small landholdings to individual Indians, interspersed with white settler holdings to create a checkerboard effect, the act deliberately broke up tribal communities, forcing native peoples to relate to the land as individual property-owning farmers rather than as communities collectively living with the land. Many Indians were unable to farm, having no knowledge, equipment, or inclination, and their failure drove many to forfeit their land or sell it to white settlers, which was a foreseen and intentional outcome of the act (Darian-Smith 2010, chapter 6; Bartecchi 2007; Stremmlau 2005). The process of land allotment proved, not unexpectedly, to be disastrous for Indian tribes, culturally, politically, and economically (Charlot 1999). Land held by individual Indians disrupted the idea of community-based tribal lands and created spatial distance between and among kinship groups. This had a devastating impact on customs and spiritual practices, many of which depended on group involvement. Traditional gender roles were shattered, with relations between men and women forced to change (Olund 2002, p. 157). The

allotment process also broke up traditional political systems of tribal governance and heralded the declining significance of indigenous law and control. This dismantling of tribal legal and social relations was predicted by former Interior Secretary Carl Schurz when he wrote, "when the Indians are individual property owners their tribal cohesion will necessarily relax, and gradually disappear. They will have advanced an immense step in the direction of the white man's ways" (cited Banner 2005, p. 268).

Driven from their lands and forced to relocate on designated reservations, out of sight and mind from mainstream society, many Native Americans also bore the brunt of environmental exploitation and degradation of the rural lands throughout the nineteenth and twentieth centuries (Grinde & Johansen 1995, LaDuke 1999). Despite tribes having inherent reserved power over their lands by virtue of treaties and federal recognition of their sovereign status (Royster 2008, Royster & Blumm 2007), reservation lands were deforested, overgrazed, mined, polluted, and infested with noxious plant species. Throughout the Cold War (1945–1990), reservations were also used to test military weapons and to dump nuclear waste (**Figure 3**). Notes historian Lewis (1995, p. 433), "In 1990, an estimated 1200 hazardous waste sites were located on or adjacent to reservations nationally" (see also Kuletz 1998; Hanson 1995; Williams 1992; Davis 2003, part 1). The process whereby states and companies took advantage of marginalized communities is consistent with other forms of environmental racism that occurred, and continues to occur, within the United States and overseas (Westra & Lawson 2001).<sup>2</sup>

The Navajo Nation provides a prominent example of the impact of adjacent

<sup>2</sup>Currently, one of the most horrifying iterations of this process is the practice by developed nations of dumping electronic waste (old computer monitors, etc.) in Chinese, Malaysian, Indian, and various African communities. Poorly regulated recycling facilities in these sites, where electronic waste is often burned in open bonfires, create toxic fumes and contaminate water sources, creating serious health problems for the inhabitants (Carney 2007).

industry on reservation land. Beginning in the 1940s, uranium was mined on Navajo land and “Indians dug the ore that started the United States’ stockpile of nuclear weapons” (Grinde & Johansen 1995, p. 206). Scholars estimate that by the 1970s, 700,000 acres of Navajo land was under lease for uranium mining (Grinde & Johansen 1995). Over the years, dust from the heaps of mining waste blew over the Navajo reservation, creating lung cancer and new forms of disease among native miners, their families, and stock animals. On July 16, 1978, tons of uranium mining waste broke into a dam, causing 100 million gallons of radioactive water to gush into the Rio Puerco River, raising the contamination to 6,000 times the allowable standard. The area was so rapidly polluted that three hours later radioactivity was monitored 50 miles away. Hundreds of people and animals died or suffered illness as a result (Grinde & Johansen 1995, p. 211).

The Inupiat Eskimo villagers in northwest Alaska offer another notable example of radioactive contamination that underscores often unforeseen ramifications of environmental abuse on indigenous peoples. The atomic waste products from Nevada were secretly buried in Alaska. Many natives became ill after eating caribou that had “eaten lichens that absorbed radiation from debris scattered across the tundra by American scientists” (Lewis 1995, p. 434). A similar instance occurred in Lapland, a region of northern Sweden, Finland, Norway, and part of Russia’s Kola Peninsula. There, in 1986, reindeer ate lichen contaminated by nuclear fallout from the Chernobyl disaster. The Swedish and Norwegian governments slaughtered vast numbers of reindeer in an effort to control the disaster, affecting the Sámi herders whose livelihood depended upon the sale of reindeer meat. Unlike the Inupiat people, the Sámi herders were compensated through various government subsidies, although the unfortunate result was that a previously self-sufficient community was made permanently dependent upon state welfare (see Stephens 1995, 1997).

