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HAZARDOUS & SOLID WASTE DUMPING GROUNDS UNDER RCRA'S INDIAN LAW LOOPHOLE

I. INTRODUCTION

Unregulated hazardous¹ and solid waste² disposal threatens the environment and human health in Indian country³ because jurisdiction for granting permits under the current Resource Conservation and Recovery Act (RCRA)⁴ remains unclear. In 1976, Congress responded to growing concerns

¹. Under the Resource Conservation and Recovery Act (RCRA), see infra note 4, hazardous waste means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may—(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. 42 U.S.C. § 6903(5) (1976).

². Solid waste, under RCRA, means "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . . ." Id. § 6903(27).

³. Indian country is defined as (a) all land within the limits of any Indian reservation under the jurisdiction of the U.S. 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 U.S. 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 (1982).

about hazardous waste by enacting RCRA. The statute relies on a comprehensive "cradle to grave" permit system to regulate the generation, transportation, and disposal of waste. However, this scheme ignores Indian country, and what is an otherwise heavily regulated industry under RCRA has discovered that waste disposal on Indian lands may fall outside of State, Tribal and Federal jurisdiction. This "loophole" has created the potential that Indian lands will be relegated to the status of hazardous and solid waste dumping grounds.

An example may place this problem in the proper perspective. Consider the case of a company which wishes to develop a hazardous or solid waste dump site on Indian land. To whom should the company apply for a RCRA permit? There are three likely candidates: the State government, Tribal government, or the Federal Environmental Protection Agency (EPA). As will be discussed more fully below, each of these interested parties have been excluded under various court rulings and statutory interpretations. Under common law principles, states generally do not have authority to regulate activities on Indian land. Further, the language in the Act does not expressly recognize Indian Tribal governments in the RCRA permitting scheme. Finally, although the only other alternative would be the Federal government, RCRA does not expressly give the EPA or any other Federal agency authority for solid waste management on reservation land.

Indian Tribes have been recognized by the U.S. Supreme Court to have attributes of sovereignty. As sovereigns, Indian Tribes may face legal and financial responsibility for hazardous and solid waste dumping on Indian lands through the RCRA Citizens' Suit provision as a "governmental instrumentality or agency," or as a "person." However,
the Act fails to provide any statutory method for preventing abuse within Tribal jurisdictions. The only recourse open to Tribal governments is to bring legal action under the Act's Citizens' Suit section, but this legal remedy becomes available only after damage has already occurred. RCRA usurps power from Tribal governments while simultaneously holding these same Tribal governments liable for hazardous and solid waste dumping on Indian lands.

The jurisdictional loophole created by Congress in RCRA has become attractive to the hazardous and solid waste industry. This comment identifies the potential problems of the "Indian land loophole" in hazardous and solid waste regulation, and proposes a statutory solution to the jurisdictional problem. The analysis of RCRA's Indian land loophole begins with a history of Congressional policy toward Indians and an analysis of Indian jurisdiction cases in other regulatory settings in order to identify Indian common law doctrines. As further background, the regulatory scheme under RCRA is outlined, detailing the role given Indian Tribes under the statute. Treatment of Indian Tribes under comparable environmental regulation is also examined to gauge congressional policy toward Indian self-regulation. With that background, this comment analyzes two Federal cases which reached conflicting solutions to the problem of allocating jurisdiction on Indian land within RCRA's permit scheme: *State of Washington, Department of Ecology v. E.P.A.*, and *Blue Legs v. U.S.E.P.A.* Finally, this comment proposes an amendment to RCRA for controlling hazardous and solid waste disposal on Indian lands. The amendment recognizes American Indian Tribal sovereignty by treating Indian Tribes as States for purposes of the Act.

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ther is defined to include "an Indian tribe or authorized tribal organization or Alaska Native village or organization." *Id.* § 6903(13)(A).

15. Tribes are having a great deal of difficulty controlling hazardous and solid waste disposal on reservation lands. Reservation lands are inviting to the hazardous and solid waste industry because these areas are generally remote and scarcely populated. The hazardous waste industry has discovered that Indian tribes may be poor and unorganized, and more willing to take the waste that states refuse to accommodate. Note, *supra* note 7, at 1092, nn. 12-13.

16. 752 F.2d 1465 (9th Cir. 1985).

II. BACKGROUND

Indian Tribes are of critical importance to the environment due to their control over substantial portions of the western part of this country.^{18} Tribal lands are rich in natural resources, but remain relatively unpopulated and isolated.\(^{{19}}\) Because of their remote locations, Indian lands appear to be ideal for hazardous and solid waste disposal.\(^{{20}}\) Economically depressed Indian Tribes are eager for much needed development, and some Tribes have actively courted the disposal industry, encouraging the development of landfills within their territories.\(^{{21}}\)

However, hazardous and solid waste dumping on Indian lands poses a threat to the already fragile water situation throughout the American West. Essential groundwater supplies remain particularly susceptible to the disposal of waste, and the threat of toxic chemicals entering groundwater reservoirs presents a primary risk in hazardous and solid waste disposal.\(^{{22}}\) The future of Western groundwater supplies depends on both Congressional legislation and the U.S. Supreme Court's interpretation of legislative intent regarding the role of Indian Tribal governments in regulating hazardous and solid waste disposal on Indian lands.

A. Congressional Policy Toward American Indians: The Trust Responsibility

Federal policy toward the American Indian, as interpreted by the U.S. Supreme Court, has evolved over time. What once was characterized as a concentrated effort to remove

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^{18} Indian reservations cover approximately 87,000 square miles, or approximately the combined area of Illinois and Indiana. Note, supra note 7, at 1095 n.16.


^{20} See supra note 7 and accompanying text.

^{21} The per-capita income for the eight largest tribes in South Dakota varies from $2,166 to $2,801, and the poverty status ranges from 26.6% to 54.9%. Prommersheim, supra note 19.

^{22} Congress has determined that open dumping "contaminates drinking water from underground and surface supplies." 42 U.S.C. § 6902(b)(4) (1982). Further, Congress has recognized that greater amounts of solid waste have been created as a result of the Clean Air Act and the Clean Water Act. Id. § 6901(b)(3).
and isolate American Indians in the 1800's became a policy of assimilation and an effort to mold American Indians into farmers and is now a policy which encourages Tribal self-government.23

Clearly, the Federal government intends to continue to exercise its sovereign power over Indian Tribes to the fullest extent possible. The ability of the U.S. government to exercise its plenary power over Tribes is limited only by Indian rights guaranteed under the U.S. Constitution,24 and by the fiduciary trust obligation which the Court has placed on the Federal government because of the "dependent" status of American Indians.25 The Federal trust becomes essential in determining whether Federal regulation preempts State jurisdiction in favor of Indians, or whether States will be allowed to regulate Indians on Indian lands.26

B. Jurisdiction Over American Indian Lands: Tribal Sovereignty & Preemption

Jurisdiction on Indian lands has long been an unsettled area of the law. Both Federal legislation and U.S. Supreme Court decisions regarding Indian jurisdiction have created unique and often confusing doctrines because Federal policy

23. There have been six periods of federal policy toward American Indians:
1) 1820-50 - Removal of tribes from populated to unpopulated, and usually undesirable, areas;
2) 1850-80's - Movement of tribes to established, 'permanent' reservations, accompanied by extensive treaty making;
3) 1871-1928 - Allotment and assimilation, during which time reservation land was changed from communally to individually held, with the aim of making Indians into farmers and 'mainstream' Americans. The result was the diminishment of tribal land holdings from 138 million acres to 48 million acres, almost half of which was arid or semi-arid.
4) 1928-43 - Indian Reorganization Act and preservation of the tribes.
5) 1943-1961 - Tribal termination, which policy ended federal recognition and the federal relationship between 109 tribes and bands and the United States.
6) 1961-present - Tribal self-determination.


26. See infra notes 28-43 and accompanying text.
toward the American Indian has evolved over time. What follows is a historical analysis of the legal development of Indian Tribal jurisdiction and Tribal sovereignty in regulatory settings. Although there are few Indian law cases involving environmental regulations, other regulatory decisions are analogous.

1. Federal Power Over Indian Tribes

In choosing between Tribal and Federal jurisdiction, courts have held the Federal government to have exclusive, plenary, and unilateral power over Indians. In regulatory matters, the Court has determined Federal power over Indian Tribes to be supreme. Thus, Congress may unilaterally pass legislation affecting Indian Tribal members and their territories.

