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## Returning to the Tribal Environmental "Laboratory": An Examination of Environmental Enforcement Techniques in Indian Country

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# RETURNING TO THE TRIBAL ENVIRONMENTAL “LABORATORY”: AN EXAMINATION OF ENVIRONMENTAL ENFORCEMENT TECHNIQUES IN INDIAN COUNTRY

*Elizabeth Ann Kronk Warner\**

## ABSTRACT

*Governments, including tribes, need to protect one of humankind’s most valuable resources: the environment. In addition to environmental regulations, effective enforcement mechanisms are key to successful efforts to protect the environment. While much has been written about the environmental enforcement mechanisms of states and the federal government, little scholarly attention has been paid to how tribal governments are working to protect their environments. Given that there are 567 federally recognized tribes and approximately 56.2 million acres held in trust for tribes in the United States, such oversight is significant. This Article fills a scholarly void with a description of environmental enforcement techniques being utilized by tribes. It builds on past articles examining tribal environmental law and also the idea of tribes, who are uniquely situated to engage in meaningful experimentation, as valuable governmental laboratories of innovation. Such consideration is constructive given that the federal government’s innovation has stagnated, and other levels of government may learn valuable lessons by reviewing the work of tribes. Further, effective enforcement of tribal environmental law may be particularly important to tribes because of the strong connection to specific areas of land that exists for many tribes and individual tribal members.*

*To accomplish this examination of tribal environmental enforcement mechanisms, this Article provides a descriptive survey on the environmental enforcement provisions found in the tribal code provisions of tribes located within the boundaries of four states. This Article reviews the survey results from respondents for nine tribes to determine how effective the tribes’ environmental enforcement mechanisms have been. This Article concludes that tribes are actively incorporating environmental enforcement mechanisms into their tribal codes, but that they are modifying and adapting such mechanisms to best accomplish enforcement within Indian country.*

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## I. INTRODUCTION

The environment is the most valuable resource available to mankind, and its exploitation has the potential to be devastating to humanity. Recognizing this interconnection, many governments across the globe actively engage in regulation of the environment. All three sovereigns located within the United States—the federal government, states, and tribes—have recognized this interconnection and are engaged in efforts at various levels to effectively regulate the environment and deter polluters from releasing too many pollutants into the environment. Regulatory initiatives, however, are not enough to accomplish the goal of protecting the environment. Enforcement measures must be enacted to prevent unwanted pollution. Much has

been written on environmental enforcement at the federal and state levels,<sup>1</sup> but little has been said regarding environmental enforcement methods used by tribes. Given that there are 567 federally recognized tribes<sup>2</sup> and approximately 56.2 million acres held in trust for tribes in the United States,<sup>3</sup> such oversight is significant. This Article seeks to fill the scholarly void by providing a descriptive discussion of the types of environmental enforcement methods used by federally recognized tribes within the United States.

Beyond a simple scholarly exercise, examining tribal environmental law is helpful for many reasons. From a tribal perspective, it is valuable so that tribes may glean important information following review of how other tribes are developing their environmental law. There are 567 federally-recognized tribes within the United States,<sup>4</sup> which means that there may be a lot of tribes experimenting with the development of tribal environmental law and others that are looking for examples of how tribes have implemented such laws. Further, adoption and adaption of tribal environmental law can be a strong expression of tribal sovereignty. The existence of tribal sovereignty allows tribes to enact laws and be governed by them.<sup>5</sup> The development and enactment of laws are fundamental expressions of sovereignty.<sup>6</sup> Enacting any tribal law, therefore, would buttress tribal sover-

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1. See, e.g., Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407 (1995).

2. Indian Entities Recognized and Eligible to Receive Services from the U.S. B.I.A., 81 Fed. Reg. 26,826 (May 4, 2016).

3. U.S. Dep't of the Interior Indian Affairs, *Frequently Asked Questions*, FAQs, <http://www.bia.gov/FAQs/> (last visited Mar. 11, 2017).

4. Indian Entities Recognized and Eligible to Receive Services from the U.S. B.I.A., 81 Fed. Reg. 26,826.

5. See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *Williams v. Lee*, 358 U.S. 217, 220–23 (1959).

6. Tribal laws incorporate several different types of law, including treaties, constitutions, customary and traditional laws, legislative enactments, and administrative rulemaking. For a general discussion of the various categories of tribal laws, see MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* (2011) and JUSTIN B. RICHLAND & SARAH DEER, *INTRODUCTION TO TRIBAL LEGAL STUDIES* (2d ed. 2010). Different types of law may express tribal sovereignty in different ways. For example, tribal constitutions establish basic tribal powers and governmental structure. FELIX S. COHEN, *COHEN'S HANDBOOK ON FEDERAL INDIAN LAW* § 4.05[3] (Nell Jessup Newton et al. eds., 2012) [hereinafter *COHEN'S HANDBOOK 2012*]. Some tribal constitutions also explicitly reference the inherent sovereignty of the tribe. See, e.g., *ROSEBUD SIOUX TRIBE CONST.* art. IV, § 3. Tribal customary law may also be developed to recognize the tribe's important cultural ties to the past and significance of tribal culture in the future. See generally Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287 (1998). Overall, "[i]n recent decades, the scope of tribal law has been widening to meet the needs of tribal self-government and contemporary self-determination. This explosion in both tribal common law decision making and positive law reflects the growing demand on Indian nations to address a wide array of matter." *COHEN'S HANDBOOK 2012*, *supra* note 6, § 4.05[2]. However, as Profes-

eignty. Finally, in addition to being expressions of tribal sovereignty, adoption and adaptation of tribal environmental law may be particularly important for tribes with cultural and spiritual connections to their environment and land.<sup>7</sup> Although certainly not always the case, native cultures and traditions are often tied to the environment and land in a manner that traditionally differs from that of the dominant society.<sup>8</sup> For a variety of reasons, including legal, cultural and spiritual reasons, many tribal nations are “land-based.”<sup>9</sup> Accordingly, for tribes with connections to the land and environment, enacting tribal environmental laws (and learning from the experiments of other tribes) may be especially helpful.

Other sovereigns—states and the federal government—also benefit from our exploration of tribal environmental law. Previously, the federal government engaged in significant experimentation related to environmental law. The period between 1969 and 1980 is often referred to as “the environmental decade”; it was a time of tremendous federal innovation in the field of environmental law.<sup>10</sup> During the environmental decade, the federal government expanded environmental regulations, passing numerous environmental statutes such as the Clean Water Act (CWA), Clean Air Act (CAA), and

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sor Christine Zuni Cruz notes, not every sovereign act undertaken by an indigenous nation necessarily promotes [its] sovereignty . . . . Adoption of western law can create a gap between the adopted law and the people . . . . In this respect, an Indian nation’s government can participate in the alienation of its own people.

Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness—[Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 2 (2000).

7. For a general discussion of the close spiritual and cultural connection that many tribes and individual Indians have with their tribal environments, see TRIBES, LAND AND THE ENVIRONMENT (Sarah Krakoff & Ezra Rosser eds., 2012).

8. The author recognizes that each Native nation has a different relationship with its environment and is hesitant to stereotype a common “Native experience,” recognizing that there is a broad diversity of thought and experience related to one’s relationship with land and the environment. In particular, the author would like to avoid traditional stereotypes of American Indians as “Noble Savages” or “Bloodthirsty Savages.” See 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, 270 (1996) (“The problems of cross-cultural interpretation and the attempt to define ‘traditional’ indigenous beliefs raise a common issues: the tendency of non-Indians to glorify Native Americans as existing in ‘perfect harmony’ with nature (the ‘Noble Savage’ resurrected) or, on the other hand, denounce them as being as rapacious to the environment as Europeans (the ‘Bloodthirsty Savage’ resurrected).”).

9. *Id.* at 274.

10. ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 68 (7th ed. 2015); ROBERT V. PERCIVALE ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 1 (6th ed. 2009) (“Since the late 1960s, spectacular growth in public concern for the environment has had a profound impact on the development of American law. During this period, U.S. environmental law has grown from a sparse set of common law precedents and local ordinances to encompass a vast body of state and federal legislation.”).

National Environmental Policy Act (NEPA).<sup>11</sup> Since 1988, however, “there has been little innovation in environmental programs,” especially at the federal level.<sup>12</sup> Congress has only innovated in a few areas since the late 1980s, such as with the CAA amendments of the 1990s and hazardous waste and oil spill laws.<sup>13</sup> Despite a demonstrated capacity for innovation in the field of environmental law, the federal government has largely ceased such efforts for the past couple of decades.

This reduction in federal innovation is problematic given the emergence of new environmental challenges that current federal environmental laws are not equipped to adequately address. Such challenging contemporary environmental problems include, “climate change and associated greenhouse gases, environmental inequities, ongoing struggles to clean America’s many areas plagued by degraded rivers and substandard air quality, as well as widespread failure to enforce existing laws.”<sup>14</sup> Many existing federal environmental regulations are not properly designed to handle the nuanced environmental challenges of the current era, given the segmented approach of federal environmental laws.<sup>15</sup> As a result, “[m]ulti-media, multi-jurisdiction problems strain the limits of the existing statutes” because the federal statutes tend to focus on only one resource.<sup>16</sup> Not only is the federal government failing to innovate in the area of environmental law, but the existing environmental statutory structure is ill-positioned to address many of the modern environmental challenges.

Given the modern realities, the federal regulatory vacuum creates a need for increased environmental legal experimentation to address this ongoing harm. And states and local governments are indeed experimenting with environmental law, developing “creative local and regional ad hoc environmental conservation and ecosystem restoration experiments.”<sup>17</sup> As a result, not only can the federal government learn from tribal environmental experimentation, but states may also be well positioned to learn from and adopt strategies developed by tribes. For example, this Article demonstrates how some tribes are experimenting with new ways of environmental enforcement outside of application of federal environmental law. Past arti-

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11. GLICKSMAN ET AL., *supra* note 10, at 72.

12. *Id.* at 74 (“We continue to live off the intellectual capital of the active first 15 years of the modern environmental movement.”). *But cf.* EPA, *Clean Power Plan for Existing Power Plants*, <http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule> (last visited Mar. 11, 2017).

13. GLICKSMAN ET AL., *supra* note 10, at 74.

14. *Id.* at 78.

15. ROBIN KUNDIS CRAIG, ENVIRONMENTAL LAW IN CONTEXT 29 (2d ed. 2005).

16. *Id.*

17. GLICKSMAN ET AL., *supra* note 10, at 77.

cles have demonstrated evidence of such tribal ingenuity outside of the enforcement context, such as in the development of tribal water codes to protect cultural resources, and tribal climate adaptation plans.<sup>18</sup> Tribal, federal, and state policy makers all benefit from examination of tribal environmental law.

Consideration of tribal environmental law is especially valuable because tribes are uniquely situated to engage in meaningful experimentation. First, greater diversity exists between tribal governments than between state governments. The political structure of most states is nearly identical.<sup>19</sup> Conversely, the political structures of tribal governments can vary significantly, from theocracies to systems utilizing three branches of government, similar to the federal system.<sup>20</sup> Unlike the United States, which is “a heavily homogenized culture with high levels of normative consensus,”<sup>21</sup> real variety exists within tribal political structures. Tribes may also be more motivated to innovate and experiment with environmental law given factors potentially driving tribes that do not have the same impact on states. Although certainly not true in every instance,<sup>22</sup> many tribes and individual Indians possess a strong connection to land and the environment for legal, cultural, and potentially spiritual reasons, as mentioned above. Because of tribal heterogeneity and the strong connections to land and environment for many tribes, tribal governments may be particularly well suited to experiment with tribal environmental law.<sup>23</sup>

This Article fills the existing scholarly void by reviewing tribal environmental enforcement provisions.<sup>24</sup> As mentioned above, effective regulation of any environment cannot occur without enforcement provisions, so it is helpful to look closely at how tribes are enforcing environmental laws

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18. See generally Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENVIL. L. 42 (2014); Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental “Laboratories,”* 86 COLO. L. REV. 789 (2015); Elizabeth Ann Kronk Warner, *Justice Brandeis and Indian Country: Lessons from the Tribal Environmental Laboratory*, 47 ARIZ. STATE L.J. 857 (2015) [hereinafter Warner, *Justice Brandeis and Indian Country*].

19. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 922 (1994).

20. See COHEN’S HANDBOOK 2012, *supra* note 6, § 4.04.

21. Rubin & Feeley, *supra* note 19.

22. Given that every tribe constitutes a separate and distinct government with its own history and culture, one should avoid generalizing a common Indian experience.

23. For a fuller discussion of the tribal experimental environmental “laboratory,” see generally Warner, *Justice Brandeis and Indian Country*, *supra* note 18.

24. This Article builds on three past articles that have examined the existence of tribal environmental law broadly: Warner, *Examining Tribal Environmental Law*, *supra* note 18; Warner, *Tribes as Innovative Environmental “Laboratories,”* *supra* note 18; Warner, *Justice Brandeis and Indian Country*, *supra* note 18. None of these previous articles have specifically examined the existence of tribal enforcement provisions.

within tribal communities. To do this, Part II of this Article introduces both environmental law generally applicable in Indian country, and the importance of effective enforcement. Both topics provide valuable foundations for later discussions, as understanding what environmental law applies in Indian country is crucial to any discussion of tribal environmental law. The second section of Part II demonstrates why specific consideration of environmental enforcement is relevant to any discussion of the overall efficacy of environmental regulations. Part III examines existing tribal environmental enforcement provisions contained within tribal codes. Part III offers a fuller understanding of the types of mechanisms being utilized by tribes located within the boundaries of Arizona, Montana, New York, and Oklahoma. Part IV looks closely at the enforcement mechanisms of nine federally recognized tribes, each of which responded to a survey gathering information on enforcement mechanisms. These survey results provide greater descriptive understanding of how tribes are (or are not) instituting such mechanisms. Part IV ends with reflections on the various mechanisms being utilized by tribes. This Article provides a critical description of tribal environmental enforcement provisions for various tribes across the country. This fuller picture is vital to understanding the extent and value of the tribal environmental “laboratories” that exist within Indian country.

## II. A STARTING POINT: APPLICATION OF ENVIRONMENTAL LAW IN INDIAN COUNTRY AND THE IMPORTANCE OF EFFECTIVE ENFORCEMENT

This Part offers background information crucial to fully developing the discussions below. Before delving into how tribes are enforcing their environmental laws, it is helpful to first understand the scope of environmental law applicable in Indian country<sup>25</sup> under both inherent tribal sovereignty and federal delegations. By starting with a brief description, one can better understand the ability of tribes to adopt their own tribal environmental laws within the existing legal regime. This Article is the fourth in a series on

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25. “Indian country” is a legal term of art that refers to designated lands, including:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2015).



tribal environmental law, and, as a result, this discussion will necessarily be brief.<sup>26</sup>

In addition to introducing the application of environmental law in Indian country, this Part discusses the importance of effective enforcement of environmental law generally. Such background information grounds subsequent discussions of what may normatively be “good” types of environmental enforcement. Accordingly, this Part clarifies the contours of environmental law applicable in Indian country and what constitutes effective enforcement generally.

### A. *A Brief Primer of Environmental Law Applicable in Indian Country*

Three sovereigns—tribes, states, and the federal government—can enforce their environmental laws in Indian country. It is helpful to understand not only tribal inherent sovereignty that allows tribes to adopt their own environmental laws, but also the scope of federal and state environmental laws applicable in Indian country.<sup>27</sup> If federal or state laws apply, the ability of the tribe to enact laws under its own tribal sovereignty may be limited. This is largely due to the fact that the federal government, through Congress, has plenary power over tribes.<sup>28</sup> Accordingly, this subpart starts with a brief introduction to the application of both federal and state environmental law to Indian country, and necessarily begins with a discussion of tribal sovereignty given the connection between sovereignty and environmental law.<sup>29</sup>

Despite the existence of federal plenary power, tribal sovereignty remains. Prior to the formation of the United States, tribes existed as independent, self-governing communities.<sup>30</sup> Despite contact with foreign

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26. See generally Warner, *Examining Tribal Environmental Law*, *supra* note 18, at 53–63 (providing a full discussion of the application of environmental law to Indian country).

27. Because the focus of this Article is not the application of federal or state environmental law in Indian country, this section is necessarily shortened. For a complete discussion of the application of federal and state environmental law in Indian country, see COHEN'S HANDBOOK 2012, *supra* note 6, chs. 4 and 10.

