Models of Tribal Environmental Regulation

In Pursuit of a Culturally Relevant Form of Tribal Sovereignty

By Darren J. Ranco

This article examines the current regulatory models in tribal environmental programs to see if the regulations meet standards of tribal sovereignty that are designed to protect tribal cultures and lifeways. In particular, I am concerned that the approaches to regulation currently available to tribes—driven by federal mandates and notions of environmental management—not only are potentially vulnerable to challenge and erosion but also do not allow for tribes to fully address their cultural needs as sovereign nations. This article aims to call attention to what many tribal lawyers and environmental managers already know—that we must be diligent defenders not only of tribes' legal and juridical control over environmental regulations but also the forms of this control.

Most contemporary environmental law in the United States is carried out through "cooperative environmental federalism," in which the states play a prominent role. Much of the history of relations between Indian tribes and the federal government has been shaped by conflicts between states and tribes—conflicts in which the tribes usually rely on the federal government to keep states from intruding into tribal affairs. As a general rule, states have no authority over tribes and tribal members within reservations, and state authority over individuals who are not members of the tribe can be pre-empted by operation of federal law. Several major environmental statutes have been amended to authorize tribes to be treated the way states are when it comes to environmental regulations. These amendments, which were enacted between 1986 and 1990, typically use the phrase "treatment as States" (TAS)[1]; in response to comments from tribes during the rule-making process, the Environmental Protection Agency (EPA) has restated this approach, labeling it "treatment in the same manner as a State."

The TAS approach affords a significant measure of respect for the status of tribes as sovereign nations and also implicitly recognizes the importance of the natural environment for the survival of tribal cultures, which are rooted in the natural world. Treating tribes like states has not proven to be sufficient, however, primarily because of unmet funding needs for tribal programs. Just as important, when the interests of non-Indians are affected, tribal authority can be challenged under a number of decisions issued by the U.S. Supreme Court over the last quarter-century.[2] To date, the lower federal courts have sustained the EPA in its support for tribal programs, but no case has yet been decided by the U.S. Supreme Court. This situation presents a paradox to tribes: the more closely a tribal program resembles a federal or state program, the more likely it is to survive litigation; but the more a tribe tries to build a program that reflects its own cultural values, the greater the risk to its own tribal sovereignty, especially if the tribal approach is different from the approach adopted by the state or states that surround the tribal land.

During the 1990s, a number of American Indian nations began to seek TAS status for various purposes under the federal environmental laws. As of March 1998, the EPA had approved TAS status for at least one program proposed by 146 tribes,[3] although most of these approvals have been for financial assistance for planning and the development of regulatory programs rather than for administration of EPA-approved regulatory programs. The statute in which tribes seeking TAS status for regulatory programs have been most involved has been the Clean Water Act; the water program in which there are the most TAS approvals is the Water Quality Standards (WQS) Program, in which, as of October 2006, 30 tribes have EPA-approved WQS in place.[4]

Taking on such regulatory functions firmly embeds tribal governments into the cooperative federalist system of major environmental laws in the United States. In this system, the federal government establishes the framework for regulating pollution, but the states assume some prominent roles in the process. The approach varies from statute to statute but generally features setting standards and administering permit programs as well as other mechanisms designed to achieve compliance with standards. Some programs are carried out in the first instance by the states and others are done by the EPA. Many programs that are carried out by the EPA can be taken over by the states; these are often called "delegable" programs.[5] There are several examples of this arrangement: Under the Clean Water Act, the states set water quality standards that follow federal guidelines, and the EPA administers a permit program to ensure compliance with these standards; the permit program is delegable to the states. Under the Clean Air Act, the EPA sets national standards and the states administer a permit program and also carry out "state implementation plans." Under the Resource Conservation and Recovery Act (which has not yet been amended to include TAS provisions), states operate permit programs for municipal landfills, pursuant to standards set by the EPA, and the EPA regulates the transport and disposal of hazardous wastes, a program that states can operate instead of the EPA doing so.