Upon analysis of the Indian Commerce Clause and the Federal power to make treaties, the Court has concluded that the Federal government has the exclusive right to intercourse with Indian Tribes. Although once recognized as sovereign powers, the Court now views Tribes as "domestic dependent communities," subject to the plenary power of the U.S. government. Jurisdiction disputes between the

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27. Federal policy toward Indian tribes has been one of removal, restriction to reservations, assimilation, preservation, termination, and self-determination. W. C. Canby, Jr., American Indian Law in a Nutshell 9-31 (1981); see supra note 23.

28. See infra notes 33, 35, 36 and accompanying text.

29. Antoine v. Washington, 420 U.S. 194 (1975) (for off-season hunting by Indians on state land, authority was found in the Commerce Clause to give the federal government plenary power to legislate Indian affairs).


32. Id. art. II, § 2.

33. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560 (1832) (In this early decision involving a state's attempt to exercise jurisdiction over a non-Indian missionary on Indian land, the Court held that because Indian tribes were self-governing sovereign communities, states had no power within Indian territory. Instead, intercourse with the Indian tribes was the exclusive domain of the federal government).

34. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (where a state was attempting to exercise jurisdiction over Indian land, the Court held that Indian tribes were not foreign nations within the meaning of the Commerce Clause, but that their status was that of "domestic dependent" tribes).

35. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (holding the federal government had plenary power to dispose of Indian land without Indian consent, as
Federal government and Indian Tribes have been settled; Indian Tribes are subject to the unilateral will of the U.S. government. 36

The Federal government's supreme power over American Indians is exercised in the name of the "fiduciary duty" of the Federal government to Indians. 37 The fiduciary duty is based on the Federal government's trust obligation to the Tribes. 38

Because of the fiduciary relationship between the Tribes and the Federal government, the U.S. government has the power to delegate its plenary authority over Indians to Federal agencies. While Federal agencies may have discretion on the reservation regarding both Indians and non-Indians, this discretion may be invoked only in instances where clear congressional intent supports the delegation of such power to the Federal agencies. Ideals of fairness, as they apply to the trust relationship, also limit the use of the delegated powers. 39 If any agency fails to regulate fairly, it will have breached the trust delegated to it by Congress. 40

This trust, as recognized under the Non-Intercourse Act of 1790, 42 is terminable only by Congress, and the termination must be in plain and clear language. 43 Neither State nor Tribal action may terminate the trust relationship between Indian Tribes and the government.

the land was held by the U.S. in fee on behalf of the Indians).

36. United States v. Kagama, 118 U.S. 375 (1886) (in this landmark case involving the murder of an Indian by an Indian on Indian land, the Court wrote a sweeping decision that left no doubt that Indian tribes would not be given the status of sovereigns equal with the U.S. federal government or state governments. The Court took sovereign status away from tribal governments by finding that Indian tribes were dependent communities subject to the unilateral will of any sovereign, state or federal.). See also Rotenberg, American Indian Tribal Death - A Centennial Remembrance, 41 U. MIAMI L. REV. 409, 412 (1986).


38. Id.

39. Scholder v. United States, 428 F.2d 1128 (9th Cir. 1970) (recognizing that the Bureau of Indian Affairs has complete discretion to regulate irrigation connections for both Indians and non-Indians on the reservation).

40. Id.

41. Id.

42. 25 U.S.C. § 177 (1790).

2. Regulatory Jurisdiction Between State and Tribe

In deciding whether jurisdiction lies within an Indian Tribal government or a State government, the Supreme Court has developed several theories. The simplest jurisdictional dispute occurs when Congress has expressly delegated its jurisdiction over Tribal lands and members either to a State or Tribe.

The Federal government has the power to delegate its regulatory authority over non-Indians, both on and off the reservation, to the States. The Indian Commerce Clause entitles the Federal government to regulate non-Indians on Indian reservations, and the Federal Commerce Clause reaches any activity by non-Indians off, but near, a reservation. The state jurisdiction issue is settled if the Federal government expressly grants the power to regulate on Tribal land. However, ambiguities arise when Congress is silent regarding jurisdiction on Indian land.

Tribal jurisdiction is generally territorial. The Court has recognized that as "unique aggregations," Indian Tribes have "attributes of sovereignty" over their members and lands. States generally are barred from regulating Indians on the reservation, but exceptions to this general rule have developed.

In an early step in the evolution of State power over Indians and their lands, the Supreme Court determined that States had absolutely no authority over Tribes. Indians were sovereign powers having the right to "make their own laws and be ruled by them," and State action would not be allowed to infringe on that right.

44. United States v. Mazurie, 419 U.S. 544 (1977) (holding that when both the Indian tribe and state have established liquor license regulations on an Indian reservation, federal power was sufficient to reach non-Indians on or near a reservation).
45. U.S. CONST. art. I, § 8, cl. 3.
46. Id.
48. Id.
49. See supra note 33 and accompanying text.
51. Id.
The Court eroded Indian sovereign powers through the application of the Federal preemption doctrine. The Court began using sovereignty as a "backdrop," recognizing that Tribal governments had a "unique status." State law was given preference unless it interfered with a reserved Indian right, in which case Federal regulation preempted all State regulation as it applied to Indians.

The Court encountered difficulty in applying traditional preemption to Indian jurisdiction issues because the doctrine did not adequately reflect that Federal policy which recognizes Indian sovereignty and encourages Tribal self-government. The Court, therefore, developed a new doctrine incorporating the Federal government's trust obligation toward Indian Tribes into its theories of preemption. Under the new theory, the Court used the Federal policy of encouraging Tribal self-government to preempt State regulatory control.

The Court next approached the jurisdiction conflict by balancing Tribe and State significant interests. In a case

52. Federal preemption, also called legal preemption, is a doctrine restricting regulation by lesser governmental bodies by application of the Supremacy Clause. U.S. CONST. art. VI. Preemption is found where Congress expressly restricts other regulations, "occupies the field," or where other regulations are found to conflict with a dominant federal purpose. W. B. LOCKHART, Y. KAMISAR, J. H. CHOPER & S. T. SHIFFLIN, CONSTITUTIONAL LAW 307-15 (6th ed. 1986).

53. Organized Village of Kake v. Egan, 369 U.S. 60 (1962) (the Court recognized the application of the federal preemption doctrine, holding that state regulation of village Indian fish trapping outside of village territory would be preempted only if it conflicted with federal regulation, if Congress intended to restrict state regulation, or if federal regulation "occupied the field").

54. Id.

55. See supra note 33 and accompanying text.

56. See supra note 37-38 and accompanying text.

57. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1973). In applying the policy preemption doctrine to Indian law, Justice Brennan, writing for the majority, held in favor of the state in a water adjudication case, by interpreting the McCarran Amendment as a waiver of sovereign immunity by the federal government on behalf of the Indians. The Court held that Indians had satisfactory protection under state law, and found that any federal action should be dismissed when a state had concurrent jurisdiction. Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). In the "sequel" to this water adjudication case, Justice Brennan, again writing for the majority, reiterated the view that the state and federal governments had concurrent jurisdiction. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

58. Puyallup Tribe v. Department of Game of Washington, 433 U.S. 165 (1977) (holding that the state of Washington could reach far into the reservation, and regulate fishing by Indians both on and off the reservation).
involving a State's fishing regulations both on and off the reservation, the Court used the State's significant interest in conserving wildlife to validate the State's regulatory reach on to the reservation.59

The Court later combined these legal theories, reviving the traditional preemption doctrine for use in conjunction with the balancing test.60 In further developing this new theory, the Court used Federal policy toward Indians to preempt State regulation, rather than the traditional preemption doctrine.61 Under this hybrid analysis, if Federal policy preempted State law, an examination of interests would not be necessary. Balancing of the significant interests of the Tribe and State would occur only if State law was not preempted by Federal policy.

