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TRIBES AS INNOVATIVE ENVIRONMENTAL "LABORATORIES"

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Tribes are not vestiges of the past, but laboratories of the future. – Vine Deloria, Jr.[1]

Indian tribes, because of their distinctive regulatory authority and significant connection to the environment, possess unique capacities to innovate within the field of environmental law in the over fifty-six million acres that make up Indian country. This Article—the first scholarly work to address this aspect of tribal environmental law—advocates for the idea of tribes as "laboratories" for examining environmental regulation. Tribes enact environmental regulation by two primary means—in their capacity as "tribes as states" (TAS) and in their capacity as inherent sovereigns—both of which create unparalleled space for innovation. Moving first to the TAS setting, the Article examines synergies between federal and tribal environmental law. Following an expansive discussion of laws adopted by

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1. *To Protect the Constitutional Rights of American Indians, 1965: Hearing on S. 961, S. 962, S. 963, S. 964, S. 965, S. 966, S. 967, S. 968 and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong., 1, 194–95 (1965) [hereinafter Deloria] (statement of Vine Deloria, Jr., Executive Director of the National Congress of American Indians).

several tribes under their TAS authority, the Article turns to a discussion of the implications of tribal environmental innovations. In this discussion, the Article looks at the emerging trends in tribal adaptation of federal environmental law. The Article turns next to tribal environmental law adopted purely as a result of tribal inherent sovereignty. Here, the Article initiates a foundational discussion of how tribes may take lessons learned from the TAS setting and, by exercising inherent sovereignty, truly innovate in the development of environmental law. The Article then develops some initial thoughts of how tribes, the states, and the federal government may benefit from innovations occurring within the tribal environmental laboratory. Tribal environmental law is particularly exciting given its ability to transcend federal environmental law. Ultimately, the Article concludes that, by enacting environmental laws to meet their distinctive tribal needs, many tribes are creating and innovating in the field under their unique powers as separate sovereigns within the United States—truly acting as laboratories of the future.

INTRODUCTION

Given the transboundary nature of environmental pollution,[2] effective environmental regulation by all sovereigns within the United States is key to maintaining a healthy environment. Three sovereigns regulate the environment in the United States[3]: the federal government, state governments, and federally recognized tribes.[4] Federally recognized tribes

2. *See, e.g.*, *Transboundary Air Pollution*, U.S. ENVTL. PROT. AGENCY, http://www2.epa.gov/international-cooperation/transboundary-air-pollution (last visited Feb. 8, 2013), *archived at* http://perma.cc/ZW58-SAZ7.

3. For example, within Arizona, the federal government may regulate water quality through the federal Clean Water Act, 33 U.S.C. §§ 1251–1387 (2012), Arizona may regulate through ARIZ. REV. STAT. ANN. §§ 49-201–49-298 (2014), and the Navajo Nation may regulate within the Nation's reservation through the Navajo Nation Clean Water Act, NAVAJO NATION CODE ANN. tit. 4, §§ 1301–1308 (2010).

4. *Frequently Asked Questions*, U.S. DEP'T INTERIOR, BUREAU INDIAN AFF., http://www.bia.gov/FAQs (last visited Feb. 8, 2014), *archived at* http://perma.cc/CAY4-DMB6 ("A federally recognized tribe is an American Indian or Alaska Native tribal entity that is recognized as having a government-to-government relationship with the United States, with the responsibilities, powers,

have jurisdictional authority over at least 56.2 million acres located throughout the United States;[5] however, scholars have paid little attention to the scope and nature of environmental laws promulgated by tribes. Because tribes have jurisdictional and regulatory control over a significant amount of land within the United States,[6] consideration of the type and extent of tribal environmental law is crucial to an understanding of whether there is effective regulation by all three sovereigns within the United States. Accordingly, this article examines tribal innovation in both the "tribe as state" (TAS) setting under federal law and in utilizing tribal inherent sovereignty, concluding that tribal environmental "laboratories" may provide useful lessons in environmental regulation.

Considering sources of tribal experimentation is particularly timely, as environmental regulatory innovation is needed now. Innovation in the field of environmental law is crucial to improve upon and protect the American environment. For example, although the major federal environmental statutes have generally been successful in improving air and water quality within the United States,[7] new and complex regulatory challenges, such as climate disruption, not contemplated by the federal environmental law developed decades ago, present a threat to the American environment.[8] Even the United States Environmental Protection Agency (EPA) acknowledges that substantial areas of "unfinished business" remain.[9] Moreover, even in areas where the Environmental Protection Agency (EPA) has had success, there is room for improvement. For example, the federal Clean Water

limitations, and obligations attached to that designation, and is eligible for funding and services from the Bureau of Indian Affairs. Furthermore, federally recognized tribes are recognized as possessing certain inherent rights of self-government (i.e., tribal sovereignty) and are entitled to receive certain federal benefits, services, and protections because of their special relationship with the United States. At present, there are 566 federally recognized American Indian and Alaska Native tribes and villages.").

5. *Id.*

6. For a general discussion of the jurisdictional and regulatory authority of tribes, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton et al. eds., LexisNexis 2012).

7. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 2–3 (6th ed. 2009).

8. *See* JAMES GUSTAVE SPETH, THE BRIDGE AT THE END OF WORLD: CAPITALISM, THE ENVIRONMENT, AND CROSSING FROM CRISIS TO SUSTAINABILITY 9 (2008).

9. PERCIVAL ET AL., *supra* note 7, at 6.

Act regulates pollution from point sources, thereby largely exempting non-point source pollution.[10] Today, "[s]tates report that nonpoint source pollution is the leading remaining cause of water quality problems."[11] In light of the importance of environmental regulation, both tribes and the federal government have become increasingly interested in the development of tribal environmental law.[12] Accordingly, pioneering environmental laws designed to address new, complex environmental challenges, as well as existing regulatory gaps, benefit all Americans by providing a healthier environment, both within and outside of Indian country. Given tribes' ability to transcend federal environmental law, their innovative capacity is particularly inspirational for other sovereigns within the United States.

Beyond a general interest in maintaining a healthy environment, environmental laws may acquire even greater meaning in Indian country, where many tribal communities and individuals maintain a close connection to the land. "When Indians and the environment intersect, the most mundane legal and political arguments evoke deep emotional charges."[13] Because of the increased importance of the environment to many tribes and tribal members, tribes may be particularly motivated to find innovative solutions to today's environmental challenges.

Importantly, because tribal governments themselves differ from the states and the federal government, tribal

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10. *See* 33 U.S.C. § 1342 (2012). "Nonpoint source pollution generally results from land runoff, precipitation, atmospheric deposition, drainage, seepage or hydrologic modification. The term 'nonpoint source' is defined to mean any source of water pollution that does not meet the legal definition of 'point source' in section 502(14) of the Clean Water Act." *What is Nonpoint Source Pollution?*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/polwaste/nps/whatis.cfm (last visited Feb. 13, 2014), *archived at* http://perma.cc/2HGG-W344.

11. *What is Nonpoint Source Pollution?*, *supra* note 10.

12. *See* M. Julia Hook, *Federal Regulatory Delegations to States and Indian Tribes*, 104A ROCKY MTN. MIN. L. SPECIAL INST. Ch. 13, at 1, 3 (Nov. 1999) ("Over the past thirty years, Indian Tribes have become increasingly cognizant of the power of their remaining inherent sovereignty, and increasingly eager to be the primary governmental authority regulating both natural resource development and environmental conditions and activities within their reservations. At the same time, the federal government has become increasingly supportive of the tribal position.").

13. Richard A. Monette, *Treating Tribes as States Under Federal Statutes in the Environmental Arena: Where Laws of Nature and Natural Law Collide*, 21 VT. L. REV. 111, 113 (1996).

environmental law also differs from federal and state law. Elements of tribal governments—unique power and authority, a demonstrated ability to adapt, and a strong connection to the environment—imbue tribes with the capacity for innovation within the realm of environmental law. Tribal governments possess power unlike the federal government or state governments, given that they are extra-constitutional entities deriving their authority not from the federal government but from their own inherent tribal sovereignty.[14] Further, tribal governments have a demonstrated ability to adapt, as shown both before and after contact with European nations,[15] and as proven by their persistence in the face of federal policies of removal, assimilation, and termination.[16] In addition to a proven record of adaptation and survival, many, if not most, tribal communities possess a significant connection to the land as well as Traditional Ecological Knowledge.[17] While not true in every instance, many tribes exist as societies bound to nature and the environment.[18] Vine Deloria, Jr. was therefore correct when he said that tribes are laboratories of the future.[19]

This Article builds on the idea of tribes as ideal

14. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 6, at § 4.01.

15. *See generally* VINE DELORIA, JR., RED EARTH, WHITE LIES (1997).

16. *See* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW, 241–42 (6th ed. 2011). Building on the idea of the capacity for tribal adaptation, Professor Gloria Valencia-Weber explained:

> The pervasive ability to change, in order to survive and maintain continuity, is the cultural characteristic of the indigenous people of the Americas. American Indian tribes have retained the capacity to integrate external concepts, technology, and life forms. Through adoption, adaptation, and appropriation the acceptance results in new meaning and value specific to tribal culture. The simultaneous pursuit of conservation and innovation is the historic pattern of native cultures. Twentieth-century American Indians are not copies of Anglo-Americans; as indigenous people they are engaged in jointly preserving and changing a cultural way of life.

Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 226–27 (1994).

17. For a general discussion of the role of Traditional Ecological Knowledge within indigenous communities, see Maxine Burkett, *Indigenous Environmental Knowledge and Climate Change Adaptation*, *in* CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES (Randall S. Abate & Elizabeth Ann Kronk eds., 2013).

18. *See generally* 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 (1996) (discussing the connection that many tribes and individual Indians have with the environment).

19. Deloria, *supra* note 1, at 194–95.

"laboratories" for developing creative and innovative environmental regulation using tribal implementation of the federal Clean Air Act (CAA) and Clean Water Act (CWA) as a lens for exploring this innovation.[20] The Article starts with an examination of the status quo. The first section of Part I considers the application of federal environmental law to tribes, focusing on TAS under the major federal environmental laws. TAS status refers to the ability of EPA to "treat [an] eligible federally-recognized Indian tribe in the same manner as a state for implementing and managing certain environmental programs."[21] This section also considers why tribes may be interested in obtaining TAS status. With this background in place, section B looks at which federally recognized tribes have obtained TAS status under various federal environmental laws.[22] In many instances, tribes have adopted American laws, such as federal environmental provisions, but have adapted these laws to the tribe's specific needs.[23] This combination of tribal law and American law can create a "synergistic result"[24] benefitting both the tribe and the federal government.[25] Accordingly, Part II of this Article examines these synergies, taking a close look at tribal environmental code provisions adopted by tribes under TAS provisions of federal environmental statutes. With a firm grasp of existing tribal environmental law adopted under the federal TAS framework, Part III considers the implications of tribal environmental innovation. First, Part III establishes emerging

20. This Article builds on the idea of states as laboratories for legal innovation, as articulated in the United States Supreme Court. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (discussing the value of states as laboratories for legal innovation). Future articles will examine this concept of tribes as laboratories for environmental innovation. *See, e.g.*, Elizabeth Ann Kronk Warner, *Justice Brandeis and Indian Country: Lessons from the Tribal Environmental Laboratory*, ARIZ. ST. L.J. (forthcoming 2015), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=2489211 (last visited Oct. 19, 2014), *archived at* http://perma.cc/P5JJ-8VEG.

21. *See Treatment in the Same Manner as a State*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/tribal/laws/tas.htm (last visited Feb. 8, 2014), *archived at* http://perma.cc/DFB3-9GD7.

22. *See id.*

23. *See infra* Part II.

24. Valencia-Weber, *supra* note 16, at 256.

25. For example, as shown below, numerous tribes have adopted water quality standards under the CWA, benefitting the overall American environment by promoting cleaner water, and have adapted the federal standards to accommodate unique tribal concerns, such as culture and spirituality. *See infra* Part II.B.2.

trends amongst tribes promulgating environmental regulations under TAS status. Second, Part III examines the ability of tribes to use their inherent tribal sovereignty to develop innovative environmental laws outside of the federal regulatory scheme. As an example, the Part closely examines the Confederated Salish and Kootenai Tribes' Climate Change Strategic Plan. Having demonstrated that tribes are truly innovators in terms of the development of environmental law, Part III concludes with some initial thoughts on what tribes, states, and the federal government may glean from such groundbreaking regulatory work.

As this Article will show, only a small percentage of federally recognized tribes are adopting federal environmental laws as their own. Those tribes that are adopting federal environmental provisions, however, are adapting those provisions to their unique tribal needs. Further, some tribes are also innovating based on their unique tribal sovereignty. Based on these observations, the Article concludes that, even for tribes that are adopting federal environmental laws, they are creating and innovating in the field of environmental law under their unique powers as separate sovereigns within the United States—truly acting as laboratories of the future.

I. THE STATUS QUO: TAS STATUS UNDER FEDERAL ENVIRONMENTAL STATUTES

Federally recognized tribes may adopt tribal environmental code provisions under either their inherent tribal authority, which exists by virtue of their sovereignty, or they may develop such provisions under authority delegated to them by the federal government.[26] This Article uses the term "delegated" to refer to tribal environmental laws adopted pursuant to federal law.[27]

26. *See* Hook, *supra* note 12, at 2–3 ("Since treaties between Indian tribes and the United States more often than not abrogated the tribes' inherent governmental powers without containing any offsetting grants of governmental power to the tribes, it is fair to say that most governmental powers exercised by a particular Indian Tribe today derive from that Tribe's non-abrogated inherent sovereignty, and from express delegations of power from Congress.").

27. However, as described more fully in this Part, it appears that Congress may have enacted TAS provisions because it recognized the sovereignty of Indian tribes. In this case, tribes would have the authority to enact tribal environmental laws under TAS provisions because such actions would be within the scope of their inherent authority. Under this scenario, "delegated authority" merely

This Part more closely explores tribal laws developed under federal environmental laws. Section A provides an overview of the application of federal environmental law to tribes, focusing on the TAS provisions of the CAA and CWA. Next, to understand where tribal environmental laws may be departing from their federal counterparts, section B examines how many tribes are availing themselves of the TAS provisions of major federal environmental statutes.[28] Again, because of TAS status in the major federal environmental laws, EPA possesses the authority to treat federally recognized tribes as states under the acts.[29] In other words, tribes with TAS status may regulate in a manner consistent with the federal standards, just as states have the authority to do so under cooperative federalism.[30] If a tribe "declines to seek authority to administer the water quality standards program, EPA has the authority under section 303 of the Act to promulgate Federal water quality standards."[31]

A. Federal Environmental Law Applicable to Indian Country

Although tribes existed before the formation of the United States, the federal government enjoys broad authority to apply

becomes a reference to tribes acting under federal TAS provisions.

28. Notably, this Article does not discuss the application of state law in Indian country given the state usually does not play a large role in regulating within Indian country. This is consistent with the United States Supreme Court's decision in *Pennoyer v. Neff*, when the Court found that "[n]o State can exercise direct jurisdiction and authority over persons or property without its territory." Monette, *supra* note 13, at 122 (citing Pennoyer v. Neff, 95 U.S. 714, 722 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977)).

29. *Treatment in the Same Manner as a State*, *supra* note 21 ("Several federal environmental laws authorize EPA to treat eligible federally-recognized Indian tribes in the same manner as a state for implementing and managing certain environmental programs."). In general, the Supreme Court has held that Congress has broad, plenary authority to act within Indian country. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Kagama, 118 U.S. 375 (1886). As a result of this historical plenary authority, the United States, and EPA specifically, has the authority to enact environmental laws applying to Indian country.

30. *See Lone Wolf*, 187 U.S. 553; *Kagama*, 118 U.S. 375; *Treatment in the Same Manner as a State*, *supra* note 21.

31. *Water Quality Standards Regulations and Federally Promulgated Standards*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/scitech/swguidance/standards/wqsregs.cfm#standards1 (last updated Aug. 26, 2014), *archived at* http://perma.cc/7TJF-AYSV (under "Standards Applicable in Indian Country").

federal environmental regulations to Indian country. This authority stems from the Indian Commerce Clause[32] and Congress's plenary authority over tribes,[33] both of which have been interpreted broadly.[34] Perhaps unsurprisingly, however, the federal relationship with Indian tribes has been a tumultuous one, moving from historical eras of removal and allotment to the Indian Reorganization Act of 1934.[35] Currently, the United States is in a period of promoting tribal self-determination, which began with President Reagan's 1983 "American Indian Policy." The President, Congress, and agencies actively support programs designed to encourage tribal sovereignty and self-determination.[36] EPA was the first federal agency (aside from the Department of the Interior, which has a long-standing relationship with Indian country) to develop an extensive policy related to Indian country.[37]

1. TAS Provisions: Their Enactment, Scope, and Continuing Legal Viability

Having broadly established the federal government's ability to regulate in Indian country[38] and, given this Article's focus on environmental law, this subsection now examines the role of EPA and TAS provisions of the CAA and CWA.

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32. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the authority "to regulate commerce with . . . the Indian tribes.").

33. *See, e.g.*, *Lone Wolf*, 187 U.S. 553; *Kagama*, 118 U.S. 375.

34. *See, e.g.*, *Lone Wolf*, 187 U.S. 553; *Kagama*, 118 U.S. 375.

