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TRIBAL, STATE, AND FEDERAL COOPERATION TO ACHIEVE GOOD GOVERNANCE

*Elizabeth Burleson**

I. INTRODUCTION

The United States Department of Justice notes that, “[v]iolent victimization among American Indians and Alaska Natives exceeds that of other racial or ethnic subgroups by about 2.5 times the national average.”¹ Addressing jurisdictional uncertainty in a manner that protects individuals and tribal integrity can help Native Americans sustain their communities. Providing fair legal frameworks that are enforced impartially is a basic function of any government. Good governance is responsive to present and future societal needs in an accountable, effective, transparent, equitable, and inclusive manner.

This article considers tribal, state, and federal cooperation to achieve good governance. Part II discusses the patchwork of laws affecting Indian country and analyzes the ways in which criminal jurisdictional uncertainty affects native sovereignty and public safety. Where the legal analysis does not depend upon the use of the term “Indian,” the following discussion uses the term indigenous peoples. Part III addresses civil jurisdiction over non-Indians in general and tribal water quality regulation in particular. Management of natural resources remains one of the core aspects of sovereignty that tribes have retained. The section examines judicial recognition of tribal water rights to prevent zinc mining in Wisconsin from impacting ancient wild rice harvests of the Chippewa; to require non-Indians to adhere to water

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1. Carole Goldberg & Heather Valdez Singleton, *Research in Brief: Public Law 280 and Law Enforcement in Indian Country- Research Priorities*, NAT’L INST. OF JUST. J., Dec. 2005, at 5 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 203097, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002, at iii, 4-6 (2004), available at http://www.usdoj.gov/otj/pdf/american_indians_and_crime.pdf).

standards to reduce transboundary water pollution affecting the Flathead Lake Reservation; and to protect ceremonial use of the Rio Grand River by the Pueblo of New Mexico. Part IV considers homeland security in the context of a devastating methamphetamine crisis among tribal communities. Part V examines the need for public oversight when regulation is devolved to the private sector. Part VI discusses international law in relation to indigenous peoples. This section addresses the domestic relevance of international human rights provisions in protecting indigenous rights. Part VII assesses the prospect for integrated management based upon comity and cooperation. This section addresses equity concerns involved in natural resource protection. Part VIII concludes that federal, state, and tribal entities can enhance international and regional institutions in order to provide good governance.

II. CRIMINAL JURISDICTIONAL UNCERTAINTY AND NATIVE SOVEREIGNTY

Criminal jurisdiction is the area over which legal authority extends to enforce laws or declare legal decisions. Distinguishing between tribal, state, and federal criminal jurisdiction depends upon the location and the nature of an offense.² Identifying gaps and overlaps in jurisdiction also involves a determination of the political status of suspects and victims as Indian or non-Indian.³ Tribes have jurisdiction to punish crimes committed by tribal members.⁴ Tribes do not have jurisdiction to punish crimes by non-Indians.⁵ The United States government has been

2. Michael J. Bulzomi, *Indian Tribal Sovereignty*, FBI LAW ENFORCEMENT BULLETIN, June 2001, at 32, available at <http://www.fbi.gov/publications/leb/2001/june01leb.pdf>.

3. The Supreme Court has recognized that the disparity in treatment between Indian and non-Indians that occurs as a result of federal regulation of Indian affairs does not constitute an impermissible racial classification. Instead, the distinction is based upon the political status of Indians as a separate people. See *United States v. Antelope*, 430 U.S. 641, 645-647 (1977), (rejecting an equal protection challenge to the Major Crimes Act following federal prosecution of an Indian for the murder of a non-Indian on the reservation.)

4. *United States v. Wheeler*, 435 U.S. 313, 328 (1978), *superseded by statute on other grounds*, Criminal Jurisdiction Over Indians Act of 1991, Pub. L. No. 102-137, 105 Stat. 646 (1991), *as recognized in* *United States v. Lara*, 541 U.S. 193, 197-98 (2004).

5. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 195 (1978), *superseded by statute on other grounds*, Criminal Jurisdiction Over Indians Act of 1991, Pub. L. No. 102-137, 105 Stat. 646, *as recognized in* *Lara*, 541 U.S. at 207. *Oliphant* eliminated tribal criminal jurisdiction over anyone who is not a member of a federally recognized tribe. *Id.* at 195. As a result, tribes have been left without jurisdiction to punish non-Indians who enter reservations and rape Native American women. As Sarah Deer notes:

Since the *Oliphant* decision, tribal law enforcement and victim advocates report a large increase in the number of non-Indian criminals attracted to Indian country because of

conflicted regarding criminal jurisdiction over crimes committed by non-member Indians.⁶

A. Federal Criminal Jurisdiction

Judicial, executive, and legislative acts by the federal government have had a profound impact upon native people in the United States. In the Marshall Trilogy cases, the Supreme Court incorporated the international colonial doctrine of discovery into United States law,⁷ divested tribes of foreign nation status,⁸ and recognized that States have no power over Native American affairs.⁹ Non-native pressure for land led President Andrew Jackson to require tribes east of the Mississippi to be forcibly moved to Oklahoma in the Trail of Tears. Traditionally, the federal government offered tribes a degree of protection from State intervention. Yet, the Supreme Court has significantly restricted federal recognition of tribal sovereignty.¹⁰ While Congress prohibited treaty making with tribes in 1871,¹¹ the legislative branch of the federal government has been the most protective of tribal sovereignty. For instance, when the Supreme Court held in *Duro v. Reina*¹² that tribes

this gap in jurisdiction. This is not limited to sexual predators. For example, there are wide reports of methamphetamine labs, drug trafficking, and other crimes happening at a large rate in Indian country.

Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 462 (2005).

6. Non-member Indians are Indians that belong to tribes other than the tribe exerting jurisdictional authority.

7. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). Chief Justice Marshall authorized the expropriation of Native American land that was discovered by colonial powers. Robert N. Clinton, *Redressing the Legacy of Conquest: a Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 93 (1993).

8. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831). By calling tribes domestic dependent nations, Chief Justice Marshall enabled Congress to lower Indian affairs from the sphere of international law to domestic law. See Clinton, *supra* note 7, at 94-95.

9. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 562-63 (1832), *abrogated by Nevada v. Hicks*, 533 U.S. 353, 361 (2001). Frank Pommersheim notes that *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia* are popularly known as the Marshall trilogy. Frank Pommersheim, *Is There a (Little Or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 274 (2003). In these cases, the Court confronted basic questions about the nature of Indian property rights: whether the Cherokee Nation was a "foreign nation" capable of bringing an original action in the Supreme Court against the State of Georgia and whether the laws of the State of Georgia (rather than the laws of the tribe) governed the actions of a non-Indian within the Cherokee Nation Reservation. *Id.*

10. See Pommersheim, *supra* note 9, at 277 (referencing *U.S. v. Kagama*, 118 U.S. 375, 384-85 (1886) and *Lone Wolf v. Hitchcock*, 187 U.S. 533, 565 (1903)).

11. Act of Mar. 3, 1871, ch. 120, § 3, 16 Stat. 544, 570 (codified at 25 U.S.C. § 71 (1988)).

12. *Duro v. Reina*, 495 U.S. 676, 688 (1990) (reciting the facts that Duro was an enrolled member of another Tribe and allegedly shot to death an Indian youth within the reservation's

lacked inherent sovereignty to exercise criminal jurisdiction over non-member Indians who committed crimes on their reservations,¹³ Congress overturned this decision by statute.¹⁴ Recognizing that tribes do have criminal jurisdiction over non-member Indians, Congress passed what has come to be known as the Duro Fix as an amendment to the 1968 Indian Civil Rights Act.¹⁵ The Duro Fix restored tribal jurisdiction over crimes committed by non-member Indians on a reservation.¹⁶ Indians who are enrolled members of any federally recognized tribe are subject to the criminal jurisdiction of all tribes.¹⁷ Tribal criminal jurisdiction is concurrent with federal jurisdiction.¹⁸

The Supreme Court has upheld Congress' authority to enact the Duro Fix. In *United States v. Lara*, the Supreme Court recognized that Congress has constitutional authority to remove restrictions on tribal criminal jurisdiction over non-member Indians imposed by other branches of the government.¹⁹ Philip Burnham notes that in *Lara*, "the court yielded to Congress authority to determine the extent of inherent sovereign power of Indian tribes under federal law."²⁰ *Lara* held that

boundaries), *superseded by statute*, Criminal Jurisdiction Over Indians Act of 1991, Pub. L. No. 102-137, 105 Stat. 646 (1991).

13. The Supreme Court held that "[i]n the area of criminal enforcement, . . . tribal power does not extend beyond internal relations among members." *Duro*, 495 U.S. at 688 (1990).

14. Pub. L. No. 102-137, 105 Stat. 646 (1991) (amending Pub. L. No. 101-511, § 8077, 104 Stat. 1892 (codified at 25 U.S.C. § 1301) (1988 & Supp. II 1990)).

15. *Id.*

16. Tribal sovereignty includes the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians. 25 U.S.C. § 1301(2) (2000). Congress enacted the "Duro Fix," Criminal Jurisdiction Over Indians Act of 1991, Pub. L. No 102-137, as an amendment to the Indian Civil Rights Act, 25 U.S.C. § 1301(2) (2000).

17. *See* *United States v. Lara*, 541 U.S. 193, 198 (2004) (citing 25 U.S.C. 1301(2)).

18. Tribal criminal jurisdiction may be concurrent with state criminal jurisdiction in a P.L. 280 state, now codified at 18 U.S.C.A. § 1162(a) (West, Westlaw through 2006 P.L. 109-279). *See also* Goldberg & Singleton, *supra*, note 1, at 7.

19. *Lara*, 541 U.S. at 199, 208-09 (finding that: (1) the source tribal jurisdiction to prosecute defendant for violence to a policeman was inherent tribal sovereignty rather than delegated federal authority; (2) Congress' constitutional power allows Congress to remove limitations on tribal criminal jurisdiction over non-member Indians imposed by other branches of government; and (3) the Double Jeopardy Clause does not prohibit federal prosecution of a defendant for assaulting a federal officer after a tribe has prosecuted him for the same offense, without making the case that tribal criminal jurisdiction derived from federally delegated power). In *Lara*, the tribe acted pursuant to its inherent tribal power. *Id.*

20. Philip Burnham, *Reading the Supreme Court*, INDIAN COUNTRY TODAY, Jan. 11 2005, available at <http://www.indiancountry.com/content.cfm?id=1096410130>. Lawrence R. Baca, provides the following *Lara* analysis:

In *United States v. Lara*, 541 U.S. 193 (2004), an Indian man who was a member of a federally recognized tribe, but not the tribe on whose reservation he had been arrested for violating tribal law, challenged the nature of the congressional action. During his arrest by federal officers, Lara had assaulted one of them. After pleading guilty in tribal court

inherent tribal sovereignty rather than delegated federal authority gave the tribe criminal jurisdiction over non-member Indians.²¹

The following federal statutes have an impact upon criminal jurisdiction in Indian country. The General Crimes Act established federal jurisdiction for all offenses committed by non-Indians upon Indian victims and certain offenses committed by Indians upon non-Indian victims.²² The Major Crimes Act limits a tribe's authority to punish its own members for crimes by establishing federal jurisdiction over Indians suspected of committing certain offenses in Indian country.²³ The majority of the listed crimes are felonies. The FBI has criminal jurisdiction in "Indian country," the official name for the program. The number of federal prosecutors that regularly prosecute rape cases in Indian country inadequately covers the 562 federally recognized tribes that are scattered across 56 million acres of the contiguous 48 States and millions of additional acres in Alaska.²⁴ In January 2006, Congress reauthorized the Violence Against Women Act

to assault on a police officer, Lara was further charged in federal court for assaulting a federal officer. Lara challenged his conviction on double jeopardy grounds.

Lawrence R. Baca, *Thirty Years of Federal Indian Law*, 52 FED. LAW. 28, 35 (2005).

21. *Lara* did not address whether Native Americans as American citizens can be tried in courts that do not follow United States Constitutional procedures. See Will Trachman, *Tribal Criminal Jurisdiction After U.S. v. Lara: Answering Constitutional Challenges to the Duro Fix*, 93 CAL. L. REV. 847, 856 (2005). The Indian Civil Rights Act (ICRA) limited tribal criminal jurisdiction by imposing upon the tribes most of the requirements of the Bill of Rights. Indian Civil Rights Act of 1968 tit. II, § 202, 25 U.S.C.A. § 1302 (West, Westlaw through 2006 P.L. 109-279).

The Constitution of the United States is the central focus of the Supreme Court, but as Saikrishna Prakash notes:

Tribal sovereignty is not a product of the Constitution. Nor should we view tribal sovereignty as emanating from federal statutes. Unlike cities and counties, tribes are not the subunits of another sovereign. Instead, Indian tribal sovereignty is "primeval," predating the Constitution, and, indeed, the United States. In fact, the Constitution presumes that the federal government would treat with Indian tribes, just as it presumes that the federal government would treat with other nations generally.

Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1076 (2004).

22. General Crimes Act, 18 U.S.C.A. § 1152 (West, Westlaw through 2006 P.L. 109-279).

23. Major Crimes Act, 18 U.S.C.A. § 1153 (West, Westlaw through 2006 P.L. 109-279).

24. Goldberg & Singleton, *supra* note 1, at 4. Native Alaskan Villages are not part of Indian country. Alaska Natives gave up aboriginal title in exchange for US \$962.5 million and land selection rights to forty-four million acres. S. James Anaya & Robert A. Williams Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 68 (2001). While incorporation allowed Alaska Natives to retain a degree of control over their natural resources, Native Alaskan Villages have even less jurisdictional authority than Indian tribes. *Id.* Law enforcement in Alaska is thus even more complex than in the continental United States. *Id.* See also Act of Dec. 18, 1971, Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. § § 1601-1628 (1988 & Supp. II 1990)); Clinton, *supra* note 7, at 78 (explaining Native American Census figures).

through 2011.²⁵ In doing so, Congress found that that “1 out of every 3 Indian (including Alaska Native) women are raped in their lifetimes.”²⁶ Given that rape falls under the Major Crimes Act, tribes are dependent upon federal agents to prosecute sexual assault cases. Since sexual assault should be prosecuted pursuant to the Major Crimes Act, many tribes lack sexual assault codes with which to prosecute rape cases when the FBI declines to prosecute. Tribes that do have codes encounter investigative obstacles that arise when more than a year has passed since a crime has occurred. Irrespective of tribal codes, all tribes are under the Indian Civil Rights Act obligation to limit prison terms to one year and fines to \$5,000.²⁷

B. State Criminal Jurisdiction

States have criminal jurisdiction in Indian country over situations in which both the victim and the suspect are non-Indian.²⁸ Otherwise, states do not have criminal jurisdiction in Indian country without express authority such as that conferred by Congress in PL-280.²⁹ State specific

25. Pub. L. No. 109-162, 119 Stat. 2960 (2006) (to be codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.). See also Ellen L. Buckwalter, Maria Perinetti, Susan L. Pollet & Meredith S. Salvaggio, *Modern Day Slavery In Our Own Backyard*, 12 WM. & MARY J. WOMEN & L. 403, 414 (2006).

26. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (to be codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.). Section 904 authorizes a national baseline study to examine violence against Indian women in Indian country. § 901, 119 Stat. at 3078-79. Section 905 permits “Indian law enforcement agencies, in cases of domestic violence, dating violence, sexual assault, and stalking, to enter information into Federal criminal information databases and to obtain information from the databases.” § 905, 119 Stat. at 3080. Section 906 funds grants to tribal governments to strengthen tribal capacity to respond to domestic violence including: services to Indian women, prevention strategies, and transitional housing for victims of domestic violence. § 906, 119 Stat. at 3080-82. Wendy Boka notes that there are four times as many animal shelters than domestic violence shelters in the United States. Wendy Boka, *Domestic Violence in Farming Communities: Overcoming the Unique Problems Posed by the Rural Setting*, 9 DRAKE J. AGRIC. L. 389, 397 (2004). England established the first battered women’s shelter in 1970. Nichole Miras Mordini, *Mandatory State Interventions for Domestic Abuse Cases: an Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295, 307 (2004). The first such shelter in the United States opened in 1972. *Id.* By 1979, President Carter had created the Office of Domestic Violence to raise awareness about domestic violence. *Id.*

27. Indian Civil Rights Act, 25 U.S.C.A. § 1302(7) (West, Westlaw through 2006 Pub. L. No. 109-279). Additionally, the Secretary of the Interior can create Courts of Indian Offenses, “CFR Courts,” with authority comparable to those of a tribal court. See 25 U.S.C.A. §§ 1301(3), 1311 (West, Westlaw through 2006 Pub. L. No. 109-279); 25 C.F.R. § 11 (Law and Order on Indian Reservations).

28. *United States v. McBratney*, 104 U.S. 621, 624 (1881).

29. Enacted in 1953, Public Law No. 83-280 (“PL 280”) transferred Federal jurisdiction over offenses involving Indians in Indian country to six States. Act of Aug. 15, 1953, Pub. L. No. 83-

statutes such as PL-280 further complicate jurisdictional inquiries.³⁰ Requiring that geographically-isolated tribes work with state and county law enforcement agencies located over 100 miles away renders law enforcement difficult. Initially enacted in the absence of tribal consent, tribes have since gained the ability to retrocede from PL-280 upon state agreement.³¹ The Indian Civil Rights Act amended PL-280 in a manner that precludes states from assuming jurisdiction over Indian country unless the affected tribes consented at specific elections called for that purpose.³² The Department of Justice notes that, “States have returned jurisdiction over nearly 30 tribes to the Federal government, thereby reinstating tribal/federal responsibility for law enforcement.”³³ The enactment of and retrocession from state jurisdictional statutes require the jurisdictional status of each tribe to be assessed individually.

C. Tribal-Federal and Tribal-State-Federal Concurrent Criminal Jurisdiction

More than one sovereign can legally prosecute crimes that occur within Indian country. The Department of Justice notes:

Most Federal and tribal justice systems that have addressed the issue of concurrent tribal jurisdiction in PL 280 States have determined that such jurisdiction exists. PL 280 contains no language removing tribal jurisdiction. The U.S. Supreme Court has not ruled on this matter either. But the Office of Tribal Justice, U.S. Department of Justice, concluded in 2000 that, “Indian tribes retain concurrent criminal

280, 67 Stat. 588 (codified as amended at 19 U.S.C. § 1162 (2000) and 28 U.S.C. § 1360 (2000)). PL 280 offered other states the choice to gain such jurisdiction. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588. The mandatory PL-280 jurisdictions are: Alaska, California, Minnesota (except Red Lake reservation), Nebraska, Oregon (except Warm Springs reservation), and Wisconsin. 28 U.S.C.A. § 1360(a) (West, Westlaw through 2006 Pub. L. No. 109-467 (excluding P.L. 109-415, 109-417, 109-432, 109-435, 109-461, 109-462)). In these jurisdictions, states have jurisdiction over most misdemeanors and felonies and tribes have concurrent misdemeanor jurisdiction. The federal government has divested jurisdiction and cannot prosecute most Indian country crimes. 18 U.S.C. § 1162(a). On those reservations neither 18 U.S.C. §§ 1152 nor 1153 apply. Other states, e.g., Kansas, Iowa, and New York, gained jurisdiction by different enactments. 18 U.S.C.A. § 3243 (West, Westlaw through 2006 Pub. L. No. 109-279) (Kansas); Act of June 30, 1948, Pub. L. No. 80-846, 62 Stat. 1161 (Iowa), and 25 U.S.C.A. § 232 (West, Westlaw through 2006 Pub. L. No. 109-279) (New York) (repealed by implication in *Dalton v. Pataki*, 780 N.Y.S. 2d 47). Concurrent federal government jurisdiction under 18 U.S.C. §§ 1152 and 1153 may be exercised in these states according to *Negonsott v. Samuels*, 507 U.S. 99, 105-06 (1993).

30. See, e.g., 18 U.S.C.A. § 3243; 25 U.S.C.A. § 232.

31. 25 U.S.C. § 1323 (West, Westlaw through 2006 Pub. L. No. 109-279).

32. Indian Civil Rights Act, 25 U.S.C.A. §§ 1321-22, 1326 (West, Westlaw through 2006 Pub. L. No. 109-279).

33. Goldberg & Singleton, *supra* note 1, at 4.

jurisdiction over Indians in PL 280 States.”³⁴

Concurrent jurisdiction can lead to a defendant’s undergoing two trials for the same offense. In *United States v. Wheeler*, the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment does not preclude the prosecution of a *Major Crimes Act* violation in federal court after the same conduct has led to a tribal court prosecution for violations of tribal law.³⁵ Similarly, the Supreme Court held in *Lara* that the Double Jeopardy Clause of the Fifth Amendment does not preclude the prosecution of a non-member Indian in both federal and tribal court for the same offense.³⁶

D. Gaps in Criminal Jurisdiction and Homeland Security

Critical infrastructure lies within Indian country, the boundaries of which are both national and international. Attorney General Ashcroft has recognized that “[m]ore than 25 Indian tribes govern lands that are either adjacent to borders or directly accessible by boat from the border. These tribal lands encompass over 260 miles of international borders”³⁷ Restoring public safety to Indian country requires cooperative networks of law enforcement.³⁸ President Bush has expressed the commitment to work with the 562 federally recognized tribes on a government-to-government basis, respecting tribal sovereignty.³⁹ Government-to-

34. *Id.* at 7.

35. It remains to be determined whether the Double Jeopardy Clause prohibits federal prosecution following prosecution in a Court of Indian Offenses. *See United States v. Wheeler*, 435 U.S. 313, 327 n.26 (1978), *superseded by statute on other grounds*, Criminal Jurisdiction Over Indians Act of 1991, Pub. L. No. 102-137, 105 Stat. 646 (1991).

36. *United States v. Lara*, 541 U.S. 193, 193 (2004).

37. *The Tribal Government Amendments to the Homeland Security Act of 2002: Hearing Before the United States Committee on Indian Affairs*, 108th Cong. (2003) (statement of Thomas B. Heffelfinger, United States Attorney for the District of Minnesota) (citing Att’y Gen. Ashcroft) [hereinafter *Tribal Government Amendments*] available at <http://www.citizensalliance.org/Major%20Issues/Supreme%20Court/The%20Hicks%20Fix/S.578/Heffelfinger%20Testimony.htm>.

38. While tribes do not have clear criminal jurisdiction over non-Natives in Indian country, tribes can establish cross-deputization agreements under which states delegate authority to tribal officers to arrest non-Natives. Geoffrey D. Strommer & Stephen D. Osborne, “*Indian Country*” and the Nature and Scope of Tribal Self-Government in Alaska, 22 ALASKA L. REV. 1, 23 (2005).

39. Press Release, George W. Bush, Office of the Press Secretary, Government-to-Government Relationship with Tribal Governments, Memorandum for the Heads of Executive Departments and Agencies (Sept. 23, 2004), available at <http://www.whitehouse.gov/news/releases/2004/09/20040923-4.html> (last visited Mar. 11, 2007). The Bureau of Indian Affairs (BIA) is responsible for the effective management of 55.7 million acres of trust land on behalf of Alaska Natives, American Indians, and Indian tribes. Bureau of Indian Affairs (BIA), available at <http://www.doi.gov/bureau-indian-affairs.html> (last visited Jan. 27, 2006).

government relations involve a comity approach in which one sovereign does not expect other judicial systems to be identical to its own, but does expect proceedings to afford parties such basic due process provisions as a full and fair trial before an impartial tribunal.

Tribal judicial power derives from inherent sovereignty, pre-dating the federal Constitution.⁴⁰ The *Indian Civil Rights Act* limited tribal criminal jurisdiction by imposing upon the tribes most of the requirements of the Bill of Rights,⁴¹ but tribal courts do not have to abide by all of the Constitution's due process requirements. Justice Sandra Day O'Connor expressed concern that the ability of tribal councils to remove judges limits the independence of tribal courts.⁴² She welcomes the amendment of tribal constitutions to provide for formal separation of powers.⁴³ Many tribal governments do not mirror the United States separation of powers system.⁴⁴ Some tribes have executive, legislative, and judicial branches that share power equally. In contrast, the Pueblo tribes of New Mexico remain theocratic.⁴⁵ Other tribes are based upon the Indian Reorganization Act or the Oklahoma Indian Welfare Act.⁴⁶ Not all tribes have independent judicial branches, and this complicates the process of balancing tribal sovereignty with individual due process rights. In addition to separation of powers concerns, the tribal criminal jurisdiction controversy involves such due process provisions as indigent defense counsel. Tribal judicial systems do not always provide free legal counsel for defendants who cannot afford an attorney. Some tribes require individuals to be tribal members before they can become jurors. This can impact a non-Indian defendant's due process rights to a jury of his or her peers. The Navajo Nation does not have to grapple with this dilemma because non-Indians can be selected in jury pools. Juries in the Navajo judicial system reflect a

40. See generally *Wheeler*, 435 U.S. 313.

41. 25 U.S.C.A. § 1301 et seq.

42. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 5 (1997).

43. *Id.* A recent Navajo Supreme Court decision shows that tribes can designate non-members as members for certain purposes. See Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. C.L. & C.R. 1, 21 (2003).

44. O'Connor, *supra* note 42, at 5.

45. Cuarto Centenario, 1998 Proclamation All Indian Pueblo Council of New Mexico, <http://www.newmexicoculture.org/CuartoCentenario/indianproclamation.html> (last visited Mar. 11, 2007).

46. Indian Reorganization Act or the Oklahoma Indian Welfare Act, 25 U.S.C.A. §§ 461, et seq. (West, Westlaw through 2006 Pub. L. No. 109-279); 25 U.S.C. § 503.

cross-section of the community.⁴⁷

The extension of tribal authority over non-Indians remains controversial.⁴⁸ The legislative attempt to fill this jurisdictional gap is commonly called a “Hicks Fix,” referring to *Nevada v. Hicks*.⁴⁹ In the Hicks decision the Supreme Court found that a tribal court lacked jurisdiction to hear a case in which a state police officer allegedly conducted an illegal search on a tribal member’s home located within the reservation.⁵⁰ Justice Scalia wrote that states possess ‘inherent jurisdiction’ over reservations, except where their authority is limited by Congress.⁵¹ He also asserted that, “an Indian reservation is considered part of the territory of the State.”⁵² It is important to keep in mind, as Edwin Kneedler clarifies, that *Nevada v. Hicks* “rests on fairly narrow grounds. It has to do with the interests of the state officer as the defendant—not non-Indians generally, but a state officer who is executing a warrant, carrying out a traditional state function.”⁵³ Despite

47. *George v. Navajo Tribe*, 2 Navajo Rptr. 1 (1979); Navajo Nation Code tit. 7, § 654. *See also Tribal Government Amendments*, *supra* note 37.

48. Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 801 (2004).

49. *See Nevada v. Hicks*, 533 U.S. 353 (2001). *See also Fletcher*, *supra* note 48, at 801.

50. Fletcher, *supra* note 48, at 801. The Supreme Court held that the tribal court cannot adjudicate tort claims that arise from state officials executing process on reservation lands when seeking evidence for an off-reservation crime. *Hicks*, 533 U.S. at 364 (reciting the fact that Hicks was alleged to have shot a big horn sheep, protected under state law; it was later proven that the sheep was not of a protected class). *See Burnham*, *supra* note 20.

Alex Tallchief Skibine provides a concise summary of Supreme Court tribal sovereignty jurisprudence, noting:

In *Oliphant*, the Court held that tribes could not assume criminal jurisdiction over non-Indians. In *Duro v. Reina*, the Court extended the *Oliphant* ruling to criminal jurisdiction over non-member Indians. In *Montana v. United States*, the Court extended this line of reasoning to civil jurisdiction over the activity of non-members on non-Indian fee lands, but allowed for two potentially meaningful exceptions: when non-members have consented to tribal jurisdiction, and when the activities of non-members have a serious and direct impact on the health and welfare of the tribe, its political integrity, or its economic security. In *Strate v. A-1 Contractors*, however, the Court severely limited, if not eliminated, the second Montana exception. The Court found that the exception did not allow the tribe to control the conduct of non-Indians driving on a state highway running through the reservation. Finally, in *Nevada v. Hicks*, the Court extended the Montana/Strate reasoning to cover non-member activities occurring on Indian owned land. The Court held that the tribal court had no jurisdiction to hear a tort case brought by a tribal member against state game wardens for wrongful acts which took place on Indian land while these state officials were investigating a crime allegedly committed by the plaintiff while he was off the reservation.

Skibine, *supra* note 43, at 16.

51. *Hicks*, 533 U.S. at 365.

52. *Id.* at 361-62.

53. Edwin Kneedler, *Indian Law in the Last Thirty Years: How Cases Get to the Supreme*

Justice Scalia's state sovereignty dicta, Scalia admitted in a footnote that "our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over non-member defendants in general."⁵⁴

Hicks exemplifies the degree of confusion that exists regarding Indian law generally, and tribal criminal jurisdiction in particular.

Who decides? This question is at the core of well-functioning societies. Governments must address efficiency, equity, security, and sovereignty. Bureau of Indian Affairs (BIA) oversight and management has consumed a great deal of funding at the expense of measurable benefits for Native Americans.⁵⁵ Prakash points out that the power to regulate commerce with tribes pursuant to the United States Constitution does not extend to the power to regulate the tribes themselves.⁵⁶ Prakash goes on to note that,

in the United States' eyes, India may seem weak; to India's neighbors, however, it may appear to be a formidable rival. Moreover, something more than weakness and helplessness is necessary to justify plenary power over persons and nations. Even where we might generally agree that certain individuals are weak and helpless, such as the comatose . . . the federal government does not have plenary power over all such persons. Likewise, even if we generally agree that a nation, such as Ethiopia, is frail and dependent, no one thinks that the United States has a plenary power over Ethiopia or similarly situated countries.

Even if one accepted the dubious wardship theory, it cannot justify the plenary power doctrine. To begin with, in order to justify the unbroken exercise of plenary power since *Kagama*, one must conclude that every Indian tribe has been continuously weak and helpless for the past century. More importantly, to validate existing plenary power over all Indian tribes, there must be some consensus that every Indian tribe is weak and helpless. In an era where quite a few tribes run multi-million dollar business enterprises, all this seems rather unlikely. The wardship theory offers more of a feeble rationalization for plenary power than it does a sound theory of constitutional law.⁵⁷

Court and How They Are Briefed, 28 AM. INDIAN L. REV. 274, 283 (2003-2004).