The Court eventually contracted the scope of Tribal sovereignty by examining whether State regulation "threatened" the self-government or internal relations of the Tribe.62 Where the Tribe taxed economic activity on the reservation, the Court held that a Tribe possessed a sovereign power of taxation over both its members and any activity on the reservation.63 The sovereign power to regulate through taxation was necessary for the Tribe's self-government and territorial management, and included the power to exclude activity from the reservation.64

Returning to preemption by Federal Indian policy and balancing of interests, the Court established a prima facie

59. Id.
62. Montana v. United States, 450 U.S. 544 (1981) (holding that state regulation of hunting on non-Indian fee land within an Indian reservation was traditionally within state control, and since fishing was not important to the reservation way of life, and state regulation did not threaten tribal self-government, the state regulations would not be preempted. The Court also identified federal policy of protecting navigable water, which the Court felt conflicted with federal policy of encouraging tribal self-government; the Court held control of the river bed, and thus the right to regulate hunting and fishing, passed to the state at the time of statehood).
64. Id.
presumption that Federal policy should protect Tribal sovereignty and preempt any State regulatory power over reservation activity.65 Furthermore, the Court placed the burden of proof on the State to show that its significant interests outweighed the semi-autonomous Tribal interests.66

Another broad preemption case soon followed, in which the Court again used Federal policy to preempt State regulation.67 Balancing of interests was done only after it was clear that the Federal government's policy of encouraging Indian self-government did not preempt State regulation. If Federal policy preempted State regulation, then no balancing test would be necessary.68 Preemption of State regulation by Federal policy toward American Indians was not viewed narrowly, nor was it found to require express language by Congress. By using Tribal sovereignty as a "backdrop," the Court held that Federal policy generally promoted Indian self-government and self-sufficiency.69 No State interest could outweigh the Federal government's interest when Tribal management was extensive, or where Federal agencies were involved in Tribal regulation.70

Once again the Court used Tribal sovereignty as a backdrop in determining whether Tribal sovereignty would prevent State regulation on the reservation.71 However, the Court narrowed its analysis, restricting Tribal activity to those particular sovereign powers historically exercised by the Tribe. The Court ruled that if the Tribe had always regulated

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66. Id.
67. See supra note 61 and accompanying text.
68. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (the state agreed that the tribe should have exclusive jurisdiction over regulation of the hunting and fishing activities of its members on the reservation; however, the state wanted concurrent jurisdiction to regulate any non-tribal members who wished to hunt or fish on the reservation).
69. Id.
70. Id.
71. Rice v. Rehner, 463 U.S. 713 (1983) (the case raised the issue of whether a tribe has the supreme and absolute power of an independent government, preventing state regulation of the sale of liquor within reservation borders. Although Justice O'Connor, writing for the majority, referred to the tradition of "sovereign immunity" throughout the opinion, it is clear from the context that the Court intended to refer to the doctrine of sovereign powers, as developed in earlier decisions. The case involved state regulation of liquor sales on the reservation, not whether litigation was precluded by immunity against the Indian tribe).
the activity in question, and the Federal government preempted State regulation, then the State would not be permitted to usurp the Tribal function. However, if the Tribe had not historically exercised its sovereign powers over the specific activity, no Tribal sovereignty would be recognized, and no Federal policy to preempt State regulatory control would exist. At best, the Court's rationale would result in concurrent jurisdiction in both State and Tribal governments.

Upon analysis, this holding drastically restricts Indian sovereignty because the Court failed to recognize the general powers of a sovereign vested in Tribal governments by prior Court decisions. Rather, the Court limited Tribal sovereignty to those types of governmental powers previously exercised by a Tribe.

Recently, the Court has returned to its theory that State regulatory laws are preempted by Federal policy encouraging Tribal self-sufficiency, Tribal economic development, and traditional notions of Indian sovereignty. As it stands, preemption by Federal policy is overcome only if "state interests at stake are sufficient to justify the assertion of state authority" on the reservation.

3. Indian Law Canons of Construction

Common law canons of statutory construction also protect Tribal sovereignty. These canons have been developed to "counteract the historically unequal bargaining position of Indian Tribes" with the Federal government, and include: liberal construction of treatise and acts of the Federal government in favor of Indians; resolution of ambiguities in favor of Indians; construction of treaties as Indians would have understood them when they were signed; and abroga-

72. Id.
73. Id.
74. See supra notes 47, 50, 63 and accompanying text. Even those prior cases which viewed tribal sovereignty as a "backdrop" gave more recognition to the general powers inherent in tribal sovereignty. See supra notes 53, 57, 62, 65, 68 and accompanying text.
78. Case Note, supra note 23, at 746.
tion of Tribal sovereignty of Indian rights only after clear expression of congressional intent.\footnote{Id.}

RCRA contradicts these established principles of law by not granting Indian Tribes a role in the RCRA permit process and not recognizing Indian sovereign powers over reservation lands. An outline of the regulatory workings under this act follows, with emphasis on the limited role given Indian Tribal governments under the statute.

C. **RCRA: “Cradle to Grave” Statute Which Ignores Indian Lands**

Although RCRA remains the most important and effective Federal legislation regarding hazardous waste management to date, it is a complicated and difficult statute to understand. RCRA was enacted to “promote the protection of health and the environment” by providing “technical and financial assistance to State and local governments . . . for the development of solid waste management.”\footnote{Id. \textsection 6902(1) (1982 & Supp. V 1987). The administrator of EPA is required to publish suggested guidelines for solid waste management providing technical and economic descriptions of the level of performance attainable; describe levels of performance for the protection of public health and welfare, and quality of groundwater; and provide minimum criteria to be used by the states in defining solid or hazardous waste management practices prohibited by RCRA. \textit{Id.} \textsection 6907(a).} Congress declared that the national policy concerning waste be the elimination and reduction of hazardous waste, coupled with management of waste storage, treatment, and disposal “so as to minimize the present and future threat to human health and the environment.”\footnote{Id. \textsection 6902(b).}

Congress enacted RCRA to regulate the generation, transportation, and disposal of waste. This “cradle to grave”\footnote{RCRA has a “comprehensive, closed ‘cradle to grave’ system” which provides for “formal identification of wastes as hazardous, written manifests tracking all waste shipments, and certification, through a permit system, that performance standards for safe treatment, storage, and disposal are being met.” F. R. ANDERSON, D. R. MANDELMER & A. D. TARLOCK, supra note 4, at 558.} management under RCRA remains the primary basis for regulating the groundwater contamination problem.\footnote{See supra note 22 and accompanying text.} The permit system constitutes the statute’s key en-

\footnote{79. \textit{Id.}}
\footnote{80. 42 U.S.C. \textsection 6902, \textsection 6902(1) (1982 & Supp. V 1987). The administrator of EPA is required to publish suggested guidelines for solid waste management providing technical and economic descriptions of the level of performance attainable; describe levels of performance for the protection of public health and welfare, and quality of groundwater; and provide minimum criteria to be used by the states in defining solid or hazardous waste management practices prohibited by RCRA. \textit{Id.} \textsection 6907(a).}
\footnote{81. \textit{Id.} \textsection 6902(b).}
\footnote{82. RCRA has a “comprehensive, closed ‘cradle to grave’ system” which provides for “formal identification of wastes as hazardous, written manifests tracking all waste shipments, and certification, through a permit system, that performance standards for safe treatment, storage, and disposal are being met.” F. R. ANDERSON, D. R. MANDELMER & A. D. TARLOCK, supra note 4, at 558.}
\footnote{83. See \textit{supra} note 22 and accompanying text.}
forcement provision. The permit and enforcement scheme contains essentially two parts: Hazardous Waste Management and Solid Waste Plans.

The EPA's primary role concerning hazardous waste is regulatory. Nonhazardous waste requires planning by States, with Federal guidelines to foster cooperation between various governmental entities. The EPA relies on both Federal and State inspections for enforcement. Further enforcement is available under RCRA's Citizens' Suit provision.

RCRA fails to mention Indian lands within the permit scheme, nor of the role Tribal governments should play in the permit process. RCRA ignores Tribal sovereignty by providing for either State or Federally-enforced permit programs. Although under this scheme the EPA has broad powers, States may assume absolute responsibility for hazardous waste control within their borders, including Indian lands. What follows is an outline of the two parts of RCRA's waste management scheme and a description of the enforcement procedures. This in turn is followed by a brief discussion of cases which recognize the power of the EPA to interpret environmental statutes.

1. Hazardous Waste Management

Under the subchapter on Hazardous Waste Management, the EPA must promulgate criteria for identifying the characteristics of hazardous waste. In addition, the Act

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84. 42 U.S.C. § 6925 (1982 & Supp. V 1987). The permit system for on-site or off-site treatment, storage, and disposal of hazardous waste is the most important provision of RCRA. To obtain a permit, "a facility operator must comply with detailed regulations for incineration, landfills, chemical treatment, liquids restrictions, site location (away from wetlands and other critical areas), groundwater and leachate monitoring, fencing and warning signs, special employee training and emergency procedures, and final site closure." F. R. ANDERSON, D. R. MANDELMAN & A. D. TARLOCK, supra note 1, at 560 (citing 47 Fed. Reg. 32,273).
86. Id. §§ 6941-6949a.
87. Id. § 6943.
88. Id. § 6942.
89. Id. § 6972.
90. See infra notes 97, 101; but see infra notes 155, 156, 161, 164-66, 169, 172 and accompanying text.
92. The Administrator must take into account "toxicity, persistence, and...
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requires the Administrator of the EPA to draft regulations “identifying the characteristics of hazardous waste, and listing particular hazardous waste” subject to RCRA's hazardous waste management provisions.93

RCRA constitutes a comprehensive “cradle to grave”94 system because of its use of a manifest system for the generation, transportation, and disposal of hazardous waste. The EPA administers a Federal permit program for all facilities used for treatment, storage, or disposal of hazardous waste, as identified in RCRA.95 This is the key enforcement provision for disposal sites. The EPA has broad inspection powers, the power to issue compliance orders, and the authority to bring civil action or seek criminal penalties against violators of the Act.96 Although RCRA authorizes the EPA to administer hazardous waste management programs, States may implement their own programs in lieu of a Federal program.97 However, the EPA retains oversight and enforcement powers over any State program.98 Nevertheless, this complex system does not contemplate any participation by Indian Tribal governments.