With varying success, tribes have begun to use these programs to control pollution within reservations and, by developing tribally based standards, the tribes are seeking

Three Rivers Petroglyph Site, New Mexico. By Lawrence Baca.

to force polluters in neighboring jurisdictions to control pollution sources that affect Indian lands. The ability of a tribe to set its own standards is critical, because such standards can adopt ceremonial and other culturally specific uses of resources.[6] Many consider the ability to incorporate standards that include culturally specific uses of resources an important aspect of self-determination, sovereignty, and therefore tribal survival.[7]

The case of *Albuquerque v. Browner*[8]—as well as other cases, such as *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998) and *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001)—have upheld tribal regulatory control in the TAS system. These cases provide a potential contradiction in the scope of tribal sovereignty when it comes to their environment, because the rulings reinforce strong checks on tribal sovereignty by the U.S. government and potentially pave the way for limited and contestable future environmental regulation by tribes. At the same time, these cases serve as a remarkable example of the federal government's committed attempts to promote tribal autonomy and decision-making.

An examination of the relationship between a tribe's authority and that of a federal agency reveals that the realm of agency control may not be a bad place for tribes to be if they must be in the control of some governmental body. In general, as Amy Quandt made clear, "Congress quite often delegates expansive authority to administrative agencies, and the judiciary consistently defers to agency determinations made pursuant to such delegations."[9] Thus, if an agency is supportive of tribal sovereignty, as the EPA has shown itself to be in *Albuquerque v. Browner*, tribes may be fortunate that these favorable agency decisions may face little challenge from other governmental bodies, and the courts will generally defer to the agencies.[10] Furthermore, some agencies have certain characteristics that might make them the most accommodating entities with which tribes can be involved. The fact that there is less separation of functions in agency decision-making than in other areas of government may limit the number of bureaucratic processes and bodies with which tribes need to deal when issues arise.[11] In addition, in the administrative realm, judicial review is acceptable only under certain conditions, the most important being when an agency has made a final decision on an issue.[12] Limiting the avenues for judicial review of agency decisions may consequently limit the number of times tribes are pulled into the courts,[13] especially if, to "adapt an old joke[,] … no Indian reservation is safe while the Supreme Court is in session."[14]

Moreover, if tribes deal primarily with agencies—in particular, with the EPA—tribes may be able to keep interactive management dialogues focused on science rather than on jurisdictional issues that could possibly follow in the footsteps of *Brendale v. Confederated Tribes and Bands*

of the Yakima Nation.[15] In *Albuquerque v. Browner*, tribal involvement with the EPA produced a success for tribal sovereignty, because the EPA tried to set aside as many potential jurisdictional questions as possible and relied on scientific evidence put forth by the tribe related to the creation of water quality standards that could have an impact on the city of Albuquerque. In *Albuquerque*, the EPA ignored competing private interests and offered the tribes the authority to establish "what will count as truth in the policy process."[16] In an article published shortly after the decision, Allison Dussias underscored the somewhat radical and impressive nature of the EPA's approval of the tribe's reliance on indigenous knowledge and interests in formulating regulations; the author pointed out that "this is a great departure from the efforts of earlier federal government officials to eradicate the nature-based religious beliefs and practices of Native Americans."[17]

Thus, it appears that tribes might fare relatively well in the realm of agency control—in particular EPA control—and *Albuquerque* and later cases reaffirm this conclusion. However, the logic determining that tribes could benefit from such a relationship with the EPA rests on two rather dangerous assumptions: that agencies will always decide in favor of tribes (especially acknowledging that agency policy can change with the change of a presidential administration), and that reviewing courts will always defer to agencies' decisions. Accepting the provision of TAS status and subjecting themselves to agency control might, in some instances, be beneficial to tribes—as demonstrated in the case of *Albuquerque*—but if the agency or courts were to rule against a tribe, it would be left totally entangled within the federal government with few protections. If this were to occur, all the benefits cited above that safeguard tribes under agency control would then serve the opposite function: placing tribes in a restricted situation with few tools with which to reassert their tribal autonomy.