54. *Hicks*, 533 U.S. at 358 n.2.

55. Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: from Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1266-67 (1995).

56. Prakash, *supra* note 21, at 1081.

57. *Id.* at 1103-04. See also *United States v. Kagama*, 118 U.S. 375 (1886), in which the Supreme Court asserted plenary federal power and upheld the constitutionality of the Major Crimes

Crime occurs when societal structures are weakened as a result of economic competition, social instability, and loss of cultural identity. Cultural attrition erodes the social cohesiveness of unwritten systems of tribal common law.⁵⁸ Commitment to the rule of law and protection of human rights requires institutions that are representative, legitimate, and accountable. Divesting a people of dignity leads to a loss of respect. This vulnerability in turn leads to a rise in violence. Restoring and maintaining peace and security requires more than armed forces. It requires cultural sensitivity and a commitment to supporting free and representative tribal governments. In addition to training and fielding an adequate police response, the United States must find a way to coordinate public safety strategies among federal, state, and tribal entities. An important first step in this process is to address jurisdictional uncertainty in a manner that protects individuals and tribal integrity. The Pueblo of New Mexico appear to be the only tribes that have succeeded in clarifying tribal criminal jurisdiction.⁵⁹ Perhaps the language regarding the Pueblo in the Native American Omnibus Act of 2005 can be used to pass broader tribal criminal jurisdiction legislation.⁶⁰

Act based upon colonialist notion of the “white man’s burden” rather than the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; Clinton, *supra* note 7, at 110-11.

58. Rebecca Tsosie, *Tribal Environmental Policy in an Era Of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 294 (1996).

59. SEC. 104. INDIAN PUEBLO LAND ACT AMENDMENTS.

(a) IN GENERAL- The Act of June 7, 1924 (43 Stat. 636, chapter 331), is amended by adding at the end the following:

SEC. 20. CRIMINAL JURISDICTION.

(a) IN GENERAL- Except as otherwise provided by Congress, jurisdiction over offenses committed anywhere within the exterior boundaries of any grant from a prior sovereign, as confirmed by Congress or the Court of Private Land Claims to a Pueblo Indian tribe of New Mexico, shall be as provided in this section.

(b) JURISDICTION OF THE PUEBLO- The Pueblo has jurisdiction, as an act of the Pueblos’ inherent power as an Indian tribe, over any offense committed by a member of the Pueblo or of another Indian tribe, or by any other Indian-owned entity.

(c) JURISDICTION OF THE UNITED STATES- The United States has jurisdiction over any offense described in chapter 53 of title 18, United States Code, committed by or against an Indian or any Indian-owned entity, or that involves any Indian property or interest.

(d) JURISDICTION OF THE STATE OF NEW MEXICO- The State of New Mexico shall have jurisdiction over any offense committed by a person who is not a member of an Indian tribe, which offense is not subject to the jurisdiction of the United States.’

S. 536, 109th Cong. § 104 (2005), available at <http://thomas.loc.gov/cgi-bin/query/F?c109:1:./temp/~c109xmPN1D:e8346:>.

60. Native American Omnibus Act of 2005, S. 536, 109th Cong. (2005), available at <http://thomas.loc.gov/cgi-bin/query/z?c109:S.536.RS>.

III. CIVIL JURISDICTION OVER NON-INDIANS AND WATER RIGHTS

Often the political opposition to tribal jurisdiction over non-tribal members is lower on reservations whose inhabitants are predominantly tribal members. The Pueblo have been able to preserve both criminal and civil jurisdiction, particularly with regard to water. In *Montana v. United States*, the Supreme Court clarified that tribes retain authority over internal relations and self-governance.⁶¹ The first *Montana* exception recognizes that when non-Indians enter into consensual relationships with a tribe or its members, the non-Indians consent to tribal jurisdiction.⁶² The second *Montana* exception recognizes that tribes retain authority over non-members that threaten or directly affect the “political integrity, the economic security, or the health or welfare of the tribe.”⁶³ Water pollution directly affects tribal health and welfare.⁶⁴ In the wake of Supreme Court cases narrowing tribal sovereignty over non-members, the Court and agencies such as the Environmental Protection Agency (EPA) have looked for explicit grants of authority to tribes rather than language that divests tribal authority.⁶⁵

61. *Montana v. United States*, 450 U.S. 544, 565 (1981).

62. The Supreme Court’s first *Montana* exception states:

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Montana, 450 U.S. at 565.

63. *Id.* at 566. The Court addressed the scope of the second *Montana* exception in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, and *Strate v. A-1 Contractors*. *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 438, 442-44 (1989) (Stevens, J., opinion) (holding the tribe has the authority to establish and enforce zoning regulation on the 3.1% of land that is located within the reservation area from which the general public is prohibited that is not owned by the tribe); *id.* at 458-59 (Blackmun, J., concurring) (same). The ability to exclude non-members impacts the tribe’s regulatory jurisdiction over non-members. *Id.* at 444-45. The Yakima Nation lost the ability to regulate zoning within the area of the reservation that had lost its “Indian character.” Anna Fleder & Darren J. Ranco, *Tribal Environmental Sovereignty: Culturally Appropriate Protection or Paternalism?*, 19 J. NAT. RESOURCES & ENVTL. L. 35, 38 (2004-2005). See also *Brendale*, 492 U.S. at 447. *Strate* extends *Montana* to prohibit tribal court authority to adjudicate a conflict between non-members arising from a traffic accident on a state highway within the reservation. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (holding that tribes’ adjudicatory powers do not exceed their regulatory powers). The Court deemed the state highway right-of-way equivalent to non-Indian fee land. *Id.* at 454-56. The inability to exclude non-members precludes tribal court jurisdiction over non-members. *Id.*

64. See generally *Wisconsin v. EPA*, 266 F.3d 741, 744 (7th Cir. 2001).

65. See *id.* (citing Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,878 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131)).

A. *The Clean Water Act and Tribal Jurisdiction*

Congress passed the Clean Water Act to restore and maintain the quality of the nation's waters.⁶⁶ In 1987 Congress amended the Clean Water Act, authorizing tribes to enforce water quality standards.⁶⁷ By enacting Section 518 of the Clean Water Act,⁶⁸ the 1987 amendments allowed the EPA to treat tribes as states for such purposes of the Act as establishing and enforcing Water Quality Standards. Jessica Owley states that, "Tribes have the ability to exercise meaningful jurisdiction over their water quality because such jurisdiction fits within the *Montana* exceptions and because the federal government has specifically delegated authority to tribes."⁶⁹ This view is not universally held. Opposed to an extension of tribal civil and criminal jurisdiction, states have brought legal challenges against recognizing tribal water regulatory authority under the Clean Water Act.⁷⁰ Rather than recognizing a delegation of federal authority to tribes based upon the text of the Clean Water Act, the EPA has made a case-by-case decision regarding non-member fee lands.⁷¹ In doing so, the EPA analyzes the impact of water pollution upon each given tribe's health or welfare.⁷² Each tribe must

66. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, 1251(a) (2000) [Clean Water Act]. It precludes the discharge from a point source of any pollutant into the waters of the United States without Clean Water Act compliance. 33 U.S.C. § 1311(a).

67. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended at 33 U.S.C. § 1377 (2000)).

68. Section 518(e) of the Clean Water Act allows EPA to treat a tribe as a state, authorizing tribes to establish their own water quality standards if:

- (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
- (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
- (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

33 U.S.C. § 1377(e) (2000). See also Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After United States V. Lara*, 35 ENVTL. L. 471, 474-75 (2005).

69. Jessica Owley, *Tribal Sovereignty Over Water Quality*, 20 J. LAND USE & ENVTL. L. 61, 100-01 (2004).

70. See, e.g., *Wisconsin v. EPA*, 266 F.3d 741, 745 (7th Cir. 2001).

71. *Id.* at 744.

72. *Id.* at 748 (citing Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,878 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131)).

prove that the second *Montana* exception applies to their tribe in order to obtain “treated in a manner similar to states” status.⁷³ Prior to the EPA’s recent change in terminology, the status was called “treated as states”; the acronym remains TAS. Once treated in a manner similar to states, the tribe may be able to place regulatory limitations upon water users located upstream from tribal lands.⁷⁴

Ann Tweedy notes that the *Lara* decision may reinvest tribal sovereignty for tribes seeking TAS status under the Clean Water Act.⁷⁵ This would lessen the burden of tribes by no longer requiring tribes to prove that they retained sovereignty over water quality regulation.⁷⁶ Prior to *Lara*, qualified tribes were eligible to regulate as if the tribe were a state once they showed that their sovereignty had not been divested.⁷⁷ Rather than granting environmental regulatory authority to tribes, the tribal amendments to the Clean Water Act acknowledged that tribes already had inherent control over their water quality based on their status as sovereign nations.⁷⁸ This federal-tribal partnership to regulate water allows tribes to set water standards that are more stringent than the federal minimum standards.⁷⁹

Ultimately, the EPA seeks to facilitate cooperative water-sharing agreements among tribal, state, and federal entities involving watershed management. The EPA identifies a watershed approach as a coordinated management framework for “hydrologically-defined geographic areas, taking into consideration both ground and surface water flow.”⁸⁰ Watershed management, rather than political or member/non-member classifications, offers the greatest likelihood of balancing human and environmental concerns.⁸¹ While watershed management remains

73. *Id.*

74. *Id.* at 749.

75. *Lara* held that Congress could reinvest tribal criminal authority over non-member Indians. *United States v. Lara*, 541 U.S. 193 (2004). *See also* Tweedy, *supra* note 68, at 473.

76. Tweedy, *supra* note 68, at 473.

77. *Id.* at 473.

78. *Id.* at 475.

79. Tsosie, *supra* note 58, at 234-35.

80. U.S. Environmental Protection Agency, What is a Watershed Approach?, <http://www.epa.gov/owow/watershed/framework/ch2.html> (last visited Mar. 11, 2007). The EPA promotes partnerships among stakeholders, taking a geographic focus and relying upon sound management techniques that are based on strong science and data. U.S. Environmental Protection Agency, Guiding Principles, <http://www.epa.gov/owow/watershed/framework/ch3.html> (last visited Mar. 11, 2007). *See also* Paul M. Drucker, *Wisconsin v. EPA: Tribal Empowerment and State Powerlessness Under § 518(E) of the Clean Water Act*, 5 U. DENV. WATER L. REV. 323, 392 (2002).

81. *See* Drucker, *supra* note 80, at 392.

politically elusive,⁸² the following cases illustrate a judicial trend towards recognizing a role for tribes in setting water standards.

B. Wild Rice in Wisconsin

In *Wisconsin v. Environmental Protection Agency*, the United States Court of Appeals for the Seventh Circuit upheld the EPA's grant of TAS status to a Chippewa tribe called the Mole Lake Band.⁸³ The Seventh Circuit concluded that,

[b]ecause the Band has demonstrated that its water resources are essential to its survival, it was reasonable for the EPA, in line with the purposes of the Clean Water Act and the principles of Montana, to allow the tribe to regulate water quality on the reservation, even though that power entails some authority over off-reservation activities.⁸⁴

The Seventh Circuit noted that the rule in *Hicks* was not implicated since *Wisconsin v. Environmental Protection Agency* did not concern tribal control of state law enforcement authorities on the reservation during the investigation of off-reservation crimes.⁸⁵ Given plans to construct a zinc-copper sulfide mine on the Wolf River,⁸⁶ Wisconsin argued that the tribe lacked jurisdiction since the state owned the underlying lake beds pursuant to the Equal Footing Doctrine.⁸⁷ The Seventh Circuit concluded that even if this were the case, Congress' Commerce Clause power to regulate navigable waters gave the EPA authority to manage *Clean Water Act* programs on reservations.⁸⁸ The Seventh Circuit set a high bar for challenges to a grant of TAS status.⁸⁹

The Mole Lake Band of the Lake Superior Tribe of the Sokaogon Chippewa Community (SCC) state that the purpose of their water quality standards is to "preserve and protect all things within the aquatic ecosystem that support the cultural integrity, health, welfare, economic security, environmental quality, safety, treaty rights and inherent sovereignty of the SCC."⁹⁰ They specify that all tribal waters shall be

82. *Id.* at 392-93.

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

84. *Id.* at 750.

85. *Id.* at 748.

86. *Id.* at 745.

87. *Id.* at 746.

88. *Id.* at 747.

89. Drucker, *supra* note 80, at 362, 364.

90. SOKAOGON CHIPPEWA COMMUNITY WATER QUALITY STANDARDS § 151.01 (2005), available at http://www.epa.gov/waterscience/standards/wqslibrary/tribes/chippewa_5_wqs.pdf.

protected for cultural, subsistence, spiritual, medicinal, ceremonial, and aesthetic purposes.⁹¹ They also note that their water quality standards do not “abrogate independent tribal rights to sufficient quantities and quality of water to support the flora, fauna, and cultural traditions of the SCC.”⁹² Similarly, the Fond du Lac Band of the Minnesota Chippewa Tribe lists cultural uses of water.⁹³ Within this category they explain that a wild rice area is “a stream, reach, lake or impoundment, or portion thereof, presently, historically or with the potential to be vegetated with wild rice.”⁹⁴ Their aesthetic use of water “may include but is not limited to primary (direct) contact with water or the preservation of wetlands for the maintenance of traditional medicinal plants.”⁹⁵

The Mole Lake Band relies upon Mole Lake, Bishop Lake, and Rice Lake.⁹⁶ The latter supports one of the only surviving wild rice beds in Wisconsin.⁹⁷ The Seventh Circuit notes that,

the Band is heavily reliant on the availability of the water resources within the reservation for food, fresh water, medicines, and raw materials. In particular, Rice Lake, the largest body of water on the reservation, is a prime source of wild rice, which serves as a significant dietary and economic resource for the Band.⁹⁸

Since none of the land within the reservation is under the control or ownership of non-tribal members,⁹⁹ the Seventh Circuit did not have to worry about tribal limits upon regulating non-tribal members on fee lands located within the reservation.

C. Montana v. Environmental Protection Agency

Jurisdiction over non-Indian fee lands was a factor in *Montana v. Environmental Protection Agency*.¹⁰⁰ The United States Court of Appeals for the Ninth Circuit upheld the EPA’s grant of TAS status in the face of a challenge by landowners on the reservation who were

91. *Id.* § 151.11.

92. *Id.* § 151.02.

93. FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA, WATER QUALITY STANDARDS OF THE FOND DU LAC RESERVATION, ORDINANCE NO. 12/98 ch. 3, § 302(e) (2001), available at <http://www.epa.gov/ost/standards/wqslibrary/tribes/chippewa.pdf>.

94. *Id.* § 302(e)(1).

95. *Id.* § 302(e)(1).

96. Drucker, *supra* note 80, at 364.

97. *Id.*

98. *Wisconsin v. EPA*, 266 F.3d 741, 745 (7th Cir. 2001).

99. *Id.* at 745.