In most cases of environmental degradation, native peoples were not consulted about activi-

ties either on or off their reservations, nor were they able to oppose such activities. Plagued by inadequate financial and human resources and fighting to cover basic health and educational needs, tribes often found it difficult to mobilize against external interference. In addition,

Native nations are also confronted with uncertainty about their ability to legislate and enforce environmental laws and regulations. Tribal government jurisdiction over environmental issues is made complicated by land status and uneven consideration in federal law, and in areas where there is significant checkerboarding, tribal jurisdiction over non-Indian activities and land is [particularly] unclear. The legal record has led some observers to remark that every attempt to exercise tribal jurisdiction over environmental protection may need to be evaluated in the context of the specific situation. This is a recipe for litigation, delay, and hefty expenses (Harvard Project 2008, p. 180).

In short, until very recently, native communities have had little legal or political recourse to stop exploitation and degradation of their reservation lands or to stop off-reservation activities that compromise their reservation lands. For many Native Americans who are not members of federally recognized tribes and hold no right to live on reservations and claim sovereign status, recourse against environmental exploitation is virtually nonexistent. As of 2009, there were 564 recognized tribes on the U.S. government’s Federal Register and approximately 245 nonrecognized tribes (on the politics of tribal recognition, see Cramer 2005). In addition to nonrecognized tribes, there are thousands of individuals who claim to be Native American but in many cases cannot readily identify with any contemporary native community due to the dissolution of tribes under colonial rule and more recently the Indian Termination Policy. For these people, there is not even the possibility to mount a formal tribal complaint against corporations involved in environmental degradation affecting their quality of life.

## INDIAN TERMINATION POLICY

The federal Indian Termination Policy set up in the 1940s tried to deal with Indian poverty by forcing native peoples to assimilate into American society, and in many ways it was a continuation of the assimilation agenda promulgated under the earlier Allotment Act. The Indian Termination Policy prevailed from the mid-1940s to the mid-1960s but came under severe criticism by activists and civil rights supporters, forcing the federal government to shift from Indian termination to self-determination policies in the 1970s and 1980s. These vacillating policies reflect more general societal concerns that surfaced throughout the 1960s civil rights era. The introduction of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Economic Act of 1964 together sought to empower ethnic minorities and local communities (Clarkin 2001, Cobb 1998). The success of the civil rights movement helped lend support to the political mobilization of Native Americans and the formation of AIM in 1968.

The Indian Termination Policy of the 1940s intended to dismantle tribes' official status as sovereign governments. It was an expedient policy that released the federal government from its trust obligations to provide health and education to native communities and at the same time allowed private corporations to gain access to former reservation lands for mining, deforestation, dam construction, and so on. One element of the Indian Termination Policy was the Indian Claims Commission Act, which set up a judicial panel in 1946 to hear grievances by tribes brought against the United States. The commission granted financial compensation to tribes for lost territories due to federal negation of earlier treaties. Despite some "positive intentions, the Act's major goal was to settle tribes' ancient grievances in order to prepare them for the termination of their special status under United States law" (Newton 1998, p. 75; Churchill 2003, pp. 125–52; Lieder & Page 1997). Another mechanism preparing tribes for termination was the introduction in 1953 of Public Law 280. This law deliberately

disrupted the government-to-government relationship between tribes and federal government by granting state governments the power to step in and assume criminal and civil jurisdiction over Indians on reservations (Goldberg-Ambrose 1997).