35. For a complete discussion of these historical eras, see GETCHES ET AL., *supra* note 16, at 41–241.

36. *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (2012). Similarly, every recent President has supported a government-to-government relationship with federally recognized tribes. *See, e.g.*, Memorandum from Barack Obama for the Heads of Exec. Dep'ts and Agencies: Tribal Consultation, 74 Fed. Reg. 57881 (Nov. 9, 2009); Memorandum from George W. Bush to Heads of Exec. Dep'ts and Agencies: Government-to-Government Relationship with Tribal Governments (Sept. 23, 2004), http://georgewbush-whitehouse.archives.gov/news/releases/2004/09/200409 23-4.html, *archived at* http://perma.cc/W87K-W65K.

37. *See* 25 U.S.C. § 450 (2012); Memorandum from Barack Obama, *supra* note 36; Memorandum from George W. Bush, *supra* note 36; *see also* WILLIAM D. RUCKELSHAUS, U.S. ENVTL. PROT. AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (Nov. 8, 1984), *available at* http://www.epa.gov/tp/pdf/indian-policy-84.pdf.

38. For a full discussion of the application of federal environmental law in Indian country, see Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENVTL. L. 42 (2014).

Following President Reagan's 1983 "American Indian Policy" directing federal agencies to adopt policies promoting tribal self-government,[39] EPA was one of the first federal agencies to develop a policy to govern its relationship with Indian country.[40] The underlying foundation of EPA's Indian policy is to promote tribal self-determination.[41] Through policy statements, EPA continuously expresses its desire to work with tribes on a government-to-government basis,[42] rather than viewing tribes as political subdivisions of the states.[43] Because of this overarching goal of promoting tribal self-determination and sovereignty, EPA will treat tribes as states both when specifically called for by the statute at issue[44] and where a reasonable interpretation of the statute "permit[s] [EPA] to delegate authority to native governments."[45] Such an interpretation is appropriate when consistent with EPA's stated policies.[46] Until a tribe has assumed primacy under the TAS provisions, EPA will retain responsibility for implementation of the CAA and CWA.[47]

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39. *See* U.S. ENVTL. PROT. AGENCY, AMERICAN INDIAN POLICY, *available at* http://www.epa.gov/tribal/pdf/president-reagan83.pdf (last visited Feb. 5, 2014), *archived at* http://perma.cc/5YDG-32K7.

40. *See id.*; *see also* RUCKELSHAUS, *supra* note 37.

41. *See* U.S. ENVTL. PROT. AGENCY, EPA MEMORANDUM ON FEDERAL, TRIBAL AND STATE ROLES IN THE PROTECTION AND REGULATION OF RESERVATION ENVIRONMENTS 1 (July 10, 1991), *available at* http://www.epa.gov/region4/Indian/EPAStTri_relations.pdf, *archived at* http://perma.cc/9JDE-3VKL (explaining EPA's "role in strengthening tribal governments' management of environmental programs on reservations").

42. EPA's efforts to work with federally recognized tribes on a government-to-government basis is consistent with the overall federal policy. *See* Indian Tribal Justice Act, 25 U.S.C. § 3601 (2012) ("[T]here is a government-to-government relationship between the United States and each Indian tribe . . . .").

43. *Id.*; *see also* U.S. ENVTL. PROT. AGENCY, MEMORANDUM ON EPA INDIAN POLICY (Mar. 14, 1994) (reaffirming EPA's 1984 formal policy statement on Indian tribes).

44. 42 U.S.C. § 7601(d)(1)(A) (2012); 33 U.S.C. § 1377(e) (2012); 42 U.S.C. § 300j-11(a)(1) (2012).

45. Judith V. Royster & R.S. Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. U. L. REV. 581, 638 (1989).

46. *Id.* at 639 (citing Nance v. U.S. Envtl. Prot. Agency, 645 F.2d 701, 714 (9th Cir. 1981)).

47. *See* Wash. Dep't of Ecology v. U.S. Envtl. Prot. Agency, 752 F.2d 1465 (9th Cir. 1985) (upholding EPA's refusal to allow the state to regulate hazardous waste-related activities conducted by Indians on reservations).

With regard to the CAA,

> It is EPA's proposed interpretation of the CAA that the Act grants, to Tribes approved by EPA to administer CAA programs in the same manner as States, authority over all air resources within the exterior boundaries of a reservation for such programs . . . enabl[ing] such Tribes to address conduct on all lands, including non-Indian owned fee lands, within the exterior boundaries of a reservation.[48]

Similarly, under the CWA, EPA determined that the TAS provisions did not delegate federal authority to tribes, but rather "recognize[d] inherent Tribal civil regulatory authority to the full extent permitted under Federal Indian law."[49]

Although very similar in multiple ways, there are important differences between the TAS provisions of the CAA and CWA. Under EPA's interpretation of the CWA TAS provision, TAS status applies to the reservation and other tribal trust lands outside of formal reservation areas.[50] Alternatively, the CAA TAS provisions recognize tribal authority over all areas of Indian country, as defined at 18 U.S.C. § 1151.[51] Moreover, EPA has interpreted the CAA to be

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48. Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. 43,956, 43,958 (Aug. 25, 1994) (codified at 40 C.F.R. pts. 35, 49, 50, 81).

49. Amendments to Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,880 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131). For a complete discussion of tribes' civil regulatory authority, see generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 6, § 10 (describing the scope of tribal civil regulatory authority).

50. 33 U.S.C. § 1377(e)(2) (2012); Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the Clean Water Act, 58 Fed. Reg. 67,966, 67,970 (Dec. 22, 1993) (codified at 40 C.F.R. pts. 122, 123, 124, 501).

51. 42 U.S.C. § 7601(d)(2)(B) (2012); Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7254–58 (Feb. 12, 1998) (codified at 40 C.F.R. pts. 9, 35, 49, 50, 81). 18 U.S.C. § 1151 (2012) provides that:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means: (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.

a congressional delegation of authority to tribes.[52]

The TAS process mirrors the state process in that the relationship between EPA and tribes is similar to that between EPA and states implementing the CAA.[53] The requirements for TAS approval under the CAA, CWA, and Safe Drinking Water Act (SDWA) are very similar. Under the CAA process, a tribe must demonstrate that it is federally recognized,[54] and then the tribe must meet the eligibility criteria.[55] In order to meet the eligibility criteria, the tribe must demonstrate that it: (1) can carry out substantial governmental duties and powers;[56] (2) has authority over the territory within the exterior boundaries of the reservation and other areas of tribal jurisdiction;[57] and (3) would be capable of implementing CAA requirements and regulations.[58] In determining whether the tribe meets the second "authority" criterion, EPA will often apply the test developed by the United States Supreme Court in *Montana v. United States*.[59]

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52. *See* Ariz. Pub. Serv. Co. v. U.S. Envtl. Prot. Agency, 211 F.3d 1280, 1287–94 (D.C. Cir. 2000).

53. Steffani A. Cochran, *Treating Tribes as States Under the Federal Clean Air Act: Congressional Grant of Authority-Federal Preemption-Inherent Tribal Authority*, 26 N.M. L. REV. 323, 325 (1996).

54. 42 U.S.C. § 7602(r) (2012) ("[T]he EPA sets the national standards and requirements, and the States assume the responsibility for the implementation process. In order to implement a program, a state must first demonstrate that it has adequate legal authority and resources to meet the minimum federal requirements. If the state can demonstrate this, EPA delegates to the state the authority to implement and enforce the Act's provisions. However, EPA reserves the right to bring an enforcement action against suspected violators.").

55. *Id.* § 7601(d)(2).

56. This Section requires that a tribe demonstrate it "has a governing body carrying out substantial governmental duties and powers." *Id.* § 7601(d)(2)(A).

57. This Section requires that "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." *Id.* § 7601(d)(2)(B). EPA has interpreted the CAA TAS provisions to apply to any land validly set aside for a tribe, including land not necessarily part of a formal reservation. Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. 43,956, 43,960 (Aug. 25, 1994) (codified at 40 C.F.R. pts. 35, 49, 50, 81). This interpretation is based on the United States Supreme Court's decision in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). *Id.*

58. 42 U.S.C. § 7601(d)(2)(A)–(C) (2012). On this third eligibility requirement, "an EPA regional administrator must determine whether a tribe is capable of carrying out the functions to be exercised in a manner consistent with the terms and purpose of the Act." Cochran, *supra* note 53, at 333 (citing 42 U.S.C. § 7601(d)(2)(C) (2012)).

59. Monette, *supra* note 13, at 115–16 (citing Montana v. United States, 450

In *Montana v. United States*, the United States Supreme Court considered the extent of a tribe's inherent sovereignty over non-Indians.[60] Ultimately, because of the implicit divestiture of its inherent sovereignty,[61] the Court determined that the Crow Nation did not have authority to regulate hunting and fishing by non-Indians who owned fee land[62] within the boundaries of its reservation.[63] However, the Court acknowledged that, despite the implicit divestiture of tribal sovereignty over non-Indians on fee land within reservation boundaries, tribes may regulate the activities of such individuals under either of two exceptions.[64] First, tribes may regulate the activities of individuals who have entered into "consensual relationships with the tribe or its members."[65] 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."[66]

U.S. 544, 565–66 (1981)).

60. *Montana*, 450 U.S. at 563.

61. *Id.* at 565–66; *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." Kevin Gover & James B. Cooney, *Cooperation Between Tribes and States in Protecting the Environment*, 10 NAT. RES. & ENV'T 35, 35 (1996).

62. 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-members on a state highway within the tribe's reservation boundaries. 520 U.S. 438, 453 (1997). The *Strate* Court explained that "[a]s to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.*

63. *Montana*, 450 U.S. at 564 (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").

64. *Id.* at 565–66.

65. *Id.* at 565.

66. *Id.* at 566; *see also* Monette, *supra* note 13, at 117 (theorizing that the two "*Montana* exceptions," as they are commonly known, derive from other areas of American law: "The 'health, safety, and welfare' test is longhand for the 'police power' analysis applied to all levels of government in the American system, going back to Chief Justice John Marshall's Court in 1827. Likewise, the 'consensual relations' test finds its constitutional counterpart in a line of cases dating as far

With a broad understanding of what the TAS provisions require, it is helpful to also consider why they were enacted. In terms of the CWA, there is evidence suggesting that the CWA TAS provisions were enacted in response to the failure of states to adequately protect tribal water quality.[67] Following an amendment in 1987 providing EPA authority to grant tribes TAS authority, tribes immediately took advantage of the ability to be treated as states under the CWA.[68] The Isleta Pueblo was one of the first applicants for TAS status under the CWA, and EPA approved its application in 1992.[69]

Examining the Isleta Pueblo's experience is helpful, as it demonstrates the continuing legal viability of the CWA TAS provisions. Notably, the Isleta Pueblo is downstream from the City of Albuquerque,[70] which means that pollution entering the water from Albuquerque impacts the Pueblo unless treated or removed. Following its TAS approval, the Isleta Pueblo promulgated water quality standards that were more stringent than those adopted by Albuquerque, and EPA approved the more stringent standards.[71] Albuquerque challenged EPA's

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back as 1945, with *International Shoe Co. v. Washington* and the 'minimum contacts' test regarding state civil jurisdiction.").

67. *See* Monette, *supra* note 13, at 114 (explaining that tribes in New Mexico began actively lobbying Congress for TAS status after the State of New Mexico "exempted from its water quality regulations a stretch of the San Juan River which flowed through several mining and industrial areas, and then into Indian Country, particularly Acoma and Isleta Pueblos"); *see also* Hook, *supra* note 12, at 9 ("As a result of this and many other examples of states' alleged 'environmental unfairness' toward tribes while the states were acting pursuant to federal delegations of power, Congress amended the SDWA and the CWA to give the Environmental Protection Agency . . . the authority to treat tribes as states for certain programs.") (citations omitted).

68. *See Frequently Asked Questions: TAS Eligibility Process for the Clean Water Act Water Quality Standards and Certification Programs*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/tribal/pdf/tas-strategy-attach-e.pdf (last visited Sept. 21, 2014), *archived at* http://perma.cc/9DJD-4PL5. Following the 1987 amendment, some of the first tribes to acquire TAS status, in addition to the Isleta Pueblo, were the Pueblo of Sandia, Ohkay Owingeh, and Puyallup Tribe of Indians. For a list of the tribes with TAS status and the dates when they acquired the status, see *Indian Tribal Approvals*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/scitech/swguidance/standards/wqslibrary/approvtable.cfm (last visited Sept. 21, 2014), *archived at* http:// perma.cc/DB3B-QUYJ.

69. *See Indian Tribal Approvals*, *supra* note 68 (listing the Isleta Pueblo as the first tribe to obtain TAS approval under the WQS requirements).

70. *Isleta Village Proper, NM*, GOOGLE MAPS, https://www.google.com/maps/place/Isleta+Village+Proper,+NM/@34.9069345,-106.6931625,15z/data=!3m1!4b1!4m2!3m1!1s0x8722056ea615524b:0xe489aa0b68747f3a (last visited Mar. 5, 2015).

71. *See* City of Albuquerque v. Browner, 865 F. Supp. 733, 736 (D.N.M. 1993).

approval of the more stringent water quality standards in federal court, and this challenge eventually led to the United States Court of Appeals for the Tenth Circuit's decision in *City of Albuquerque v. Browner*.[72] Although Albuquerque raised seven issues on appeal, the court focused on Albuquerque's argument that the Isleta Pueblo could not enact water quality standards more stringent than the federal standards and, moreover, that those water quality standards could not be enforced beyond the Pueblo's reservation boundaries.[73] The court ultimately rejected Albuquerque's arguments, and found that EPA's interpretation of the CWA TAS provisions was reasonable under the *Chevron* doctrine.[74] Moreover, tribes with TAS status could adopt more stringent water quality standards because such actions were consistent with "powers inherent in Indian tribal sovereignty."[75]

Following the Tenth Circuit's decision in *City of Albuquerque v. Browner*, two other courts similarly upheld the ability of EPA to approve water quality standards adopted by tribes under their CWA TAS authority.[76] In *Montana v. EPA*, the state of Montana challenged EPA's approval of the Confederated Salish and Kootenai Tribes' authority to adopt water quality standards for the Flathead Reservation under CWA TAS provisions.[77] Montana also challenged the Tribes' ability to regulate several non-Indians and non-Indian businesses located on non-Indian land within the Flathead Reservation.[78] Ultimately, the United States Court of Appeals for the Ninth Circuit upheld EPA's approval of the Tribes' standards under the second *Montana* exception,[79] finding that the "activities of the non-members posed such serious and substantial threats to Tribal health and welfare that Tribal

72. City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996). Ultimately, the court resolved all seven issues raised against Albuquerque. *Id.* at 429.

73. *Id.* at 423.

74. *Id.* at 422; Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (explaining when courts should give agencies deference given the agencies' expertise in their regulatory field).

75. *Albuquerque*, 97 F.3d at 423.

76. Montana v. U.S. Envtl. Prot. Agency, 137 F.3d 1135, 1142 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998); Wisconsin v. U.S. Envtl. Prot. Agency, 266 F.3d 741, 750 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002).

77. *Montana v. U.S. Envtl. Prot. Agency*, 137 F.3d at 1139–40.

78. *Id.* at 1138.

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

regulation was essential."[80]

In *Wisconsin v. EPA*, the state of Wisconsin challenged EPA's grant of TAS status to the Mole Lake Band of Lake Superior Chippewa Indians to regulate water quality on the Mole Lake Reservation.[81] Wisconsin's argument differed somewhat from the previous cases challenging a grant of TAS status. Wisconsin argued that, under the Equal Footing Doctrine, it had superior title to submerged lands on the Reservation and therefore retained the authority to regulate water quality within the Reservation.[82] Despite the different legal challenge, the result was the same. The United States Court of Appeals for the Seventh Circuit upheld EPA's grant of TAS status as consistent with both the CWA and the second *Montana* exception.[83] Ultimately, the court concluded that "the Band ha[d] demonstrated that its water resources were essential to its survival,"[84] and, therefore, "it was reasonable for the EPA . . . to allow the [Band] to regulate water quality on the reservation, even though that power [included] some authority over off-reservation activities."[85]

Just as the TAS provisions of the CWA have withstood several legal challenges, courts have also upheld EPA's interpretations of the CAA TAS provisions. In *Arizona Public Service Co. v. EPA*, the United States Court of Appeals for the District of Columbia upheld EPA's interpretation that the CAA TAS provisions delegated authority to tribes over non-Indians and non-Indian lands.[86] The court determined that EPA's interpretation was consistent with congressional intent.[87] Moreover, the court held that tribal authority over non-Indian land was necessary to avoid "checkerboard" regulation and to be consistent with the purpose of the CAA.[88]

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80. *Montana v. U.S. Envtl. Prot. Agency*, 137 F.3d. at 1141.
81. *Wisconsin*, 266 F.3d at 745.
82. *Id.* at 746.
83. *Id.* at 750; *Montana*, 450 U.S. at 566.
84. *Wisconsin*, 266 F.3d at 750.
85. *Id.*
86. Ariz. Pub. Serv. Co. v. U.S. Envtl. Prot. Agency, 211 F.3d 1280, 1284 (D.C. Cir. 2000).
87. *Id.* at 1288.
88. *Id.*

2. Tribal Perspectives on TAS Provisions

Having established that courts regularly uphold standards adopted by tribes under their TAS authority, it is helpful to also consider the tribal perspective of the TAS provisions. At least one tribe, the Navajo Nation, has determined that taking advantage of the TAS provisions helps to promote tribal sovereignty.[89]

> From the outset NNEPA [Navajo Nation Environmental Protection Agency] developed a long-range plan committing itself to obtaining TAS and primacy for as many environmental programs as possible. NNEPA made this commitment for two main reasons: a belief that the TAS provisions in the federal environmental laws created a unique opportunity to assert tribal sovereignty, and a view that EPA implementation of federal environmental laws in Navajo Indian country was not providing the desired degree of environmental protection.[90]

Ultimately, once it obtained TAS status, the Navajo Nation viewed itself as exercising its sovereignty by enacting tribal environmental laws "which need not be identical to the federal laws as long as they are at least as stringent as the federal."[91] Furthermore, except for criminal enforcement, which lies solely with EPA, the Navajo Nation also exercises its sovereignty through enforcement of program requirements under tribal law.[92] Based on the Navajo Nation's experience with TAS status, it is clear that tribes maintain an active role in the implementation of environmental laws promulgated as a result of TAS status, and are not merely passive recipients of federal environmental law.[93] Professor Alex Tallchief Skibine also concluded that TAS status may benefit tribes, as it "allows Indian tribes to extend the reach of their sovereignty beyond

89. *See, e.g.*, Jill Elise Grant, *The Navajo Nation EPA's Experience with "Treatment as a State" and Primacy*, 21 NAT. RESOURCES & ENV'T 9, 9 (2007).