28. See *United States v. Kagama*, 118 U.S. 375, 385 (1886).

29. For a more complete discussion of the application of federal and state environmental law in Indian country, see Gregory P. Crinion & Tracey Smith Lindeen, *Environmental Law & Indian Lands*, 69 WIS. LAW. 14 (1996) and Kevin Gover & James B. Cooney, *Cooperation Between Tribes and States in Protecting the Environment*, 10 NAT. RES. & ENV'T 35 (1996). For a general discussion of jurisdiction in Indian country, see FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton et al. ed., 2005) [hereinafter COHEN'S HANDBOOK 2005].

30. COHEN'S HANDBOOK 2012, *supra* note 6, § 4.01[1][a] (“Most Indian tribes were independent, self-governing societies long before their contact with European nations, although

governments, tribal governments continued to be recognized as independent, sovereign governments after the formation of the United States. The U.S. Supreme Court acknowledged in *Worcester v. Georgia* that tribes are “distinct, independent political communities.”<sup>31</sup> Additionally, the federal government recognized tribal sovereignty through the Indian Commerce Clause of the U.S. Constitution.<sup>32</sup> These recognitions of tribal sovereignty remain today because tribal sovereignty has never been extinguished.<sup>33</sup> “Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice.”<sup>34</sup> Unless Congress acts to divest a tribe of its inherent sovereignty, the tribe’s sovereignty remains.<sup>35</sup> Ultimately, “Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate.”<sup>36</sup>

In addition to inherent tribal sovereignty, Congress may also delegate federal authority to tribes through treaties or statutes.<sup>37</sup> Because federal environmental laws are usually considered to be laws of general application, federal courts have generally found that they apply in Indian country unless their application would directly interfere with tribal sovereignty.<sup>38</sup> The

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the degree and kind of organization varied widely among them.”) (citing STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 72–76 (1988)).

31. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). The Court went on to explain that even though the Court had described tribes as “domestic dependent nations” in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), tribal sovereignty still existed and tribes were not dependent on federal law. COHEN’S HANDBOOK 2005, *supra* note 29, § 4.01[1][a] (citing *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)).

32. COHEN’S HANDBOOK 2005, *supra* note 29, § 4.01[1][a].

33. *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978). Although this assertion is generally true, it is worth noting that some tribes were “terminated” during the Termination Era of the mid-twentieth century. COHEN’S HANDBOOK 2005, *supra* note 29, § 1.06 (citing Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. IND. L. REV. 139, 151–54 (1977)). “Although the termination acts did not expressly extinguish the governmental authority of such [terminated] tribes, most were unable to exercise their governmental powers after losing their land base. Termination thus weakened the sovereignty of terminated tribes.” *Id.* § 1.06.

34. COHEN’S HANDBOOK 2012, *supra* note 6, § 4.01[1][a].

35. *Id.*

36. *Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1151–52 (10th Cir. 2011) (quoting *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) (en banc)).

37. COHEN’S HANDBOOK 2005, *supra* note 29, § 4.01[1][a] (“Whether such statutes actually delegate federal power, as opposed to affirming or recognizing inherent power, is a matter of congressional intent.”).

38. COHEN’S HANDBOOK 2005, *supra* note 29, § 10.01[2][a]. However, the application of federal environmental laws does not displace the ability of tribes to enact tribal environmental laws. *Id.* § 10.01[2][b].

federal Environmental Protection Agency (EPA) therefore has the authority to implement federal environmental laws in Indian country.<sup>39</sup> Under several federal environmental statutes, however, tribes may choose to administer the federal environmental programs and standards through tribes-as-states (TAS) mechanisms.<sup>40</sup> The TAS provisions of major federal environmental statutes, such as the CWA, allow tribes to act as states for purposes of implementing the statute under the cooperative federalism scheme.<sup>41</sup> Accordingly, tribes with TAS authority may find themselves implementing federal environmental standards in ways that accord with their tribal norms and customs.<sup>42</sup>

Relevant to the application of environmental law in Indian country is the question of who those laws apply to within tribal territories. Civil jurisdictional uncertainty sometimes arises in relation to a tribe's authority over the actions of non-members<sup>43</sup> and non-Indians acting within the tribe's territory.<sup>44</sup> In *Montana v. United States*, the U.S. Supreme Court considered the extent of the Crow Tribe's inherent sovereignty over non-Indians on non-Indian land.<sup>45</sup> Ultimately, because of implicit divestiture of the Tribe's inherent sovereignty,<sup>46</sup> the Court determined that the Tribe did not have authority to regulate the hunting and fishing of non-Indians owning fee

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39. *Id.* § 10.01[2][a].

40. JUDITH V. ROYSTER, MICHAEL C. BLUMM & ELIZABETH ANN KRONK, *NATIVE AMERICAN NATURAL RESOURCES LAW* 227 (3d ed. 2013).

41. *Id.*

42. For a discussion of TAS status in Indian country, see generally Warner, *Tribes as Innovative Environmental "Laboratories," supra* note 18.

43. A "non-member" refers to someone who is Indian, but not a citizen of the particular tribe in question.

44. *Montana v. United States*, 450 U.S. 544 (1981). Tribes' criminal jurisdiction is generally limited to Indians. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

45. *Montana*, 450 U.S. at 547.

46. *Id.* at 557; see also Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994). "According to this theory, courts can rule that, in addition to having lost certain aspects of their original sovereignty through the express language of treaties and acts of Congress, tribes also may have been divested of aspects of sovereignty by implication of their dependent status." Gover & Cooney, *supra* note 29, at 35.

land<sup>47</sup> within the Crow Tribe's reservation boundaries.<sup>48</sup> However, the Court acknowledged that, despite this implicit divestiture, tribes may regulate the activities of such individuals under two exceptions. First, tribes may regulate the activities of individuals who have entered into "consensual relationships with the tribe or its members."<sup>49</sup> This has commonly become known as the "consensual relations" or first *Montana* exception. Second, a tribe retains the "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>50</sup> This is commonly known as the "direct effects" or second *Montana* exception. Although the *Montana* decision was limited to non-Indians on non-Indian land, the rationale of the decision was arguably extended to tribal lands by the U.S. Supreme Court's decision in *Nevada v. Hicks*.<sup>51</sup> In *Hicks*, the Supreme Court considered whether the Fallon Paiute-Shoshone Tribes had jurisdiction over a tribal member's civil claim against Nevada game wardens, in their individual capacities.<sup>52</sup> When searching the tribal member's on-reservation property, the aggrieved tribal member alleged that the Nevada game wardens violated certain tribal civil provisions (in addition to violating federal law). The Court found that the tribal court could not hear the claim because the *Montana* exceptions were inapplicable.<sup>53</sup> It may therefore be argued that the Court implicitly suggested in *Hicks* that *Montana* applied to the actions of non-members and non-Indians within Indian country, regardless of the status of land where the activity occurred.<sup>54</sup>

Just like inherent tribal sovereignty plays an important role in the development of tribal environmental law, so too may federal law impact the

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47. Since *Montana*, the Supreme Court has also considered the ability of tribes to regulate the conduct of non-members and non-Indians on other types of lands. For example, in *Strate v. A-1 Contractors*, the Court held that the Indian tribe did not possess the inherent sovereignty to adjudicate a civil complaint arising from an accident between two non-Indians on a state highway within the tribe's reservation boundaries. The *Strate* Court explained that "[a]s to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." 520 U.S. 438, 453 (1997).

48. *Montana*, 450 U.S. at 564–65 (holding that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation").

49. *Id.* at 565.

50. *Id.* at 566.

51. *Nevada v. Hicks*, 533 U.S. 353 (2001).

52. *Id.*

53. *Id.* at 355–69, 374–75.

54. Alternatively, however, it may be argued that the result in the *Hicks* case came as a result of the sovereignty of the State of Nevada.

law applicable in Indian country. Congress may delegate authority to tribes to implement federal laws. Also, Congress may limit the ability of tribes to enact environmental laws where the federal government is already occupying the field.<sup>55</sup> The federal government's limitation on tribal sovereignty as well as its delegation to tribes play important roles in understanding the development of environmental law applicable in Indian country.

Since 1970, the federal government has played an active role in the regulation of environmental pollution.<sup>56</sup> In the areas where the federal government extensively regulated the environment, questions arose as to whether such regulations applied to Indian country. In 1986, the U.S. Court of Appeals for the Tenth Circuit held that the Safe Drinking Water Act applied to Indian country, consistent with EPA's authority in Indian country and Congress' intention for it to be a general statute.<sup>57</sup> In 1987, Congress acknowledged the right of tribes to enforce their own environmental standards within their territorial boundaries when it adopted "tribal amendments" to several federal environmental statutes.<sup>58</sup> Assuming tribes meet certain established criteria, these amendments let tribes assume "TAS status" under federal environmental statutes, which in turn allows them to establish environmental quality standards and to issue permits.<sup>59</sup> Even if the statute does not specifically include TAS provisions, it may include language suggesting that the tribe should be treated like a state.<sup>60</sup> If a federal environmental statute does not specifically speak to the role of tribes, the EPA may determine whether tribes may be treated similar to states under the statute.<sup>61</sup> Therefore, under the federal environmental statutes, the EPA regulates in Indian country unless tribes have assumed regulatory authority under TAS provisions or the EPA is treating the tribe similar to a state. Tribes, however, are not always treated like states under federal environmental statutes. For example, "[t]he Resource Conservation and Recovery Act (RCRA), the only major federal environmental law that has not been

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55. This is consistent with Congress' plenary authority over tribes. *See, e.g.*, *United States v. Kagama*, 118 U.S. 375 (1886) (holding that Congress possesses plenary authority over tribes).

56. PERCIVALETAL., *supra* note 10, at 94.

57. *Phillips Petrol. Co. v. EPA*, 803 F.2d 545, 547 (10th Cir. 1986).

58. *E.g.*, 33 U.S.C. § 1377 (Clean Water Act); 42 U.S.C. § 300j-11 (Safe Drinking Water Act); 42 U.S.C. § 9626 (Superfund); and 42 U.S.C. § 7474 (Clean Air Act).

59. 33 U.S.C. § 1377 (Clean Water Act); 42 U.S.C. § 300j-11 (Safe Drinking Water Act); 42 U.S.C. § 9626 (Superfund); and 42 U.S.C. § 7474 (Clean Air Act).

60. COHEN'S HANDBOOK 2012, *supra* note 6, § 10.02[2].

61. For example, although both the Emergency Planning and Community Right-to-Know Act and lead-based paint program under the Toxic Substance Control Act are silent as to how tribes are to be treated, the EPA treats tribes as states under both programs. COHEN'S HANDBOOK 2012, *supra* note 6, § 10.02[2].

amended to accord tribes primary regulator status, defines tribes as municipalities for purposes of the statute.”<sup>62</sup>

Having considered the role of tribal sovereignty and federal authority in developing environmental law applicable in Indian country, it is helpful to also consider the application of state law to Indian country. States are generally preempted from regulating Indians acting within Indian country.<sup>63</sup> In terms of environmental regulation and otherwise, the state’s role in Indian country is thus severely limited.<sup>64</sup> The EPA generally requires states to show jurisdictional authority over their entire territory, including Indian country, before granting the state authority under federal environmental statutes.<sup>65</sup> Many states have therefore opted to participate under the federal environmental scheme without trying to regulate in Indian country.<sup>66</sup>

To summarize, tribes and the federal government have the authority to play a significant role in the development of environmental law in Indian country, while states play a much smaller role. For this reason, the discussion below focuses largely on how tribes are acting to enforce environmental law enacted by virtue of their tribal sovereignty, federal law delegated to the tribes, and laws developed by tribes under their TAS authority that are also consistent with the federal minimum standards.

### B. *The Importance of Effective Enforcement of Environmental Law*

Having a general idea of the scope of environmental law applicable in Indian country, this subpart turns to a general discussion of the need for effective enforcement of environmental provisions. As mentioned above, this Article is the fourth in a series of articles examining tribal environmen-

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62. *Id.* (citing RCRA Section 1004(13), 42 U.S.C. § 6903(13)).

63. Gover & Cooney, *supra* note 29, at 36 (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)).

64. COHEN’S HANDBOOK 2012, *supra* note 6, § 10.02[1] (“In general, states may exercise jurisdiction over Indians and Indian lands only as authorized by Congress, and state jurisdiction over nonmembers on fee lands is constrained both by tribal rights to regulate nonmembers in order to protect core tribal governmental interests and by federal preemption of state authority.”).

65. Gover & Cooney, *supra* note 29, at 36 (“Accordingly, before a state may assume primary enforcement responsibilities for federal environmental laws on reservations, the state must demonstrate to EPA’s satisfaction that it has jurisdiction.”).

66. *See, e.g., Wash. Dep’t of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985) (rejecting the state of Washington’s attempt to regulate in Indian country).

tal law.<sup>67</sup> Previous articles examined the scope of tribal environmental laws and the different types of laws being enacted by tribes within the boundaries of Arizona, Montana, New York, and Oklahoma. This Article continues the tradition of focusing on federally recognized tribes within these four states, but diverges from previous articles by examining the type of environmental enforcement provisions being used by these tribes. As such, a general introduction to environmental law applicable to Indian country is not enough before launching into a discussion of such enforcement provisions; it is also necessary to discuss the necessity of effective enforcement provisions. In addition to generally discussing environmental enforcement, this subpart offers some insights into how tribal environmental enforcement may necessarily diverge from enforcement schemes used by other sovereigns, such as the federal government.

The United States has been actively engaged in regulating the environment since the late 1960s, and it is helpful to examine the evolution of federal environmental enforcement.<sup>68</sup> Civil fines and penalties have played an important role in the environmental enforcement mechanisms used by the federal government. Initially, the civil fines and penalties were relatively insignificant.<sup>69</sup> However, the federal government learned that relatively slight penalties yielded ineffective enforcement, because many regulated industries would prefer to pay a low fine than comply.<sup>70</sup> In response, the federal government adopted stronger enforcement mechanisms in order to increase compliance.<sup>71</sup> Congress increased the complexity of the environmental regulatory scheme and escalated some environmental crimes from misdemeanors to felonies.<sup>72</sup> Further, the EPA increased the number of its investigators and the Department of Justice (DOJ) created an Envi-

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67. See Warner, *Examining Tribal Environmental Law*, *supra* note 18; Warner, *Tribes as Innovative Environmental "Laboratories," supra* note 18; Warner, *Justice Brandeis and Indian Country*, *supra* note 18.

68. Admittedly, tribes have likely been regulating the tribal environment since time immemorial through custom, tradition, and community norms. This Article largely focuses, however, on enforcement provisions adopted through tribal environmental code provisions. See *infra* Part III. Accordingly, given the federal government has largely relied on statutes, codes and regulations to accomplish its environmental goals, considering the evolution of federal environmental enforcement is helpful.

69. See Lazarus, *supra* note 1, at 2442, 2446–47, 2454.

70. See Robert W. Adler & Charles Lord, *Environmental Crime: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 782–84 (1991).

71. See Lazarus, *supra* note 1, at 2415–16.

72. See generally WILLIAM H. RODGERS, ENVIRONMENTAL LAW § 3.1A (Supp. I 2002) (discussing amendments to the Clean Air Act); David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 4 UTAH L. REV. 1223 (2009).

ronmental Crimes Section.<sup>73</sup> In making these changes, the federal government acted on the theory that environmental compliance would only come with harsher potential sanctions, and sanctions that punished individual corporate officials rather than only the company itself.<sup>74</sup> As a result, the DOJ saw substantial increases in both the number of fines assessed and number of prison sentences for defendants in cases involving environmental crimes.<sup>75</sup>

Although the appropriate “mix” of enforcement options may be a constant work in progress, the federal government has come to rely on a combination of criminal offenses and civil fines to enforce its environmental laws. As discussed below, many tribes have also developed enforcement systems using criminal penalties, civil fines, or both. Notably, tribes may not be able to use those penalties with the same latitude that the federal government can. In 1978, the Supreme Court decided *Oliphant v. Suquamish Indian Tribe*, holding that tribes had been divested of their inherent tribal sovereignty over non-Indians.<sup>76</sup> At issue were the actions of Mark Oliphant, a non-Indian living as a permanent resident on the Suquamish Indian Tribe’s Reservation.<sup>77</sup> Tribal police arrested and charged Mr. Oliphant for assault on a tribal officer and resisting arrest.<sup>78</sup> Oliphant challenged the Tribe’s exercise of criminal jurisdiction, and won.<sup>79</sup> Although criminal jurisdiction over non-Indians has subsequently been restored in very limited circumstances,<sup>80</sup> tribes today do not have criminal jurisdiction over non-

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73. Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900, 909–10 (1991).