As we have seen, *Albuquerque v. Browner* and the cases like it can be viewed as a success not only for the reasons discussed above but also from an environmental perspective: the court upheld tribal rules that blocked the city of Albuquerque from polluting the Rio Grande River, which flows through tribal lands. But the case can also be viewed as an example of U.S. government efforts to limit tribal sovereignty and thus prevent tribes from making meaningful authoritative decisions. The case might be deemed a failure by the larger standards of tribal self-determination:

- The tribe obtained permission to adopt standards under a clean water law and system that the tribe did not devise and could not change.
- The tribe's standards were subject to review by a U.S. agency.
- Only the agency that reviewed the standards could enforce them.

By making these tools available to the tribe, was the U.S. government really making a fundamental change in U.S.-tribal relations and creating a new opportunity for tribal self-government? As Taiaiake Alfred, Mohawk scholar, notes, "From the perspective of the state, marginal losses of control are the trade-off for the ultimate preservation of the framework of dominance."[18]

Before examining the potential cultural dilemmas that tribes face in the TAS process, it is important to point out some of the difficulties tribes face when they participate in the cooperative federalism involved in U.S. environmental law. The case of *Albuquerque v. Browner* demonstrated that in order to gain treatment as a state in programs that come under the Clean Water Act, for example, the Pueblo of Isleta—as well as other tribes—must apply to the EPA for such status and submit evidence that (1) it is a tribe, as recognized by the secretary of the interior; (2) it has a functioning tribal government; and (3) it has the authority and capability to create effective water quality standards.[19] Thus, in order to gain any authority over its water quality standards, the tribe was required to go through a tedious procedure to gain the approval and recognition of the federal government. Thus, when one considers what TAS status actually signifies and who can obtain it, these stipulations for gaining TAS status have serious implications for understanding whether the TAS amendments to the Clean Water Act are even significant. For example, in a case concerning the Flathead WQS, attorney Daniel I.S.J. Rey-Bear pointed out that "the dispute is not really about the technical content of those WQS themselves. Rather, this dispute concerns the scope of the underlying federally recognized tribal authority to promulgate those standards under the CWA's section 518(e) TAS provisions."[20] Therefore, TAS status is one of those ironic situations that *appears* to augment the authority of tribes but, in fact, diminishes tribal sovereignty.

It seems obvious that the regulatory approaches embedded in the TAS process are tied to America's environmental regulatory culture and do not emerge from tribal ideals regarding the environment. That said, in the *Albuquerque* case, the Pueblo of Isleta was able to set standards based on ceremonial uses of the Rio Grande—and that was no small victory. Still, there are some serious challenges in using the TAS regulatory approach in a way that not only protects but also reflects tribal cultures and also shows how they are different from the dominant culture.

As a point of departure, the meaning of "different" in this context should be clarified. In his discussion of tribal courts in *Braid of Feathers*, Frank Pommersheim discussed what he calls the "dilemma of difference" for tribal courts.[21] He pointed out that the courts run by tribal communities "do not exist solely to reproduce or replicate the dominant canon appearing in state and federal courts. If they did, the process of colonization would be complete. …"[22] Pommersheim, like many others, is concerned about the possibility of maintaining tribal differences through the use of quasi-autonomous structures within the contours of the United States. Within the context of environmental regulation, these differences quickly become issues that affect the relative health not just of tribal cultures but also of Indians themselves, who often bear an inordinate amount of environmental risk.

In addition, the "dilemma of difference" in this sense is also a problem of recognition. In a system of unequal pow-

er, cultural differences and concepts like justice or environmental management have to be understood as features that occur in a system in which differences are not usually desired or communicated. According to Pommersheim, in the American federalist system, the "federal record evinces a tolerance of similarity rather than dissimilarity,"[23] and this makes it difficult for tribal courts and governments to define spaces for cultural differences. Therefore, to be protective of tribal cultural differences, tribal sovereignty cannot just mean that tribes are just another partner in the federal system, the dominant culture must also recognize that tribal governments can form the basis of a different civic community and a different sense of the public good. This idea can be seen as dangerous to members of the dominant culture when non-Indians are subject to this different sense of the public good; for example, the U.S. Supreme Court has repeatedly shown that it is not comfortable allowing tribal police powers over non-Indian residents within reservations because these individuals are not full participants in the political process that takes place on Indian reservations. Moreover, states often see tribal sovereignty claims as threats to their own territorial sovereignty, as demonstrated by the numerous challenges to the legality of environmental programs that tribes propose or conduct.