90. *Id.*

91. *Id.* at 10.

92. *See id.*

93. *See id.* at 14 (explaining that after TAS status is obtained the tribe must promulgate substantive and procedural laws, ensure adequate funding and information to support the new programs, and also ensure that it has adequate staff in place to support the new environmental programs).

the reservation borders."[94]

Federally delegated authority, such as the TAS provisions, is intimately related to tribal sovereignty.[95] While the TAS provisions appear to delegate federal authority, they also recognize the inherent sovereignty and regulatory authority held by tribes. It is this inherent authority that empowers tribes to regulate their environments.[96] "If a tribe plans to regulate the activities of nonmembers on non-Indian fee lands, even if it does not meet the test of *Montana v. United States*, it may still obtain the authority through congressional delegation."[97] EPA has recognized this inherent authority.[98] While interpreting the CAA, EPA acknowledged that "tribes generally maintain inherent sovereign authority over air resources within the exterior boundaries of the tribe's reservation."[99] Ultimately, EPA concluded that the "high mobility of air pollutants, resulting area-wide effects, and the seriousness of such impacts would all tend to support Tribal inherent authority" over the air.[100]

Similarly, in *City of Albuquerque v. Browner*, the Tenth Circuit acknowledged that the TAS provisions recognize the existence of inherent tribal sovereignty: "Congress's authorization for the EPA to treat Indian tribes as states *preserves* the right of tribes to govern their water resources

94. Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1022 (2008).

95. *See* Hook, *supra* note 12, at 10 ("Where an Indian Tribe's regulatory action is territorial (that is to say, it affects only conditions within the exterior boundaries of its reservation), the delegation of power contained in a federal environmental or natural resources development statute should be sufficient to support the action. Where, however, the Tribe's action has extra-territorial implications (that is to say, it affects conditions beyond the exterior boundaries of its reservation), the federal delegation of power may not be sufficient. In such a case, the Tribe's action may also require the support of an inherent unabrogated governmental power.") (citation omitted); *see also generally* Cochran, *supra* note 53 (discussing the connection between tribal sovereignty and federal delegations under federal environmental laws).

96. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 6, § 10.01.

97. Cochran, *supra* note 53, at 334.

98. *See* Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. 43,956, 43,958 (Aug. 25, 1994) (codified at 40 C.F.R. pts. 35, 49, 50, 81) ("This grant of authority by Congress would enable such Tribes to address conduct on all lands, including non-Indian owned fee lands, within the exterior boundaries of a reservation.").

99. Cochran, *supra* note 53, at 334 (citing Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. at 43,958).

100. *Id.* at 336.

within the comprehensive statutory framework of the Clean Water Act."[101] Moreover, the court explained that "the EPA's construction of the 1987 amendment to the Clean Water Act—that tribes may establish water quality standards that are more stringent than those imposed by the federal government—is permissible because it is in accord with powers inherent in Indian tribal sovereignty."[102] Finally, at least one scholar has concluded that "[i]n almost every instance where a statute has more or less explicitly treated 'Tribes as States,' either the statute or an attendant Supreme Court opinion clarified that the tribe itself, and not the statute, provided the source of the tribe's sovereignty."[103]

Accordingly, one of the advantages for tribes regulating under TAS provisions is that the federal law would pre-empt any state regulatory assertions, especially in light of the fact that the state would likely be unable to demonstrate sufficient interests to justify regulation.[104]

> Nothing in the language of the CAA purports to diminish tribal regulatory authority over environmental matters. In fact, the language specifically affirms inherent tribal authority over "air resources within the exterior boundaries of the reservation." An argument could be made that the 1990 CAA Amendments recognizing inherent tribal authority over air quality regulations is a congressional affirmation of a tribe's existing inherent regulatory authority . . . .[105]

Another advantage to tribes of utilizing TAS provisions is that this method of environmental regulation reduces potential controversy surrounding tribal regulation of non-Indians living within Indian country. For a variety of historical reasons, a significant percentage of non-Indians live within Indian

101. City of Albuquerque v. Browner, 97 F.3d 415, 418–19 (10th Cir. 1996) (emphasis added).

102. *Id.* at 423.

103. Monette, *supra* note 13, at 130 (citing, for example, Indian Reorganization Act, 25 U.S.C. § 461 (2012); Indian Child Welfare Act, 25 U.S.C. §§ 1901–1922 (2012); Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (2012)).

104. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) (holding that a state regulatory interest may be preempted where there is a stronger federal and tribal interest).

105. Cochran, *supra* note 53, at 344.

country today.[106] As a result of this non-Indian presence, there is concern, both on the part of non-Indians living within Indian country and those external to tribal communities, that tribes may not treat non-Indians fairly. This concern causes pushback against tribal regulation of non-Indians.[107] Delegations of authority from Congress to tribes, whether containing explicit recognition of inherent tribal sovereignty or not, therefore decrease potential conflicts arising from the presence of non-Indians because "this congressional delegation confers regulatory authority over a designated area regardless of whether the tribe's inherent authority would allow such regulation."[108]

B. Tribes Currently Possessing TAS Status

Having established what TAS status is, how it is acquired, and why tribes may be availing themselves of it, this section will examine the number of federally recognized tribes with TAS status under the federal CAA,[109] CWA,[110] SDWA,[111] Toxic

106. In many instances, the substantial presence of non-Indians in Indian country may be traced back to the Dawes Severalty Act, or the General Allotment Act of 1887, which opened up Indian country to non-Indians. *See* Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–334, 339, 341–342, 348–349, 354, 381 (2012)). The Act divided up Indian country, as it then existed in 1887, by giving parcels to individual Indians. *See id.* Any land not given to individual Indians, i.e., surplus land, was then opened up to non-Indians. *See id.* The federal government was to hold the title to the land in trust for individual Indians for at least twenty-five years, but several statutes shortened these restrictions. *See, e.g.*, The Burke Act, Pub. L. No. 59-149, 34 Stat. 182 (1906) (codified as amended at 25 U.S.C. § 349 (2012)). Accordingly, in addition to obtaining surplus land following the initial allotment of Indian country, non-Indians were later able to acquire Indian land by purchasing the land from an Indian, purchasing the land following foreclosure on the land, or through inheritance. *See id.*

107. *See* Hook, *supra* note 12, at 9 ("In these situations, the most frequently expressed concern is that tribes may not offer a non-member the due process of law to which he is entitled."). Another potential concern from the tribal perspective is that incorporation of the federal environmental laws decreases tribal sovereignty, as tribes are not enacting environmental laws solely on the basis of their inherent sovereignty. Also, tribes may be incorporating foreign law into their tribal laws without fully considering the potential impact of the foreign law. *See, e.g.*, Wenona Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL'Y 357 (2006).

108. Grant, *supra* note 89, at 13.

109. Clean Air Act, 42 U.S.C. §§ 7401–7626 (2012).

110. Clean Water Act, 33 U.S.C. §§ 1251–1387 (2012).

111. Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j (2012).

Substances Control Act (TSCA), [112] and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[113] Specifically, this section will first explain how TAS status is conferred upon tribes, and why it benefits both tribes and the federal government. Then, this section will provide a brief overview of what status under the various TAS provisions tribes have been granted, demonstrating that the majority of tribes have not taken advantage of this status. Finally, this section will briefly consider possible reasons why the majority of tribes have not taken advantage of the TAS status.

Under the CAA, for example, twenty-eight federally recognized tribes, or approximately five percent of the 566 federally recognized tribes,[114] have TAS approval for at least one provision of the Act.[115] Of these twenty-eight tribes, four tribes have TAS approval under section 110;[116] five tribes have TAS approval under section 126;[117] twenty-five tribes have TAS approval under section 505(a)(2);[118] and two tribes have general Title V permitting authority.[119] In addition, three federally recognized tribes have CAA TAS applications pending as of January 2014.[120]

In comparison, forty-eight tribes, or approximately eight percent of federally recognized tribes, have TAS approval under section 303 of the CWA.[121] CWA section 303 addresses the creation and implementation of water quality standards.[122]

112. Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692 (2012).

113. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (2012).

114. As of May 2013, there are 566 federally recognized tribes. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 78 Fed. Reg. 26,384–389 (May 6, 2013). Accordingly, the Author obtained percentages by dividing the number of tribes with the requisite status by 566, the number of federally recognized tribes.

115. Tribes are not eligible to be treated as states for all provisions of the CAA. *See* 40 C.F.R. § 49.4 (2014). Tribes with TAS approval for at least one provision are listed *infra* in Appendix 1.A. Although only a relatively small percentage of tribes have applied for TAS status, the interest in developing tribal air quality programs may be more expansive. Jana B. Milford, *Tribal Authority Under the Clean Air Act: How Is It Working?*, 44 NAT. RESOURCES J. 213, 213–214 (2004) (citing a telephone interview with C. Darrel Harmon, Senior Indian Program Manager, EPA (Feb. 19, 2003)).

116. *Infra* Appendix 1.B.

117. *Infra* Appendix 1.C.

118. *Infra* Appendix 1.D.

119. *Infra* Appendix 1.E.

120. *Infra* Appendix 1.F.

121. *Infra* Appendix 1.G.

122. 33 U.S.C. § 1313 (2012).

In addition to those tribes which have already obtained TAS approval under section 303 of the CWA, twelve tribes have TAS applications awaiting approval as of January 2014.[123]

Although the CAA and CWA are the focus of this Article, as explained below, it is also interesting to note that federally recognized tribes have obtained TAS approval under other major federal environmental statutes, including the SDWA,[124] TSCA,[125] and FIFRA.[126] Under the SDWA, "[t]he Assiniboine and Sioux Tribes have TAS approval from the Underground Injection Control program. The Navajo Nation has TAS approval under the Underground Injection Control program and the Public Water System Supervision program."[127]

In terms of the regulation of toxic substances, three federally recognized tribes—Cherokee Nation, Lower Sioux Indian Community, and the Upper Sioux Community—have TAS approval for lead-based paint compliance and enforcement under TSCA.[128] Although "the Federal Insecticide, Fungicide, and Rodenticide Act does not include a general TAS authority similar to some of the other environmental statutes, the statute does authorize approval of tribal programs for the certification and training of applicators of restricted use pesticides."[129] There are four tribes with approved certification and training programs under FIFRA.[130]

As demonstrated by the low percentage of tribes that have secured TAS status for each federal environmental statute, the majority of the 566 federally recognized tribes are not taking advantage of the opportunity to be treated as states. There may be many reasons tribes are not or cannot take advantage of TAS status. For example, related to the federal TAS provisions, EPA has stressed the need for tribes to develop a regulatory authority when acting under TAS status,[131] and many tribes

123. *Infra* Appendix 1.H.

124. Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j (2012).

125. Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692 (2012).

126. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (2012).

127. Letter from JoAnn K. Chase, Dir. Am. Indian Envtl. Office, U.S. Envtl. Prot. Agency, to author (Jan. 24, 2014) (on file with author).

128. *Id.*

129. *Id.*

130. *Infra* Appendix 1.I.

131. *See* Safe Drinking Water Act–National Drinking Water Regulations, Underground Injection Control Regulations; Indian Lands, 53 Fed. Reg. 37,396, 37,400–01 (Sept. 26, 1988) (codified at 40 C.F.R. pts. 35, 124, 141–146); Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of

may not be in a position to develop such an authority or agency. Further, tribes wanting to avoid jurisdictional conflicts with states or the federal government may avoid promulgating their own environmental regulations.[132] Alternatively, some smaller tribes may not have a large enough territory to warrant expansive environmental regulation.[133] Moreover, this trend could be related to the fact that, overall, a majority of tribes previously surveyed seem to not be enacting tribal environmental laws.[134] Although any statement as to why this may be happening would be speculative, some tribes may not be developing their tribal environmental laws due to a lack of adequate financial and human resources.[135]

Though some tribes are not taking advantage of their ability to enact tribal environmental codes, the tribes that are experimenting with their own environmental codes provide diverse and innovative solutions to modern environmental problems. A closer look at these existing laws reveals patterns of tribal adoption and adaption of environmental laws, allowing for consideration of where tribes may be innovating and moving beyond the federal framework. However, before these areas of innovation can be explored, it is helpful to first understand how tribes may be incorporating federal environmental law into their tribal codes.

II. TRIBAL ADAPTATION OF FEDERAL ENVIRONMENTAL LAW

With the legal context of the TAS provisions of many federal environmental statutes in mind, the Article now turns to explore tribal code provisions adopted and adapted by tribes

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the Clean Water Act (CWA), 58 Fed. Reg. 67,966, 67,971–72 (Dec. 22, 1993) (codified at 40 C.F.R. pts. 122–124, 501).

132. *See generally* Milford, *supra* note 115, at 217.

133. *See Frequently Asked Questions*, *supra* note 4 (explaining that many smaller reservations are less than 1,000 acres, and the smallest is 1.32 acres).

134. *See* Kronk Warner, *supra* note 38 (concluding that 51 percent of seventy-four federally recognized tribes located in four states did not have any tribal environmental laws related to the regulation of pollution or environmental quality). Admittedly, this study was limited to seventy-four of the 566 federally recognized tribes. *Id.* However, the study does provide some evidence of what may be a trend within Indian country. *See id.*

135. *See generally* John Koppisch, *Why Are Indian Reservations So Poor? A Look at the Bottom 1%*, FORBES (Dec. 13, 2011, 7:32 PM), http://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1, *archived at* http://perma.cc/Z7YY-6WSE (examining the reasons for poverty in Indian country).

as a result of their TAS status. Accordingly, this section examines specific code provisions of several federally recognized tribes located throughout the United States.

Specifically, this Article examines the tribal codes of seventy-four federally recognized tribes[136] located within the borders of four states: Arizona,[137] Montana,[138] New York,[139] and Oklahoma.[140] The tribes in the survey were selected because of their geographical diversity and together they represent approximately 29 percent of the entire population of American Indians and Alaska Natives nationally.[141] Moreover, the survey included the two largest federally recognized tribes by population, the Navajo Nation and the Cherokee Nation.[142] Section A first explores tribal environmental law developed under the CAA. Section B then turns to tribal provisions adopted under section 303 of the CWA.[143] By examining tribal environmental code provisions enacted under TAS status, this Part demonstrates where tribal environmental laws map onto their federal counterparts and also where differences and innovations exist.

136. *See generally* Kronk Warner, *supra* note 38. For the sake of continuity, this Article examines the tribal code provisions of the same seventy-four federally recognized tribes considered in the author's previous article. In examining the environmental laws of the same seventy-four federally recognized tribes in successive articles, the goal is to eventually arrive at justified normative recommendations regarding the development of tribal environmental law.

137. *Infra* Appendix 2.A.

138. *Infra* Appendix 2.B.

139. *Infra* Appendix 2.C.

140. *Infra* Appendix 2.D.

141. *See* Kronk Warner, *supra* note 38 (discussing the population density of American Indian tribes). Notably, the population of American Indians and Alaska Natives is broader than the number of Indians who will be impacted by the regulations discussed in this Article. This is because these population statistics include American Indians and Alaska Natives who live anywhere within the state and not necessarily on a reservation.

142. *See Ten Largest American Indian Tribes*, INFOPLEASE, http://www.infoplease.com/ipa/A0767349.html (last visited Nov. 8, 2014), *archived at* http://perma.cc/K8JH-R39J (compiling 2010 U.S. Census data). The survey in this article also includes several of the tribal nations listed as among the top ten largest American Indian tribes. These tribes include the Chippewa, Choctaw, Apache, Iroquois, Creek, and Blackfeet. *Id.*

143. In 1987, Congress amended the CWA to authorize EPA to "treat an Indian tribe as a State . . . to the degree necessary to carry out the objectives of" the Act. 33 U.S.C. § 1377 (2012).