2. Solid Waste Plans

The purpose of the subchapter on Solid Waste Plans99 is to “assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound ...”100 The EPA must publish guidelines for identifying areas which are appropriate for regional solid waste management.101 The Act further requires the EPA to adopt

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93. Id. § 6921(b).
94. See supra note 82 and accompanying text.
96. Id. § 6927, § 6928.
97. The state standards may be no less stringent than those authorized under RCRA. Id. § 6926.
98. The Administrator may withdraw authorization for the state program if it fails to comply with federal requirements, in which case, EPA continues to administer the federal program in that state. Id. § 6926(e).
100. Id. § 6941.
101. EPA must include the size and location of the areas identified, the vol-
guidelines for the development and implementation of State solid waste management plans.102 State plans must comply with provisions of the Federal statute.103 Similarly to RCRA's subchapter on Hazardous Waste Management, the Act's Solid Waste Plan fails to provide for Tribal participation.

3. Federal Enforcement and Citizens' Suits

RCRA allows enforcement against "persons," under both the Federal enforcement provision104 and the Citizens' Suit section.105 As defined by the act, "person" includes a "municipality,"106 which in turn is defined to include "... an Indian tribe or authorized tribal organization."107

Federal enforcement of hazardous waste management requires the Administrator of the EPA to assess civil penalties for past or current violations by "any person."108 The EPA may file a civil action in Federal district court to obtain an injunction, civil penalties, or criminal penalties.109

Citizens' Suits under RCRA may be brought by "any person" and are also allowed against "any person" who violates a permit or regulation, or who contributes to solid or hazardous waste.110 The Act's definition of "any person" includes Indian Tribes.111 The Act grants jurisdiction to Fed-

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102. Id. § 6942(b).
103. The statute requires, among other things, that the plan identify the responsible state, local and regional authorities, and how Federal funds will be distributed. Id. § 6943. The plan must also prohibit new open dumps within the state, and require that all solid waste either be recovered or disposed of in sanitary landfills or some other environmentally sound manner. In addition, the state plan must either close or upgrade all existing open dumps. Further, the state plan must provide provisions for revision by EPA. Id. § 6947.
104. Id. § 6928.
105. Id. § 6972.
106. Id. § 6903(15).
107. Id. § 6903(13).
108. Id. § 6928(a)(1).
109. EPA may file a civil action in a federal district court to obtain an injunction. Id. § 6928(a)(1). Civil penalties are also available against "any person" who knowingly violates the subchapter, and include a $50,000 fine for each day of knowing violation, and imprisonment for up to five years. Id. § 6928(d). Penalties for "any person" who knowingly endangers another person include a $1,000,000 fine and fifteen year prison term. Id. § 6928(e).
110. Id. § 6972(a).
111. Id. § 6903(15) defines "person" to include municipalities, and id. §
ereral district courts to enforce RCRA permits or regulations, to restrain any contribution to the disposal of solid or hazardous waste, and to order any other necessary actions.\textsuperscript{112}

4. \textit{The EPA's Power to Interpret RCRA}

The EPA has broad authority to interpret RCRA so long as its interpretation is reasonable.\textsuperscript{113} The Supreme Court defers to reasonable agency interpretation of environmental statutes because of the technical nature of such statutes.\textsuperscript{114} The Court has found that Congress relies on Federal agencies to "fill in the gaps" when the Legislative branch drafts ambiguous statutes or statutes which are silent with regard to a particular issue.\textsuperscript{115} The Court has chosen not to "second guess" Congressional purpose in these circumstances, and will not replace a reasonable agency interpretation with the Court's own judgment.\textsuperscript{116}

The EPA has compiled a policy statement regarding environmental program administration on Indian reservations.\textsuperscript{117} In doing so, the Agency sought to "consolidate

\textsuperscript{6}90\textsuperscript{3}(13)(A) defines "municipality" to include Indian tribes or authorized tribal organizations or Alaska Native villages or organizations.

\textsuperscript{112} Id. § 6972(a).


\textsuperscript{114} Id.

\textsuperscript{115} Id.

\textsuperscript{116} Id.

\textsuperscript{117} EPA's policy statement described nine principles which EPA would pursue to reach its goals:

1. The Agency stands ready to work directly with Indian tribal governments on a one-to-one basis (the 'government-to-government relationship) rather than as subdivisions of other governments . . .

2. The Agency will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations . . .

3. The Agency will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities for reservation lands . . .

Until tribal governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs on reservations . . .

4. The Agency will take appropriate steps to remove existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs . . .
and expand on existing the EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal 'self-government' and 'government-to-government' relations between Federal and Tribal governments . . . [and to] significantly enhance environmental quality on reservation lands."

Although the regulatory sections of RCRA require State or Federal participation, no mention is made of the role Indian Tribes may play in regulating hazardous and solid waste on Indian land. However, Indian Tribes are included in the Act's enforcement provision, thus subjecting them to enormous liability. Courts have interpreted these issues created by RCRA in conflicting ways, as discussed below.

D. Conflict in Interpretation of RCRA

Tribal governments have not been adequately accommodated within RCRA, given the limited role of Tribes under the Act. The language of RCRA contains ambiguities, and thus courts have been faced with interpreting the Act either in compliance with Indian canons of construction favoring Tribes or in accordance with environmental and administrative law doctrines which require deference to administrative interpretations. Under these conflicting policies, Tribal governments have been denied regulatory authority under

5. The Agency, in keeping with the Federal Trust Responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect tribal environments . . .

6. The Agency will encourage cooperation between tribal, state, and local governments to resolve environmental problems of mutual concern . . .

7. The Agency will work with other Federal agencies which have responsibilities on Indian reservations to enlist their interest and support in cooperative efforts to help tribes assume environmental program responsibilities for reservations . . .

8. The Agency will strive to assure compliance with environmental statutes and regulations on Indian reservations . . .

9. The Agency will incorporate these Indian policy goals into its planning and management activities, including its budget, operating guidance, legislative initiatives, management accountability system and ongoing policy and regulation development processes . . .

Case Note, supra note 23, at 751-52.

118. Id. at 751.
HAZARDOUS & SOLID WASTE DUMPING

RCRA, while at the same time they have been held liable for violations of the Act on the reservation.


In 1985, the Ninth Circuit first approached the problem of the hazardous waste management Indian land loophole in State of Washington, Department of Ecology v. E.P.A. At issue was whether the State of Washington could include "the activities of all persons, Indians and non-Indians, on Indian lands" in its State hazardous waste permit program under RCRA. The State argued that "[s]ince tribal regulatory powers [were] not expressly preserved ... RCRA [had] eliminated such tribal powers." Under this argument, only the Federal and State governments were recognized to have any regulatory authority, and State administration of a permit program would be specifically allowed by the Act if it conformed to Federal standards. In its review of Washington's proposed permit plan, the EPA approved the program as it applied to the State, but concluded that "RCRA [did] not give the State jurisdiction over Indian lands, and ... states could possess such jurisdiction only through an express act of Congress or by treaty ... [and so] the EPA retained jurisdiction to operate the federal hazardous waste management program 'on Indian lands in the State of Washington.'