Therefore, the basic challenge for tribal governments is to maintain "separateness" by holding on to a difference that is recognizable and acceptable to the dominant culture and its institutions as well as to tribal citizens within the minority culture. An example of where the TAS structure might shortchange tribal difference is in the arena of environmental risk assessment. Even though risk assessments come out of a different regulatory context, they easily represent the Faustian cultural bargain that tribes face in exerting regulatory control in a system that is not of their making.

Many critics of environmental risk assessment have pointed out that the science used in risk assessments does not protect cultural minorities very well for a variety of reasons—one of the key reasons being that some cultural minorities access resources in the environment differently than both the mainstream culture and the scientists and policy-makers conducting the risk assessments do.[24] Since the late 1990s, there has been a flurry of activity within both the EPA and among American Indian nations to address this problem, and two different but sometimes overlapping approaches have developed to address the problems of cross-cultural risk assessment. The following discussion briefly explores how the EPA and tribal nations have shaped these approaches.

One approach to solving the problems of cross-cultural risk assessment the EPA and the tribal nations have explored is to make science more responsive to the ways that Indians actually access resources in the environment today and the way they have done so in the past. Instead of using aggregate models from the entire American population for something like fish consumption, this approach would have the EPA and tribal scientists measure the actual intake of fish by tribal people who live off the resources on their land. I believe this approach is very similar to the TAS approach for setting standards; it modifies the existing structure of science and regulation and places it into a tribal context.

The other approach is much more culturally relevant but harder to define in a scientific manner from the EPA's perspective and clearly does not fit into the regulatory approach of cooperative federalism. This approach to solving the problem of cross-cultural environmental risk assessment, defined by some as the "health and well-being" model, would allow for and encourage tribal nations and the EPA to redefine health in culturally relevant terms. Therefore, a risk assessment would not just emphasize the potential number of deaths caused by cancer, for example, but would look at the risks cancer poses to a healthy, culturally defined lifestyle in each tribal nation. This approach has the potential to allow tribal nations to define health in much broader terms than simply death rates tied to cancer and would include cultural indicators, such as access to a healthy traditional diet, ability to participate in ceremonies, the passing down of traditional knowledge, and so forth. Unlike the classic risk assessment paradigm, the new one based on health and well-being addresses tribal cultural differences. The model is driven by tribal priorities, whereas traditional risk assessment is driven by the EPA's regulations and measurements of risk.[25] The health and well-being paradigm also focuses on the health of communities, as determined by the tribes: hence, a healthy community encompasses all aspects of tribal relationships and tribal priorities that affect a community.[26] This paradigm does not simply focus on a certain aspect of the environment; it takes a holistic approach so that the interconnectedness of all aspects of a community is respected. This approach to risk assessment is also an approach to environmental regulation that surely goes beyond the TAS approach to shared regulatory control. The health and well-being paradigm is framed around tribal concerns and definitions of health, and there is the potential that a regulatory program could be built up around these more culturally defined parameters, not on the concepts and rules that define federal standards and cooperative federalism.

This article has presented only a short overview of the problems and prospects of tribal environmental sovereignty. The essay needs to conclude with the gentle reminder that many tribal lawyers, policy-makers, and environmental professionals deal with these issues on a daily basis and still continue to come up with creative responses in the face of unfair power relationships and a limited number of resources. The health and well-being paradigm described above, for example, has come out of tribal environmental managers' attempts make risk assessment more reflective of tribe members' way of life and the tribal community's understanding of what makes a healthy human being. We should all be mindful that the TAS approach to cooperative federalism may drown out these more culturally appropriate approaches to tribal environments; therefore, we should all do whatever we can to support this work. **TFL**