A. Tribal Environmental Law Promulgated Under the CAA TAS Provisions

In 1990, Congress amended the CAA allowing EPA to "treat Indian tribes as states" for purposes of developing and enforcing air quality regulations within their boundaries.[144] Section 7601(d) of the CAA gives EPA this discretion, assuming the tribe in question meets certain requirements.[145] This section of the CAA also requires EPA to promulgate regulations allowing tribes "to assume responsibility for the development and implementation of CAA programs on lands within the exterior boundaries of their reservations or other areas within their jurisdiction."[146] In 1998, EPA promulgated regulations to implement the TAS provisions of the CAA.[147] As previously mentioned, EPA took the position that the CAA TAS provisions allow tribes to regulate all sources of air pollution "within the exterior boundaries of the[ir] reservation[;]"[148] however, if a tribe wishes to regulate CAA programs outside of the reservation, it must demonstrate the jurisdictional authority to do so.[149]

Six tribes—located in Arizona, Montana, New York, and Oklahoma—have obtained TAS approval for at least one provision of the CAA.[150] These tribes are the Cherokee Nation, Gila River Indian Community, Kaw Nation, Navajo Nation, St. Regis Mohawk Tribe, and Salt-River Pima-Maricopa Indian Community.[151] It appears that tribes enacting tribal code provisions under CAA TAS authority are not departing from the federal laws in any notable manner. Accordingly, this is likely not an area of innovative tribal environmental law.

Because the environmental code provisions of the Navajo Nation have previously been examined at great length in a

144. 42 U.S.C. § 7601(d) (2012).

145. *Id.*

146. Indian Tribes: Air Quality Planning and Management, 59 Fed. Reg. 43,956, 43,958 (Aug. 25, 1994) (codified at 40 C.F.R. pts. 35, 49, 50, 81).

147. Indian Tribes: Air Quality Planning and Management, 63 Fed. Reg. 7254, 7254–58 (Feb. 12, 1998) (codified at 40 C.F.R. pts. 9, 35, 49, 50, 81).

148. *Id.* at 7258. EPA includes Pueblos and trust lands set aside for tribes within its definition of "reservation." *Id.*

149. *Id.* at 7259. Notably, the CAA TAS provisions exempt tribes from the citizen suit provisions of the CAA. 40 C.F.R. § 49.4(o) (2014).

150. Letter from JoAnn K. Chase, *supra* note 127.

151. *Id.*

separate article,[152] the Navajo CAA-related code provisions will not be re-examined here. The remaining five tribes, the Cherokee Nation,[153] Gila River Indian Community, Kaw Nation,[154] St. Regis Mohawk Tribe and the Salt-River Pima-Maricopa Indian Community all have TAS approval for section 505(a)(2) of the CAA.[155] Section 505(a)(2) provides:

> The permitting authority shall notify all States –
>
> Whose air quality may be affected and that are contiguous to the State in which the emission originates, or
>
> that are within 50 miles of the source, of each permit application or proposed permit forwarded to the Administrator under this section, and shall provide an opportunity for such States to submit written recommendations respecting the issuance of the permit and its terms and conditions. If any part of those recommendations are not accepted by the permitting authority, such authority shall notify the State submitting the recommendations and the Administrator in writing of its failure to accept those recommendations.[156]

By acquiring TAS status under CAA section 505(a)(2), these tribes now have the authority to review permits issued in the surrounding region.[157] In other words, these tribes can comment on permits being considered by local states and EPA before the permits are issued.

As an example of how tribes have codified their TAS approval under section 505(a)(2), the St. Regis Mohawk Tribe incorporates this status into its Tribal Implementation Plan.[158]

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152. *See* Kronk Warner, *supra* note 38.

153. The Cherokee Nation obtained approval for TAS status under section 505(a)(2) on April 18, 2009. *Clean Air Act Treatment in a Manner Similar to States Requests*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/earth1r6/6pd/air/pd-s/tribal.htm (last visited Feb. 7, 2014), *archived at* http://perma.cc/PWE5-LX4B.

154. The Kaw Nation obtained approval for TAS status under section 505(a)(2) on June 13, 2013. *Id.*

155. Letter from JoAnn K. Chase, *supra* note 127.

156. 42 U.S.C. § 7661d(a)(2) (2012).

157. *See id.*

158. ST. REGIS MOHAWK TRIBE, ENV'T DIV., TRIBAL IMPLEMENTATION PLAN (2004), *available at* http://www.srmtenv.org/pdf_files/airtip.pdf, *archived at*

At section 19, the Tribe explains that it "will be afforded the opportunity to submit written recommendations in respecting the issuance of the permit and its terms and conditions," which is consistent with the federal CAA provision.[159]

Like the St. Regis Mohawk Tribe, the Gila River Indian Community has for the most part implemented the federal standards without significant modifications. In addition to possessing TAS status under section 505(a)(2), the Gila River Indian Community also possesses TAS status under CAA section 110 and Title V.[160] CAA section 110 allows a state or tribe with TAS status to develop an implementation plan for national primary and secondary ambient air quality standards.[161] The Gila River Indian Community codified its TAS authority under section 110 in its Air Quality Management Program.[162] Rather than modify existing national standards, the Tribe adopted the National Ambient Air Quality Standards as the applicable standards for its community.[163] Accordingly, the Tribe's air quality standards adopted under its CAA section 110 TAS status closely mirror those of the federal government. CAA Title V, on the other hand, allows a state or tribe with TAS status to implement a permitting program.[164] Although the Tribe has obtained TAS status under Title V, it appears that the Tribe is still in the process of developing and implementing its permitting program.[165]

Two trends seem to emerge from the foregoing discussion. First, relatively few federally recognized tribes appear to be taking advantage of the CAA TAS provisions, as only six of the seventy-four surveyed tribes, or approximately eight percent, have TAS status under at least one provision of the Act. Second, the tribes that have codified environmental laws as a result of this status do not appear to be departing in any

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http://perma.cc/6RUF-TTWZ.

159. *Id.* at 36.

160. Letter from JoAnn K. Chase, *supra* note 127.

161. 42 U.S.C. § 7410 (2012).

162. Gila River Indian Community Air Quality Management Program, GILA RIVER INDIAN CODE tit. 17, ch. 9 (Aug 20, 2008), *available at* http://www.epa.gov/region9/air/actions/pdf/gila/gric-part1-general-provisions.pdf, *archived at* http://perma.cc/2DGZ-EBE7.

163. *Id.* at 10.

164. 42 U.S.C. §§ 7661–7661f (2012).

165. *See Air Actions, Gila River Indian Community*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/region9/air/actions/gila-river.html (last visited Feb. 7, 2014), *archived at* http://perma.cc/BDQ7-6MPL.

significant respect from the federal laws. Accordingly, the regulation of air pollution may be an area where tribes have yet to demonstrate their capacity for innovation and creativity in the development of tribal environmental law.

B. Tribal Environmental Law Promulgated Under the CWA TAS Provisions

In comparison to the CAA, where tribal innovation appears minimal, tribes seem to be demonstrating greater interest in adapting CWA provisions to their specific needs. Under the CWA, tribes may apply for TAS authority to regulate under several provisions of the Act.[166] Except for one tribe which has adopted the federal water quality standards, all of the tribes which have promulgated water quality standards have developed their own standards modeled on the federal requirements.[167] For this reason, there is substantial similarity between the tribal and federal water quality standards, as the tribes are required to meet the federal minimums,[168] but there are occasional differences. These differences present tribal environmental innovations, demonstrating the value of tribes as laboratories of environmental innovation. This section highlights those differences, where they exist.

To date, all tribes which have obtained TAS status under the CWA are authorized to promulgate water quality standards under section 303 of the Act.[169] Tribal focus on section 303, which authorizes the promulgation of water quality standards, can be better understood in light of EPA's policy, which,

> presumes that, in general, Tribes are likely to possess the authority to regulate activities affecting water quality on the reservation . . . [but it] does not believe . . . that it would be appropriate to recognize Tribal authority and approve [TAS] requests [without] verifying documentation . . . [and] an affirmative demonstration of their regulatory

166. *See* 33 U.S.C. § 1377(e) (2012) (citing provisions under which tribes may apply for TAS authority).

167. *See* 33 U.S.C. § 1313 (2012); *Indian Tribal Approvals*, *supra* note 68.

168. City of Albuquerque v. Browner, 97 F.3d 415, 422 (10th Cir. 1996).

169. 33 U.S.C. § 1313 (2012); *see Indian Tribal Approvals*, *supra* note 68.

authority.[170]

Accordingly, TAS status under section 303 of the CWA may be more attractive to tribes as the authority to regulate water quality falls squarely within their inherent authority, which, in turn, reduces the likelihood of jurisdictional conflict.[171] Ultimately, EPA concluded that "water management is absolutely crucial to the survival of many Indian reservations and that a 'checkerboard' system of regulation . . . 'would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing [the] standards.'"[172] Moreover, EPA seems to suggest that regulation of water quality through enactment of water quality standards would meet the requirements of the second *Montana* exception,[173] allowing for the regulation of non-Indians on non-Indian land within the reservation, because "water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government."[174]

CWA section 303 provides a baseline for the promulgation of new water quality standards, explaining that such standards must

> consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and also taking into

170. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,881 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131).

171. *See* Marren Sanders, *Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State*, 36 WM. MITCHELL L. REV. 533, 543 (2010).

172. *See id.* (quoting Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations).

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

174. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,879 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131).

consideration their use and value for navigation.[175]

Because EPA issues permits under section 402 of the Act in Indian country,[176] tribes can send their water quality standards to EPA for inclusion into the section 402 permits issued by EPA.[177] Accordingly, even though no tribe currently possesses permitting authority under section 402 of the CWA, tribes can certainly impact the type of permits issued within their territories through promulgation of water quality standards under section 303 of the CWA.

To better understand this impact, the section now explores

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175. 33 U.S.C. § 1313(c)(2)(A) (2012).

176. EPA is generally responsible for issuing National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the CWA in Indian country, because Indian country does not fall within the territory of states. "State primacy over Indian lands requires congressional authorization, but nothing in the environmental statute provides a grant of jurisdiction to the states." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 6, § 10.02[1] (citing RUCKELSHAUS, *supra* note 37; Wash. Dep't of Ecology v. U.S. Envtl. Prot. Agency, 752 F.2d 1465, 1470–73 (9th Cir. 1985)). Notably, the Confederated Salish and Kootenai Tribes possess authority under section 401 of the CWA to certify that any applicant for a federal permit has met the tribal water quality standards. CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, NATURAL RES. DEP'T ENVTL. PROT. DIV., SURFACE WATER QUALITY STANDARDS AND ANTIDEGRADATION POLICY 51 (Apr. 11, 2006), *available at* http://www.cskt.org/tr/docs/epa_wqs-antidegradationpolicy.pdf, *archived at* http://perma.cc/TB48-8QWY.

177. *See, e.g.*, HOPI TRIBE, HOPI WATER QUALITY STANDARDS (Nov. 2010), *available at* http://water.epa.gov/scitech/swguidance/standards/wqslibrary/upload/hopitribe.pdf, *archived at* http://perma.cc/Q65A-XDMZ; HUALAPAI TRIBE, WATER QUALITY STANDARDS 18 (July 7, 2009), *available at* http://water.epa.gov/scitech/swguidance/standards/upload/hualapai.pdf, *archived at* http://perma.cc/MHV7-FYPS ("Unless and until the Hualapai Tribe asserts primary responsibility for NPDES permitting, the EPA shall work together with the Tribe to develop, issue and enforce permits for dischargers within Hualapai tribal lands in accordance with standards set forth in this Ordinance."); WHITE MOUNTAIN APACHE TRIBE OF THE FORT APACHE INDIAN RESERVATION, WATER QUALITY PROTECTION ORDINANCE 8, *available at* http://water.epa.gov/scitech/swguidance/standards/upload/2008_11_04_standards_wqslibrary_tribes_white_mountain_9_wqs.pdf (last visited Feb. 4, 2014), *archived at* http://perma.cc/W9WE-DC59 ("Unless and until the White Mountain Apache Tribe asserts primary responsibility for NPDES permitting, the EPA shall work together with the Tribe to develop, issue and enforce permits for dischargers within the Reservation in accordance with the standards set forth in this Ordinance."); FORT PECK ASSINIBOINE & SIOUX TRIBES, WATER QUALITY STANDARDS 20, *available at* http://water.epa.gov/scitech/swguidance/standards/upload/2008_11_04_standards_wqslibrary_tribes_fort_peck_8_wqs.pdf (last visited Feb. 4, 2014), *archived at* http://perma.cc/N3MQ-WX6C ("Until such time as the Tribes receive eligibility to implement Section 402 of the Clean Water Act, discharge permits will be issued by the EPA to comply with the Tribes' water quality standards.").

some specific examples of tribes exceeding the baseline set by section 303. Again focusing on the federally recognized tribes within Arizona, Montana, New York and Oklahoma,[178] there are eleven federally recognized tribes with TAS approval under section 303 of the Act.[179] These tribes are: Assiniboine and Sioux Tribes, Blackfeet Tribe, Confederated Salish and Kootenai Tribes, Havasupai Tribe, Hopi Tribe, Hualapai Indian Tribe, Navajo Nation, Northern Cheyenne Tribe, Pawnee Nation, St. Regis Mohawk Tribe, and White Mountain Apache Tribe.[180] The laws of the Pawnee Nation, Havasupai Tribe, and Blackfeet Tribe, however, are not examined here because, although these tribes obtained TAS approval under section 303, they have yet to adopt water quality standards.[181] Furthermore, because the environmental code provisions of the Navajo Nation have previously been examined at great length,[182] the Navajo environmental code provisions are also excluded from this discussion. It is worth, however, taking a closer look at the environmental code provisions adopted by three tribes in Arizona: the Hopi Tribe, Hualapai Indian Tribe and White Mountain Apache Tribe; three tribes in Montana: the Assiniboine and Sioux Tribes, Confederated Salish and Kootenai Tribes, and Northern Cheyenne Tribe; and one tribe in New York: the St. Regis Mohawk Tribe. Each of these is considered below, highlighting instances in which each tribe has adapted federal environmental law to better reflect tribal cultural and environmental values. Each of the tribes highlighted herein have adopted standards that exceed those adopted by the federal government. In this way, they are each functioning as a laboratory that will allow for study of the varying impact that different regulations can cause. The implications of these differences are explained more fully below.

178. *See* Kronk Warner, *supra* note 38.

179. *Indian Tribal Approvals*, *supra* note 68.

180. *Id.* As of May 2013, three tribes located within the original surveyed area—Ak Chin Indian Community, Gila River Indian Community, and the Salt River Pima-Maricopa Indian Community—have submitted applications for TAS status under section 303 of the CWA. Letter from JoAnn K. Chase, *supra* note 127.

181. *Id.*

182. *See* Kronk Warner, *supra* note 38.

1. Tribes Located Within Arizona

a. Hopi Water Quality Standards

The Hopi Tribe's Water Quality Standards include an Antidegradation Policy and Implementation Plan, Water Body Uses and Standards Specific to the Uses, and Designated Uses for Water Bodies of the Hopi Reservation.[183] In developing the applicable water standards, the Hopi Tribe stated that:

> The Standards are consistent with Section 101(a)(2) of the Clean Water Act (33 U.S.C. Section 1251(a)(2)), which declares that "it is the national goal that, wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 . . . ." In addition to these uses, primary contact ceremonial use, domestic water source, groundwater recharge, and agricultural and livestock water supply use are other uses of the Hopi waters.[184]

Given that the Hopi utilize a broader definition of uses, which includes ceremonial use, the Tribe's water quality standards exceed the scope of the federal standards.

The Hopi's water quality standards include regulations related to stream bottom deposits, floating solids, color, odor and taste, nuisance conditions, pathogens, turbidity, mixing zones, radioactive materials, temperature, salinity/mineral quality, pH, dissolved oxygen, fecal coliform and E. coli bacteria, and toxic substances.[185] Within the Specific Water Quality Uses and Standards, the Tribe includes uses for Aquatic and Wildlife, Primary Contact Ceremonial,[186] Full Body Contact, Partial Body Contact, Agricultural Irrigation, Fish Consumption, Groundwater Recharge, and Domestic

183. HOPI TRIBE, *supra* note 177.

184. *Id.* at 1–2.

185. *Id.* at 9–11.

186. "Primary Contact Ceremonial" is defined as "the use of a spring, stream reach, lake, or other water body for religious or traditional purposes by members of the Hopi Tribe; such use involves immersion and intentional or incidental ingestion of water, and it requires protection of sensitive and valuable aquatic life and riparian habitat." *Id.* at 13.

