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**Dimensions of Environmental Justice in Indian Country and Native Alaska
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Dimensions of Environmental Justice in Indian Country and Native Alaska

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Abstract

American Indian and Alaska Native tribal communities differ from other environmental justice (EJ) communities in several ways. Many of the differences can be seen as implications of the legal status of Indian tribes under federal law. Tribes have the legal right to be different, including the collective right of tribal self-government within their reservations. In addition to differences derived from their legal status, tribal communities also differ from other EJ communities in ways that reflect their cultural ties to the environment as indigenous peoples. If the key factor in applying the term EJ to a conflict is disproportionate impacts on a minority or low-income community, then almost any conflict with environmental impacts affecting a tribal community can be labeled an EJ conflict – if you look closely you are bound to find impacts that affect tribal people differently from the way they affect other groups. Just using the EJ label does not help us find solutions, nor does it necessarily help in building alliances between tribal communities and the other people and organizations that comprise the EJ movement. This paper explores the concept of EJ in Indian country and Native Alaska by applying an analytical framework featuring four dimensions of justice: distributive, procedural, corrective and social justice. By drawing on a few historical and contemporary examples of environmental controversies that affect tribal communities, the paper tries to invest these abstract terms with meaning in ways that convey the range of concerns that tribal people have for justice and for the protection and restoration of the environment. Many more examples could have been offered. The paper suggests that the use of these dimensions of justice can be constructive in fashioning solutions to EJ controversies. The analysis identifies a few instances in which persons in the EJ movement, or persons writing for the benefit of the EJ movement, apparently have a blind spot with respect to tribes. The paper expresses the author's hope that the analytical framework presented will contribute to better understanding among non-Native people in the EJ movement about the range of EJ issues that tribal communities face, and the hope that better understanding will contribute to more constructive and durable alliances.

Introduction

This essay addresses the meaning of the term “environmental justice” as applied to matters involving American Indian and Alaska Native tribes.¹ This is not a simple topic. As a term with roots in a social movement, the term “environmental justice” (EJ) is used by community activists and people in grassroots organizations without a consensus definition. The Environmental Protection Agency (EPA) has coined a definition that has become something of a standard, although this definition is not free of issues. Academicians have tried to clarify the term's content, even while recognizing that, as a grassroots term, grassroots people cannot be expected to adhere to academicians' quests for theoretical consistency. Regardless of whether they agree on what it would mean to actually realize environmental *justice*, community-based activists know environmental *injustice* when they see it. Cases of environmental injustice have generally involved communities comprised mainly of racial or ethnic minorities and/or low-income families that have suffered disproportionate impacts from governmental decisions that choose, or allow private parties to choose, their communities as sites for polluting activities that majority and/or more affluent communities have the political power to resist.

¹ I have also addressed this topic in earlier works, including: *NEPA in Indian Country: Compliance Requirement to Decision-Making Tool*, in JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 225 (Kathryn M. Mutz, et al., eds, 2002); *The Indian Country Environmental Justice Clinic: From Vision to Reality*, 23 VT. L. REV. 567 (1999); and *Turtle's War Party: An Indian Allegory on Environmental Justice*, 9 J. ENVTL. L. & LIT. 461 (1994); for additional sources on environmental justice as applied to Indian tribes, see generally CLIFFORD RECHTSCHAFFEN AND EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATION 421-60 (2002).

Community-based EJ activists and the scholars who write about this subject also seem to agree that American Indian and Alaska Native communities should be included in the environmental justice movement. Quite a number of American Indian and Alaska Native individuals have been prominently active in the EJ movement, nationally and in site-specific conflicts. Attention to concerns of tribal communities has been institutionalized in the National Environmental Justice Advisory Council (NEJAC) through the establishment of the Indigenous Peoples Subcommittee (IPS). The Environmental Protection Agency (EPA) has included tribal governments as eligible applicants for its EJ grant programs, and a number of tribes have received grants. The fact that some of the people in the EJ movement, and some of the organizations and institutions in which they do their work, now routinely call attention to the need to think about the concerns of American Indian and Alaska Native tribal communities does not, however, always result in actually dealing with these concerns in appropriate ways. My experience leads me to believe that dealing with issues of concern to tribal peoples must be almost as hard for many people in the EJ movement as it is for most people in the larger American society. Most people in the larger society seem to have a blind spot when it comes to Indian tribes – and if they do think of tribes at all they are not sure what to think. My experience also leads me to believe that, while many people in the EJ movement are genuinely interested in learning about tribal concerns and finding ways to deal with these issues that are acceptable to tribal peoples, a blind spot with respect to tribes is a common affliction.

Part I of this essay offers a few comments on how Indian tribes, including Alaska Native villages, are different for purposes of an EJ analysis. Part II takes note of EPA’s more-or-less “standard” definition of EJ. Part III summarizes the kinds of settings in which EJ claims tend to arise. Part IV introduces four “notions” or “: dimensions” of justice that seem relevant for analyzing EJ issues in Indian country and Native Alaska. Parts V, VI, VII, and VIII apply offer some observations on the application of these dimensions to EJ claims involving tribal communities.

I. Indian Tribes Are Different

American Indian tribal communities² differ from other environmental justice (EJ) communities in several ways. They are also different from one another, and it is important to note that generalizations may not be accurate when applied to particular tribes. There are about 560 federally recognized tribes, including some 220 in Alaska.³ Each tribe has its own relationship with the federal government, shaped in part by legal documents that may include treaties, statutes and Executive orders. Many tribes have relatively large reservations and thousands of tribal members; many more have small reservations and less than a thousand members.⁴ Quite a number do not have reservations, including all but one of the Alaska tribes. There are also a number of groups that are not federally-recognized as tribes, of which some are recognized by a state, some are engaged in seeking federal recognition, and some were once federally recognized but were “terminated” in the 1950s. The concerns of non-federally recognized groups may raise a range of EJ issues, but these issues are beyond the scope of this essay.

Many of the differences between tribes and other EJ communities can be seen as implications of the legal status of Indian tribes under federal law. Tribes have the legal right to be different. They have the right to be culturally distinct from the larger American society, and they have the collective right of tribal self-government within their reservations, as sovereigns that are distinct from the states. One of the basic lessons of the history of federal policies for relations with Indian tribes is that the right of tribal self-government is critical for the survival of tribes as distinct cultures.

² As a member of a federally recognized tribe, the Cherokee Nation, I have a strong personal preference for the term “American Indian” or “Indian” rather than “Native American,” mainly because the term “Indian” is defined in federal law by reference to membership in a tribe. For further discussion of these terms *see generally*, FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 1-46 (1982 ed.)