100. *See Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998).

subject to the tribe's water quality standards.¹⁰¹ An estimated 4,000 natural stream miles and 1,300 miles of irrigation canals and laterals are within the 1.2 million acre reservation.¹⁰² The water policy of the Confederated Salish & Kootenai Tribes seeks to "preserve, protect and maintain the chemical, physical, and biological integrity of the surface waters and wetlands of the Flathead Reservation."¹⁰³ The water from Flathead Lake supports agricultural, domestic, and industrial activities within the reservation, a patchwork quilt of land owned by tribal and non-tribal entities.¹⁰⁴ This mixed use includes state, county, and municipal pollution discharges on the reservation.¹⁰⁵

The Ninth Circuit confirmed the EPA decision that the "activities of the non-members posed such serious and substantial threats to tribal health and welfare that tribal regulation was essential."¹⁰⁶ The Ninth Circuit drew heavily upon the second exception established by *Montana v. United States*.¹⁰⁷ When non-Indian activity threatens the health or welfare of the tribe, then tribes retain inherent sovereign power to exercise civil jurisdiction over non-Indians on fee lands.¹⁰⁸ The Ninth Circuit distinguished *Montana v. Environmental Protection Agency* from *Brendale* by noting that the latter was a discrete zoning case while the former concerns water pollution that can have broad ramifications.¹⁰⁹ The district court noted that Justice White cited TAS status under the Clean Water Act as an express Congressional delegation of tribal regulatory authority over non-Indian lands.¹¹⁰ Given the mobile nature of pollution, it is not feasible to manage water regulation based upon the "member/non-member checkerboard."¹¹¹ The district court deferred to

101. *Id.* at 1141.

102. *Montana v. EPA*, 941 F.Supp. 945, 949 n.5 (D. Mont. 1996).

103. CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, SURFACE WATER QUALITY STANDARDS AND ANTIDegradation POLICY ch. 1, pt. III, § 1.3.1 (1995), available at http://www.epa.gov/waterscience/standards/wqslibrary/tribes/salish_kootenai_8_wqs.pdf.

104. *Montana v. EPA*, 137 F.3d at 1139.

105. *Id.*

106. *Id.* at 1141.

107. *See generally id.*

108. *Montana v. United States*, 450 U.S. 544, 566 (1981). *See also Montana v. EPA*, 137 F.3d at 1140.

109. The district court recognized that "zoning impacts are normally discrete and localized, whereas water pollution creates environmental health risks that may affect many people miles from the source." *Montana v. EPA*, 941 F.Supp. 945, 953 (D. Mont. 1996).

110. *Montana v. EPA*, 941 F.Supp. at 957 (citing *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 428 (1989), to clarify that the decision does not overrule the Montana exceptions).

111. *Id.* at 958.

this EPA finding and agreed with the EPA's decision to recognize tribal jurisdiction over trust and fee lands.¹¹² The Ninth Circuit agreed that the tribe had water regulatory jurisdiction over non-Indians pursuant to the Clean Water Act.¹¹³

D. The Right of the Pueblo to Set High Water Quality Standards

In *City of Albuquerque v. Browner*, the United States Court of Appeals for the Tenth Circuit held that the EPA correctly interpreted Section 518 of the Clean Water Act to recognize tribal authority to adopt water quality standards more stringent than federal standards and to implement those standards even when upstream point sources are located beyond tribal land.¹¹⁴ The Tenth Circuit recognized the right of the Isleta Pueblo to regulate the City of Albuquerque's waste treatment plant.¹¹⁵ The plant was located five miles upstream from the reservation.¹¹⁶ The Tenth Circuit determined that the EPA correctly incorporated the Pueblo standards into a National Pollution Discharge Elimination System (NPDES) permit that was issued to the City's waste treatment facility.¹¹⁷ Water quality standards are a means by which the desired condition of a given watercourse can be reached.¹¹⁸ Water quality standards focus upon the desired character of the watercourse rather than the pollutants.¹¹⁹ In contrast, uniform technology-based standards focus directly upon such acts as curbing chemical concentrations from point sources.¹²⁰

The Tenth Circuit found that the EPA approval of the Pueblo's religiously-based "Primary Contact Ceremonial Standard" did not contravene the Establishment Clause.¹²¹ The Isleta Pueblo's WQS states, "[p]ursuant to Section 518 of the Clean Water Act, the Tribal Council of the Pueblo of Isleta, a federally-recognized Tribe of Indians, hereby enacts the Pueblo of Isleta Surface Water Quality Standards . . . to promote the social welfare and economic well-being of the Pueblo of

112. *Id.*

113. *Montana v. EPA*, 137 F.3d at 1141.

114. *Albuquerque v. Browner*, 97 F.3d 415, 419, 422-24 (10th Cir.1996), *cert. denied*, 522 U.S. 965 (1997).

115. *See id.* at 423-24.

116. *Id.* at 419. *See also* Tweedy, *supra* note 68, at n.49.

117. *Browner*, 97 F.3d at 423-24. *See also* Brief of Federal Respondents at 11, *Wisconsin v. EPA*, No. 01-1247 (S.Ct. May 3, 2002).

118. *See* Clean Water Act § 303; 33 U.S.C. § 1313 (2000).

119. *Browner*, 97 F.3d at 419 n.4.

120. *See* Clean Water Act §§ 301, 304; 33 U.S.C. §§ 1311, 1314.

121. *Browner*, 97 F.3d at 428-29.

Isleta.”¹²² The tribe lists primary contact ceremonial use, as well as fishing, agricultural, and wildlife usage of the Rio Grande.¹²³ Primary contact ceremonial use is the use of a stream, reach, lake, or impoundment for religious or traditional purposes by members of the PUEBLO OF ISLETA; such use involves immersion and intentional or incidental ingestion of water, and it requires protection of sensitive and valuable aquatic life and riparian habitat.¹²⁴

Fleder and Ranco note that “[a]fter a session in the sweathouse, tribal members bathe in the river.”¹²⁵ They go on to explain that, “if a person is hesitant to dance in ceremonies, he may be thrown into the river briefly and then brought back to dance in wet clothes.”¹²⁶ The ceremony of the Corn groups involves chiefs washing their hands and face in the river and praying.¹²⁷ Spiritual practices followed by many Pueblos seek to sustain harmony and bring weather that is favorable to farming.¹²⁸

The Isleta Pueblo’s town was established in the 1200s by descendants of people who came to America an estimated 30,000 years ago.¹²⁹ The Sandia Mountains are no longer capped by glaciers and the mammoths are long gone.¹³⁰ The people survived, learning to work communally to build sophisticated irrigation systems with which to cultivate the arid land.¹³¹ Individuals and families had rights to use tribal land and waters.¹³² By the 1st century A.D., they were growing beans, corn, and squash.¹³³ The prehistoric Anasazi peoples became the Pueblo. These village-dwelling Indians of the southwestern United States encompass (1) the Rio Grande Pueblos (2) the Hopi of northeastern

122. PUEBLO OF ISLETA, SURFACE WATER QUALITY STANDARDS, TRIBAL RES. 92-14 § I(A)(4) (1992), *as amended by* TRIBAL RES. 02-064 (2002), *available at* http://www.epa.gov/waterscience/standards/wqslibrary/tribes/isleta_6_wqs.pdf.

123. *Id.* at 15. *See also* *Browner*, 865 F.Supp. at 740.

124. PUEBLO OF ISLETA, SURFACE WATER QUALITY STANDARDS, TRIBAL RES. 92-14 § IV (1992), *as amended by* TRIBAL RES. 02-064 (2002), *available at* http://www.epa.gov/waterscience/standards/wqslibrary/tribes/isleta_6_wqs.pdf.

125. Fleder & Ranco, *supra* note 63, at 53.

126. *Id.*

127. *Id.*

128. Scholastic, Pueblo (Indian Tribes), <http://content.scholastic.com/browse/article.jsp?id=5046> (last visited Jan. 15, 2007).

129. The History of the Pueblo of Isleta, <http://www.isletapueblo.com/history.htm> (last visited Apr. 4, 2006).

130. *Id.*

131. Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 769 (2001).

132. *Id.*

133. The History of the Pueblo Isleta, *supra* note 129.

Arizona, and (3) the Zuni of western New Mexico. Pueblo geographic isolation and a tradition of resistance facilitated greater cultural preservation than was achieved by any other tribe in the United States. The Isleta do not dwell on an island, but their tongue of land does jet out into the Rio Grande River, prompting the Spanish to call them Isleta (little island).¹³⁴ While willing to sell blue corn tortilla chips, the Isleta Pueblo remain an “island town,” culturally committed to the Rio Grande Pueblos tradition of resistance to assimilation.¹³⁵ Pueblo standards make up nine out of twenty-eight of the EPA-approved tribal water quality standards.¹³⁶ The EPA notes that “(t)ribal reservations without approved water quality standards account for as much land area as all of New

134. “The Eastern Pueblos include the peoples of Acoma and Laguna, in the high plateaus of west central New Mexico, as well as along the Rio Grande, including the villages of Taos, Isleta, Jemez, Nambé, Picurís, Pojoaque, Santa Clara, San Ildefonso, San Juan, Sandia, and Tesuque.” Scholastic, *supra* note 128.

135. The History of the Pueblo of Isleta, *supra* note 129. See also Scholastic, *supra* note 128.

136. U.S. Environmental Protection Agency, Tribal Water Quality Standards Approved by EPA, <http://www.epa.gov/waterscience/standards/wqslibrary/tribes.html> (last visited Apr. 9, 2006). The following list is arranged by region.

Region 4 consists of: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. *Id.* The Seminole of Florida and Miccosukee Tribe of Indians of Florida are the only region 4 tribes to have gained EPA approval of Water Quality Standards. *Id.*

Region 5 consists of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. *Id.* The following Region 5 tribes have obtained approval from the EPA: Mole Lake Band of the Lake Superior Tribe of the Chippewa Indians, Sokaogon Chippewa Community, The Fond du Lac Band of the Minnesota Chippewa Tribe, and Grand Portage Band of the Minnesota Chippewa Tribe. *Id.*

Region 6 consists of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas. *Id.* The following Pueblo tribes have been the only tribes in region 6 to receive EPA approval: Pueblo of Acoma, Pueblo of Isleta, Pueblo of Nambe, Pueblo of Picuris, Pueblo of Pojoaque, Pueblo of Sandia, Pueblo of San Juan, Pueblo of Santa Clara, and Pueblo of Tesuque. *Id.*

Region 8 consists of Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming. *Id.* The following region 8 tribes have achieved EPA approval: Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, and Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. *Id.*

Region 9 consists of Arizona, California, Hawaii, Nevada, and Pacific Islands. *Id.* The following region 9 tribes have gained EPA approval: White Mountain Apache, Hoopa Valley Tribe, Hualapai Tribe, and Navajo Nation. *Id.*

Region 10 consists of Alaska, Idaho, Oregon, and Washington. *Id.* The following region 10 tribes have obtained EPA approval: Kalispel Indian Community of the Kalispel Reservation, Spokane Tribe of Indians, Puyallup Tribe of Indians, Confederated Tribes of the Chehalis Reservation, Federal Water Quality Standards Regulations for the Confederated Tribes of the Colville Reservation, Confederated Tribes of the Umatilla Indian Reservation of Oregon, Confederated Tribes of the Warm Springs Indian Reservation of Oregon, and Port Gamble S’Klallam Tribe. *Id.*

England plus the State of New Jersey.”¹³⁷ There remain roughly 52,000 bodies of water that are polluted beyond their “total maximum daily loads” of pollutants.¹³⁸ The EPA has proposed allowing financially strapped rural communities to have lower drinking water standards for toxins such as arsenic *vis a vis* the rest of the United States.¹³⁹

Based on the designated use of the waterway, the Clean Water Act water quality standards convey the desired state of a given waterway.¹⁴⁰ This gives tribes an opportunity to establish and enforce high water quality standards.¹⁴¹ A criminal violation of the Clean Water Act may subject non-Indian defendants that are charged with polluting water that flows through tribal land to fewer due process provisions than are available under the United States Constitution.¹⁴²

The Isleta Pueblo note that “Isleta’s current population is more than 4,000, of which about 2,500 are tribal members. A person must be at least 50% pure Isleta blood in order to be eligible for tribal membership.”¹⁴³ Balancing tribal sovereignty and individual due process rights becomes increasingly challenging as modern life overwhelms traditional cultures. For instance, ten percent of the Isleta Pueblo community has been exposed to the drug methamphetamine, prompting the tribe to redirect resources to establish a comprehensive plan encompassing emergency department, health education, mental health, addiction treatment, primary care, and environmental health services.¹⁴⁴

137. U.S. ENVIRONMENTAL PROTECTION AGENCY, INTERIM DRAFT 1-29-04, INTERIM DRAFT OUTREACH AND CONSULTATION PLAN, FEDERAL WATER QUALITY STANDARDS FOR WATER IN INDIAN COUNTRY 1 (2004), available at <http://www.epa.gov/ost/standards/tribal/2004outreach-consultationplan-1-29.pdf>. See also William H. Rodgers, Jr., *Treatment as Tribe, Treatment as State: The Penobscot Indians and the Clean Water Act*, 55 ALA. L. REV. 815, 825 (2004).

138. Daniel McCool, *The River Commons: a New Era in U.S. Water Policy*, 83 TEX. L. REV. 1903, 1925 (2005).

139. Juliet Eilperin, *EPA May Weaken Rule on Water Quality, Plan Would Affect Towns That Find Complying Costly*, WASH. POST, Apr. 1, 2006, at A04, available at http://www.washingtonpost.com/wpdyn/content/article/2006/03/31/AR2006033101629.html?nav=rss_politics.

140. *Albuquerque v. Browner*, 97 F.3d 415, 419 n.4 (10th Cir.1996) (summarizing 33 U.S.C. §§ 1311, 1314).

141. *Montana v EPA*, 941 F.Supp. 945, 958 (D. Mont. 1996).

142. Trachman, *supra* note 21, at 859.

143. The History of the Pueblo Isleta, *supra* note 129.

144. *Oversight Hearing on the Problem of Methamphetamine in Indian Country: Hearing Before United States Senate Comm. On Indian Affairs*, 109th Cong. 7 (2006) (statement of Jefferson Keel, First Vice President, National Cong. Of American Indians) [hereinafter Keel Statement], available at http://www.indian.senate.gov/public/_files/Keel040506.pdf.

IV. METHAMPHETAMINE CRISIS AMONG TRIBAL COMMUNITIES

Tribes are responding to the threat of methamphetamine (“meth”) to tribal members, homes and aquatic habitat by enacting strict tribal anti-methamphetamine criminal codes.¹⁴⁵ Tribes are exercising their sovereign right to banish meth dealers and are promoting cooperative tribal criminal jurisdiction, inter-jurisdictional task forces, memorandums of understanding, and family courts.¹⁴⁶ Drug cartels are targeting tribal communities, taking advantage of jurisdictional gaps between criminal justice systems.¹⁴⁷ Al-Qaeda found Afghanistan’s lack of a legal system conducive to terrorist training. On a smaller scale, organized crime has infiltrated Indian country, recognizing that the patchwork of criminal jurisdiction insulates criminal activity. Homeland Security requires integrated communication and reporting among tribal, state, and federal entities.¹⁴⁸ At the signing ceremony for the *USA Patriot Improvement and Reauthorization Act of 2005*,¹⁴⁹ President Bush pointed out that the Act “places limits on large-scale purchases of over-the-counter drugs that are used to manufacture meth. It requires stores to keep these ingredients behind the counter or in locked display cases. The bill also increases penalties for smuggling and selling of meth.”¹⁵⁰ Noting that meth is easy to make and highly addictive, President Bush explained that the act would make many of the ingredients used in manufacturing meth harder to obtain in bulk and easier for law enforcement to track.¹⁵¹

On March 17, 2006, the United Nations Commission on Narcotic

145. *Id.* at 5.