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Endnotes

[1]In 1986, TAS amendments were enacted for the Safe Drinking Water Act (42 U.S.C. § 300f–300j-26 (2000), TAS provisions at § 300j-11) and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9601–9675 (2000), TAS provisions at § Sec. 9626, *see also* natural resources damages provisions in Sec. 9607). Clean Water Act TAS amendments were enacted in 1987 (33 U.S.C §§ 1251–1387 (1988), TAS provisions at § 1377). Clean Air Act TAS amendments were enacted in 1990 (42 U.S.C. § 7401–7671q (2000), TAS provisions at § 7601(d)). The major environmental federalism statute administered by the EPA that has not been amended to include TAS provisions is the Resource Conservation and Recovery Act (also known as the Solid Waste Disposal Act) (42 U.S.C. §§ 6901–6992k), which established the framework for regulating municipal solid waste and hazardous waste. In addition to statutes administered by the EPA, there are a number of other federal statutes that treat tribes in a manner comparable to states, including the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. § 1221 and various sections to 1328 (2000), tribal provisions at § 1235(k)) and the National Historic Preservation Act (16 U.S.C. §§ 470–470x-6 (2000), tribal provisions at § 470a(d)).

[2]*See* David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573 (1996); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 Yale L.J. 1 (1999); and Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, A Theory that Has No Place in the Realm of Environmental Law*, 13 Tulane L. Rev. 1. (2002).

[3]U.S. Environmental Protection Agency, Office of Water, "Treatment of Tribes in the Same Manner as States/Program Approval Matrix" (1998).

[4]U.S. Environmental Protection Agency, Office of Science and Technology, "Indian Tribal Approvals for the Water Quality Standards Program" (2006).

[5]Robert V. Percival, et al., Environmental Regulation: Law, Science, and Policy 118 (New York, Little, Brown, and Company 1996).

[6]William Galloway, *Tribal Water Quality Standards Under the Clean Water Act: Protecting Traditional Cultural Uses*, 17 Stan. Env. L. J. 3.

[7]Jace Weaver, ed., Defending Mother Earth: Native American Perspectives on Environmental Justice 116 (Maryknoll, N.Y., Orbis Books 1996).

[8]*City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997).

[9]Amy Quandt, *American Trucking Associations, Inc. v. United States Environmental Protection Agency: A Speedbump Along the Highway of Judicial Deference to Agency Determinations*, 11 Vill. Envtl. L.J. 425, 426 (2000).

[10]Stephen Breyer and Richard Stewart, Administrative Law and Regulatory Policy: Problems, Text, and Cases 1029 (3rd ed., New York, Little, Brown, and Company 1992).

[11]Dean B. Suagee and John P. Lowndes, *Due Process and Public Participation in Tribal Environmental Programs*, 13 Tul. Envtl L.J. 8, 20 (1999).

[12]*Id.* at 22.

[13]*Id.*

[14]Frickey, *supra* note 2, at 24.

[15]492 U.S. 408 (1989).

[16]Bruce Williams and Albert Matheny, Democracy, Dialogue, and Environmental Disputes: The Contested Languages of Social Regulation 34 (New Haven, Conn., Yale University Press 1995).

[17]Allison M. Dussias, *Asserting a Traditional Environmental Ethic: Recent Developments in Environmental Regulation Involving Native American Tribes*, 33 New Eng. L.Rev. 653, 659 (1999).

[18]Taiaiake Alfred, Peace Power Righteousness: An Indigenous Manifesto 47 (New York and London, Oxford University Press 1999).

[19]40 C.F.R. § 131.8 (1995).

[20]Daniel I.S.J. Rey-Bear, *The Flathead Water Quality Standards Dispute: Legal Bases for Tribal Regulatory Authority Over Non-Indian Reservation Lands*, 20 Amer. Indian L.Rev. 151, 186.

[21]Frank Pommersheim, Braids of Feathers: American Indian Law and Contemporary Tribal Life (Berkeley, University of California Press 1995).

[22]*Id.* at 99.

[23]*Id.* at 100.

[24]Robert Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 103 U. of Ill. L.Rev. 1 (1996); Christine O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 Stanford Env. L.J. 3 (2000).

[25]Tribal Science Council, "Health and Well-Being Paradigm Development Meeting: Draft Summary 9" (U.S. Environmental Protection Agency, Tulalip Indian Reservation) (2004).

[26]*Id.*