³ Bureau of Indian Affairs, Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs. 67 Fed. Reg. 46328 (July 12, 2002) (listing 562 federally recognized tribes).

⁴ *See generally* AMERICAN INDIAN RESERVATIONS AND TRUST AREAS (compiled and edited by Veronica E. Velarde Tiller, Tiller Research Inc., Albuquerque, NM, 1996).

The right of tribal self-government distinguishes Indian tribes from other EJ communities. While other EJ communities must compete with other constituencies for the attention of governmental officials, tribes can deal with environmental problems through enacting and enforcing laws. At least in theory. In reality, as noted later in this essay, tribes face a unique array of limits on their sovereign powers.

The tribal right of self-government is particularly relevant in the realm of environmental law. Federal environmental statutes are administered primarily by states in cooperation with EPA. This approach is often called “cooperative federalism.” In the 1970’s, when it enacted the first generation of federal environmental laws, Congress did not consider how these laws would be carried out within Indian reservations. States were charged with leading roles, while tribes were left out of the process. In the mid-1980s, Congress began to rectify this oversight by enacting amendments to some of the major environmental laws authorizing tribes to develop environmental protection programs like those of the states. Although the legal framework is largely in place for tribes to become partners in cooperative environmental federalism, and quite a few tribes have taken on some of the roles of states pursuant to the federal statutes, most tribes have not, for a variety of reasons, some of which are discussed later.

In addition to differences resulting from their legal status, tribal communities also differ from other EJ communities in ways that reflect their cultural ties to the environment. Tribal cultural practices and religious beliefs are rooted in the Earth and woven into the web of life. Tribal members use wildlife and plants and other natural resources in ways that are different from other ethnic groups that exist within the American society. They use places in the natural world for religious and cultural activities, and their oral traditions include stories about these places. Like other cultures, tribal cultures are dynamic, and most Indian people do not live the way their ancestors did, but traditional cultural and religious beliefs and practices are still important components of the identities of contemporary Indian people. These beliefs and practices, and the traditions in which they are grounded, help contemporary Indian people understand the ways in which human societies should relate to the rest of the web of life. While it is true that some immigrant minority populations have roots in similar cultural traditions from other parts of the world, it is also true that American Indian tribal cultures are indigenous to the United States with cultural roots in this land, and this is a significant difference from other minorities.

Alaska Native tribes are different from tribes in the “lower forty-eight.”⁵ There are some cultural differences, which is to be expected since the environments that Alaska Natives live in are different. (Anthropologists generally do not classify Aleuts and Eskimos as Indians, although they are so classified in federal law.) Alaska Natives generally rely more on hunting, fishing and trapping for meeting their basic human needs such that their material culture – often called “subsistence” – is a core aspect of tribal identity for Alaska Natives to a greater degree than for most tribal communities in the lower forty-eight. The most significant differences, however, are found in the way they are treated in federal law. In 1971, Congress passed a law that treats tribes in Alaska differently from tribes in the lower forty-eight, the Alaska Native Claims Settlement Act (ANCSA).⁶ Under ANCSA, Alaska tribes (with one exception) no longer have “reservations.” Rather, most of the land that Alaska Natives own is held by regional corporations; Alaska Native villages, which generally are also considered federally recognized tribal governments, have much smaller land holdings than the regional corporations, and the village holdings are not formally designated as “reservations.” In interpreting ANCSA, the U.S. Supreme Court has cast major doubt on the extent to which Alaska Native tribes have territorial jurisdiction.⁷ One implication of this is that the interests of Alaska Natives are largely subject to the legislative power of the state government, which is controlled by the non-Natives who live in the state’s few urban areas. As such, Alaska Native tribes may have more in common with other EJ communities than tribes in the lower forty-eight – decisions affecting their environmental interests are made by governmental entities that are largely beyond their control. In this

⁵ See generally, Cohen, *supra* note 2, at 739-70.

⁶ Pub. L. No. 92-203 (codified as amended at 43 U.S.C. §§1601 -1628).

⁷ *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) (holding that a tribe’s former reservation, now owned in fee by the tribal government, is not “Indian country” and so the tribe authority, as an aspect of its inherent sovereignty, to enact and enforce a business activity tax). See Dean B. Suagee, *Cruel Irony in the Quest of an Alaska Native Tribe for Self-Determination*, 13 NATURAL RESOURCES & ENVIRONMENT 495 (Winter 1999).

essay I have included a few comments specifically focused on Alaska Native tribes, but I want to acknowledge that I have barely scratched the surface of EJ issues affecting Native Alaska.

II. The Meaning of Environmental Justice

Many definitions have been offered for use by the EJ movement, but for purposes of this essay, it will be sufficient to note the definition used by the Environmental Protection Agency (EPA), the federal agency that has taken the lead role among federal agencies in drawing attention to EJ issues.

“Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. **Fair treatment** means that no group of people, including a racial, ethnic, or a socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies. **Meaningful involvement** means that: (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public’s contribution can influence the regulatory agency’s decision; (3) the concerns of all participants involved will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.”⁸

We have all seen this definition before, sometimes with slight variations. For example, the final sentence, explaining what “meaningful involvement” means, is relatively new.⁹ This definition is aspirational, in that it describes a phenomenon that does not yet exist, but that we as a society aspire to achieve, in the apparent hope that we will know it when we see it. The two key concepts – fair treatment and meaningful involvement – can be seen as proactive standards intended to avoid repetition of the pattern that gave rise to the EJ movement, that is, minority and low-income communities suffer disproportionate environmental burdens while more politically powerful communities enjoy more of the benefits from the activities that cause the burdens.

What about the broadly inclusive wording of the second sentence? Even if our aspiration is that “no group of people . . . should bear a disproportionate share of . . . negative environmental consequences,” if negative consequences are proposed to be borne by a predominantly white and affluent community, can such a group legitimately raise an EJ claim? Professors David Getches and David Pellow argue that the EJ movement should focus on “championing the cause of communities for whom inequity in the allocation of benefits and burdens of environmental policy intensifies the social or economic disadvantages they already suffer.”¹⁰ They would include low-income communities, communities of color, and tribal communities, and leave open the possibility of including other communities on a case-by-case basis. In this essay, I use the term “EJ communities” as a generic term for such communities, noting that EPA also has used this term to narrow the application of its broadly stated definition of EJ.¹¹

⁸ This definition appears on the EPA Compliance and Enforcement website, at: www.epa.gov/compliance/environmentaljustice/ (visited Sept. 18, 2002).

