

**HOW CAN INDIAN TRIBES' ENVIRONMENTAL PROBLEMS BE ADDRESSED  
BY THE ENVIRONMENTAL JUSTICE MOVEMENT?**

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**ROUGH DRAFT**

## ABSTRACT

The distinctive land tenure status of Indian reservations has combined with the relationship between tribal governments and state environmental regulatory authority to make Indian lands especially attractive to developers seeking sites for the treatment, storage, and disposal of hazardous by-products of industry and electrical power generation. In deciding whether to permit such activities on their lands, tribal communities have often faced difficult choices concerning whether to accept the local investment that accompanies the potential environmental, health, and safety risks. To address past environmental problems and avoid them in the future, the choices that tribes face in deciding whether (and on what basis) to join with other constituents of the environmental justice movement are equally difficult. The environmental justice movement aims to promote structural changes needed to exert greater control over facility siting and cleanup of existing contamination, yet tribal governments have a different basis of authority to protect the health, welfare, and resource base of their tribal members than their counterparts in community-based organizations, the backbone of the environmental justice movement. Confounding the uncertain strategic wisdom of tribal governments in casting their lot with community-based organizations is the fact that more than half the Indian people in America live away from reservation lands, in urban areas, where they are among the most disadvantaged of all residents. This paper characterizes the extent to which tribal jurisdictions and urban Indian communities are disproportionately burdened by environmental health risks, and assesses three political mobilization strategies for Indian participation in the promotion of environmental justice in America.

# HOW CAN INDIAN TRIBES' ENVIRONMENTAL PROBLEMS BE ADDRESSED BY THE ENVIRONMENTAL JUSTICE MOVEMENT?

## Introduction

Through a complex interaction of political, economic, and ecological processes, Indian tribes are left at the margins of American society, and limited economic and educational opportunities have pushed many tribal members to relocate in urban settings. The tribal members who remain on reservation lands often face difficult choices between a life of poverty (and its concomitant health risks) on the one hand, and on the other, a form of economic development that harbors potentially disastrous environmental consequences.

The marginal status of tribal lands makes them attractive to industrial developers, especially when the development involves a controversial technology that likely faces well-organized opposition in other locales.<sup>1</sup> In addition, the distinctive place that tribal governments occupy in the American federal system contributes to developers' interest in siting controversial and potentially hazardous facilities on tribal lands. Tribes are not subdivisions of state government, and their jurisdictions are not necessarily subject to the same environmental protection rules as nearby non-Indian lands. This sometimes leads industrial developers to seek facility-siting agreements with Indian tribes, guided by the

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<sup>1</sup> Goldtooth, for example, reports that over 200 tribal communities have been approached by the waste disposal industry. "Waste industry officials, knowing of the lack of Indigenous environmental infrastructure, are targeting vulnerable indigenous communities to construct waste disposal facilities. These facilities would deal with wastestream materials ranging from toxic sludge, hazardous waste, medical and 'low' level radioactive waste, solid waste, asbestos, nuclear waste, and just about anything that 'not-in-my-backyards' don't want" (1995: 144).

presumption that the cost to the developer of complying with regulatory requirements may be lower.

Just as tribes face complex choices involving economic development that avoids environmental degradation, equally difficult choices are necessary to address past environmental problems. Inattention to environmental standard setting and enforcement, mainly the province of the federal government on Indian reservations until the early 1980s, has led to remedial challenges of monumental proportions. The environmental legacies of mining, forestry, power production, and defense activities are formidable, and as recently as 1992, the US Environmental Protection Agency acknowledged that "tribes often lack the physical infrastructure, institutions, trained personnel, and resources necessary to protect their members" (EPA 1992: 3).

Given the scale of environmental problems, the diversity of tribal interests, the range of tribal technical capacities, and the complex circumstances that frame the authority of tribal governments to create and enforce environmental protection standards, the organized tribal response to environmental threats must reflect a combination of political mobilization strategies. This paper suggests three such strategies that may be used in concert with one another:

- (1) **tribe-by-tribe**, exercising authority acknowledged by statute;
- (2) through **intertribal organizations**, increasing tribal government authority by lobbying Congress, participating in executive agency rule-making, and calling public attention to environmental health and safety issues confronting urban and

reservation Indian communities alike; and

- (3) **minority coalition-building**, whereby tribal people cast their lot with community-based organizations that form the backbone of the environmental justice movement, taking advantage of the federally-instituted response to this movement, which specifically provides for executive agency attention to Native American rights and resources.