The Indian Termination Policy ultimately failed, in part because tribal communities were made subject to state taxes that many could not pay and in part because state governments refused to step in and finance social service programs in the absence of federal funding. The end result was that termination increased native poverty and poor health and education (Philp 1995, 1999; Fixico 1986). By the 1960s, as the negative effects of termination began to be widely experienced by native communities, opposition intensified against the government by tribes as well as by new activist organizations at state and national levels, such as the Inner Tribal Council of California (founded 1958) and, as already mentioned, AIM. By 1970, President Nixon declared that forced termination should be stopped and Indian self-determination encouraged. Some tribes had their reservation lands returned to them, but some did not. Policy reform was formalized in the Indian Self-Determination and Education Assistance Act of 1975. This legislation resumed federal responsibility for Indian tribes but also encouraged tribal communities to develop plans to assume greater control over their own future (Castile 1998). This involved providing bloc grants to tribes to enable them to manage their own health and educational programs with the long-term goal of decreasing federal financial expenditure. In 1988, Title III was added to the Indian Self-Determination and Education Assistance Act, which further expanded opportunities for tribes in the realm of self-government. The self-determination legislation of the 1970s and 1980s under Nixon, Ford, and Reagan (the latter drastically cutting all funding of Indian affairs) was consistent with a conservative domestic agenda that sought to reduce federal costs in many social services areas through privatization and deregulation.

With respect to environmental politics, the shift in federal Indian policy from termination to self-determination reflected wider societal demands for a bottom-up approach to governance on local issues. This bottom-up approach coincided with a growing concern in environmental justice circles that recognized the disproportionate harm suffered by marginalized peoples in the exploitation of natural resources. These concerns informed the participatory environmentalism movement of the 1970s and 1980s that sought to bring multiple voices to the table to deal with environmental problems. With respect to Native Americans, the participatory environmental movement helped forge a change in attitude about indigenous ecological practices. Prior to this period, proponents of state paternalism and assimilation had denigrated Indian techniques, and federal agencies had sought to teach native peoples modern Western conservation methods. The patent failure of this approach underscored a need to adopt different strategies that included more active support by federal agencies of native environmental sustainability and management practices.

### **“TREATMENT AS STATE” AND GOVERNMENT-TO- GOVERNMENT RELATIONS**

The growing federal support of Indian self-determination, and the rise of the participatory environmental movement, together created the political and policy backdrop for the increased recognition of tribal self-governance under the EPA. As mentioned above, the 1970 establishment of the EPA formed a new partnership between federal and state agencies (Grijalva 2008, p. 14). To get around the silence of Congress on how best to implement environmental regulation on reservation lands, the EPA started treating tribal governments as equivalent to state governments in their capacity to manage reservation land. In a series of moves throughout the 1970s, the EPA supported tribal governmental control over non-Indian environmental degradation that affected the health of Indians on

reservation lands. This was a radical departure from prior federal policies of Indian extermination and tribal termination and represented a shift in attitude toward native peoples by some sectors of the political system.

The EPA's expansion of Indian authority over reservation land proceeded largely unnoticed or unchallenged by Congress (see Grijalva 2008, chapter 2). The EPA's actions conformed to the hands-off approach by the federal government's policy of Indian self-determination informed by the administration's desire to shed its financial obligations to tribes. Furthermore, the widespread corruption and bureaucratic mismanagement within the Bureau of Indian Affairs made it difficult for the federal government to object to tribes' claiming the right to manage their own lands. Also important was the fact that native peoples in the 1970s and 1980s were the most impoverished ethnic minority in the country according to census data, and tribes had virtually no economic resources of any kind. Few people within the federal government, or white American society more generally, considered tribal governments as able to challenge in any substantial way industrial environmental exploitation of reservation and off-reservation lands. The prevailing view about Indian peoples was still that epitomized by Iron Eyes Cody—Native Americans were passive observers of their ultimate demise. Beyond specific circles of environmental concern and political activism, Indian affairs did not enter public consciousness, and for most Americans, native peoples remained remote figures living on distant reservations.

The introduction of Indian gaming by the Seminole tribe, which opened its first high-stakes bingo parlor in 1979, slowly changed the marginality of some native communities (Cattellino 2007, 2008; Darian-Smith 2003, pp. 59–61; Goldberg & Champagne 2002; Champagne 2004, Mason 2000). By the time a few tribes began to exert substantial political and legal clout as a result of gaming profits in the late 1980s, the EPA had already established a process of delegated power that recognized tribal governments as

equivalent to state governments. This process was formalized in 1984 when the EPA became the first federal agency to adopt an explicit Federal Indian Policy (Ruckelshaus 1984). This policy, in part stemming from the EPA's commitment to environmental justice, "institutionalized recognition of tribal sovereignty and acknowledged the importance and value of involving tribes in all stages of the development and implementation of national environmental policy" (Harvard Project 2008, p. 181). The EPA's Indian Policy sought to provide meaningful involvement by Indian governments in policymaking, as well as to address the disproportionate environmental harm suffered by native communities (Harvard Project 2008, p. 181). According to the Indian Policy:

- The EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, the EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.
- In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate nonfederal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace.
- The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes, similar to what we provide State Governments (Ruckelshaus 1984).