74. Mark A. Cohen, *Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes*, 82 J. CRIM. L. & CRIMINOLOGY 1054, 1056 (1992); David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CALIF. L. REV. 917, 918 (2001). Some scholars have subsequently come to argue that criminal actions against individual corporate officers may not be the best method of enforcement. For a discussion of the potential negative implications of such enforcement methods, see David C. Fortney, *Thinking Outside the “Black Box”: Tailored Enforcement in Environmental Criminal Law*, 81 TEX. L. REV. 1609, 1612 (2003). Further, some scholars, such as Richard Lazarus, argue that the purposes of criminal law and environmental law generally conflict, making it very difficult to resolve the two. Lazarus, *supra* note 1, at 2412.

75. See e.g., EPA OFFICE OF ENFORCEMENT, ENFORCEMENT ACCOMPLISHMENTS REPORT, FISCAL YEAR 1993, 2-2, app. (1994).

76. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

77. *Id.* at 194.

78. *Id.*

79. *Id.* at 195.

80. For example, in the 2013 reauthorization of the Violence Against Women Act, Congress allowed for tribal criminal jurisdiction over non-Indians engaged in domestic violence against citizens of the tribe in question. See Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 204, 127 Stat. 54, 120–22 (Mar. 7, 2013) (“Title IX—Safety for Indian



Indians violating tribal environmental laws within the tribes' territories as a result of the *Oliphant* decision. Accordingly, any criminal enforcement provisions adopted by tribes by virtue of their tribal inherent sovereignty would be limited to Indians.<sup>81</sup>

Similarly, tribes may not have as broad civil environmental enforcement capabilities as the federal government because of the Supreme Court's decision in *Montana v. United States*.<sup>82</sup> As discussed above,<sup>83</sup> the *Montana* decision found a general presumption against civil regulatory jurisdiction over non-Indians on non-Indian land within Indian country, unless one of the two exceptions applies. If not, tribes cannot apply civil fines against non-Indians on non-Indian lands within their territory. As discussed below,<sup>84</sup> many tribes now exercise civil jurisdiction over non-Indians by virtue of the second *Montana* exception, on the theory that environmental pollution threatens the health and safety of their communities. So, while tribal enforcement mechanisms may look similar to federal enforcement mechanisms, limitations exist due to constraints on tribal enforcement under the *Oliphant* and *Montana* decisions.

### III. ENVIRONMENTAL ENFORCEMENT PROVISIONS IN TRIBAL ENVIRONMENTAL CODES

With the necessary background information on the extent of environmental law applicable in Indian country and the importance of effective enforcement mechanisms in hand, this Part discusses enforcement mechanisms being used by federally recognized tribes located within the boundaries of Arizona, Montana, New York, and Oklahoma.<sup>85</sup> This Part describes enforcement provisions included in the tribal codes providing insight into the general scope and structure of such mechanisms. To be consistent with past articles on the topic, this Part is generally limited to enforcement provisions related to the regulation of air, water, and solid waste, with some

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Women"). This restoration of tribal criminal jurisdiction over non-Indians, however, is quite limited and would not apply to criminal violations of environmental laws.

81. In *United States v. Lara*, the U.S. Supreme Court held that tribes maintain criminal jurisdiction over all Indians, regardless of whether the Indian in question is a citizen of the tribe. 541 U.S. 193, 198 (2004).

82. *Montana v. United States*, 450 U.S. 544, 564–66 (1981).

83. See *supra* notes 48–54 and accompanying text.

84. See *infra* Part IV.B.4.

85. To be consistent with the past articles written on tribal environmental law, this Article focuses on federally recognized tribes located within these four states, as those were the areas of focus in past articles. See e.g., Warner, *Examining Tribal Environmental Law*, *supra* note 18; Warner, *Tribes as Innovative Environmental "Laboratories"*, *supra* note 18; Warner, *Justice Brandeis and Indian Country*, *supra* note 18.

helpful commentary also provided. This Part builds on this initial structure by taking a close look at the enforcement mechanisms used by nine federally-recognized tribes.

As a starting point, tribes located within Oklahoma may be more restricted in their ability to enact laws under TAS status. Specifically, it may be that tribes located within the boundaries of Oklahoma develop fewer environmental programs under the TAS provisions of various environmental statutes. If true, that is likely a result of the specific provision requiring that any Indian tribe seeking TAS status must enter into an agreement with the appropriate Oklahoma state agency, and that the tribe and state agency jointly administer the program requirements.<sup>86</sup> This requirement is only applicable to federally recognized tribes located within Oklahoma. Accordingly, if tribes located within Oklahoma seem to participate in TAS programs under federal environmental statutes at a lower rate than tribes located within other states, there is a strong possibility that it is because of this requirement to obtain approval from the appropriate Oklahoma state agency before a TAS application can be approved.<sup>87</sup>

In addition to enacting tribal code provisions regulating air, water, and solid waste pollution, some tribes adopted overarching tribal code provisions speaking to environmental quality broadly. For example, the Cherokee Nation of Oklahoma adopted the Environmental Quality Act.<sup>88</sup> One of the purposes of the Act is to make “pollution unlawful,”<sup>89</sup> and it contemplates penalties where violations are found.<sup>90</sup> The Absentee Shawnee Tribe

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86. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users, Or “SAFETEA-LU”, Pub. L. No. 109-59, § 10211(b)(2), 119 Stat. 1937 (Aug. 10, 2005) (“[T]he Indian tribe and the agency of the State of Oklahoma with federally delegated program authority enter into a cooperative agreement, subject to review and approval of the Administrator after notice and opportunity for public hearing, under which the Indian tribe and that State agency agree to treatment of the Indian tribe as a State and to jointly plan administer program requirements.”).

87. Completed Enforcement of Tribal Environmental Law Survey by Tribe A (on file with author) [hereinafter Tribe A Survey].

88. Cherokee Nation Quality Code Amendments Act of 2004, Legislative Act 31-04 (2004) (Cherokee Nation of Oklahoma) (amending the existing Environmental Quality Act).

89. *Id.* § 2.

90. *Id.* § 1006 (“Except as otherwise specifically provided by law, any person who violates any of the provisions of, or who fails to perform any duty imposed by, the Cherokee Nation Environmental Quality Code or who violates any order, permit or license, or rule promulgated by the Commission pursuant to the Cherokee Nation Code: 1. Shall be guilty of a crime and upon conviction therefore may be punished by a fine of not less than Two Hundred Dollars (\$200.00) for each violation and not more than Five Thousand Dollars (\$5,000.00) for each violation or by imprisonment for not more than one year, or by both such fine and imprisonment. Each day a violation continues may be considered a separate crime; 2. May be published in civil proceedings in district court by assessment of a civil penalty of not more than Five Thousand Dollars (\$5,000.00) for each violation, and for each

of Indians of Oklahoma also has a tribal code provision speaking generally to environmental protection. Interestingly, the Tribe contemplates assessing monetary penalties against any violators of the Act (up to \$5,000 per day for each day of such violation or continued violation following non-compliance) in addition to any federal penalties that may be applicable.<sup>91</sup> Some tribes have enforcement provisions related to the general maintenance of the environment, in addition to mechanisms associated with specific resources—such as air and water.

### A. *Enforcement Provisions Related to the Regulation of Air Pollution*

A previous survey of tribal environmental codes reviewed the codes of the 74 federally recognized tribes located within the boundaries of Arizona, Montana, New York, and Oklahoma to determine how many of these tribes possessed tribal environmental code provisions related to air pollution, water pollution, solid waste disposal, and environmental quality generally.<sup>92</sup> As to the regulation of air pollution, the survey determined that only four tribes, or 5% of the survey group, enacted tribal code provisions related to the regulation of air pollution.<sup>93</sup>

As previous research demonstrates, relatively few tribes have enacted tribal code provisions related to the regulation of air pollution.<sup>94</sup> It therefore makes sense that, within the scope of this article's study, only three tribes—the Navajo Nation, Saint Regis Mohawk Tribe, and Cherokee Nation of Oklahoma—have adopted tribal code provisions speaking to the enforcement of such tribal code provisions related to air pollution regulation.

Located partially within the borders of Arizona, the Navajo Nation adopted the Navajo Nation Air Pollution Prevention and Control Act. In adopting the Act, the “Navajo Nation Council . . . is creating a coordinated program to control present and future sources of air pollution on the Navajo Nation,” and it “declared to be the policy of this Nation that no further significant degradation of the air in the Navajo Nation shall be tolerated, and that economic growth will occur in a manner consistent with the preser-

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day that the violation continues; 3. May be assessed an administrative penalty not to exceed Five Thousand Dollars (\$5,000.00) per day of noncompliance; and 4. May be subject to injunctive relief granted by a district court. A district court may grant injunctive relief to prevent a violation of, or to compel a compliance with, any of the provisions of this Code or any rule promulgated thereunder or order, license or permit issued pursuant to this Code.”)

91. ENVIRONMENTAL CODE ch. 3, § 2 (Absentee Shawnee Tribe of Indians of Oklahoma).

92. See generally Warner, *Examining Tribal Environmental Law*, *supra* note 18.

93. *Id.* at 68.

94. *Id.*

vation of existing clean air resources.”<sup>95</sup> The Code provides for potentially both civil<sup>96</sup> and criminal penalties,<sup>97</sup> and also contemplates the potential administrative assessment of penalties<sup>98</sup> and citizen suits under the appropriate conditions.<sup>99</sup>

Located in New York, the Saint Regis Mohawk Tribe adopted a Tribal Implementation Plan (TIP) under the TAS provisions of the CAA. “It is the purpose of this TIP to safeguard the air resources from pollution by: (1) controlling or abating air pollution which shall exist when this Plan shall be enacted; and (2) preventing new air pollution.”<sup>100</sup> The TIP provides for enforcement of the Plan, explaining that “[t]he Peacemakers Court, Civil Disobedience Division, shall be the arbiter of all summons and complaints filed under this Plan.”<sup>101</sup>

Finally, the Cherokee Nation of Oklahoma adopted an Air Quality Code, as part of its overall Environmental Quality Code. The Code states “that the Nation has an air quality code that is comprehensive and will ensure that the Nation has the authority in place to obtain treatment as state for air programs.”<sup>102</sup> The Code establishes that potential violators may be subject to compliance orders, administrative penalties, settlements and/or consent orders.<sup>103</sup> Although the Code does not specify actual pen-

95. NAVAJO NATION CODE ANN. tit. 4, § 1102(A)–(B) (2009) (Navajo Nation).

96. *Id.* § 1154(A) (“The Director shall request the Attorney General to file an action for a temporary restraining order, a preliminary injunction, a permanent injunction or any other relief provided by law, including the assessment and recovery of civil penalties not more than thirty-two thousand five hundred dollars (\$32,500) per day, which amount shall increase automatically whenever the federal maximum civil penalty increases, in any of the following instances . . .”).

97. *Id.* § 1154(B).

98. *Id.* § 1155.

99. *Id.* § 1156.

100. TRIBAL IMPLEMENTATION PLAN § 2.1 (Feb. 2004) (Saint Regis Mohawk Tribe). The TIP also goes on to explain that the Plan was adopted as part of a federal delegation to the Tribe, “TCR 99-43 expressly states that the Tribe authorizes the SRMT’s Air Quality Program to submit applications for federal assistance and to receive delegation of the federal CAA authority, as allowed by law under the CAA of 1970 and Amendments to the act thereafter.” *Id.*

101. *Id.* § 18.2(2).

102. Cherokee Nation Air Quality Act of 2004, Legislative Act 42-04, § 2 (Nov. 23, 2004) (Cherokee Nation of Oklahoma).

103. *Id.* § 2-5-110. In relevant part, the Code explains that:

Any penalty assessed in the order shall not exceed Five Thousand Dollars (\$5,000.00) per day for each violation or the maximum established in the Environmental Quality Code. In assessing such penalties, the Commission shall consider the seriousness of the violation or violations, any good faith efforts to comply, and other factors determined by rule to be relevant.

*Id.* § 2-5-110(D).

alty amounts, it does explain that violators may be subject to civil and/or criminal fines.<sup>104</sup> Finally, the Code also contemplates the possibility of an injunction being entered against a violator; such an injunction would be limited to the extent of the Tribe's jurisdiction as defined by federal Indian law.<sup>105</sup>

### B. Enforcement Provisions Related to the Regulation of Water Pollution

A previous survey examined the tribal environmental code provisions for the 74 federally recognized tribes located within the boundaries of Arizona, Montana, New York, and Oklahoma.<sup>106</sup> As to tribal code provisions related to the regulation of water pollution, twenty-three tribes, or 31% of the survey group, enacted some tribal environmental code provision related to the regulation of water.<sup>107</sup>

Looking more closely at enforcement provisions of such tribal environmental codes, several tribes located within the borders of Arizona adopted tribal code provisions on water pollution that are remarkably similar. These Tribes are the Fort McDowell Yavapai Nation,<sup>108</sup> Hualapai Tribe,<sup>109</sup> Salt River Pima Maricopa Indian Community,<sup>110</sup> Tonto Apache Tribe,<sup>111</sup> and Yavapai-Prescott Indian Tribe.<sup>112</sup> In each instance, the provisions related to water pollution are included in the Tribes' Health and Sanitation Codes. Each code provision is similar to the following: "[i]t shall be unlawful for any Indian to pollute any source of domestic water by disposing of, in or near the water, garbage, dead animals or other polluting items or to locate a privy within fifty (50) feet of said water source."<sup>113</sup> Similarly, all codes contemplate penalties for violations of these prohibitions against polluting water.<sup>114</sup>

Several other tribes located within the borders of Arizona have adopted comprehensive water codes. For example, the Hualapai Tribe adopted a Water Resources Ordinance, which was designed to allow "the standards set forth in this Ordinance into permits issued pursuant to the NPDES provi-

104. *Id.* § 2-5-116.

105. *Id.* § 2-5-117.

106. Warner, *Examining Tribal Environmental Law*, *supra* note 18.

107. *Id.* at 69.

108. LAW & ORDER CODE ch. 13, § 13-2 (1979) (Fort McDowell Yavapai Nation).

109. TRIBAL CODE ch. 9, § 9.2 (Hualapai Tribe).

110. CODE OF ORDINANCES ch. 13, § 13-2 (Salt River Pima Maricopa Indian Community).

111. CIVIL & CRIMINAL LAW & ORDER CODE ch. 8, § 8.1 (Tonto Apache Tribe).

112. LAW & ORDER CODE ch. 9, § 9.2 (Yavapai Prescott Indian Tribe).

113. *Id.*

114. *See, e.g., id.* § 9.3.

sions of Section 402 of the Clean Air Act or Section 604 of this Ordinance and into the management process for nonpoint source generators.”<sup>115</sup> The Tribe therefore contemplates incorporating its provisions into federal permits. The Tribe’s Ordinance specifically calls for enforcement, including administrative enforcement, judicial enforcement, cease and desist orders, civil penalties, criminal penalties, and potential referral to federal court for enforcement.<sup>116</sup> In relation to civil penalties, the Ordinance recites several factors that the tribal court may take into consideration when determining the penalty amount, and also contemplates potential referral to federal authorities for civil penalties.<sup>117</sup>

The Navajo Nation adopted three code provisions related to water: the Navajo Nation Clean Water Act, the Navajo Nation Safe Drinking Water Act, and the Navajo Nation Water Code. The Navajo Nation Clean Water Act provides for general enforcement authority for the Nation.<sup>118</sup> The Code also contemplates judicial enforcement, allowing for the “assessment and recovery of civil penalties of not less than five hundred dollars (\$500.00) and not more than twenty-five thousand dollars (\$25,000) per day per violation” under certain circumstances.<sup>119</sup> In addition to judicial enforcement, the Code also contemplates administrative assessment of penalties,<sup>120</sup> and the possibility of citizen suits under the appropriate circumstances.<sup>121</sup> Similarly, the Navajo Nation Safe Drinking Water Act<sup>122</sup> also discusses the Nation’s general enforcement authority.<sup>123</sup> Further, the Act contemplates judicial enforcement, including how a tribal court might calculate civil penalties, and the potential assessment of criminal penalties.<sup>124</sup> Although not speaking directly to the pollution of water re-

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115. ENVIRONMENTAL REVIEW CODE pt. 1, ch. 1, § 102(B) (Hualapai Tribe).