**Threats to tribal environmental management capacities:**

Macro forces:

- structured limits to tribes' economic base, which lead, in turn, to:
  - pursuit of dirty industry and unsustainable exploitation of renewable resource base to meet short-term public finance needs;
  - difficulty in recruiting and retaining talented community members;
  - disputes with states over regulatory authority (to set and enforce protective standards)
- Disestablishment of tribal governments: In addition to reduction in BIA appropriations, eliminating program support in various executive agencies, "devolution" through block grants make no provision for population growth, and are coupled with continuing efforts to eliminate revenue generating niches that tribes have effectively exploited (e.g., gaming)
- Another political gimmick, in the spirit of "devolution,"

is the Indian Self-Governance Act of 1994. It authorizes the Interior Secretary to enter into contracts with qualified tribes to provide services to the American public that had previously been provided by the Interior Department agencies themselves. This may appear to some tribes as a money-making scheme, or as an opportunity to become a partner in regional ecosystem management with other land and resource management agencies of the federal government. However, it may prove to be little more than a distraction that keeps tribes from serving tribal communities. What's more, because of the contracting authority invoked, and Congressional unwillingness to appropriate funds for the administration of tribal contracts, tribes entering into such agreements with the Interior agencies will only have available 80% of money that Interior agency would have used to accomplish the same purpose - the other 20% goes to administer the contract.

**Environmental Justice movement is a "social movement."** Who is constituency here: Largely African-American and Hispanic; Native American concerns remain marginalized. A review of the organizations included in the "Econet" directory (see appendix) indicates just a handful with an inter-ethnic constituency, and the vast majority of organizations that identify themselves as having a Native constituency list this as their exclusive orientation.

Certainly, the Native Americans named to the National

Environmental Justice Advisory Council, a group empaneled by the US Environmental Protection Agency under the authority of the Federal Advisory Committee Act, have reported the Council to be focusing on issues less central to Native communities, operating from a limited knowledge base concerning the scope of tribes' authority to protect their environmental resource base, and generally employing a discursive style in the conflict-ridden early meetings of the Council at odds with the Native members' expectations (Cindy Thomas and Jean Gamache, personal communications).

It is also important to remember that the 1994 Executive Order is not the movement; just as the 1968 *Civil Rights Act* was not the Civil Rights movement. Implementation of the Executive Order is a federal response to the social movement; Congressional legislation may follow, but if such federal legislation is forthcoming, it probably will not be enacted until after the coming year's national elections.

In the environmental justice domain, the legislative action is at the statehouse level (see, for example, the National Conference of State Legislatures 1995). However, state governments have often been in conflict with the tribes whose jurisdictions they encompass, and the state legislation enacted to date is not effective in accommodating the distinctive position that tribes occupy in the federal system.

Historically, "social movements" on behalf of Indian rights have succeeded in elevating issues to a higher Congressional priority, but Congress works within the Federal framework, enacting legislation that authorizes executive agencies to carry out environmental

protection programs, for example. For most federal executive agencies, it is a daunting administrative prospect to interact on a government-to-government basis with all of the sovereign tribal governments in the US. With few exceptions, agencies' track records in moving toward direct interactions with individual tribes has been unremarkable over the last several years.

### **Mobilizing Strategies**

I mention these threats to tribal authority, the ethnic partitioning of community-based environmental organizations, and marginalized position of tribal representatives in the federally instituted response to an environmental justice movement, because they have substantial implications for the manner in which tribes can address their environmental concerns through participation in the environmental justice movement. As highlighted most recently in reviews by Goldtooth (1995) and Grijalva (1995), tribes are not just another set of public interest groups. The tribes' basis for seeking federal intervention to alleviate a disproportionate environmental, health, and safety burdens has a rich and lengthy legal history, far more binding than the 1994 Executive Order.

The US Constitution authorizes Congress to exercise "plenary" power within tribal territories.<sup>2</sup> Federal environmental laws will generally be interpreted to apply to tribal jurisdictions (*Blue Legs*

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<sup>2</sup> See Shattuck and Norgren (1991), Wilkinson (1987), and Barsh and Henderson (1980) for detailed discussions about the history of the legal notion of tribal sovereignty, Congressional plenary powers, and the general scope of tribal governments' authority.



*v. United States Bureau of Indian Affairs, 1989*).<sup>3</sup>

State jurisdiction over tribal lands is preempted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority (*California v. Cabazon Band of Mission Indians* 1987). Federal courts have prohibited the application of state environmental laws to tribal lands (*Washington Department of Ecology v. United States EPA* 1985).<sup>4</sup>

Tribal governments retain the authority to enforce tribal laws, including environmental laws, against their own tribal members. However, the right to regulate non-Indians on tribal lands is limited (cf. *Montana v. United States* 1981, *Brendale v. Yakama Indian Nation* 1989). In *Montana*, tribes were regarded as empowered to regulate the conduct of non-Indians even on fee lands when "that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" (cit.). However, in *Brendale*, non-Indian landowners whose properties are located within "predominantly non-Indian" portions of a reservation (where lands passed out of tribal control largely through the allotment process in the early part of the century) were said to be exempt from tribal land use regulations. Moreover, there are conflicting legal findings concerning ability of tribal governments to enact laws that control activities of non-Indians *outside the reservation*, even if

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<sup>3</sup> The *Blue Legs* case determined that the Pine Ridge Lakota government could be held liable under the Resource Conservation and Recovery Act (RCRA) for illegal disposal of municipal solid waste in a reservation open dump site.