The "treatment as state" (TAS) status of tribal governments under the EPA was formalized in 1987 with amendments to the

Clean Water Act (Silvern 2002, p. 122). Section 518(e) authorized the EPA to transfer regulatory powers to Indian tribes—previously only delegable to states—upon a tribe satisfying four requirements. Importantly, in practice the EPA interpreted this section as recognition of a tribe's inherent sovereignty, rather than a delegation of specific sovereign powers to it (Tweedy 2005). Under the section, a tribe must (a) be recognized as a federally recognized tribe, (b) have a functional tribal government that is responsible for the health and welfare of its members, (c) be able to demonstrate that regulatory functions to be performed by the tribe are within its jurisdiction, and (d) be capable of administering the regulations. Notably, only a tribe with reservation land can satisfy these requirements, so in effect TAS status further marginalizes tribes without reservations, be they federally recognized tribes or not.

Under the Clean Water Act, the EPA can recognize a tribe's jurisdictional authority over water within that tribe's jurisdiction. However, a tribe's approved water standards under the act can affect upstream, off-reservation waters that flow into its reservation territory. This extraterritorial dimension of TAS status has caused much controversy (Silvern 2002). As noted by one commentator, "Jurisdictional conflicts, compliance questions, and permitting issues may arise when standards set by a tribe differ from those set by a state that has concurrent jurisdiction over the same stream or body of water" (Slade & Stern 1995). Federal courts have fueled both controversy and conflict between Indian and non-Indian groups by typically upholding "tribal environmental quality standards, particularly with regard to water" (Harvard Project 2008, p. 185). As a result, state governments and private corporations have been forced to comply with the higher quality standards imposed on them by tribal governments with approved TAS status.

TAS status as established under the Clean Water Act is now well recognized and has been expanded to include a range of environmental legislation such as the Clean Air Act, the Safe

Drinking Water Act, and the Toxic Substance Control Act (Cochrane 1996).<sup>3</sup> As of 2009, hundreds of tribes have been authorized by the EPA to regulate their own environmental standards. “In fact, the basic principle now extends well beyond environmental regulation, with ‘treatment as state’ policy accepted at federal departments such as Energy, Defense, and the National Park Service and applying to programs ranging from Temporary Assistance for Needy Families to certain elements of homeland security” (Harvard Project 2008, p. 181). The EPA, in an effort to further its commitment to cooperation with tribes, has also established the American Indian Environmental Office to work with tribes directly, the Indigenous Peoples Subcommittee to consult on native involvement in federal environmental decision making, and the Indian Environmental General Assistance Program that provides grants to tribes to hire experts to assess environmental problems so that they can mount a case against polluting industries.

Examples of relatively successful cooperation between the EPA and native communities are that of the Confederated Tribes of the Umatilla Indian Reservation in northeastern Oregon, the Bad River Band of the Lake Superior Tribe of the Chippewa Indians in northwestern Wisconsin, the Pala Band of Mission Indians in northern San Diego county, the Mole Lake Band of Chippewa in Wisconsin (Nesper 2010), and the St. Regis Mohawk Tribe in northern New York State. Significantly, all five tribes own successful Indian casino enterprises and hotels. With respect to the latter, over the past decade the St. Regis Mohawk Tribe has made good use of the EPA’s commitment to respect its sovereign state status and deal with its vast environmental problems. These problems stem from the 1950s when General Motors and Alcoa built large production plants next to the Mohawk reservation that produced thousands