116. *Id.* §§ 701–811

117. *Id.* § 806. Interestingly, and related to the discussion of trespass actions below (*see infra* Part III on Common Law Provisions) this portion of the Ordinance also contemplates violations as Trespass, “[v]iolation of any provision of this Ordinance by any person who is not a member of the Hualapai Tribe constitutes a trespass on the Hualapai Indian Reservation, subject to exclusion or expulsion from the Reservation pursuant to the provisions of the Hualapai Law and Order Code.” *Id.* § 808.

118. NAVAJO NATION CODE ANN. tit. 4, § 1382 (2009) (Navajo Nation).

119. *Id.* § 1383.

120. *Id.* § 1384.

121. *Id.* § 1385.

122. “The purpose of this Act is to protect the health and welfare of the Navajo people and the environment by establishing appropriate drinking water standards to ensure that drinking water is safe for consumption, and by protecting underground sources of drinking water from potential contamination by underground injection activities.” Safe Drinking Water Act, NAVAJO NATION CODE ANN. tit. 22, § 2503 (2009) (Navajo Nation).

123. *Id.* § 2582.

124. *Id.* § 2583.

sources,<sup>125</sup> the Navajo Nation Water Code does provide sanctions for violation of the code.<sup>126</sup>

The San Carlos Apache Tribe has also adopted a Water Pollution Code. The purpose of the code is to “eliminate all discharges of pollutants into the waters of the San Carlos Apache Reservation.”<sup>127</sup> The Water Pollution Code does establish civil penalties for individuals who violate the Code,<sup>128</sup> and contemplates the possibility of court action and injunctions.<sup>129</sup> A Chapter of the Salt River Pima Maricopa Indian Community’s tribal code is dedicated to water and other resources, which provides that the Tribe is the responsible party for ensuring the health and welfare of its citizens through regulation of the Tribe’s waters.<sup>130</sup> The Code contemplates the enforcement of water quality regulations,<sup>131</sup> and also provides penalties for violators where appropriate.<sup>132</sup>

125. The purpose of the Navajo Nation Water Code is to provide for a permanent homeland for the Navajo People to protect the health, the welfare and the economic security of the citizens of the Navajo Nation, to develop, manage, and preserve the water resources of the Navajo Nation, to secure a just and equitable distribution of the use of water within the Navajo Nation through a uniform and coherent system of regulation, and to provide for the exercise of the inherent sovereign powers of self-government by the Navajo Nation, the Navajo Nation asserts its sovereign authority over all actions taken within the territorial jurisdiction of the Navajo Nation which affect the use of water within the Navajo Nation.

*Id.* § 1101.

126. *Id.* § 2305 (“Violations of this chapter may subject the person(s) or entity(ies) responsible to forfeiture or suspension of rights to the use of water administered under this Code. Sanctions may also include the requirement of payment for water improperly used or adversely affected by the improper use; payment of the costs for all associated remedial actions taken, including the replacement of lost water; payment of associated administrative costs incurred by the Navajo Nation as a result of the violation; and payment of such other costs as are necessary to render the Navajo Nation and its inhabitants whole.”).

127. WATER POLLUTION CODE § 1.1 (2000) (San Carlos Apache Tribe).

128. *Id.* § 4 (“Any person discharging any pollutant into the waters of the Reservation shall pay a civil fine in an amount not to exceed five thousand dollars (\$5,000) for each day in which the violation occurs. The civil fine required by this Section shall be imposed by any court of competent jurisdiction in accordance with Sections 5 and 6 of this Ordinance.”).

129. *Id.* § 6.

130. CODE OF ORDINANCES § 18-41(2) (Salt River Pima Maricopa Indian Community) (“Consistent with the 1984 statement of policy by the United States Environmental Protection Agency entitled ‘EPA Policy for the Administration of Environmental Programs on Indian Reservations,’ the community develop and fulfill its principal role as the appropriate nonfederal party for making decisions and carrying out program responsibilities affecting the reservation, its environment, and the health and welfare of the reservation populace.”).

131. *Id.* § 18-44.

132. *Id.* § 18-80 (“Any permittee who violates the conditions of the permit or the provisions of this code shall be subject to the forfeiture of the permit after notice and hearing as provided for in section 18-77. The Salt River Pima-Maricopa Indian Community shall have

Similarly, the Tohono O'odham Nation has also adopted a water code, because the Nation has determined that "[a]ll waters which originate in or flow in, into or through the Tohono O'odham Nation . . . are a sacred and valuable public resource of the Tohono O'odham Nation to be protected for the present and future use of the Tohono O'odham Nation as a whole."<sup>133</sup> Article 9 of the Code contemplates enforcement of the Code, and specifically allows for potential issuing of orders to comply<sup>134</sup> and penalties for violations.<sup>135</sup> Likewise, the White Mountain Apache Tribe has also adopted a tribal code provision to provide water quality protection. In adopting this portion of its Code, the Tribe recognizes that water is "essential to the survival" of the Tribe.<sup>136</sup>

The Code provides both for the enforcement of the code and potential penalties to be applied against violators.<sup>137</sup> The Code goes on to recognize

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the jurisdiction to provide injunctive relief in order to prevent the use of surface water in violation of this code upon a petition of the surface water administrator. The Salt River Pima-Maricopa Indian Community Court shall have the jurisdiction over civil actions brought by the surface water administrator against permittees for civil damages resulting from the violation of the permit issued, or for using surface water without a permit, and such damages shall include the value of the water use in violation of this code, the cost of investigations and attorney's fees, and all hearing and court costs incurred.").

133. TOHONO O'ODHAM CODE tit. 25, ch. 3, pmb. (Tohono O'odham Nation).

134. *Id.* § 3902.

135. *Id.* § 3903 ("(A) Except as provided in subsection (B), any Person found to be in violation of the Code or any Permit, license to perfect, rule, regulation or order of the Director issues pursuant to the Code, as provided in subsection 3902(B), may be assessed a civil penalty of up to \$1,000.00 for each day the violation continues following the issuance of a Final Decision by the Director pursuant to that section. (B) If the Director determines, pursuant to subsection 3902(B), that the violation was willful or that the violation constitutes an illegal use of disposition of any of the Nation's Water, a civil penalty of up to \$10,000.00 per day may be assessed by the Director for each day the violation continues following the issuance of a Final Decision by the Director pursuant to that subsection.").

136. ENVIRONMENTAL CODE ch. 3, pmb. (1999) (White Mountain Apache Tribe) ("Tú water, is one of the gifts of the Creator that is essential to the survival of the White Mountain Apache People. Water is inseparable from our land and culture. Our homeland has always been blessed with a great number of springs, streams, and meadows to sustain a diverse and vibrant community of plants, wildlife, and people . . . We recognize that we must assert full authority over all the lands and waters of our Reservation to protect them from abuse. The standards for water quality in this Tribal Ordinance will guide the protection of our waters for present and future generations.").

137. *Id.* § 3.4. Interestingly, the Tribe provides that its jurisdiction under the Code provision applies to both Indians and non-Indians. *Id.* § 3.4(A). Moreover, the Code also contemplates potential federal prosecution, which is not prohibited by tribal prosecution. *Id.* § 3.4(D). In terms of civil citations, the Code provides that "[a]ny Authorized Officer can issue civil citations imposing fines of up to \$500 for violations of this Code." *Id.* § 3.4(G)(1).



the possibility of liquidated damages<sup>138</sup> and nothing in the Code precludes the Tribe from applying punitive damages against a violator.<sup>139</sup>

Located within the boundaries of Oklahoma, the Sac & Fox Tribe of Oklahoma adopted a tribal code chapter focused on crimes against public health, safety, and welfare. The Code provides for a “water offense,” which makes it unlawful to “[i]nterfere with or alter the flow of water in any stream, river, or ditch, without lawful authority to do so, or a permit from the Tribe, and in violation of the right of any other person; or . . . pollute or befoul any water in any of the following ways.”<sup>140</sup> The code also provides for specific penalties for violations of this section.<sup>141</sup>

Located in New York, the Saint Regis Mohawk Tribe has adopted water quality standards effective within its territory. “The purpose of these water quality standards is to facilitate sovereign self-determination and the restoration and preservation of traditional hunting, fishing, gathering and cultural uses in, on and around Tribal Surface Waters.”<sup>142</sup> The standards provide for compliance schedules, as appropriate.<sup>143</sup>

### C. *Enforcement Provisions Related to the Regulation of Solid Waste*

As mentioned above, a previous survey reviewed the tribal environmental code provisions of 74 federally recognized tribes, and this survey determined that 27 of those tribes, or approximately 36 percent of the survey group, possessed a tribal environmental code provision related to the disposal of solid waste.<sup>144</sup> In addition to adopting tribal code provisions related to solid waste disposal, many tribes also provide for enforcement mechanisms for their solid waste ordinances. For example, several tribes located within Oklahoma have adopted enforcement provisions for their solid waste code provisions. The Seneca-Cayuga Tribe of Oklahoma proposed recovery costs related to its Solid Waste Code.<sup>145</sup> The Cherokee Nation of

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138. *Id.* § 3.4(L)–(M).

139. *Id.* § 3.4(N).

140. CODE OF LAWS ch. 5, § 566 (Sac & Fox Tribe of Oklahoma).

141. *Id.* § 566(b) (“A water offense shall be punishable by a fine not to exceed Two Hundred Fifty Dollars (\$250.00), or by a term of imprisonment in the Tribal jail not to exceed three months, or both.”).

142. WATER QUALITY STANDARDS § I(A) (2013) (Saint Regis Mohawk Tribe).

143. *Id.* § III(F).

144. Warner, *Examining Tribal Environmental Law*, *supra* note 18, at 70.

145. SOLID WASTE CODES IV (2009) (Seneca-Cayuga Tribe of Oklahoma) (“If a person violates this ordinance and the Seneca-Cayuga Tribe arranges for or executes the lawful disposal of solid waste, that person shall be responsible to the Seneca-Cayuga Tribe for all reasonable costs and expenses associated with transportation and disposal of solid waste.”). Attorney’s fees may also be awarded to a prevailing party. *Id.* at IV(B). Notably, although

Oklahoma generally prohibits illegal dumping on tribal land, and “[a]ny violation of this statute shall be subject to any provision for fine and/or other punishment as provided by state or federal law.”<sup>146</sup> The Apache Tribe of Oklahoma enacted an entire code provision focused on solid waste disposal, titled “Solid Waste Code.”<sup>147</sup> Section 613 of the Tribe’s Code focuses on enforcement authority, and Section 614b focuses on enforcement actions.<sup>148</sup>

In terms of enforcement actions, the Code contemplates complaints, cease and desist orders, remedial actions, revocation and suspension of permits, hearings, compliance orders, or appeals.<sup>149</sup> The Tribe also goes on to specify the penalties associated with violations.<sup>150</sup> Under the Absentee Shawnee Tribe of Indians of Oklahoma Solid Waste Code, the Tribe contemplates using cooperative compacts with surrounding tribes, states, and the federal government in order to ensure compliance of its solid waste provisions.<sup>151</sup> In addition to the possibility of inter-sovereign compacts to ensure compliance, the Tribe’s Code also contemplates complaints, cease and desist orders, remedial actions, revocation of permits, hearings, appeals, and compliance orders as methods of potential enforcement of its Solid Waste Code.<sup>152</sup> Very similar to other tribes in Oklahoma, the Tribe goes on

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this ordinance indicates that the Business Committee of the Tribe was to consider passage of the Ordinance on Aug. 11, 2009, the copy on file with the author is not signed, and, it is therefore possible that this provision was not adopted.

146. A New Act Relating to the Cherokee Nation of Oklahoma Law Regarding Illegal Dumping on Tribal Land, Legislative Act 26-87 (Nov. 14, 1987).

147. SOLID WASTE CODE §§ 600–616f (Apache Tribe of Oklahoma).

148. *Id.* §§ 613, 614b

149. *Id.* §§ 613, 614a-c.

150. *Id.* § 614d(A)-(B) (“Any person under Apache jurisdiction who violates any of the provisions of this Act or orders or regulations of the ATEP shall be guilty of a crime and upon conviction thereof may be subject to imprisonment in facilities normally used by the Apache Tribe for detention of criminals for not more than one year, or a fine of not more than \$5000 per incident, or by both fine and imprisonment. Each day or part of a day during which such violation is continued or repeated shall constitute a separate offense. B) Any person who violates any of the provisions of the Act or orders regulations of the ATEP may be subject to a fine of not more than \$5000; each day or part of a day during which such violation is continued or repeated shall constitute a separate offense.”).

151. SOLID WASTE CODE, ENFORCEMENT ACTIONS (A)(2) (2010) (Absentee Shawnee Tribe of Indians of Oklahoma); *id.* at COMPLIANCE ORDERS (A)(3).

152. *Id.* at PENALTIES (“(A) Any person under ABSENTEE SHAWNEE TRIBE OF OKLAHOMA jurisdiction who violates any of the provisions of this Act or orders or regulations of the EPC shall be guilty of a crime and upon conviction thereof may be subject to imprisonment in facilities normally used by the Absentee Shawnee Tribe of Oklahoma for detention of criminals for not more than one year, or a fine of not more than \$5,000 per incident, or by both fine and imprisonment. Each day or part of a day during which such violation is continued or repeated shall constitute a separate offense. (B) Any Person who violates any of the provisions of the Act or orders or regulations of the EPC may be subject to a fine of not more than \$5,000, each day or part of a day during which such violation is

to specify penalties potentially applicable to violations of the Solid Waste Code.

Like tribes located within the borders of Oklahoma, tribes located within the borders of Arizona also have enacted tribal code provisions speaking to the enforcement of tribal solid waste provisions. For example, the Colorado River Indian Tribes adopted an Article of its Health and Safety Code dedicated to the disposal of solid waste, and a chapter of the Article speaks to enforcement.<sup>153</sup> The Code provision also specifies the civil penalties applicable to those who violate the Code.<sup>154</sup> The San Carlos Apache Tribe has adopted a Solid Waste Ordinance, and the Ordinance does provide both for criminal prosecution<sup>155</sup> and civil proceedings depend-

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continued or repeated shall constitute a separate offense.”). If someone is deemed to have knowingly violated the Solid Waste Code and put another into imminent danger of death or serious bodily injury, then that person

shall be guilty of a crime and or shall be referred to the appropriate prosecutor as provided for in 42 USC 6992d(c) upon conviction under subsection (e) be subject to a fine of not more than \$250,000 or imprisonment for not more than 1 year or both as provided for in this Act. The EPC is directed under these circumstances to pursue federal enforcement of the federal provisions.

*Id.* at KNOWING ENDANGERMENT.

153. HEALTH AND SAFETY CODE art. VIII, ch. 7 (Colorado River Indian Tribes).

154. *Id.* at ch. 8, § 11-8801 (“Any person who violates or fails to comply with any provision of this Article shall be subject to the following civil fines: (1) for a first violation, a fine not less than one hundred dollars (\$100) but not to exceed one thousand dollars (\$1,000). (2) Subsequent Violations: (A) Except as provided for in Subsection (2)(b) of this Section, for subsequent violations committed within one year of a previous violation of any provision of this Article, a fine not less than five hundred dollars (\$500) but not to exceed one thousand five hundred dollars (\$1,500).”). Further, Section 11-8802 discusses the application of punitive damages:

Any person adjudged to have engaged in a pattern or practice of violating this Article may be liable for punitive damages in an amount not to exceed one thousand dollars (\$1,000). The Court may assess punitive damages pursuant to this Section 11-8802 for each violation of which the pattern or practice is found to consist.

*Id.* § 11-8802.