⁹ This final sentence was not included EPA’s “Final Guidance for Incorporating Environmental Justice Concerns into EPA’s NEPA Compliance Analyses” (April 1998), available at: www.epa.gov/compliance/resources/policies/ej/index.html (visited Sept. 14, 2002). Nor does this sentence appear in EPA’s “Final Guidance for Consideration of Environmental Justice in Clean Air Act 309 Reviews” (July 1999), also available at: www.epa.gov/compliance/resources/policies/ej/index.html (visited Sept. 14, 2002).

¹⁰ David H. Getches and David N. Pellow, *Beyond “Traditional” Environmental Justice*, in JUSTICE AND NATURAL RESOURCES 3, 26 (Kathryn M. Mutz, et al., eds. Island Press, 2002).

¹¹ As the term has been used by EPA, to be an “environmental justice community” the “residents must be a minority and/or low income group; excluded from the environmental policy setting and/or decision-making process; subject to a disproportionate impact from one or more environmental hazards; and experience a disparate implementation of environmental regulations, requirements, practices, and activities in their

For purposes of this essay, I assume that tribal communities generally fit within the term “EJ communities.” Although being a tribal member has been described as a “political” rather than a “racial” classification,¹² Indians are generally treated as a minority, and most reservation communities are low-income. Most people who use the term “communities of color” surely intend to include tribal communities, though many tribal members (myself included) have considerably less color than others. The EPA definition of “EJ communities” includes a clause, however, that could operate to exclude tribal communities from inclusion in the term – an “EJ community” is “excluded from the environmental policy-setting or decision making process.”¹³ If a tribe as a governmental entity sets the policy or makes the decision, then is the tribe as a community an “EJ community”?

Good question. I could respond by saying that it is largely hypothetical. As discussed later, the federal environmental regulatory and enforcement infrastructure in most of Indian country is so underdeveloped that Indian reservations experience a kind of “structural” disproportionate impacts. When tribes exercise governmental authority to deal with environmental issues, their actions should be understood in this historical context of having been left out of “cooperative environmental federalism” for so long that it is really hard to catch up. Or I could respond by saying that the question underscores the difference between tribes and other EJ communities, a difference that makes it hard for many people in the EJ movement to figure out how tribes fit.

III. Settings in Which EJ Claims Arise

The aspirational definition of EJ quoted earlier may be necessary in order to include the range of settings in which EJ claims have been raised. In the early years of the movement, EJ claims arose mostly in the context of opposition by communities of color to the siting of environmentally undesirable land uses such as hazardous waste facilities, landfills, and industrial activities that discharge various kinds of pollutants into the environment.¹⁴ These cases generally involve decisions by state or local government agencies, with jurisdiction over land use planning or facility siting. They frequently also involve one or more permitting decisions by EPA and/or state environmental regulatory agencies. Communities that were already burdened with more than their fair share of environmental degradation rose up to resist additional insults.

But EJ is now about a lot more than putting a stop to one more unwanted land use. As grassroots efforts grew into a national movement, and as activists and scholars began to write about the movement, people began looking beyond site-specific permitting decisions and raised concerns about other aspects of regulatory processes. Some of the other contexts in which EJ claims have been raised include: standard setting; enforcement of existing environmental laws; land use planning; clean-up of contaminated properties; risk assessment; the design of regulatory programs; alternatives to traditional “command and control” regulation, such as market-based incentives; inter-agency and/or inter-governmental collaborative decision-making initiatives; and sustainable development as a way to avoid environmentally undesirable industrial development. As the EJ movement has expanded the range of settings in which it is engaged, advocates have necessarily expanded the range of issues included within EJ claims.

For all of the settings listed in the preceding paragraph, there are nuances peculiar to Indian country and Alaska Native communities. To elaborate on these nuances is beyond the scope of this essay. Some of these nuances are rather obvious implications of the status of tribes as governments with a rightful role in

communities.” From a document captioned “What is Environmental Justice?”, previously posted on an EPA website, but apparently no longer available on the internet. *Quoted in* Robert M. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681, 10683, n.8 (Sept. 2000). *See also* Suagee, *NEPA in Indian Country*, *supra* note 1, at 247, n. 8.

¹² *Morton v. Mancari*, 417 U.S. 535 (1974). *See generally* David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 U.C.L.A. L. REV. 169 (1991); Carole Goldberg-Ambrose, *Not “Strictly” Racial: A Response to “Indians as Peoples,”* 39 U.C.L.A. L. REV. 169 (1991).

¹³ *See* note 11, *supra*.

¹⁴ *Rechtschaffen and Gauna*, *supra* note 1, at 3-5, 187 (2002).

cooperative environmental federalism; some are functions of cultural differences between Indian people and other populations in this country;¹⁵ and to try to explain some nuances would require an exploration Supreme Court case law.¹⁶

IV. Dimensions of Justice

If we can assume that a matter in which a tribe is engaged does present an EJ claim, and if we can assume that the tribe is an EJ community, does this help us know how to respond to such a claim?

In searching for resolutions to EJ matters involving tribes, I think that the analysis offered by Professor Robert Kuehn is helpful.¹⁷ He suggests that it will help “to advance our understanding of environmental justice by disassembling the term into the four traditional notions of ‘justice’ that are implicated by allegations of environmental injustice” – distributive justice, procedural justice, corrective justice, and social justice.¹⁸ I prefer to refer to these as “dimensions” of justice rather than “notions.”

The concept of distributive justice means looking at the ways in which the benefits and burdens of an action are distributed among different groups or communities. This dimension of justice is implicated in the siting and permitting cases that attracted most attention in the early years of the EJ movement, and which, of course, are still common – cases in which affluent white communities get most of the benefits while low-income and minority communities bear most of the environmental burdens. This dimension is reflected in the “fair treatment” component of EPA’s standard definition, i.e., that no group should bear a disproportionate share of environmental burdens.

The procedural dimension of justice focuses on the way decisions are made. The focus is not so much the decision itself, but rather on how the people who are affected by these decisions are involved in the process. Under this dimension, environmental justice requires that low-income and minority communities must have a right to participate in the decision-making process. This corresponds to the “meaningful involvement” component of EPA’s “standard” definition.

Corrective justice means that when wrongs are done, there ought to be a way for things to be made right, and that the people who are responsible for causing the damage ought to be responsible for correcting the problem. Superfund (Comprehensive Environmental Response, Compensation and Liability Act) can be seen as an example of federal environmental law that seeks to achieve corrective justice in environmental contexts.

A fourth dimension of justice is social justice, the dimension of justice that motivates us to seek a more just society in which the needs of all people are met. In one sense, this social justice dimension expands the concept of EJ to include a broad range of racial, social and economic issues; in another sense, this dimension reflects recognition that EJ communities see this broad range of issues as interrelated.