of tons of hazardous waste that bled into the St. Lawrence River, upstream from the tribe. In the 1970s and 1980s, the tribe began to see illness among its members, particularly young people attending a school situated yards from General Motor’s property. One member of the tribe, Katsi Cook, invited pathologist Ward Stone to come to the reservation and collect samples. Stone found alarming levels of toxins in the fat of local animals such as frogs and ducks, as well as in the breast milk of Indian women. The tribe became proactive. It hired lawyers, developed an environmental division within its government, and began working with the EPA to initiate air and water quality programs. According to the Mohawk’s environmental health education specialist Lawrence Swamp, the tribe was driven by necessity to create one of the most advanced tribal environmental programs in the country. Achieving TAS status, the St. Regis Mohawk Tribe can now set its own water and air quality standards on its reservation, forcing adjacent industries to comply with those standards. Notes Swamp (1996):

A key element in the Environment Division’s success is its negotiating strategy and relations with other agencies. The relationship between the Tribe and EPA was a little rocky at the beginning because the EPA did not recognize the need to work with the Tribe on a government-to-government basis... Through persistent pressure and tough negotiations, the Tribe was able to muscle its way into the negotiation process as a legitimate partner.

The importance of Indian gaming enterprise should not be downplayed in any conversation about TAS status for tribal governments. Profits from gaming have given some tribes the financial resources to create environmental divisions within their governments, consult with scientists and other experts, and mount legal action for TAS status. Notably, of the 46 federally recognized tribes who have achieved TAS status under the EPA Clean Water Act between 1992–2009, 41 tribes run casinos, a few are in the process

<sup>3</sup>See EPA American Indian Tribal Portal, <http://www.epa.gov/tribalportal/laws/tas.htm>.



of building casinos, and the Hualapai Indian Tribe used to run a bingo hall but has now diversified its investments into a vacation destination overlooking the Grand Canyon.<sup>4</sup> The exception to this connection between gaming and tribal environmental control is the Hopi Tribe, which has managed to establish cultural museums and stores that attract tourist dollars. Although all of the 46 tribes represent varying degrees of success in addressing the wide range of environmental problems facing their communities, it is essential to remember that most tribes in the United States do not have equivalent financial resources and face an uphill battle to get basic needs met such as access to clean water and proper sewerage treatment. As scholars have noted, "Tribal governments have begun to lift their communities out of poverty and economic desperation, but this is an enormous task that will take many generations to accomplish" (Harvard Project 2008, p. 1920).

## INDIGENOUS RESISTANCE, INDIGENOUS COOPERATION

The capacity of tribes to resist and/or cooperate with governmental agencies is undermined by a long history of colonial oppression of native peoples coupled with the circulation of stereotypical images and conceptions of Native Americans in mainstream society. These images and preconceptions often prevent open dialogue and create hurdles in the building of relationships between native and non-native parties based on mutual respect.

Unfortunately, the St. Regis Mohawk Tribe's experience of having to "muscle its way into the negotiation process" is not unique. Despite the EPA's commitment to involving native communities in environmental programs and policymaking, political cooperation does not come easily. Each tribe raises a unique set of circumstances and must be dealt with on a case-by-case basis. Furthermore, there is much distrust

of and resistance to federal agents by tribal communities for obvious historical reasons. Genocide and ecocide taint Indian and non-Indian relations (Grinde & Johansen 1995, LaDuke 1999, Jaimes et al. 1999, Churchill 1993). Distrust is exacerbated by the ways tribes are forced to present themselves as authentically native and culturally distinct from white society in order to gain access to political and legal forums (Dombrowski 2001, p. 13). Once granted access to these forums, however, native peoples must then speak according to dominant forms of legal and scientific discourse in order to be taken seriously by industries, policy makers, courts, and the EPA (Espeland 1994, Buchanan 2009, Martello & Jasanoff 2004, Nadasdy 2003, Deloria 1995). As noted by sociolegal scholars, land and water conflicts are often "no less than fundamental epistemological conflicts" (Sefiha & Lauderdale 2008, p. 508).