155. SOLID WASTE ORDINANCE § 1004(a) (San Carlos Apache Tribe) (“Criminal Prosecution (i) Any person who commits one or more violations of the provisions of this Code or its regulations shall be subject to criminal prosecution in the Tribal Courts of the San Carlos Apache Tribe. Such prosecution shall be initiated by the Administrator through a sworn statement specifying the violation(s). (ii) Any person found to be guilty of violations of this Code shall be subject to a fine not less than three hundred dollars (\$300.00) and/or imprisonment for a period not to exceed six months and/or similar period of community service. Each violation shall be treated as a separate offense. (iii) Any person found to be guilty of repeat violations shall be fined not less than \$1,000.00 and/or imprisoned for a period not to exceed one year and/or similar period of community service.”).

ing on the nature of the violation of the Ordinance.<sup>156</sup> Likewise, the Tohono O'odham Nation's Solid Waste Management Code provides both for the Code's enforcement and penalties, as appropriate.<sup>157</sup> The Fort McDowell Yavapai Nation also generally precludes solid waste disposal within its territory without prior approval,<sup>158</sup> and provides for an enforcement process in its tribal code.<sup>159</sup> The Code also provides information on how civil and criminal penalties are to be determined.<sup>160</sup> Unlike other tribal code provisions previously discussed, the Nation includes a list of factors to be taken into consideration by a court when determining the appropriate civil penalty.<sup>161</sup> Similar to the Fort McDowell Yavapai Nation, the Navajo Nation has also adopted a robust tribal code provision related to the disposal of solid waste, the Navajo Nation Solid Waste Act.<sup>162</sup> The Navajo Nation Solid Waste Act contemplates the Nation's general enforcement author-

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156. *Id.* § 1004(b)(ii) ("Any person who violates any provision of the Code may be assessed a civil penalty by the Administrator of not more than five thousand dollars (\$5,000.00) for each violation; provided, however, that no civil penalty shall be assessed unless the person cited shall have been given notice and opportunity for a hearing on such violation.").

157. SOLID WASTE MANAGEMENT CODE ch. 7 (1997) (Tohono O'odham Nation). Civil penalties for violating the Code may include any of the following or a combination of the following:

- (1) injunction, including an order to clean up or remediate unauthorized dumping;
- (2) a civil penalty in an amount not to exceed Twenty Five Thousand Dollars (\$25,000) for each day each violation occurs;
- (3) reasonable attorneys' fees and costs; and
- (4) compensatory damages for the damage to the land or natural resources of the Nation, and for the reasonable costs actually incurred or to be incurred by the Nation for cleaning up any solid or hazardous waste, or abating the effects of the conduct complained of.

*Id.* § 702(a). Moreover, the court may also order a violator to complete community service, if appropriate. *Id.* § 702(b).

158. LAW AND ORDER CODE ch. 23, § 23-9 (2015) (Fort McDowell Yavapai Nation).

159. *Id.* § 23-15.

160. *Id.* § 23-12(A) ("Any person who violates any provision of this Article that is specifically criminalized pursuant to Chapter 6 Section 113 of the Criminal Code shall be guilty of a criminal offense. Any person who violates any provision of this Article shall be subject to civil penalty based upon the severity of the offense and be based on the factors set forth in Subsection B of this Section. The Tribal Court may impose a civil penalty either: 1.) Not less than fifty dollars (\$50.00) but not more than ten thousand dollars (\$10,000) for each violation, or 2.) The actual damage caused plus up to three (3) times the actual damages sustained by the Tribe, the owner, or possessor of the property.").

161. *Id.* § 23-12(B) ("In determining the amount of a civil penalty under this section, the following factors shall be considered: 1. The seriousness of the violation. 2. As an aggravating factor only, the economic benefit, if any, resulting from the violation. 3. Any history of that violation. 4. Any good faith efforts to comply with this chapter. 5. The economic impact of the penalty on the alleged violator. 6. The duration of the violation. 7. Previous violations of the alleged violator. 8. Other factors deemed relevant.").

162. NAVAJO NATION CODE ANN. tit. 4, ch. 1, §§ 101-62 (2009) (Navajo Nation).

ity,<sup>163</sup> judicial enforcement,<sup>164</sup> administrative assessment of penalties,<sup>165</sup> and the ability to bring citizen suits under certain circumstances.<sup>166</sup>

Located in Montana, the Fort Peck Assiniboine and Sioux Tribes also adopted a Solid Waste Code.<sup>167</sup> In addition to creating a plan for the disposal of solid waste and permitting as appropriate, the Code also contemplates enforcement, including establishing an enforcing agency, establishing a compliance schedule, and contemplating potential enforcement mechanisms such as cease and desist orders, and revocation, suspension, or modification of a permit.<sup>168</sup> Further, Subchapter 12 of the Code details the potentially applicable criminal and civil penalties.<sup>169</sup>

Located within the borders of New York, the Saint Regis Mohawk Tribe adopted a Solid Waste Management Code and a Solid Waste Handbook.<sup>170</sup> At the start of the Code, the Tribe explains that the Code is enacted as part of the Tribe's sovereign inherent authority and that, by virtue of this inherent authority, the Tribe maintains its "sovereign power to exercise civil authority and jurisdiction over the conduct of both Tribal and non-Tribal members on all lands within the Akwesasne Mohawk territory."<sup>171</sup> The Code contemplates public involvement and enforcement of the solid

163. *Id.* § 152.

164. *Id.* § 153 ("The Director shall request the Attorney General to file an action for a temporary restraining order, a preliminary injunction, a permanent injunction or any other relief provided by law, including the assessment and recovery of civil penalties in a maximum amount per day per violation of not less than five hundred dollars (\$500.00) but not to exceed twenty-five thousand dollars (\$25,000)."). Section 153 goes on to provide guidance to the tribal court as to how to calculate civil penalties.

165. *Id.* § 154.

166. *Id.* § 155.

167. COMPREHENSIVE CODE OF JUSTICE tit. 22, ch. 3 (Fort Peck Assiniboine and Sioux Tribes).

168. *Id.* §§ 1101–08.

169. *Id.* § 1202 (explaining that potential violators "shall be liable for a civil penalty not to exceed fifteen thousand dollars (\$15,000.00) each day for each violation, to be assessed by the Office of Environmental Protection. Any Person who commits any of the above prohibited acts may be subject to criminal penalties, may be liable for any civil damages caused by the commission of such acts, and may be excluded from the Reservation in accordance with CCOJ. Any Person who commits any of the above prohibited acts, or whose employees of Agent(s) in the course of their employment or agency commit any of the above prohibited acts, may have its rights to engage in activities on the Reservation suspended or terminated.").

170. SOLID WASTE MANAGEMENT CODE (2002) (Saint Regis Mohawk Tribe); SOLID WASTE HANDBOOK (2002) (Saint Regis Mohawk Tribe).

171. SOLID WASTE MANAGEMENT CODE § 1.2 (2002) (Saint Regis Mohawk Tribe).

waste provisions,<sup>172</sup> as well as penalties and fines.<sup>173</sup> As an interesting aside: demonstrating how tribes may be able to develop tribal environmental code provisions in a manner that is consistent with their customs and traditions, the Tribe's Solid Waste Handbook explains that, "[d]eveloping and implementing solid waste management programs consistent with the traditional and cultural beliefs of the Indian Nations will help to instill community ownership of the program and will lead to good community decisions with respect to management of solid waste."<sup>174</sup> Further, the Tribe believes that "[a] comprehensive solid waste management approach is the best option available to meet the needs of the present generation without compromising the lives of the future generations."<sup>175</sup>

Interestingly, several tribes located within the borders of Arizona adopted similar tribal code provisions related to illegal dumping. These Tribes are the Fort McDowell Yavapai Nation,<sup>176</sup> Hualapai Tribe,<sup>177</sup> Salt River Pima Maricopa Indian Community,<sup>178</sup> Tonto Apache Tribe,<sup>179</sup> and Yavapai-Prescott Indian Tribe.<sup>180</sup> In each instance, the provision related to illegal dumping is included in the Tribe's Health and Sanitation Code. For each of these code provisions, the language is similar to: "Any person who shall dump any trash, garbage or refuse within the exterior boundaries of the Nation . . . shall be deemed guilty of an offense and upon conviction shall be subject to a fine . . ."<sup>181</sup>

In addition to actual solid waste disposal codes, several tribes have adopted littering provisions related to the disposal of solid wastes.<sup>182</sup> Under certain circumstances, such as physical invasion, it would be possible to use

172. *Id.* § 6.1.

173. *Id.* § 6.4 ("The Tribal Court may levy financial penalties and fines and/or other form of penalty, such as restitution, against those who violate any section of this Code. Penalties and fines will be assessed according to the Tribal Court.")

174. SOLID WASTE HANDBOOK, *supra* note 170, § 2.1.

175. *Id.*

176. LAW AND ORDER CODE ch. 13, § 13-3 (Fort McDowell Yavapai Nation).

177. ENVIRONMENTAL REVIEW CODE ch. 9, § 9.4 (Hualapai Tribe).

178. CODE OF ORDINANCES ch. 13, § 13-3 (Salt River Pima Maricopa Indian Community).

179. CIVIL AND CRIMINAL LAW AND ORDER CODE ch. 8, § 8.2 (Tonto Apache Tribe).

180. LAW AND ORDER CODE ch. 9, § 9.4 (Yavapai Prescott Indian Tribe).

181. *See, e.g.*, LAW AND ORDER CODE ch. 13, § 13-3 (Fort McDowell Yavapai Nation).

182. Although not specifically denominated as a littering provision, the White Mountain Apache Tribe does have a "sanitation" provision within its Game and Fish Code prohibiting [p]lacing in or near a stream, lake, or other water any substance which does or may pollute a stream, lake, or other water; . . . [f]ailing to dispose of all garbage, including any paper, can bottle, sewage, waste water or material, or rubbish either by removal from the site or area, or by depositing it into receptacles or at places provided for such purposes . . .

GAME AND FISH CODE ch. 4, § 4.15 (2009) (White Mountain Apache Tribe).

a littering provision to address pollution. For example, the Ak Chin Tribe provides that “[a] person who dumps, deposits, places, throws or leaves rubbish, refuse, debris, filthy or odoriferous objects, substances, or other trash upon a highway, road, or public place within the AK-CHIN INDIAN RESERVATION is guilty of littering.”<sup>183</sup> Similarly, the Sac & Fox Tribe of Oklahoma also enacted a littering provision as part of its criminal offenses tribal code, making littering punishable by a fine and/or potential imprisonment.<sup>184</sup> The Hopi Nation also has a provision prohibiting littering, which provides that “[a] person commits an [sic] minor offense by recklessly or negligently discarding any refuse, debris, destructive or other injurious material that he does not remove, without lawful authority,” and the code provision goes on to specify that “[a] person who discharges sewage, oil products or other harmful substances, in excess of three hundred pounds in weight or one hundred cubic feet in volume, or is done in any volume for commercial purposes, into any public waters is guilty of an offense.”<sup>185</sup> The Nation requires that anyone convicted of littering remove or remedy the nuisance upon an order from the appropriate court.<sup>186</sup> Further, the Fort Peck Assiniboine and Sioux Tribes of Montana adopted a littering provision in addition to their solid waste code.<sup>187</sup> Because of this tribal provision’s limitation to public rights of way and highways, it may not be as broadly applicable as some of the other littering provisions discussed above.

#### D. *Common Law Provisions that May be Utilized for Environmental Enforcement*

In addition to tribal code provisions specific to different categories of enforcement (*i.e.*, air, water, and solid waste), many tribes have codified what are traditionally known as common law enforcement provisions (*e.g.*, nuisance or trespass) into their tribal codes, which can prove particularly

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183. TRIBAL CODE ch. IV, § 4.49 (1975) (Ak Chin Indian Community). The code goes on to explain that anyone found guilty of littering “shall be imprisoned in the Community Jail for a period not to exceed ten (10) days, or fined not to exceed \$100.00, or both, for each day such littering occurs.” *Id.*

184. CODE OF LAWS, ch. 5 § 517(a) (Sac & Fox Tribe of Oklahoma). The code provision generally prohibits littering and “[l]ittering shall be punishable by a fine not to exceed Two Hundred Fifty Dollars (\$250.00), or by a term of imprisonment in the Tribal jail not to exceed three months, or both.” *Id.* § 517(b).

185. HOPI CODE tit. 3, ch. 8, § 3.8.7(B) (2012) (Hopi Nation).

186. *Id.* at (C).

187. The littering provision is located in the Tribes’ Health and Sanitation Code, and generally prohibits disposal of rubbish alongside any public right of way, public road or highway. COMPREHENSIVE CODE OF JUSTICE tit. 14, ch. 2, § 201 (Fort Peck Assiniboine and Sioux Tribes). Violators of the littering prohibition may be subject to criminal penalties. *Id.* § 201(d).

helpful in protecting the environment, especially where the statutory law does not develop quickly enough to adequately address new types of pollution.<sup>188</sup> Accordingly, codifying these types of provisions can provide tribes increased flexibility to address environmental challenges not contemplated by more specific provisions elsewhere in the codes. This subpart reviews some of the common law tribal code provisions that have been incorporated into various tribal code provisions in order to gain a better understanding of how tribes may be using common law provisions to address environmental challenges.

Before looking at specific tribal code provisions, it is helpful to consider the role of the common law within tribal law in general. Tribes may adopt and adapt common law developed from other sovereigns, such as the United States or Great Britain,<sup>189</sup> or tribal common law may be developed from the customs and traditions of the tribe.<sup>190</sup> Tribes possess the sovereign ability to recognize and enforce tribal common law, unless divested by the federal government.<sup>191</sup> Expressions of tribal common law must be consistent with tribal civil and criminal jurisdiction.<sup>192</sup>

As evidence of this, several tribal constitutions and tribal courts have recognized the existence of tribal common law. For example, see the Pueblo of Laguna's and Ho-Chunk Nation's constitutional preambles, which both recognize customary law.<sup>193</sup> Further, many tribes have enacted codes recognizing tribal common law. For example, the Sisseton-Wahpeton Sioux Tribe's Code at Chapter 33-01-01 broadly explains that "[c]ivil matters shall be governed by the laws, customs, and usage of the Tribe not prohibited by the laws of the United States."<sup>194</sup> Further, the U.S. Supreme Court has recognized the existence and legitimacy of tribal common law. In *United States v. Quiver*, the Court explained that "[a]t an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws."<sup>195</sup>

Some tribes have incorporated trespass into their tribal code provisions. Trespass can be an effective tool in combatting environmental pollution

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188. See generally JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY: A CONTEMPORARY APPROACH 1-94 (2009).

189. See COHEN'S HANDBOOK 2012, *supra* note 6, § 4.05[8]

190. *Id.* § 4.05[1].

191. *Id.* § 4.03[1].

192. *Id.* § 4.05[1].

193. PUEBLO OF LAGUNA OF N.M. CONST. pmb.; HO-CHUNK NATION CONST. pmb.

194. TRIBAL CODE ch. 33, § 01-01 (1982) (Sisseton-Wahpeton Sioux Tribe).

195. *United States v. Quiver*, 241 U.S. 602, 603-04 (1916).



where there is a physical invasion of another's property – for example, it could reach water pollution or solid waste disposal.<sup>196</sup> As long as the tribe's actions are consistent with federal law, they are generally free to exercise the right to exclude and bring actions for trespass. For example, the U.S. Court of Appeals for the Ninth Circuit explained that such trespass actions were consistent with the tribe's right as a landowner to "occupy and exclude."

The tribe seeks to enforce its regulations that prohibit, among other things, trespassing onto tribal lands, setting a fire without a permit on tribal lands, and destroying natural resources on tribal lands. The Supreme Court has strongly suggested that a tribe may regulate nonmembers' conduct on tribal lands to the extent that the tribe can "assert a landowner's right to occupy and exclude." The tribal regulations at issue stem from the tribe's "landowner's right to occupy and exclude." Trespass regulations plainly concern a property owner's right to exclude, and regulations prohibiting destruction of natural resources and requiring a fire permit are related to an owner's right to occupy . . . Accordingly, the tribe's ownership of the land may be dispositive here.<sup>197</sup>

For example, the Ak Chin tribal code describes the acts that constitute trespass, and, included within the list are "[d]umping, depositing or throwing refuse or litter upon the property of another."<sup>198</sup> The tribal code provision goes on to specify that "[a]ny person found guilty of trespass shall be imprisoned in the Community Jail for a period not to exceed three (3) months, or fined not to exceed \$250.00, or both. Each day the trespass persists shall be considered a separate offense."<sup>199</sup> The Hopi Nation also has enacted a tribal code provision respecting trespass, which states "[a] person who enters or remains in any building, structure or land, after being notified by the owner or lawful possessor not to enter or remain, is guilty of a minor offense."<sup>200</sup> Also, the Colorado River Indian Tribes' tribal code provides extensive information on prohibited trespass actions, which includes the "unlawful occupation or use of premises and lands within the Reserva-

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196. See generally Anthony Z. Roisman & Alexander Wolff, *Trespass by Pollution: Remedy by Mandatory Injunction*, 21 FORDHAM ENVTL. L. REV. 157 (2010).