146. *Id.* at 6.

147. *Id.* at 1-2.

148. Homeland Security Act of 2002, 6 U.S.C.A. § 112 (West, Westlaw through 2006 Pub. L. No. 109-279) (as amended by section 7402 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458)). To this end, several senators have introduced bills to facilitate tribal involvement in home land security. S. 477 would amend the Homeland Security Act of 2002 to include Indian tribes among the entities consulted with respect to activities carried out by the Secretary of Homeland Security. S. 477, 109th Cong. (2005), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c109:S.477.IS>. S. 1374 would amend the Homeland Security Act of 2002 to provide for a border preparedness pilot program on Indian land. S. 1374, 109th Cong. (2005), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c109:S.1374.PCS>.

149. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006). *See also* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections in numerous titles of U.S.C.).

150. Press Release, The White House, President Signs USA Patriot Improvement and Reauthorization Act (Mar. 9, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/03/20060309-4.html>.

151. *Id.*

Drugs adopted a resolution on precursor chemicals used to make synthetic drugs.¹⁵² The resolution calls upon states to make available to the International Narcotics Control Board annual approximations of the country's legitimate use of such chemicals as pseudoephedrine.¹⁵³ The resolution also calls upon states to equilibrate imports of such chemicals with legitimate uses.¹⁵⁴ Super labs must acquire large quantities of pseudoephedrine to produce meth.¹⁵⁵ Pseudoephedrine is an ingredient in many over-the-counter and prescription products.¹⁵⁶ Based upon drug and lab seizure statistics, approximately eighty percent of the meth used in the United States is produced in Mexican super labs.¹⁵⁷ The Tohono O'odham Indian Reservation borders Mexico for approximately 70 miles.¹⁵⁸ It is the second largest reservation in the United States and has become a critical drug corridor for Mexican traffickers.¹⁵⁹

152. Press Release, Office of National Drug Control Policy, United Nations Body Agrees to Strengthen Systems for International Control of Precursor Chemicals (Mar. 17, 2006), available at <http://www.whitehousedrugpolicy.gov/news/press06/031706.html>.

153. *Id.*

154. *Id.* See also *Crystal Meth to be Class A Drug*, BBC NEWS, June 14, 2006, available at http://news.bbc.co.uk/2/hi/uk_news/politics/5079266.stm ("Crystal Meth is to be reclassified as one of the UK's most dangerous drugs alongside cocaine and heroin, the government has announced. Drugs Minister Vernon Coaker said the drug, also known as methamphetamine, is to move from class B to class A"); John Leland, *Meth Users, Attuned to Detail, Add Another Habit: ID Theft*, N.Y. TIMES, July 11, 2006, available at <http://www.nytimes.com/2006/07/11/us/11meth.html?ex=1310270400&en=6df49385bf828429&ei=5088&partner=rssnyt&emc=rss> ("While public concern about identity theft has largely focused on elaborate computer schemes, for law enforcement officials in Denver and other Western areas, meth users have become the everyday face of identity theft . . . because the drug has a long high, addicts have patience and energy for crimes that take several steps to pay off."); *Oregon Meth Law Requires Prescription for Cold Meds*, NPR, July 1, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5527039&ft=1&f=1001> ("A new law takes effect in Oregon that requires cold medicines containing pseudoephedrine, like Sudafed and Claritin D, to be sold only with a prescription. Pseudoephedrine is used in the manufacturing of methamphetamine."); *US Warns of 'Global Meth Threat'*, BBC NEWS, May 10, 2006, available at <http://news.bbc.co.uk/2/hi/americas/4757179.stm>.

155. *Combating Methamphetamine In Indian Country: Hearing Before the Senate Comm. On Indian Affairs*, 109th Cong. 2 (2006) (statement of Matthew H. Mead, United States Attorney of the District of Wyoming) [hereinafter Mead Statement], available at http://www.indian.senate.gov/public/_files/Mead040506.pdf.

156. OFFICE OF NATIONAL DRUG CONTROL POLICY, ONDCP FACTSHEET: EFFORTS TO CONTROL PRECURSOR CHEMICALS (2006), available at http://www.whitehousedrugpolicy.gov/publications/international/factsht/eff_contr_precurs_chem.html (last updated Oct. 18, 2006).

157. Mead Statement, *supra* note 155, at 2.

158. *Id.* at 4.

159. *Id.*

In the United States, there are 562 federally recognized tribes, residing on 281 reservations within 34 different states. Sixty-one reservations are within 50 miles of either the U.S.-Canada border or the U.S.-Mexico border. Because of the sovereign status of the tribes, they are generally not subject to state jurisdiction, except where

The Central Intelligence Agency (CIA) indicates that “prolonged drought, population growth, and outmoded practices and infrastructure in the border region strains water-sharing arrangements with Mexico; the U.S. has stepped up efforts to stem nationals from Mexico, Central America, and other parts of the world from crossing illegally into the U.S. from Mexico . . .”¹⁶⁰ According to the CIA, the United States is a consumer of meth from Mexico, as well as an illicit producer of meth.¹⁶¹ Felicia Fonseca of the Associated Press reports, “Law-enforcement officials believe the meth is coming from Phoenix and Mexico, and say it is particularly hard to stop on the huge reservation, which covers 27,000 square miles in Arizona, New Mexico and Utah and is plagued by a shortage of police officers.”¹⁶² International drug traffickers are taking the route of least resistance and are well aware of criminal jurisdictional uncertainty in Indian country.

The Director of the Bureau of Indian Affairs (BIA) has testified to the Senate that “meth is fueling homicides, aggravated assaults, rape, child abuse, and other violent crimes.”¹⁶³ He explained that meth is a highly addictive synthetic central nervous system stimulant that creates intense euphoric highs.¹⁶⁴ Robert McSwain of the Department of Health and Human Services testified that as many females use meth as males.¹⁶⁵ While the heaviest use of meth is occurring among people between the ages of 25 to 34, meth use among children and the elderly is alarming.¹⁶⁶ Meth causes violent behavior and paranoia.¹⁶⁷ McSwain calls for

Public Law 280 applies. As a result, local law enforcement often has no jurisdiction in Indian country, and tribal law enforcement agencies bear the burden of most law enforcement functions. The ratio of law enforcement personnel to residents on tribal lands is far lower than in non-tribal areas.

Id. at 3.

160. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK: UNITED STATES (2006) [hereinafter CIA WORLD FACTBOOK: U.S.], available at <https://www.cia.gov/cia/publications/factbook/geos/us.html> (last updated Dec. 19, 2006).

161. *Id.*

162. Felicia Fonseca, ‘Devil’s Drug’ Meth Rotting Navajo Lives, ARIZ. DAILY STAR, Apr. 15, 2006, available at <http://www.azstarnet.com/news/124756>.

163. *Problem of Methamphetamine Use in Indian country: Hearing Before the Comm. On Indian Affairs*, 109th Cong. 1 (2006) (statement of William P. Ragsdale, Director, Bureau of Indian Affairs), available at http://www.indian.senate.gov/public/_files/Ragsdale040506.pdf.

164. *Id.*

165. *The Problem of Methamphetamine in Indian Country: Hearing Before the Senate Comm. On Indian Affairs*, 109th Cong. 3 (2006) (statement of Robert McSwain, Deputy Director, Indian Health Service) [hereinafter *McSwain Statement*], available at http://www.indian.senate.gov/public/_files/McSwain040506.pdf.

166. *Id.*

167. OFFICE OF NATIONAL DRUG CONTROL POLICY, ONDCP FACTSHEET: COUNTERING THE SPREAD OF SYNTHETIC DRUGS (2006) [hereinafter ONDCP, COUNTERING SYNTHETIC DRUGS],

“coordinated and collaborative responses from federal, tribal, state, and private agencies.”¹⁶⁸ First synthesized in 1919, meth was administered to troops during the Second World War as a stimulant.¹⁶⁹ Commonly called crystal or speed, meth has become the drug of choice for many Americans. Montana has launched a large-scale anti-meth public health campaign.¹⁷⁰ Dr. John Nautts of the West Montana Addiction Services explains that people who stop using meth often experience severe depression. There is a severe shortage of residential chemical dependency treatment facilities in Indian country.¹⁷¹ In the same manner that adrenalin releases high levels of the neurotransmitter dopamine, meth sharply stimulates the central nervous system. Meth addicts become dependent on highly stimulated thought processes. Damaged neuro-transmitters leave meth users with a reduced capacity to feel pleasure.¹⁷² In February 2006, U.S. Senator Byron Dorgan (D-ND) and Senator John McCain (R-AZ) introduced a bill to increase counseling and suicide-prevention materials for rural tribal communities that are experiencing teenage suicide rates up to 10 times the national average.¹⁷³

Jefferson Keel of the National Congress of American Indians testified that

[Meth] is not only poisoning our souls, minds and bodies, but the

available at http://www.whitehousedrugpolicy.gov/publications/international/factsht/counter_synth_drg.html (last updated Aug. 3, 2006).

168. *McSwain Statement*, *supra* note 165, at 9.

169. ONDCP, COUNTERING SYNTHETIC DRUGS, *supra* note 167.

170. See Montana Meth Project, <http://www.montanameth.org/> (last visited Jan. 15, 2007).

171. *The Prople of Methamphetamine in Indian Country: Hearing Before the Senate Comm. On Indian Affairs*, 109th Cong. 5 (2006) (statement of Ivan D. Posey, Chairman of the Eastern Shoshone Business Council) available at http://www.indian.senate.gov/public/_files/Posey040506.pdf. Ivan Posey notes:

[T]he need for more prevention programs that can be offered through our Boys and Girls Clubs or other youth organizations. There is also a place for this at our Senior Citizens programs. We need to continue to educate at all age levels and strongly push the negative affects of this drug. We also need to look at long term treatment facilities in areas such as ours which are in rural settings which makes us send our loved ones to other states to receive treatment. The emphasis needs to be Prevention, Education, and Treatment. Unfortunately, those caught in the middle are subject to our law enforcement and judicial systems.

Id. at 6.

172. Meth affects memory and word recall as well as emotional stability. Andrew Buncombe, *Drug Dependency in the US: The Crystal Craze*, THE INDEPENDENT, Apr. 21, 2006, available at <http://news.independent.co.uk/world/americas/article359121.ece>.

173. Press Release, U.S. Senate Committee on Indian Affairs, Dorgan Calls for More Investment in American Indian Education (Mar. 23, 2006), available at http://indian.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=15&Month=3&Year=2006.

highly toxic meth labs are irreversibly poisoning our homes, our lands, and our water supplies; and stretching those who serve us, our law enforcement officials, our public works staff, and our child protective services workers to the breaking point.¹⁷⁴

There are no proven safe levels of meth residue.¹⁷⁵ Meth can be made from common household products in small toxic labs.¹⁷⁶ John Walters notes, “The production of one pound of meth releases poisonous gas into the atmosphere and creates 5 to 7 pounds of toxic waste. Many laboratory operators dump the toxic waste down household drains, in fields and yards, or on rural roads.”¹⁷⁷ These labs and heavy meth use contaminate homes, requiring decontamination at an average cost of \$10,000.¹⁷⁸

V. PUBLIC OVERSIGHT AND DEVOLUTION TO THE PRIVATE SECTOR

Without transparency, civil society struggles to hold public and private sectors accountable for preserving the public trust. Without trust, tangible natural resources vanish. Some re-emerge as specters, once able to heal but transformed into threats to body and soul. Medicine marketed to help people breathe becomes a catchy monosyllabic substance with which to stop breathing altogether. Medicating boredom is a dangerous game. Feeding desperation with chemical dependency is lethal. Drug production and use thrives in states destabilized by rapid wealth or poverty. Such change goes to the heads of individuals whose communities struggle to retain social cohesion and economic stability. Cashing in natural resources alters traditional notions of value and welfare. Sustainable development becomes a term with which people can converse without finding middle ground. Consensus building makes way for political expediency.

Guns cannot win the war on drugs since the supply of mind-altering substances fluctuates with the economic disparity between peoples. The demand for addictive chemicals has the same origin. Fortresses often fall

174. Keel Statement, *supra* note 144, at 2. Jefferson Keel notes that the “lack of adequate law enforcement resources, difficult jurisdictional issues, historical struggles with addiction, limited governmental resources, and all of the complexities that come with poverty have made Indian reservations a target by external drug traffickers and disproportionately vulnerable to all aspects of methamphetamine from manufacturing to abuse.” *Id.* at 1.

175. *Id.* at 4.

176. Mead Statement, *supra* note 155, at 2.

177. OFFICE OF NATIONAL DRUG CONTROL POLICY, FACTS & FIGURES: METHAMPHETAMINE (2006), available at <http://www.whitehousedrugpolicy.gov/drugfact/methamphetamine/> (last updated Jan. 9, 2007).

178. Keel Statement, *supra* note 144, at 2.

to the most desperate. Immigration and illicit drugs are the topics of the day. Often discussions of indigenous title are not taken seriously in decision-making forums. Yet, South America is uniting. Control over natural resources is at the core of this development. Venezuelan oil politics are headline news,¹⁷⁹ as is Bolivia's suspension of coca eradication programs.¹⁸⁰ Bolivians have endured nearly 200 coups and countercoups since gaining independence from Spain in 1825.¹⁸¹ Electing an indigenous head of state in December 2005, Bolivians seek to address the country's severe poverty.¹⁸²

Corporations can invest in infrastructure but do not always make distribution decisions based upon vital human need.¹⁸³ Privatization of water brings into question the public service role of government to make water available on the basis of public interest. Faced with aging infrastructure, city officials of Cochabamba, Bolivia privatized water distribution in 1999.¹⁸⁴ Hundreds of thousands of ordinary Bolivians joined street protests when water prices rose far beyond the capacity with which most citizens could pay their water bills.¹⁸⁵ The government was forced to break its contract with Bechtel subsidiary, Aguas del Tunmari.¹⁸⁶ Similar civil unrest occurring in El Alto, Bolivia in January 2005 led President Carlos Mesa to rescind the contract with the Suez

179. *Venezuela Gives US Cheap Oil Deal*, BBC NEWS, Nov. 23, 2005, available at <http://news.bbc.co.uk/2/hi/americas/4461946.stm>.

180. For a discussion of the recent coca controversy in Bolivia see Becky Branford, *Coca Quandary for Hard-up Bolivia*, BBC NEWS, Apr. 14, 2006, available at <http://news.bbc.co.uk/2/hi/americas/4902192.stm>.

181. Bolivia is the world's third-largest coca producer after Colombia and Peru. CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK: BOLIVIA* (2006), available at <https://www.cia.gov/cia/publications/factbook/geos/bl.html> (last updated Dec. 19, 2006). Coca cultivation is gaining momentum, increasing by eight percent from 2004 to 2005. *Id.*

182. Daniel Schweimler, *Bolivia Unveils Anti-Poverty Plan*, BBC NEWS, June 17, 2006, available at <http://news.bbc.co.uk/2/hi/americas/5090850.stm> (explaining that funding for increased access to clean water will come from proceeds from the recently nationalized gas industry as well as foreign investment and international lending). *See also* *Bolivia 'Won't Pay Compensation'*, BBC NEWS, May 11, 2006, available at <http://news.bbc.co.uk/2/hi/business/4760525.stm> (explaining that Bolivia wants to use its energy revenues to finance national growth). The article explains, "Bolivia's President Evo Morales has said that foreign energy firms should not expect compensation for assets that are now under state control."