Water Source.[187] The Hopi's Water Quality Standards then designate uses for each surface water found within the Tribe's territory.[188] The Hopi Water Quality Standards also allow for a determination that a body of water is a "unique" water because of the water's "exceptional recreational, traditional, or ecological significance."[189] The Hopi Water Quality Standards conclude with numeric criteria.[190]

The Hopi's Water Quality Standards mirror the standards suggested and utilized by the federal government by incorporating designated uses and quantitative criteria. However, the Hopi Standards are also broader than the federal standards in that they consider additional designated uses for water, such as "primary contact ceremonial," domestic water source, groundwater recharge, and agricultural and livestock water supply.[191] Additionally, under the Hopi Standards, a water may be designated a "unique water" by virtue of its traditional uses.[192]

b. Hualapai Water Quality Standards

The Hualapai Tribe's Water Quality Standards include an anti-degradation policy, classification of tribal waters, narrative water quality standards, numeric water quality standards, implementation and enforcement procedures, and procedures for public review and amendment.[193] Section 102 spells out the purposes of the Water Quality Standards, which include "[t]o promote the social welfare and economic well-being of the Hualapai Tribe" and "[t]o protect the health and welfare of the Hualapai people."[194] This language is reminiscent of the second *Montana* exception, where the Supreme Court indicated that a tribe possesses the "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct

187. *Id.* at 13–14.
188. *Id.* at 15.
189. *Id.* at 19.
190. *Id.* at tbls. A-1, A-2.
191. *Id.* at 1–2.
192. *Id.* at 19.
193. Water Resources and Wetlands, HUALAPAI ENVIRONMENTAL REVIEW CODE (July 7, 2009), *available at* http://water.epa.gov/scitech/swguidance/standards/upload/hualapai.pdf, *archived at* http://perma.cc/4DXG-ZSEQ.
194. *Id.* at 1.

threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[195] Also, the Tribe states that the Water Quality Standards apply to "all persons residing or doing business on Hualapai tribal lands, and to all property located within Hualapai tribal lands."[196] It is therefore apparent that the Tribe intends to regulate both Indians and non-Indians under the Standards.

The Tribe precludes any degradation of Outstanding Tribal Resource Waters, which include "waters associated with Traditional Cultural Places."[197] In addition to providing narrative criteria for designated uses, the Tribe also provides numeric water quality standards addressing maximum bacteria levels, acceptable pH ranges, maximum turbidity levels, total residual chlorine, dissolved oxygen, salinity standards for the Colorado River, and toxicity.[198]

In sum, the Tribe's Water Quality Standards mirror federal standards in their inclusion of an anti-degradation policy, narrative and numeric criteria, and designated uses. However, two elements of the Tribe's Standards show the benefit of tribes as laboratories. First, as indicated by the language identified above, the Tribe clearly intends for its Water Quality Standards to apply to Indians and non-Indians by incorporating language similar to the second *Montana* exception. Second, the Tribe specifically contemplates that traditional cultural practices may be protected through the designated uses of specific water bodies.

c. *White Mountain Apache Tribe Water Quality Protection Ordinance*

The White Mountain Apache Tribe's Water Protection Ordinance includes an anti-degradation policy, implementation and enforcement procedures, narrative water quality standards, designated uses and specific criteria, and water

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

196. Water Resources and Wetlands, *supra* note 193, at 2. The standards define "Hualapai Tribal Lands" to be "lands over which the Hualapai Tribe has jurisdiction, including all land within the exterior boundaries of the Hualapai Reservation and all other Hualapai Indian Country, as that term is defined in 18 U.S.C. § 1151." *Id.* at 6.

197. *Id.*

198. *Id.* at 13–15.

quality sampling requirements.[199] In the preamble to the Ordinance, the Tribe explains that "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."[200] The preamble therefore recognizes the cultural significance of water for the Tribe. The preamble goes on to explain that "[w]e recognize that we must assert full authority over all the lands and waters of our Reservation to protect them from abuse."[201] With this statement, the Tribe recognizes the need to regulate all waters, regardless of whether such regulation implicates Indians or non-Indians. The Ordinance goes on to reference both the Tribe's "inherent and aboriginal sovereign authority" and section 518 of the CWA as authority allowing its enactment of the Ordinance.[202]

The Tribe recognizes the purposes of the federal CWA, and notes that the Tribe's standards share the objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The Ordinance goes further, adding "the objective of restoring and maintaining the *cultural* and *spiritual* integrity of its waters."[203] In addition to those beneficial uses identified in the federal CWA, the White Mountain Apache Tribe also wishes to protect "[i]rrigation, primary contact, domestic water supply (including municipal and industrial), groundwater recharge, plant gathering, fish culture, and respect for culturally and religiously significant areas."[204]

Within its anti-degradation policy, the Tribe allows for certain waters to be designated "high quality waters," which shall be maintained to protect "culturally or religiously significant areas" and "archaeological and historical sites," in addition to other designated uses.[205] Relatedly, the Tribe may designate a water body as an "Outstanding Tribal Resource Water" because of its "cultural value, the presence of archeological or historic sites, ecological or biological features, scenic beauty or other exceptional qualities of importance to

199. White Mountain Apache Tribe of the Fort Apache Indian Reservation, *supra* note 177.
200. *Id.* at 1.
201. *Id.*
202. *Id.* at 2.
203. *Id.*
204. *Id.*
205. *Id.* at 7.

the Tribe."[206]

The Tribe goes on to develop narrative water quality standards that address bottom deposits, floating solids, oil and grease, color, odor and taste, nuisance conditions, pathogens, turbidity, mixing zones, radioactive materials, temperature, salinity/mineral quality, pH, dissolved oxygen, dissolved gases, total residual chlorine, toxic substances, and mercury and arsenic.[207] Under the Tribe's designated uses, the Tribe explains that "[a]ctions that disrespect waters of religious significance are prohibited."[208]

As seen from the other water quality standards adopted by federally recognized tribes located within Arizona, the White Mountain Apache Tribe's Ordinance mirrors the federal water quality standards in its development of narrative and numeric criteria, an anti-degradation policy, and establishment of designated uses. The Tribe's Ordinance, however, moves beyond the federal standards by putting a significant focus on the protection of waters related to religious and cultural practices. Moreover, the Tribe echoes EPA's recognition of the interconnectedness of congressional delegations under TAS status and tribal sovereignty[209] by indicating that the Ordinance is enacted under its sovereign authority in addition to authority delegated it under the CWA.

2. Tribes Located Within Montana

a. Fort Peck Assiniboine & Sioux Tribes

The water quality standards adopted by the Fort Peck Assiniboine & Sioux Tribes include an anti-degradation policy, narrative water quality criteria, narrative biological criteria, water quality standards for wetlands, designated uses, numerical criteria, and implementation criteria.[210] The Tribes explain that one of the purposes of adopting the Standards is to "protect public health and welfare,"[211] which again is similar to language used by the Supreme Court when it recognized that

206. *Id.*
207. *Id.* at 15–19.
208. *Id.* at 24.
209. *See generally* Monette, *supra* note 13.
210. *See* FORT PECK ASSINNIBOINE & SIOUX TRIBES, *supra* note 177.
211. *Id.* at 1.

there may be two circumstances when tribes can regulate the civil activities of non-Indians on non-Indian land.[212] The Tribes specifically expect that the Standards apply to both non-Indians and Indians, concluding that "the [Tribes'] Constitution confirms that tribal law extends to all lands, natural resources, public health and security and persons doing business on the reservation, as authorized by federal law."[213]

In their identification of designated uses, the Tribes explain that those surface waters designated "Primary Contact Recreation" shall include waters "used for swimming, ceremonial uses, and wading."[214] The Tribes' Standards also include consideration of critical conditions, including stream flow, effluent flows, temperatures and pH, hardness, ambient quality, and dissolved oxygen.[215] Additionally, the Tribes developed extensive numeric water quality standards.[216]

As with the other tribal water quality standards explored already, the Fort Peck Assiniboine & Sioux Tribes' standards mirror the federal standards in significant ways, such as the use of narrative and numeric criteria and the development of an anti-degradation policy. Although not as pervasively shown throughout their standards, the Tribes also depart from the federal standards in their recognition of the need to protect water bodies' traditional and cultural uses. Moreover, it is clear from their standards that the Fort Peck Assiniboine & Sioux Tribes intend for their water quality standards to apply both to Indians and non-Indians.

b. Confederated Salish and Kootenai Tribes

The Confederated Salish and Kootenai Tribes' (CSKT) Surface Water Quality Standards and Antidegradation Policy establishes surface water quality standards, including classifications of various waters, an anti-degradation policy, a mixing zone policy, compliance standards, and numeric standards.[217] Within the Policy's definitions section, the CSKT define "Outstanding National Resource Waters" to mean

212. Montana v. United States, 450 U.S. 544, 566 (1981).
213. FORT PECK ASSINNIBOINE & SIOUX TRIBES, *supra* note 177, at 2.
214. *Id.* at 13.
215. *Id.* at 21–22.
216. *Id.* at 16–17.
217. CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, *supra* note 176.

"waters that because of their exceptional quality and/or their ecological, recreational, or cultural significance, constitute an outstanding National resource."[218] CSKT require that "surface waters must be free from substances that are or may become injurious to public health, safety, welfare, or any of the designated or existing beneficial uses."[219] Furthermore, as seen in other tribal standards discussed above, this language models the second *Montana* exception, which implicitly suggests the Tribes possess the authority to regulate non-Indians on non-Indian lands because of the potential threat to the "health, safety and welfare" of the Tribes.[220] Within their anti-degradation policy, the Tribes establish a Tier 3 for waters that "constitute an outstanding national resource, such as waters of exceptional quality, or waters of ecological, recreational, or cultural significance . . . ."[221] Also, the Tribes developed extensive numeric criteria to govern the addition of any pollutants to their tribal waters.[222]

Although the CSKT's Surface Water Quality Standards and Anti-degradation Policy largely tracks the federal requirements, there are notable differences. As with other tribal water quality standards, the CSKT's Policy recognizes that water may have unique cultural dimensions important to the tribe. Moreover, the Policy contemplates application to both Indian and non-Indians living within the CSKT's reservation.

c. Northern Cheyenne Tribe

The Northern Cheyenne Tribe's Surface Water Quality Standards include an anti-degradation policy and review process, and the surface water quality standards themselves include tribal beneficial use classifications, narrative water quality criteria, biological standards, and standards for wetlands.[223] The Tribe's Standards also incorporate numeric

218. *Id.* at 7.
219. *Id.* at 19.
220. Montana v. United States, 450 U.S. 544, 566 (1981).
221. CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, *supra* note 176, at 22.
222. *See id.* at 54–70.
223. N. CHEYENNE ENVTL. PROT. DEP'T, SURFACE WATER QUALITY STANDARDS (2013), *available at* http://water.epa.gov/scitech/swguidance/standards/wqslibrary/upload/cheyennewqs.pdf, *archived at* http://perma.cc/ZWZ3-CT5W.

criteria and CWA section 401 certification processes.[224] The Tribe notes that one of the purposes of adopting the Water Quality Standards is to "protect public health and welfare,"[225] which is language reminiscent of the second *Montana* exception.[226] Unlike some of the other tribal water quality standards examined, however, the Tribe focuses on the purposes of the federal CWA without expanding to other purposes unique to the Tribe in effectuating its water quality standards.[227] However, the Tribe does define "Outstanding Tribal Resource Waters" as including waters that may be significant because of their cultural qualities.[228] Further, in its beneficial use classifications, the Tribe classifies some waters as being for cultural uses, which means that "[t]hese waters are suitable for cultural, ceremonial, and religious uses to support and maintain the way of life and traditional activities practiced on the Northern Cheyenne Reservation."[229] Cultural uses are also contemplated in the Tribe's water quality standards for wetlands.[230] Moreover, outstanding tribal waters may receive a "Tier 3" designation, which is the highest level of protection, because of their cultural significance.[231]

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224. *Id.* In terms of the CWA section 401 certification, "Section 401 of the Federal Water Pollution Control Act . . . requires that applicants for a Federal license or permit relating to any activity which may result in any discharge into navigable waters . . . shall obtain a certification from the responsible governmental authority that such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act." *Id.* at 40.

225. *Id.* at 1. Similarly, within the Tribe's narrative water quality criteria, the Tribe indicates that "surface waters must be free from substances which are or may become injurious to public health, safety, welfare or any of the designated or existing beneficial uses." *Id.* at 9.

226. *Compare* N. CHEYENNE ENVTL. PROT. DEP'T, *supra* note 223, at 1 (quoting one of the purposes of adopting Water Quality Standards as to "protect public health and welfare"), *with* Montana v. United States, 450 U.S. 544, 566 (1981) (explaining that tribes have 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"). Here, the Northern Cheyenne utilize the idea of the "public health and welfare," which is the language used by the Court in *Montana*.

227. N. CHEYENNE ENVTL. PROT. DEP'T, *supra* note 223, at 1–2.

228. *Id.* at 4. Outstanding Tribal Resource Waters may also be significant because of their ecological, aesthetic, educational, recreational, or scientific qualities. *Id.*

229. *Id.* at 8.

230. *Id.* at 10–11, 13.

231. *Id.* at 17–19.

As seen with the other tribal water quality standards examined, the Northern Cheyenne Tribe has largely tracked the federal structure of section 303 of the CWA with its standards, anti-degradation policy, and narrative and numeric criteria. However, the Tribe notably departs from its federal counterpart by incorporating language mirroring the second *Montana* exception and also referencing cultural uses that may be of importance to the Tribe.

3. Tribe Located Within New York

One federally recognized tribe located within the state of New York, the St. Regis Mohawk Tribe, promulgated water quality standards under the authority of section 303 of the federal CWA.[232] The Tribe's water quality standards include an anti-degradation policy that includes implementation procedures, general narratives, numeric criteria, water body classifications, standards specific to uses, and designated uses.[233] Similar to other tribes' water quality standards, the St. Regis Mohawk Tribe references protection of the Tribe's "social welfare and economic well-being" as one of the purposes of the water quality standards.[234] The Standards go on to state that "[t]hese water quality standards will in turn promote the general welfare and well-being of the community by allowing the Tribe and its members to utilize the water for traditional, cultural and ceremonial purposes."[235] This language mirrors that of the Supreme Court in the second *Montana* exception.[236] Consistent with an interpretation suggesting the Tribe's intent to regulate both Indians and non-Indians, the Tribe says that it "maintains the plenary sovereign power to regulate the quality of Tribal Surface Waters in the interest of the health and well being of the Mohawk people."[237]

The Tribe goes on to explain that another purpose of

232. ST. REGIS MOHAWK TRIBE ENV'T DIV., WATER QUALITY STANDARDS FOR THE ST. REGIS MOHAWK TRIBE UNDER THE AUTHORITY OF THE CLEAN WATER ACT § 303(C) (2013), *available at* http://www.srmtenv.org/web_docs/WQS/FINAL-SRMT-WQS-08.2013_3.pdf, *archived at* http://perma.cc/JC5G-FF4B.

233. *Id.*

234. *Id.* at 1.

235. *Id.*

236. Here, the Tribe references its "welfare," which is consistent with the second *Montana* exception. Montana v. United States, 450 U.S. 544, 566 (1981).

237. ST. REGIS MOHAWK TRIBE ENV'T DIV., *supra* note 232, at 1.

adopting the water quality standards is to "protect cultural and ceremonial uses" associated with water located within the Tribe's territory.[238] Continuing on, the Tribe states that "[t]he 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."[239] Furthermore, after acknowledging protection of the uses identified in the federal CWA, the Tribe goes on to specify that, in addition to these federally recognized uses, "[p]rimary contact and ceremonial use, agricultural and water supply use are other designated uses of Tribal Surface Waters."[240] Consistent with the Tribe's recognition that traditional and ceremonial uses of water should be protected under the Tribe's standards, it defines "Ceremonial and Spiritual Water Use" to be "the use of water for spiritual and cultural practices which may involve primary and secondary contact. This shall include uses of Tribal Surface Waters of a water body to fulfill cultural, traditional, spiritual, or religious needs of the Tribe or its members."[241] Relatedly, "Cultural Use" is defined as "[c]ultural and ceremonial uses that utilize tribal water resources."[242] Within its Anti-degradation Policy, the Tribe establishes that "Outstanding Resource Waters" may include those waters "[h]aving other special environmental, recreational, religious or ecological attributes . . . ."[243]

The Tribe's general narrative and numeric criteria considers: the impact of solids, the impact of floating substances, color, odor and taste, nitrogen and phosphorus, pathogens, turbidity, temperature thermal discharge, salinity/ mineral quality, pH, garbage, dissolved oxygen, and toxic substances.[244] Furthermore, the Tribe provides ample numeric criteria.[245]

As detailed above, within its purpose statement, the St. Regis Mohawk Tribe establishes that its water quality standards will in part protect traditional uses of water; also,

238. *Id.*
239. *Id.*
240. *Id.* at 2.
241. *Id.* at 4.
242. *Id.* at 5.
243. *Id.* at 10.
244. *Id.* at 15–17.
245. *Id.* at 27–76.

the Tribe uses language mirroring the second *Montana* exception implying the Tribe's intent to regulate both Indians and non-Indians under the water quality standards. In this regard, although the Tribe largely follows the standards developed under federal law, its water quality standards go beyond the federal minimum requirements.

III. INNOVATIONS ARISING FROM THE TRIBAL ENVIRONMENTAL LABORATORY

Having now closely examined tribal environmental laws adopted under TAS status and the federal framework, this Part gleans lessons and trends from those tribes utilizing their TAS status to regulate resources. Specifically, building on the preceding discussion of individual tribal environmental code provisions, this Part begins with a summary of instances where tribes have departed from the federal environmental scheme, thereby isolating areas of potential innovation. Next, this Part considers how tribes may be experimenting beyond the federal environmental framework by exploring the Confederated Salish and Kootenai Tribes' Climate Change Strategic Plan. Finally, this Part concludes with some thoughts on what could potentially be learned from these tribal innovations.