197. *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 849–50 (9th Cir. 2009) (citations omitted).

198. TRIBAL CODE ch. IV, § 4.34 (Ak Chin Indian Community).

199. *Id.*

200. HOPI CODE tit. III, ch. 8, § 3.8.3 (2012) (Hopi Nation).

tion.”<sup>201</sup> Section 9-203 of the Colorado River Indian Tribes’ Article IX on Civil Proceedings provides:

[t]he Colorado River Indian Tribes Tribal Court is hereby granted the jurisdiction and authority to determine whether a person or entity has committed a trespass or is presently trespassing, including issuing orders requiring the person or entity having been found by the Court to be a trespasser to vacate the subject tribal lands and requiring a tribal Realty Agent, Law Enforcement Officer, and/or Fish and Game Warden to physically remove the person or entity and their personal property from the subject tribal lands.<sup>202</sup>

The Colorado River Indian Tribes therefore recognize removal of the individual engaged in trespass as a potential enforcement method, which is certainly an effective method of enforcement to end a trespass. Similarly, the White Mountain Apache Tribe generally precludes trespass as well, and, under certain circumstances, the trespasser may be excluded from the Tribe’s territory.<sup>203</sup> And, given the limitation on tribes’ criminal jurisdiction following the *Oliphant* decision, several tribes utilize banishment and exclusion under their civil authority as a way of separating bad actors from the tribal community.<sup>204</sup> In many such cases, banishment and exclusion were also consistent with traditional forms of cultural justice used by the tribes.<sup>205</sup>

Like trespass actions, several tribes have also adopted tribal code provisions related to nuisance. A private nuisance occurs where one’s use of land is intentional, non-trespassing, unreasonable, and constitutes a substantial interference with another’s use and enjoyment of his or her land.<sup>206</sup> The Ak Chin Tribe defines a public nuisance as:

anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of private or community property. A public nuisance is further defined as allowing

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201. LAW AND ORDER CODE art. IX, ch. 2, §§ 9-202, 9-205 (Colorado River Indian Tribes).

202. *Id.* § 9-203.

203. GAME AND FISH CODE § 6.21 (2009) (White Mountain Apache Tribe); ENVIRONMENTAL CODE ch. 3, § 3.4(J) (1999) (White Mountain Apache Tribe).

204. See generally Patrice Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85 (2007).

205. *Id.*

206. See SPANKLING & COLLETA, *supra* note 188, at 72.

property, public or private, to remain in such state of disarray so as to be offensive to the senses of a reasonable person or persons.<sup>207</sup>

The Tribe enforces the statute with penalties of “imprison[ment] in the Community Jail for a period not to exceed ten (10) days, or fined not to exceed \$100.00, or both, for each day such nuisance continues.”<sup>208</sup> Beyond this general prohibition of nuisances, the Tribe also goes on to specifically list “health menaces” as public nuisances, as they are dangerous to the public health.<sup>209</sup> The Tribe considers potential solid waste violations and water pollution to be examples of health menaces.<sup>210</sup> These tribal code provisions therefore demonstrate that some tribes may use typical common law tools, such as nuisance, to address specific categories of pollution—such as solid waste or water.

The Modoc Tribe of Oklahoma treats such pollution similarly, as evidenced by its Ordinance for Adoption of Clean Air and Pollution Codes. The Tribe styles pollution of its natural resources as a public nuisance.<sup>211</sup> Section 4 of the Tribe’s Ordinance goes on to specify administrative proceedings that may be held when such a nuisance arises. The Tribe limits enforcement in such a way as “any penalty assessed or proposed in an order shall not exceed One Hundred Dollars (\$100.00) per day of noncompliance.”<sup>212</sup>

#### IV. A DEEPER EXAMINATION: SURVEY OF TRIBAL ENVIRONMENTAL ENFORCEMENT PROVISIONS

Part III of this Article established that existing tribal code provisions contemplate enforcement and establish mechanisms through which enforcement may be achieved. Several federally recognized tribes located within

207. TRIBAL CODE ch. IV, § 4.51 (1975) (Ak Chin Indian Community).

208. *Id.*

209. *Id.* ch. VI, § 6.5.

210. As to solid waste, Section 6.5(4) provides that “[a]ll sewage, human excreta, waste water, garbage or other organic wastes deposited, stored, discharged, or exposed, so as to be a potential instrument or medium in the transmission of disease to or between any person or persons,” and Section 6.5(5) goes on to specify “[a]ny vehicle or container used in the transportation of garbage, human excreta, or other organic material which is defective and allows leakage or spillage of contents.” *Id.* As to water pollution, Section 6.5(7) specifies “[t]he pollution or contamination of any domestic waters.” *Id.*

211. ORDINANCE FOR ADOPTION OF CLEAN AIR AND POLLUTION CODES § 3(A) (Modoc Tribe of Oklahoma) (“It shall be unlawful for any person to cause pollution of any air, water, land, or resources of the Modoc Tribe, or to place or cause to be placed any wastes or pollutants in a location where they are likely to cause pollution of any air, water, land or resources of the Modoc Tribe. Any such action is hereby declared to be a public nuisance.”).

212. *Id.* § 4(F).

the boundaries of Arizona, Montana, New York, and Oklahoma possess enforcement provisions designed to effectuate their tribal environmental code provisions. The foregoing discussion, however, does not speak to the effectiveness of those provisions. Although tribes have put enforcement mechanisms into place, it is possible that such mechanisms are not successful in abating environmental pollution. In an attempt to shed some light on the effectiveness of such provisions while also providing for a more in-depth examination of tribal environmental enforcement provisions used by some tribes, this Part of the Article examines the results of a survey sent to all federally recognized tribes located within the four state scope of this article. The purpose of the survey was to gather information on how effective tribal environmental enforcement provisions are. This Part of the Article therefore begins with a brief discussion of the survey design and dissemination, and then concludes with a discussion of the results of the survey.

### A. Survey Design

The survey, "Enforcement of Tribal Environmental Law," was designed and disseminated to the 74 federally recognized tribes located within the boundaries of Arizona, Montana, New York, and Oklahoma during the summer of 2015.<sup>213</sup> The survey was distributed to all 74 federally-recognized tribes via mail and e-mail, where appropriate. Thirteen tribes appeared to have their own active tribal institutional review boards to review and approve research conducted within the tribes' territories.<sup>214</sup> For these tribes with IRBs, the author submitted specific requests to the tribes consistent with the tribal IRB requirements. Of the 74 tribes contacted to complete the survey, nine tribes returned completed surveys. Of these nine tribes, three requested to not be identified by name, and these tribes will be referred to consistently throughout as Tribe A, Tribe B, and Tribe C. Of the participating tribes, three are located within Arizona, one is located within Montana, one is located within New York, and four are located within Oklahoma.

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213. For a copy of the survey, please review Appendix A below. Prior to releasing the survey, the University of Kansas Institutional Review Board (KU IRB) reviewed the survey and determined that it did not involve human research. E-mail from eCompliance: Conflict of Interest and Human Subjects Research to Author, *Notification of Not Human Research Determination* (Apr. 20, 2015) (on file with author).

214. These tribes included: the Cherokee Nation of Oklahoma, Sac and Fox Nation of Oklahoma, Hopi Tribe, Hualapai Tribe, Tohono O'odham Nation, Fort Peck Assiniboine & Sioux Tribes, Ak Chin Indian Community, Colorado River Indian Tribes, Navajo Nation, Fort McDowell Yavapai Nation, Pascua Yaqui, Gila River Indian Community, and San Carlos Apache Tribe.

## B. Results of Survey

The survey was broken into three sections: water regulation, air pollution, and solid waste regulation. Accordingly, the discussion of the survey results is broken into these three parts.

### 1. Water Regulation Survey Responses

In relation to water regulation, survey participants were asked one to four questions, depending on their responses to the first question. The first question asked: “Does the Tribe you work for regulate water pollution? If yes, what tribal laws regulate water pollution?” If the respondent answered yes to the first question, they were then asked to complete three subsequent questions:

(2) what mechanism(s) does the Tribe you work for use to enforce its laws regulating water pollution?; (3) What is the Tribe’s goal in relation to regulating water pollution? Assuming enforcement mechanisms related to the regulation of water pollution exist, do these mechanisms assist the Tribe in meeting its regulatory goal? Please explain; and, (4) Do these regulations apply to non-members of the Tribe? And, if yes, what is the legal justification that the Tribe employs to apply these enforcement regulations against non-members (e.g. territorial sovereignty, one of the *Montana* exceptions, etc.)?

Of the nine participating tribes, six answered “no” to the first question—that they did not regulate water pollution. Of these, only Tribe C answered “no” without any additional explanation. The other five tribes provided some explanation. Respondent for Tribe A explained that, “[n]o, currently Tribes in Oklahoma cannot regulate water pollution standards due to the infamous “Midnight Rider” or Subtitle B “Other Miscellaneous Provisions” within the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005.”<sup>215</sup>

Several of the tribes indicated that they relied on federal environmental laws for water regulation. The respondent for the Fort McDowell Yavapai Nation responded “[n]o-federal laws apply,”<sup>216</sup> suggesting that the Nation was not actively regulating water given federal environmental regulations are in place. Respondent for Tribe B stated, “[n]o, we currently operate a

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215. Tribe A Survey, *supra* note 87.

216. Completed Enforcement of Tribal Environmental Law Survey by Fort McDowell Yavapai Nation (on file with author) [hereinafter Fort McDowell Yavapai Nation Survey].

CWA 106 Surface Water Monitoring Program,”<sup>217</sup> which also suggests a reliance on federal law. Similarly, the respondent for the Kickapoo Tribe of Oklahoma stated that:

[a]t this time, the tribe has not completed its own environmental regulation on water pollution that should be applied to the Kickapoo Tribe of Oklahoma. However, the Kickapoo Tribe of Oklahoma has created an ordinance adoption of environmental regulations as it relates to CFR, Title 40, as applicable, and other federal regulations to regulate activities related to the environment as to Kickapoo Tribe of Oklahoma Indian Country.<sup>218</sup>

The respondent for the Crow Tribe explained that, “[c]urrently the Crow Tribal Water Quality Protection Code is in Legislation—with the NR Subcommittee, to be followed up by the Water Quality Standards,”<sup>219</sup> which suggests that the Tribe is currently in the process of adopting provisions to regulate water.

Although the Kickapoo Tribe of Oklahoma answered “no” to the first question, the respondent for the Tribe provided answers to the three follow up questions. In response to question 2, the respondent explained, “[t]he only mechanism to enforce its laws is the Kickapoo Tribal Courts.”<sup>220</sup> In response to question 3, the respondent stated, “I have to assume the tribe’s goal would be creating their own water pollution standard based off the State of Oklahoma’s water pollution standard. Any enforcement mechanism would help meet the regulatory goal or the tribe’s water pollution standards.”<sup>221</sup> And, finally, in response to question 4, the respondent provided:

I am not sure of how regulations would be interpret [sic] on this issue. With the tribe’s new utility board, I have to assume in order to receive drinking water from the tribe’s water line (i.e., from a right-of-way agreement), there must be a clause intact to ensure non-tribal members to furnish proof from the Oklahoma Depart-

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217. Completed Enforcement of Tribal Environmental Law Survey by Tribe B (on file with author) [hereinafter Tribe B Survey].

218. Completed Enforcement of Tribal Environmental Law Survey by Kickapoo Tribe of Oklahoma (on file with author) [hereinafter Kickapoo Tribe of Oklahoma Survey].

219. Completed Enforcement of Tribal Environmental Law Survey by Crow Nation (on file with author).

220. Kickapoo Tribe of Oklahoma Survey, *supra* note 218.

221. *Id.*

ment of Environmental Quality of an approved waste water system.<sup>222</sup>

Three tribal respondents—Hualapai Tribe, Navajo Nation, and Saint Regis Mohawk Tribe—responded yes to question 1. In response to question 1, the Hualapai Tribe, which is located within the boundaries of Arizona, explained that the Tribe enacted six laws related to the regulation of water—the Hualapai Water Quality Standards Ordinance, the Hualapai Wetland Ordinance, Hualapai Ground Water Overlay Protection Ordinance, Hualapai Air Quality Ordinance, Hualapai Solid Waste Ordinance, and the 2470 Hualapai Wildlife Ordinance.<sup>223</sup> In response to question 2, the Tribe provided: “[t]hrough our established Tribal Ordinances the Director of Natural Resources and Resource Managers have regulatory authority to enforce the above mentioned ordinances, and activities that have the potential to contaminate as well as reckless actions that have caused contamination.”<sup>224</sup> In response to question 3, the respondent for the Tribe explained:

[o]ur Goal is to maintain, protect and conserve all surface and ground water resources on Hualapai Tribal Lands. All proposed activities and projects, are sent to our Tribal Environmental Review Commission where any proposed project or activity is scoped and all necessary environmental clearances must be adhered to. We emphasize the need to protect all water resources and insist on protective measures to be in place as construction and activities occur on our lands. Issuing 401 certification permits to activities occurring on our lands.<sup>225</sup>

And, finally, in response to question 4, the respondent explained:

[a]ny person entering our tribal lands are subject to our laws and ordinances, our reservation is not considered an open reservation. Meaning that some of our primary roads through our reservation may be public roads, non-Indian visitors are still subject to our tribal laws. Roadways not designated as public roads non-Indian visitors are required to get access permits and some areas of tribal lands have restrictions on access. Burlington, Northern, Santa Fe Railroad has tracks through our land and rights of way. In one instance, their construction contractors cut through the right of

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222. *Id.*

223. Completed Enforcement of Tribal Environmental Law Survey by Hualapai Tribe (on file with author) [hereinafter Hualapai Tribe Survey].

224. *Id.*

225. *Id.*

way fence, disturbed tribal lands, by creating roads and a staging area for construction. The construction company was charged with trespass and all of their equipment was impounded and they were cited and scheduled a court hearing in our tribal court. The construction company paid trespass fines, impoundment fees, and fees for damages, through our tribal courts, before they were allowed to reclaim their equipment and knew certainly where the railroad right of way was and tribal lands were.<sup>226</sup>

The respondent for the Navajo Nation, located partially within the boundaries of Arizona, also answered yes to question 1, explaining that “[y]es; Navajo Nation Clean Water Act (4 N.N.C. § 1301 *et seq.*) and Navajo Nation Safe Drinking Water Act (22 N.N.C. § 2501 *et seq.*). The Navajo Nation also has various regulations related to water pollution.”<sup>227</sup> In response to question 2, the respondent explained that, “[p]ermits are a primary mechanism. The Nation also has water quality standards to protect the designated uses of waters of the Navajo Nation.”<sup>228</sup> In response to question 3, the respondent stated:

[a]mong other things, the Nation’s goal is to protect the health, safety, welfare and environment of the Navajo Nation and its residents; to prevent, reduce and eliminate pollution of the waters of the Navajo Nation; and to plan the development and use (including restoration, preservation, and enhancement) of land and water resources within the Nation. *See* 4 N.N.C. § 1303. Concerning drinking water, it is the policy of the Nation to recognize, preserve, and protect the health and welfare of the Navajo people by ensuring that water is safe for drinking and to protect underground sources of drinking water from contamination by the subsurface emplacement of fluids by injection wells as by surface and subsurface discharges. *See* 22 N.N.C. § 2502.

Generally, the mechanisms do assist the Nation in meeting its goals in regards to air pollution. The Nation has limited resources and does the best with what it has.<sup>229</sup>

And, in response to question 4, the respondent for the Navajo Nation stated, “[y]es, under Montana’s second exception.”<sup>230</sup>

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226. *Id.*

227. Completed Enforcement of Tribal Environmental Law Survey by Navajo Nation (on file with author) [hereinafter Navajo Nation Survey].