<sup>4</sup> In *Washington Department of Ecology v. USEPA*, the state of Washington was not allowed to include tribal lands in its state permit program.

such activities take place upstream or upwind of tribal resources and therefore potentially pose an environmental, health, or safety burden to tribal members (Grijalva 1995).

Given these conflicting voices of authority, and a political economy that has forced many tribal people to move away from their reservations in search of educational and employment opportunities, an organized response to environmental problems may require a combination of three possible mobilization strategies : (1) **tribe-by-tribe**, exercising authority acknowledged by statute; (2) through **intertribal organizations**, increasing tribal government authority by lobbying Congress, participating in executive agency rule-making, and calling public attention to environmental health and safety issues confronting urban and reservation Indian communities alike; or (3) by **minority coalition-building**, whereby tribal people cast their lot with community-based organizations that form the backbone of the environmental justice movement, taking advantage of the federally-instituted response to this movement, which specifically provides for executive agency attention to Native American rights and resources.

Tribe-by-tribe:

Necessary for dealing with local resource management issues, and especially appropriate when the tribal government is itself a confederation that encompasses disparate cultural traditions lashed together for the administrative convenience of the federal government. Sole reliance on this approach will have limited effectiveness, however, as there exists significant unevenness among

tribes' technical capacity to set and enforce their own standards. In addition, historical animosities with adjacent non-Indian (and sometimes Indian) jurisdictions that will not be easily overcome, and most tribes' staff resources would be easily dissipated in fighting these turf battles.

#### Intertribal Organizations:

Mobilizing national and regional intertribal organizations can be effective in working to change the shared structural circumstances that limit tribal capital formation and operating revenue streams, placing many tribes in the difficult position of having to choose from among equally unsustainable options. Intertribal organizations are not particularly effective at addressing local environmental management problems, although in some instances (e.g., the Eight Northern Pueblos, some of the intertribal fishery organizations of the Pacific Northwest, and the rural Alaska sanitation coalition), the intertribal organizations' mission is sufficiently focused that problems of accountability to members' specific interests can be overcome.

#### Minority Coalition Building:

The main interests to be served by joining forces with community-based organizations from African-American and Latino participants in the environmental justice movement are those of urban Indians, who find themselves increasingly engaged in environmental politics "at home" in the city, rather than "at home" on the reservation. For tribal governments and intertribal coalitions,

however, formidable political challenges must be met in building a consensus regarding economic restructuring that leads away from environmental threats, a distinctively Indian set of concerns. In the longer term, if tribes are able to establish themselves as political forces to be reckoned with, their collective interests may be better served by joining with ethnic minority groups from which there is some disaffection at present. For now, however, the ties between tribes and Latino and Black environmental justice organizations appear so attenuated that to strengthen these ties may divert organizing efforts from the more immediate community development tasks at hand.

If that sounds exclusionary in its outlook, it is only modestly so. The tangible benefits that can be achieved through a self-conscious application of all three of these mobilizing strategies are exceeded only by the feelings of comfort that are engendered by the knowledge that a familiar realm persists amidst the changes held by an uncertain future.

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1994-95 Environmental Justice Organizations Directory  
(gopher://gopher.igc.apc.org:70/11/environment/envjustice)

Akwasasne Task Force on the Environment  
Alaska Health Project  
Alaska Native Health Board  
American Indian Environmental Council  
American Indian Science and Engineering Society (AISES)  
Americans for Indian Opportunity  
Association of Village Council Presidents, Inc. (AVCP)  
California Indian Basketweavers Association  
California Indians for Cultural and Environmental Protection  
Chickaloon Village Alaska Rights Consultants Tribal Organization  
Citizen Alert Native American Program  
Citizens Against Ruining Our Environment (CARE)  
Cultural Conservancy  
D-Q University  
Detroit American Indian Center  
Dine Citizens Against Ruining Our Environment  
First Environment Project  
First Nations Development Institute  
Good Road Coalition  
Great Lakes Indian Fish & Wildlife Commission  
Great Lakes Inter-Tribal Council  
Gwich'in Steering Committee  
Indian Law Resource Center  
Indigenous Women's Network  
Inter-Tribal Environmental Council  
International Indian Treaty Council  
Inuit Circumpolar Conference  
Maricopa County Organizing Project  
Mid-Columbia River Council  
Mohawks Agree on Safe Health (MASH)  
National Congress of American Indians  
Native Action  
Native American Women's Health Education Resource Center  
Native Americans for a Clean Environment (NACE)  
Native Lands Institute: Research and Policy Analysis  
Nebraska Indian Intertribal Development Corporation  
Office of Navajo Uranium Workers  
OR Columbia River Defense Project  
Puerco Valley Navajo Clean Water Association  
Seventh Generation Fund  
Southwest Indigenous Uranium Forum  
Southwest Network for Environmental and Economic Justice  
Sovereignty Network  
Talavaya Center Route 2, Desque Dr.  
Tonatierra  
WA Columbia River Defense Project

Wa-Swa-Gon Treaty Organization  
Western Shoshone National Council Environmental Protection Committee  
White Earth Land Recovery