¹⁵ See, e.g., Stuart Harris and Barbara Harper, *Environmental Justice in Indian Country: Using Equity Assessments to Evaluate Impacts to Trust Resources, Watersheds and Eco-Cultural Landscapes* (undated), a paper posted on the web site of the International Institute for Indigenous Resource Management: www.iiirm.org (visited Sept. 22, 2002). (Click on “publications,” then on “environmental justice.”)

¹⁶ See, e.g., *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (upholding the application of a tribal zoning law to privately-owned land in the “closed” area of a reservation, but striking it down in the “opened” area, in decision without a majority opinion). For a critical commentary by a law professor, see Joseph William Singer, *Sovereignty and Property*, 86 NW. L. REV. 1 (1991). See also references cited in note 37, *infra*.

¹⁷ Robert M. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681 (Sept. 2000).

¹⁸ Kuehn, *supra* note 11, at 10683. Professor Gary Bryner has offered a similar set “conceptual frameworks” with a substantial degree of overlap with Professor Kuehn’s. See Gary C. Bryner, *Assessing Claims of Environmental Justice: Conceptual Frameworks*, in JUSTICE AND NATURAL RESOURCES, *supra* note 1, at 31. Professor Bryner’s five “frameworks” are: civil rights, distributive justice and ethics, public participation, social justice, and ecological sustainability.

These last two dimensions are not explicitly included in EPA's "standard" definition, but they should be recognized as part of what EJ is all about. In my view, the social justice dimension is particularly important – the quest for social justice in the environmental context leads to the concept of sustainable development. If development really is ecologically sustainable development, then it does not cause the kinds of environmental damage that the politically powerful fight to keep out of their neighborhoods. Rather than arguing about which communities get stuck with bearing the burdens while other communities get most of the benefits, environmentally sustainable development has the potential to lift everybody.

Professor Kuehn suggests that "This taxonomy offers the opportunity for greater awareness of what justice means to impacted people of color and lower income communities and to help them attain the livable communities and improved environmental conditions that are the shared goals of all Americans."¹⁹ In the remainder of this essay, I take note of a number of issues facing tribal communities and try to show how these are EJ issues, with reference to these four dimensions of justice.

V. Distributive Justice Issues and Tribal Communities

If we assume that tribal communities generally are "EJ communities," and if the existence of disproportionate impacts is the key factor in treating something as an EJ matter, then practically any matter resulting in environmental impacts experienced by a tribal community can be described as an EJ matter. Of course, merely using the EJ label does not help us know what to do about these situations. But it may help to take a closer look at some examples of disproportionate impacts.

A. Disproportionate Impacts Because of Basic Cultural Differences

If the key factor in applying the term EJ to a conflict is disproportionate impacts on a minority or low-income community, then almost any conflict with environmental impacts affecting a tribal community can be labeled an EJ conflict – if you look closely you are bound to find impacts that affect tribal people differently from the way they affect other groups. Any activity that affects the environment has the potential to cause impacts on a tribal community that are different from impacts suffered by other communities because of the ways in which the natural world is important to tribes for cultural and religious reasons. As noted earlier in this essay, this kind of disproportionate impact reflects a basic difference between tribes and other minority groups in this country. This distinction applies both within and beyond reservation boundaries, and it applies to tribes that do not have reservations. Some tribes, and some people within any given tribe, are more dependent than others on traditional cultural practices for their basic survival needs. Traditional religions have more practitioners in some tribes than in others. But for all American Indian and Alaska Native people, traditional cultural and religious practices are an important aspect of tribal identity. Impacts on culturally important biological communities or sacred places are bound to affect tribal communities differently.

Many kinds of examples could be offered, but for this essay I simply note that many examples were provided to the NEJAC during its meeting in December 2001, which focused on the EJ implications of fish consumption.²⁰ The "draft final" report of that meeting includes numerous recommendations related to the concerns of tribes, although as of the date that report has not yet been released.

How should such disproportionate impacts be addressed? They can't be, of course, unless they are acknowledged and considered. Fortunately for tribes, there is a federal law that establishes a process through which tribes can bring these kinds of concerns to the attention of federal agency decision-makers, the National Historic Preservation Act (NHPA).²¹ Indian tribes have statutory rights under NHPA to be consulted by federal agencies when a proposed federal action may affect a place that holds religious and

¹⁹ Kuehn, *supra* note 11, at 10703.

²⁰ NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, FISH CONSUMPTION REPORT, FINAL DRAFT (March 2002) (Developed after deliberation at the NEJAC Meeting of December 3-6, 2001, in Seattle, Washington) (distributed to NEJAC members by email on March 15, 2002, but, as of this date, not yet released to the public).

²¹ 16 U.S.C. §470 *et seq.*, specifically §470a(d)(6).

cultural importance for a tribe, if the place is eligible for the National Register of Historic Places. Such places frequently are eligible for the National Register as “traditional cultural properties” (TCPs).²² This statutory duty of federal agencies applies regardless of where such a place is located, regardless of its location with respect to reservation boundaries. The regulations of the Advisory Council on Historic Preservation (ACHP) for the environmental review and consultation process mandated by NHPA section 106 establish specific procedural responsibilities for federal agencies to engage in consultation with tribes so that places that may be eligible for the National Register can be identified and evaluated and the effects of proposed federal actions assessed and mitigation measures devised.²³

Although the NHPA section 106 consultation process is, like NEPA, procedural and does not require specific outcomes, it can be useful in bringing tribal concerns into federal agency decision-making processes.²⁴ Like NEPA, NHPA section 106 applies to all federal agencies. In addition, NHPA section 106 applies to undertakings that are “subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.”²⁵ This apparently means that EPA has responsibility for NHPA section 106 compliance when states issue permits under EPA-approved or delegated programs.²⁶ Thus this law provides statutory authority for EPA to ensure that tribal concerns regarding historic properties are taken into consideration before states issue or renew permits.

Unfortunately for tribes, this law has not attracted much attention in the EJ movement or in the relevant offices and programs within EPA. Two recent documents prepared by the Environmental Law Institute (ELI) with financial support from EPA provide examples of the failure to consider the importance of the NHPA section 106 process for bringing tribal concerns into decision-making: *Opportunities for Advancing Environmental Justice: An Analysis of U.S. EPA Statutory Authorities*²⁷ and *A Citizen’s Guide to Using Federal Environmental Laws to Secure Environmental Justice*.²⁸ In my view, failure to include NHPA in

²² See NATIONAL PARK SERVICE, NATIONAL REGISTER BULLETIN 38: GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES (undated, but released in 1990), available on the National Park Service website at www.cr.nps.gov/nr/publications/bulletins.htm (visited Sept. 22, 2002).