183. Advocates of market liberalism seek to maximize value, leaving distributive equity to separate tax and transfer programs. Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 TEX. L. REV. 2109, 2132 (2005). In response, sustainable development advocates point out that subsequent corrective devices stigmatize equity as a cost. *Id.*

184. Jason Astle, Comment, *Between the Market and the Commons: Ensuring the Right to Water in Rural Communities*, 33 DENV. J. INT'L L. & POL'Y 585, 589 (2005).

185. *Id.*

186. *Id.*

subsidiary, Aguas del Illimani.¹⁸⁷ It remains a formidable challenge to bring water across the Andes Mountains to remote villages. Whether market driven pricing is augmented by water subsidies for the poor or some other regulatory oversight occurs, water availability must be recognized as not only a need but a human right.¹⁸⁸

Public distribution of water does not guarantee efficiency or equity.¹⁸⁹ In the United States, Reclamation Bureau water policies have led to growing high water, low-value crops such as hay and alfalfa in water-stressed areas.¹⁹⁰ Daniel McCool notes that,

[t]hese programs allocated most of their money to a small number of large corporate farming operations. A recent USDA study found that 59% of government payments went to producers with a net worth of \$600,000 or more. A report by the Environmental Working Group also found that subsidies tended to concentrate in a few very large corporate recipients. For example, the top 10% of corn subsidy recipients received 72% of the corn money; the top 10% of cotton subsidy recipients took in 80% of that money.¹⁹¹

McCool goes on to point out that overproducing crops has overdrawn groundwater resources such as the Ogallala Aquifer, located under the Great Plains.¹⁹² Spanning from Canada to Texas, this aquifer is being drawn down at a rate that is three to four times more rapid than the rate at which it is being recharged.¹⁹³

The public expects governmental control to be transparent, ensuring that managers remain accountable to the people. Governments and private companies are both capable of upgrading infrastructure. They are also both susceptible to corruption. The Cobell litigation over Indian

187. *Id.* at 589-90. Robert Glennon notes:

In 1998, the World Bank insisted that the Bolivian government turn over its public water utility to the private sector, or else the Bank would refuse to guarantee a \$25 million loan for improvement of the water system infrastructure. The Bank required that infrastructure costs be passed on to consumers. At the instruction of the Bank, the company that received the concession, a subsidiary of the Bechtel Corporation, increased water rates by 35%. A series of escalating protests resulted in seven deaths and spurred Bolivian President Hugo Banzer to place the country under martial law.

Robert Glennon, *Water Scarcity, Marketing, and Privatization*, 83 TEX. L. REV. 1873, 1890 (2005). See also David H. Getches, *Indigenous Peoples' Rights to Water Under International Norms*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 259, 269-70 (2005).

188. Astle, *supra* note 184, at 596.

189. McCool, *supra* note 138, at 1912.

190. *Id.* at 1913.

191. Furthermore, roughly half of the land that is irrigated in the United States is done so using a flood-irrigation method. *Id.* at 1914. This is very inefficient *vis a vis* drip irrigation. *Id.*

192. *Id.* at 1915.

193. *Id.*

Trust assets¹⁹⁴ and the controversy over who should control port security¹⁹⁵ highlight the complexities of ensuring competent governance. Given the cost of oversight, privatization may not be cost-effective. Civil society continues to challenge a lack of transparency in the use of private contractors, be they Suez in Bolivia or Halliburton in Iraq.¹⁹⁶ “Early in the Iraq war, several companies of soldiers found themselves in particularly dangerous parts of Iraq without food or fresh water, because the contractors in charge of supplying provisions were unable to fulfill their contracts.”¹⁹⁷ The Pentagon has been investigating allegations by Halliburton water personnel that the corporation threatened troops in Iraq by not treating water.¹⁹⁸ The Iraq Water Quality Manager for Halliburton’s Kellogg Brown & Root (“KBR”) subsidiary reported that KBR’s water service depended upon employees that the company paid as unskilled workers and recognized as semiskilled labor.¹⁹⁹ Lack of training and records led to prolonged exposure to contaminated water.²⁰⁰ KBR collected Euphrates River water less than a mile downstream from a raw sewage outlet.²⁰¹ The non-potable water provided to troops was

194. *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003). See also Press Release, U.S. Senate Committee on Indian Affairs, McCain and Dorgan Call For Action Following Cobell v. Kempthorne Decision (July 18, 2006), available at http://indian.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=17&Month=7&Year=2006. “[A]lthough removal of Judge Lamberth from the Cobell case may be a moral victory for the government attorneys, the decision in no way diminishes the government’s underlying liability to hundreds of thousands of individual Indians.” Dorgan pointed out that the Circuit Court reaffirmed that Interior’s record in acting as trustee to these Indians is ‘deplorable’ and ‘deserves condemnation in the strongest terms.’ *Id.* (quoting Vice Chairman of the Senate Committee on Indian Affairs, Senator Dorgan).

195. Dana Milbank, *On Immigration and Ports, Turning Inward*, WASH. POST, Mar. 3, 2006, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/02/AR2006030201702.html>.

196. See Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989 (2005).

197. Rebecca Ulam Weiner, *Sheep in Wolves’ Clothing: Private Military Men Patrol Iraq in Constant Jeopardy of Stepping on Legal Landmines*, LEGAL AFFAIRS, Jan./Feb. 2006, at 25, available at http://www.legalaffairs.org/issues/January-February-2006/argument_weiner_janfeb06.msp

198. Larry Margasak, *Update 2: Firm Failed to Protect U.S. Troops’ Water*, FORBES, Mar. 16, 2006, available at <http://www.forbes.com/feeds/ap/2006/03/16/ap2600881.html>. See also Julianne Donofrio, *Did Halliburton Sell Dirty Water?*, ABC News, Jan. 23, 2006, <http://abcnews.go.com/International/IraqCoverage/story?id=1533349>.

199. Larry Margasak, *Firm Failed to Protect U.S. Troops’ Water*, THE ASSOCIATED PRESS, Mar. 16, 2006, available at <http://abcnews.go.com/Politics/wireStory?id=1731535>.

200. *Id.*

201. *An Oversight Hearing on Whether Halliburton Failed to Provide Clean Water to United States Troops in Iraq: Hearing Before the Senate Democratic Policy Comm.*, 109th Cong. 3 (2006) (statement by Ben Carter, former Halliburton employee), available at <http://democrats.senate.gov/dpc/hearings/hearing27/carter.pdf>.

approximately twice as contaminated as untreated Euphrates River water, since KBR used wastewater that should have been returned to the river.²⁰² Pentagon auditors have found a \$1 billion discrepancy in costs submitted by Halliburton.²⁰³ Discontinuing its multibillion-dollar contract with Halliburton, Army officials note that depending upon one contractor puts the government in a vulnerable position. Future work will be divided among three companies. A fourth company will assess performance.²⁰⁴

Good governance involves accountability, transparency, participation, consensus building, responsiveness, effectiveness, efficiency, and equity.²⁰⁵ The rule of law component of good governance calls for fair legal frameworks that are enforced impartially by an independent judiciary.²⁰⁶ Mindful of future as well as present needs of society; good governance requires the full protection of human rights.²⁰⁷ The National Security Agency's (NSA) presidentially-authorized program of warrantless wiretapping²⁰⁸ and the CIA-run network of secret

202. Donofrio, *supra* note 198. See also Julian Borger, *Halliburton accused over Iraq water supplies*, GUARDIAN, Jan. 24, 2006, available at <http://www.guardian.co.uk/Iraq/Story/0,,1693463,00.html> (“‘The level of contamination was roughly 2x the normal contamination of untreated water from the Euphrates river,’ said one email dated July 15 2005 from William Granger, an employee of Halliburton’s subsidiary, KBR.”); Larry Margasak, *Workers Allege Halliburton Knew Their Water Was Foul*, WASH. POST, Jan. 23, 2006, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/22/AR2006012200853.html>; Larry Margasak, *Halliburton Cited in Iraq Contamination*, ABC NEWS, Jan 22, 2006, available at <http://abcnews.go.com/Politics/wireStory?id=1531615>.

203. Renae Merle, *Halliburton Allegations Are Sent to Justice Dept.: No-Bid Contracts In Iraq Are at Issue*, WASH. POST, Nov. 19, 2005, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/18/AR2005111802503.html> (“Two former Halliburton workers have been charged with taking kickbacks while working for the company in the Middle East. And Pentagon auditors have questioned more than \$1 billion in costs for the company’s work there.”); Griff Witte, *Army to End Expansive, Exclusive Halliburton Deal: Logistics Contract to Be Open for Bidding*, WASH. POST, July 12, 2006, at A01, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/07/11/AR2006071101459.html?nav=rss_print/asection (“Government audits turned up more than \$1 billion in questionable costs.”).

204. Witte, *supra* note 203, at A01.

205. United Nations Economic and Social Commission for Asia and the Pacific, *Human Settlements, What is Good Governance?*, <http://www.unescap.org/huset/gg/governance.htm> (last visited Aug. 16, 2006).

206. *Id.*

207. *Id.*

208. For a discussion of NSA wiretapping, see Eric Lichtblau, *Administration Lays Out Legal Case for Wiretapping Program*, N.Y. TIMES, Jan. 19, 2006, available at <http://www.nytimes.com/2006/01/19/politics/19cndnsa.html?ex=1295326800&en=2a39fd0e9ee78d01&ei=5088&partner=rssnyt&emc=rss>. See also Adam Brookes, *White House Defends Spying Policy*, BBC NEWS, Jan. 24, 2006, available at <http://news.bbc.co.uk/2/hi/americas/4645412.stm>; *Google defies US over Search Data*, BBC NEWS, Jan. 20, 2006, available at <http://news.bbc.co.uk/2/hi/technology/4630694.stm>.

prisons have prompted a debate on who should define the parameters of good governance.²⁰⁹

VI. INTERNATIONAL LAW AND INDIGENOUS PEOPLES

Liberal democracy consists of two important components: a liberal notion of freeing the people protects individuals from tyranny and a democratic notion of empowering people implements popular rule.²¹⁰ As Philippa Foot notes, some needs are universal: “[a]ll need affection, the cooperation of others, a place in a community, and help in trouble. It isn’t true to suppose that human beings can flourish without these things Communities as well as individuals can live wisely or unwisely.”²¹¹ Remediating the legacy of historical inequities requires a commitment to supporting the cultural integrity of the myriad of indigenous peoples around the world.²¹² Indigenous peoples have gained the status as special subjects of concern in relation to the United Nations.²¹³ The General Assembly declared an international decade on the rights of indigenous peoples.²¹⁴ Indigenous communities within states are not members of the United Nations but have been able to voice some concerns by obtaining official consultative status with the UN Economic and Social Council.²¹⁵ Indigenous peoples have advanced

209. Dana Priest & Scott Higham, *At Guantanamo, a Prison Within a Prison*, WASH. POST, Dec. 17, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A5918-2004Dec16.html>. See also *Controversy Continues Regarding Detainees Held by the CIA, Renditions to Other Countries*, 99 AM. J. INT’L L. 706 (2005); Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14, 2005, available at http://www.newyorker.com/fact/content/?050214fa_fact6; Richard Norton-Taylor, *Amnesty Demands Public Inquiry on Rendition Flights*, GUARDIAN, April 5, 2006, available at <http://www.guardian.co.uk/usa/story/0,,1746827,00.html>; Dana Priest & Walter Pincus, *CIA, White House Defend Transfers of Terror Suspects*, WASH. POST, Mar. 18, 2005, at A07, available at <http://www.washingtonpost.com/wp-dyn/articles/A45119-2005Mar17.html>.

210. Giovanni Sartori, *How Far Can Free Government Travel?*, 6:3 JOURNAL OF DEMOCRACY 101, 102 (1995).

211. Michael J. Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A “Naturalist” Perspective*, 20 GA. L. REV. 995, 1063 (quoting Philippa Foot, *Moral Relativism*, in RELATIVISM: COGNITIVE AND MORAL 164 (J. Meiland & M. Krausz eds., 1982)).

212. S. James Anaya, *Indigenous Peoples and International Law Issues*, 92 AM. SOC’Y INT’L L. PROC. 96, 96-97 (1998).

213. *Id.* at 96. Indigenous people have also gained special subjects of concern status with the International Labour Organisation (“ILO”), Organization of American States (“OAS”) and other international institutions. *Id.*

214. *Id.* at 97.

215. The Office of the United Nations High Commissioner for Refugees notes that: 15 organizations of indigenous peoples have consultative status with the United Nations Economic and Social Council (ECOSOC). Consultative status entitles them to attend and contribute to a wide range of international and intergovernmental conferences. These

historic sovereignty claims, treaty claims, minority claims, self-determination claims, and human rights claims.²¹⁶ International human rights based claims have provided indigenous communities the greatest protection to date.²¹⁷ The Convention Against Genocide recognizes that all cultural groupings of people have a right to exist.²¹⁸ The UN Charter calls upon states to show “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”²¹⁹ The widely ratified UN Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) provides that states

organizations are: Aboriginal and Torres Strait Islander Commission, Asociación Kunas Unidos por Nabguana, Four Directions Council, Grand Council of the Crees (of Quebec), Indian Council of South America, Indian Law Resource Centre, Indigenous World Association, International Indian Treaty Council, International Organization of Indigenous Resource Development, Inuit Circumpolar Conference, National Aboriginal and Islander Legal Services Secretariat, National Indian Youth Council, Saami Council, Sejekto Cultural Association of Costa Rica, and World Council of Indigenous Peoples. In addition, hundreds of representatives of other indigenous peoples and their organizations participate in United Nations meetings, in particular those of the Working Group on Indigenous Populations. Non-governmental organizations with general human rights interests actively contribute to work in the field of indigenous peoples’ rights, in addition to supporting indigenous peoples’ causes.

U.N. Office of the High Commissioner for Human Rights, *Fact Sheet No.9 (Rev.1), The Rights of Indigenous Peoples*, July 1997, Introduction [hereinafter *Fact Sheet No. 9*], available at <http://www.unhchr.ch/html/menu6/2/fs9.htm>.

216. Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law*, 34 N.Y.U. J. INT’L L. & POL. 189, 190 (2001).

217. S. James Anaya, *Divergent Discourses About International Law, Indigenous Peoples, and Rights Over Lands and Natural Resources: Toward a Realist Trend*, 16 COLO. J. INT’L ENVTL. L. & POL’Y 237, 241-42 (2005) [hereinafter Anaya, *Realist Trend*].

218. Article 2 of the Convention Against Genocide defines genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.” Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277. See also S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT’L & COMP. L. 13, 20 (2004) [hereinafter Anaya, *Multicultural State*].