228. *Id.*

229. *Id.*

230. *Id.*



Last, the Saint Regis Mohawk Tribe also answered yes to question 1, explaining that “Water Quality Standards as developed, adopted and approved by the SRMT and EPA.”<sup>231</sup> In response to question 2, the respondent for the Tribe explained that “Tribal courts and compliance office within the Tribe” were responsible for enforcement.<sup>232</sup> In response to question 3, the respondent provided, “[y]es, they assist by requiring permitting by the Tribe and preventing contamination [sic] of waterbodies that might violate our WQS.”<sup>233</sup> And, finally, in response to question 4, the respondent for the Tribe stated that “they apply to outside agencies and as approved by EPA are recognized and followed by state and federal agencies.”<sup>234</sup>

## 2. Air Pollution Survey Responses

In relation to the regulation of air pollution, survey participants were asked one to four questions, depending on their responses to the first question. The first question (question 5 in the actual survey) asked, “[d]oes the Tribe you work for regulate air pollution? If yes, what tribal laws regulate air pollution? (Please list. There is no need to list federal laws that may be applicable.)” If the tribal respondent answered yes to question 1, they were asked to answer three additional questions. The second question stated, “[i]f you answered yes to question 5, what mechanism(s) does the Tribe you work for use to enforce its laws regulating air pollution?” The third follow up question asked, “[w]hat is the Tribe’s goal in relation to regulating air pollution? Assuming enforcement mechanisms related to the regulation of air pollution exist, do these mechanisms assist the Tribe in meeting its regulatory goal? Please explain.” And, the final follow up question asked, “[d]o these regulations apply to non-members of the Tribe? And, if yes, what is the legal justification that the Tribe employs to apply these enforcement regulations against non-members (e.g. territorial sovereignty, one of the *Montana* exceptions, etc.)?” The tribal respondents’ responses to these questions are detailed below.

As with the responses to the survey questions related to the regulation of water, six tribal respondents indicated that the tribe they worked for did not regulate air pollution (outside of potentially applicable federal regulations). Two tribal representatives, representing the Crow Tribe and Tribe C, simply responded “[n]o” or “[n]ot currently” and did not provide any

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231. Completed Enforcement of Tribal Environmental Law Survey by Saint Regis Mohawk Tribe (on file with author) [hereinafter Saint Regis Mohawk Tribe Survey].

232. *Id.*

233. *Id.*

234. *Id.*

additional information.<sup>235</sup> The Kickapoo Tribe of Oklahoma explained that “[t]he Kickapoo Tribe of Oklahoma does not have their own air pollution standard.”<sup>236</sup> Two of the tribal respondents—one for the Fort McDowell Yavapai Nation<sup>237</sup> and one for Tribe B<sup>238</sup>—indicated that the Tribes did not regulate air pollution, but that federal laws were applicable. The final tribal respondent represented Tribe A, and stated, “[n]o, Same as Response to Question 1.”<sup>239</sup> In response to question 1, as explained above, the respondent indicated that the “Midnight Rider” or Subtitle B “Other Miscellaneous Provisions” within the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 effectively resulted in tribes within Oklahoma not being able to regulate pollution.<sup>240</sup> As mentioned above, the effect of this “Midnight Rider” provision may be that tribes in Oklahoma are not acting to regulate their environments to the extent tribes in other states may be.<sup>241</sup>

The same three Tribes that answered yes to question 1 discussed in the previous section also answered yes to the first question on regulating air pollution—the Hualapai Tribe, Navajo Nation, and Saint Regis Mohawk Tribe. In response to the first question, the Hualapai tribal representative explained, “[t]he tribe has an air quality ordinance, that we have enforced against other tribal departments in the burning of solid waste materials, that have caused unhealthy air to breathe and unnecessary smoke to vulnerable populations.”<sup>242</sup> In the first follow up question, the respondent went on to explain that,

In our air quality ordinance there are prohibitions against activities that create unhealthy air conditions and excessive amounts of smoke. There are posted fire restrictions that are posted during different times of the seasons, that are strictly enforced for the protection of the environment and the health of the Hualapai community.<sup>243</sup>

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235. Completed Enforcement of Tribal Environmental Law Surveys by the Crow Tribe and Tribe C (on file with author) [hereinafter Crow Tribe and Tribe C Surveys].

236. Kickapoo Tribe of Oklahoma Survey, *supra* note 218.

237. Fort McDowell Yavapai Nation Survey, *supra* note 216 (“No—federal laws apply”).

238. Tribe B Survey, *supra* note 217 (“No, we currently operate a Clean Air Act CAA-103 ambient air monitoring program.”).

239. Tribe A Survey, *supra* note 87.

240. *Id.*

241. *See supra* Part IV.B.1 (regarding “Tribe A”).

242. Hualapai Tribe Survey, *supra* note 223.

243. *Id.*

In response to the second follow up question on air pollution regulation, the tribal representative stated, “[t]he Hualapai Air shed is predominantly a class 1 air shed and air quality as well as visibility concerns are the tribes, since our northern boundary is 108 miles of the Grand Canyon to the middle of the river, from this tribal members perspective.”<sup>244</sup> And, finally, in response to the third follow up question, the Hualapai representative explained:

[a]ny person on Hualapai Tribal Lands is subject to the laws of the Hualapai Indian Reservation. Our tribal lands are not free and open space, access through most of our tribal lands requires a permit and entering and leaving our reservation there is signage informing the public of the limited access.<sup>245</sup>

The respondent for the Navajo Nation also answered yes to the first question regarding the regulation of air pollution, explaining, “[y]es, Navajo Nation Air Pollution Prevention and Control Act 94 N.N.C. § 1101 *et seq.*). The Navajo Nation also has regulations related to air pollution.”<sup>246</sup> In response to the first follow up question, the respondent stated that the “[p]rimary mechanism is the issuance of permits.”<sup>247</sup> As to the second follow up question and the Nation’s goals, the respondent provided:

[a]s stated in 4 N.N.C. 1102(A)(2), the tribe is committed to the regulation of air pollution activities in a manner that ensures the health, safety and general welfare of all residents of the Navajo Nation, protects property values and protects plants and animal life.

Generally, the mechanisms do assist the Nation in meeting its goals in regards to air pollution. The Nation has limited resources and does the best with what it has.<sup>248</sup>

And, finally, in response to the third follow up question inquiring as to whether the Nation’s regulations apply to non-members of the Nation, the respondent provided:

[y]es; U.S. EPA has taken the position that the federal Clean Air Act (CAA) constitutes a statutory grant of jurisdictional authority to tribes, which authorizes U.S. EPA to treat a tribe in the same

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244. *Id.*

245. *Id.*

246. Navajo Nation Survey, *supra* note 227.

247. *Id.*

248. *Id.*

manner as a state for the regulation of “air resources within the exterior boundaries of the reservation or other areas within the tribe’s jurisdiction.” CAA § 301(d)(2)(B); *see also* U.S. EPA’s Tribal Authority Rule, 63 FR 7254-01. U.S. EPA believes that this statutory provision, viewed within the overall framework of the CAA, establishes a territorial view of tribal jurisdiction and authorizes a tribal role for all air resources within the exterior boundaries of Indian reservations without distinguishing among various categories of on-reservation land.<sup>249</sup>

Finally, the respondent for the Saint Regis Mohawk Tribe also answered yes to the first question regarding the regulation of air pollution, stating “[y]es we regulate under our own EPA accepted Tribal Implementation Plan.”<sup>250</sup> The respondent went on to explain that the tribal court was responsible for enforcing the Tribe’s air pollution regulations.<sup>251</sup> In response to the second follow up question, the respondent explained that the Tribe’s goal was to “[p]rotect our air quality and maintain attainment of all priority air pollutants.”<sup>252</sup> Finally, without providing any additional explanation, the representative for the Tribe did indicate that its regulations apply to non-members of the Tribe.<sup>253</sup>

### 3. Solid Wastes Survey Responses

And, finally, in relation to the regulation of solid wastes, survey participants were asked one to four questions, depending on their responses to the first question. The first question asked respondents, “[d]oes the Tribe you work for regulate solid waste disposal? If yes, what tribal laws regulate solid waste disposal? (Please list. There is no need to list federal laws that may be applicable.)” If respondents answered in the affirmative to the first question, they were asked three follow-up questions: 1) “[i]f you answered yes to question 9, what mechanism(s) does the Tribe you work for use to enforce its laws regulation solid waste disposal?; 2) “[w]hat is the Tribe’s goal in relation to regulating solid waste disposal? Assuming enforcement mechanisms related to solid water disposal exist, do these mechanisms assist the Tribe in meeting its regulatory goal? Please explain.”; and, 3) “[d]o these regulations apply to non-members of the Tribe? And, if yes, what is the legal justification that the Tribe employs to apply these enforcement

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249. *Id.*

250. Saint Regis Mohawk Tribe Survey, *supra* note 231.

251. *Id.* (“Our own Tribal Courts enforce our regs.”).

252. *Id.*

253. *Id.*

regulations against non-members (e.g. territorial sovereignty, one of the *Montana* exceptions, etc.)?”

Based on the survey results, it appears that more tribes have enacted tribal environmental laws related to the regulation of solid waste than either water or air pollution. Respondents for six Tribes indicated that they do have some form of tribal law related to the regulation of solid wastes, three Tribes do not have any such regulation. The three Tribes falling into the latter category are the Crow Tribe, Tribe B, and Tribe C. The respondents for both the Crow Tribe and Tribe C indicated simply that neither Tribe had such tribal environmental laws.<sup>254</sup> The respondent for Tribe B did go on to provide some additional information, explaining, “[n]o, our tribal members are not in one location but spread among several areas. We currently operate a recycling project locally.”<sup>255</sup>

The respondents for the remaining six tribal survey participants all indicated that the Tribes had some sort of tribal environmental law directed toward the regulation of solid wastes. First, the Fort McDowell Yavapai Nation indicated that it has a tribal law in its Tribal Environmental Code that prohibits illegal dumping.<sup>256</sup> Enforcement is accomplished through the Code, and the solid waste laws “apply to anyone on Tribal land.”<sup>257</sup>

The Hualapai Tribe “adopted a solid waste ordinance that prohibits illegal dumping of any refuse on tribal lands not designated as a transfer station or landfill.”<sup>258</sup> The Tribe enforces this ordinance by prescribing a “fee that covers water, sewer and solid waste service to the tribal community and tribal businesses. There are prohibitions of dumping household trash on tribal lands not designated as a transfer station or landfill. In addition to the prohibitions there are fees and penalties associated with different illegal activities.”<sup>259</sup> The goal of the program is “to ensure that all tribal members participate in the solid waste program and comply with established fees and responsibilities.”<sup>260</sup> And, finally, the law does apply to both members and non-members of the Tribe, as the “reservation is a closed reservation that for the most part requires a permit for access or if accessing the tribal lands from public roads there is an assumption of the tribe that all persons are subject to our tribal laws; when they access our tribal lands.”<sup>261</sup>

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254. Crow Tribe and Tribe C Survey, *supra* note 235.

255. Tribe B Survey, *supra* note 217.

256. Fort McDowell Yavapai Nation Survey, *supra* note 216.

257. *Id.*

258. Hualapai Tribe, *supra* note 223.

259. *Id.*

260. *Id.*

261. *Id.*

Also, the Kickapoo Tribe of Oklahoma regulates illegal dumping on tribal lands through an “ordinance . . . used to regulate solid waste with penalty fees for illegal dumping.”<sup>262</sup> Specifically, the Tribe has enacted a criminal ordinance to regulate the illegal dumping with the goal of preventing illegal dumping within the Tribe’s territory.<sup>263</sup> The respondent for the Tribe was uncertain whether the ordinance applied to both members and non-members of the Tribe.<sup>264</sup>

As with water and air pollution regulation, the Navajo Nation has adopted a tribal law, the Navajo Nation Solid Waste Act,<sup>265</sup> to regulate solid waste disposal. The Act is enforced primarily through permits, and the Nation prohibits “open dumping” of waste.<sup>266</sup> “The Nation’s overall goal is to protect the health, safety, welfare and environment of the Navajo Nation; to manage, protect and preserve the resources of the Nation; and to maintain and improve the aesthetic appearances of the Nation. *See* 4 N.N.C. § 103(B).”<sup>267</sup> Further, the Act does apply to both members and non-members of the Nation.<sup>268</sup>

So, too, the Saint Regis Mohawk Tribe adopted a Tribal Solid Waste Management Code, approved by both the Tribe and the EPA, to regulate solid waste disposal on the reservation.<sup>269</sup> The respondent for the Tribe indicated that the Code provision is enforced through the tribal court and that it is applicable to both members and non-members of the Tribe.<sup>270</sup>

Finally, Tribe A also adopted tribal laws to regulate solid waste, as it has “solid waste codes within their Policies and Regulations.”<sup>271</sup> The Tribe enforces these laws through “their Tribal Court and their Marshals.”<sup>272</sup> The respondent for the Tribe explained that “the Environmental Department has been trying to eliminate illegal dumping within [a certain area]. The mechanisms that exist to enforce regulations are bleak and are difficult to administer.”<sup>273</sup> Also, the laws apply to both members and non-members of the Tribe, and the respondent stated that, “[i]f non-tribal members are caught, the hope is that they will be prosecuted to the maximum extent.

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262. Kickapoo Tribe of Oklahoma Survey, *supra* note 218.

263. *Id.*

264. *Id.*

265. NAVAJO NATION CODE ANN. tit. 4 (2009) (Navajo Nation).

266. Navajo Nation Survey, *supra* note 227.

267. *Id.*

268. *Id.* The respondent explained, however, that “I don’t work on solid waste regulation for the Nation, so I’m not sure what the specific legal justification is.” *Id.*

269. Saint Regis Mohawk Tribe Survey, *supra* note 231.

270. *Id.*

271. Tribe A Survey, *supra* note 87.

272. *Id.*

273. *Id.*

Many illegal dumpers have to cross no-trespassing signs to commit these acts.”

#### 4. Reflections on Survey Responses

Although very few tribes responded to the Enforcement of Tribal Environmental Law survey, the responses that were received are helpful in gaining greater insight into how tribes are enforcing their tribal environmental laws. Even the responses from those tribes that indicated they have not developed their own tribal environmental laws regulating water are helpful for a couple of reasons. First, the response from Tribe A identifies that the “Midnight Rider,” or Subtitle B “Other Miscellaneous Provisions” within the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005, has seemingly impacted the development of tribal environmental law for tribes located within Oklahoma.<sup>274</sup> Although the respondent for Tribe A does not provide additional detail as to why this may be the case, perhaps it is because the State of Oklahoma must agree to any proposed provision, enacted under federal law (TAS status), and to jointly regulate the program. Such a requirement for State cooperation could very likely have a chilling impact on the development of tribal environmental law in Oklahoma. Further, three of the tribes answering “no” to the first question—Fort McDowell Yavapai Nation, Tribe B, and Kickapoo Tribe of Oklahoma—did indicate that they are relying on the application of federal environmental laws within their territories, suggesting that there is not a lack of environmental regulation within such territories. And, finally, at least one tribe—the Crow Tribe—appears to be in the process of developing its own set of tribal environmental laws.

Three tribal respondents, or one-third of the survey participants, indicated that they do regulate water resources within their territories using tribal environmental law. These Tribes are the Hualapai Tribe, Navajo Nation, and Saint Regis Mohawk Tribe. This finding is roughly consistent with past research demonstrating that 25 to 35 percent of tribes have developed their own tribal environmental law.<sup>275</sup> The responses of these three participants is helpful in understanding the nature of tribal environmental law enforcement. Interestingly, unlike federal environmental laws that may

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274. Pub. L. 109-59, 119 Stat. 1937, § 10211(b)(2) (Aug. 10, 2005) provides that: the Indian tribe and the agency of the State of Oklahoma with federally delegated program authority enter into a cooperative agreement, subject to review and approval of the Administrator after notice and opportunity for public hearing under which the Indian tribe and that State agency agree to treatment of the Indian tribe as a State and to jointly plan administer program requirements.

275. E.g., Warner, *Examining Tribal Environmental Law*, *supra* note 18, at 87 n.237.

distinguish between surface and ground water,<sup>276</sup> the Hualapai Tribe makes clear that its tribal environmental regulations are applicable to all water within the Tribe's territory—surface and ground water, alike.