A. Trends Related to Tribal Laws Enacted Under TAS Status

As suggested in Part II, trends can be identified among tribal provisions adopted under TAS status. The purpose here is not to advocate for or against the development of tribal environmental law under the CAA or CWA TAS provisions.[246] Rather, this section more closely examines tribal environmental laws promulgated under federal CAA and CWA TAS status to identify where such trends emerge. Such trends may be indicative of ways in which tribes are adapting federal environmental laws in innovative and creative ways. Especially

246. For a thorough discussion of the potential risks and benefits associated with TAS status under the CWA, see Sanders, *supra* note 171. Notably, Dr. Sanders concludes in part that a "tribal government applying for TAS status may be exposed to challenges that risk their sovereign ability to protect their lands and natural resources as well as their relationship with the federal government." *Id.* at 546.

among water quality standards adopted by tribes under section 303 of the federal CWA, trends do emerge. Specifically, tribal environmental laws adopted pursuant to TAS status tend to reference (1) tribal inherent sovereignty; (2) language similar to the second *Montana* exception; and (3) the need to protect resources of cultural, religious, and spiritual significance.

An example of this first trend, expressions of tribal inherent sovereignty, is clear from the St. Regis water quality standards, where the Tribe explains that it "maintains the plenary sovereign power to regulate the quality of Tribal Surface Waters in the interest of the health and well being of the Mohawk people."[247] Similarly, in the White Mountain Apache Tribe's water quality Ordinance, the Tribe references its "inherent and aboriginal sovereign authority" as a legal basis justifying adoption of the water quality standards.[248] It is not surprising that tribes would reference their inherent tribal sovereignty to regulate the tribal environment. First, as previously explained, the regulation of non-Indians on non-Indian land has been contentious;[249] accordingly, tribes may want to assert all legal justifications for regulation to reduce the likelihood of conflict. Second, regulation of the tribal environment, even through federal environmental statutes, can be seen as an expression of tribal sovereignty.[250] It is therefore consistent with this expression of tribal sovereign authority that tribes would reference their inherent sovereignty in tribal environmental laws.

Relatedly, given the controversy that has erupted in the past over tribal regulation of non-Indians on non-Indian lands,[251] the second trend of using language similar to the language used by the Supreme Court in *United States v. Montana* is foreseeable. As demonstrated by the Confederated Salish and Kootenai Tribes' regulations, several of the tribal water quality standards explored above make reference to the

247. ST. REGIS MOHAWK TRIBE ENV'T DIV., *supra* note 232, at 1.

248. White Mountain Apache Tribe of the Fort Apache Indian Reservation, *supra* note 177, at 2.

249. *See generally* Sanders, *supra* note 171.

250. Grant, *supra* note 89.

251. *See, e.g.*, *supra* Part I.A (discussing City of Albuquerque v. Browner, 522 U.S. 965 (1997); Montana v. United States, 450 U.S. 544 (1981); Arizona Pub. Serv. Co. v. U.S. Envtl. Prot. Agency, 562 F.3d 1116 (10th Cir. 2009); Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001); and Montana v. U.S. Envtl. Prot. Agency, 137 F.3d 1135 (9th Cir. 1998)).

tribes' ability to protect the health and safety of their citizens.[252] This is likely directly related to the tribes' ability to regulate non-Indians located on non-Indian owned land. As one scholar explains, "[t]hroughout history, tribes' inherent sovereign powers of jurisdiction over reservation lands, as well as over tribal members and non-member Indians, has generally been accepted, but authority over non-Indians and non-Indian land is often challenged."[253] As previously explained, the Court's decision in *Montana* is relevant because the Court provides two exceptions where tribes will have the authority to regulate non-Indians located on non-Indian land.[254] The second of these situations is when the conduct in question "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[255] Accordingly, by explaining the impact of environmental pollution on tribal health and welfare, tribes buttress their assertion of regulatory jurisdiction over non-Indians.

Finally, a third trend that emerges following examination of tribal environmental provisions adopted pursuant to TAS status is the desire to protect resources for their cultural, religious, and spiritual significance. This third trend is an example of how tribes are truly innovating within the field of environmental law, as the federal equivalents do not contain anything similar to the stringent cultural, religious, and spiritual protections identified in the tribal code provisions studied. The White Mountain Apache Tribe's water quality standards are a particularly good example of this third trend of recognizing the need to protect resources because of their cultural, religious, and spiritual significance. The initial preamble to the Tribe's water quality ordinance explains that "[w]ater is inseparable from our land and culture."[256] Tribal communities and individual Indians often differ from the general American population by virtue of their strong connection to the land and surrounding environment. For example, "American Indian tribal religions . . . are located

252. *See, e.g.*, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, *supra* note 176.

253. Sanders, *supra* note 171, at 540.

254. *See supra* Part I.A.

255. Sanders, *supra* note 171, at 544 (quoting *Montana*, 450 U.S. at 566); Monette, *supra* note 13, at 117.

256. White Mountain Apache Tribe of the Fort Apache Indian Reservation, *supra* note 177, at 1.

'spatially,' often around the natural features of a sacred universe. Thus, indigenous people care very much about where a religious tradition occurred."[257] Accordingly, given this strong connection between land and spirituality and culture, it makes sense that tribal environmental regulations would depart from federal regulations to make space for the protection of culturally valuable resources. This third trend is a perfect example of tribes acting as laboratories: moving beyond the uses and purposes of the federal law, and adapting the law in a way that is crucial for tribal communities—protection of cultural and spiritual resources.

Unfortunately, the examination of tribal environmental laws developed under CAA TAS status does not contribute much to this conversation. Significantly fewer federally recognized tribes have obtained TAS status under the CAA in comparison to the CWA.[258] Moreover, of the twenty-eight tribes with TAS status under the CAA, seventeen only have TAS status under section 505(a)(2),[259] which gives them authority to comment on permits being considered by surrounding sovereigns but may not result in the promulgation of any related tribal environmental law.[260] One author has suggested that, despite the fact that tribes have significant interest in the regulation of air quality within their territories, they may not take advantage of the ability to regulate under CAA TAS provisions because of the prohibitive costs and complexity of such regulation.[261]

B. Revolutionizing Environmental Law through Inherent Tribal Sovereignty

Having now thoroughly examined tribal environmental law adopted by virtue of federal TAS status, this section turns to environmental law adopted solely on the basis of inherent tribal sovereignty. Because these laws are not based on federal statutes, the adoption of these laws offers fertile ground for the

257. Tsosie, *supra* note 18, at 282–83.

258. Letter from JoAnn K. Chase, *supra* note 127. To date, twenty-eight federally recognized tribes have TAS status under at least one provision of the CAA, versus forty-eight federally recognized tribes who possess TAS status under the CWA. *Id.*

259. *Id.*

260. 42 U.S.C. § 7661(d) (2012).

261. *See generally* Milford, *supra* note 115.

development of innovative environmental laws. Subsection 1 begins with a brief introduction to tribal inherent sovereignty and its scope. Subsection 2 then considers tribal environmental laws enacted solely as a result of tribal inherent sovereignty, such as the Confederated Salish and Kootenai Tribes' Climate Change Strategic Plan. The previous section explained how tribes are departing from federal environmental laws and therefore innovating within the realm of their TAS authority. This section builds on this conclusion by demonstrating that tribes also have the capacity for environmental regulatory innovation outside of the TAS context.

1. An Introduction to Tribal Inherent Sovereignty

Before exploring the nature of tribal environmental code provisions adopted as a result of inherent tribal sovereignty, an understanding of the nature and origin of tribal sovereignty is helpful. As indicated in the introduction to this Article, tribes possess power unique within the United States; "they are both sovereigns and wards subject to the protection of the federal government."[262] Tribes pre-existed the formation of the United States of America.[263] The Supreme Court described tribes "as distinct political communities, having territorial boundaries, within which their authority is exclusive."[264] Chief Justice Marshall, the author of the "Marshall Trilogy" of cases that serve as the foundation of modern federal Indian law,[265] "recognized that tribes possess territorial sovereignty, including the power to issue title to whomever they please."[266] Today, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[267] For purposes of this discussion, "[t]he Indian sovereignty doctrine is relevant . . . because it provides a backdrop against which the

262. Hook, *supra* note 12, at ch. 13.

263. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

264. Worcester v. Georgia, 31 U.S. 515, 557 (1832), *abrogated by* Nevada v. Hicks, 533 U.S. 353 (2001).

265. Monette, *supra* note 13, at 127.

266. *Id.* at 128.

267. United States v. Wheeler, 435 U.S. 313, 323 (1978), *superseded by statute as stated in* United States v. Lara, 541 U.S. 193, 194 (2004) ("*Wheeler* [and other cases], then, are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority the United States recognizes.").

applicable treaties and federal statutes must be read."[268]

Tribal sovereignty has multiple meanings for many Indian people, as exemplified by the story below.

> [A] young Indian activist . . . had grown weary of his own strained explanations to non-Indians of what Indians meant when they said "our sovereignty." So he asked a respected elderly Indian couple of the Tribe: "Just what do we mean when we say 'sovereignty'?" In response, the old man reached for his walking stick, drew a deep line in the dirt, pointed to one side and then the other, and said: "That's North Dakota. This is Turtle Mountain. And that's sovereignty." As the young man turned to the elderly woman she reposed her look in agreement, but subtly added, "this is sovereignty," as she pointed directly to herself.[269]

As illustrated by this story, tribal sovereignty can be a reference to both a physical place, as well as to the people who occupy the place. For many Indians, their tribe's sovereignty contributes to their very personhood.

In sum, unless divested of their sovereign authority either explicitly through treaty or federal statute, or implicitly through historical circumstances,[270] tribes generally maintain the ability to regulate the activities of Indians, and in specific circumstances such as those discussed by the Court in *Montana*, non-Indians. In terms of environmental regulation, this leaves tribes the opportunity to innovate where the federal government has not precluded innovation through its own federal environmental statutes.

2. Examining Tribal Environmental Law Adopted by Virtue of Inherent Sovereignty

This subsection identifies areas of true tribal environmental law innovation, as a federal counterpart does not exist. As previously explained, the majority of federally recognized tribes are not regulating the tribal environment

268. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973).

269. Monette, *supra* note 13, at 124.

270. *See, e.g.*, *Wheeler*, 435 U.S. at 323 (holding that tribes possess inherent sovereignty that has not been explicitly divested by the federal government).

through TAS status.[271] In other words, either tribes are not regulating the environment at all or they are regulating under their inherent tribal sovereignty rather than delegated authority. This subsection therefore demonstrates the capacity for tribes to regulate their environments through inherent tribal authority. Given the focus of this Article on tribal environmental code provisions, future articles will consider other sources of tribal environmental law (i.e., methods other than code provisions) where tribes may demonstrate the ability to regulate through their inherent authority rather than federal delegations.

At least in terms of water pollution, it appears that tribes are taking advantage of their sovereign authority to regulate the environment. A previous survey of the same seventy-four federally recognized tribes discussed above found that twenty-three of the federally recognized tribes surveyed—or approximately 31 percent of the survey group—enacted at least one law related to the regulation of water pollution.[272] So, what does this mean? Based on the foregoing, tribes appear to be regulating water pollution within their territories. Also, the number of tribes regulating water pollution solely on the basis of their inherent tribal sovereignty versus those regulating on the basis of TAS status is almost evenly split.[273] Within the original seventy-four federally recognized tribes surveyed, twenty-three are regulating water pollution.[274] Of those, eleven are utilizing authority under the TAS CWA provision,[275]

271. Only twenty-eight of the 566 federally recognized tribes, or approximately 5 percent, have TAS approval for at least one provision of the CAA. *See supra* note 115 and *infra* Appendix 1.A. In comparison, forty-eight of the 566 federally recognized tribes, or approximately 8 percent of all federally recognized tribes, have TAS approval under section 303 of the CWA. *See supra* note 121 and accompanying text; *infra* Appendix 1.G. Even assuming that there is no overlap between these tribes (which is not the case (e.g., the Navajo Nation)), at most, that would mean that only seventy-six tribes, or 13 percent of federally recognized tribes, have TAS status under either the CAA or CWA.

272. Kronk Warner, *supra* note 38. This prior survey examined all environmental code provisions including those adopted pursuant to federal law and those adopted solely pursuant to inherent tribal sovereignty (i.e., it did not distinguish between laws adopted pursuant to federal statutes or inherent tribal authority). *Id.*

273. *Compare id.* at 69 (finding that twenty-three of the seventy-four federally recognized tribes studied had some tribal code provision related to the regulation of water), *with* Letter from JoAnn K. Chase, *supra* note 127 (finding that eleven tribes have enacted tribal code provisions as a result of their TAS status).

274. Kronk Warner, *supra* note 38, at 69.

275. Letter from JoAnn K. Chase, *supra* note 127.

meaning that twelve are regulating on the basis of their inherent sovereignty. This finding demonstrates that tribal inherent sovereignty plays a significant role as a source of authority leading to the enactment of tribal environmental laws.

This strong tribal connection to water was demonstrated in the above discussion of the protection of cultural, spiritual, and religious uses under tribal environmental laws developed as a result of TAS status. For example, the objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[276] Given the strong connection between water resources and culture and religion for many tribes and individual Indians, tribal code provisions enacted as a result of CWA TAS status move beyond the stated objective of the CWA to protect not only the tribal environment but also the human rights of tribal citizens through protection of cultural, spiritual, and religious resources with close connections to water.[277]

Furthermore, a particularly exciting aspect of tribal environmental law is its ability to transcend federal environmental law. In this regard, some tribes are moving entirely beyond the federal scheme to regulate in new arenas—such as in response to climate change. To date, the federal government has generally failed to implement comprehensive climate change mitigation or adaptation policies on the national level.[278] Given the federal government's failure to regulate comprehensively and the fact that many tribes are

276. White Mountain Apache Tribe of the Fort Apache Indian Reservation, *supra* note 177, at 2.

277. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at art. 18, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (recognizing a right to freedom of religion); G.A. Res. 61/295, at art. 8, 11, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (recognizing a right to culture).

278. Admittedly, EPA has promulgated regulations to reduce the greenhouse gas emissions of cars and light duty trucks. 77 Fed. Reg. 62,624 (Oct. 15, 2012) (codified at 40 C.F.R. pts. 523, 531, 533. 536, 537). However, these standards are not applicable until model year 2017. 77 Fed. Reg. at 62,624. Relatedly, the federal government has also promulgated fuel efficiency standards for medium- and heavy-duty engines and vehicles. 76 Fed. Reg. 57,106 (Sept. 15, 2011) (codified at 40 C.F.R. pts. 85, 86, 600, 1033, 1036, 1037, 1039, 1065, 1066, 1068). EPA's other efforts to address climate change, including data gathering, promotion of partnerships, and funding opportunities, are not binding; nor are they comprehensive in nature. *What EPA Is Doing about Climate Change*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/climatechange/EPAactivities.html (last visited Feb. 7, 2014), *archived at* http://perma.cc/4DH5-W2E9.

disproportionately impacted by the negative effects of climate change,[279] tribes are filling this regulatory void with their own laws adopted under their inherent sovereignty.

Several tribes have adopted tribal regulations and policy statements aimed at mitigating climate change and assisting tribal communities in their adaptation to climate change.[280] Keeping the focus on tribes located within Arizona, Montana, New York, and Oklahoma, this subsection examines the Climate Change Strategic Plan of the CSKT, which are located within Montana.[281] Although each of the Tribes located on the CSKT Flathead Reservation, including Salish, Pend d'Oreilles, Kalispel, and Spokane Indians, is culturally distinct, they all share a strong knowledge of the natural environment and respect for all creation.[282] Interestingly, there is also a substantial non-Indian population within the CSKT's territory, as "the Flathead Reservation is 1.317 million acres, of which just over 790,000 acres are owned and managed by the Tribes and its members."[283] Also, "[u]nlike many Indian Reservations, the Flathead Reservation is not isolated from the larger state and regional economies. Located in the center of western Montana's dynamic economy, the Reservation contributes to and is influenced by the region's development."[284]

On November 29, 2012, the CSKT adopted Resolution No. 13-52 acknowledging the impact of climate change on the Tribes' reservation, and declaring the "intent and commitment" of the Tribes to address the effects of climate change on the Reservation.[285] "The Northwest has already observed climate changes including an average increase in temperature of 1.5°F over the past century . . . . Locally, all models predict warmer temperatures, lower snowpack, and more frequent and severe

279. *See generally* CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES xii (Randall S. Abate & Elizabeth A. Kronk eds., Edward Elgar Publ'g, 2013).

280. Terri Hansen, *8 Tribes that Are Way Ahead of the Climate-Adaptation Curve*, INDIAN COUNTRY TODAY (Oct. 15, 2013), http://indiancountrytodaymedianetwork.com/2013/10/15/8-tribes-are-way-ahead-climate-adaptation-curve-151763, *archived at* http://perma.cc/S44X-ETN9.

281. *See* CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES, *supra* note 279. A future article will consider the climate change regulations adopted by tribes outside of the four states identified in this article.

282. *Id.* at 6.

283. *Id.* at 4.

284. *Id.* at 11.

285. *Id.* at i–ii.

droughts and floods."[286] For the Tribes, the change in water quantity and its impact on the fisheries that the Tribes rely on are some of the most important effects of climate change.[287] Through Resolution No. 13-52, the CSKT Tribal Council called on the Tribes "[t]o develop appropriate policies and strategies for addressing effects and projected impact of climate change on the Tribe and the Reservation" and "[t]o develop potential programmatic and/or regulatory actions and changes consistent with said policies."[288] Notably, the Resolution called for the incorporation of Traditional Ecological Knowledge[289] into the Climate Change Strategic Plan and also recognized that climate change may result in cultural impacts, as well as negative social, environmental, and economic consequences.[290] The focus on culture in the Strategic Plan is consistent with the Tribes' overall use of cultural considerations for natural resources in land use planning.[291] The Strategic Plan later explains that Traditional Ecological Knowledge is uniquely related to cultural resources, and that both must be

286. *Id.* at 2.