²³ 36 C.F.R. part 800, published as revised final rules at 65 Fed. Reg. 77968 (Dec. 12, 2000). See also Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 37 U. COLO. L. REV. 413, 445-52 (2002).

²⁴ For addressing tribal concerns, in my view the NHPA section 106 process is much more effective than say, Title VI of the Civil Rights Act of 1964, which has attracted much attention from EJ advocates and scholars. Applying civil rights law to Indians is problematic in at least two basic ways: first, whether Indians fit within a protected class based on race, color or national origin; and second, whether tribes as recipients of federal financial assistance are subject to the same civil rights conditions as are other non-federal governments. With respect to the first issue, Indian and Alaska Natives are generally considered to fit within a protected class, and EPA’s regulations expressly include them. 40 C.F.R. §7.25. EPA’s “Draft Title VI Guidance” provides no direction on how to deal with issues relating to Indian as members of a protected class for Title VI purposes, other than to cite this section of the regulations. 65 Fed. Reg. 39650, 39699 (June 27, 2000). For other purposes, however, the Supreme Court has treated the classification “Indian” as political rather than racial. See note 12 *supra*. With respect to the second issue, EPA’s “Draft Title VI Guidance says that this issue “will be addressed in a separate document because the subject involves unique issues of Federal Indian law.” 65 Fed. Reg. at 39656. See generally Richard Monette, *Environmental Justice and Indian Tribes: The Double-Edged Tomahawk of Applying Civil Rights Laws in Indian Country*, 76 U. DET. MERCY L. REV. 721 (1999).

²⁵ 16 U.S.C. §470w(7).

²⁶ The ACHP has expressed the view that “delegated” authority for nonfederal governments to administer programs under federal statutes does not relieve a federal agency of its responsibilities, unless a statute expressly makes the nonfederal government responsible, and, at the time of its rulemaking document, ACHP believed that the only agency that had been so relieved of its duties was the Department of Housing and Urban Development. 65 Fed. Reg. at 77701.

²⁷ ENVIRONMENTAL LAW INSTITUTE, OPPORTUNITIES FOR ADVANCING ENVIRONMENTAL JUSTICE: AN ANALYSIS OF U.S. EPA STATUTORY AUTHORITIES (Nov. 2001).

²⁸ ENVIRONMENTAL LAW INSTITUTE, A CITIZEN’S GUIDE TO USING FEDERAL ENVIRONMENTAL LAWS TO SECURE ENVIRONMENTAL JUSTICE (2002) (herein *ELI Citizen’s Guide*).

these reports is not only a glaring omission but also a missed opportunity – consultation with tribes as required by NHPA offers federal agency officials the opportunity to make better decisions by making sure that tribal cultural and religious concerns are considered.

The Indigenous Peoples Subcommittee (IPS) of the NEJAC presented an overview of the requirements for consultation with tribes in its *Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making* (herein *IPS Consultation Guide*).²⁹ The IPS has included the development of guidance on NHPA consultation with tribes in its strategic plan. But, of course, the IPS is comprised of volunteers and has no budget. This is, more appropriately, a matter that should be addressed by offices within EPA that do have funding for the development of guidance documents.

B. Impacts from Off-Reservation Activities

Matters in which Indian tribes are subjected to environmental impacts as a result of decisions made by federal, state or local agencies relating to activities outside reservation boundaries tend to look like EJ matters involving more typical EJ communities. Many such cases have been brought to the attention of the NEJAC and /or described in the literature. I have not attempted to catalogue such cases in this essay. Typically a tribe's reservation is (or is proposed to be) affected by the permitting decision of a government outside the reservation, and the tribe and its members are relatively lacking in power to influence the decision. In some cases, the off-reservation activity affects (or would affect) places or resources outside the reservation that are important to the tribe for economic, cultural or religious reasons.

Even in these cases that look rather typical in terms of EJ issues, there are likely to be factors that render them different in important ways. If such cases may involve decisions by federal agencies that would result in impacts on within reservations, then, in addition to federal review processes such as those under NEPA and NHPA, the legal doctrine of the federal trust responsibility to Indian tribes will be implicated.³⁰ In many cases tribes also have rights outside of reservation boundaries secured in treaties and federal statutes, and such off-reservation rights may also render the trust responsibility applicable.

Another basic way in which such cases may differ from typical EJ cases is that the tribe may have assumed a role under one of the federal environmental statutes through which, like a state, it has some legal leverage that other EJ communities do not. For example, the efforts of Isleta Pueblo in New Mexico³¹ and the Sokaogan Chippewa Community in Wisconsin³² to use tribal water quality standards under the Clean Water Act (CWA) to assert some control over upstream sources of pollution fit this mold. Similarly, in a case that arose before the EJ movement, the Northern Cheyenne Tribe used the Clean Air Act to limit the siting of additional coal-fired power plants near its reservation in Montana.³³

Thus, while tribes are in some ways like other EJ communities when dealing with off-reservation activities, they also have some legal handles that are not available to other EJ communities (only a few of which have been noted here). Accordingly, when the interests of tribes converge with those of other EJ communities, and when the interests of tribes converge with the interests of mainstream environmental groups, opportunities arise for alliances and collaborations that can prove mutually beneficial. In fact, short-term

²⁹ NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL INDIGENOUS PEOPLES SUBCOMMITTEE, GUIDE ON CONSULTATION AND COLLABORATION WITH INDIAN TRIBAL GOVERNMENTS AND THE PUBLIC PARTICIPATION OF INDIGENOUS GROUPS AND TRIBAL MEMBERS IN ENVIRONMENTAL DECISION MAKING (Nov. 2000) (herein *IPS Consultation Guide*). This document is available on the EPA website (though the address changes from time-to-time), most recently on the Environmental Justice website at: www.epa.gov/compliance/environmentaljustice/index.html. (Click on NEJAC, then Subcommittees, the Indigenous Peoples Subcommittee.)

³⁰ The *IPS Consultation Guide*, *supra* note 29, provides some references on the trust responsibility doctrine.

³¹ *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996).

³² *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001).

³³ *Nance v. EPA*, 645 F.2d 701 (9th Cir. 1981).

collaborations have occurred in many cases. Blind spots about Indian tribes, however, seem to get in the way of realizing the potential benefits of genuine long-term alliances.