Managing long-standing stereotypes about native peoples poses yet another difficulty to overcoming resistance and seeking cooperation between Indian and non-Indian communities, at least from the perspective of tribal governments (Barta 1997, Jahoda 1999, Mihesuah 1996, Churchill 2001, Huhndorf 2001). These stereotypes include the strongly held notion that native peoples are passive and without agency, and if not passive, then certainly not smart enough or organized enough to oppose industries such as General Motors. Another prevailing stereotype that hampers cooperation between Indian and non-Indian groups is the widespread belief that all native peoples love nature. From the time of earliest colonization, and reinforced by environmental movements in the late-nineteenth and twentieth centuries (see above), Indians have been romanticized in mainstream society as living in spiritual harmony with the natural world (Bordewich 1997, Krech 2000, Harkin & Lewis 2007). This stereotype precludes non-Indians from appreciating that tribal lands are a vital economic resource for native people, thus impeding Indians from developing their reservation lands for economic profit if they so desire (Abramson & Theodossopoulos 2001). If tribes indicate an

<sup>4</sup>For a list of Indian tribal approvals with respect to water quality see <http://www.epa.gov/waterscience/tribes/approvable.htm>.

interest in leasing land to mining companies, building casinos, or accommodating a nuclear waste storage facility on reservation land, local community and environmental groups have typically condemned them for being “greedy,” “hypocritical,” and ultimately not “authentic” Indians (Darlan-Smith 2003; Lewis 2007; Nadasdy 2005, p. 318). As Lewis (1995, p. 439) has observed, the constraints of racial stereotypes have “unintentionally denied Native Americans their humanity, culture, history, and most importantly, their modernity.”

Only through increased conversation between Indian and non-Indian groups may stereotypes be broken down and opportunities opened up for sincere collaboration. We have some such examples. To defend their treaty rights to participate in traditional hunting of walleyed pike from the lakes of Wisconsin and Minnesota, the Ojibwe and their non-Indian supporters created a new composite coalition to effectively combat the white supremacists that opposed them. In part, the coalition’s success can be attributed to its creation of new racial identities for both natives and their white allies, allowing people who had previously been divided along essentialized racist lines to come together as a collective (Lipsitz 2007, Nesper 2002, Whaley & Bresette 1994).

Other instances of cooperation are emerging between tribes. For example, intertribal natural resource management agencies such as the Great Lakes Indian Fish and Wildlife Commission, the Columbia River Inter-Tribal Fish Commission, and the Northwest Indian Fishing Commission have developed to handle fishing rights in Wisconsin, Washington, Oregon, and Michigan. In various ways, these commissions seek to bring together tribes and states for the purpose of environmental management. According to the Web site of the Northwest Indian Fishing Commission (<http://www.nwifc.org/about-us>):

The role of the NWIFC is to assist member tribes in their role as natural resources managers. The commission provides direct services to tribes in areas such as biometrics, fish

health and salmon management to achieve an economy of scale that makes more efficient use of limited federal funding. The NWIFC also provides a forum for tribes to address shared natural resources management issues and enables the tribes to speak with a unified voice in Washington, D.C.

The EPA seems to appreciate the transformative potential of cooperation and toward this end provides advice, maps, and links to a range of agencies about how best to work effectively with tribal governments, as well as brokering tribe-to-tribe communication by sharing knowledge and other resources.<sup>5</sup> This facilitating of dialogue reflects more widespread attitudes within environmental justice circles that recognize a need to empower local communities through coalition politics, particularly in the face of global warming and other transborder and multi-jurisdictional environmental issues (Grossman 2001; Martello & Jasanoff 2004, p. 4; Pellow & Brulle 2005; Gunningham 2008).

## REDEFINING INDIGENOUS SOVEREIGNTY

Empowering local communities, as the environmental justice movement urges, demands greater recognition of indigenous sovereignty. Historically, however, the concept of native sovereignty has been problematic in the United States. The argument that tribes are in some way equivalent to sovereign nations—nations within nations—has caused constant legal and political tension (Wilkinson 1987, Deloria 1998, Wilkins & Lomawaima 2002). Chief Justice John Marshall’s trilogy of Indian cases in the 1820s and 1830s held that tribes are not foreign states as envisaged under the U.S. Constitution, but rather are domestic dependent nations in a state of pupilage. In short, a tribe’s relation to the United States resembles that of a

<sup>5</sup><http://www.epa.gov/oar/tribal/WETG.html>;  
<http://www.epa.gov/oar/tribal/tribetotribe.html>.