287. *Id.* at 22. Anticipated climatic impacts also include changes in hydrology, changes in the forest and vegetation, increased wildlife, decreased air quality, and changes to wildlife, such as impacts on fish. *Id.* at 24–26.

288. *Id.* at ii.

289. The Climate Change Strategic Plan defines "Traditional Ecological Knowledge":

> TEK refers to the evolving knowledge acquired by indigenous and local peoples over hundreds of thousands of years through direct contact with the environment. This knowledge is specific to a location and includes the relationships between plants, animals, natural phenomena, landscapes and timing of events that are used for lifeway[s], including but not limited to hunting, fishing, trapping, agriculture, and forestry.

Id. at xi. The Tribes' Strategic Plan incorporates Traditional Ecological Knowledge by including observations by elders, which "indicate that the climate has noticeably changed within their lifetime and as stated prior, the knowledge they gained from parents, grandparents, and great grandparents goes back at least three generations." *Id.* at 36.

290. *Id.* at i.

291. *Id.* at 16. The Tribes go on to explain:

> [C]ultural traditions rely on abundant populations of native fish and wildlife, healthy plant communities, clean air and water. Undisturbed spiritual sites, prehistoric and historical campsites, dwellings, burial grounds and other cultural sites are important too, because they, in the words of the Flathead Culture Committee, "reaffirm the presence of our ancestors, how we are alive today only because of them. These places are part of the basis of our spiritual life." They provide young people with a connection to ancestors and native traditions.

Id.

protected.[292] In fact, the Strategic Plan places a special emphasis on the importance of protecting tribal culture and Traditional Environmental Knowledge, as section 2.3 extensively focuses on both and provides excerpts of tribal elder observations related to climate change.[293]

As a result of Resolution No. 13-52, the Tribes eventually adopted their Climate Change Strategic Plan in September 2013.[294] The Tribes' Strategic Plan aligns with local regional, state, and city efforts to address the impacts of climate change.[295] The Plan includes a discussion of the characteristics and history of the Tribes, the climate impacts addressed by the Plan, the planning focus, a vulnerability and risk assessment, goals and actions, and an implementation plan.[296] The Strategic Plan focuses on nine sectors that may be affected by climate change: forestry, land, fish, wildlife, water, air, infrastructure,[297] people,[298] and culture.[299] The Plan also provides priority levels for each of the areas examined; the Tribes rated the priority for culture as high.[300] In relation to the high priority placed on culture, the Strategic Plan concludes that "[p]rotecting land-based cultural resources is essential if the Tribes are to sustain Tribal cultures."[301]

Ultimately, the Tribes' Strategic Plan develops goals and actions related to each of the nine sectors considered.[302] Where possible, the Tribes work to incorporate Traditional Ecological Knowledge into their goals and actions. For example, the forestry goals include developing a greenhouse to grow native

292. *Id.* at 17.

293. *Id.* at 27–36. Based on an examination of the entire Strategic Plan, the Tribes do not dedicate similar space in the Plan to any other resource category. *See generally id.* Accordingly, one can conclude that the protection of cultural resources is especially important to the Tribes. *See id.*

294. *Id.*

295. *Id.* at 19. Specifically, the Tribes acknowledged the Western Climate Initiative (a collaboration of several governors of Western states), the Montana Climate Change Action Plan, and a report called "Missoula County Climate Action." *Id.* Although the Tribes mention that these regional, state and local county actions align with the Tribes' Strategic Plan, it is clear that the Tribes do not view these other climate change plans as being binding on the Tribes. *See id.*

296. *Id.* at iii–iv.

297. "The focus of the infrastructure sector is housing and power." *Id.* at 42.

298. "The focus of the people sector is social services, safety, tribal health, and human resources." *Id.*

299. *Id.* at 37–44.

300. *Id.* at 53.

301. *Id.* at 18.

302. *Id.* at 54–66.

and cultural plant species.[303] Similarly, the land goals include engaging in practices to promote the growth of native plants.[304] In terms of obtaining the cultural goals, the Tribes task the Tribal Council and CSKT Elders Advisory Council, who possess Traditional Ecological Knowledge, with this responsibility.[305]

In a foreword written by Joe Durglo, Chairman of the Council of Confederated Salish and Kootenai Tribes, he explains the Tribes' reasoning behind adopting the Strategic Plan:

> Our people have long lived by an idea that we know best how to govern ourselves. . . . Our lands and resources are the basis of our spiritual life. That's been our way since time began. By preparing for further environmental changes, we can mitigate threats to our way of life. Our traditions rely on abundant populations of native fish and wildlife, healthy plant communities, clean air, water, undisturbed spiritual sites, prehistoric and historic campsites, dwellings, burial grounds, and other cultural sites because these areas reaffirm the presence of our ancestors. These resources also provide our future leaders with a connection to their ancestors and native traditions. . . . Our survival is woven together with the land. . . . These recent efforts are a continuation of the work our elders have done for years in observing and considering climate changes to our lands. As is our practice, we look ahead to prepare for coming challenges and apply the values taught by our ancestors.[306]

Moreover, the Salish-Pend d'Oreille Culture Committee explained that "Indigenous people of the world have a special moral stature on this issue [of climate change] and may have a special role to play in coming together to advocate for action."[307] Additionally, the CSKT Climate Change Strategic Plan concludes that:

> Climate change is expected to impact the Flathead Reservation. These impacts may substantially affect ways of

303. *Id.* at 54.
304. *Id.* at 57.
305. *Id.* at 66.
306. *Id.* at iii.
307. *Id.* at 2.

> life that have been at the core of Tribal Culture for generations. As such, the significance of these impacts merits special focus, especially related to the connection between traditions and issues of community resilience and sovereignty.[308]

In the Executive Summary of the Strategic Plan, the Tribes acknowledge that the Plan is an "early step" in the Tribes' efforts to combat the impacts of climate change, and that much future work will be required.[309] Having taken the initial step of developing the Strategic Plan, the Tribes establish several steps of an implementation plan to effectuate the Strategic Plan.[310]

The CSKT's Climate Change Strategic Plan is an excellent example of tribes using their inherent sovereignty to regulate the environment. Given that a federal plan to combat and adapt to climate change is not currently in place, the CSKT Plan represents solely tribal evaluations of risk and priority. Based on the Strategic Plan, the Tribes clearly took steps to provide for the protection of those resources, such as cultural resources, that are a high priority for the community. Accordingly, the Plan is an example of environmental law that transcends mere regulation of pollution to incorporate cultural, spiritual and religious aspects of humanity.[311]

C. Lessons to be Extrapolated from the Tribal Environmental Laboratory

What are the implications of the tribal environmental innovations discussed above? The implication for tribes is perhaps the most obvious. As demonstrated by statements above from the Navajo Nation regarding the use of TAS status, the development of tribal environmental law promotes tribal

308. *Id.* at 18.
309. *Id.* at 1.
310. *Id.* at 67.
311. Admittedly, while the Climate Change Strategic Plan is a great example of how the Tribes are potentially regulating the tribal environment outside of federal law (especially given that there is no existing federal climate change strategic plan that the Tribes could use as a template), the Plan is a limited example in that it does not constitute binding tribal environmental law. Accordingly, it remains to be seen how the Tribes, and other tribes, will utilize their inherent tribal sovereignty to adopt binding laws.

sovereignty. Admittedly, as Professor Christine Zuni Cruz notes, "not every sovereign act undertaken by an indigenous nation necessarily promotes the sovereignty of the people. . . . Adoption of western law can create a gap between the adopted law and the people to whom it is applied. . . . In this respect, an Indian nation's government can participate in the alienation of its own people."[312] Accordingly, tribal environmental law must be developed in a way that is consistent with the tribal community's existing tribal environmental ethics. Ultimately, "an indigenous nation's sovereignty is strengthened if its law is based upon its own internalized values and norms."[313]

This is exactly what some tribes are doing. In the context of tribal environmental laws adopted as a result of TAS status, tribes utilize the federal environmental laws as an initial starting point and then adapt such laws to incorporate tribal norms and values. As shown repeatedly in the discussion above of tribal water quality standards developed under the TAS provision of the CWA, tribes adapted the federal laws to incorporate the protection of resources with cultural, spiritual, and historical significance. Similarly, where tribes are solely utilizing their inherent sovereign capacity for regulation, such as with the CSKT's Climate Change Strategic Plan, they are analyzing those aspects of society that have the greatest importance for the community and then providing greater protection for those aspects of society. For example, in the CSKT Climate Change Strategic Plan, the Tribes both reference the importance of Traditional Ecological Knowledge and incorporate it through use of elder interviews.[314] Accordingly, the laws discussed above provide tribal governments some guidance as to how to adopt and adapt environmental laws to best fit their tribal community, as well as promote tribal sovereignty.

Such benefits, however, are not limited to tribal governments. The other two sovereign entities in the United States, states and the federal government, also stand to benefit

312. Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness—[Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 1 (2000), *available at* http://lawschool.unm.edu/tlj/tribal-law-journal/articles/volume_1/zuni_cruz/index.php (last visited Aug. 27, 2013), *archived at* http://perma.cc/PT9J-DY25.

313. *Id.*; *see also* Singel, *supra* note 107.

314. *See, e.g.*, CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, *supra* note 176, at 29, 36.

from such innovation. American environmental law on the whole needs to evolve to better address emerging environmental threats, such as climate change, and fill "gaps" left by existing environmental regulation,[315] as exemplified by the CWA's failure to regulate non-point source pollution. Tribal environmental innovations present opportunities to address some of these challenges, or at least to think in new directions.

For example, given the pervasive and devastating nature of climate change,[316] other governments may want to adopt the CSKT's method of establishing categories of importance to society and then identifying the risk posed to each category from climate change. Such efforts assist the government in prioritizing valued aspects of society. They may also give rise to the understanding that the government, as opposed to private actors, is in the best position to protect valuable resources, such as culture. Moreover, the CSKT's Strategic Plan shows the importance of local knowledge by incorporating elder interviews and Traditional Ecological Knowledge into the Plan. Given that the effects of climate change are not universal and that different geographical regions face varied negative impacts, local knowledge may prove incredibly beneficial to the planning of climate change mitigation and adaptation projects beyond Indian country.

These are just a few examples of the myriad of ways in which other sovereigns may benefit from tribal experimentation in the field of environmental law. Ultimately, what should be so very exciting for other sovereigns is that tribal governments, which are not bound by the same legal systems as state governments and the federal government, are looking beyond existing environmental legal schemes in new and groundbreaking ways.[317]

CONCLUSION

Tribal governments are uniquely situated to regulate the

315. SPETH, *supra* note 8, at 9; PERCIVAL ET AL., *supra* note 7, at 2–6.

316. *See generally Climate Change 2013: The Physical Science Basis*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, https://www.ipcc.ch/report/ar5/wg1 (last visited Feb. 13, 2014), *archived at* http://perma.cc/Z2EG-NDPY (explaining that climate change is dramatically affecting the global environment through trends such as increased storm intensity, drought, ocean acidification, flooding, etc.).

317. *See* Kronk Warner, *supra* note 20.

environment in comprehensive, compassionate, and innovative ways. By virtue of their unique authority, proven record of adaptation, and strong connection to nature and the environment, tribes may in fact be in the ideal position to be strong "laboratories" for the development of environmental law—providing lessons for the other sovereigns located within the United States.

As demonstrated by the foregoing, tribes are taking advantage of opportunities to regulate their environments under both federal law and their inherent tribal sovereignty. In terms of the former, several tribes, although certainly not a majority of federally recognized tribes, are taking advantage of TAS provisions of federal environmental laws. In terms of the CAA, tribes with TAS status seem to be adopting code provisions very similar to their federal counterparts. Conversely, in terms of the CWA, tribal code provisions adopted as a result of TAS status appear to depart from their federal counterparts in notable and interesting ways. These departures represent areas where tribes are adapting federal environmental laws to better fit with the priorities of tribal communities—as demonstrated by the emphasis on protecting cultural, spiritual, and religious resources.

Moreover, many tribes are also utilizing their inherent sovereign authority to adopt environmental laws without federal counterparts. The CSKT's Climate Change Strategic Plan is an example of this trend. Within their Strategic Plan, the Tribes clearly identify sectors—such as culture, people, and fisheries—which are of high priority to the tribal community, and work to protect those resources of the highest priority within the designated sectors. In this way the CSKT's Climate Change Strategic Plan is an example of the ability of tribal "laboratories" to innovate.

As mentioned above, this Article is the second in what will hopefully be a series of articles dedicated to a closer examination of tribal environmental law. Future articles will examine enforcement of tribal laws, other sources of tribal environmental law aside from tribal code provisions,[318] and potential norms for the development of tribal environmental law. In the realm of tribal environmental law, there is much to learn from the tribal "laboratory."

318. *Id.*

APPENDIX 1

1.A. Tribes with TAS Approval for At Least One Provision of the CAA:[319]

1. Arapahoe Tribe of the Wind River Reservation
2. Bad River Band of the Lake Superior Tribes of Chippewa Indians
3. Cherokee Nation
4. Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians
5. Confederated Tribes of the Umatilla Reservation
6. Forest County Potawatomi Community
7. Gila River Indian Community
8. Kaw Nation
9. Mashantucket Pequot Tribe
10. Minnesota Chippewa Tribe, Fond du Lac Band
11. Minnesota Chippewa Tribe, Leech Lake Band
12. Mohegan Indian Tribe of Connecticut
13. Navajo Nation
14. Paiute-Shoshone Indians of the Lone Pine Community
15. Pala Band of Luiseno Mission Indians
16. Pechanga Band of Luiseno Mission Indians
17. Pueblo of Laguna
18. Prairie Band of Potawatomi Nation
19. Puyallup Tribe
20. Robinson Rancheria of Pomo Indians
21. St. Regis Mohawk Tribe
22. Salt-River Pima-Maricopa Indian Community
23. Santee Sioux Tribe
24. Shoshone-Bannock Tribes of the Fort Hall Reservation
25. Shoshone Tribe of the Wind River Reservation
26. Southern Ute Indian Tribe
27. Swinomish Indians of the Swinomish Reservation
28. Yurok Tribe

319. Letter from JoAnn K. Chase, *supra* note 127.

1.B. Tribes with TAS Approval under CAA Section 110:[320]

1. Gila River Indian Community
2. Mashantucket Pequot Tribe
3. Mohegan Indian Tribe of Connecticut
4. Swinomish Indians of the Swinomish Reservation

1.C. Tribes with TAS Approval under CAA Section 126:[321]

1. Arapahoe Tribe of the Wind River Reservation
2. Forest County Potawatomi Community
3. Pechanga Band of Luiseno Mission Indians
4. Santee Sioux Tribe
5. Shoshone Tribe of the Wind River Reservation

1.D. Tribes with TAS Approval under Section CAA 505(a)(2):[322]

1. Arapahoe Tribe of the Wind River Reservation
2. Bad River Band of the Lake Superior Tribes of Chippewa Indians
3. Cherokee Nation
4. Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians
5. Confederated Tribes of the Umatilla Reservation
6. Forest County Potawatomi Community
7. Gila River Indian Community
8. Kaw Nation
9. Mashantucket Pequot Tribe
10. Minnesota Chippewa Tribe, Fond du Lac Band
11. Minnesota Chippewa Tribe, Leech Lake Band
12. Paiute-Shoshone Indians of the Lone Pine Community

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320. *Id.* CAA section 110 refers to state implementation plans for national primary and secondary ambient air quality standards. Clean Air Act, 42 U.S.C. § 7410 (2012).

321. Letter from JoAnn K. Chase, *supra* note 127. CAA section 126 refers to interstate pollution abatement. Clean Air Act § 7426.

322. Letter from JoAnn K. Chase, *supra* note 127. CAA section 505(a)(2) refers to notification requirements to the EPA Administrator and contiguous states. Clean Air Act § 7661d.

13. Pala Band of Luiseno Mission Indians
14. Pechanga Band of Luiseno Mission Indians
15. Pueblo of Laguna
16. Prairie Band of Potawatomi Nation
17. Puyallup Tribe
18. Robinson Rancheria of Pomo Indians
19. St. Regis Mohawk Tribe
20. Salt-River Pima-Maricopa Indian Community
21. Santee Sioux Tribe
22. Shoshone-Bannock Tribes of the Fort Hall Reservation
23. Shoshone Tribe of the Wind River Reservation
24. Swinomish Indians of the Swinomish Reservation
25. Yurok Tribe

1.E. Tribes with Title V Permitting Authority under the CAA:[323]

1. Navajo Nation
2. Southern Ute Indian Tribe

1.F. Tribes with CAA TAS Applications Pending:[324]

1. Mille Lacs Band of Ojibwe
2. Moapa Band of Paiute Indians
3. Red Lake Band of Chippewa

323. CAA Title V refers to the authority to issue operating permits to air pollution sources. 42 U.S.C. § 7661 (2012). Because of the location of significant sources of air pollution on the Navajo reservation, the Navajo Nation had a strong interest in the development of a permitting program. Grant, *supra* note 89, at 12 ("Because of the two large coal-fired power plants located on the reservation, together with various other sources of air pollution, such as compressor stations and coal mines, the Clean Air Act operating permit program was one of the first programs that NNEPA decided to pursue."). Ultimately, the Navajo Nation implemented the federal program under Part 71 of the CAA, rather than develop its own program under Part 70. *Id.* Unless tribes have significant sources of air pollution on their reservations, like the Navajo Nation does, there may not be a strong incentive to develop an entire permitting program under either Parts 70 or 71 of the CAA.