A recent publication produced by the Environmental Law Institute (ELI), with funding from EPA, provides a glaring example of such a blind spot in ELI's *A Citizen's Guide to Using Federal Environmental Laws to Secure Environmental Justice*.³⁴ While this document does include a few references to the fact that tribes can be treated like states for purposes of some statutes, chapter 2, captioned "Understanding the Players and the Laws," contains no mention of tribes whatsoever. Apparently, ELI does not regard Indian tribes as "players" in our system of federal environmental law – if tribes were players, they would have been mentioned in this chapter. ("Key players" listed include EPA and five other federal agencies, state environmental agencies, local governments, business groups, emergency planning or response officials, environmental groups and citizen groups.) Or if tribes are players, they must have such minor roles that citizens do not need to be bothered trying to understand their roles. This is the apparent implication. Had I had the time to seek comment from ELI on this point, I suspect they might have said that I read too much into this omission. I suspect the real reasons for the omission of any mention of tribes in chapter 2 of the ELI Citizen's Guide is simply that the authors of that document have a blind spot with respect to tribes and that EPA did not take the steps that it surely could have to avoid publishing this bit of documentary evidence of this blind spot. Regardless of why this blind spot made it into print, for people in the EJ movement who might want to collaborate with tribes, the ELI *Citizen's Guide* is practically useless.

Unfortunately, the ELI Citizen's Guide is but one example of a blind spot regarding tribes. Training materials on EJ developed for use by federal agencies are similarly flawed by such a blind spot.³⁵

C. On-Reservation Activities – Structural Disproportionate Impacts

As noted earlier, the legal framework is largely in place for tribal governments to become partners in cooperative environmental federalism, taking on responsibilities like those of the states. Most tribes, however, simply do not have the resources to build programs that are comparable to those of the states.

The differences between tribes and states warrant emphasis. Most tribes do not have sources of revenue comparable to the states, nor do they generally have ready access to the full range of federal financial and technical assistance programs for non-federal governments. Institutions that analyze the development of laws and other policy tools for use by states and local governments generally ignore the existence of tribal governments.³⁶ In addition, tribal governments are subject to a diabolical body of law made by the Supreme Court that renders the exercise of tribal sovereignty risky – if the interests of non-Indians would

³⁴ ENVIRONMENTAL LAW INSTITUTE, *A CITIZEN'S GUIDE TO USING FEDERAL ENVIRONMENTAL LAWS TO SECURE ENVIRONMENTAL JUSTICE* (2002) (herein "ELI Citizen's Guide"). This document was published approximately one and a half years after the NEJAC's *IPS Consultation Guide*, *supra* note 29, yet, while one other NEJAC document is cited, the *IPS Consultation Guide* is not. Personally, I think that its blind spot with respect to tribes, renders the *ELI Citizen's Guide* so fundamentally flawed that it ought to be recalled, revised, and published in a revised edition, and I think it ought to be taken down from the ELI web site while the blind spot is rectified.

³⁵ Environmental Justice Fundamentals Course Materials (Maresh Brainworks, Boulder, CO, Nov. 2001).

³⁶ E.g., NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *MODELS FOR CHANGE: EFFORTS BY FOUR STATES TO ADDRESS ENVIRONMENTAL JUSTICE* (a report for EPA, June 2002). In my review of this 195-page document, the only references that I found to tribes were in a few passages that were quoted from other sources. I realize that EPA did not ask NAPA to include tribal laws in its analysis, and I wonder if NAPA could have done so had it been asked. My point is simply that there is no federally-supported institution with a mission of helping tribes deal with these issues through the development of legislation. (The inside cover of the NAPA report says that it is an "independent, nonprofit organization chartered by Congress to improve governance at all levels: local, regional, state, national, and international." It does not expressly include "tribal," and I have not investigated to determine if it has ever focused on tribal governance, but in my experience, the omission of tribes from such a list generally indicates a blind spot.)

be affected, people who object to something that a tribe proposes can go to court and argue that the tribe has been implicitly divested of its governmental authority over the subject at hand.³⁷

There are several points here that could be discussed in detail, but which I will simply state as “givens”: (1) federal environmental regulatory laws are largely administered and enforced by states; (2) tribes generally lack the resources to develop and administer tribal programs under federal law; (3) tribes face a range of other challenges in developing regulatory programs; (4) states generally lack regulatory authority over tribes and tribal members and trust lands within reservations; (5) EPA has limited resources to devote to direct implementation of federal laws. Given these factors we find that the environmental regulatory infrastructure in most of Indian country is generally not comparable to what it is outside Indian country. In short, while it is now theoretically possible for tribes to be real partners in environmental protection, tribes were invited into the partnership about two decades after the states and not provided with enough resources to catch up.

I describe this situation as a “structural” inequality in the environmental protection infrastructure. Because of this inequality, almost any activity that causes environmental impacts in Indian country can result in disproportionate impacts on tribal communities, what I call “structural disproportionate impacts.” Tribal staff is stretched beyond their limits trying to build environmental protection programs. Violations of federal law may go unnoticed or unreported. In some cases, people may be attracted to do business in Indian country because they have the impression that federal laws do not even apply.

This comparative lack of environmental regulatory infrastructure is the most serious environmental justice issue confronting tribes and the people who live within reservations and in Alaska Native villages.

This is my opinion, but it is an opinion shared by many of my friends and colleagues who work in the general field of Indian country environmental protection. Drawing attention to this issue is a hard sell. EJ activists, like people in the mainstream environmental movement, just do not seem to find this issue very interesting. It involves the EPA budget – federal funding for tribal programs has increased dramatically in recent years, but does not come close to meeting the needs.³⁸ This issue involves the hard work of building environmental programs without enough staff or money, and trying to cope with the implications of the Supreme Court’s anti-tribal activism. Personally, I find this theater of action very interesting and many of the people who are engaged in it are admirable for their knowledge, skills, and dedication. As a combatant, however, I may just be too closely engaged to know how to make this issue interesting to others.

Moreover, these structural disproportionate impacts seem to fall into the blind spot of many people who probably ought to know better. Since many of the federal statutes authorize EPA to treat tribes like states, people engaged in environmental issues (such as EPA employees, institutions that prepare reports under EPA contracts,³⁹ and people involved in EJ groups or in mainstream environmental groups) who have not had much experience in dealing with tribes sometimes assume too much in the way of similarities. (This

³⁷ In another work I have discussed the Supreme Court’s theory of “implicit divestiture” of tribal sovereign powers as an EJ issue. See Suagee, *The Indian Country Environmental Justice Clinic*, *supra* note 1, at 591-93. This is a very important topic, but, unfortunately, must be treated as beyond the scope of this essay. See generally N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994); 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); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

³⁸ At this point I had hoped to insert a footnote with some summary information on EPA funding for tribal environmental programs. I do not have that information available, but perhaps I can put something together by the date of EJ Summit II. I have been advised that the Tribal Caucus of EPA’s Tribal Operations Committee has recommended funding for tribal programs at about 2.5 times the amount in the Administration’s proposed budget.