ward to his guardian (*Johnson v. McIntosh* 1823). The degree to which a tribal government is deemed a ward of the state has shifted over the decades, and ambiguities and inconsistencies with respect to the concept of tribal sovereignty plague Indian and non-Indian relations to this day (Wilkins 2008, p. 244). Nonetheless, despite general confusion in federal and state Indian law over the meaning of native sovereignty, there do appear to be recognizable trends in judicial interpretation (Wiessner 2008). Typically, U.S. courts interpret the concept of native sovereignty to accord with the institutional and economic interests of the state, or of the industries that the state supports, to the detriment of tribal interests. These interpretations stress that tribes do not hold inherent sovereign power and are only qualified to exercise any form of self-government because, by virtue of their status as wards, that right has been delegated to them by the United States (Tweedy 2009). As Biolsi (2005, p. 243) notes, the court's idea of tribal sovereignty is "limited, in fact, to the point that it does not make logical sense to many Indian people, is not really sovereignty at all from their point of view, and can only be understood as bespeaking a profoundly racist view of Indians on the part of Congress, the courts, and white people in general."

Against trends of U.S. judicial interpretation that seek to limit the concept of inherent native sovereignty, federal environmental regulations have provided a mechanism for some tribes to reassert their sovereign authority "by effectively creating a presumption in favor of tribal jurisdiction" (Tweedy 2005, 2009). As mentioned above, the EPA's Indian Policy was introduced in the 1980s when the federal government and American society in general dismissed native peoples as out of sight and mind on distant reservations. No one anticipated the enormous shift in fortune among a few tribes as a result of the development of Indian gaming enterprises. These enterprises granted tribes the ability to participate in mainstream political activities for the first time (Darian-Smith 2003, Champagne 2004). They provided, among other things, the economic resources to mount formal

applications under the EPA to be granted state status and the authority to regulate environmental standards on reservation lands. As the legal scholar Grijalva (2008, p. xi) has noted:

The Agency [EPA] has repeatedly exercised its substantial authority under the modern environmental laws to link Congress' preference for local program implementation with federal Indian law's doctrine of retained tribal sovereignty in a legal and administrative framework effectively offering tribes a co-equal seat at the table. The seat comes with an unparalleled opportunity for translating tribal environmental value judgments into federally enforceable requirements constraining Indian and non-Indian polluters inside and outside Indian country. It offers a genuine chance for tribes to protect and preserve the health and welfare of their citizens, the quality of Indian country environment, and most importantly, their land-based Indigenous culture.

Over the years, EPA's policy of recognizing indigenous sovereignty has caused increasing tension between native and non-native communities. One example of conflict is that experienced by the Pala Band of Mission Indians in northern San Diego County, which received state-like status from the EPA in 2008. This status means the tribe must be notified when a project that may cause air pollution is proposed within 50 miles of the reservation. Whether the status can prevent the building of the Gregory Canyon landfill, planned to be built just west of the reservation, and against which the tribe has objected for over a decade, is not certain. In any case, according to Doug Elmets, a spokesperson for the Pala Band, the importance of the EPA's determination is that "[i]t's as much a recognition of the status of the tribe as it is their ability to comment on air quality issues that would affect members" (Pfungsten 2008). Public objections to the Pala Band's new state-like designation were considerable. In the words of one blogger, "So a project within 50 miles, impacting upwards of 650 people, must be reviewed by the tribe. What about

the impacts tribal expansion has on upwards of 6.5 million people? We have a right to know what's up their sleeves. This is a runaway train!"

The Pala Band's experience of local antagonism is not unique. The Pala Band is one of many tribes that have been the focus of public ire and political attack in recent years. The rise of Indian gaming and the increased recognition of tribal sovereignty that has accompanied it have generated a backlash against so-called rich Indians who, it is argued, now receive special rights (Dudas 2008, 2005; Goldberg-Hiller & Milner 2003). This backlash against empowered native communities represents a new twist in the growing recognition of Indian sovereignty through environmental law avenues. The long-standing stereotype of Indians as stewards of the environment prevents many non-Indians from appreciating that native peoples are full citizens and should be able to exercise their property rights in the same way that non-Indians exercise theirs. This includes the right of tribes to log or mine reservation lands as a source of income or, in the case of the Skull Valley Band of Goshute Indians in Utah, to build a nuclear waste dump (Lewis 2007). Indian sovereignty means that tribes should have ultimate control over their reservation land, be it either to protect it or to use it, as a tribe sees fit. It also means that tribes have the right to practice their own notion of environmentalism that may or may not accord with Western paradigms (Nadasdy 2005). It seems that mainstream American society is still grappling with the idea of modern Indians and may not yet be prepared to accommodate the full implications of indigenous sovereignty, particularly as it emerges within the context of U.S. environmental law and regulation.