219. U.N. Charter art. 1, para. 3. The U.N. Charter recognizes the right of self-determination for all peoples and calls upon states to advance human rights without discriminating on the basis of race, sex, language, or religion. *Id.* International and regional human rights instruments that address non-discrimination and equality include: International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978); African Charter on Human and Peoples’ Rights, June 26, 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 I.L.M. 58 (1982); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/684 (1981); American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/ser.L./V./II.23, doc. 21 rev. 6 (1948); Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948).

promote indigenous cultural identity, freedom from discrimination, sustainable development, and effective participation.²²⁰

The United States ratified CERD in October 1994. Under its early warning and urgent action procedure, the United Nations Committee on the Elimination of Racial Discrimination has called upon the United States

to freeze any plans to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developer; and to desist from all activities or plans concerning the ancestral lands of Western Shoshone or in relation to their natural resources, which were being carried out without consultation with and despite protests of the Western Shoshone peoples.²²¹

Nevada-based Western Shoshone tribal members and two residents of Utah filed suit to prevent the detonation of a 700-ton ammonium nitrate and fuel oil bomb at the Nevada Test Site.²²² A mushroom cloud

220. UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation XXIII: Indigenous Peoples, U.N. Doc. CERD/C/51/misc 13/Rev 4, at ¶ 4 (1997) [hereinafter CERD General Recommendation on Indigenous Peoples] calls upon states to:

- (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
- (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
- (e) Ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs and to preserve and to practice their languages.

The UN Human Rights Committee and the UN Committee on the Elimination of Racial Discrimination have recognized indigenous peoples' rights, based upon the new international standards. Respect for indigenous human rights increasingly impacts lending decisions of the European Union, Inter-American Development Bank, and World Bank. International law that recognizes indigenous rights also affects the executive and judicial system of states. *See, e.g.*, Report of the Committee on the Elimination of Racial Discrimination, U.N. GAOR, 49th Sess., Supp. No. 18, at 30, U.N. Doc. A/49/18 (1994) (addressing Swedish legal provisions affecting Saami land and hunting rights). *See also* Anaya, *Multicultural State*, *supra* note 220, at 18 n.23.

221. Press Release, U.N. Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Racial Discrimination Concludes Sixty-eighth Session (Mar. 10, 2006), available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/D85D881B5C5CF007C125712D007A1035?opendocument>.

222. Ken Ritter, *Indian Tribe, Downwinders: Stop Nev. Blast*, WASH. POST, Apr. 20, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/20/AR2006042002031.html>.

from bunker buster blasts developed to penetrate solid rock would expose people in the region to radioactive fallout remaining after nuclear weapons detonated from 1951 to 1992.²²³ Oxfam reports that this is the first time that a UN committee has issued a full decision against United States federal Indian law and policies.²²⁴

Prior to the creation of the United Nations, the Permanent Court of International Justice described national minorities as distinct from the majority “in race, language and religion.”²²⁵ This conception of minorities has been broadened by such agreements as the International Covenant on Civil and Political Rights (“ICCPR”),²²⁶ which recognizes that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.”²²⁷ Article 27 of the ICCPR provides, “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”²²⁸

International law recognizes the rights of peoples to internal self-determination and cultural integrity.²²⁹ For instance, the ICCPR recognizes to “all peoples” the right of self-determination and the right to freely pursue economic, social, and cultural development.²³⁰ The International Labor Organization (“ILO”) Convention No. 169 on Indigenous and Tribal Peoples states that “governments shall have the

223. *Id.*

224. Press Release, Oxfam America, Western Shoshone Victorious at United Nations (Mar. 10, 2006), *available at* http://www.oxfamamerica.org/newsandpublications/press_releases/press_release.2006-03-10.3507376169/?searchterm=Shoshone.

225. Steven Wheatley, *National Minorities and the Emerging Human Rights to Political Inclusion and Dialogue*, 2:2 E. EUR. HUM. RTS REV. 123 (1997).

226. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (1978) [*hereinafter* ICCPR], *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id. art. 2(1).

227. *Id.* art. 1(1).

228. *Id.* art. 27.

229. Clinton, *supra* note 7, at 115-16.

230. ICCPR, *supra* note 227, art. 1. *See also* Clinton, *supra* note 7, at 115-16.

responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.²³¹ This binding multilateral treaty is the foremost international confirmation of indigenous rights to date,²³² revising the ILO's earlier Convention No. 107 assimilation policy.²³³ ILO Convention No. 169 recognizes the aspirations of indigenous peoples to: "exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they lie."²³⁴ Indigenous cultural integrity²³⁵ is intertwined with land and resource rights.²³⁶ S. James Anaya points out:

Within the Western liberal frame adopted in the political and juridical culture of the United States, indigenous peoples' lands have been

231. International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO Convention No. 169, art. 2(1), June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991) [hereinafter ILO Convention No. 169], available at <http://www.unhcr.ch/html/menu3/b/62.htm>. Article 3(1) provides: "[i]ndigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination." *Id.* art. 3(1).

232. ILO Convention No. 169 has impacted indigenous human rights struggles around the world, most notably in Mexico. Implementing the North American Free Trade Agreement (NAFTA) resulted in an effort to weaken Article 27 of the Mexican Constitution, recognizing collective land tenure. See Marco Palau, *The Struggle for Dignity, Land, and Autonomy: the Rights of Mexico's Indigenous People a Decade After the Zapatista Revolt*, 36 COLUM. HUM. RTS. L. REV. 427, 438-42 (2005). The indigenous peoples of Chiapas organized themselves into an armed resistance group known as the Zapatistas. Their seizure of six Chiapas towns gained them global recognition. National and international pressure forced the Mexican government to end its military response and sign the 1995 Law for Dialogue, Reconciliation, and Dignified Peace in Chiapas. "Ley para El Dialogo, La Conciliacion y La Paz Digna en Chiapas," D.O., 11 de marzo de 1995, <http://info4.juridicas.unam.mx/ijure/tcfed/188.htm?s=> (last visited April 2, 2006). The Zapatistas' concerns were seen in light of the International Labour Organization (ILO) Convention No. 169.

233. International Labour Organization, Convention Concerning the Protection and Integration of Indigenous Populations and Other Tribal and Semi-Tribal Populations in the Independent Countries, ILO Convention No. 107, June 2, 1959, 107 I.L.O. 1957 [hereinafter ILO Convention No. 107].

234. ILO Convention No. 169, *supra* note 231, at pmb1., par. 5. Article 7(1) of ILO Convention No. 169 provides that:

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Id. art. 7(1). See also Anaya, *Multicultural State*, *supra* note 218, at 23-24.

235. *E.g.*, ILO Convention No. 169, *supra* note 231, art. 5 ("[T]he social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected.").

236. *Id.* pt. 2 (land).

treated as fungible with cash.

In contemporary international law, by contrast, modern notions of cultural integrity, non-discrimination, and self-determination join property precepts in the affirmation of sui generis indigenous land and resource rights, as evident in ILO Convention No. 169.²³⁷

This convention calls upon states to recognize the unique value of land and natural resources to cultural integrity.²³⁸ Such spatial references as a place of origin are central to tribal religious practice and identity.²³⁹ Article 15 guarantees indigenous peoples rights “to participate in the use, management and conservation” of their natural resources.²⁴⁰

Raymond Cross notes, “Indian peoples by custom, heritage, and treaty bargain are highly immobile. Their lands represent their collective entwinement with their spiritual, emotional, and economic lives.”²⁴¹ Indigenous peoples have the right to retain their own customs and institutions.²⁴² The ILO Convention No. 169 provides that “the methods customarily practiced by the peoples concerned for dealing with offences committed by their members shall be respected.”²⁴³ Autonomous governance is fundamental to cultural development and stewardship of natural resources.

International institutions are playing a role in strengthening consensus regarding indigenous peoples’ rights. The United Nations Working Group on Indigenous Populations produced the draft of a UN Declaration on the Indigenous Peoples, under the auspices of the UN Commission on Human Rights.²⁴⁴ The Working Group has reviewed

237. Anaya, *Multicultural State*, *supra* note 218, at 38.

238. Article 13(1) of ILO Convention No. 169 provides: “[G]overnments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.” ILO Convention No. 169, *supra* note 231, art 13(1). *See also* Martin Wagner, *The International Legal Rights of Indigenous Peoples Affected by Natural Resource Exploitation: A Brief Case Study*, 24 HASTINGS INT’L & COMP. L. REV. 491, 498 (2001).

239. Tsosie, *supra* note 58, at 283.

240. ILO Convention No. 169, *supra* note 231, art. 15(1).

241. Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 508 (1998). Rebecca Tsosie points out that biodiversity prospecting is another area in which value conflicts occur. Tsosie, *supra* note 58, at 317-18. Indigenous claims for protection of such sacred knowledge as desert resistant corn seed stock face stiff economic pressure. *Id.*

242. ILO Convention No. 169, *supra* note 231, art. 8(2).

243. *Id.* art. 9.

244. The UN Draft Declaration of Principles on the Rights of Indigenous Peoples provides that, “[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual and

national developments impacting indigenous human rights and has established international human rights thresholds.²⁴⁵ A similar process is underway with regard to a proposal for an American Declaration on the Rights of Indigenous Peoples.²⁴⁶ The Inter-American Commission on Human Rights has developed a draft American Declaration, which is under discussion within a working group of the Permanent Council of the Organization of American States.²⁴⁷ United Nations Permanent Forum on Indigenous Issues Chairperson Victoria Tauli-Corpuz calls upon the Human Rights Council to make certain that indigenous issues will be an integral part of its mandate.²⁴⁸ The Office of the United Nations High Commissioner for Refugees estimates that there are 300 million indigenous peoples in the world.²⁴⁹ There exists a great deal of diversity among these indigenous communities. Benedict Kingsbury notes that the UN draft Declaration inadequately addresses relationships between tribes, states, and federal governments.²⁵⁰ Kingsbury calls for a strengthening of cooperative relationships among indigenous and state judicial systems,²⁵¹ as well as a recognition of the individual rights of non-members and dissenting members of indigenous communities.²⁵²

material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used.” Draft United Nations Declaration on the Rights of Indigenous Peoples, art. 25, E.S.C. Res. 1994/45, U.N. ESCOR, 46th Sess., at 105, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994), reprinted in 34 I.L.M. 541 [hereinafter UN Draft Declaration]. Non-governmental International conferences in 1977 and 1981, combined with a United Nations study, prompted the Economic and Social Council to create the United Nations Working Group on Indigenous Populations (1982). “The Working Group has become one of the largest United Nations forums in the field of human rights.” *Fact Sheet No. 9*, supra note 215, Introduction, Working Group on Indigenous Populations.

245. *Fact Sheet No. 9*, supra note 215, Introduction, Working Group on Indigenous Populations.

246. Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., 95th Sess., 1333d mtg., pmb., OEA/Ser/L/V/II.95 (1997) [hereinafter Proposed American Declaration].

247. Anaya, *Realist Trend*, supra note 217, at 241. See also Proposed American Declaration, supra note 246.

248. *UN Forum on Indigenous Issues Looks to New Human Rights Council*, UN NEWS SERV., May 25, 2006, available at <http://www.un.org/apps/news/story.asp?NewsID=18622&Cr=indigenous&Cr1>.

249. *Fact Sheet No. 9*, supra note 215, Introduction.

250. Kingsbury, supra note 216, at 226-28.

251. *Id.* See also UN Draft Declaration, supra note 244. The UN Draft Declaration recognizes rights by indigenous peoples to participate fully in the affairs of the state and strengthen separate legal systems. *Id.* art. 4. See also *id.* arts. 8, 12-14, 19-21, 23.

252. Kingsbury, supra note 216, at 227-28.

VII. PUBLIC PARTICIPATION: THE MEANS ARE THE ENDS

How one asks for protection affects what kind of protection one will receive. Language of tolerance minimizes criticism that can be directed at a given group. On the other hand, such an approach runs the risk of providing limited immunities rather than full equality and participation. Inter-temporal resource misallocations occur when politicians base decisions upon short-term outcomes at high discount rates.²⁵³ They place little value on future harms.²⁵⁴ The economic arena is no longer the nation-state. Rather, we now operate in a global market. At the same time, we have consolidated power into microeconomic units. Harold Laski noted that “demands of modern global economics render the nation-state economically untenable as a discrete economic unit.”²⁵⁵ Yet, there remains a mystique surrounding the concept of the nation state.

Treaties between states historically have been limited to positive obligations derived from specific agreements based on mutual benefit. Often these treaties were honored for only as long as it was expedient to do so. Yet, international cooperation is no longer restricted to such a minimalist approach. Since any legal system’s ability to affect social change is limited, however, relying on law’s omnipotence to replace morals eventually leads to legal nihilism. Law merely provides a skeletal framework for society. Without individual creativity and a sense of genuine community such a skeleton can become an ominous presence inspiring fear.

Bringing divergent political traditions together is an ambitious challenge, the drafters of which must not lose sight of the need to establish an identity that its members can embrace. New Zealand fishery management illustrates the advantages and disadvantages of devolving environmental decision-making to the private sector. Property rights should not be designed to liberate industries from interacting with communities. Implementing an individual transferable quotas system must involve equitable allocation. This is best achieved through provisions for public participation that create a level-playing field for non-elite members of civil society. Otherwise, environmental management will diverge from the larger public interest. Balancing

253. Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. Rev. 1495, 1515-16 (1999).

254. *Id.*

255. IAN WARD, *THE MARGINS OF EUROPEAN LAW* 27 (1996) (citing HAROLD LASKI, *LIBERTY IN THE MODERN STATE* (rev. ed., Viking Press 1949) (1930)).

access to information and process transparency with guarantees of finality for permit holders is not an insurmountable challenge. Public participation by civil society increases procedural legitimacy. Meaningful consent requires governments to facilitate processes by which members of the public analyze the appropriate level of governmental intervention. While scientists can narrow the range of technical uncertainty, ordinary individuals have the capacity to make value judgments.

A. Equitable Allocation of Tradable Fishing Permits to the Maori

Individual transferable quotas have become a common management tool for fisheries.²⁵⁶ Granting exclusive property rights within a closed system provides perpetual harvesting rights.²⁵⁷ As a result, individual transferable quotas reduce incentives for fishers to stay out in dangerous weather conditions.²⁵⁸ Furthermore, environmental organizations and governmental agencies can enter the market and retire permits by buying individual transferable quotas if stocks are over-fished.²⁵⁹ New Zealand has implemented rights-based management for the vast majority of its commercial fisheries.²⁶⁰

The establishment of an individual transferable quotas system in New Zealand was based on the assumption that fisheries were part of a common property resource that was ultimately under government control. This was not a valid assumption. The Maori people were able to bring a property claim through the Waitangi Tribunal. The Maori noted that they had not given up their fisheries rights guaranteed to them under Article II of the Treaty of Waitangi.²⁶¹ Negotiated in 1840 between England and Maori tribal leaders, this treaty established exclusive Maori

256. Alison Rieser, *Prescriptions for the Commons: Environmental Scholarship and the Fishing Quotas Debate*, 23 HARV. ENVTL. L. REV. 393, 406-09. (1999).

257. *See id.* at 395.

258. Robert N. Stavins, *Taking Fish to Market: Why Not Trade Fishing Rights the Way Business Trades Pollution Credits?*, FORBES, Apr. 28, 2003, available at <http://forbes.com/forbes/2003/0428/040.html>.

259. Roger Bate, *The Common Fisheries Policy: A Sinking Ship*, WALL ST. J., June 2000, available at <http://www.environmentprobe.org/enviroprobe/evpress/0700wsj.html>.

260. Robert Repetto, *A New Approach to Managing Fisheries*, ISSUES IN SCI. & TECH., Fall 2001, available at <http://www.issues.org/18.1/repetto.html>.