³⁹ E.g., the ELI and NAPA reports cited in notes 34, 35, *supra*.

permutation of America's blind spot might work something like this – people might be saying to themselves, “It never occurred to me how Indian reservations fit into environmental law, but if Congress says that tribes can be treated like states, then tribes must in fact be like states.”)

Acknowledging federal laws authorizing EPA to treat tribes like states does serve the purpose of reminding people that tribes are sovereign governments – it is useful for people engaged in the EJ movement and those who write about EJ matters to acknowledge the existence of these federal laws. Failing, however, to acknowledge the real differences between tribes and states and the comparative lack of regulatory infrastructure in Indian country does not contribute to dealing with this problem. Tribes need help in dealing with this problem, and we cannot expect people to be willing to help if they do not even realize that this problem exists.

VI. Procedural Justice Issues

Procedural EJ issues involving tribal communities may arise in different contexts. For purposes of this essay, it should be sufficient to identify two basic categories: (a) those arising from activities and governmental decisions outside of reservation boundaries; and (b) those arising within reservation boundaries.

A. Off-Reservation Activities

As with the distributive justice dimension discussed in the preceding section, procedural justice issues arising from off-reservation issues activities that affect tribal interests, either because the impacts affect off-reservation interests or because the impacts cross reservation boundaries, may resemble EJ matters affecting communities other than tribes. Some state and local government officials treat tribal members, as citizens of the states in which their communities are located, as part of their constituencies, but tribal communities generally have political influence comparable to that of other minority and low-income communities. In addition, tribal communities are often excluded from processes established under state law because states recognize that they lack jurisdiction; rather than directing state and local agencies to seek voluntary involvement of potentially affected tribes, state laws often simply ignore the existence of tribes. In some states, relations between tribes and state and/or local government entities is openly hostile.⁴⁰

As noted in Part V, when federal agency decisions are involved, tribes often have rights to be consulted, based on treaties, statutes, or the doctrine of the federal trust responsibility. I chose to discuss some of these tribal rights in the Part V because they are related to the differential ways in which environmental impacts affect tribal communities. Rights such as those established under NHPA and the ACHP regulations are essentially procedural rights, though, and might instead have been discussed under the heading of procedural justice.

Similarly, requirements under the regulations issued by the Council on Environmental Quality (CEQ) implementing NEPA to seek involvement of tribes in the preparation of environmental impact statements fit within the procedural dimension of EJ.⁴¹ With respect to NEPA, my experience suggests that some agencies (and some regional offices) do a better job seeking involvement from tribes than others. The CEQ regulations require efforts to invite tribes to participate in scoping and to comment on a draft EIS; tribes can also be cooperating agencies for the preparation of an EIS. Agencies have sometimes interpreted the regulations narrowly and left tribes out, for example, two provisions of the regulations speak of when effects may occur “on a reservation,”⁴² and a narrow interpretation leaves out tribes that do not have reservations, including all but one in Alaska. Probably more important than how well agencies seek

⁴⁰ I should also note that I have been informed of instances in one state in which a state agency routinely invites tribes to participate but they generally decline for the reason that their government-to-government relationship is with the federal government rather than with the state.

⁴¹ 40 C.F.R. parts 1500 – 1508. Provisions that expressly mention tribes are summarized in the *IPS Consultation Guide*, *supra* note 29, at 30-31.

⁴² 40 C.F.R. §§1501.6, 1508.5 (cooperating agencies), 1503.1(a)(2) (commenting on a draft EIS).

involvement from tribes in EISs is how well they do in providing tribes with information about actions taken on the bases of an environmental assessment (EA) and finding of no significant impact (FONSI). Gathering systematic information on this might well be impossible, since there is scarcely any oversight of agencies' use of EAs and FONSI for NEPA compliance, and since the vast majority of federal agency actions that are subject to the preparation of NEPA documents are done on the basis of an EA and FONSI.

In my view, CEQ, with assistance from EPA and the Bureau of Indian Affairs (BIA), should engage in some systematic consultation with tribes on their experiences with NEPA and their recommendations for improvement. After all, when Congress enacted NEPA more than 30 years ago, it apparently paid no attention to how this law would be applied in Indian country, and not much attention has been paid since then, by Congress, federal agencies, the environmental movement, or the EJ movement. Because NHPA compliance is often integrated with NEPA compliance, and since tribes have procedural rights under NHPA that are lacking under NEPA, I think that such a consultation project should address both statutes.

B. On-Reservation Activities

The on-reservation setting presents a range of challenging procedural EJ issues. If “meaningful involvement” of groups affected by a decision is an acceptable shorthand phrase to describe procedural EJ, there are at least four general contexts in which procedural EJ issues may arise within reservations. Categorized by who makes the decision, these contexts include decisions by: federal agencies, tribal governments, state or local government agencies, and private persons (who, in some cases, may believe that they are beyond the jurisdiction of any government). In this section, I offer observations on only the first two categories.

When a federal agency has decision making authority for an action within reservation boundaries, NEPA usually applies. In the preceding section I briefly noted some procedural issues relating to NEPA and off-reservation activities. There are also many NEPA issues relating to on-reservation activities. Many activities in tribal communities (within reservations and in other tribal areas such as Alaska Native villages) involve federal funding from agencies such as BIA, the Indian Health Service (IHS), or the Department of Housing and Urban Development (HUD), and federal funding triggers the applicability of NEPA. Since many kinds of “development” activities in Indian country involve a transaction relating to Indian trust land, the approval of the BIA is often necessary, even if there is no federal funding, and so NEPA review had become a kind of *de facto* permitting process on many reservations.⁴³ Since federal agencies are generally only responsible for their own NEPA compliance, it may not be surprising that there has never been any concerted effort by any agency to help tribes learn how to use the NEPA process, including how to prepare NEPA documents.⁴⁴ This is particularly important in the era of tribal self-determination in tribes in fact are responsible for preparing, or contributing to the preparation of these documents.

The consultation I suggested in the preceding section regarding NEPA in the context of off-reservation activities should include on-reservation activities as well. I think it would be particularly helpful to direct some attention to how to make the NEPA process work better for tribal communities, including how to use NEPA as a decision-making tool rather than just how to prepare documents that treat NEPA as a compliance requirement.