## LOOKING TOWARD THE INTERNATIONAL

The inadvertent yet increasing recognition of indigenous sovereignty within U.S. domestic law echoes more explicit developments in international law. Since the 1970s, efforts have been made to unite native peoples around the

world and establish pan-native social movements to further the recognition of indigenous sovereignty. Toward this goal, forums such as the International Indian Treaty Council (1974), World Council of Indigenous Peoples (1975), UN Working Group on Indigenous Populations (1985), and the UN Permanent Forum on Indigenous Issues (2002) have been established. Many of these groups played a role in the International Labor Organization (ILO) Convention Concerning Indigenous and Tribal Peoples of 1989. The ILO treaty has now been ratified by almost all Latin American countries and ensures that the rights of native groups over legal status, lands, and environment are at the center of many states' political concerns (Fischer 2009; Warren & Jackson 2002; Royster & Blumm 2007, pp. 517-604).

In 2007, the ratification of the UN Declaration on the Rights of Indigenous Peoples focused additional world attention on indigenous sovereignty and native rights to their lands and territories (Xanthaki 2007; Wiessner 2008; Charters et al. 2010; Allen & Xanthaki 2010). Among the many issues identified in the declaration, indigenous peoples' rights to the preservation, conservation, and development of their environment were prominent. The declaration represents, in the words of UN Special Rapporteur S. James Anaya, an important contribution to international customary law by presenting "an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples" (cited in Wiessner 2008, p. 1162). Significantly, 143 countries signed the UN Declaration with only four refusing: the United States, Canada, Australia, and New Zealand (Australia subsequently reversed its decision). Despite these notable state exceptions, the 20 years of work culminating in the 2007 declaration have invigorated new thoughts about indigenous-state relations and new political theories that take into account competing and overlapping legal jurisdictions at international and national levels (Barker 2005, Ivison et al. 2008, Champagne 2005, Weissner 1999, Anaya & Williams 2001, Anaya 2004, Hall & Fenelon 2009).

## CONCLUSION

The degree to which the United States will be receptive to the concept of indigenous sovereignty as it is promoted through international law remains to be seen. What is reasonably sure, however, is that as concerns over climate change and global warming intensify, U.S. environmental law will increasingly have to navigate and accommodate international environmental legal developments. And these international legal developments are increasingly addressing, among other things, indigenous peoples' rights over land. The cumulative and compounding pressures from international and domestic environmental laws that elevate the stature of indigenous authority suggest that the

United States, whether it welcomes it or not, will be forced to confront non-Western values and perspectives with respect to the preservation, conservation, and sustainability of natural resources. One result may be that the United States can no longer treat the environment as something to be conquered and a resource to be economically exploited. In the future, U.S. environmental law, which has conventionally viewed the environment as a "universal, objective reality" separate from society and human experience (Kapoor 2001, p. 270), may have to embrace alternative epistemological viewpoints and sets of ecological priorities. To put it another way, U.S. environmental law may be on trajectory whereby it becomes, if only in part, decolonized.

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**Figure 2**

Keep America Beautiful's 1971 ad campaign, featured Iron Eyes Cody, the "Crying Indian." The actor was not Native American but Italian American. "People Start Pollution, People Can Stop It" (1971) advertisement courtesy of Keep America Beautiful, Inc. (<http://www.kab.org>).



**Figure 3**

Hanford Nuclear Reservation, printed with permission from the Heart of North America Northwest, <http://www.hoanw.org>. The Hanford Nuclear Reservation, located in northeastern Oregon and southeastern Washington, is the most contaminated site in the Western Hemisphere. The Confederated Tribes of the Umatilla Indian Reservation have been active in demanding a say in clean-up procedures, but their demands, based on the exposure to their tribal members of contaminants, are often disputed as unreasonable by the Department of Energy.



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