In short, the Ninth Circuit held that the EPA could not authorize a State program that regulated Indians on Indian land, but did not consider whether a State program limited to non-Indians on Indian land would be appropriate under

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119. State of Washington, Department of Ecology v. E.P.A., 752 F.2d 1465 (9th Cir. 1985) (State was not allowed to include Indian lands in its state permit program. Instead, EPA was given exclusive jurisdiction to regulate under RCRA).
121. 752 F.2d 1465 (9th Cir. 1985).
122. Id.
123. Id. at 1466. EPA is required to approve all state hazardous waste permit programs, and if the Administrator finds that the state program is not equivalent to the federal program, the state program will be preempted by the federally administered permit program. 42 U.S.C. § 6926(b) (1982 & Supp. V 1987).
124. State of Washington, 752 F.2d at 1467.
125. Id.
126. Id.
RCRA.\textsuperscript{127} The court's rationale was that although RCRA did not "directly address the problem of how to implement a hazardous waste management program on Indian reservations," Congress intended to delegate "policy-making authority to the agency."\textsuperscript{128} Therefore, the court chose to defer to the EPA's "reasonable construction of the statute," which gave regulatory authority on Tribal lands to the EPA, not to the State or to the Tribe.\textsuperscript{129}

The court explained that its deference to agency discretion was "buttressed by well-settled principles of federal Indian law."\textsuperscript{130} Citing U.S. Supreme Court cases holding that Congress had "plenary authority" concerning Indian affairs and a "concomitant federal trust responsibility," the court precluded the State of Washington from "exercising jurisdiction over Indians in Indian country unless Congress [had] clearly expressed an intention to permit it."\textsuperscript{131} Referring to a "long tradition of tribal sovereignty and self-government,"\textsuperscript{132} the court felt this "backdrop of tribal sovereignty" should be respected, especially when an ambiguous Federal statute affected "an area in which the tribes historically have exercised their sovereign authority, or contemporary federal policy encouraged "tribal self-government."\textsuperscript{133} Claiming that the EPA had a practice of involving Tribal governments "in relevant decisionmaking and implementation of

\textsuperscript{127} Id. at 1467-68. Many Indian regulatory cases turn on the facts, particularly whether the parties and activities can be characterized as Indian or non-Indian.

\textsuperscript{128} Id. at 1469.

\textsuperscript{129} Id.

\textsuperscript{130} Id. at 1469-70 (quoting Bryan v. Itasca County, Minn., 426 U.S. 373, 376 n.2 (1976); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 170-71 (1973) (for the general rule precluding states from exercising jurisdiction over Indians on Indian land without express Congressional permission)).

\textsuperscript{131} Id. at 1469-70 (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-43 (1980) (recognizing the plenary authority of Congress in the area of Indian affairs); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977) (a federal trust responsibility toward the Indian tribes exists which accompanies the broad power of Congress in its dealings with Indians)).

\textsuperscript{132} Id. at 1470 (quoting White Mountain Apache Tribe, 448 U.S. at 141-44; Bryan, 426 U.S. at 376 n.2 (recognizing that tribal sovereignty and self-government underlay the rule that state jurisdiction over Indians in Indian country will not be easily implied)).

\textsuperscript{133} Id. See supra note 71 and accompanying text.
Federal environmental programs on Indian reservations, the court concluded that the EPA "retained regulatory authority over Indian lands" and remained "responsible for ensuring that the federal standards [were] met on the reservations."

Although the Ninth Circuit in State of Washington clearly found the EPA to retain responsibility for hazardous waste regulation on Indian lands, two years later, a South Dakota U.S. District Court held in Blue Legs, that Indian Tribes were responsible for solid waste management on reservation land and, therefore, liable under the Citizens' Suit provision if they failed in that responsibility.

2. Blue Legs v. U.S.E.P.A.

The U.S. District Court in South Dakota held that under RCRA, the Oglala Sioux Indian Tribe had both a duty and a responsibility for the regulation, operation, and maintenance of solid waste disposal sites on reservations in Blue Legs v. U.S.E.P.A. The case involved an improperly maintained nonhazardous community dump. The court distinguished authorization under RCRA for the EPA's hazardous waste regulations from a State or local government's nonhazardous solid waste management plan.

The court found that the Tribe was subject to Citizens' Suits because it had the "responsibility to regulate, operate, and maintain the dumps on the Reservation . . . stem[ming] from the inherent sovereignty which Indian Tribes possess." Since the Tribe had adopted a disposal ordinance and participated in open dumping, the Tribe had "acknowledged its tribal sovereignty over tribal lands" and the responsibility of regulation that went along with its sovereign status. The court found that Tribal sovereignty was pre-

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134. Id. at 1471. See supra note 117 and accompanying text.
135. Id. at 1472.
137. Id.
138. Id.
140. Blue Legs, 668 F. Supp. at 1337.
141. Id. at 1338.
empted by RCRA, which subjected the Tribe to application of RCRA's enforcement provisions.  

The court determined that the EPA lacked "Congressionally granted authority over open dumping" under RCRA. The EPA was, however, authorized to "issue certain guidelines and criteria for solid waste management to assist State and local governments and regions in their solid waste planning." Any further "encroachment into open dumping on the Pine Ridge Indian Reservation would be a violation of the inherent sovereignty of the Oglala Sioux Tribe." Although the court "recognized the trust responsibility of the federal government to the Indian tribes," the court found that RCRA did not authorize either Bureau of Indian Affairs or Indian Health Services to "administer open dumping on the Reservation."

The court addressed State of Washington, distinguishing it from Blue Legs, because while the State of Washington case involved a conflict between State and Federal authority to enforce hazardous waste programs on Indian lands within the State, the issue in Blue Legs was Tribal versus Federal power over non-hazardous solid waste on a reservation. The court noted that although RCRA did apply to "all persons," the statute did not "directly address how hazardous waste management programs should be implemented on reservations." The court in Blue Legs agreed with State of Washington's holding that Indian Tribes were regulated entities under RCRA, and therefore subject to Citizens' Suits.

Beyond the EPA and State attempts at controlling environmental programs on Indian reservations, RCRA's ambiguous language can also be analyzed in light of Congressional

142. Id. at 1338-39 (quoting Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation, S.D., 231 F.2d 89 (8th Cir. 1956) (Indian tribes possess inherent sovereignty, except where it has been taken by treaty or Congressional act)).
143. Under Title IV, relating to discarded materials, "EPA does not have . . . Congressionally granted authority over open dumping . . . ." Id. at 1339.
144. Id.
145. Id.
146. Id. at 1340.
147. 752 F.2d 1465 (9th Cir. 1985).
148. Blue Legs, 668 F. Supp. at 1338; see supra note 123.
149. Blue Legs, 668 F. Supp. at 1338.
150. Id.
treatment of Indian Tribes under other environmental statutes.

E. Environmental Statutes Which Treat Indian Tribes as States: Models for Amendments to RCRA

Generally, Federal environmental legislation is structured to grant control over pollution regulations to either Federal, State, or local governments. Although many environmental statutes recognize American Indian Tribes as local governmental entities, Tribal governments have been excluded from RCRA, except in the Citizens' Suit provision. What follows is a brief examination of Congressional treatment of Indian land jurisdiction under other environmental legislation.

1. Clean Water Act

Following a 1987 amendment, the Clean Water Act treats Indian Tribes as it does States for many purposes. Apparently, Congress intended the role of Indian Tribes to be very extensive. The Act gives Indian Tribes the right to adopt their own water quality standards, so long as those standards are consistent with the Act. More importantly,

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151. The U.S. has used “centralized command and control regulations almost exclusively.” F. R. ANDERSON, D. R. MANDELKER & A. D. TARLOCK, supra note 4, at 58.
153. Id.
154. The EPA is authorized to treat Indian tribes as states for purposes of water allocation, sewage treatment works, research and grants, setting water quality standards, inspection laws, enforcement, regulation of lakes, nonpoint source management, see supra note 85, and permitting programs including National Pollutant Discharge Elimination System (NPDES) and dredge and fill. 33 U.S.C. § 1377(e), § 1377 (1982 & Supp. V 1987). For the purpose of allocating quantities of water within its jurisdiction, tribes are treated as States. Id. § 1251(g). Indian tribes are also treated as states for the purpose of cooperative national research and federal grants for pollution control programs. Id. § 1254, § 1256.
155. Under this same provision, Indian tribes are responsible for periodically reviewing applicable water quality standards, identifying areas where the effluent limitations are not stringent enough, and implementing a continuing planning process. Id. § 1313(a)(2). Indian tribes are required to submit a report on water quality to EPA. Id. § 1315. Tribes also must develop procedures under tribal law for the Administrator’s inspection of point sources located on the reservation. Id. §1318(c), § 1377(e). Point source means “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding opera-
under the Clean Water Act Indian Tribes are allowed to establish National Pollutant Discharge Elimination System, and dredge or fill material permit programs. This comprehensive inclusion places Tribal governments on equal footing with States within the Clean Water Act's regulatory scheme.

2. Clean Air Act

Indian Tribes are also being given increasingly important roles in controlling air pollution within their territories. Under the Clean Air Act, Indian Tribes have the authority to designate reservation land under Prevention of Significant Deterioration standards.