On-reservation procedural EJ issues can also arise in a context in which there is no federal action, but, rather, in which the tribal government is the real decision-maker. As with decisions made by other kinds of governments, this is not just one context, but rather an entire range of governmental activity including the enactment of legislation, environmental standard-setting (which may be done through rule-making), site-specific permit decisions, remediation of contaminated sites, enforcement actions, administrative appeals and judicial review. When tribes administer programs that are approved by EPA pursuant to federal statutes, tribes are generally subject to the same kinds of procedural and public participation requirements

⁴³ See Suagee, NEPA in Indian Country, *supra* note 1.

⁴⁴ I cannot cite documentary evidence to prove this negative assertion, and I would be happy to learn that I am wrong on this point, but I do not think that I am.

as are the states.⁴⁵ Of course, as noted earlier, tribes were invited into cooperative environmental federalism only recently and they do not have much experience in running these kinds of programs. Tribes could use more help than they are getting from the federal government. Tribes are often engaged in trying to create rather standard “command and control” programs, perhaps with more stringent standards, while state and federal agencies are working on various kinds of regulatory innovations. Tribal environmental programs could become laboratories for creativity in environmental protection, drawing from modern science and from tribal cultural traditions. But for this to happen, some of the people who are interested in regulatory innovation need to start working with tribes.

When tribes enact and enforce environmental and natural resource laws, they are not limited to doing so within the framework of federal environmental law. Rather, tribes can, and often do, operate programs on the basis of inherent sovereignty rather than pursuant to the federal statutes. Programs based on tribal sovereignty are generally not subject to the public participation and due process requirements found in EPA’s regulations. The legal framework for “meaningful involvement” in such programs is found in the Indian Civil Rights Act,⁴⁶ tribal constitutions, tribal legislation and tribal common law.

The NEJAC Indigenous Peoples Subcommittee has included within its strategic plan an objective to: “Identify how EPA might assist interested Tribes in identifying and addressing environmental justice issues arising within Indian country and of concern to Alaska Native villages . . .”⁴⁷ As an activity within this objective, the IPS plans to develop a work product that addresses issues of public participation appropriate for use by tribal governments. This is a subject that is rather controversial in Indian country. I personally think this is a very important issue, for a variety of reasons, some of which have to do with the Supreme Court’s recent ruling in Indian law. I am also afraid, however, that taking on this issue is more than can reasonably be expected from a voluntary advisory committee such as the IPS.

VII. Corrective Justice

Having already exceeded the space I was allocated for this essay, this part and the next are abbreviated. The corrective dimension of justice is nonetheless important from a tribal perspective. Tribal cultures have suffered from many kinds of environmental destruction over many generations, such as the decimation of species like buffalo and salmon that are of central importance to certain tribes. Many tribes have suffered from the flooding of their lands by massive dams, or from the poisoning of their water or agricultural lands. People in the lower forty-eight tend to think of Alaska as a pristine wilderness, but many of the tribes there are suffering high rates of cancers and other diseases as a result of toxic materials left behind by the Defense Department. Alaska Natives also suffer from the effects of persistent organic pollutants that tend to become concentrated in northern latitudes.

Approaching this variety of EJ claim using the corrective dimension of justice leads to a conclusion that the appropriate resolution of such matters is to restore the health of the environment on which these cultures depend. Powerful economic interests, no doubt, will resist corrective measures in many cases. Tribal communities and their advocates and allies can insist on articulating the corrective justice aspect of their claims while building the political coalitions that will likely be needed to achieve outcomes that are acceptable.

There is at least one basic example of the corrective dimension of justice that I believe must be noted. Much of the hardships that tribal governments face in trying to exercise their sovereignty result from recent decisions of the U.S. Supreme Court. One way of characterizing what the Court has done is to say that it has resurrected the federal government’s Indian policies of the “allotment” era (from about 1887 to 1934).⁴⁸

⁴⁵ See generally Dean B. Suagee and John P. Lowndes, *Due Process and Public Participation in Tribal Environmental Programs*, 13 TULANE ENVTL. L. J. 1 (1999).

⁴⁶ 25 U.S.C. §§1301 – 1303.

⁴⁷ NEJAC, Indigenous Peoples Subcommittee, Strategic Plan 2002-2004 (Final Discussion Draft 8/10/02) (unpublished), Objective 1.3, page 6.

⁴⁸ See generally Cohen, *supra* note 2, at 129-38; Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. STATE. L. J. 1 (1995).

This was an era in which the federal government sought to force Indian people to become assimilated in the American society. The laws of the allotment era had disastrous consequences for tribes, and these laws were repudiated by Congress. But the Supreme Court now seems intent on bringing these laws back to life, showing much greater concerns for the interests of non-Indians living within reservations than for the survival of the tribes as distinct cultures. If EJ activists and scholars are truly interested in issues of importance to the tribes, I suggest finding ways to support the Tribal Sovereignty Protection Initiative of the National Congress of American Indians,⁴⁹ which seeks the enactment of legislation by Congress to curb the activism of the Supreme Court in Indian law. People in the EJ movement should understand that this legislative campaign is so important to tribes that it can be expected to consume much of the attention of tribal leaders for as long as it takes to prevail.

VIII. Social Justice Issues—Sustainable Development

In the EJ context, I think that an analysis of the social justice dimension leads us to the need to promote environmentally sustainable economic development. Like other EJ communities, most tribal communities desperately need employment and business ownership opportunities. There is great potential, for example, for renewable energy development in Indian country. And there are ways in which the governmental powers of tribes can be marshaled to help bring such development about. This topic, however, will have to wait for another forum, or perhaps an expanded version of this essay.

Conclusion

The selection of issues discussed in this essay is not exhaustive. Perhaps a more comprehensive treatment could be presented in another forum. I hope that others find the framework of the analysis presented useful.

Although it is complicated to apply the concept of EJ to tribal communities, the concept itself is nevertheless potent. Perhaps this is because it represents the confluence of two great American social movements: the civil rights movement and the environmental movement. Each of these movements has changed American society for the better. American Indian and Alaska Native people have benefits from both these movements, although our actual engagement in these movements has for the most part been outside the main currents. In the early years of the civil rights movement and the environmental movement (and this is just my personal impression), many people engaged in these movements must have had a vague feeling that they ought to do something to include the Indians, or at least to address their concerns, but they generally did not know quite what to do.

Now, I believe, tribal people really must take on more prominent roles, because the EJ movement needs us and because the mainstream environmental movement needs us. I sincerely hope that this essay helps others in the EJ movement, and in the mainstream environmental movement, understand the range of EJ issues that tribal communities face so that we can find more constructive ways to work together. These movements need us, because we have the cultural roots to help others understand a fundamental truth about our existence on this Earth – human societies are, and must understand themselves to be, part of the web of life.

⁴⁹ Look for information about the Tribal Sovereignty Protection Initiative on the NCAI web site: www.ncai.org.

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