324. Letter from JoAnn K. Chase, *supra* note 127.

1.G. Tribes with TAS Approval under Section 303 of the CWA:[325]

1. Assiniboine and Sioux Tribes
2. Bad River Band of the Lake Superior Tribe of Chippewa Indians
3. Big Pine Band of Owens Valley Paiute Shoshone Indians
4. Blackfeet Tribe
5. Confederated Salish and Kootenai Tribes
6. Confederated Tribes of the Chehalis Reservation
7. Confederated Tribes of the Umatilla Reservation
8. Confederated Tribes of the Warm Spring Reservation
9. Coeur D'Alene Tribe
10. Dry Creek Rancheria of Pomo Indians
11. Havasupai Tribe
12. Hoopa Valley Tribe
13. Hopi Tribe
14. Hualapai Indian Tribe
15. Kalispel Indian Community
16. Lac du Flambeau Band of Lake Superior Chippewa Indians
17. Lummi Tribe
18. Makah Indian Tribe
19. Miccosukee Tribe of Indians
20. Minnesota Chippewa Tribe, Fond du Lac Band
21. Minnesota Chippewa Tribe, Grand Portage Band
22. Navajo Nation
23. Northern Cheyenne Tribe
24. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony
25. Pawnee Nation
26. Port Gamble Indian Community
27. Pueblo of Acoma
28. Pueblo of Isleta
29. Pueblo of Nambe
30. Pueblo of Picuris
31. Pueblo of Pojoaque
32. Pueblo of San Juan

325. *Indian Tribal Approvals*, *supra* note 68.

33. Pueblo of Sandia
34. Pueblo of Santa Clara
35. Pueblo of Taos
36. Pueblo of Tesque
37. Puyallup Tribe
38. Pyramid Lake Paiute Tribe
39. St. Regis Mohawk Tribe
40. Seminole Tribe of Florida
41. Shoshone-Bannock Tribes of the Fort Hall Reservation
42. Sokaogon Chippewa Community
43. Spokane Tribe
44. Swinomish Indians
45. Tulalip Tribes of the Tulalip Reservation
46. Twenty-Nine Palms Band of Mission Indians
47. Ute Mountain Tribe
48. White Mountain Apache Tribe

1.H. Tribes Awaiting CWA TAS Approval:[326]

1. Agua Caliente Band of Cahuilla Indians
2. Ak Chin Indian Community
3. Cahto Indian Tribe
4. Chemehuevi Tribe
5. Gila River Indian Community
6. Keweenaw Bay Indian Community
7. Pala Band of Mission Indians
8. Pueblo of Santa Ana
9. Red Lake Band of Chippewa
10. Salt River Pima-Maricopa Indian Community
11. Summit Lake Paiute Tribe
12. Three Affiliated Tribes of the Fort Berthold Reservation

326. Letter from JoAnn K. Chase, *supra* note 127.

1.I. Tribes with Approved Certification and Training Programs under FIFRA:[327]

1. Cheyenne River Sioux Tribe
2. Rosebud Sioux Tribe
3. Shoshone-Bannock Tribes of the Fort Hall Reservation
4. Three Affiliated Tribes of the Fort Berthold Reservation

327. Letter from JoAnn K. Chase, *supra* note 127. For information on certification and training of applicators of restricted use pesticides under FIFRA, see 40 C.F.R. § 171.10 (2014).

APPENDIX 2

2.A. Tribal codes surveyed of tribes located within Arizona:[328]

1. *The Official Website of the Ak Chin Indian Community*, AK CHIN INDIAN COMMUNITY OF THE MARICOPA, http://ak-chin.nsn.us (last visited Nov. 8, 2014), *archived at* http://perma.cc/EV8V-M6UT.
2. COCOPAH INDIAN TRIBE, http://www.cocopah.com (last visited Nov. 8, 2014), *archived at* http://perma.cc/HT8A-KQR4.
3. *Colorado River Indian Tribes*, COLORADO RIVER INDIAN RESERVATION, http://www.crit-nsn.gov (last visited Nov. 8, 2014), *archived at* http://perma.cc/WES5-TWY8.
4. FORT MCDOWELL YAVAPAI NATION, http://www.fmyn.org (last visited Nov. 8, 2014), *archived at* http://perma.cc/YQ3F-7UCS.
5. FORT MOJAVE INDIAN TRIBE, http://mojaveindiantribe.com/about (last visited Nov. 8, 2014), *archived at* http://perma.cc/5V9J-GR9S.
6. *Gila River Indian Community*, GILA RIVER INDIAN RESERVATION, http://www.gilariver.org (last visited Nov. 8, 2014), *archived at* http://perma.cc/Z46D-L6EJ.
7. *The Official Website of the Havasupai Tribe*, THE HAVASUPAI TRIBE, http://www.havasupai-nsn.gov (last updated July 15, 2014), *archived at* http://perma.cc/854M-KVEP.
8. *The Hopi Tribe*, INTER TRIBAL COUNCIL OF ARIZONA, http://itcaonline.com/?page_id=1162 (last visited Nov. 8, 2014), *archived at* http://perma.cc/YP78-EWT9.
9. *Hualapai Department of Natural Resources*, HUALAPAI INDIAN TRIBE, http://hualapai-nsn.gov (last visited Feb. 17, 2015), *archived at* http://perma.cc/859W-42HT.

328. *American Indian Environmental Office Tribal Portal: Region 9*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/indian/whereyoulive/region9.htm (last visited July 31, 2013), *archived at* http://perma.cc/7QBW-TZKY.

10. KAIBAB BAND OF PAIUTE INDIANS, http://www.kaibabpaiute-nsn.gov (last visited Nov. 8, 2014), *archived at* http://perma.cc/4TMX-TMMY.
11. *Deschene 2014*, NAVAJO NATION, http://www.deschene2014.com (last visited Nov. 8, 2014), *archived at* http://perma.cc/4B3A-U56N.
12. PASCUA YAQUI TRIBE, http://www.pascuayaqui-nsn.gov (last visited Nov. 8, 2014), *archived at* http://perma.cc/SV53-BTP2.
13. *Quechan Tribe*, INTER TRIBAL COUNCIL OF ARIZONA, http://itcaonline.com/?page_id=1173 (last visited Nov. 8, 2014), *archived at* http://perma.cc/CZ8R-3RTX.
14. SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, http://www.srpmic-nsn.gov (last visited Nov. 8, 2014), *archived at* http://perma.cc/2M7T-DLYD.
15. NDEH-SAN CARLOS APACHE TRIBE, http://www.sancarlosapache.com/home.htm (last visited Nov. 8, 2014), *archived at* http://perma.cc/Q3F5-CPMT.
16. *San Juan Southern Paiute Tribe*, INTER TRIBAL COUNCIL OF ARIZONA, http://itcaonline.com/?page_id=13724 (last visited Nov. 8, 2014), *archived at* http://perma.cc/AB7P-H8EU.
17. *Tohono O'odham Nation*, INTER TRIBAL COUNCIL OF ARIZONA, http://itcaonline.com/?page_id=1181 (last visited Nov. 8, 2014), *archived at* http://perma.cc/V57W-Y8UD.
18. *Tonto Apache Tribe*, INTER TRIBAL COUNCIL OF ARIZONA, http://itcaonline.com/?page_id=1183 (last visited Nov. 8, 2014), *archived at* http://perma.cc/Z5LP-4FEH.
19. WHITE MOUNTAIN APACHE TRIBE, http://www.wmat.nsn.us (last visited Nov. 8, 2014), *archived at* http://perma.cc/4GY5-DTHL.
20. YAVAPAI-APACHE NATION OF THE CAMP VERDE INDIAN RESERVATION, http://itcaonline.com/?page_id=1187 (last visited Nov. 8, 2014), *archived at* http://perma.cc/M5LW-JDGT.
21. YAVAPAI-PRESCOTT INDIAN TRIBE, http://www.ypit.com (last visited Nov. 8, 2014), *archived at* http://perma.cc/4C2Y-GB4X.

2.B. Tribal codes surveyed of tribes located within Montana:[329]

1. *Fort Peck Tribes*, ASSINIBOINE AND SIOUX TRIBES, http://www.fortpecktribes.org (last visited Nov. 8, 2014), *archived at* http://perma.cc/Y8U4-2JKE.
2. *Blackfeet Tribal Law and Order Code*, NAT'L INDIAN LAW LIBRARY, http://www.narf.org/nill/codes/blackfeetcode (last visited Mar. 6, 2015), *archived at* http://perma.cc/AT5B-AYC6.
3. Chippewa-Cree Indians of the Rocky Boy's Reservation, CONFEDERATED SALISH & KOOTENAI TRIBES, http://www.cskt.org (last visited Nov. 8, 2014), *archived at* http://perma.cc/BR8Q-WSHY.
4. CROW NATION, http://www.crow-nsn.gov (last visited Nov. 8, 2014), *archived at* http://perma.cc/6JQG-NMP6.
5. FORT BELKNAP INDIAN COMMUNITY, http://www.ftbelknap.org (last visited Nov. 8, 2014), *archived at* http://perma.cc/PD9T-9Z3E.
6. NORTHERN CHEYENNE TRIBE, http://www.cheyennenation.com (last visited Nov. 8, 2014), *archived at* http://perma.cc/Z3QD-ZZUA.

329. *American Indian Environmental Office Tribal Portal: Region 8*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/indian/whereyoulive/region8.htm (last visited July 31, 2013), *archived at* http://perma.cc/K4MF-3NT4. Notably, although the federal government officially recognizes seven tribes in Montana, the number is actually greater because several tribes are located within one reservation. For example, the Confederated Salish and Kootenai Tribes of the Flathead Reservation are counted as one tribe on the federal list. However, the Flathead Reservation is home to three tribes: the Salish, the Kootenai, and the Pend d'Oreille. CONFEDERATED SALISH & KOOTENAI TRIBES, http://www.cskt.org (last visited July 31, 2013), *archived at* http://perma.cc/N2KM-3JTW. This phenomenon is not limited to Montana and is true of other tribes surveyed in this article. However, for purposes of counting the number of tribes surveyed, the federal numbers are used in this Article.

2.C. Tribal codes surveyed of tribes located within New York:[330]

1. CAYUGA NATION, http://www.tuscaroras.com/cayuganation (last visited Nov. 8, 2014), *archived at* http://perma.cc/989M-U97U.
2. ONEIDA NATION, http://www.oneidaindiannation.com (last visited Nov. 8, 2014), *archived at* http://perma.cc/ZGS7-ZB5Y.
3. ONONDAGA NATION, http://www.onondaganation.org (last visited Jan. 18, 2015), *archived at* http://perma.cc/6U43-TD7C.
4. ST. REGIS MOHAWK TRIBE, http://www.srmt-nsn.gov (last visited Nov. 8, 2014), *archived at* http://perma.cc/AHU9-PPRN.
5. SENECA NATION OF INDIANS, https://www.sni.org/ (last visited Nov. 8, 2014), *archived at* http://perma.cc/AHU9-PPRN.
6. SHINNECOCK INDIAN NATION, http://www.shinnecocknation.com (last visited Nov. 8, 2014), *archived at* http://perma.cc/Z5EZ-VEYS.
7. TONAWANDA BAND OF SENECA INDIANS, http://www.narf.org/nill/tribes/tonawanda.html (last visited Dec. 14, 2014), *archived at* http://perma.cc/GDA2-D5YZ.
8. TUSCARORA NATION, http://www.tuscaroras.com (last visited Nov. 8, 2014), *archived at* http://perma.cc/9W7K-7EJP.

330. *American Indian Environmental Office Tribal Portal: Region 2*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/indian/whereyoulive/region2.htm (last visited July 31, 2013), *archived at* http://perma.cc/VW22-7BHA.

2.D. Tribal codes surveyed of tribes located within Oklahoma:[331]

1. ABSENTEE-SHAWNEE TRIBE OF INDIANS, http://www.astribe.com/astribe (last visited Nov. 8, 2014), *archived at* http://perma.cc/Z5EQ-HLAA.
2. ALABAMA-QUASSARTE TRIBAL TOWN, http://www.alabama-quassarte.org (last visited Nov. 8, 2014), *archived at* http://perma.cc/N6PS-83UF.
3. *Apache Tribe of Oklahoma—Tribal Code*, NAT'L INDIAN LAW LIBRARY, http://www.narf.org/nill/codes/apache_ok/index.html (last visited Mar. 6, 2015), *archived at* http:// perma.cc/YSH4-3G4C.
4. *Caddo Nation of Oklahoma*, NAT'L INDIAN LAW LIBRARY, http://www.narf.org/nill/codes/caddo/index.html (Mar. 6, 2015), *archived at* http://perma.cc/7MTL-UDH8.
5. CHEROKEE NATION, http://www.cherokee.org (last visited Nov. 8, 2014), *archived at* http://perma.cc/T4GK-CTSP.
6. CHEYENNE-ARAPAHO TRIBES, http://www.c-a-tribes.org (last visited Nov. 8, 2014), *archived at* http://perma.cc/FW3K-CQLG.
7. THE CHICKASAW NATION, https://www.chickasaw.net (last visited Nov. 8, 2014), *archived at* https://perma.cc/GZ25-3ENR.
8. CHOCTAW NATION, http://www.choctawnation.com (last visited Nov. 8, 2014), *archived at* http://perma.cc/JQ7E-SS2T.
9. CITIZEN POTAWATOMI NATION, http://www.potawatomi.org (last visited Nov. 8, 2014), *archived at* http://perma.cc/S8MD-FXQN.
10. THE COMANCHE NATION OF OKLAHOMA, http://www.comanchenation.com (last updated Nov. 8, 2014), *archived at* http://perma.cc/24RT-GWYL.
11. DELAWARE TRIBES OF INDIANS, http://delawaretribe.org (last visted Nov. 8, 2014), *archived at* http://perma.cc/HRR9-3XQ3.

331. *American Indian Environmental Office Tribal Portal: Region 6*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/indian/whereyoulive/region6.htm (last visited July 31, 2013), *archived at* http://perma.cc/84A6-5S72.

12. EASTERN SHAWNEE TRIBE OF OKLAHOMA, http://www.estoo-nsn.gov (last visited Nov. 8, 2014), *archived at* http://perma.cc/Q8ED-D7B8.
13. FORT STILL APACHE TRIBE, http://www.fortsillapache-nsn.gov (last visited Nov. 8, 2014), *archived at* http://perma.cc/SX65-CWY5.
14. *The Iowas of Oklahoma*, IOWA TRIBE, http://www.iowanation.org (last visited Nov. 8, 2014), *archived* at http://perma.cc/293N-UNEH.
15. KAW NATION, http://kawnation.com (last visited Nov. 8, 2014), *archived at* http://perma.cc/3LX7-L47F.
16. *Kialegee Tribal Town*, OKLAHOMA HISTORICAL SOCIETY, http://www.okhistory.org/publications/enc/entry.php?entryname=KIALEGEE%20TRIBAL%20TOWN (last visited Feb. 17, 2015), *archived at* http://perma.cc/8CUT-DZRP.
17. KICKAPOO TRIBE OF OKLAHOMA, http://www.kickapootribeofoklahoma.com (last visited Nov. 8, 2014), *archived at* http://perma.cc/4Q7P-37GZ.
18. KIOWA INDIAN TRIBE, http://www.kiowatribe.org (last visited Nov. 8, 2014), *archived at* http://perma.cc/FL6B-PTBC.
19. THE MIAMI TRIBE OF OKLAHOMA, http://www.miamination.com/newsite (last visited Nov. 8, 2014), *archived at* http://perma.cc/3W5E-ZSQJ.
20. THE MODOC TRIBE OF OKLAHOMA, http://www.modoctribe.net (last visited Nov. 8, 2014), *archived at* http://perma.cc/WMB7-X576.
21. MUSCOGEE (CREEK) NATION, http://www.muscogeenation-nsn.gov (last updated Nov. 8, 2014), *archived at* http://perma.cc/JRQ2-DQ5W.
22. OSAGE NATION, http://www.osagenation-nsn.gov (last updated Nov. 8, 2014), *archived at* http://perma.cc/99F2-5L4R.
23. THE OTTAWA TRIBE OF OKLAHOMA, http://www.ottawatribe.org (last updated Nov. 8, 2014), *archived at* http://perma.cc/D534-QJJ6.
24. OTOE-MISSOURIA TRIBE OF INDIANS, http://www.omtribe.org (last visited Nov. 8, 2014), *archived at* http://perma.cc/N8Q8-LEGZ.

25. PAWNEE NATION OF OKLAHOMA, http://www.pawneenation.org (last visited Nov. 8, 2014), *archived at* http://perma.cc/WJ2N-EREY.
26. PEORIA TRIBE OF INDIANS, http://peoriatribe.com (last visited Nov. 8, 2014), *archived at* http://perma.cc/S7A8-T732.
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