156. Id. § 1377(e), § 1342.
157. Id. § 1377(e), § 1344.
159. Id. The Clean Air Act was originally enacted in 1970 through amendments to prior environmental statutes. This was the same year that EPA was created by executive order of President Richard M. Nixon, and the Administrator of EPA was given responsibility for coordinating the national policy of protecting the public health and welfare from air pollution. The Act was more recently amended in 1977. See W. H. Rodgers, Jr., supra note 155, § 3.1.
160. 42 U.S.C. § 7474(C) (1982); see also id. § 7474(e). Congress adopted a nondegradation policy by enacting Prevention of Significant Deterioration (PSD) standards in response to statutory language in the Clean Air Act to "protect and enhance" the air resource. F. R. Anderson, D. R. Mandelker & A. D. Tarlock, supra note 4, at 270.
3. **Safe Drinking Water Act**\(^ {161} \)

The Safe Drinking Water Act\(^ {162} \) states that the statute is neither meant to alter the jurisdictional status of Indian lands, nor affect the status of "American Indian lands or water rights."\(^ {163} \) Moreover, the Act authorizes the EPA to treat Indian Tribes as States, delegating primary enforcement responsibility for public water systems and underground injection control to the Tribes.\(^ {164} \) The Act requires the Administrator of the EPA to specify those provisions of the Act for which it is appropriate to treat Indian Tribes as States.\(^ {165} \)

4. **Federal Insecticide, Fungicide, and Rodenticide Act**\(^ {166} \)

The Federal Insecticide, Fungicide, and Rodenticide Act\(^ {167} \) authorizes the EPA to enter into cooperative agreements with Indian Tribes.\(^ {168} \) The EPA may delegate its authority to Tribes, and train and assist Tribes in implementing the enforcement programs, granting Federal money as necessary.

5. **Comprehensive Environmental Response Compensation, and Liability Act**\(^ {169} \)

The Comprehensive Environmental Response Compensation, and Liability Act\(^ {170} \) authorizes Indian Tribes to recover costs of removal or remedial action from owners and operators, persons disposing of, and transporters of hazardous waste, in the same manner as either the Federal or State government.\(^ {171} \) Tribes are treated substantially the same as

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162. Id. This Act is aimed primarily at protecting underground drinking water resources.
163. Id. §§ 300j-6(c).
164. EPA may also grant federal money to assist the tribe in establishing enforcement programs. Id. §§ 300j-11(a).
165. Id. §§ 300j-11(b)(1).
167. Id. The Act was originally enacted in 1972, and amended in 1975.
168. Id. § 136v.
170. Id.
171. Id. § 9607(a)(4)(A).
States regarding notice of release of hazardous substances, choice of remedy in treating the release, role and responsibility under the national contingency plan, and general information access.

Unlike RCRA, all of the above-mentioned statutes give Indian Tribes some role in the enforcement of environmental legislation within their territories, allowing Indian Tribes some measure of control and management over Indian lands.

III. ANALYSIS

Environmental legislation has been difficult to implement historically because of challenges to both agency and court interpretations of Congressional intent.\(^\text{172}\) Hazardous and solid waste legislation is especially prone to industry and agency challenge because of the significant costs involved in compliance with federal statutes, coupled with the enormous costs of cleanup once statutory requirements have been violated.\(^\text{173}\) Resolution of the ambiguities in federal environmental legislation is generally accomplished through interpretation by the Administrator of the EPA,\(^\text{174}\) and ultimately resolved in the courts. However, as has been discussed above, court interpretations of RCRA have had conflicting results.

\(^{172}\) At the beginning of the environmental decade, environmentalists relied heavily on the courts to police what were perceived as hostile agencies . . . They were soon joined by business interests seeking review of agency decisions newly hostile to their viewpoint after the 'environmental awakening' of 1970, the creation of EPA, and the outpouring of new statutes mandating strict environmental standards. For both sides the basic task was to convince the court to reach the merits of the action or prod the agency to make a different decision on remand.

F. R. ANDERSON, D. R. MANDELKER & A. D. TARLOCK, supra note 4, at 91.

\(^{173}\) See supra note 109. "The cost of disposal of hazardous wastes (about $5 billion annually in 1982) may require the producing industries to invest an incremental $7 billion annually by 1990, but this sum is one tenth to one hundredth of the cost of cleanup of improperly disposed-of wastes. Cleanup of the backlog of existing dangerous sites will apparently cost $10 to $40 billion." F. R. ANDERSON, D. R. MANDELKER & A. D. TARLOCK, supra note 4, at 554 (citing U.S. Office of Technology Assessment, Technologies and Management Strategies for Hazardous Waste Control. Summary 11, 12 (1983)).

\(^{174}\) See supra note 113 and accompanying text.
Interpretation of any statute generally begins by examining the plain language of the statute and maxims of interpretation in order to establish Congressional intent in passing legislation.\textsuperscript{175} Other environmental statutes assist in the analysis of Congressional policy toward environmental issues. While courts sometimes rely solely on statutory language, in the area of Indian law, the unique legal doctrines developed by the Supreme Court to implement Congressional policy regarding Indians must be accommodated.\textsuperscript{176}

A. Congressional Policy and Ambiguous Language in RCRA

Regardless of conflicts within the Federal court system, Federal policy behind the creation of RCRA is clear. The statute was drafted in response to growing concern about hazardous waste.\textsuperscript{177} RCRA's objective is to "promote the protection of health and the environment."\textsuperscript{178} The Act further declares national policy to be the reduction and elimination of hazardous waste, and the treatment, storage, and disposal of waste in a manner which will "minimize the present and future threat to human health and the environment."\textsuperscript{179}

The role of Indian Tribes is clearly a limited one under the current Act. RCRA contains three main sections: Hazardous Waste Management,\textsuperscript{180} Solid Waste Plans,\textsuperscript{181} and Citizens' Suits.\textsuperscript{182} In reading RCRA, it appears that Congress intended to separate the roles of States and Indian Tribes under the Act. The issue remains whether the term "State" will be treated as including Indian Tribes within the meaning of RCRA when waste management and control are concerns. Although Supreme Court precedent in the area of Indian law has not clearly resolved the issue of what status Indian Tribal governments will be given when regulating their own territories and members, the plain language of RCRA clearly provides that Indian Tribes may be held liable

\begin{footnotesize}
\begin{enumerate}
  \item See supra notes 24, 25, 48, 50 and accompanying text.
  \item See supra note 22 and accompanying text.
  \item Id. § 6902(b).
  \item Id. §§ 6921-6939.
  \item Id. §§ 6941-6949.
  \item Id. § 6972.
\end{enumerate}
\end{footnotesize}
under the Citizens' Suit provision as "any person." Beyond that, the role of Indian Tribes remains ambiguous under both the hazardous waste management and the solid waste plan. Although both sections provide for State and Federal participation, the statute fails to mention Indian Tribal regulation of hazardous and solid waste on Indian land.

Clearly, RCRA allows Citizens' Suits against Indian Tribes, as the Blue Legs court found. In Blue Legs, "State plan" was interpreted to mean that Indian Tribal governments had the authority to manage solid waste on Indian land. The Blue Legs court relied on the Tribe's inherent sovereignty to conclude that the Tribe was responsible for maintaining solid waste disposal sites under RCRA. Even though the court found that RCRA did not directly address implementation of hazardous waste management programs on reservations, the court concluded that because Indian Tribes could sue and be sued under RCRA's Citizens' Suit provision, Tribes must also be regulated sovereign entities under RCRA. The court in Blue Legs followed the national policy of encouraging Tribal self-government, and its decision is consistent with the Tribal role recognized in other environmental legislation.

In State of Washington, RCRA's language was interpreted to mean that the EPA had the authority to manage hazardous waste on Indian land when "EPA or State plans" are involved. The Ninth Circuit's interpretation of RCRA is consistent with the language of the Act. The Act plainly says either the EPA Administrator or the States shall administer hazardous waste management, and that States shall implement solid waste plans. For hazardous waste management, the court in State of Washington found that neither the Tribe nor the State had jurisdiction over Indian land under RCRA. The court used the plenary power of the Federal government as a backdrop in discussing Federal policy of encouraging Tribal sovereignty and self-government. In finding that the EPA's practice of involving Tribal governments in

183. See supra notes 105, 106, 107, 111 and accompanying text.
185. Id.
186. 752 F.2d 1465 (9th Cir. 1985).
187. Id.
other Federal environmental legislation warranted deference to the EPA to recognize and encourage Tribal self-govern-
ment in hazardous waste regulation, the court ignored the fact that there was no evidence existed showing that any such Tribal involvement had occurred or was likely to occur. Even with a broad sovereignty backdrop, the rules for statutory construction indicate a clear Congressional intent to exclude Indian Tribes from hazardous and solid waste reg-
ulation.