261. The *Treaty of Waitangi (TE TIRITI O WAITANGI)* was entered into on Feb. 6, 1840. A retranslation of the Maori text of the Treaty can be found in the judgment of *New Zealand Maori Council v. Att'y Gen.*, [1987] 1 N.Z.L.R. 641, 662-63 (C.A.). The Treaty is also available at <http://www.govt.nz/en/aboutnz/?id=77737fd3275e394a8ed9d416a72591d0> (last visited Feb. 13, 2004).

rights over fisheries.²⁶² Before settlers came from Europe, fishing was important to both local Maori diets and inter-tribal trade.²⁶³ In contrast, fishing has not played an important role in the general New Zealand economy until recently.²⁶⁴

Without documentation of landings, Maori fishing was deemed informal. As a result, non-Maori fishers gained exclusive property rights over New Zealand fish stocks based upon proven catch from the previous three years.²⁶⁵ Efforts to facilitate responsible self-management contravened the Treaty of Waitangi's guarantee of Maori ownership of New Zealand fisheries. Devolving responsibility for delivery of new quota registry systems to the fishing industry resulted in a long legal battle that left the Maori with ten percent of their original fishery rights. As Richard Dawson notes:

The ultimate problem of legal-economic policy is the structuring of the decision-making process itself. The supreme question is: who decides? Who decides which interests are to count in situations of conflicting wills. That is to say, who can create enforceable interests? Most if not all conflicts over the *Treaty of Waitangi* have concerned the question of 'who decides?' – especially in regard to the issue of 'whose interpretation is to count'.²⁶⁶

Claims to commercial fishing rights were settled by negotiation. Significant controversy arose regarding the selection of Maori

262. Richard M. Dawson, *The Genesis of the New Zealand Parliament's Treaty of Waitangi (Fisheries Claims) Settlement Act, 1992*, 1 INT'L. J. WATER 80 (2000), available at http://www.inderscience.com/search/index.php?action=record&rec_id=2054&prevQuery=&ps=10&m=or.

263. In a submission to the Tribunal, citizen Huhana Morgan noted, "Our knowledge and skills have been ignored, we are silently angry and extremely saddened at the loss of one of our major resources. What was once the staple diet of the Southern people is now a luxury many of us cannot afford." Dawson, *supra* note 262 (quoting a submission to the Waitangi Tribunal by Huhana Morgan, of Ngui Tahu).

264. Pyar Memon & Ross Cullen, *Fishery Policies and their Impact on the New Zealand Maori*, 7 MARINE RESOURCE ECON. 3 (1992):153-67. Refrigeration technology enabled New Zealand to establish a lucrative meat and dairy export industry. The country became a grasslands based economy. Until the 1970s fishing was primarily a small-scale enterprise. While there were many small boats, they did not venture beyond inshore fisheries. In general, the industry did not account for a large sector of employment or profitability in the economy. The 1970s marked a rapid expansion of New Zealand's fishing operations. The combination of Britain's entry into the EC and the OPEC oil shock caused New Zealand's economy to suffer in the early 1970s. In an attempt to bolster the economy, the government introduced a variety of ways to increase exports. These initiatives included incentives to expand fishing.

265. Carol M. Rose, *Expanding the Choices for the Global Commons: Comparing Newfangled Tradable Allowance Schemes to Old-Fashioned Common Property Regimes*, 10 DUKE ENVTL. L. & POL'Y F. 45, 59-60 (1999). See also Dawson, *supra* note 262.

266. Dawson, *supra* note 262.

negotiators and their ability to bind the Maori people. The government provided the capital for Maori to acquire a half share in New Zealand's largest fishing company.²⁶⁷ Ten percent of individual transferable quotas were allocated to Maori. Combined with the shares acquired through the fishing company, the Maori became the largest participant in the commercial industry. In return the Maori agreed that all claims to commercial fishing were extinguished.²⁶⁸

B. Impetus to Change Rules

The environmental debate is defused when government devolves decision-making to the market. Decreasing the government's role in natural resource management takes away the forum in which conflicting views can be discussed and policies challenged.²⁶⁹ Transferring the protection of the environment from the public sphere to the marketplace depoliticizes the decision-making process. When issues are brought back into the public domain they are resolved pursuant to scientific expert witnesses and narrow legal interpretations of sustainability. Social dimensions of resource distribution are discounted in no small part due to the manner in which industry can control the parameters of the decision-making process. Corporations have greater resources at their disposal to retain persuasive scientific experts, conduct research that supports their position and present findings in an attractive way. New Zealand has devolved much of the responsibility for fishery management to industry. This has included scientific research on the health of fish stocks. Privatizing fisheries through the individual transferable quotas system has concentrated ownership. According to the New Zealand Ministry for the Environment, the three largest fishing companies controlled sixty percent of the total allowable catch by 1997.²⁷⁰ Duke University notes that ten percent of the permit holders own eighty percent of permits.²⁷¹ Despite the imperative of establishing sustainable

267. Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, 1992 S.N.Z. No. 121, available at http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes (Interim Website Home for Statutes of New Zealand).

268. H.R. STANDING COMM. ON PRIMARY INDUSTRIES, RESOURCES AND RURAL AND REGIONAL AFFAIRS, 38TH PARL., DEVELOPMENTS IN NEW ZEALAND AGRICULTURE – REPORT OF A VISIT TO NEW ZEALAND, PARLIAMENTARY PAPER 397/97, ch. 3.11 (1997) (Austl.) available at <http://www.aph.gov.au/house/committee/primind/newzeald/nzreport/nzindex.htm>.

269. Maria Lee and Carolyn Abbot, *The Usual Suspects? Public Participation Under the Aarhus Convention*, 66 M.L.R. 80, 103-05 (2003).

270. Tom Bührs, *From Diffusion to Diffusion: the Roots and Effects of Environmental Innovation in New Zealand Environmental Politics*, 12 ENVTL. POL. 83, 94 (2003).

271. Stephanie Hunt, Daphne Pee & Tracy Parsons, Flopping Fisheries, at Individual

fishing practices, management systems that lead to consolidated markets often concentrate wealth and severely impact small-scale fishers.²⁷² As Katrina Smith notes:

Debates over environmental issues usually involve questions of distribution. Problems such as deciding where to site noxious facilities, how to share the costs of cleaning up pollution, and how to allocate natural resources equitably all raise concerns over who will bear the costs of using (or not using) natural resources. While science and economics can outline efficient and effective solutions to technical problems, the ultimate choice between possible solutions can only be made after considering qualitative issues such as power, politics, public opinion, tradition, and fairness.²⁷³

Public participation must be meaningful. Facilitating political deliberation can inform the public of government decisions and make public opinion known to policy-makers. Political sophistication is not a

Transferable/Fishing Quotas, para. 7 (2002), available at <http://www.biology.duke.edu/class/bio217/2002/fish/management.html>.

272. *Id.*

273. Katrina Smith, *Fairness In Water Quality: A Descriptive Approach*, 4 DUKE ENVTL. L. & POL'Y F. 85, 85 (1984). See also STEVEN YEARLEY & UNWIN HYMAN, *The Authority of Science: Knowledge, Truth and Reality*, in SCIENCE, TECHNOLOGY & SOCIAL CHANGE (1988) (pointing out the weaknesses in trying to divorce science from socially constructed forms of knowledge); Brendan Gillespie, Dave Eva & Ron Johnston, *Carcinogenic Risk Assessment in the United States and Great Britain: The case of Aldrin/Dieldrin*, in 9 SOCIAL STUDIES OF SCIENCE 265 (1979), available at <http://sss.sagepub.com/cgi/content/abstract/9/3/265> (discussing why the United States and British policies diverged regarding the status of Aldrin/Dieldrin as a carcinogen). These two critiques by Yearley and Gillespie provide a framework for understanding the arguments and inconsistencies of anti-constructionist and constructionist theories. By analyzing what kind of knowledge science gives we can conclude how much authority such information should receive. Anti-constructionist contend that because science is based on facts directly found in nature science is uniquely true. The Aldrin/Dieldrin case divided the United States and Britain because universal criterion could not be agreed upon. As a result, policies were based on opposing paradigms. Britain based its findings on traditional cause and effect toxicology, which subscribes to acceptable dosages within lethal limits. In contrast, the United States used a newer branch of toxicology, which moves beyond relating toxicity to dosage. The case was by no means divided simply because the American toxicologist, Saffiotti, was a molecular biologist who believed in a trigger effect while the British toxicologist, Barnes, believed in the traditional view of thresholds. Many cultural factors played a role in the policy-making decisions of each country. One such non-scientific debate was the decision not to discount mice as a viable test animal. The scientific grounds of the controversy were ignored because it was too overwhelming to consider that the vast majority of products would have to be taken off the market if mice were discredited. There is a lack of consensus both regarding what kind of knowledge science provides and how deserving science is of authority. Many decisions depend upon the branch of science used by the decision-maker, explaining why the United States banned Aldrin/Dieldrin while Britain kept it on the market. Even if ideal distribution of funding and resources were available, rarely are scientists given the time to determine findings. A continued study of science and technology's relation to society is needed to safeguard society against special interest groups or simply overly hasty attempts at progress.

prerequisite for rational political dialogue. Actual discourse enables public participation. Political conversation builds skills unattainable by merely instilling political knowledge. Deliberative democracy depends upon a healthy public sphere, which in turn requires public space to facilitate rational discourse. Deliberation legitimizes decisions by exposing the decision-making process to a discussion among equal citizens.²⁷⁴ Politically knowledgeable citizens have crystallized opinions that enable them to express views in collective decision-making venues more fluently than individuals with lower levels of education and interest. While such factors as age and newspaper readership affect political sophistication, conversation as opposed to sophistication increases deliberative capability. Discourse enables people to form articulate opinions. For deliberation to provide decision-makers with the views of the people, there must be an even playing field. Discussions foster equality only if everyone has an opportunity to be heard.²⁷⁵ In the absence of equality, opinions that are voiced cannot be said to represent public opinion.²⁷⁶

Beyond civic skills, time and money play a significant role in one's ability to participate. Possessing these resources increases both the chances that an individual will take part and the likelihood that such participation will make a difference. Psychological engagement varies depending on peoples' values, group affinity, interest in politics, and feelings of efficacy.²⁷⁷ Discussion regarding equitable distribution loses its public forum when regulatory control is transferred to the private sector. Decision-making becomes de-politicized as dominant interests are promoted as scientific expertise. Devolving environmental regulation to industry moves issues out of the public sphere. This downplays conflict since differences do not come to light through public debate. This is not an adequate solution to the manner in which governments have protected the environment. The fact that judges and scientific expert witnesses are not elected officials combined with restricted access to courts leaves the public with little recourse. People have a right to participate in decisions that affect their social and physical

274. See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 600 (1999).

275. David Dutwin, *The Character of Deliberation: Equality, Argument, and the Formation of Public Opinion*, 15 INT'L J. PUB. OPINION RES. 239, 240 (2003).

276. *Id.*

277. Political efficacy is a person's perception that he or she can affect change and that the political system responds to his or her particular needs. See Dietram A. Scheufte, Matthew C. Nisbet & Dominique Brossard, *Pathways to Political Participation? Religion, Communication Contexts, and Mass Media*, 15 INT'L J. PUB. OPINION RES. 300, 302-04 (2003).

environment.²⁷⁸

C. The Århus Convention and the Human Right to a Clean Environment

Increasing the flow of information to and the thoughtful analysis by ordinary citizens avoids policy stagnation in a rapidly changing world. While scientists provide valuable technical expertise, civil society must be consulted regarding such value judgments as the appropriate level of governmental intervention. The Århus Convention has codified a human right to a clean environment, granting citizens access to environmental information, participation in decision-making in environmental matters, and judicial redress.²⁷⁹ The Convention recognizes the need to protect the environment for both present and future generations.²⁸⁰ Including citizens in environmental protection increases the effectiveness of that protection since people often have a deep interest and are affected by the state of their surrounding environment.²⁸¹ This rights-based approach prohibits discrimination on the basis of citizenship, nationality, or domicile. While the Convention is not focused on the private sector, when environmental regulation has been devolved to privatized bodies, these entities are covered under the definition of public authorities.²⁸²

Public authorities must generate and provide basic environmental information, access to which will facilitate informed participation in decision-making. By increasing government accountability and transparency, better decisions can be reached. Having a stake in the process should enhance people's willingness to implement decisions. Public authorities have both a passive responsibility to respond to requests for information and an active responsibility to collect, update and distribute information. Article 4 sets forth a presumption in favor of

278. Bührs, *supra* note 270, at 98.

279. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice regarding Environmental Matters (Århus Convention), June 25, 1998, 38 I.L.M. 517 (1999) (entered into force Oct. 30, 2001), *available at* <http://www.unece.org/env/pp/documents/cep43e.pdf>. The convention was negotiated among the Member States of the United Nations Economic Commission for Europe (UNECE). On June 25, 1998 the convention was adopted at a pan-European meeting of environment ministers in Århus, Denmark. All of the member states of the European Union and the EU itself signed. The convention entered into force on October 30, 2001. The convention and general information are available via the UN/ECE Århus Convention website at <http://www.unece.org/env/pp/welcome.html> (last visited Mar. 28, 2004). Further information is available from the European Union Online website at <http://europa.eu.int/rapid/start/cgi/guesten.ksh?paction.gettxt=gt&doc=MEMO/03/2100|RAPID&lg=EN&display=> (last visited Mar. 28, 2004).

280. Århus Convention, *supra* note 279.

281. *Id.*

282. *Id.*

access, leaving a finite list of exemptions that are to be interpreted restrictively.²⁸³ Both individuals and NGOs may request environmental information without proving that they are interested parties.²⁸⁴ The Convention brings together human rights and environmental law. Access to information is a prerequisite to public participation in environmental decision-making.²⁸⁵ The Convention grants the public with a right to be heard in the law making process and a right to seek judicial remedies when there has been a breach of environmental law.²⁸⁶

VIII. CONCLUSION

Living sustainably depends upon our ability to find common ground amidst an array of competing interests. Given the urgent need for coordination to maintain peace and security, comity between governments is essential. The United States has discovered that legislating the assimilation of native communities into a national polity neither reduces administrative complexity nor achieves meaningful governance. Chippewa cultural heritage is interwoven with the harvest of ancient wild rice. Pueblo ceremonial rights to clean water are equally central to retaining cultural heritage. Alaska Natives and the Maori fishermen of New Zealand have been induced to incorporate in order to retain control over traditional natural resources. While the Clean Water Act has succeeded in curbing the disposal of chemicals into North American waterways, non-point source pollution remains as difficult to control as the smuggling of illicit drugs. Who decides the parameters of homeland security and the requisite degree of public oversight of private entities? Cooperative tribal, state, federal, and international responses to the meth crisis can address both environmental and human health. Ensuring water quality and water availability remain core public functions, the provision of which governments cannot disregard. An important first step in this process is to address jurisdictional uncertainty. Transparent, legitimate, and accountable governments are the most likely to be able to achieve good governance and cooperate

283. Article 4(4) states that the “grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.” 38 I.L.M. 517, 519-20.

284. Article 2(5) clarifies that “‘The public concerned’ means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.” *Id.* at 519.

285. *Id.* at 517.

286. *Id.* at 524.

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with one another in international decision-making forums. Protecting individuals and tribal integrity are not inherently mutually exclusive goals. Cooperation involves time and trust. Governments, nongovernmental organizations, and civil society must remain committed to justice, respecting varying cultural approaches to conflict resolution. Our strength is not in our ability to assimilate. It is in our capacity to transcend co-existence to sustain genuine cooperation.