Further, the Hualapai Tribe's response to question 4 of the survey is particularly instructive for a couple of reasons. First, the Tribe's respondent indicated that it does not distinguish between Indian and non-Indian individuals when applying tribal environmental laws related to water regulation.<sup>277</sup> Although the Tribe does not explain the legal basis for this, it may be that the Tribe is relying on the second exception to the general rule prohibiting regulation of non-Native individuals on non-Native land as articulated by the U.S. Supreme Court in *Montana v. United States*.<sup>278</sup> Given the Hualapai Tribe's indication that it regulates "any person entering our tribal lands," the Tribe seemingly does not distinguish between Indian and non-Indian, and, as a result, may be said to be regulating under the second *Montana* exception. Admittedly, this is conjecture, given the respondent does not provide an explanation for the application to "any person."

The Tribe's response to the fourth question also provides evidence that the Tribe limits access to its tribal lands through use of permits and potential trespass actions. The Tribe explains that non-Indians are required to obtain permits in order to gain access to roads that are not designated public roads. Further, when the construction contractor for a major railroad impermissibly entered the Tribe's territory, the Tribe utilized a trespass action against the contractor in order to remedy the situation. This is consistent with the discussion above demonstrating that some tribes may use trespass actions to provide a remedy for environmental pollution.<sup>279</sup>

Similar to the Hualapai's response to question 4, the Navajo Nation's response to the same question indicates that it too regulates Indian and non-Indian individuals within its tribal territories under the second *Montana* exception.<sup>280</sup> Further, the Navajo Nation's respondent explained that the Nation uses permits and designated uses of water in order to effectively enforce its tribal environmental laws.

And, finally, the respondent for the Saint Regis Mohawk Tribe explained that effective enforcement of its tribal environmental laws is obtained, in part through EPA approval. Overall, therefore, the three tribes utilizing their own tribal environmental laws have selected different forms

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276. *E.g.*, 33 U.S.C. § 1252(a) (2015).

277. Hualapai Tribe Survey, *supra* note 223 (stating in answer to question 4 that "[a]ny person entering our tribal lands.>").

278. *Montana v. United States*, 450 U.S. 544, 566 (1981).

279. *See supra* Part III.D.

280. Navajo Nation Survey, *supra* note 227 (answering the following in response to the fourth question, "[y]es, under Montana's second exception.>").



of enforcement, including tribal courts, identified environmental officials, permits, designated uses, and, as appropriate, approvals by the EPA.

As with tribal regulations governing regulation of water pollution, the provisions regulating air pollution also yield interesting insights into enforcement of tribal environmental laws. Only three tribal respondents—Hualapai Tribe, Navajo Nation, and Saint Regis Mohawk Tribe—indicated that they actively regulate air pollution through tribal environmental laws. This is consistent with past research demonstrating that fewer tribes engage in the regulation of air pollution.<sup>281</sup> The responses from several of the tribal representatives to the first question on the regulation of air pollution suggests that many of the tribal respondents are relying on the application of federal environmental laws to effectively regulate air pollution. Further, respondent for Tribe A rearticulated the concern that the “Midnight Rider” or Subtitle B “Other Miscellaneous Provisions” of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 is likely have significant impact on the development of TAS programs within tribes located inside the boundaries of Oklahoma, as previously discussed.<sup>282</sup>

Further, much can be learned from those three tribes indicating that they do have tribal environmental laws regulating air pollution. First, although tribes do generally appear to rely on the federal government for regulation of air pollution as demonstrated by past research and survey results,<sup>283</sup> the survey results reveal that tribes are still finding ways to actively regulate outside of the federal environmental laws—as evidenced by the Hualapai Tribe’s regulation of burning and the Navajo Nation’s Air Pollution Prevention Act. Further, the Tribes are utilizing permits and tribal courts to ensure effective enforcement of their tribal laws. And, all three Tribes indicate that their laws are applicable to any person, regardless of whether the person is a member of the Tribe or not. The respondent for the Navajo Nation explained that this is consistent with the EPA’s view of the TAS provisions of the Clean Air Act, under which tribes have the authority to regulate based on territorial jurisdiction and not the political identity (i.e. non-member versus member) of the individual being impacted by the regulation.

Interestingly, the respondent for the Hualapai Tribe also explains that, “[o]ur tribal lands are not free and open space, access through most of our tribal lands requires a permit and entering and leaving our reservation there

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281. See generally Warner, *Examining Tribal Environmental Law*, *supra* note 18; Warner, *Tribes as Innovative Environmental “Laboratories,” supra* note 18.

282. Tribe A Survey, *supra* note 87.

283. See generally Warner, *Examining Tribal Environmental Law*, *supra* note 18; Warner, *Tribes as Innovative Environmental “Laboratories,” supra* note 18.

is signage informing the public of the limited access.”<sup>284</sup> Although admittedly speculation, this focus on the Tribe’s lands not being “free and open space” may be a reference to the U.S. Supreme Court’s decision in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*.<sup>285</sup>

*Brendale*, a consolidated case, involved two non-Indian parties, Brendale and Wilkinson, each of whom privately owned land within the Tribe’s territory and desired to develop that land.<sup>286</sup> A treaty between the United States and the Tribes provided that the reservation land shall be for the “exclusive use and benefit” of the Tribes.<sup>287</sup> The Tribes’ reservation land was largely located within Yakima County, Washington.<sup>288</sup> Roughly 80 percent of the reservation land is held in trust by the United States for the Tribe or its individual members, and the remaining 20 percent is owned in fee by Indian or non-Indian owners.<sup>289</sup> The Tribes’ reservation was divided into two parts: a “closed area,” which is so named because it has been closed to the general public, and an “open area,” which is not so restricted.<sup>290</sup> Only a small portion of the closed area consists of fee land, while almost half of the open area is fee land.<sup>291</sup> Brendale’s land was located within the “closed” portion of the reservation, and Wilkinson’s property was located within the “open portion.”<sup>292</sup> The Tribes’ zoning ordinance applied to all lands within the reservation, including fee lands owned by Indians or non-Indians, while the county’s zoning ordinance applies to all lands within its boundaries, except for Indian trust lands.<sup>293</sup> The Tribes’ zoning ordinance precluded the proposed development, but the County’s ordinance would have allowed such development.<sup>294</sup>

In a plurality decision, the Court ultimately held that the Tribes had exclusive jurisdiction over the Brendale property, located within the closed portion of the reservation, but lacked authority over the Wilkinson property.<sup>295</sup> The Court explained that Brendale’s proposed development, but not Wilkinson’s, posed a threat to the Tribe’s political integrity, economic security, and health and welfare, and therefore was impermissible under the

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284. Hualapai Tribe Survey, *supra* note 223.

285. See 492 U.S. 408 (1989).

286. *Id.* at 414.

287. *Id.* at 414–15.

288. *Id.* at 415.

289. *Id.*

290. *Id.* at 415–16.

291. *Id.*

292. *Id.* at 417–18.

293. *Id.* at 416.

294. *Id.* at 416–17.

295. *Id.* at 432–33.

second *Montana* exception.<sup>296</sup> The Court also determined that the County was unable to exercise concurrent zoning authority over closed area lands because its interests in regulating those lands were minimal, while the Tribes' were substantial.<sup>297</sup>

Accordingly, by explaining that the Tribe's lands are not "open," the Hualapai Tribe may be trying to track the rationale of the U.S. Supreme Court in *Brendale* in that the second *Montana* exception applies in these instances because of the strong likelihood that the actions of non-members will directly affect the Tribe. And, second, that the Tribe has a much stronger interest in regulating a "closed" section of a reservation than some other party, such as a county in the *Brendale* case.

And, finally, the survey responses provide interesting insights into how the Tribes regulate and enforce laws related to the disposal of solid wastes. As mentioned above, the majority of survey respondents, six out of nine, or approximately 67% of respondents, adopted some tribal law related to solid waste disposal. This result is twice as many Tribes as compared to air and water pollution regulation where only three of nine, or approximately 33% of respondents, had adopted tribal laws. This finding (that more tribes adopted regulations related to solid waste disposal) is consistent with past findings reviewing the tribal code provisions of all 74 federally recognized tribes located within the boundaries of Arizona, Montana, New York, and Oklahoma.<sup>298</sup> The past survey determined that 36 percent of all 74 federally recognized tribes possessed tribal code provisions related to the disposal of solid waste, which was a larger percentage than any of the other three categories studied—air pollution, water pollution, and environmental quality generally.<sup>299</sup>

Only three of the respondents indicated that the Tribes did not possess any tribal laws related to the regulation of solid waste. Tribe B's explanation is that it does not possess such regulations because its members are spread out in several different areas. This may shed some light on why some tribes may be less likely to adopt such tribal laws.

Of the Tribes that do possess such laws, most of the Tribes (Fort McDowell Yavapai Nation, Hualapai, Navajo Nation, Saint Regis Mohawk Tribe, and Tribe A) all apply their solid waste disposal laws to both members and non-members of the Tribes. Although not explicit, the Navajo Nation's response to the survey suggests that such application to members and non-members may be justified based on the second *Montana* exception,

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296. *Id.* at 429–31.

297. *Id.* at 466–68.

298. Warner, *Examining Tribal Environmental Law*, *supra* note 18.

299. *Id.* at 70.

as the Nation incorporated language very similar to the second *Montana* exception into its Navajo Nation Solid Waste Act.<sup>300</sup> Also, the Hualapai again references the importance of the “closed” nature of its reservation in relationship to applying its solid waste tribal laws to both members and non-members,<sup>301</sup> which could be a reference to the U.S. Supreme Court’s decision in *Brendale* as discussed above.<sup>302</sup> And, finally, all of the tribal respondents reference using some combination of fines, penalties, permits, or tribal courts to enforce their tribal environmental laws related to solid waste disposal.

## V. CONCLUSION

Because the environment is arguably humankind’s most valuable resource, effective regulation of environmental pollution is of great importance. Within the United States, the federal government once engaged in substantial innovation within the field of environmental regulation, but, at the present time, such federal innovation has stagnated. It is therefore necessary to look to the environmental laws of other sovereigns to gain insight into how to best tackle new and emerging challenges. To date, few have considered the contributions of tribal environmental law, and this article has helped to fill that void by providing descriptive analysis of tribal environmental enforcement mechanisms utilized by many federally recognized tribes within the United States. Consideration of enforcement mechanisms is vital given that environmental regulations are likely to be unsuccessful without them.

Reviewing tribal environmental enforcement provisions yields several insights. First, the examination of tribal code provisions demonstrated that tribes are actively including enforcement provisions into their environmental codes. Many of these provisions look similar to mechanisms used by the federal government, such as the use of civil penalties and criminal sanctions in some instances. Some notable differences also appear—such as the use of banishment and exclusion, which were traditional remedies used by many tribes and may be effective tools against non-Indian actors especially given

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300. Compare *Montana v. United States*, 450 U.S. 544, 566 (“A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”), with Navajo Nation Survey, *supra* note 227 (“The Nation’s goal is to protect the health, safety, welfare and environment of the Navajo Nation . . .”).

301. Hualapai Tribe Survey, *supra* note 223 (“[R]eservation is a closed reservation that for the most part requires a permit for access . . .”).

302. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 408 (1989).

the limitations placed on tribes by the U.S. Supreme Court's decision in *Oliphant*. Second, review of the survey results from nine federally recognized tribes yielded a deeper understanding of tribal enforcement of environmental laws. Again, many tribal enforcement mechanisms mirror federal mechanisms, yet differences do exist. For example, tribes must take into consideration how to effectively regulate non-Indians given the limitations of *Montana* and *Brendale*. The survey results demonstrate that tribes are actively considering these limitations and arriving at creative solutions to overcome such obstacles. In sum, the description of tribal environmental enforcement provisions offered by this article presents a useful starting place in better understanding tribal environmental law. Through such increased understanding, all sovereigns within the United States will hopefully realize more effective and efficient environmental regulation.

APPENDIX A  
SURVEY  
**Enforcement of Tribal Environmental Law**

**Introduction and Purpose of the Survey**

The University of Kansas supports the practice of protection for human subjects participating in research. The following information is provided for you to decide whether you wish to participate in the present study. You may refuse to participate in this study. You should be aware that even if you agree to participate, you are free to withdraw at any time. If you do withdraw from this study, it will not affect your relationship, in any, with the University of Kansas.

To date, not much has been written about the environmental laws enacted by tribes under either federal delegated authority or inherent sovereignty (collectively referred to as “tribal environmental law”). Accordingly, the purpose of the survey is to gather information on how tribes are enforcing their tribal environmental laws. Overall, it is hoped that tribes and other sovereigns interested in the enforcement of tribal environmental law will benefit from the results of this survey.

**Procedures**

This study will be based on one survey. You are asked to complete the survey that is provided below. Information gathered from this survey will only be used for this study’s purposes. If you wish, your name and the tribe for which you work will not be included in the publication of the survey results.

**Payment to Participants**

There will be no compensation provided to participants.

**Participant Confidentiality**

Your name will not be used in any publication or presentation of the material collected from this survey. However, identifying information may be required to be shared under University policy or federal law. In such circumstances, however, it would not be included in the resulting article.

**Consent**

By completing and returning the survey below, you consent to the researcher’s use of the information provided consistent with the participant confidentiality provisions listed above.

You may withdraw your consent to participate in this survey at any time. To withdraw your consent, please send your written request to:

Elizabeth Kronk Warner  
 University of Kansas School of Law  
 1535 W. 15th St.  
 Lawrence, KS 66044  
 elizabeth.kronk@ku.edu

### Questions about Participation

Questions about procedures should be directed to Professor Elizabeth Kronk Warner at (785) 864-1139, elizabeth.kronk@ku.edu, or the address listed above.

### SURVEY

### Enforcement of Tribal Environmental Law

Position within Tribe: \_\_\_\_\_

Name of Tribe for which you work:  
 \_\_\_\_\_

May the Tribe be identified in the proposed article? Yes/No

### Water Regulation

- 1) Does the Tribe you work for regulate water pollution? If yes, what tribal laws regulate water pollution? (Please list. There is no need to list federal laws that may be applicable.)

If yes, please answer questions 2-4. If no, please continue to question 5.

- 2) If you answered yes to question 1, what mechanism(s) does the Tribe you work for use to enforce its laws regulating water pollution?
- 3) What is the Tribe's goal in relation to regulating water pollution? Assuming enforcement mechanisms related to the regulation of water pollution exist, do these mechanisms assist the Tribe in meeting its regulatory goal? Please explain.
- 4) Do these regulations apply to non-members of the Tribe? And, if yes, what is the legal justification that the Tribe employs to apply these enforcement regulations against non-members (e.g. territorial sovereignty, one of the *Montana* exceptions, etc.)?

### Air Pollution

- 5) Does the Tribe you work for regulate air pollution? If yes, what tribal laws regulate air pollution? (Please list. There is no need to list federal laws that may be applicable.)

If yes, please answer questions 6-8. If no, please continue to question 9.

- 6) If you answered yes to question 6, what mechanism(s) does the Tribe you work for use to enforce its laws regulating air pollution?
- 7) What is the Tribe's goal in relation to regulating air pollution? Assuming enforcement mechanisms related to the regulation of air pollution exist, do these mechanisms assist the Tribe in meeting its regulatory goal? Please explain.
- 8) Do these regulations apply to non-members of the Tribe? And, if yes, what is the legal justification that the Tribe employs to apply these enforcement regulations against non-members (e.g. territorial sovereignty, one of the *Montana* exceptions, etc.)?

### Solid Wastes

- 9) Does the Tribe you work for regulate solid waste disposal? If yes, what tribal laws regulate solid waste disposal? (Please list. There is no need to list federal laws that may be applicable.)

If yes, please answer questions 10-12. If no, please continue to question 13.

- 10) If you answered yes to question 9, what mechanism(s) does the Tribe you work for use to enforce its laws regulating solid waste disposal?
- 11) What is the Tribe's goal in relation to regulating solid waste disposal? Assuming enforcement mechanisms related to solid waste disposal exist, do these mechanisms assist the Tribe in meeting its regulatory goal? Please explain.
- 12) Do these regulations apply to non-members of the Tribe? And, if yes, what is the legal justification that the Tribe employs to apply these enforcement regulations against non-members (e.g. territorial sovereignty, one of the *Montana* exceptions, etc.)?



- 13) May I contact you with any follow-up questions? And, if yes, what is the best way to contact you?

Please return the completed survey to Professor Elizabeth Kronk Warner at [elizabeth.kronk@ku.edu](mailto:elizabeth.kronk@ku.edu) or mail the completed survey to:

Professor Elizabeth Kronk Warner  
University of Kansas School of Law  
1535 W. 15th St.  
Lawrence, KS 66044  
Chi Miigwetch! (Thank you!)