Following the two conflicting decisions by Federal courts in *State of Washington* and *Blue Legs*, Indian Tribes may be left with all of the liability for hazardous and solid waste dumping in Indian country, but none of the regulatory control.

B. Congressional Policy Toward the Environment

Federal environmental statutes have generally provided extensive recognition of Tribal interests in regulating pollu-
tion within Indian land. With the exception of its regulatory scheme, RCRA has been patterned on other environ-
mental legislation. Enforcement techniques in RCRA have been “borrowed from air and water pollution laws.”

The enforcement provisions of RCRA provide that Indian Tribes may sue and be sued as “any person.” However, the regulatory portion of RCRA does not provide for any participation by Tribal governments. Indian Tribes may be held responsible through Citizens’ Suits, but they are denied any regulatory method for preventing abuse within Indian country. The only recourse open to Tribal governments is to bring legal action under the Citizens’ Suit provision, but only after damage has already occurred. The role given Indian

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188. *Id.*
Tribes is too limited to be meaningful, while the potential liabilities for environmental clean-up are enormous.192

Congress clearly violated its trust obligations to the American Indian by refusing to accommodate valid Tribal interests in managing and controlling hazardous and solid waste in Indian country, although that role has been recognized in the areas of water, air, groundwater, and pesticide pollution, and emergency response.

C. Congressional Policy Toward American Indians as Applied to RCRA

What once was a major effort to first remove and isolate American Indians, then assimilate Tribes and change American Indians into farmers, is now a policy which encourages Tribal self-government.193 Under any national policy, however, clearly the Federal government intends to fully exercise its sovereign power over Indian Tribes.194

Indian Tribes have a special status and unique legal posture in relation to Federal and State governments.195 Tribal governments are regarded as separate sovereign powers, dependent on the Federal government but not subject to State jurisdiction.196 Under common law principles regarding Indian sovereignty, States generally do not have jurisdiction on Indian land unless expressly granted by Congress.197

Congress may unilaterally exercise its power over American Indians by passing legislation that affect Indian Tribal members and their territories.198 Therefore, Congress had the power to draft Federal legislation governing the management of hazardous and solid waste on Indian reservations. However, Congress may have failed in its "fiduciary duty"199 toward American Indians by neglecting to enforce the national policy of encouraging Tribal self-govern-

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192. For a violation of hazardous waste management requirements of RCRA, 42 U.S.C. §§ 6921-6939(d), EPA may seek temporary or permanent injunctions; fines of up to $25,000 per day for each violation. Id. §§ 6928(a), (d) (g).
193. See supra notes 25, 27 and accompanying text.
194. See supra notes 29, 30, 35, 36 and accompanying text.
195. See supra note 44 and accompanying text.
196. See supra note 50 and accompanying text.
197. See supra notes 44-47 and accompanying text.
198. See supra note 29 and accompanying text.
199. See supra note 37 and accompanying text.
Congress possess the power to draft legislation delegating the right to regulate waste within their borders. Similarly, Congress may grant Indian Tribal governments the same ability to manage and control the disposal of waste within Indian lands.

The Supreme Court's analysis in determining jurisdiction between Tribes and States has resulted in Federal preemption of most State interference with Indian Tribes, with Tribal sovereignty viewed as a backdrop. Recently, the Court has alternated its approach in determining regulatory jurisdiction in Indian country. Absent an express intention by Congress to either recognize or prevent Tribal jurisdiction under RCRA, the Court will look at either whether the broad powers of a sovereign government should include environmental regulation because Tribal interest outweighs State's interest, or whether a Tribe has historically regulated environmental concerns, specifically hazardous and solid waste. Although the test remains unsettled by the U.S. Supreme Court, this latter version restricts Indian Tribal sovereignty, limiting Tribal governments to only those sovereign powers exercised before liquor, automobiles, and hazardous and solid waste were introduced into Indian country.

IV. PROPOSAL

The unique status and strategic importance of Indian Tribes requires a uniform and comprehensive Federal policy for hazardous and solid waste management. This policy should address the role of Tribal governments in implementing RCRA, and resolve the issue of whether Tribal lands are included within the jurisdiction of this statute. The status of Indian Tribes in the Federal scheme for controlling hazardous and solid waste must be firmly established. What at first glance may appear to be conflicting Federal policies of encouraging Indian self-government while at the same time administering comprehensive and uniform environmental

200. See supra notes 23, 27 and accompanying text.
201. See supra note 69 (tribal sovereignty should be viewed as a broad governmental power); but see supra notes 71-72 (tribal sovereignty is limited to those specific powers historically exercised by the tribe).
202. See supra note 77 and accompanying text.
203. See supra notes 71-72 and accompanying text.
regulations at the State or Federal level, may be reconciled by giving Indian Tribal governments equal footing with the States for hazardous and solid waste management.

As stated at the beginning of this paper, the Federal government must firmly establish the role of Indian Tribes in implementing Federal environmental laws, and resolve the issue of whether Tribal lands are included within environmental statutes. This must occur in a uniform and comprehensive manner which both recognizes the unique sovereign attributes of American Indian Tribal governments, and honors the fiduciary obligation which the Federal government has toward American Indians.

Three alternatives exist for establishing a regulatory scheme on Indian reservations: Federal, State or Tribal governments could be recognized as having regulatory jurisdiction. One way of accomplishing this goal is to interpret the current statute as allowing Tribal enforcement under the Act based on both the language of the statute and Tribal sovereignty. Another method would be to amend the current legislation to clearly reflect Congressional intent.

A. Interpretation of RCRA to Include Indian Participation

The plain meaning of the language used in RCRA indicates that Congress intended to separate the roles of the States and Tribes under the Act. While RCRA allows Indian Tribes to sue and be sued through the Citizens' Suit provision, as the Blue Legs court found, this role is limited. Further, Indian Tribes remain in the precarious position of risking enormous liability for hazardous and solid waste clean-up without being given the opportunity to regulate hazardous and solid waste disposal in Indian country. Although the State of Washington court expressed the belief

| 204 | EPA has responsibility for both hazardous waste management and solid waste state plans in Indian land, based on the plain meaning of RCRA. Although the Blue Legs court did recognize some sovereign aspects of solid waste planning, the language in RCRA contemplates only federal and state involvement; states shall implement solid waste plans, and either the EPA Administrator or states shall manage hazardous waste. 42 U.S.C. § 6912, § 6926 (1982 & Supp. V 1987). Even with a broad sovereignty backdrop, statutory construction clearly excludes Indian tribes from hazardous and solid waste regulation on Indian land. |
| 206 | 752 F.2d 1465 (5th Cir. 1985). |
that the EPA could be relied upon to include Tribal government in the management of hazardous waste on Indian reservations, this has been unsupported by the EPA's practice. Without adequate accountability within the EPA, Indian Tribes will fail to achieve meaningful involvement in the regulation and management of hazardous and solid waste in Indian country.

Although *Blue Legs* follows the national policy of encouraging Indian self-government, and grants the Tribe a role in the regulation of solid waste which is supported by other environmental legislation, Tribal jurisdiction for hazardous and solid waste management on reservation land under the current statute requires a strained interpretation of unambiguous language.

B. **RCRA Amendment for Directly Involving Indian Tribes**

The most effective method for allowing Tribal governments to regulate and manage hazardous and solid waste on reservation lands would be through an amendment of the Federal statute. An amendment to RCRA would clearly

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208. Proposed amendment to RCRA: Indian Tribes:
   (a) Policy Indian tribes shall be treated as states for purposes of management of hazardous and solid waste in Indian country, recognizing the national policy of encouraging Indian self-government and tribal sovereignty.
   (b) Indian tribes shall be treated as states for purposes of:
      (1) Administration of hazardous waste permit programs in Indian country; and
      (2) Administration of solid waste planning in Indian Country.
      (3) However, the Administrator may withdraw authorization for a tribal program under either (1) or (2) of this part, if the tribe fails to comply with federal requirements under this Act, in which case the Administrator shall administer the federal program within the affected Indian country.
   (c) EPA shall:
      (1) Promulgate guidelines for the development and implementation of tribal programs, and shall include identification of the responsible tribal authority, and description of the distribution of federal funds; and
      (2) Provide a mechanism for the revision of any tribal program.
   (d) the Administrator of EPA shall have the discretion to treat tribes as states to the degree necessary to carry out the objectives of the Act:
demonstrate Congressional intent to encourage Indian self-government and recognize Tribal sovereignty. This comment proposes that such an amendment be modeled after other environmental legislation which currently does recognize Tribal sovereignty. Of the environmental statutes to date, the Clean Water Act contains the most comprehensive procedure for recognizing Indian Tribal governments. This statute places Indian Tribes on an equal footing with States for essential regulatory provisions. RCRA's enforcement techniques have already been borrowed from the water pollution laws, so it should not cause any significant problems to further borrow the Clean Water Act's regulatory scheme, as it applies to Tribal governments.

RCRA should be amended to include Indian Tribal governments in the management of both hazardous and solid waste on Indian land. A national policy of encouraging Indian self-government and recognizing Tribal sovereignty should be stated, and an active role for Indian Tribes in the management of hazardous and solid waste on Indian land should

(1) Before a tribe may administer either the hazardous waste program or solid waste management plan in Indian country, the Administrator must insure that the tribe has a governing body capable of carrying out substantial governmental duties and powers;
(2) The Administrator must also insure that the functions to be exercised by the tribe pertain to the management of hazardous and solid waste necessary for the protection of resources which are held by the Indian tribe, by the U.S. government in trust for the Indians, by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of Indian country; and
(3) The Administrator must also insure that, in his or her judgment, the Indian tribe would be reasonably expected to be capable of carrying out these functions to be exercised in a manner consistent with the terms and purposes of RCRA and all applicable regulations.

(c) Congress will allocate Federal funds for the establishment of qualified tribal administrative agencies for the management of hazardous and solid waste in Indian country, or otherwise as described in part (d) (2), for the purpose of encouraging EPA to involve Indian tribal governments in the management of hazardous and solid waste within the tribe's jurisdiction in Indian country.

209. 33 U.S.C. § 1377 (1987). The Clean Water Act was amended to treat Indian tribes as states for many important purposes, giving tribes very extensive responsibilities under the Act. Key among those is the establishment of tribal NPDES permits and permit programs for dredge and fill material.
be effectuated. Tribal governments should administer hazardous waste programs with oversight by the EPA. The Administrator could withdraw authorization for a Tribe's program if it failed to comply with Federal requirements, in which case the EPA would administer a Federal program within that area. Solid waste planning under RCRA should also clearly be defined to include Tribal solid waste management plans. The EPA could promulgate guidelines for the development and implementation of Tribal plans, and Tribal plans should identify the responsible Tribal authority, and describe distribution of Federal funds. The EPA could also be provided a mechanism for revision of any Tribal plans.

As in the Clean Water Act, the Administrator of the EPA should be authorized to treat Indian Tribes as States for select purposes under RCRA.\textsuperscript{210} Discretion should be expressly granted to the EPA for treating Tribes as States to the degree necessary to carry out the objectives of RCRA and this proposed amendment.\textsuperscript{211} Congress could insure that Tribal governments were capable of accepting responsibility for hazardous and solid waste management by requiring that Indian Tribes have a governing body capable of carrying out substantial governmental duties and powers.\textsuperscript{212} Further, the EPA should insure that the functions to be exercised by the Indian Tribes pertain to the management of hazardous and solid waste necessary for the protection of resources which are held by the Indian Tribe, held by the U.S. government in trust for the Indians, held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of Indian Country.\textsuperscript{213} Indian Tribes would have to be reasonably expected to be capable of carrying out the functions to be exercised in a manner consistent with the terms and purposes of RCRA and of all applicable regulations.\textsuperscript{214} Congress should further encourage the EPA to involve Indian Tribal governments by providing Federal funds for the establishment of qualified Tribal administrative agencies for the

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{209}
\item Id.
\item Id. § 1377(a).
\item Id. § 1377(c)(1).
\item Id. § 1377(c)(2).
\item Id. § 1377(c)(3).
\end{enumerate}
\end{footnotesize}
management of hazardous and solid waste on reservation land.215

By amending RCRA to indicate Congressional policy of recognizing the increasingly important role of Indian Tribal governments, Congress could provide a mechanism by which the EPA could insure that a uniform and comprehensive Federal policy of controlling hazardous and solid waste be efficiently implemented on Indian lands. The Federal government is in a position to oversee a cooperative effort among the States and Tribes. By making the Indian Tribal government's role within RCRA clear, Congress could provide the accountability in the EPA that would be lacking under possible court interpretations of the current statute.

V. CONCLUSION

American courts have had a great deal of difficulty in reconciling Indian tribal sovereignty with the plenary power of both the Federal and State governments. Clearly, the Federal government will continue to unilaterally exercise its power over Indian Tribes. This power is limited only by American Indian rights under the U.S. Constitution and the fiduciary obligation of the Federal government toward dependent Indian Tribes. The U.S. Supreme Court appears to alternate between attributing broad sovereign status to Indian Tribes, at least against the States, and effectively eliminating all Tribal sovereign status. If read narrowly, the Court's most recent approach restricting Indian sovereignty to regulatory areas historically exercised under Tribal jurisdiction, would prove to be an effective bar to Tribal self-government, and appears to be contrary to public policy of encouraging Tribal self-government.

In response to concerns about management of hazardous and solid waste in this country, Congress enacted RCRA to regulate the generation, transportation and disposal of waste. States have been given an important role under this statute, as has the EPA. However, unless the role of Tribal governments in implementing RCRA is resolved, hazardous waste on Indian land could pose a serious threat to the environment and human health in Indian country. This comment

215. Id. § 1377(e).
HAZARDOUS & SOLID WASTE DUMPING

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HAS ANALYZED RCRA IN AN ATTEMPT TO UNDERSTAND THE ROLE INDIAN TRIBES MAY PLAY IN THE REGULATION AND ENFORCEMENT PROVISIONS OF THE ACT. A LIMITED ROLE FOR TRIBES HAS BEEN CARVED OUT UNDER THE CITIZENS' SUIT PROVISION, WHICH MERELY EXPOSES TRIBES TO ENORMOUS LIABILITY FOR CLEANUP COSTS WITHOUT PROVIDING ANY OPPORTUNITY TO REGULATE HAZARDOUS AND SOLID WASTE IN INDIAN COUNTRY.

THE BLUE LEGS AND STATE OF WASHINGTON DECISIONS CONFLICTED REGARDING THE APPLICATION OF RCRA, AS HAS BEEN DISCUSSED ABOVE. THIS DEMONSTRATES THAT WHILE A STATE WOULD GENERALLY NOT BE PERMITTED TO IMPLEMENT ITS RCRA PLAN IN INDIAN COUNTRY, AND THE EPA MAY OR MAY NOT BE AUTHORIZED TO ENFORCE ITS REGULATIONS, TRIBES COULD STILL BE FOUND LIABLE FOR CLEANUP COSTS.

THIS COMMENT HAS IDENTIFIED THE INDIAN LAND LOophOLE IN RCRA AND PROPOSED A WORKABLE APPROACH TO MANAGING HAZARDOUS AND SOLID WASTE DISPOSAL ON INDIAN LANDS. INTERPRETATION OF THE CURRENT STATUTE DOES NOT CLEARLY INDICATE CONGRESSIONAL INTENT TO PROVIDE EITHER INDIAN TRIBES OR STATES WITH ENFORCEMENT AUTHORITY. THUS, AN AMENDMENT IS NECESSARY TO BOTH IMPLEMENT CONGRESSIONAL INTENT OF ENCOURAGING INDIAN SELF-GOVERNMENT AND HONOR THE FEDERAL FIDUCIARY OBLIGATION TOWARD THE AMERICAN INDIAN IN THE APPLICATION OF RCRA'S HAZARDOUS AND SOLID WASTE CONTROL. THE AMENDMENT PROVIDES A MORE ACTIVE ROLE FOR TRIBAL GOVERNMENTS IN THE AREA OF HAZARDOUS AND SOLID WASTE MANAGEMENT, REMAINING SENSITIVE TO AMERICAN INDIAN TRIBAL SOVEREIGNTY BY ALLOWING INDIAN TRIBAL GOVERNMENTS TO TAKE RESPONSIBILITY FOR HAZARDOUS AND SOLID WASTE ON RESERVATION LANDS. THIS RESPONSIBILITY CARRIES WITH IT BOTH THE REGULATORY REQUIREMENTS UNDER RCRA AND THE CONCOMITANT LIABILITIES PROVIDED FOR IN CITIZENS' SUITS.

AMANDA K. WILSON

217. 752 F.2d 1465 (9th Cir. 1985).